IN THE SUPREME COURT OF FLORIDA

JERRY MICHAEL WICKHAM,

Appellant

v.

STATE OF FLORIDA,

Appellee

Case No. SC05-1012

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, Petitioner, or by proper name, e.g., "Wickham." Appellee, the State of Florida, was the prosecution and respondent below; the brief will refer to Appellee as such, the prosecution, respondent, or the State. The following are examples of other references:

> "PCR8 1455" refers page 1455 of the postconviction record in Volume 8.
>
> "R1 164" refers to page 164 of Volume 1 of the record of the original direct appeal of this case to this Court.
>
> "TT/X 2044" refers to page 2044 (as stamped by the trial clerk) of Volume X of the trial transcript of the original direct appeal of this case to this Court.
>
> "IB 20" references page 20 of the Initial Brief dated as served by mail June 18, 2007.
>
> "Postconviction Motion" references Wickham's Motion to Vacate Judgment and Sentence, which the Circuit Clerk stamped as filed on March 31, 2003, and which was dated as served on the Office of the State Attorney that day. (PCR15 2740 et seq.)

Unless the contrary is indicated, **bold-typeface** emphasis is supplied; cases cited in the text of this brief and not within quotations are <u>underlined</u>; and, all other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

This Court's opinion on direct appeal summarized the underlying facts of this case:

> In March 1986, Wickham together with family members and friends, including children, were driving along Interstate 10 when they discovered they were low on money and gas. While at least some

members of the party felt they should stop at a church for help, Wickham and others decided they would obtain money through a robbery. The group continued along Interstate 10 and exited at Thomasville Road in Tallahassee.

Proceeding north almost to the Georgia border, the group decided to trick a passing motorist into stopping. They placed one of the vehicles conspicuously on the roadside. One of the women, apparently accompanied by some of the children, then flagged down the victim, Morris "Rick" Fleming. The woman told Fleming her car would not work. Wickham later told a fellow inmate that he had deliberately used the woman and children because "that's what made the guy stop and that's what I was interested in."

After examining the car, Fleming told the woman he could find nothing wrong with it. At this time, Wickham came out of a hiding place nearby and pointed a gun at Fleming. Fleming then turned and attempted to walk back to his car, but Wickham shot him once in the back. The impact spun Fleming around, and Wickham then shot Fleming again high in the chest. While Fleming pled for his life, Wickham shot the victim twice in the head.

Wickham then dragged the body away from the roadside and rummaged through Fleming's pockets. He found only four dollars and five cents. At this point, Wickham criticized the woman-decoy for not stopping someone with more money.

The group drove to a gas station and put two dollars' worth of gas in one of the cars, and two dollars' worth in a gas can Wickham changed his clothes and threw his bloodstained pants and shoes into a dumpster Wickham directed one of the others to throw the empty bullet casings and live rounds out the window. A short while later, the group drove past the murder scene and saw that the police and ambulances had begun to arrive. They then headed back south and drove to Tampa, obtaining more gas money by stopping at a church along the way.

At trial, defense counsel submitted extensive evidence about Wickham's prior psychological problems, which included extended periods of confinement in psychiatric hospitals during his youth. There also was evidence that Wickham was alcoholic, had suffered an abusive childhood, and that his father had deserted the family.

Other evidence, however, indicated that Wickham was not legally insane during the events in question and had not been drinking at the time of the murder, and that he had not been confined in mental institutions for many years. One expert, Dr. Harry McClaren, stated that Wickham both appreciated the criminality of the murder and chose to engage in this conduct despite his awareness of its nature. Dr. McClaren stated his opinion that Wickham had murdered Fleming to

> avoid arrest, because Wickham previously had been incarcerated for another robbery in Michigan. Although Dr. McClaren agreed that Wickham suffered from alcohol abuse, an antisocial personality disorder, and schizophrenia in remission, he concluded that these conditions did not impair Wickham's ability to understand the nature of his actions in murdering Fleming.

Wickham v. State, 593 So.2d 191 (Fla. 1991).

On November 28, 1988, the trial began (TT/I), and on December 7, 1988, the jury found Wickham guilty as charged of First Degree Murdfer and Robbery with a Firearm. (TT/IX 1863-67).

On December 8, 1988, the jury recommended Wickham be sentenced to death by a vote of eleven to one (11-1). (TT/X 2043-44) The trial judge found six aggravating circumstances and no mitigating circumstances. The trial judge followed the jury recommendation and sentenced Wickham to death. (R2 246-53; TT/X 2043-45)

On direct appeal, Wickham raised seven issues alleging that (1) the trial court erred in limiting testimony about his alleged inability to form the specific intent to commit premeditated murder; (2) the trial court erroneously admitted evidence Wickham had made plans to escape from the Leon County jail while being detained there; (3) the trial court erred in finding that the murder was heinous, atrocious, or cruel; (4) the trial court erred in finding the murder was cold, calculated, and premeditated. (5) & (6) the trial court erred in failing to find and weigh mitigating evidence available in the record; (7) the death sentence was not proportional. Wickham, 593 So.2d at 193-195.

Wickham struck HAC, concluded that the trial judge did not properly find and weigh all available mitigation, but affirmed:

> As we recently stated in *Cheshire*, the trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase. *Cheshire*, 568 So. 2d at 911 (*citing Rogers*, 511 So. 2d at 534). Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Rogers*, 511 So. 2d at 534. Clearly, the evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters, should have been found and weighed by the trial court. *Id.*
>
> However, we also must note that the State controverted some of this mitigating evidence, thus diminishing its forcefulness. Wickham had not been hospitalized for mental illness for many years and was not drinking at the time the murder was committed. His schizophrenia was in remission. Expert testimony indicated that he was not insane, and that he was able to appreciate the criminality of his actions in March 1986. This testimony is consistent with the facts of the murder and the actions and statements of Wickham.
>
> In light of the very strong case for aggravation, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence. Having reviewed the entire record, we find this error harmless beyond a reasonable doubt. *Rogers*, 511 So. 2d at 535.
>
> Seventh, Wickham argues that death is not a proportional penalty in this instance. The cases cited by Wickham for this proposition all deal with domestic violence, "heat-of-passion" murders, persons who were severely mentally disturbed at the time of the murder, or similar reasons. The facts of none of these cases approach the aggravated quality of the facts of the present case.
>
> In killing Fleming, Wickham planned and executed a roadside ambush designed to lure a victim who believed he was helping a stranded woman and children. While some mitigating evidence was available, the case for aggravation here is far weightier. If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose. Accordingly, this Court may not disturb the sentence on this ground. The conviction and sentence are affirmed.

593 So.2d at 194.

Justice Barkett dissented and highlighted the mitigating mental health evidence. Id. at 194-95.

Wickham filed a Petition for Writ of Certiorari with the United States Supreme Court which was denied on June 22, 1992. Wickham v. Florida, 505 U.S. 1209 (1992).

In May 1995, Wickham filed a motion for post-conviction relief. (PCR1 1 et seq.) On March 31, 2003, Wickham filed an amended motion to vacate his conviction and sentence of death, raising twenty-one claims. (PCR15 2740 et seq.) After the State responded and a Huff hearing, the trial court entered an order summarily denying some claims and granting an evidentiary hearing on others (PCR17 3111 et seq.).

June 2d to June 7, 2004, the trial court held an evidentiary hearing on Wickham's motion for post-conviction relief. (PCR17 3271 et seq.)

The trial court denied postconviction relief through a 40-page order (PCR40 7723-63), and this appeal ensued.

SUMMARY OF ARGUMENT

Wickham raises a wide array of claims. Some are preserved. Some are not.

As a threshold matter, in ISSUE I, Wickham contests any circuit judge in the First District Court of Appeal handling his Postconviction Motion. He essentially advocates a per se rule in which a witness's position on a court would disqualify all other judges on that court and all judges on inferior courts. His argument is misplaced. While there needs to be a sensitivity to the "appearance of justice" and, of course, to whether there is prima facie showing of bias, Wickham places too little faith in the

ability of circuit judges to set aside their personal feelings and decide the issues on the law and the facts.

Having been afforded a multi-day evidentiary hearing on his postconviction motion, Wickham presents multiple issues in which he second-guesses the well-grounded decisions of his trial defense attorney as well as the postconviction trial court. He has failed to meet his burdens of demonstrating that his trial counsel was unreasonable, and he has failed to establish that the trial court's findings were not based upon competent and substantial evidence.

ARGUMENT

ISSUE I: WHETHER WICKHAM HAS DEMONSTRATED THAT THE TRIAL COURT ERRED BY NOT DISQUALIFYING ALL CIRCUIT JUDGES OF THE SECOND JUDICIAL CIRCUIT. (RESTATED)

ISSUE I argues that Judge Dekker, of the Second Judicial Circuit, should not have decided Wickham's March 31, 2003, Motion to Vacate Judgment of Conviction and Sentence ("Postconviction Motion," PCR15 2740 et seq.). It argues (IB 13) that Phillip J. Padovano became Chief Judge in 1993, Hankinson and Padovano's wife subsequently joined Padovano on the bench of the Second Judicial Circuit, and in 1996, Padovano began serving on the First District Court of Appeals, where he "hears appeals from the Second Judicial Circuit, including from the decisions of Judge Dekker." ISSUE I then contends (IB 13) that Judge Dekker's "opinion depended upon her unquestioning acceptance of Padovano's testimony" and then tenders (IB 13-15) some interview notes that supposedly undermine accrediting Padovano's

testimony. ISSUE I then contends (IB 15-16) that Judge Dekker was put in the "untenable position of assessing the credibility of her circuit court colleague, Judge Hankinson." Next, ISSUE I argues (IB 16-17) that "Wickham's disqualification motions" were legally sufficient, entitling him to a "new evidentiary hearing."

A. ISSUE I was not preserved below.

Rather than "motions" (plural), the State has found one disqualification motion (singular): Wickham's Motion to Disqualify … All Circuit Judges in and for the Second Judicial Circuit ("Disqualification Motion") filed May 22, 1995 (PCR8 1455-70).[1] The Motion does not raise the same claims as ISSUE I, and, indeed, the Motion's claims became moot.

The 1995 Disqualification Motion argued that Judge McClure should be disqualified for various reasons (PCR8 1456-58), a matter not raised in ISSUE I. Also, Judge McClure retired from the bench (See PCR8 1570) and did not adjudicate Wickham's postconviction motion (See Judge Dekker's Huff Order at PCR17 3111-20 and Judge Dekker's Order based on evidentiary

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[1] Thus, Claim V of the 2003 amended postconviction motion mentions (PCR15 2780) only one motion to disqualify. This apparent contradiction illustrates a rationale for requiring an appellant, as a threshold matter, to specify where in the record on appeal each of appellate issue/claim was preserved, rather than the appellee attempting to locate arguable preservation and, as a result, asserting lack of preservation. The State respectfully submits that requiring an appellant to specify where in the record a claim was preserved or specify why it is fundamental error should be a gateway matter, the "ticket," without which there would be no appellate review of each claim.

hearing at PCR40 7723-63). The Disqualification Motion also contended that Wickham's trial defense counsel, Phillip J. Padovano, had risen to "Chief Judge," thereby requiring the disqualification of all judges "sitting in the Second Judicial Circuit," (PCR8 1459-60, 1465) but, by the time of the evidentiary hearing, trial defense counsel Padovano was no longer in that position (PCR8 3293-94). Therefore, the Motions' claims based upon Judge McClure and Judge Padovano's circuit court positions became moot, and the Motion also failed to preserve ISSUE I's claims based upon Padovano assuming a First District Court of Appeal position and his wife and prosecutor Hankinson becoming circuit court judges. See, e.g., Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); White v. State, 753 So.2d 548, 549 (Fla. 1999) (argument regarding state Constitutional due process not raised to the trial court or to the district court of appeal during the direct appeal from conviction; "not preserved"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal, not preserved); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars appellant from presenting the argument on appeal").

B. The Disqualification Motion was untimely.

In addition to the Disqualification Motion alleging different grounds and its claims becoming moot, its allegations were untimely.

Rule 2.160(e), Fla.R.Jud.Admin., effective January 1, 1993, specified the 10-day limit on motions to disqualify a judge:

> A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion ….

Fla. Bar Re Amendment to Fla. Rules of Judicial Admin., 609 So.2d 465, 466, 491 (Fla. 1992). And, decades prior to Fla.R.Jud.Admin. 2.160(e),[2] Florida Statutes specified a 30-day window for moving to disqualify a judge; "otherwise, the ground, or grounds, of disqualification shall be taken and considered as waived," Ch. 16053, s. 3, Laws of Fla. (1933).

Here, the May 22, 1995, Motion to Disqualify was filed well-beyond the 10-day period provided in Rule 2.160/2.330, Fla.R.Jud.Admin., and well-beyond the 30-day window of Section 38.02, Fla. Stat. Therefore, the disqualification motion was properly denied summarily (PCR9 1681). See Rivera v. State, 717 So.2d 477, 481 n.3 (Fla. 1998)("we agree with the State that Judge Ferris' statement to the Fort Lauderdale Sun Sentinel five months before trial is forever waived as a ground for disqualification" due to its untimeliness); Mansfield v. State, 911 So.2d 1160 (Fla.

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[2] Fla.R.Jud.Admin.2.160(e) has been renumbered as 2.330, but it still requires that the motion be filed within "10 days after discovery of the facts constituting the grounds," In re Amendments to the Fla. Rules of Judicial Administration--Reorganization of the Rules, 939 So.2d 966, 1004 (Fla. 2006).

2005)(timeliness as a procedural bar; holding based upon alternative ground).

More specifically, concerning Phillip J. Padovano, he was sworn in as a circuit judge in January 1989 and first became chief judge in the Second Judicial Circuit in 1993 (PCR17 3294, 3296). At best for Wickham, his Disqualification Motion should have been filed within 30 days of when his conviction became final,[3] which was when the United States Supreme Court denied his Petition for Writ of Certiorari on June 22, 1992, see Wickham v. Florida, 505 U.S. 1209 (1992), or within 10 days of the January 1, 1993, effective date of Rule 2.160, or within 10 days or 30 days of Padovano becoming chief judge in 1993. Instead, Wickham waited until 1995, which was **YEARS too late**. See Asay v. State, 769 So.2d 974, 980(Fla. 2000)(motion to disqualify filed in post-conviction proceeding in the same month as the original 3.850 motion, untimely because the grounds upon which based were known by the defense at the time of the original trial).

Similarly, in addition to being moot, all of the allegations concerning Judge McClure were untimely. All of them were made in the 1995 Motion based upon comments that were made during the 1988 trial proceedings. At best for Wickham, he should have filed his Disqualification Motion within 30 days of June 22, 1992, when his conviction became final from the United States

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[3] Indeed, the disqualification motion should have been filed within 10 or 30 days of when this Court issued its mandate for the direct appeal of this case. See Wickham v. State, 593 So.2d 191 (Fla. 1991)(rehearing denied March 2, 1992).

Supreme Court's denial of certiorari, see Wickham, 505 U.S. 1209 (1992), or within 10 days of the January 1, 1993, effective date of Rule 2.160; he did not.

C. Other allegations purportedly in support of disqualification.

If Wickham argues that his March 31, 2003, Postconviction Motion (PCR15 2740 et seq.) preserved ISSUE I, he would be incorrect.

CLAIM V of Wickham's Postconviction "maintained" that "all circuit Judges in and for the Second Judicial Circuit be disqualified and an independent judge from outside of the First, Second, Third, Fourth, Eighth, and Fourteenth Circuits be appointed to the Court to hear his case." (PCR15 2780) Claim V argued (PCR15 2779-80) Mr. Padovano being "elevated to the First District Court of Appeal, on which he now sits," committees on which he sits, and being "considered as an expert on capital cases."[4] Even CLAIM V did not discuss prosecutor Hankinson, rendering that appellate claim still unpreserved below.

Further, concerning Judge Padovano, CLAIM V was not the appropriate vehicle to seek the disqualification of a sitting judge. In order for these matters to be presented to the trial court, they should be presented through the appropriate vehicle, that is, Rule 2.160, renumbered as 2.330, Fla.R.Jud.Admin. Therefore, the assertions in Claim V did not preserve any

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[4] As discussed infra in ISSUE II, Judge Padovano's esteemed qualifications, **as a matter of law**, place a heavier burden on Wickham to establish ineffective assistance of counsel.

appellate claim pertaining to disqualification. See Asay v. State, 769 So.2d 974, 981 (Fla. 2000)("As for the incidents occurring during the postconviction proceeding that Asay points to as establishing an additional basis for recusal, these grounds were not raised by Asay in the trial court in a renewed motion for recusal, so they are not properly before this Court").

In any event, like the 1995 Disqualification Motion, the grounds alleged in Claim V were untimely. As the Initial Brief indicates (p. 13), Padovano became a First DCA judge in 1996, **SEVEN YEARS** prior to the 2003 postconviction motion.

Further, in contrast with the Motion to Disqualify … (PCR8 1467), neither Claim V nor the postconviction motion containing it included a requisite certificate of good faith, per Rule 2.160/2.330. See Fondura v. State, 940 So.2d 489, 491 (Fla. 3rd DCA 2006)("The motion was also procedurally deficient. The initial written motion did not include the requisite certificate of good faith signed by Fondura's counsel pursuant to Florida Rule of Judicial Administration 2.160(c). Counsel also orally presented the second motion to disqualify, and this is legally insufficient and contrary [to] the requirements set forth in Florida Rules of Judicial Administration 2.160(c)(1)"). See also Fla. Bar Re Amendment to Fla. Rules of Judicial Admin., 609 So.2d 1t 490-91.

D. Wickham's appellate claims are facially insufficient.

Assuming that Wickham's disqualification claims survive the foregoing

arguments, ISSUE I still fails to demonstrate reversible error when viewed de novo on appeal.[5] See Mansfield v. State, 911 So.2d 1160, 1170 (Fla. 2005). Since Judge Padovano will not be asked to review his own decisions here and since there have been no facts alleged that show a specific well-founded bias within this case, disqualification was not mandated here. The trial court's postconviction evidentiary-hearing findings (PCR40 7723 et seq.) adverse to the merits of Wickham's postconviction motion (See IB 13-15) are insufficient to require disqualification. Analogously, it is well-settled that prior adverse rulings of a judge are insufficient to mandate disqualification. See, e.g., Rivera v. State, 717 So.2d 477, 480-81 (Fla. 1998). Instead, it is a judge's duty to resolve the cases properly before him or her. See In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir.1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is"); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir.1987) ("There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do

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[5] The movant's burden is higher for a motion to disqualify when a prior motion was granted. See Card v. State, 803 So.2d 613, 619-20 (Fla. 2001)(in an initial motion, judge passes only on the legal sufficiency of the allegations and not on the truth of the facts, whereas, a successor judge may pass on the truth of the facts alleged in support of the motion and need only be disqualified if "he or she is in fact not fair or impartial" citing Fla. R. Jud. Admin. 2.160(f)). Here, the record is unclear whether a disqualification of Judge Dekker would constitute the first disqualification caused by a Wickham motion. Judge McClure was the trial judge, and Judge Lewis Hall (See PCR8 1566-73) and Judge Francis (See PCR9 1681, PCR9 1692 et seq., PCR13 2549) handled the postconviction proceedings prior to Judge Dekker. (At one point, Judge Ferris recused herself upon her own motion. PCR8 1500)

so when there is").

ISSUE I argues (IB 13) that Padovano became a Circuit Judge and a Chief Judge in the circuit in 1993. However, there is not even a bare allegation that Judge Padovano's tenure on the Circuit bench or as Chief Judge in any way overlapped Judge Dekker, who adjudicated his Postconviction Motion. Taking the merits of ISSUE I in their best light for Wickham, arguendo if those merits are reached, it distills to contentions that Judge Dekker should not have presided over the Postconviction Motion because of Judge Padovano's position on the DCA, because of Judge Padovano's wife's position as a circuit judge on the Second Judicial Circuit, and because of Circuit Judge Hankinson's status as a witness in the postconviction evidentiary hearing. None of these claims merit reversal for a new evidentiary hearing in front of a judge who is outside of the First, Second, Third, Fourth, Eighth, and Fourteenth Circuits.

ISSUE I, as well as CLAIM V, failed to posit anything specific whatsoever concerning any relationship, other than job titles, among Judge Dekker, Judge Padovano, Judge Ferris, and Judge Hankinson. Essentially, granting relief on ISSUE I would establish a per se rule of disqualification in which a witness in a position as a circuit judge in the circuit or on the DCA for that circuit mandates disqualification of all circuit judges of that circuit and all circuit judges within the DCA's jurisdiction, respectively. Yet, Wickham fails to cite a single authoritative case for such an extreme position. As such, Wickham's ISSUE I fails to overcome the presumption that the trial judges of this state will

comply with the law, Dragovich v. State, 492 So.2d 350, 353 (Fla. 1986). Put more specifically, Wickham's accusations and attendant citations to adverse rulings are not

> well-founded and contain[ing] facts germane to the judge's undue bias, prejudice, or sympathy. *See Gilliam v. State*, 582 So.2d 610, 611 (Fla. 1991); *Dragovich v. State*, 492 So.2d 350, 352 (Fla. 1986). The fact that a judge has previously made adverse rulings is not an adequate ground for recusal. *Gilliam*, 582 So.2d at 611; *Suarez v. State*, 95 Fla. 42, 115 So. 519 (1928). Nor is the mere fact that a judge has previously heard the evidence a legally sufficient basis for recusal. *Dragovich*, 492 So.2d at 352.

Mansfield v. State, 911 So.2d 1160, 1171 (Fla. 2005), quoting Jackson v. State, 599 So.2d 103, 107 (Fla. 1992).

Ervin v. Collins, 85 So.2d 833 (Fla. 1956),[6] upheld the denial of disqualification. There, the Governor was a party to the law suit. There, it was claimed that the Governor and a justice of the Florida Supreme Court "and their families are close, intimate, and personal friends, and have been for many years." The claim also alleged that two additional justices were appointed by the Governor. These friendships and appointments were insufficient to require disqualification. Here, a witness simply sitting in

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[6] In re Estate of Carlton, 378 So.2d 1212 (Fla. 1979) "receded" from Ervin's discussion of legal insufficiency but also held, consistent with the non-recusal here, that

> each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances. This procedure is in accord with the great weight of authority, and it re[i]nforces the modern view of disqualification as a matter which is "personal and discretionary with individual members of the judiciary . . . ." *Department of Revenue v. Leadership Housing, Inc.*, 322 So.2d 7, 9 (Fla. 1975).

the same circuit or District Court of Appeal and a witness's wife sitting in the same circuit are insufficient.

Mackenzie v. Super Kids Bargain Store, 565 So.2d 1332 (Fla. 1990), held that "disqualification of a judge is [not] required on motion where an attorney appearing before the trial judge had made a $500 contribution to the political campaign of the trial judge's husband." The motion also alleged that "the $500 contribution was the second largest amount contributed." Mackenzie reasoned that "the standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'" Its additional reasoning, Id. at 1338, was even more applicable to this case:

> There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification. *See*, *e.g.*, *In re Estate of Carlton*, 378 So.2d 1212 (Fla. 1979) (Overton, J., Denial of Request for Recusal), *cert. denied*, 447 U.S. 922, 100 S. Ct. 3013, 65 L. Ed. 2d 1114 (1980); *Ervin v. Collins*, 85 So.2d 833 (Fla. 1956).

Mackenzie held[7] "that an allegation in a motion that a litigant or counsel for a litigant has made a legal campaign contribution to the political

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[7] Ultimately, Mackenzie, 565 So.2d at 1139-40, required the trial judge to disqualify himself because when he ruled on the motion, "Judge MacKenzie went beyond a mere determination of the legal sufficiency of the motion and passed upon the truth of the facts alleged" and a Third DCA opinion controlled as a matter of law when the trial court made the decision.

campaign of the trial judge, or the trial judge's spouse, without more, is not a legally sufficient ground." Here, there has not been a bare allegation that any of the judges were friends, and their positions as judges in the same circuit was substantially less close than fraternity brothers could be.

Schoenwetter v. State, 931 So.2d 857, 872 (Fla. 2006), rejected an appellate claim based upon "generalizations." There, the judge had been a prosecutor in an office "the trial judge was a former prosecutor and that his office aggressively opposed the use of PET scans." There were additional "allegations concerning other prosecutors or the prosecutors' office in general." Schoenwetter held: "Such generalizations fall short of the "specifically described prejudice or bias of the judge" required by Florida Rule of Judicial Administration 2.160(d)(1). Error on this issue has not been demonstrated." Here, as in Schoenwetter, an allegation that a judge has been, or is, in an organization that generally takes positions on legal matters is insufficient.

Wright v. State, 857 So.2d 861, 872-73 (Fla. 2003), rejected as insufficient "mere possession of a special deputy card." An allegation of general status is insufficient, as it is here.

United States v. Harrelson, 754 F.2d 1153, 1165 (5th Cir. 1985), rejected a disqualification claim like Wickham's:

> Appellants were tried before Judge William S. Sessions, a federal judge of the Western District of Texas, on charges arising from the murder of John H. Wood, Jr., **also a federal judge of that district. Judge Sessions had known and worked with Judge Wood for eight or nine years at the time of the latter's death and admired him.** The relationship was collegial and there is no evidence of any special

> social relationship between the two judges or between the Wood and Sessions families. Judge Sessions was an honorary pallbearer at Judge Wood's funeral and eulogized him at several memorial ceremonies. Because of the murder, Judge Sessions was guarded 24 hours a day until December 2, 1980. The appellants contend that these facts are sufficient to render the trial court's denial of their motion for recusal reversible error.

Moreover, even if they were former colleagues or can be viewed as judicial colleagues because both are judges, being professional colleagues is not a sufficient basis for disqualification.

O'Connor v. Reed, 1993 U.S. App. LEXIS 21741, n.1 (9th Cir. 1993), although not published as precedent, is instructive. The Ninth Circuit found a claim of impropriety to be meritless. The Plaintiff, O'Connor, sued four judges. O'Connor argued that the district judge improperly failed to sua sponte recuse himself and transfer the case out of the Ninth Circuit. The U.S. District Court judge was a judicial colleague of one of the four defendant judges, who had also sat by designation on the Ninth Circuit and thus was a colleague of the Ninth Circuit judges as well. The Ninth Circuit explained that the alleged prejudice must come from a extrajudicial source. The Ninth Circuit concluded that the allegations "did not provide any basis for recusal." Similarly, here allegations of a colleague-status and appointment to an appellate court are insufficient.

Indeed, Judge Padovano has served as an Associate Justice to the Florida Supreme Court in Stewart v. State, 801 So.2d 59 (Fla. 2001). However, this association with this Court would not disqualify anyone. The reality is that many judges tend to know each other, and simply because they have worked together, or work with spouses, does not render them

incapable of objectively reviewing testimony. Similarly, the role of a judge in an appellate capacity does not necessarily mean that the trial-level judge is incapable of such an objective review. An assertion of bias due to those general roles is not reasonable or "well-founded," and thereby not the basis for requiring a judge to disqualify him/herself.

Wickham's reliance (IB 16) on a few circuit court orders is misplaced. A decision of a judge in another case (and in another circuit) for disqualification in no way mandates, as precedent or otherwise, the disqualification here.

See also Rivera, 717 So.2d at 482 ("Judge Ferris's prior representation of Juror Thorton's restaurant was disclosed by the judge during voir dire"). Compare Livingston v. State, 441 So.2d 1083, 1085 (Fla. 1983)(rejected a "blanket" claim; but held the disqualification supported by "incidents [between a particular judge and the attorney], which occurred over a period of twenty-five years," with "the last incident involving Judge Fleet and Mr. Wade occurred just five months prior to the commencement of appellant's trial").

E. Wickham's due process claim.

Wickham includes "due process" as a title of a subsection in Issue I (IB 16), but he does not develop the point,[8] thereby failing to preserve it

[8] Wickham does not even specify the United States or the Florida Constitution.

at the appellate level. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997). See also U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"). Further, although he mentions "due process" in his 1995 Motion to Disqualify, he does not even mention the phrase in Claim V. As discussed above, the claims in the Disqualification Motion became moot. Therefore, due process remains unpreserved concerning the Claim V. See, e.g., Harrell; White; Gore; Hill. In any event, the mere employment positions that Wickham has alleged in ISSUE I do not implicate due process.

ISSUE II: WHETHER THERE WAS COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS THAT WICKHAM HAD FAILED TO DEMONSTRATE TRIAL COUNSEL'S STRICKLAND INEFFECTIVENESS AT THE PENALTY PHASE OF THE TRIAL. (RESTATED)

Issue II (IB 17-43) contains a series of assertions labeled as

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The State objects if Wickham's Reply Brief attempts to develop an argument of this claim, or any other undeveloped claim, because his Initial Brief framed the appellate issues, which the State answers in this brief.

subsections A1 to A10 and B1 to B4. Wickham argues (IB 18) that counsel was unconstitutionally ineffective by "virtually ignor[ing] the many tasks necessary to prepare for Wickham's trial. And did not engage in even the most rudimentary investigation that would have developed evidence crucial for Wickham's defense." CLAIM VII of the Postconviction Motion alleged IAC at the penalty phase of the trial (PCR15 2804-59), and the trial court granted Wickham an evidentiary hearing on allegations of "counsel's failure to investigate and present mitigating evidence … to the extent that it deals with an ineffective assistance of counsel claim" (PCR17 3114).

STANDARD OF REVIEW AND WICKHAM'S BURDENS.

Since the postconviction trial court conducted an evidentiary hearing on Wickham's IAC/Penalty phase allegations, this Court "affords deference to the trial court's factual findings," Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006), "to the extent they are supported by competent, substantial evidence," Guzman v. State, 941 So.2d 1045, 1049-50 (Fla. 2006); see also Walls, 926 So.2d at 1165 ("'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court'"), quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997), quoting Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984).

Essentially, Wickham's burdens on appeal are compounded. He not only bears the burden of overcoming the presumption that the trial court performed its duty, see, e.g., Operation Rescue v. Women's Health Center,

626 So.2d 664, 670 (Fla. 1993)(" As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error"), by establishing that there is no competent, substantial evidence" to support its finding of no IAC but also the strong presumption that trial counsel was constitutionally effective.

More specifically concerning IAC, Strickland v. Washington, 466 U.S. 668 (1984), and its progeny controls. Under Strickland, in order to establish ineffective assistance of counsel, a postconviction defendant must establish both deficient performance and prejudice. See Wike v. State, 813 So.2d 12, 17 (Fla. 2002). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Wike, 813 So.2d at 17, quoting Strickland, 466 U.S. at 687. "In establishing deficiency, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness' based on "prevailing professional norms.'" Wike, 813 So.2d at 17, quoting Strickland, 466 U.S. at 688.

In assessing whether counsel's performance was unconstitutionally deficient, "[a] strong presumption exists that trial counsel's performance was not ineffective," Cox v. State, 32 Fla. L. Weekly S427, 2007 WL 1932134, *6, 2007 Fla. LEXIS 1188, *18 (Fla., SC05-914 July 5, 2007)(rehearing pending as of 9/17/07), citing Strickland, 466 U.S. at 690, and the presumption is even weightier when counsel is experienced, see Jones v. State, 732 So.2d 313, 319-320 n. 5 (Fla. 1999), citing Provenzano

v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) ("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel"); Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(en banc; noting that when courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger); Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("The more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances"), quoting Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

"The issue [in applying Strickland] ... is not "what present counsel or ... [a] Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel

actually responsible for the defense," Cooper v. State, 856 So.2d 969, 976 (Fla. 2003), quoting Occhicone v. State, 768 So.2d 1037, 1049 (Fla. 2000).

"That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient," State v. Coney, 845 So.2d 120, 136 (Fla. 2003)(approvingly quoting trial court's order). See also, e.g., Mills v. Moore, 786 So.2d 532, 535 (Fla. 2001) (quote within quotes: "That current counsel, through hindsight, would now do things differently than original counsel did is not the test for ineffectiveness").

Consistent with the prohibition against hindsight, defense counsel's hindsighted second-guessing of him/herself "'"is of little persuasion in these [postconviction] proceedings,"'" Mills v. State, 603 So.2d 482, 485 (Fla. 1992), quoting Routly v. State, 590 So.2d 397, 401 n.4 (Fla. 1991), quoting Kelley v. State, 569 So.2d 754, 761 (Fla. 1990).

Hannon v. State, 941 So.2d 1109, 1125 (Fla. 2006), citing to Wiggins v. Smith, 539 U.S. 510 (2003), summarized concerning an allegation of penalty-phase IAC:

> When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000) (*quoting Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)). Further, as the United States Supreme Court recently stated in *Wiggins*:
>
> > [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the

> circumstances, applying a heavy measure of deference to counsel's judgments.
>
> . . . . [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t] is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'

539 U.S. at 521-23 (citations omitted) (fifth alteration in original) (first emphasis supplied) (*quoting Strickland*, 466 U.S. at 688-89, 691).

Strickland prejudice is the second prong that a defendant must establish for IAC. For this prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wike*, 813 So.2d at 17, quoting Strickland, 466 U.S. at 694. Hannon, 941 So.2d at 1134, illuminated the application of the prejudice prong to the penalty phase:

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined. *See Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998) (stating that in assessing prejudice 'it is important to focus on the nature of the mental mitigation' now presented); *see also Wiggins*, 539 U.S. at 534 ('In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.'). We conclude that it does not. There is no reasonable probability that had any of the mental health experts who testified at the postconviction evidentiary hearing testified at the penalty phase, Hannon would have received a life sentence. Our confidence has not been undermined in this outcome or proceeding.

APPLICATION OF THE STANDARDS TO THE MITIGATOR-RELATED CLAIMS HERE.

Since the trial court's fact-based determinations receive special deference on appeal, meriting affirmance if they are "supported by competent, substantial evidence," the State summarizes the trial court's well-reasoned and well-documented order.

However, as a threshold matter, the State highlights the extensive experienced, and, indeed, esteemed high-quality, of Wickham's trial defense counsel, which entitle his representation of Wickham to an especially high presumption of effectiveness. See Jones, 732 So.2d at 319-320 n. 5; Provenzano, 148 F.3d at 1332; Chandler, 218 F.3d at 1316; Spaziano, 36 F.3d at 1040; Gates, 863 F.2d at 1498. Prior to being appointed to represent Wickham, Phillip J. Padovano practiced law in St. Petersburg for a couple of years, then in Tallahassee for about 10 years. A significant part of his practice was criminal. In 1984, he began writing a book about appellate practice. In 1982, he received an award for his pro bono work. He has never had a bar complaint reach the level of probable cause. By the time that this case was tried in 1988, Padovano had tried about 100 cases before a jury, and he had tried another death penalty case before a jury as lead counsel. (PCR17 3297-3302. For additional experience and awards, see PCR18 3487-90.)

The trial court concluded that the 'court record shows that defense counsel brought out the defendant’s abusive childhood and past mental history through testimony of the defendant’s sisters and mental health expert." (PCR40 7731) The trial court's order then referenced this Court's

observation in the direct appeal:

> As found by the Florida Supreme Court, 'defense counsel submitted extensive evidence about Wickham's prior psychological problems, which included extended periods of confinement in psychiatric hospitals during his youth. There was also evidence that Wickham was an alcoholic, had suffered an abusive childhood and that his father had deserted the family.' Wickham v. State, 593 So.2d 191, 193 (Fla. 1991).

(PCR40 7731-32) Indeed, this Court capsulized the extensive mitigation evidence that Wickham's experienced trial lawyer marshaled for his defense and indicated that the trial court erred in not properly weighing it:

> Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *** Clearly, the evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters, should have been found and weighed by the trial court. ***

593 So.2d at 194. However, Wickham indicated that the State's evidence rebutting the mitigation was also extensive and "[h]aving reviewed the entire record, we find this error harmless beyond a reasonable doubt." Id. Justice Barkett's dissent elaborated on the details of the mitigating evidence. See Id. at 194-95.

The postconviction trial court's order also detailed (PCR40 7732-37) the extensive mitigation evidence that trial defense counsel presented at trial, including the following.

- Trial defense counsel was able to introduce several mitigating facts through the trial testimony of expert **Dr. Joyce Lynn**

Carbonell (PCR40 7732. See TT/VII 1462 et seq., TT/IX 1969 et seq.), who was a clinical psychologist. (TT/VII 1462-65)[9]

? Wickham was **badly abused as a child**. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490) and **severely beaten** (PCR40 7732, citing "Trial Tr. At 1165-66," TT/VII 1490-91).[10] Wickham's older sister characterized the beatings as "**something awful**." (PCR40 7732, citing "Trial Tr. At 1166," TT/VII 1491)

? Wickham's **step[grand]parents were particularly cruel** to him. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490)

? Wickham's **father was an alcoholic**. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490)

? Wickham's **family had a history of mental problems**. (PCR40 7732, citing "Trial Tr. At 1165-1166," TT/VII 1491)[11]

? Wickham's **mother was killed while Wickham was hospitalized**. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490)

? Sometimes Wickham, in his childhood, was **made to sit at the table all night** because he had not eaten. (PCR40 7732, citing "Trial Tr. At 1165-66," TT/VII 1490-91)

? Wickham was **nervous and shaky,** (PCR40 7732, citing "Trial Tr. At 1165," "Trial Tr. at 1165-1166," TT/VII 1490, 1491)

? Wickham **could not cope** with the outside world. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490)

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[9] Dr. Joyce Lynn Carbonell (PCR40 7732. See TT/VII 1462 et seq., TT/IX 1969 et seq.), was a clinical psychologist and tenured professor at Florida State University, who had interned at Baylor College of Medicine, served as a "postdoctoral Fellow on the National Institute Fellowship in applications of psychology to crimes in the criminal justice system," who had published articles regarding the "prediction of criminal behavior, correlates to criminal behavior, and violent behavior," who has done "a lot of" research on "personality testing and the use of personality tests," who has done extensive practical work in forensic psychology, and who had previously testified as an expert for both the State and the defense (TT/VII 1462-65)

[10] The trial court's citations to the trial transcript, "Trial Tr.," uses the court reporter's typed page numbers. The State also provides the clerk's stamped page numbers. The trial court attached many of the referenced pages to its postconviction order.

[11] Thus, Alice Bird, Wickham's younger sister, admitted to Dr. Carbonell that she "had had mental health problems." (TT/VII 1491)

- ? Wickham's history of **mental** problems resulted in his **hospitalization at Northville and Ionia**. (PCR40 7732, citing "Trial Tr. At 1165-66," TT/VII 1490-91)

- ? Ed, Wickham's older brother said that Wickham was **not mentally capable of handling anything**. (PCR40 7732, citing "Trial Tr. At 1165," TT/VII 1490) His older sister, Sue, said that due to his mental problems, she did **not** think he was **capable of living on his own**. (PCR40 7732-33, citing "Trial Tr. at [1166-]1167," TT/VII 1491)

- ? Wickham **was a loner and had spells** (PCR40 7733, citing "Trial Tr. at 1167," TT/VII 1492)

- ? Wickham **walked around and talked to himself**. (PCR40 7733, citing "Trial Tr. at 1167," TT/VII 1492) Sometimes he would stop his truck and walk away, **not knowing where he was**. (PCR40 7733, citing "Trial Tr. at 1167," TT/VII 1492)

- ? A number of events in Wickham's life can lead to **brain damage**, including his history of drinking, being beaten rather severely as a child, and car accidents; the closed head injuries can lead to serious brain damage. (PCR40 7733, citing "Trial Tr. at 1154," TT/VII 1479)

- ? Extensive testing consistently showed that Wickham had **brain damage**. (PCR40 7733, citing "Trial Tr. at 1154," TT/VII 1479; see also TT/VII 1476-81)

Trial defense counsel elicited for the jury that Wickham's father abandoned the family (See TT/VII 1490) that Wickham "always had mental problems" (TT/VII 1491) and that "he had borderline convulsive tendencies" (TT/VII 1493-94).

In addition to Dr. Carbonell, trial defense counsel called a number of witnesses who testified on Wickham's behalf, as the trial court states (PCR40 7735-36). These included two of Wickham's sisters[12] and his wife, who testified and reiterated about --

[12] Wickham was 42 years old at the time of the trial according to his sister. (TT/VI 1384)

- ? Wickham's lengthy **mental hospitalization** (See TT/VI 1386-87, 1398);
- ? Wickham being **abused** many times (Id. at 1397);
- ? Wickham being **beaten** in the head (Id. at 1387);
- ? beatings while Wickham was hospitalized at Ionia (Id. at 1388-89), **heavy bruising on his face** (Id. at 1387), being **"beat[en] half to death"** (Id. at 1397);
- ? his **inability** to obtain a **driver's license and balance a checkbook** (Id. at 1389; see also Id. at 1402, 1457);
- ? his completion of only the **fourth grade** (See Id. at 1389, 1399);
- ? **talking to himself** and **wandering off** (Id. at 1456-57); and,
- ? doing **irrational** things almost always (Id. at 1390).

The postconviction trial court elaborated (PCR40 7733) on Dr. Carbonell's overview of Wickham's medical records, including --

- ? The diagnosis of Wickham as **schizophrenic** (TT/VII 1499).

Dr. Carbonell explained that Wickham has a type of schizophrenia in which he does not have "the ability to cope with the world, … maintain a job, reasonable social relations, take care of himself." (TT/VII 1499-1500) She continued her trial testimony:

> He does peculiar and odd behaviors. He walks around and talks to himself. He has periods where he doesn't particularly know what he's doing. He also has psychological testing that indicates some sort of that poor contact with reality. And that's supported by the MMPI and the Rorschach, neither of which look healthy. They both look **psychotic**. *** He's **brain damaged**, ***

(TT/VII 1500) She reiterated Wickham's miserable home environment and testified that Wickham's schizophrenia has "been there since this man was ten years old." (TT/VII 1500) Wickham does not have any strengths. (TT/VII 1507)

Dr. Carbonell summarized for the jury Wickham's hospitalizations:

> He was in a hospital continuously [for a period of ten years]. He was transferred briefly to Northville when he was ten years old, and he stayed there and he was transferred to Ionia when he was about 18 years old. He stayed in Ionia for a few years, one or two years, and transferred back to Northville and was released when he was approximately 20 or 21. He was institutionalized throughout his entire developmental years.

(TT/VII 1500)

As the trial court indicates (PCR40 7733-34), Dr. Carbonell was allowed to tell the jury Wickham's version of the events, that is, that he had no plan to kill anyone. "Before I knew what happened, I shot him." (TT/VII 1504-1505)

Padovano explained that the "nice part about the insanity defense is that most of the stuff that goes to the mitigators in the penalty phase has already been hashed out in great detail." (PCR19 3513) And, Padovano prepared for the penalty phase before the trial began. Therefore, he was able to begin the penalty phase on short notice. (See PCR19 3512-18)

As the trial court discusses (PCR40 7734, 7736-37), Wickham's trial counsel did re-call Dr. Carbonell for the penalty phase, and the doctor specifically discussed the application of two statutory mitigators. (See TT/IX 1969-78)

The trial court summarized Dr. Carbonell's testimony and compared it with the evidence Wickham elicited at the 2004 evidentiary hearing, when his postconviction team was armed with **16 years of hindsight**:[13]

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[13] Padovano succinctly captured the improperly hindsighted nature of the postconviction accusations:

> As is clear from the record of trial, the only thing that the jury did not hear from Dr. Carbonell was that Defendant may suffer from epilepsy and Tourette's Syndrome. From Dr. Carbonell, the jury heard that Defendant suffered from traumatic brain injury as a result of beatings and car accidents, was badly abused as a child, had a history of alcohol abuse, has a low IQ, was schizophrenic, psychotic and disturbed, was judgment impaired, was hospitalized during his formative years, is brain damaged, is suggestible, exhibited irrational behavior such as wandering away from home and talking to himself, was unable to plan or understand the consequences of his actions at the time of the murder, and was legally insane at the time of the murder.

(PCR40 7734-35) The trial court ruled correctly that

> [t]he presentation of changed opinions and additional mitigating evidence in the post-conviction proceeding does not[] establish ineffective assistance of counsel. Hodges v State, 2003 WL 21402484 (Fla. June 19, 2003)[14]; Gaskin v State, 822 So.2d 1243, 1250 (Fla. 2002); Asay v State, 769 So.2d 974, 986 (Fla. 2000); Davis v Singletary, 119 F.3d 1471, 1475 (11th Cir 1997) (ruling that the "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."); Rose v State, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense' trial expert does not establish that the original evaluation was insufficient.") ***

(PCR40 7738)

Accordingly, based upon evidence that he had provided to the jury, in his guilt-phase closing argument, trial defense counsel vigorously advocated the lack of any planning or premeditation. (See TT/VIII 1773-

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> I don't have the luxury of working on … a case for eight or nine years, as if it were a postconviction motion.

(PCR19 3518)

[14] Hodges v. State, 885 So.2d 338, 347 (Fla. 2004)(revised opinion).

1815). Instead, there was an "ill-defined notion" in the group that they might go one place, then an ill-defined notion they might go another place. (TT/VIII 1783) Wickham and his companions were "people roaming around aimlessly in a car" (Id. at 1784) There was no "plan" to kill anyone (Id. at 1785) and the shooting was a "bizarre, unexplained act," not premeditated (Id. at 1787) He continued the theme, for example: "It makes no sense at all. I agree with Mr. Hankinson's [prosecutor] first observation about the case. It was senseless. It wasn't planned, it was senseless." (Id. at 1788) A little later, in another example, he continued to hammer the theme:

> The issue is whether his illness is such that it prevents him from accepting responsibility. That's the point.
>
> Now, I presented testimony from a number of relatives who testified that Mr. Wickham has basically been mentally ill all his life. People who have known him off and on, that he has lived with. They say he can't balance a checkbook. That he never had a checking account. Doesn't have a credit card or driver's license. Can't pay his rent. Can't manage a household. He is not somebody who is able to take care of himself. He is not able to make his way in the world.

(TT/VIII 1471-72) Trial defense counsel discussed Dr. Carbonell's testimony at length. (See TT/VIII 1800-1806) Among his points were Wickham's being psychotic, schizophrenic, and sick. Wickham has organic brain damage. "Wickham has a physical defect of the brain." (Id. 1801-1803) At one point, he turned the State's expert, Dr. McClaren, against the State:

> So basically we have Dr. McClaren admitting we're dealing with a person who has an IQ level in the mid-eighty range, who is brain damaged and who is mentally ill. *** The State's own psychologist says he's sick.

(Id. at 1809)

For the penalty phase, trial defense counsel recalled Dr. Carbonell.

Among other things, she opined that Wickham has "extreme mental or emotional disturbance" and "his ability to conform his conduct to the requirements of the law is substantially impaired." (TT/IX 1976-77)

Accordingly, in defense counsel's penalty-phase closing argument to the jury, he stressed evidence supporting mitigators of under extreme mental or emotional disturbance and substantially impaired capacity. (See TT/X 2023-2025. See also Id. at 2033-35) He also highlighted evidence of Wickham's remorse (Id. at 2025-26), organic brain damage (Id. at 2026-27), Wickham being "severely beaten as a child" (Id. at 2027), Wickham's hospitalization (Id. at 2028-29), and the relative culpability of the accomplices (See Id. at 2029-31)

In light of the foregoing exceedingly-far-above-reasonable performance of trial defense counsel that is palpable in the trial record, the State submits that his postconviction testimony was unnecessary to justify his actions in 1988. Nevertheless, trial defense counsel testified at the evidentiary hearing, and the trial court accredited that testimony. The State submits those findings as supported by competent substantial evidence and therefore as additional grounds for affirmance:

> During the evidentiary hearing, trial counsel testified he intentionally did not call five or six witnesses, as Defendant asserts he should have, to say the same things other witnesses had already related to the jury. Trial counsel told this court he adequately painted the picture of Defendant's childhood before the jury. Trial counsel noted that '[i]f you call five or six witnesses to say the same thing, you begin to weaken the point.' Trial counsel went on to testify that 'you can overplay that hand by calling too many witnesses about a bad childhood.' (Attachment JJ – Ev. Hr. at 232 [PCR18 3502]). He went on to note that in his view, it 'has a better impact on a jury to make your point and sit down than it does to just beat it to death. So I think there is a point of diminishing

> returns with a lot of his kind of evidence.' (Attachment KK – Ev. Hr. at 232-233 [PCR18 3502-3503]). Trial counsel testified this view played a factor in the way he handled the defendant's case.
>
> Trial counsel testified Ed Wickham's [Defendant Wickham's older brother] testimony was pretty much the same as what his sister said and in his view 'putting on more witnesses on about that doesn't really help.' (Attachment LL - Ev. Hr. at 234 [PCR18 3504]). Insofar as his decision to call Dr. Carbonell, trial counsel testified that at trial there was a one-on-one match-up with Dr. McClaren and in his opinion, she [Carbonell] was a very good witness. Trial counsel told this Court that, in his view, the case was not going to get any better and that he did not select Dr. Carbonell by accident. (Attachment MM - Ev. Hr. at 235 [PCR18 3505]). In his opinion, additional health experts would have probably weakened the case in that it would be a battle between defense mental health experts and state mental health experts.
>
> Defense counsel testified that in his opinion the family history together with the defense mental expert opinion was sufficient to bring to the jury's attention mitigating evidence. To raise the same issues again at the mitigating phase would have been duplicative. It is not ineffective assistance when counsel fails to present evidence in mitigation that is merely cumulative to evidence already presented. Henyard v. State, 883 So.2d 753 (Fla. 2004); Gudinas v. State, 816 So.2d 1095, 1106(Fla. 2002).

However, as summarized in this Court's direct-appeal opinion, the evidence against Wickham in the guilt and penalty phases was too compelling, and the jury recommended the death penalty by a vote of 11 to 1. (R1 164, TT/X 1712-13) Indeed, five aggravating circumstances were found and were upheld on appeal:

> 1. **Under sentence of imprisonment**: Wickham was paroled in Colorado as of April 9, 1985;
>
> 2. **Prior violent felony**: Wickham had been previously convicted of Armed Robbery in Michigan and First Degree Aggravated Motor Vehicle Theft in Colorado;
>
> 3. **During the commission of a robbery** of the murder victim, as the jury found Wickham guilty of Count II;
>
> 4. **Avoid arrest**, as the trial court found that "the dominant motive for this Murder was to eliminate a potential witness";

5. **Cold, calculated and premeditated ("CCP")**, as the trial court found that Wickham planned the armed robbery, suggested that there might be a killing involved in it, armed himself with a gun, concealed himself, and shot the victim in the back and then executed the victim by walking to the victim and shooting him in the head twice at close range.

(R2 247-50) Heinous atrocious and cruel ("HAC") was stricken on appeal.

This Court explicitly reviewed the weighing process, assessed this death's sentence's proportionality with others, and upheld the death sentence:

> As we recently stated in *Cheshire*,[15] the trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase. *Cheshire*, 568 So.2d at 911 (*citing Rogers*, 511 So.2d at 534). Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Rogers*, 511 So.2d at 534. Clearly, the evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters, should have been found and weighed by the trial court. *Id.*
>
> However, we also must note that the State controverted some of this mitigating evidence, thus diminishing its forcefulness. Wickham had not been hospitalized for mental illness for many years and was not drinking at the time the murder was committed. His schizophrenia was in remission. Expert testimony indicated that he was not insane, and that he was able to appreciate the criminality of his actions in March 1986. This testimony is consistent with the facts of the murder and the actions and statements of Wickham.
>
> In light of the very strong case for aggravation, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence. Having reviewed the entire record, we find this error harmless beyond a reasonable doubt. *Rogers*, 511 So.2d at 535.

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[15] Cheshire v. State, 568 So.2d 908, 912 (Fla.1990).

> ... Wickham argues that death is not a proportional penalty in this instance. The cases cited by Wickham for this proposition all deal with domestic violence, 'heat-of-passion' murders, persons who were severely mentally disturbed at the time of the murder, or similar reasons. The facts of none of these cases approach the aggravated quality of the facts of the present case.
>
> In killing Fleming, Wickham planned and executed a roadside ambush designed to lure a victim who believed he was helping a stranded woman and children. While some mitigating evidence was available, the case for aggravation here is far weightier. If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose. Accordingly, this Court may not disturb the sentence on this ground. The conviction and sentence are affirmed.[16]

Therefore, defense counsel should not be faulted at the postconviction phase because the facts were compelling against his client. Defense counsel performed admirably under adverse circumstances, far-exceeding Strickland's requisite reasonableness.

The strength of the State's case and of the aggravators against Wickham suggests the next point: Wickham has failed to demonstrate Strickland prejudice. Thus, the trial court analysis, which begins with a record-supported finding that Wickham's postconviction evidence is substantially duplicitous of the evidence marshaled at trial, merits affirmance:

> [T]he defendant fails to show prejudice by counsel’s failure to present testimony that would have been cumulative to Alice Bird's, Sue LaValley's, Sylvia Wickham's, and Dr. Carbonell's trial testimony.

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[16] Accordingly, this Court has indicated that two of the aggravators here are among the most serious. See Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006)(jury vote of 8 to 4; "HAC and CCP aggravators are 'two of the most serious aggravators set out in the statutory sentencing scheme'"; "we have upheld death sentences where the prior violent felony aggravator was the only one present").

> Even assuming that trial counsel was ineffective in failing to locate additional witnesses that could have provided additional confirmation to the testimony already presented at the penalty phase, Defendant has failed to meet the prejudice prong of Strickland, and hence is not entitled to relief on this claim. Henyard; Sweet v State, 810 So.2d 854, 863-64 (Fla. 2002) (noting that the Court did not need to reach the issue of whether trial counsel was deficient in failing to have additional penalty phase witnesses testify, because the testimony of the witnesses at the evidentiary hearing did not establish prejudice where the majority of the testimony was cumulative with other witnesses' trial testimony).
>
> *** Provenzano v Dugger, 561 So.2d 541, 546 (Fla. 1990)(holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).
>
> Because the record reveals a thorough background investigation and the presentation of substantial mental health mitigation, the defendant has failed to show how the presentation of additional repetitive evidence of mitigation would have probably changed the outcome of the trial as required under Strickland.

ADDITIONAL REBUTTAL AND REASONS FOR AFFIRMANCE.

The State disputes the content and/or significance of Wickham's additional IAC contentions or sub-claims in his Initial Brief.

Padavano running for judge.

The State disputes Wickham 's mantra (E.g., IB 18, 19) that Padavano was running for judge and therefore "virtually ignored the many tasks necessary to prepare for Wickham's trial." The postconviction trial court correctly found:

> Defendant contends that trial counsel was too busy to prepare for trial because he was campaigning for circuit judge. Trial counsel's testimony at the evidentiary hearing established that he was well-prepared for trial. Trial counsel subjected the State's case to adversarial testing, he thoroughly cross-examined and sought to discredit key state witnesses, he retained and presented a mental

> health expert in an attempt to mitigate the murder. He testified that he was prepared to go to trial. The Court finds Judge Padovano's testimony credible.

(PCR40 7727) After 16 years, Padovano was unable to re-construct the exact number of hours that he labored for Wickham, but he testified that his bill submitted to the trial court underestimated them:

> I did a lot of work that I didn't charge people for. Some of it I did on purpose out of the goodness of my heart. Some of I did because I wasn't real good at the business end of the law practice.
>
> But yes, I did have – I mean, we've obviously discovered several meetings that I had with her [Dr. Carbonell] that are not on my bill.

(PCR18 3500) Thus, Padovano received formal awards, including the Tobias Simon Pro Bono Award "for lawyers who have done the most in any given year for carrying out the pro bono obligation." (PCR18 3489) The bottom-line is that Wickham has failed to prove that Padovano's representation of him was adversely affected by any judicial campaign.

Padovano refused to spend time on the case.

Likewise, the State disputes the allegation that "Padovano refused to spend time on the case" (IB 19). For this assertion, Wickham cites to "R 242-44; PC-R 3534." However, the former cite to the trial record references only Padovano's bill. The latter cite is only to the testimony of **Jennifer Greenberg**, who had worked at CCR (PCR19 3531), who corroborated Padovano's extensive pro bono work by indicating that he was willing to represent her in that capacity regarding an FDLE investigation of her and others (PCR19 3531-32). At page 3534 of the transcript, she testified that she was "very afraid." She said she thought that "this work … had to be done very competently and very well." She then ambiguously testified:

> I was used to working with attorneys who knew their cases cold, who put in the time, who were available; and this was the only time I ever walked away from a case. But I did walk away because I felt that might be in Mr. Wickham's best interest, ultimately.

(PCR19 3434) Elsewhere, she clarified that a letter she wrote for Padovano was her to-do list, but she did not follow-up with him because, at the time, she was six months pregnant and she was trying to finish law school. (PCR19 3533) She began to opine that she had a very deep conviction that "Phil, whom I like very much, was not performing in the way --," at which point the postconviction judge overruled the prosecutor's objection, but she then testified about being "very afraid," as indicated above. Whatever her opinion, it was based on working with Padovano for "a few weeks only" (PCR19 3532; see also Id. at 3539), her memo was written almost six months prior to the trial on May 17, 1988 (PCR19 3532), she did not follow up with Padovano (PCR19 3533), and the State submits that Padovano delivered effective representation for Wickham.

An interesting aspect of Wickham tendering Greenberg's testimony in conjunction with Padovano's billing log is that, for the 2004 evidentiary hearing, Greenberg, like Padovano, had no records to document the time that she spent on this case. (See PCR19 3536-37) However, the omissions from Padovano's log were consistent with his extensive, pro bono work, including for Wickham.

Inexperienced investigator.

Wickham cites (IB 19) to the following for his attack on Padovano's

relationship with the "new investigator" as inexperienced,[17] getting "little direction from Padovano," doing little, and uncovering none of the 2004 evidence:

> R242-44, however this part of the trial record is Padovano's bill to the trial court, as discussed above;
>
> PC-R 3421, however at this juncture in the evidentiary hearing, Ms. Greenberg responded "No" to a question whether she knew if the new investigator had prior experience doing investigations in death penalty cases and followed up by indicating that she does not remember the new investigator;
>
> PC-R 4395-97, however this only references Padovano's Motion for Payment of Investigator's Fees and Expenses and an attached log, but the Motion states that the investigator is experienced in capital cases and there is no indication of the relative significance, comprehensiveness, or thoroughness of the log.

Padovano's preparation concerning Dr. Carbonell.

Wickham (IB 19)appears to be attempting to distill Padovano's communications with Dr. Carbonell to a "fleeting[]" meeting with her in the parking lot. For this accusation, he cites again to Padovano's bill, to Padovano's testimony at PC-R 3424-25, where Padovano testified about having a discussion with Dr. Carbonell in the context of the conversation with her in his office, Padovano walking her out to her car, and the conversation continuing in the parking lot. He explained that "[o]ne time it [the conversation in the parking lot] continued for nearly an hour. And it was

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[17] Wickham (IB 21-22) again suggests that the new investigator had no death penalty experience, but the State submits that, again, Wickham's record cites do not support that assertion: PCR 3337 which does not discuss the investigator's experience, 3421 where Padovano says he does not recall Harris at all or his background, and 3521 which does not address the investigator's experience. In any event whoever-did-what resulted in Padovano putting on a fine defense for Wickham.

because we were both very interested in the case … ." (PCR18 3424)

Concerning Padovano's preparation of Carbonell (IB 22), Wickham wishes to parse and hindsightedly micromanage how Padovano prepped the expert. He overlooks the key question of the product of what Padovano adduced in the trial, as bulleted and summarized above and in the postconviction trial court's order. The State does clarify, however, that Padovano's comment that more testing was necessary (IB 22) was made in his May 20, 1988, Motion for Continuance (PCR23 4404-4407), six months prior to the actual trial.

Padovano's preparation of lay witnesses.

Wickham states (IB 21) that "Padovano's preparation of his two lay witnesses consisted of a brief encounter at the courthouse. (PC-R 4002)('He didn't give us time to say anything. He was just in and out.')" The State has three responses. First, in the 2004 postconviction hearing the witness testifying at PCR 4002 was Marguerite Ann LaValley, who alternated between being positive about her recollection of events in 1988 (e.g., PCR 4002) and admitting, "I don't remember too much" because she had a stroke (PCR21 4003). Second, after flatly stating "no" to a question, "Did you also have an opportunity to talk to Dr. Carbonell?," (PCR21 4002), she admitted that it is possible that she talked with the doctor (PCR21 4003). At trial, Dr. Carbonell testified to detailed information about Wickham (See TT/VII 1491-92) that the doctor obtained from "Sue," who is actually Marguerite LaValley (Id. at 1538). "Sue" appears to have been correct when she testified in 2004 that she no longer remembers much. Third, the State

invites the Court to compare "Sue's" entire 2004 testimony (PCR21 3995-4009) with the facts that Padovano was able to elicit at trial about Wickham's history for Wickham, as bulleted above; even armed with 16 years of hindsight, postconviction counsel has produced additional facts that are inconsequential.

Additional mitigation.

Wickham discusses (IB 23-27) the supposed "crucial" mitigation evidence that Padovano deficiently failed to present to the jury. As detailed above, plentiful mitigation evidence was presented, some in the guilt phase and some in the penalty phase, and argued by Padovano in the penalty phase. In 2004, with 16 years to explore, Wickham would have added a few details to the plethora of details concerning his abused childhood and brain that Padovano produced in 1988. Hindsight and different packaging pale in comparison to the Padovano's trial product and the adversarial testing to which Padovano subjected the State's case. Trial counsel painted a picture for the jury of a defendant who was subjected to "suffering extreme and brutal abuse with life-long repercussions" (IB 25). As the trial court found, Wickham's postconviction evidence is substantially duplicitous of the trial evidence.

At this point (IB 25), Wickham cites to Ragsdale v. State, 798 So.2d 713 (Fla. 2001). The State agrees that Ragsdale is instructive, but its significance is due to its stark contrast with the performance of counsel here. There, unlike here, it appears that only one witness testified about one incident in the defendant's childhood and that there was no expert

testimony about mitigation. Interestingly, the expert who was produced by the defendant to establish counsel's deficiency at Ragsdale's postconviction phase was a "forensic psychologist," that is the type of expert that Padovano produced at trial for Wickham. Moreover, in Ragsdale, the postconviction expert (Dr. Berland) interviewed the family, as did Dr. Carbonell, conducted a WAIS test, as did Dr. Carbonell (TT/VII 1467), but Dr. Carbonell did much more (See TT/VII 1462 et seq.) Ragsdale's **postconviction** expert testified about "extreme mental or emotional disturbance and inability to conform to the requirements of law applied in the instant case" and "organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability," which nearly mirrors Dr. Carbonell's **trial** testimony. If the psychological testimony was strong enough to overcome the presumption of effective performance in Ragsdale, then it was certainly enough to buttress that presumption well-beyond what is necessary to affirm the trial court here. In any event, Padovano's product far exceeded that of Ragsdale's trial counsel.

Wickham (IB 25) also cites to State v. Lara, 581 So. 2d 1288 (Fla. 1991). However, Lara is a State appeal in which this Court deferred to the trial court's finding of fact and affirmed the trial court's decision. As discussed above, the State submits that there is plentiful competent and substantial evidence supporting the trial court's ruling denying Wickham relief here.

Hanvey, Moody, and Page.

Concerning Hanvey and Moody, Wickham seems to argue (IB 28) that Padovano, with reasonable effort, could have discovered that both "had been given reduced sentences in return for testifying against Wickham." The trial court found there was no plea agreement with Hanvey for him to testify against Wickham, which is based upon competent and substantial evidence. (See PCR40 774041, ISSUE V infra) The State has not found where Wickham's 121-page Postconviction Motion alleged such a deal with Moody (Compare PCR15 2824-25), and the State objects on that ground to Wickham raising such a claim now. In any event, Moody was cross-examined at trial regarding his plea deal with the State. (See TT/VII 1614-20) Wickham has failed to show that there is something substantively new for defense counsel to have reasonably discovered.

Wickham's Initial Brief discusses (IB 28) Darnell Page. Wickham cites to Darnell Page's perpetuated deposition (PCR22 4211 et seq.) as purported support for the IAC claim that Padovano should have called Page at trial as a witness. Wickham[18] (IB 28) self-servingly infers, contrary to applicable standard of review, that he saw Wickham have "seizures and epileptic episodes" and that the police asked him to "fabricate" testimony. Some of what Page described may have been some sort of seizure, but it may also

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[18] These allegations are not made in the Postconviction Motion where it discusses Darnell Page (PCR15 2802-2803, paragraphs #75-#77). Therefore, unless and until Wickham shows where these claims are made in his 122-page Motion, they are unpreserved.

been akin to the evidence introduced at trial that Wickham was a loner, had "spells," and wandered off sometimes. Concerning the "fabrication" allegation, Page essentially accused the police of nagging him to give them "something" on Wickham but Page did not testify that the police told him what to say against Wickham; he did not state that the police told him to lie. (PCR22 4223)

Further, Hanvey testified at trial that Wickham's statement was not made to any specific person (TT/VI 1327), so Hanvey may have heard Wickham's statement and Page not heard it; accordingly, Page testified for the postconviction proceedings that he was not in the cell three times for 35 to 45 minutes each time (PCR22 4242; see also Page and Wickham separated sometime in 1988, Id. at 4245-46).

Further, Page's minimal use to a trial defense in any future trial would have been more than offset by his admission to the impeachment that he had been convicted of about ten felonies (PCR22 4233-34). Indeed, even in 1988, Page had convictions for possession of a firearm, auto theft, and marijuana (Id. at 4235). Page also admitted to multiple escapes, including one in which he "jumped" an officer and another elaborate plan that involved "drilling a hole throughout the toilet" in 1988. He explained on direct examination from Wickham's attorney:

> I was planning to go through the toilet and chip away at the base of the concrete, and try to go through the walls and come up on the second floor and leave that way.

(PCR22 4216-17; see also Id. at 4236-37, 4239-41) He said he concocted his plan "prior to them moving some guys in there." (Id. at 4217) Although Page

denied that Wickham was involved in his elaborate plan to escape (Id. at 4218), it would have corroborated the State's other evidence that the occupants of that cell, in which Wickham was located, were involved in an escape attempt. (TT/VI 1323) Thus, somehow, in this small cell, Wickham did not see or hear Page at work chipping away his escape route. (See PCR22 4242-43)

Page also admitted, when he was in the cell with Wickham, that he (Page) was there for attempted murder on a law enforcement officer, that he agreed to testify against Wickham, that he obtained the benefit from the bargain, and that he reneged on the deal. (Id. at 4237) Therefore, Page's usefulness to the defense at trial pales in contrast to the incriminating evidence amassed against Wickham. Even if the defense could have done more to explore Page, there is no Strickland prejudice.

Tammy Jordan, Sylvia Wickham, & Larry Schrader.

Contrary to Wickham's argument (**I**B 29-31), he has failed to meet either Strickland prong concerning these three witnesses. Trial defense counsel did not "botch" (IB 30) impeaching any of them. Wickham's postconviction arguments attempt to micro-parse defense counsel's trial performance, contrary to Strickland. The trial court (PCR40 7727-29) correctly highlighted details of defense counsel's closing arguments and cited to applicable sections of the trial transcript.

Trial defense counsel did, indeed, argue that Tammy Jordon's testimony that Jerry thought about killing someone before the group arrived in Tallahassee was refuted by Sylvia Wickham, Larry Schraeder, and Jimmy

Jordon. (TT/VIII 1784-86). Trial counsel reminded the jury that he asked the witnesses whether there was a plan to kill anyone, and each said there was no such a plan (TT/VIII 1785). Trial counsel also argued that Tammy gave inconsistent statements to police. Trial counsel fully made the case to the jury they should view Tammy Jordon's testimony as not credible based upon her motive to lie. (See Id. at 1787; additional reasoning in court order at PCR40 7727-28)

Concerning Sylvia Wickham, defendant Wickham contends (IB 30) that she made a conflicting initial statement to the police concerning precisely when the decision was made to rob someone. For her initial statement, the Initial Brief cites to PC-R 570 and 585, but those pages refer an appendix to his Postconviction Motion (PCR3 562 et seq.), not to competent evidence introduced at the evidentiary hearing. In any event, arguendo, in light of the total context of the trial as well as the facial content of the cited document, this subclaim is trivial. According to the document, she said that her husband, defendant Wickham, announced shortly before the shooting a plan to rob someone, but nothing was said about killing anyone. (See PCR3 564-65, 570-71) According to the document, she also said that after the defendant shot the victim the first time, the victim begged for help and the defendant shot the victim again. (Id. at 574) Similarly, at trial, she testified that shortly before the shooting, there was discussion of a robbery (TT/V 1144-50), and after the defendant shot the victim the first time, the victim begged for help and the defendant shot the victim again (Id. at 1150-51). On cross-examination, for Wickham's benefit, defense

counsel repeatedly highlighted the point that there was no discussion of killing anyone prior to the shooting. (See Id. at 1155-57, 1162-63) He also elicited, for the defendant, from the witness that her husband said he did not know how or why it happened and that he said he was sorry that it happened. (Id. at 1157-58) defense counsel's performance was very effective, not Strickland deficient at all, and not Strickland prejudicial.

Concerning Larry Schrader, Wickham has also failed to demonstrate either Strickland deficiency or Strickland prejudice. Instead, Wickham (IB 30-31) selectively highlights aspects of defense counsel's cross-examination and then essentially asks for more, while referencing deposition-content that he does not cite as part of the postconviction record along the way and to which the State objects; Wickham has the burden to establish error on appeal, and he has failed. Wickham also references (IB 31) an attachment to his Postconviction Motion for documentation of a statement Schrader made to Detective Blair; as such, it is not competent evidence. Moreover, arguendo, that document does not assist Wickham because it is consistent with Schrader's insistence at trial that he was not explicitly asked by the detective whether Wickham had mentioned a plan to kill someone prior to the murder. (Compare TT/V 1110 with PCR3 545 et seq.)

Further, aspects of Padovano's effective cross-examination of Schrader that Wickham omitted include, for example: Schrader's possession of a machine gun (TT/V 1098); questioning Schrader's reason for the machine gun (TT/V 1099); the plea-bargain concession afforded to Schrader (Id. at 1099-1101), including eliciting from Schrader an acknowledgement that he had no

choice but to testify against Wickham (Id. 1101); Schrader's use of marijuana (Id. at 1106-1107); Schrader admitting that he lied to the jury (Id. 1108); the ten-second duration between the first and last shots (Id. at 1116).

Vague jury instructions on HAC and CCP.

Wickham complains (IB 31-33) that Padovano did not object to these two jury instructions. As the postconviction trial court ruled (PCR17 3117), these claims are procedurally barred. See Bruno v. State, 807 So. 2d 55, 70 (Fla. 2001) (challenges to penalty-phase jury instructions should be brought on direct appeal); Waterhouse v. State, 792 So.2d 1176,1196 (Fla. 2001)(rejecting an ineffective assistance claim during this penalty phase proceeding for not objecting to the CCP instruction on vagueness grounds and by failing to submit a limiting instruction); Downs v. State, 740 So.2d 506, 518 (Fla.1999)(rejecting an identical argument and reasoning that because the CCP instruction was the standard jury instruction which had been approved by this Court, defense counsel could not be deemed ineffective for not objecting); Hall v. State, 541 So. 2d 1125 (Fla. 1989)("trial court correctly determined that these issues [explicitly including Maynard] could have and should have been raised on direct appeal or in prior motions for postconviction relief. Accordingly, they are procedurally barred at this stage of the proceedings").

To support his point, Wickham cites to a number of cases that were decide after this 1988 trial. Trial defense counsel was not ineffective for failing to foresee subsequent case law. See, e.g., Strickland, 466 U.S. at

688 ("eliminate the distorting effects of hindsight"; "evaluate the conduct from counsel's perspective **at the time**"); State v. Lewis, 838 So.2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"), citing Nelms v. State, 596 So.2d 441, 442 (Fla. 1992) ("Defense counsel cannot be held ineffective for failing to anticipate the change in the law.").

Moreover, at the State's request, unlike the standard jury instruction at the time, HAC was defined so that substantively this issue would be avoided. (See TT/IX 1880)

See also discussion of IAC appellate counsel claim in State's response to Petition for Writ of Habeas Corpus, I E.

Wickham's conviction for a violent robbery in Michigan.

Wickham claims (IB 33-34) IAC due to trial defense counsel's failure to contest Wickham's prior violent felony aggravator. The trial court correctly ruled (PCR17 3115-16) that this claim is procedurally barred; it is not supported by Johnson v. Mississippi, 486 U.S. 578 (1988), because, unlike Johnson, Wickham's prior conviction was not vacated and because Johnson is not retroactive, see Stano v. State, 708 So.2d 271, 275 (Fla. 1998)("*Johnson* is not applicable because Stano's prior convictions have not been set aside"); and it is meritless because factually Wickham's prior felony was violent, see Williams v. State, 2007 Fla. LEXIS 1106 (Fla. 2007)("whether a crime constitutes a prior violent felony is determined by

the surrounding facts and circumstances of the prior crime").[19]

Concerning the "surrounding facts and circumstances of the prior crime," it is significant that, in the penalty phase, the prosecution introduced evidence concerning a Michigan felony. This evidence included testimony from victim Francis Daniels, a taxi cab driver. He testified that he drove to a location where Wickham got into his cab, pulled a gun on him, and said, "This is a robbery." Wickham then directed the victim to drive him a number of places for about an hour to an hour-and-a-half. Wickham directed the victim to a secluded location and shot the victim in the back of the head. The victim's head went forward then back and then Wickham shot him again. Then, Wickham got out of the cab, pulled the victim out of the cab, and point-blank shot the driver in the face while standing directly over him. Wickham then drove off in the cab. (TT/IX 1927-1930)

For a second prior violent felony, Lt. James Hibberd, from a Colorado police department, testified that he was in a marked police vehicle when he was dispatched due to the report of a stolen vehicle. He spotted the stolen vehicle and a high-speed chase ensued. He described the routes and speeds. Another marked police vehicle joined the chase. On the interstate, the "driver of the stolen vehicle began to weave from shoulder to shoulder of the highway, crossing over both lanes. It was impossible to get to the side of him … ." After requesting assistance from the state patrol, Lt. Hibberd

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[19] Also, contrary to Wickham's assertion, trial defense counsel did vigorously contest this aggravator during the trial proceedings. (See TT/IX 1892-1903) Therefore, there is no deficiency.

was able to inch along side of the stolen vehicle. When the windows of the two vehicles were side by side, the driver of the stolen vehicle intentionally turned into the left side of the officer's door. At the time, "there was no reason" for Wickham not to go straight. The officer said that his vehicle then "lost control" and went into the median. Wickham and the officer then went into the eastbound lanes traveling westbound, traveling into the oncoming traffic. It was close to rush hour. They traveled about another mile or two, when Wickham hit a truck and then, as the officer was gradually stopping, Wickham rammed the officer's vehicle from behind. Wickham rammed the officer a second time. Wickham was apprehended and arrested for aggravated motor vehicle theft, a felony in Colorado. The chase extended for 12 to 14 miles. Photographs of the damaged vehicles were introduced into evidence. The officer suffered back spasms and whiplash. Wickham did not appear drunk and, after he was arrested, Wickham responded appropriately to the officer's commands. (TT/IX 1949-63)

Therefore, due to these two prior violent felonies, the additional four aggravators, and the jury's recommendation of death (11 to 1 vote), the failure to contest one of the prior violent felonies would be entirely non-prejudicial. See Stano v. State, 708 So.2d 271, 275-76 (Fla. 1998)("even if these convictions were set aside, *Johnson* would not require a reversal of the death sentence here"; "remain three other murder convictions upon which the trial court could have relied to find the prior violent felony aggravator. In addition to this, there were three other valid aggravating circumstances"). See also Buenoano v. State, 708 So.2d 941, 952 (Fla.

1998)("three other valid aggravating factors, which in no way could be affected by information concerning Martz, and a complete absence of mitigating circumstances").

State's arguments to the jury.

Wickham argues (IB 35) that Padovano was ineffective because he did not object to "the State's inflammatory language in opening and closing arguments at the guilt and penalty phase." The trial court afforded an evidentiary hearing concerning the IAC only. (Claim 10, PCR17 3115)[20]

In four lines of his brief, Wickham lists (IB 35) without any discussion three sets of supposed inflammatory language. Because they are argued perfunctorily, the State submits that these claims are not preserved at the appellate level. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is

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[20] The trial court should have summarily denied this claim as procedurally barred. Issues relating to prosecutor's arguments are direct appeal issues that are not properly litigated in collateral proceedings. See Reaves v. State, 826 So.2d 932, 936 n. 3 (Fla. 2002)(holding post-conviction claim relating to prosecutorial comments was procedurally barred because it should have been raised in direct appeal); Marquard v. State, 850 So. 2d 417, 423 n1 & n.2 (Fla. 2002)("claim as to whether the jury was misled by statements that diluted their responsibility for sentencing should have been raised on direct appeal and hence was procedurally barred), citing Hoffman v. State, 800 So. 2d 174, 178 n.3 (Fla. 2001); Koon v. Dugger, 619 So.2d 246, 248 (Fla.,1993)(claim that "prosecutor made improper comments regarding mercy and sympathy toward Koon" procedurally barred). Therefore, if somehow there is any error in the trial court's determinations after the evidentiary hearing, the trial court still would merit affirmance as right for any reason.

unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997). See also U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention").

The State addresses the one comment that Wickham argues in his brief, and if the remaining ones are reached on the merits, defers to the trial court's extensive order (See PCR40 7742-53) denying claims based upon alleged inflammatory comments. See also, e.g., Fernandez v. State, 730 So.2d 277 (Fla. 1999)(no abuse of discretion to deny mistrial due to "prosecutor's references to appellant as 'a robber and a murderer' and to the victim as singing a Christian song just before he was shot" and "by describing the bullet's trajectory through the victim's body"; supported by the evidence); Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992)("proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence").

Concerning the one comment that Wickham discusses (IB 35), this claim focuses upon the prosecutor's penalty phase argument surrounding his comment that "I'm sure that Mr. Padovano is going to get up here and say that 25 years before parole." (TT/X 2016) The prosecutor was correct. The 25-years was a major theme of the defense penalty closing argument. Padovano detailed Wickham's mental illness for pages of transcript. (See

TT/X 2023-29) He then compared Wickham with the accomplices and their bargained-for dispositions. "Mr. Hankinson literally gave up four first degree murder cases for pleas to second degree murder." "Jerry Wickham," due to his First Degree Murder conviction, will "get" as a minimum 25 years in prison. (Id.) He continued:

> He [the prosecutor] already has made a sufficient distinction between these defendants. Is it really required to say, 'I'm going to make an even greater distinction. Let's take the life of this one while the other four got second degree murder.' I don't think those differences are justified in this case. It's quite true that the other two men didn't fire their guns. But is that a virtuous act? A lucky act for them? They were obviously out in the woods with the guns, and I don't know what they were planning with those guns. But I doubt very seriously that Larry Schrader was out there with his gun because he couldn't lock it up in his trunk. I don't think any of us believe that. He was out there with a machine gun and, for all we have to assume, he was prepared to use it. I just don't understand that distinction. He says, well, they got 17-year sentences. Larry Schrader got a 12-year sentence. 12 years. Does it make sense for you now – in fact, look at it this way. I don't even really know what the distinction is between them. Why did Tammy and Jimmy, who Mr. Hankinson describes as practically innocent people, get 17 years and Larry Schrader, the man with ten prior felonies and a machine gun in the woods, got 12 years? And now he wants you to give Mr. Wickham the death penalty. Does any of that make any sense? *** [A]sk yourselves … whether that would be a fair distinction between all of the defendants in this case.

(Id. at 2029-31) Defense counsel continued the same theme of whether the relative sentences among all of the accomplices match their relative culpability. (See Id. at 2031) he then argues that the death penalty is "reserved for the worst of the cases." He argued: "But I ask you to ask yourselves whether it would be appropriate to use the death penalty for a pathetic lost soul like Jerry Wickham. I don't think it is. I don't think it is. You look at Jerry Wickham and ask yourselves if this isn't the product of 43 years of being unable to deal effectively with the world."

(Id. at 2032) He then honed in on the 25 years:

> Now, Mr. Hankinson says this is the only effective remedy. And 25 years in prison – and then he says, well, I don't know what that means. I know what it means. It means 25 years at the very least. That's what it means. It is not a difficult concept at all. 25 years at the very least. If you return a life recommendation, it means that 25 years will pass before Mr. Wickham is even eligible for parole.

(Id.) He continued to focus on the significance of the 25 years for Wickham and pointed out that he is 43 years old now. "I really don't think that that argument about the death penalty being necessary is something that merits serious consideration. The man is going to be 68 years old before he is even eligible to be paroled." He argued that a life sentence may mean the rest of Wickham's natural life, and then he returned to emphasizing Wickham's mental illness and concluded with "asking you to show mercy on Jerry Wickham." (Id. at 2033-35) The trial court then instructed the jury, including informing them that a recommendation of life includes no parole eligibility for 25 years. (Id. 2035-41)

Thus, the prosecutor's argument was a proper balance to the defense argument. It accurately stated the law concerning a life and argued against the defense position that Wickham deserves life. The prosecutor argued that Wickham does not deserve the mercy that defense counsel would request and did request.

Based on the foregoing distinctive aspects of this case, Teffeteller v. State, 439 So.2d 840 (Fla. 1983)(cited at IB 35), is not applicable. Moreover, here the comments were not at the same level as those in Teffeteller. There, the prosecutor was more explicit concerning the degree of the defendant's dangerousness: "You must know that this Defendant will

kill again and when he does it will be too late." The prosecutor repeated: "[T]his Defendant will kill again if he is given a chance. I don't see how you can find otherwise." And, again: 'Don't give him that chance. Don't have to realize after he is paroled and after he kills someone else, perhaps Donald Poteet, perhaps Rick Kuykendall or who knows who he will go after." And, again: "Know that your determination will have a deterring effect on this Defendant and know that it will keep him from being able to kill again. Don't let it happen. Don't let it happen. Don't let Robert Teffeteller kill again." There were no such repetition of such explicit statements here. Instead, here the prosecutor's comments were at the same level as the defense's argument for mercy and relative culpability.

In light of the foregoing arguments, trial defense counsel's explanation for not objecting is unnecessary. However, Mr. Padovano explained his rationale for not objecting the comments listed in the Postconviction Motion:

> I did review all of them. Most of them -- my impression of most of those points was that while there could be some objection made on some of the points, for example, first point was not objecting to when Mr. Hankinson essentially made fun of the insanity defense, that it was something - because we had an insurmountable case, here we come along at the last minute with the insanity defense.
>
> I could have objected. I could have said well, he's arguing with the jury. But, to me, it's far better to deal with the argument, that argument, than it is to object to it. Because the response is, first of all, the jury didn't know that it was a defense that came along at the last minute. Only we knew that.
>
> Secondly, it was a pretty good rebuttal I think to say that this wasn't something that just recently happened. He went in a mental hospital at the age of ten. I don't think he went in a mental hospital at the age of ten thinking that some 30 years later he would be able to use that as a defense to murder.

> It wasn't a new thing. In other words, I thought it was better to attack his argument than it was to object to it. I believe that to this day. I mean, I think that lawyers make far too many objections when they don't need to.
>
> Now if there was going to be some evidence that would come in that would be harmful to Mr. Wickham that I could keep out with an objection, I would object.
>
> If there was going to be an argument that was over overboard that I thought maybe if these people are so enamored of this prosecutor that they're going to be swayed by it, I might object.
>
> By in large though, Mr. Hankinson did not do anything extreme. Not at all. I mean, he was relatively tame. I mean, he was assertive. But he was not -- I don't think he made, you know, any arguments that are -- I mean, you read about these cases where the lawyer calls the defendant an animal or something. He didn't do any of those things.
>
> And for me, most of what he said was better to just address it in argument then it is to be bickering with him in front of the jury all the time.
>
> Q So it was a conscious decision then, a tactical decision not to object to the State's argument on those issues?
>
> A. That's right. Some of them I don't think were even objectionable, period. Others, you know, maybe they were, but there wasn't any real point in it.

(PCR/18 235-237).

Trial counsel is not ineffective when he does not object to prosecutorial argument as a part of trial strategy. See Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2003) (recognizing that a decision not to object to an otherwise objectionable comment may be made for strategic reasons); Ferguson v. State, 593 So.2d 508, 511 (Fla. 1992) ("decision not to object is a tactical one. Although some of the prosecutor's remarks were objectionable, he did not dwell on these inappropriate comments, nor were they so severely inflammatory or damaging as to render counsel's silence deficient performance"); McCrae v. State, 510 So.2d 874, 878 (Fla. 1987)

("Whether to object to an improper comment can be a matter of trial strategy upon which a reasonable discretion is allowed to counsel.").

Trial counsel testified at the evidentiary hearing, that it was his conscious tactical decision to not object to the prosecutor’s comments and that in his view, it is better to deal with these comments in his own argument rather than bickering in front of the jury.

Further, due to all of aggravation in this case, any deficiency was non-prejudicial. And, for all of the foregoing reasons, the denial of this claim merits affirmance.

Padovano's devotion to his duty showed as the product of his labor. In spite of the difficulties that Wickham presented to Padovano, they "truly did have a very good attorney/client relationship" (PCR18 3493-94), and he vigorously contested the charges and the death penalty, as detailed above and exhibited throughout the trial transcript.

Written sentencing findings.

This subclaim (IB 36-37) is substantially the same as ISSUE VII, discussed infra. As in ISSUE VII, the State submits that Walton v. State, 847 So.2d 438, 446-47 (Fla. 2003), is on point. Moreover, as discussed in the accompanying State's response to Wickham's Petition for Writ of Habeas Corpus (ISSUE ID), by the time that the trial judge pronounced sentence, he had been saturated with this case and its extensive aggravation. The sentencing order was individualized, although Wickham does not like the

result. Moreover, when the State brought up its concern, Padovano stated that Wickham personally waived[21] the written findings. (See TT/X 2045)

See also ISSUE VII infra; ISSUE ID, Response to Petition for Writ of Habeas Corpus.

Strategy.

Wickham contends (IB 37-38) that defense counsel cannot reasonably rely upon a strategy when he has not conducted a reasonable investigation. However, the State has submitted under the various subclaims above the position that trial counsel's investigative efforts far-exceeded requisite reasonableness. Counsel reviewed records, directed an investigator, marshaled a formidable psychological expert and lay witnesses and asserted Wickham's position to the judge and jury. His efforts and judgment far surpass Strickland's requirements. Wickham now mistakes 16 years of hindsighted postconviction investigation for Strickland requirements. Instead, Strickland recognizes defense counsel's position in the midst of combat with the prosecution and applies a very deferential test. Here, trial defense counsel's efforts, for all of the reasons discussed in this brief, more than meet that test.

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[21] Wickham's Initial Brief engages in groundless speculation about possible motivations emerging from Judge Padovano's schedule. Quite to the contrary, Judge Padovano's dedication to Wickham's cause is evident throughout the lengthy trial.

Prejudice.[22]

As discussed above, prejudice is determined by a reasonable probability that, but-for counsel's unprofessional errors, the result of the proceeding would have been different. The State submits counsel's performance as reasonable, given his 1988 situation of Wickham as a client, the facts of his crime, and the status of the law. So, there is no Strickland deficiency, that is, no unprofessional errors, to impact the result.

In contrast with all of the artifacts of trial defense counsel's professional performance marshaled in 1988, after 16 years, Wickham's postconviction team hindsightedly assembled some additional witnesses who were able to add some new "wrinkles" but no new substance to trial defense counsel's 1988 product.

Wickham discusses (IB 38-43) his new "wrinkles" in this section of his brief. He argues (IB 38) new testimony concerning brain damage. But trial defense counsel elicited testimony regarding brain damage. (See TT/VII 1476-81) He argues (IB 38) schizophrenia. But trial defense counsel elicited testimony regarding schizophrenia. (See TT/VII 1499-1500) He argues epilepsy. But trial defense counsel elicited testimony concerning parallel symptoms that pervaded Wickham's life. (See Wickham "had borderline convulsive tendencies," TT/VII 1493-94, had spells, TT/VII 1492, walked around and talked to himself, TT/VII 1492, and sometimes stop his truck and walk away, not knowing where he was, TT/VII 1492) He argues (IB

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[22] Hanvy and Moody (IB 40) are discussed supra.

38) his postconviction evidence that he was impulsive and planned poorly, but defense counsel covered these too (See, e.g., Wickham could not cope with the outside world, TT/VII 1490, was not mentally capable of handling anything, TT/VII 1490, and was capable of living on his own, TT/VII 1491)). He argues (IB 39-40) his lack of cooperation, but Wickham himself made sure that also was visible at the 1988 trial. (See, e.g., "shooting bird" at the prosecutor, TT/IX 1888) He argues (IB 39) that he found a better expert to package the statutory mitigators, but the test is not how close an expert can get to perfection, but rather, did defense counsel reasonably choose the expert he used. Here, Dr. Carbonell told the jury that she had met with Wickham five times (TT/VII 1467, 1506) and very competently presented (See TT/VII 1462 et seq., TT/IX 1969 et seq.) the same statutory mitigators that Wickham's 2004 team presented (See TT/IX 1976-77).

In contrast, for example, Dr. Riebsame and Dr. Gorp, had not even talked with Padovano (PCR19 3627-28, PCR20 3724). They were missing a very crucial body of information for his evaluation of Wickham, that is, all of Padovavno's observations of Wickham over the months before trial and during the trial. Their information was selectively front-loaded against formulating objective opinions.

Here, as in Routly v. State, 590 So. 2d 397, 402 (Fla. 1991), the postconviction defendant "has not demonstrated a reasonable probability that he would have received a life sentence if trial counsel had presented this [postconviction] evidence. Much of this evidence was before the judge and jury, although in a different form than now proffered." Here, as in

Routly, a substantial amount of information concerning the childhood of the defendant was presented through the expert. Moreover, here the expert conducted extensive testing and reviewed extensive records, and laypersons testified in front of the jury on Wickham's behalf. Here, Padovano's product far-exceeded counsel's in Routly. There was no prejudice, as well as no deficient performance.

Wickham (IB 41) cites to Wiggins v. Smith, 539 U.S. 510, 535 (2003), but there, the lawyer failed to discover that "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." As discussed above, here, the postconviction team presented nothing significantly different than what was presented at the 1988 trial.

Wickham discusses (IB 42) Orme v. State, 896 So. 2d 725 (Fla. 2005), but there, unlike here, trial counsel did not inform the expert that the defendant had been previously diagnosed with a major psychological disorder (bipolar disorder) or provide "prison medical records that would have shown the medications prescribed to … indicating such a diagnosis." Further, the attorney did not know why he failed to provide this information. None of those facts apply here.

Also important in this analysis is the fact that Smith did not inform his trial experts that Orme had been diagnosed with bipolar disorder. Orme's experts never knew that such a diagnosis had been made. Smith testified that he thought he would have provided the information to his

experts. He stated that he did not know why he did not provide the information.

See also Asay v. State, 769 So. 2d 974 (Fla. 2000)("statutory aggravating circumstances that the murder was committed while the defendant was on parole and the defendant had a prior violent felony conviction for the contemporaneous murder … CCP"; "no reasonable probability that mitigation evidence of the defendant's abusive childhood and history of substance abuse would have led to the imposition of a life sentence").

Conclusion.

As in Jones v. State, 845 So. 2d 55, 68-70 (Fla. 2003), the expert reviewed extensive records (TT/VII 1469-72, 1493-1504, 1538, TT/IX 1970-71), communicated with trial defense counsel (See , e.g., PCR18 3500), and interviewed laypersons familiar with the defendant (TT/VII 1489-93, 1522-24, 1532, 1538). Indeed, here Dr. Carbonell met with Wickham five times (TT/VII 1467, 1506) and conducted extensive testing with him (See TT/VII 1467-69, 1472-89, 1529-32, 1569-76). The trial court should be affirmed.

ISSUE III: HAS WICKHAM DEMONSTRATED THAT HIS DEFENSE COUNSEL WAS STRICKLNAND DEFICIENT, THEREBY CAUSING STRICKLAND PREJUDICE, BECAUSE HE DID NOT REQUEST A COMPETENCY HEARING? (RESTATED)

Issue III (IB 43-56) contends that the trial court erred in rejecting, after the evidentiary hearing, a claim that trial defense counsel was constitutionally ineffective by not pursuing a competency hearing. Like ISSUE IV, this issue is based upon CLAIM II of the Postconviction Motion (PCR15 2766-73). The applicable general standards applicable to an IAC

claim were discussed in ISSUE II supra.

Since the trial court's fact-based determinations receive special deference on appeal, meriting affirmance if they are "supported by competent, substantial evidence," the State quotes the trial court's well-reasoned and well-documented order at length:

> At the evidentiary hearing, Judge Padovano testified that he felt a competency hearing was not needed because it was his belief, based on his observations and conversations with his client, that although he noticed that the defendant has some mental problems he was competent to stand trial. (Attachment A – Ev. Hr. at 102). Trial counsel stated that while the defendant tended to act up and was very childlike, counsel never had a problem communicating with him and that he had "never for a minute any suspicion that he was incompetent to stand trial." Trial counsel testified that the defendant understood what he was charged with and also understood the consequences of his actions. (Attachment B – Ev. Hr. at 101, 161-165, 221-224).
>
> Judge Padovano further testified that the defendant had the capacity to appreciate the charges against him, was able to appreciate the range and nature of the possible penalties that could have been imposed, understood the adversarial nature of the process, was aware his relatives were being called by the State as witnesses against him, was able to discuss the pertinent facts about the trial and the facts surrounding it, and was able to relate the details of a prior violent felony, in particular a "blow-by-blow" description of the robbery/shooting of a cab drive some 20 years before the murder of Rick Fleming. Additionally, trial counsel testified he and the defendant had a “very good attorney/client relationship.” (Attachment C – Ev. Hr. at 221-224).
>
> Trial counsel also testified he had numerous discussions about the case with the defendant, sometimes in intricate detail about some of the defenses and issues that were going to be raised. (Attachment D – Ev. Hr. at 169). Judge Padovano also stated that he had extensive discussions with Wickham about the case "in detail throughout the entire trial" including parts of the judgment of acquittal argument "which were very complex." Trial counsel testified that the defendant "understood everything we discussed," despite the fact they "discussed some very complicated things." (Attachment E – Ev. Hr. at 171-172).
>
> Trial counsel also explained that as a result of Judge McClure’s concern about potential Nixon issues, the trial judge insisted on

> trial counsel's assurance that the defendant consented to trial counsel's legal arguments, even those that would not ordinarily be cleared with the client. As a result, trial counsel reported that he was required to have in-depth discussions with the defendant. (Attachment F – Ev. Hr. at 220-221).
>
> Judge Padovano further testified that he relied on the defense mental health expert, Dr. Joyce Carbonell, who examined the defendant and concluded that the defendant was competent to stand trial. (Attachment G – Ev. Hr. at 99). In addition to the testimony of trial counsel, the deposition testimony of Dr. Joyce Carbonell established that at the time of trial there were no reasonable grounds upon which trial counsel could base a motion for a competency evaluation. During that deposition, Dr. Carbonell was asked directly whether in her opinion the defendant was competent to stand trial. She testified that in her opinion, he was competent to stand trial. (Attachment H – Ev. Hr. Ex. R at 10). The court record also evidences that the State's expert, Dr. McClaren, examined the defendant and also concluded that Defendant has some mental problems but was competent to stand trial. (Attachment I – Ev. Hr. at 839-842).
>
> Based on the foregoing, trial counsel's reliance on the mental health experts' finding of competency coupled with his own observations of the defendant can not be said to have been unreasonable or below measurable standards. Accordingly, because where was no reasonable grounds existing to believe that the defendant was incompetent , counsel's failure to seek a competency hearing is not ineffective assistance of counsel.

(PCR40 7724-26)

Trial defense counsel unequivocally testified that he "know[s]" that Wickham had the capacity to appreciate the charges against him." He elaborated: "**I read the letters he wrote. You can read the letters he wrote. He has a very consistent train of thought.** He actually has good penmanship … . He was capable of – I know he was capable of discussing this and understanding it, because I had these discussions with him." (PCR18 3491) A little later, he continued:

> [T]here was never a point in the trial where I felt like he did not understand what was going on, or what was happening, or what we were trying to do with the defense.

(PCR18 3496) Therefore, there is competent, substantial evidence to support the trial court's findings.

Indeed, even Wickham's own experts opined at the evidentiary hearing that Wickham was competent in 2004. (See PCR 19 3623; see also Wickham aware of why he was in prison, disclosed pertinent facts, PCR20 3714) One might consider it bizarre that a defendant does not even want to be at a hearing that may determine whether he lives or dies, as Wickham expressed in 2004 (See PCR17 3276-78), but bizarre behavior, or some belligerence for that matter, does not necessarily trigger a mandatory competency examination.

Wickham's bizarre behavior in 1988 illustrates his competence, not incompetence. At one point during the trial while looking at the victim's family in the courtroom, he stated, "I should have killed the whole g---damned family" (TT/IX 1884); he thereby demonstrated he understood that they were, in effect, on the other side of the matter being tried and that he had a stake in it. Similarly, after the guilty verdict and while the lawyers and the trial judge were discussing Wickham's robbery of a Michigan taxicab driver as one of Wickham's prior violent felonies, Wickham demonstrated his recall of the event and its significance: "S—t, no. Relax, my –ss. (unintelligible). I hope the son-of-a-b---- gets hit by a car and dies. … Yes, I'm getting upset. It's my life." (TT/IX 1914) This bizarre behavior was consistent with Padovano's assessment of Wickham as

"appreciating the adversarial nature of the process" (PCR18 3492) and as "cranky."[23] Even more importantly, it demonstrated Wickham's understanding of the events that were transpiring and the implications for the outcome of the trial.

Therefore, anytime a defendant is disruptive, a competency hearing is not necessarily required. See, e.g., Israel v. State, 837 So.2d 381 (Fla. 2002)(defendant voluntarily absents himself from the courtroom; defendant restrained with shackles).

If anything, "cranky" is too kind. Likewise, if anything, "childlike" (PCR18 3495) is much too kind. "Belligerent" would be more on point, or perhaps even more apt, "antisocial personality disorder," as Dr. McClaren described Wickham (See TT/IX 1982).

Wickham (IB 44-45) cites to Hill v. State, 473 So. 2d 1253 (Fla. 1985), but there, unlike here, the defendant was mentally retarded, with an IQ of 48, as well as suffering from "grand mal epileptic seizures." There, unlike here, the investigator testified that "Hill could not, for example, relate concepts of time as he was unable to distinguish between three weeks and three months." There, unlike here, the defendant's bizarre behavior did not substantiate his competency but rather he thought the "jury was laughing at him." There, unlike the postconviction experts who suggested Wickham's 2004 competence, the expert indicated that the defendant "was about as

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[23] This testimony was in response to a question regarding Wickham's lack of cooperation with Dr. Carbonell.

incompetent to stand trial, in my professional opinion, as anyone that I have seen except for several people who are actively hallucinating at the time of the interview." There, unlike here, the defense attorney confused the defendant's ability to distinguish "right from wrong" with competency to stand trial. Hill is inapplicable here.

Wickham waxes long on his disagreements (IB 44-49) with the postconviction trial court's determinations, quoted above. Having lost the trial, he now prefers to substitute his current postconviction team's judgment for that of the experienced and knowledgeable attorney who sat shoulder to shoulder with him in the courtroom. However, these are not the tests. The trial court has made its determination based on competent and substantial evidence, which merits affirmance. Here, Wickham was belligerent and competent.

The State disputes a number of Wickham's assertions or suggestions, such as his suggestion (See IB 50) that Padavano did not know "mental health and related issues." At this point in his testimony (PCR18 3339-41), Padavano was referring to getting familiar with the specific application in this case, not to general principles: He was reviewing the trial file of his predecessor counsel, digging into Wickham's background, and evaluating alternative strategies for this case. Wickham wrongly claims (IB 50) that Dr. Carbonell had "no background or expertise in brain damage"; to the contrary, she was very articulate and knowledgeable on the topic, as the above summaries of her testimony indicates.

Wickham indicates (IB 50) that Padovano admitted to the jury in the

penalty phase that "we don't know" the effect of brain damage on Wickham's behavior. Wickham leaves out the next phrase: "It may have a profound effect on behavior." (TT/X 2027) Read in context, within the penalty phase, the jury had already rejected the insanity defense, so Padovano's plea for Wickham's life at this juncture must make the concession to what the jury has already decided while still asserting what he could for Wickham.

Especially given Wickham's irrational behaviors and difficulties with prior defense attorneys, and behaviors that hindered Padovano's defense, the Initial Brief **incorrectly** concludes (IB 50) that Padovano's failure was "striking." Wickham had shown signs of belligerence, but Dr. Carbonell was able to complete her testing. And, Padovano testified that he and Wickham "truly did have a very good attorney/client relationship" (PCR18 3493-94). Thus, to complete the testing, Padovano "had to go out there to do it" (PCR/18 3330-31), which yielded the wide array of test results to which Dr. Carbonell testified at trial (See TT/VII 1467 et seq.)

Wickham (IB 51) compounds the self-serving nature of his analysis, contrary to the standard of appellate review in which the trial court's factual determinations are entitled to deference and affirmance if supported by competent, substantial evidence, especially when compounded by the heavy deference to a trial attorney's performance and especially here with a very experienced attorney. He relies on testimony that Padovano contradicted. For example, the trial court has not accredited evidence indicating that Wickham had almost "zero" ability to assist the defense (IB 51). Wickham references a deposition taken "[j]ust before trial," but the

characterizations of Wickham's mind in that deposition referred to 1986, the time of the homicide. (See PCR24 4524)

These and other inferences that Wickham is willing to make on his own behalf are contradicted by evidence such as this testimony from Padavano: "I read the letters he [Wickham] wrote. You can read the letters he wrote. He has a very consistent train of thought. He actually has good penmanship … . He was capable of – I know he was capable of discussing this and understanding it, because I had these discussions with him." (PCR18 3491) A little later, he continued:

> [T]here was never a point in the trial where I felt like he did not understand what was going on, or what was happening, or what we were trying to do with the defense.

(PCR18 3496)

There is competent, substantial evidence supporting the postconviction trial court's factual determinations. The trial court merits affirmance.

ISSUE IV: WHETHER THE TRIAL COURT REVERSIBLY ERRED IN DENYING A POSTCONVICTION EVIDENTIARY HEARING TO DETERMINE WHETHER WICKHAM WAS COMPETENT TO STAND TRIAL. (RESTATED)

Issue IV (IB 56-60) argues that the trial court erred in denying a postconviction evidentiary hearing to determine if Wickham was competent to stand trial. Like ISSUE III, this issue is based upon CLAIM II of the Postconviction Motion (PCR15 2766-73), which also argued IAC. (The trial court afforded Wickham an evidentiary hearing on IAC, which is discussed under ISSUE III supra.) The trial court was correct in denying Wickham an evidentiary hearing on this claim (PCR17 3113).

Wickham takes issue with the trial court's reliance upon Carroll v. State, 815 So.2d 601 (Fla. 2002). Contrary to Wickham's argument, Carroll held:

> Carroll alleges that abundant psychiatric testimony before, during, and since trial establishes that he was incompetent at the time of trial. Carroll's underlying claim that he was incompetent to stand trial should have been raised on direct appeal and therefore is procedurally barred. *See Patton v. State*, 784 So.2d 380, 393 (Fla. 2000); *Johnston v. Dugger*, 583 So.2d 657, 659 (Fla. 1991).

815 So.2d at 610. And, although Patton v. State, 784 So.2d 380 (Fla. 2000), specifically concerned a claim that "his competency hearing was inadequate," the State submits that its foundation, consistent with Carroll's citation of it, is that the determination of a defendant's competency to stand trial is not a proper matter for collateral proceedings. In other words, whether a competency hearing is adequate derives its significance from the right to have a competency hearing; since there is no right to raise for collateral review competency to stand trial, then also there is no right to raise the adequacy of the hearing determining competency to stand trial.

Wickham's reliance (IB 57) on Mason v. State, 489 So.2d 734 (Fla. 1986)[24], is misplaced. Although Mason did remand for an evidentiary hearing

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[24] Interestingly, Mason was decided June 12, 1986, in the same month and the same year as Ford v. Wainwright, 477 U.S. 399 (1986)("Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane"), and a death warrant had been issued in Mason. See Mason v. State, 489 So.2d 734 (Fla. 1986) (June 26, 1986; "We previously granted Mason's motion for a stay of execution in order to afford this Court an opportunity to adequately assess the issues raised in this proceeding").

regarding competency, the opinion did not address procedural bar, which is therefore not part of the holding of the case. In contrast, Carroll and Patton, decided after Mason, did specifically address procedural bar, which makes them precedent for this case.

Furthermore, Wickham has not demonstrated that he could have and would have produced any evidence at the evidentiary hearing concerning this claim that the trial court did not already allow pursuant to the IAC, which was discussed in ISSUE III supra. Because of the extensive evidentiary hearing that Wickham received on the related claim of IAC, the trial court's ruling essentially determined that Wickham has competent to stand trial, and in any event, any error in not conducting a hearing labeled as "competency" was harmless. See evidence discussed in ISSUE III supra.

ISSUE V: WHETHER WICKHAM DEMONSTRATED A VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963), GIGLIO V. UNITED STATES, 405 U.S. 150 (1972). (RESTATED)

Issue V (IB 60-81) argues that the State put "tremendous pressure on witnesses and withheld important impeachment information." The trial court ruled against him and merits affirmance. (See PCR40 7739-42) Wickham (IB 79 n. 23) appears to identify CLAIM IX (PCR15 2821-28) as the source of this issue.[25]

Riechmann v. State, 32 Fla. L. Weekly S135, 2007 Fla. LEXIS 664 *18-19,

[25] Therefore, the State limits its comments to CLAIM IX and the trial court's discussion of it.

2007 WL 1074938, *5 (Fla., April 12, 2007), recently summarized a postconviction petitioner's burdens to establish a claim pursuant to Brady:

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *** To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. ***
>
> To establish prejudice or materiality under *Brady*, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *** "In other words, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. (quoting *Strickler*, 527 U.S. at 290[, 119 S.Ct. 1936]).
>
> *Ponticelli v. State*, 941 So.2d 1073, 1084-85 (Fla. 2006). With regards to Brady's second prong, this Court has explained that "[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information." *** Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State*, 760 So.2d 903, 911 (Fla. 2000). This Court then reviews de novo the application of the law to these facts. ***

Riechmann, 2007 Fla. LEXIS at *17-*20 also summarized Giglio:

> A *Giglio* violation is demonstrated when it is shown (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable probability that it could have affected the jury's verdict. *** Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt.***

Accordingly, "*Giglio* stands for the proposition that a prosecutor has a duty to correct testimony he or she knows is false when a witness conceals bias against the defendant through that false testimony." Ventura v. State,

794 So. 2d 553, 562 (Fla. 2001), quoting Routly v. State, 590 So. 2d 397, 400 (Fla. 1991).

Therefore, the factual determinations made by the trial court are entitled to appellate deference if they are supported by "competent, substantial evidence."

Concerning CLAIM IX's allegations, the trial court ruled, based upon the prosecutor's and Hanvey's postconviction evidentiary hearing testimony, that there was no plea agreement between the State and **Hanvey** concerning Wickham's trial. (PCR40 7740-41, citing to PCR18 3403, PCR20 3814) More specifically, the prosecutor testified that he "thought" that the note regarding Hanvey concerned another case, and Hanvey testified that there was no deal whatsoever. Hanvey's case was disposed of months prior to Wickham's trial. Thus, there is competent evidence supporting the trial court's finding that that there was no deal concerning Wickham's case, and because the trial court accredited Hanvey's testimony and because Wickham has not otherwise established any deal with Hanvey with accredited evidence, Wickham has failed to meet his burden. In any event, with Hanvey testifying that there was no deal and with the prosecutor not really knowing, and with the totality of evidence against Wickham, there is no prejudice to Wickham under any standard.

The trial court accredited the prosecutor's evidentiary hearing testimony that he recalled no plea agreement with Mr. **Bordeaux** and that if there were, he would have "[a]bsolutely" disclosed it. (PCR40 7741, citing to PCR18 3411-12) Wickham's speculations (See IB 63-66) are insufficient

to establish a claim or to dis-accredit testimony that the trial court has accredited. Moreover, the innuendo that trial defense counsel was able to plant on his cross-examination of Bordeaux (See TT/VI 1308) was effective, negating any prejudice from whatever one might tease, contrary to the standard of appellate review, from Wickham's speculative facts.

Based upon the prosecutor's evidentiary hearing testimony, the trial court found that notes that Wickham had alleged to be from a taped interview of **Norris** were actually the prosecutor's trial preparation notes. (PCR40 7741-42, citing to and quoting from PCR18 3386) Therefore, the trial court, again, merits affirmance.

In sum, Wickham can parse and speculate, but the crucial aspect of the status of the evidence and the trial court's order remains: There were no deal or other supposedly exculpatory information that was not disclosed. Therefore, there was no Giglio or Brady violation and nothing for trial defense counsel to be deficient obtaining or using.

ISSUE VI: DID THE STATE INAPPROPRIATELY PRESSURE WITNESSES NOT TO TESTIFY AT THE POSTCONVICTION EVIDENTIARY HEARING? (RESTATED)

Issue VI (IB 81-92) contends that the State was "oppressive" in warning witnesses of possible perjury. Wickham points to four witnesses which this claim concerns: Tammy Jordan (PCR20 3788-89); Michael Moody (PCR20 3747-48); Jimmy Jordan (PCR20 3790-94); and Larry Schrader (PCR19 3578).[26]

[26] At one point, postconviction counsel told the trial court that he has

Section 837.021, Fla. Stat., provides:

> Perjury by contradictory statements
>
> (1) Except as provided in subsection (2), whoever, in one or more official proceedings, willfully makes two or more material statements under oath which contradict each other, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Whoever, in one or more official proceedings that relate to the prosecution of a capital felony, willfully makes two or more material statements under oath which contradict each other, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) In any prosecution for perjury under this section:
>
> (a) The prosecution may proceed in a single count by setting forth the willful making of contradictory statements under oath and alleging in the alternative that one or more of them are false.
>
> (b) The question of whether a statement was material is a question of law to be determined by the court.
>
> (c) It is not necessary to prove which, if any, of the contradictory statements is not true.
>
> (d) It is a defense that the accused believed each statement to be true at the time the statement was made.
>
> (4) A person may not be prosecuted under this section for making contradictory statements in separate proceedings if the contradictory statement made in the most recent proceeding was made under a grant of immunity under s. 914.04; but such person may be prosecuted under s. 837.02 for any false statement made in that most recent proceeding, and the contradictory statements may be received against him or her upon any criminal investigation or proceeding for such perjury.

See Brown v. State, 334 So.2d 597 (Fla. 1976)(upholding constitutionality

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no standing to suggest what should be done on the witness's behalf. (PCR19 3573) But he objected at another juncture. (PCR19 3574-77)

of perjury conflicting statements statute). See also § 837.02, Fla. Stat. (Perjury in official proceedings"); Iacono v. State, 930 So. 2d 829 (Fla. 4th DCA 2006)("If a defendant is instructed by counsel to ignore a court's instructions and the oath to tell the truth, then the defendant must speak up and immediately inform the court").

As to each witness who Wickham's attorney was tendering to testify contrary to their trial testimony, it is clear that, at least at the 2004 evidentiary hearing that they were endangering themselves with criminal liability for perjury. The new sworn testimony alone, if it conflicted with trial testimony, would expose the witness to perjury liability. Accordingly, it was proper[27] for each of these witnesses to be warned of possible perjury liability. See, e.g., Hill v. State, 847 So. 2d 518 (Fla. 5th DCA 2003)(approved judge's warning: " if you were to say that, it could very possibly expose you to a felony charge and up to five years in state prison as a consequence"; " have the right to an attorney. You have the right to - - to not incriminate yourself"). Indeed, the interjection of counsel for each witness provided yet another layer of protection for the witness.

The State submits that all attorneys should be sensitive to witnesses endangering themselves to perjury. It is not a "pretext" (IB 88) when a witness appears to be on the verge of recanting his or her trial testimony. "[R]ecanting testimony is exceedingly unreliable," Sweet v. State, 810

So.2d 854, 867 (Fla. 2002), quoting Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994).[28]

ISSUE VII: WHETHER THE TRIAL COURT ERRED IN RULING AS PROCEDURALLY BARRED A CLAIM CONCERNING WEIGHING OF AGGRAVATORS AND MITIGATORS. (RESTATED)

Issue VII (IB 93-96) essentially contends that the trial judge rushed to judgment and conducted no "independent weighing of aggravating and mitigating circumstances whatsoever" (IB 93). The purported bases for this abdication claim are the trial court's failure to "state its findings on aggravating and mitigating factors on the record before imposing sentence"; its failure "to enter written findings explaining the decision prior to sentencing" (IB 94); and the similarities between the trial court's subsequent written findings and the State's memorandum on the subject (IB 94-96). These arguments were made in CLAIM VII of the Postconviction Motion (PCR15 2860-65). The postconviction trial court summarily denied CLAIM XVII, concluding that it was procedurally barred: "These are issues which should have been raised on direct appeal and are procedurally barred." (PCR17 3117) The State submits that the trial court was correct.[29]

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[28] As suggested by the discussion above, the State notes that it disagrees with Wickham's analysis at IB 86-89. A defendant's postconviction counsel has no authority to immunize anyone. The statute of limitations would not necessarily have protected these witnesses; for example, the newer sworn testimony could be the basis of the prosecution. The State has no duty to immunize and encourage recanting witnesses.

[29] The State addresses the lack of merit of a parallel claim (D) in its Response to Petition for Writ of Habeas Corpus filed contemporaneously with

In Walton v. State, 847 So.2d 438, 446-47 (Fla. 2003), like here, the defendant asserted "in both his postconviction motion and his habeas corpus petition that his resentencing trial court improperly relied upon a sentencing order submitted by the State in sentencing him to death" and "improperly abdicated his sentencing responsibilities." Moreover, Walton, unlike here, also "contend[ed] that the sentencing order contained information not before the court on resentencing." Also, Walton, unlike here, "assert[ed] that his trial counsel rendered constitutionally ineffective assistance of counsel for failing to object to the trial court's adoption of the State's sentencing memorandum as its sentencing order." Walton controls and supports the postconviction trial court's decision:

> This claim is procedurally barred. Clearly, any claims regarding the conduct of the resentencing trial judge in the creation of his sentencing order could and should have been raised on direct appeal. *See Young v. State*, 739 So.2d 553, 555 n.5 (Fla. 1999). Indeed, in *Swafford v. Dugger*, 569 So.2d 1264 (Fla. 1990), this Court specifically foreclosed argument regarding the trial court's failure 'to independently weigh the aggravating and mitigating factors' because 'they should have been raised, if at all, on direct appeal.' Id. at 1267.

847 So.2d at 447.[30]

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this brief.

At this juncture, the State notes that it does contest Wickham's **assumed** link between the trial court's sentencing him to death on December 8, 1988, (TT/X 1715-16) and an abdication of independently weighing aggravators and mitigators.

[30] In addition, as the State argues in its Response to Petition for Writ

ISSUE VIII: WHETHER WICKHAM IS ENTITLED TO POSTCONVICITON RELIEF BASED ON A STATEMENT OF THE VICTIM'S FATHER TO THE SENTENCING JUDGE REGARDING AN ACCOMPLICE'S PLEA BARGAIN. (RESTATED)

ISSUE VIII (IB 96-97) is based upon CLAIM XIX of the Postconviction Motion (PCR15 2868-69). It concerns a statement that the victim's father made **to the trial judge** supporting the plea bargain in Larry Harold Schrader's case. Here is the father's statement and its context:

> MR. COREY [DEFENSE COUNSEL]: As the Court will recall, Your Honor, Mr. Schrader is the gentleman who came forth to law enforcement and advised law enforcement of this case and advised Detective Alan Blair in the Marion County Sheriff's Department of what had occurred. His statements were freely and voluntarily given to Detective Blair; and I believe that the State would agree without Mr. Schrader's information and cooperation with Detective Blair and Detective Livings, that they would not have had any case at all against these individuals. I think that speaks pretty highly of my client and I think – There are other factors also, but based on that fact alone, I think he is worthy of consideration and the Court accepting this negotiated plea and accepting the petition that has been signed by the parties.
>
> It is also my understanding that law enforcement agrees with me and they recommend it, and I also believe that Mr. Hankinson has conferred with Mr. Fleming's family and they did not oppose it.
>
> ***
>
> MR. HANKINSON [PROSECUTOR]: That is the agreement as entered into with Mr. Corry. I have talked to the Sheriff's Department who made this case, and they are in agreement with this disposition, and Mr. and Mrs. Fleming, who I have discussed it with. ***

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of Habeas Corpus, Walton alternatively held that demonstrating that the trial court's "use of identical language in somewhat substantial portions of the final sentencing order and the sentencing memoranda submitted to the trial court by the State" does not per se constitute error, 847 So.2d at 447 (citing cases).

Clearly, all the parties have agreed, and I would like this to be on the record, this was part of the agreement with the Sheriff's Department and with the family that we intend to seek the death penalty against Jerry Wickham, the person who perpetrated this murder, and we have assured the family that's our intention.

***

MR. CORRY: I think this is a fair, appropriate disposition of this case. I think that my client did everything he could and been totally cooperative and truthful with the State. Without him. They wouldn't have a case at all.

***

MR. HANKINSON: We stand by our recommendation of a twelve-year sentence with a three—year mandatory minimum.

THE COURT: Okay, the victim's father is here. Mr. Fleming, would you have anything you would like to say at this time, sir? You may step –

Mr. FLEMING: (Inaudible)

THE COURT: Come on up so we can get it on the record, sir. I'm not requiring you to; I'm just giving you the opportunity.

MR. FLEMING: No, sir, that's fine. I appreciate the opportunity. I didn't come to speak.

Mr. Hankinson has spoken with me about this, and I think he has eloquently stated the reason for pleading with any of these people. It would appear from what I understand that this Jerry Wickham killed my son. This man saw it. And the plea bargaining gets to one point only, and that is to impose capital punishment on the man that killed my son.

And I thank you for inviting me to speak, sir. Thank you.

(PCR23 4438-39, 4449-50)

The trial court summarily denied this claim, reasoning alternatively that there is no showing that the trial judge even considered the father's statement in sentencing Wickham, that it is not newly discovered because the father's statement was made six months prior to the trial court sentencing Wickham to death thereby undermining any newly discovered

evidence claim, and that it is procedurally barred. (PCR17 3118)

The trial court was correct on all points, supporting an affirmance of the summary denial of the postconviction claim. However, prior to discussing each of the trial court's reasons, it is noteworthy that Wickham's Initial Brief relies on Booth v. Maryland, 482 U.S. 496 (1987), but Payne v. Tenn., 501 U.S. 808, 830 n.2 (1991),[31] partially overruled Booth:

> Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), and *South Carolina v. Gather*s, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Thus, a family member opining to a trial court about a case is not per se reversible. It depends upon the content of the opinion and the purpose for which it was offered. See, e.g., Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996) ("victim-impact evidence through testimony from the victim's wife"; held admissible).

The State disagrees with the implication of Wickham's claim that the statement to the trial judge concerning the rationale for the victim's father concurring with the disposition in a co-defendant's case per se

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[31] Because Strickland's prohibition against hindsightedly judging trial counsel is a protection for trial counsel, future changes in the law that support trial counsel's prior actions undermine an IAC claim. See Lockhart v. Fretwell, 506 U.S. 364 (1993).

constitutes grounds for a new sentencing for Wickham. Trial judge's routinely review evidence that is inadmissible; indeed without hearing the evidence, the trial judge cannot determine admissibility and must even allow the proffer of what appears to be inadmissible evidence or risk reversal due to denying the proffer alone. See, e.g., Rogers v. State, 511 So.2d 526 (Fla. 1987)("trial court may not refuse a proffer of testimony necessary to preserve a point on appeal"), citing and distinguishing Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983). See also Blackwood v. State, 777 So.2d 399 (Fla. 2000)("In order to preserve a claim based on the court's refusal to admit evidence, the party seeking to admit the evidence must proffer the contents of the excluded evidence to the trial court"); Lucas v. State, 568 So.2d 18 (Fla. 1990) ("defense did not proffer what the witness would have said if allowed to answer the question. A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence"). Further, evidence can be lawfully admissible for one purpose but not another.

Wickham's Postconviction Motion failed to allege anywhere that the father's statement affected the trial judge's decision to sentence. Therefore, evaluating the context of the father's statement, it was tendered only for the purpose of the prosecution justifying the disposition of Larry Harold Schrader's case about six months prior to Wickham's trial. Accordingly, the trial judge's order sentencing Wickham to death discussed the 11 to 1 jury vote and the aggravating and mitigating evidence, but it

did not consider the father's statement. (See R2 246-52)

Indeed, Card v. State, 803 So.2d 613, 627-28 (Fla. 2001), suggests that even if the victim's father had made the comment to the trial court for Wickham's sentencing, it would not rise to the level of prejudice or harm for an IAC or newly discovered evidence claim:

> Although Courtney Brimmer's testimony exceeded the proper bounds of victim impact evidence because she commented on the defendant and the crime and provided her opinion as to a proper punishment, defense counsel failed to contemporaneously object to her testimony. Thus, this issue was not preserved for review and **would not constitute fundamental error because the testimony came during the *Spencer* hearing and outside the presence of the jury**. In addition, having reviewed the testimony of Ed Franklin and Cindy Brimmer, we conclude that neither witness provided improper victim impact testimony in violation of section 921.141(7). Accordingly, we deny relief on this claim.

In Sexton v. State, 775 So.2d 923, 933 (Fla. 2000), this Court considered Sexton's claim that the trial judge erred in admitting the testimony of the victim's aunt **to the jury**. She characterized the victim's murder as a "senseless act of violence" and should not have been put before the jury. This Court agreed and ruled the witness' testimony exceeded the scope of permissible impact evidence. This Court held, however, that "given the jurors' familiarity with the death of the infant, any improper comments during the victim impact testimony would not rise to the level of fundamental error." Here, the prosecutor lawfully tendered to the trial court the attitude of the victim's family as a justification for accepting a plea bargain in Larry Harold Schrader's case. The father telling the judge essentially the same information does not rise to the level of harm requiring a new sentencing hearing. Thus, Sexton also held:

> [I]n light of the three aggravators and the fact that the testimony regarding the effect of the infant's death on the surviving relatives was brief and not made a focus of the penalty phase, we further find that not only did the error not rise to the level of fundamental error, it was harmless beyond a reasonable doubt.

Here, there were five aggravating circumstances that withstood the test of the direct appeal, the father's testimony was brief, and it was not even in front of the jury. Here, however harm may be measured, the father's testimony was harmless and non-prejudicial.

Further, as the postconviction trial court reasoned (PCR17 3118), citing to the reasonable diligence requirement of Jones v. State, 591 So.2d 911 (Fla. 1991), the father's statement could not constitute newly discovered evidence because its six-month-prior-to-Wickham's-trial vintage and open-court venue rendered it anything but new.

And, further, the trial court's procedural bar reason is supported. See Swafford v. State, 828 So.2d 966, 968 (Fla. 2002), discussing Swafford v. Dugger, 569 So.2d 1264 (Fla.1990) ("Postconviction proceedings cannot be used as a second appeal"; postconviction claim based upon Booth "procedurally barred because they should have been raised, if at all, on direct appeal"; also rejected IAC appellate counsel claim); Hardwick v. Dugger, 648 So.2d 100, 103 (Fla. 1994)(cited by postconviction trial court).

Claim VIII does not support relief.

ISSUE IX: WHETHER ATKINS PROHIBITS THE EXECUTION OF WICKHAM. (RESTATED)

Issue IX (IB 98-99) argues[32] that Atkins v. Virginia, 536 U.S. 304 (2002), applies to Wickham. This claim was initiated as CLAIM I of the Postconviction Motion (PCR15 2762-66). After the Huff hearing, the trial court summarily denied the claim as insufficient. (PCR17 3111-12) The trial court observed that Wickham's IQ has been established as being 84/85, citing to several sources, including the trial transcript at "P. 1086" (TT/VI 1410. See also TT/IX 1975), and declined to extend Atkins beyond mental retardation. (PCR17 3112)

ISSUE IX concedes (IB 98) that Wickham "does not meet the current standards for mental retardation under §921.137(1), Fla. Stat." but maintains the position that Atkins should be extended to cover Wickham's mental illness.

ISSUE IX is incorrect; the trial court was correct and merits affirmance. Atkins held that the Eighth Amendment prohibits the execution of mentally **retarded** individuals and applies only to the mentally **retarded**. For example, Atkins explained that "not all people who claim to be **mentally retarded** will be so impaired as to fall within the range of mentally

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[32] The State notes that ISSUE IX does not argue that Wickham is insane under Ford v. Wainwright, 477 U.S. 399 (1986)("Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane"). Instead, ISSUE IX contends that Atkins extends to those who have "limited mental capacity." Compare, e.g., Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)(in the context of a death warrant, discusses procedure regarding a Ford claim); Panetti v. Quarterman, __U.S.__, 127 S. Ct. 2842 (2007)(procedure regarding a Ford claim).

retarded offenders about whom there is a national consensus." Atkins, 536 U.S. at 348.

Atkins, 536 U.S. at 317, deferred to the States how to implement its holding in determining whether a defendant is mental retarded:

> To the extent there is serious disagreement about the execution of **mentally retarded** offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' 477 U.S. 399, 405, 416-417, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986).

See also Cherry v. State, 959 So.2d 702 (Fla. 2007)("In *Atkins*, the Supreme Court recognized that the various sources and research differ on who should be classified as mentally retarded. For this reason, it left to the states the task of setting specific rules in their determination statutes").

In Florida, before a defendant can be relieved of the death penalty due to Atkins' mental retardation, Rule 3.203, Fla.R.Crim.P., and Section 921.137(1), Fla. Stat., requires that the defendant establish all of the following:

a. "significantly subaverage general intellectual functioning"--

> "[T]he term 'significantly subaverage general intellectual functioning,' ... means performance that is two or more standard deviations from the mean score on a standardized intelligence test ["specified in the rules of" or "authorized by" specified state agencies] ***

b. "existing concurrently with deficits in adaptive behavior";

> "The term 'adaptive behavior' …, means the effectiveness or degree with which an individual meets the standards of personal

> independence and social responsibility expected of his or her age, cultural group, and community."
>
> and,
>
> c. "manifested during the period from conception to age 18."

Jones v. State, 2007 Fla. LEXIS 950, *18, *21, 32 Fla. L. Weekly S 272 (No. SC04-726, Fla. May 24, 2007, rehearing pending), held that a defendant must establish that s/he meets the intellectual-functioning **and** adaptive-skills criteria for **retardation** before s/he was 18 and now:

> The legal definition ... states that the intellectual functioning component must 'exist[] concurrently with' the deficient adaptive behavior. The word 'concurrent' means 'operating or occurring at the same time.' Merriam Webster's Collegiate Dictionary 239 (10th ed. 2001). Jones's analysis would require us to ignore the plain meaning of the phrase 'existing concurrently with' that links the first two components of the definition. The third prong-'and manifested during the period from conception to age 18'-- specifies that the present condition of 'significantly subaverage general intellectual functioning' and concurrent 'deficits in adaptive behavior' must have first become evident during childhood.
>
> ***
>
> Dr. Suarez explained that ..., because mental retardation is lifelong, a child may meet the criteria for the diagnosis because of developmental delays without being mentally retarded. Unless the person also meets the criteria as an adult, the individual is not mentally retarded. Thus, diagnosis of mental retardation in an adult must be based on present or current intellectual functioning and adaptive skills and information that the condition also existed in childhood. Accordingly, the trial court accepted Dr. Suarez's interpretation of the DSM-IV, which was consistent with Florida law, and did not abuse its discretion in rejecting Dr. Eisenstein's contrary opinion.

Jones relied upon the "plain language" of applicable Florida law that implemented Atkins' mental **retardation** holding. Accordingly, for example, Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002), rejected an Atkins claim because the evidence did not establish that he was **mentally retarded**. Zack v. State, 911 So.2d 1190, 1201 (Fla. 2005), is another example. There, the

"evidence … show[ed] [the defendant]'s lowest IQ score to be 79. Pursuant to *Atkins*, . . . a mentally retarded person cannot be executed, and it is up to the states to determine who is 'mentally retarded.'" Zack rejected the postconviction Atkins claim. Here, Defendant's IQ of 84 (PCR19 3596-97, TT/VI 1410) requires the rejection of Wickham's Atkins claim.

Therefore, applying Rule 3.203 requirements here, among the deficiencies fatal to ISSUE IX, Wickham essentially concedes (IB 98) that, in fact, he is not mentally retarded, as defined by Fla.R.Crim.P. 3.203(b) and Section 921.137(1), Fla. Stat., which implement Atkins: "… Wickham does not meet the current standards for mental retardation under §921.137(1), Fla. Stat. … ." Also among the deficiencies fatal to ISSUE IX, there has been no "certification by counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is mentally retarded," Fla.R.Crim.P. 3.203(c)(1),(d)(4)(A). Further Claim I alleged no evidence that "significantly subaverage general intellectual functioning" and "deficits in adaptive behavior" "manifested during the period from conception to age 18," Fla.R.Crim.P. 3.203(b); §921.137(1), Fla. Stat.[33]

Wickham, with his IQ score of 84, does not meet the statutory definition of mentally retarded. There is no argued evidentiary support for an Atkins claim, which is limited to mental retardation.

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[33] The State also submits that §921.137's clear-and-convincing standard is constitutional. Cf., e.g., Ford v. Wainwright, 477 U.S. 399, 417 (U.S. 1986) ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity").

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on September 21, 2007:

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I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and served,
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