IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Case No. SC05-189

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Marlys Sather was murdered September 5, 1990. On October 17, 1991, Willacy was convicted of first degree murder, burglary of a dwelling with assault, robbery with a deadly weapon, and first-degree arson. The jury recommended death by a vote of nine to three. Willacy raised the following guilt-phase issues on direct appeal:

> (1) The court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror;
>
> (2) A prospective juror was improperly challenged based on his race;
>
> (3) The jury foreman was ineligible to serve;
>
> (4) The court improperly found that Willacy's statements were voluntarily made;

This Court affirmed the conviction but reversed the sentence because trial counsel was not afforded the opportunity to rehabilitate a venire person who was opposed to the death penalty. *Willacy v. State*, 640 So. 2d 1079, 1081 (Fla. 1994)(*"Willacy I").*

On retrial, the court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating circumstances:

> (1) The murder was committed in the course of a robbery, arson, and burglary;

(2) The murder was committed to avoid lawful arrest;

(3) The murder was committed for pecuniary gain;

(4) The murder was especially heinous, atrocious, or cruel (HAC);
and

(5) The murder was committed in a cold, calculated, and premeditated manner (CCP).

The trial judge found no statutory mitigating circumstances. Willacy proposed thirty-seven separate mitigating factors. The trial court rejected six factors, and gave the others little weight. Willacy was sentenced to death. He raised eleven issues on direct appeal:

(1) The denial of the motion for recusal of the judge;

(2) The admission of inflammatory evidence;

(3) The finding of heinous, atrocious, or cruel;

(4) The finding that the murder was committed to evade arrest;

(5) The finding of pecuniary gain;

(6) The finding of cold, calculated, and premeditated;

(7) The death sentence is disproportionate;

(8) The admission of victim impact evidence;
(9) The refusal to strike jurors for cause;

(10) Cumulative error; and

> (11) The death penalty statute is unconstitutional.

Willacy v. State, 696 So. 2d 693, 694-695 (Fla. 1997)(*Willacy II)*.

A petition for writ of certiorari to the United States Supreme Court was denied November 10, 1997. *Willacy v. Florida*, 522 U.S. 970 (1997). Willacy filed a "shell" Motion to Vacate on May 11, 1998. (R2093-2122). He filed an Amended Motion for Postconviction Relief on March 18, 2002. (R2171-2218). The State filed a Response on April 30, 2002. (R2219-2267). After legal argument, the trial court issued an order on December 19, 2002, outlining the claims on which there would be an evidentiary hearing. (R2277-2279). The trial court amended that order on September 24, 2003, summarily denying some claims and allowing an evidentiary hearing on others. (R 2294-2313). An evidentiary hearing was allowed on Claims I, II, VII, X, XIII, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXV, and XXXI as follows:

> I. Ineffective assistance of counsel - failure to raise independent act defense;
>
> II. Ineffective assistance of counsel - failure to present exculpatory evidence - Alonzo Love;
>
> VII. Ineffective assistance of counsel - failure to voir dire on juror eligibility;
>
> X. Ineffective assistance of counsel - failure to prepare for trial: fingerprint expert, crime scene review;

XIII. Ineffective assistance of counsel - failure to disqualify trial judge at Spencer hearing because order prepared in advance;

XVII. Ineffective assistance of counsel - failure to preserve suppression;

XVIII. Ineffective assistance of counsel - failure to request an instruction on principal to felony murder, as relevant to the "minor participant" statutory mitigator;

XIX. Ineffective assistance of counsel - failure to request an *Enmund* instruction;

XXI. Ineffective assistance of counsel - failure to establish statutory mitigator of "inability to conform conduct to requirements of law;"

XXII. Ineffective assistance of counsel - failure to establish statutory mitigator of "extreme emotional disturbance" - evidence of drug use;

XXIII. Ineffective assistance of counsel - failure to establish non-statutory mitigators: Father's alcohol abuse, beaten by father, mother feared for life and abused by father, drug use, mental illness;

XXIV. Ineffective assistance of counsel - failure to rebut CCP;

XXV. Ineffective assistance of counsel - waive PSI;

XXXI. Cumulative Error.

The trial court held an evidentiary hearing December 3, 4, 5, and 19, 2003, and February 16, 2004. Willacy presented eleven witnesses: Kurt and Susan Erlenbach, 1992 trial counsel; James Hamilton, private investigator; Susan Pullar, general

forensic sciences/crime scene investigation; James Kontos, counsel at the 1995 re-sentencing; Danny Johnson, defense investigator; Heather Willacy, Appellant's sister; Dr, William Riebsame, psychologist; Terri Sirois, private investigator; Audrey Willacy, Appellant's mother; and Colin Willacy, Appellant's father. The State presented five witnesses: Ronald Whittaker, pastor of a church in Mt. Dora; Dr. Jeffrey Danziger, psychiatrist; Detective James Bauman, investigator who met with Carlton Chance on September 8, 1991; Detective Frank Ciccone, detective who interviewed Marisa Walcott, Alonzo Love, and James Brown; and Officer George Santiago, lead investigator in the Sather murder.

Kurt Erlenbach was lead counsel and his wife, Susan, was second chair. (R616-17). Mrs. Erlenbach was in charge of jury selection matters and was present for the entire jury selection process and some parts of the trial. Mr. Erlenbach believed he and wife could handle the trial by themselves, so he did not request appointment of a second full-time lawyer to assist them with Willacy's case. (R617). Mr. Erlenbach did not retain any experts to assist him. He saw no mental illness in Willacy, who was easily able to discuss matters. The family denied any history of mental problems. Willacy did not appear to be incompetent or insane at the time of trial. (R619). Mr. Erlenbach did not hire his own blood expert because the blood

spatter evidence was "helpful to us because of the left-handed[1] aspects of it." (R621). He did not hire a fingerprint expert since, in his experience, attacking the validity of a piece of evidence as well as trying to explain it away was a shotgun approach and less effective. (R626). During his years as an assistant state attorney, Erlenbach prosecuted quite a few sex crime cases that involved medical testimony and other cases involving fingerprint experts. (R700). Generally speaking, if fingerprint evidence was clear, he agreed that an expert would not do him any good. (R701).

Mr. Erlenbach did not consider the microanalyst's analysis of the evidence to be particularly harmful. (R630). The analyst had testified that the tape used to bind the victim was the same kind of tape found in Mr. Willacy's house; however, the ends did not match and the analyst could not say the tape on the victim was even from the same roll as that found in Willacy's house. In Mr. Erlenbach's opinion, that made the evidence "rather weak." (R630). Erlenbach testified:

> I have used experts in the past in other cases in other murders. Sometimes they're useful and sometimes they're not.

(R685, 687).

[1] The medical examiner's testimony indicated a left-handed person hit the victim. (R752).

Mr. Erlenbach did not consult with an expert on blood typing because the State did nothing more than test the blood type. That evidence was Anot particularly harmful and fairly easily explainable." (R632). Erlenbach did not believe there was an expert who could have helped the defense with the time frame of the murder as "... that's the kind of thing jurors are called upon to make decisions and I think they're fairly commonsensical determinations ... " (R751). Since the trial, Erlenbach has not learned of any expert who would have been able to provide assistance in Willacy's defense. (R710).

After reviewing the State's discovery, Erlenbach believed "it was a very gruesome murder which also looked well for the State. The circumstantial evidence ... in totality was fairly strong ... the statement that Mr. Willacy gave was substantially incriminating ... @ (R634). Mr. Erlenbach was successful in suppressing Willacy's second statement. (R638). Although Willacy implicated another person, Erlenbach Alooked into his circumstances and determined that he had a pretty good alibi for where he was.@ (R638). The defense consisted of eliminating any evidence he could through motions and explanations of other incriminating evidence. (R640). As Mr. Ehrlenbach stated, Willacy had given a confession to:

> [a]t least a felony murder, that he was involved in a burglary in which the other person committed the murder. I think of all

> the pieces of evidence that statement was by far the most damaging.

(R640).

In addition, Willacy contradicted himself by telling police that he had never been in the victim=s house. (R642). Mr. Ehrlenbach recalled that a confidential informant, James Brown (a/k/a James Earl Jones), implicated Alonzo Love as being involved in the crime. (R647). He was unsuccessful in taking Brown=s deposition. (R648-49). In addition, other potential suspects (Carlton Chance and Alonzo Love) had alibis, which included Reverend Whittaker as Chance's alibi, and Love's employer as his alibi. (R712-13, 715). An additional witness at trial (co-worker of the victim) put one black male in the victim's car shortly after the murder and, shortly thereafter, somebody who looks a lot like Chadwick Willacy at the ATM during the same time frame. (R717-18). Additional witnesses only saw one person at the ATM with the car in the background although none of them could identify Willacy. (R127.).[2]

Erlenbach did not pursue the Independent Act Defense because he focused on suppressing the evidence. This tactic was discussed with Willacy. (R651, 652). Although the State had a very strong circumstantial case, Erlenbach believed, "we still

[2]Alonzo Love was small in stature. The witnesses at trial indicated that the black male they saw at the ATM was approximately six feet tall and had a muscular build. (R720).

had a good case." (R653). It was important to try to keep Willacy=s statement out of evidence as it was Atantamount to a confession of felony murder ... @ (R653).

Subsequent to the verdict, Erlenbach learned that Juror Clark had charges pending against him during Willacy's trial. He moved for the Florida Supreme Court to relinquish jurisdiction in order to litigate a motion for a new trial based on this information. He would have moved to strike Juror Clark or use a peremptory challenge had he learned of the pending charges during *voir dire*. (R671-72, 684). At the relinguishment hearing, Juror Clark said he had not been paying attention and did not feel the jury clerk's questions (during jury qualifications) pertained to him or were important. (R677-679). Erlenbach did not ask the jury panel if they had any charges pending or ever filed against them. (R681). However, he does not automatically strike jurors who have had charges filed against them. In fact, Afrom a defense perspective sometimes it=s a good thing to have people on the jury who have had charges filed against them.@ (R683-84). Further, "A person who has arrests or convictions in the past is not *per se* a bad juror." (R699).

Erlenbach and Willacy never discussed whether Willacy committed the offense. "He certainly never told me that he did it." (R705). Further, pursuant to Willacy's statement,"...he may have been there and involved but he did not commit the murder."

(R706). Erlenbach stated that the fact that the victim's property was found in Willacy's home, "was a big problem to overcome." (R724). Erlenbach thought it was a significant fact that the duct tape seized from Willacy's home did not have ends that matched the duct tape used on the victim. That fact Awas more significant than the fact that the manufacturer was the same." (R730).

Susan Erlenbach, Kurt Erlenbach's wife, assisted with jury selection and other parts of the trial. (R753-54). It was her intent to assist in acquiring jurors "who could look at Mr. Willacy in a sympathetic way." (R755). Had she been aware of the pending "grand theft" charges against Juror Clark, she would have encouraged her husband to strike him for cause. (R757). She would not have wanted a juror with Mr. Clark=s status to serve on a criminal case. (R757).

James Hamilton, licensed private investigator, specializes in fingerprints and major crime scene reconstruction. (R763). He has been doing fingerprint and crime scene reconstruction for nearly forty years. (R830). Hamilton is a former police officer who now owns an investigation agency. (R813-14, 815, 817). He had worked approximately twenty hours on this case. (R818). He reviewed case reports and trial testimony and determined there was a "built-in contamination of the crime scene." (R781-82). Had trial counsel obtained his services, he could have discussed

potential contaminants that were brought into the crime scene and how they affected the reliability of the investigation. (R783-84). The crime scene technicians should have initially used a laser to show hair, fibers, blood, seminal fluid, and latent fingerprints to determine areas of valuable evidence. (R786). Since latent fingerprints are fragile and can be destroyed by brushing or bumping into them, the "super glue" technique should be used. (R787-88). This technique of polymerization attaches itself to the protein matter in the residue in the fingerprint and exposes fingerprint marks. (R789). Then a technician comes back through the area with a laser and photographs what develops. (R790). Since the crime scene technician initially used black fingerprint powder, it was not possible to use the super glue/laser technique. The black powder technique wipes out whatever the powder doesn't hang on to. (R793). The laser technique would have taken up to one hour, depending on the area. (R796). In Hamilton's opinion, since it only took Agent Cockriel approximately one and one half hours to complete his investigation, he did not conduct a thorough investigation. (R796). In addition, fingerprints can be obtained from a dead body. (R812-13).

Hamilton testified that if hair samples had been tested, it would have identified race, type of body hair, and gender. (R798-99). The laser would also have identified blood, hair, and

fibers before they were moved or picked up. (R799). Although the laser would also have identified shoe prints, there was no indication that any shoe prints were collected at the scene. (R800-01).

The silver duct tape should have been tested for hair or fibers, utilizing crystal violet which actually stains the fingerprint impressions on tape and allows development of a fingerprint of whoever used the tape. (R802). In addition, a gas can recovered at the scene should have been tested for latent prints, utilizing the laser/super glue technique. (R803).

A fingerprint of Willacy=s located on a fan indicated Willacy had been holding the fan in such a way as to transport it from one place to another. (R804). Hamilton criticized expert testimony on the use of the fan. (R805). In addition, the garage area of the victim=s home should have had latent fingerprint processed with the laser/super glue method to determine whether there were body falls, foot prints, or hand prints on the floor around the blood. (R806). The inside of Sather’s car that Willacy drove should have been lasered and super-glued, as well. (R807). Hamilton believed there was a lot of information that law enforcement did not look at that could potentially have exculpated or created reasonable doubt in Willacy's case. (R810).

Susan Pullar teaches chemistry at California State University at Sacramento and has been qualified as an expert in alcohol and drug analysis over a thousand times. (R835-36, 838). She has never actually been called to any crime scene. She evaluates work done by law enforcement agencies, including bloodstain patterns, and completes reports or offers her opinions. (R839, 840). In this case, she reviewed photographs of the crime scene, the autopsy report, police and investigator reports, trial testimony, and reports produced by FDLE. (R842). In reviewing the work conducted by the serologist in this case, she determined that there was a lack of controls used to verify results. (R846). Blood stains on the wall indicated impact spatter, not cast-off blood. (R849, 851, 853, 854). Pullar was not aware of any problem with the work conducted by the serologist and was not aware of any phase or step the serologist failed to do. (R889).

Photographs indicated somebody=s foot moved through bloodstains at the scene, but the area was not processed. (R859, 860). Although she believed the investigation conducted by law enforcement produced "a fairly good job," Pullar believed there were things that weren't done. (R861). In her opinion, all the evidence could be retested by DNA because DNA is extremely stable. (R862). She has used the tent-and-super-glue method at crime scenes. (R864).

Willacy's clothing should have been tested for accelerants. She would have reviewed Willacy's statement to ensure that he, in fact, was not at the crime scene when the victim was injured or set on fire. (R867-68). In her expert opinion, "the physical evidence indicated that Willacy was just a part of at least two people who may have committed the crime." (R872). He either did not do the crime, or someone else was involved with him. (R875). She would have advised the defense attorney to hire a forensic pathologist or doctor of some sort to testify how quickly a person loses consciousness. (R880). It was her opinion that photographs of the victim could not depict whether or not the victim was conscious. (R856).

Pullar would have questioned why there were no fingerprints found on the duct tape. (R884). She was not aware of any attempts to check for fingerprints on the victim's body. (R887). Evidence indicated that the victim may have moved under her own power after she had been beaten and set on fire. (R922, 962). Pullar agreed that fingerprints are fragile and easily destroyed. Gasoline on a body could easily wash away fingerprints. (R924). Due to the "skin sloughage" of the victim, it would have been impossible to get a latent print off Mrs. Sather’s body. (R925).

Pullar could have assisted the defense attorney by showing that Willacy did not have enough time to accomplish his criminal

acts in such a short time span. (R952). Reasonable doubt would have been created by showing that it was impossible for a person to commit these acts, then drive to a bank several miles away. (R954-55). Evidence could point to multiple assailants being involved, and the victim may have been alive in order for Willacy to get her ATM "pin number." In the alternative, Willacy may have found the PIN. (R956, 957, 958). The evidence in this case could easily point to another person being involved. (R958).

Jim Kontos represented Willacy at his resentencing in 1995, along with Jeff Thompson. It was their first penalty phase proceeding. (R976, 977). Kontos did not attend any death penalty seminars but prepared for this case by reading case law regarding the death penalty, discussing the case at Dan Ciener's office, discussing with Mr. Erlenbach how he was going to represent Mr. Willacy, and reviewing the transcript and death penalty phase that Mr. Erlenbach conducted. He also reviewed death penalty seminar books. (R978).

Kontos' approach to the penalty phase was to present:

> [f]actual mitigation ... legally or factually challenge the sufficiency of the evidence on the aggravators ... try to convince the judge or jury that certain aggravators didn't apply ... a strong attempt to make sure we preserved any and all error ... make sure if there was the possibility of error that we brought it out and properly objected to it ... aggressively

> cross examine the fact witnesses ... create ... this little glimmer of doubt in their minds as to whether he did do it ... a jury might think we're not 100 percent positive so we're not going to execute this individual ...

(987-88).

It was not Kontos= practice to call expert witnesses. (R998). However, in this case, he retained a medical examiner, Dr. Fegal, regarding HAC. He decided not to call Dr. Fegal, since "there was also some stuff that he said that might hurt." (R1003, 1082). He also retained a photograph expert in Virginia who examined the ATM photo presumed to be Willacy. (R1000, 1002). He spoke with Dr. Radelet, a sociologist, who informed him that he could not assist with Willacy's case. (R1001-02). He did not retain an investigator because he had a bad experience with one at the Public Defender's Office. (R1013-14). Further,

> [l]awyers doing the investigative work was better because the lawyer knows the questions to ask and you get the read on the witnesses and it's better for the lawyer to do it than have an investigator do it.

(R1014).

After consulting with present counsel, Brian Onek, Kontos consulted with Dr. Riebsame, a psychologist, hoping he could provide evidence on mitigators. (R1004, 1005). Kontos did not obtain school, medical or any other records from Willacy's past. (R1014). He was not aware that there had been a recommendation

for Willacy to see a psychologist when he was a child. (R1015). He was not aware that Willacy's father abused alcohol, or that Willacy suffered physical abuse as a result. (R1016-17). He was not aware that Willacy became involved with drugs and subsequently became homeless. (R1022-23). He tried to paint a picture of Chad Willacy as a life worth saving and wanted the jury look at him like a regular person as opposed to a cold-blooded murderer. (R1021). He tried to show that Willacy had done good deeds in his life. (R1022).

Dr. Riebsame told Kontos that Willacy=s test results indicated he might be a Asociopath or psychopath.@ (R1026). If Willacy had ADHD, he "would have wanted jurors who had children with ADHD because I believed that they could have understood and would have believed that children with ADHD are impulsive and lose control." (R1028).

Kontos did not move to disqualify the trial judge, Anever even thought about it.@ (R1061). He wanted Willacy to be convicted under the felony murder statute as opposed to the first-degree premeditated statute because that way it was not conclusive if he was the person who actually killed Mrs. Sather. (R1062). He never thought of requesting an *Enmund* instruction.[3] (R1063). There was no evidence presented at the penalty phase of

[3]*Enmund v. Florida*, 458 U.S. 782 (1982).

another participant involved in this murder. (R1064). Kontos discussed strategies with Willacy, and talked to him about witnesses. Willacy never told him he committed the murder, only about the things he had done that day. Willacy never suggested another person was responsible for, or participated in, Ms. Sather=s murder. (R1073). Kontos presented the theory of another person's involvement, the fact that a left-handed person had been involved, and the fact that Willacy made statements saying other people were involved. (R1091).

Dr. Riebsame, licensed psychologist, testified that he conducted an evaluation of Willacy on September 8, 1995, prior to his second penalty phase.[4] (R1107-08, 1118). He asked Willacy "about his education, his marital history, his family history ... his history of alcohol and drug abuse ... work history, history of prior legal problems ... psychological treatment, medical problems ... problems at the jail during his incarceration ... history of abuse." (R1118-19). He conducted a mental status examination, looking for any psychotic episodes. He tested Willacy's memory and assessed his mood to determine whether he was particularly depressed or anxious. (R1119). Willacy denied his involvement in the offense. (R1121). He spoke with Dr. Riebsame in a rational and coherent manner. (R1120).

[4]The resentencing occurred September 18, 1995, through October 3, 1995.

Willacy behaved appropriately, although guarded and abbreviated in his answers. (R1120). The interview itself lasted approximately one hour.

Dr. Riebsame administered two psychological tests to get an idea of Willacy's intellectual level. (R1120). Tests indicated Willacy's IQ was 105, "which is average to above average range with no obvious cognitive impairment ... " (R1121). Dr. Riebsame administered the Wisconsin Card-Sort Test and the Trail Making Test. Results indicated there was Ano frontal lobe damage ... that would ... affect his decision-making.@ (R1138).

Dr. Riebsame said Dr. Brown, a psychologist from Tallahassee, also evaluated Willacy. (R1131, 1133). Dr. Brown administered intelligence testing and the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Brown=s conclusion was that Willacy=s IQ was 110, five points higher than Dr. Riebsame=s assessment. (R1134). Willacy=s MMPI results indicated an elevation on the antisocial scale. (R1134). Test results also indicated extreme impulsive behavior. (R1136). Willacy had Aa number of psychological experiences probably related to his substance abuse history.@ (R1136-37).

Dr. Riebsame reviewed an investigative report that Willacy had been physically abused during his childhood. It also included detailed documentation of Willacy's drug abuse. (R1142, 1144). Willacy's father admitted he physically abused his son,

beatings that began in early childhood and were carried out until Willacy was asked to leave home due to his drug abuse. (R1153-54). Willacy=s father would beat him excessively when he was in a rage. Willacy never fought back. (R1157). Willacy denied any history of physical or sexual abuse. (R1140).

Willacy said he bought crack cocaine many times from Carlton Chance. (R1159). Chance told Dr. Riebsame that Willacy was on "a drug binge" when he might have committed the murder. (R1160). James Brown, the confidential informant, told police that Willacy bought "crack all that day, all Wednesday, Wednesday night, and Thursday." (R1162). Brown[5] allegedly told "a person named Larry" he was at the victim's house the night of the murder. (R1163). In sum, Dr. Riebsame stated, "so the information I had from this individual again is just significant crack cocaine use by Mr. Willacy while with some other individuals around the time of the offense." (R1163). Third party sources told Dr. Reibsame that Willacy had been up several nights doing crack cocaine. He was also doing crack cocaine in

[5] Terri Sirois, a licensed private investigator, was hired by defense counsel to locate James Earl Brown. (R1357). James Earl Jones and James Brown are the same person: the confidential informant used by the police in Willacy's case. (R1357-1359). Sirois obtained a death certificate from the medical examiner's office. (R1360-61). Brown had been committed to the Department of Corrections on various occasions. (R1366-67).

the morning of, and the afternoon of the offense.[6] (R1208, (R1218, 1246).

It was Dr. Riebsame=s understanding that Willacy had been in the midst of a burglary when the victim, Ms. Sather, came home. A struggle ensued, and Willacy "took several steps to try and cover up evidence of his presence in the home, fled with ... her vehicle or an ATM card." "I think that the actual facts of the murder itself, how it was carried out, what was done to Ms. Sather also reflects extreme emotional disturbance." (R1221). Due to cocaine and ADHD, "He beats the woman in a very aggressive, assaultive way ... it appears to have occurred in a rather unexpected fashion the way the beating occurred." (R1223). In Dr. Riebsame=s opinion, Willacy=s efforts to murder Ms. Sather were unsuccessful, disorganized and haphazard. (R1224). Willacy left the scene "in a rather ignorant manner@ and, being observed by others, immediately proceeded to an ATM machine where he was observed. This behavior would not make sense unless there were symptoms of a mental disorder or cocaine intoxication. (R1224). Willacy=s actions were Aimpulsive, haphazard, ineffective.@ (R1225).

[6] Chance, Love, and Brown all made statements about Willacy=s cocaine use. (R1209). In addition, Willacy told George Santiago that he did not commit the murder, but was in the house, and was Ahigh.@ (R1206, 1210).

In reviewing Willacy's statements to police, Dr. Riebsame agreed that Willacy implicated another individual being involved in the offense, but Dr. Riebsame did not find the statements useful in terms of mitigation. (R1164, 1165). Willacy indicated he took part in the burglary with another individual and he was Ahigh@ at the time. (R1166). After Dr. Riebsame reviewed the videotape of Willacy's statement to police, he described Willacy as appearing withdrawn, physically exhausted, somewhat confused, and having symptoms which might indicate "coming off a drug binge." (R1170). Dr. Riebsame's overall diagnosis was cocaine, cannabis and alcohol abuse, Attention Deficit Hyperactivity Disorder and Antisocial Personality Disorder. He believed Willacy was also in the throes of cocaine intoxication and withdrawal. (R1171-72). Dr. Riebsame believed that Willacy had an extreme mental or emotional disturbance given the crack cocaine intoxication and symptoms of the other mental disorder. (R1189). However, he was not substantially impaired, and his conduct was "purposeful." (R1185-86). Dr. Riebsame would have testified to this during Willacy's resentencing. (R1183-84).

Dr. Riebsame agreed with Dr. Danziger=s assessment regarding the majority of the case. (R1195). In Willacy=s interview with Dr. Danziger, Willacy "adamantly denies@ any cocaine use or symptoms associated with cocaine use around the time of the

offense. (R1197). Both doctors agreed that there is a history of ADHD, as well as Antisocial Personality Disorder.[7] (R1198).

Willacy showed signed of conduct disorder at age twelve. (R1234). According to a report prepared by Dr. Brown, Willacy described his family life as a normal one. His parents worked and they had a loving family. His father was a strict disciplinarian. His mother was always there for him, but his father was the head of household. Willacy said, AI don't think I was abused but by today's standards maybe." (R1249). Willacy had a loving relationship with his sister. (R1250). His father would break furniture on his son and then use the chair leg to beat him with it. (R1250). Willacy self-reported (to Dr. Brown) that he would Abreak windows, throw bottles at people, drive recklessly.@ (R1250). Without drug use, Dr. Riebsame would not offer the opinion that Willacy was under extreme mental or emotional disturbance. (R1269). In sum, when attention deficit disorder and cocaine intoxication are combined, antisocial personality disorder is Aintensified or worsened as a result.@ (R1277).

Danny Johnson, currently a private investigator, assists defense lawyers in all aspects of first-degree murder trials.

[7]The hyperactivity portion would typically subside by age 21. The attention and impulsivity difficulties would continue to be present. (R1218).

(R1289-90). As an investigator during the guilt phase, he would review all discovery material, police reports, witness statements, forensic evidence, collection methods, and interview witnesses. (R1290). He obtained Willacy's records and spoke with family members. (R1295-96). Willacy:s parents and sister indicated he had been physically abused when growing up. (R1299). Johnson said Willacy told him about disputes between his parents, and that he had to separate his parents during a fight. (R1301). Willacy's mother relayed many instances where there were physical confrontations between Willacy and his father. (R1302-03). She told Johnson, “... he would go into a rage and she was afraid that he was going to kill him." (R1304).

Audrey Willacy, Appellant’s mother, said her husband, Colin, drank quite a bit when he went out with friends. He would come home drunk two or three times a week. (R1368-69). Physical confrontations between her husband and her son occurred almost every time he was drunk. (R1371). Colin beat Willacy at least four times a week from the age of eight to sixteen. (R1378). She would attend to any injuries Willacy received, “...scratches and bruises and whales ... ” (R1380). She recalled Colin beating Willacy with a chair when he was approximately ten years old. (R1380). After she served Colin with divorce papers, his behavior changed, gradually. (R1382-83). Audrey never told anyone about these incidents "because nobody knew about it and

nobody asked me. I didn't want to bring this out in the open." (R1384). Had Willacy's defense attorney asked her about this type of behavior, she would have told him. (R1385). Both Erlenbach and Kontos told her she Ashould get people who can tell of Chad=s good behavior and good conduct and good things that he had done ... @ (R1385). Kontos told Audrey that they needed to present Willacy in the best light and tell the judge all the good things Willacy had done: that he was worth saving. (R1412).

Audrey told Kontos that her husband was a strict disciplinarian, but that her son was raised in a loving, religious home. (R1399, 1405). Prior to Willacy=s move to Florida (from New York), he had jobs, and all his employers loved him. (R1408-09). However, due to his drug abuse, Willacy=s parents kicked him out of the house. They told him to pack his bags, and get out. (R1391).

Colin Willacy, Appellant=s father, admitted that he struck his wife and children and drank to an intoxicated state. This behavior occurred over a period of years. (R1415-16). When he became aware of impending divorce, he made a vow he would try to do better and use more dialogue rather than physical abuse. (R1422). Willacy's attorneys did not asked about his discipline methods. (R1425). Further, Abecause it's dirty laundry it's not something that I would want to divulge to anyone ..." (R1425-26). Had a professional or Willacy's attorney asked him about

this behavior, he would have told them. (R1428). He did not recall telling his son to leave their home when he was growing up. (R1432).

Colin believes his son grew up to be a respectful and well-liked adult. (R1430). Willacy never showed signs of mental problems during the time he lived with his parents. (R1433). His son never showed a propensity for violence and was well-liked by his employers. He was very respectful. He had a lot of friends and was popular with the boys and girls. (R1436, 1443). After Willacy moved to Florida, Colin visited him. (R1439-40). He knew Willacy was smoking marijuana and spoke harshly to him about it. (R1440). Colin received various reports from his son=s neighbors that they did not approve of company coming in and out of the house. (R1451).

Heather Willacy, Chadwick=s sister, testified that physical abuse occurred in their household when they were growing up. (R1317-18). Willacy's trial counsel and subsequent resentencing counsel never asked her about the abuse. She was not willing to volunteer the information as, "it's not something I'm proud of that happened." When Chadwick would come between her parents when they were fighting, Colin would turn on him and beat him severely. (R1322). Willacy was beaten several times a week. (R71324). Heather recalled an incident during which Colin beat Willacy with the leg of a chair. (R1327, 1328). There was always

a reason Colin would beat Willacy[8]. Colin was not drinking every time her brother was hit. (R1329, 1330). When Audrey told Colin she was going to leave him, he stopped hitting her, but kept hitting Willacy. (R1332-33). Heather was aware of her brother's drug use, but he was not home that often, so she “never really saw that drastic of a change." (R1334).

Heather was also disciplined. (R1341). In addition to being hit, she would lose privileges and have to stay in her room. Notwithstanding, she described the home as “very loving and supporting." (R1342). She and her brother had a very good relationship with their parents, who encouraged them to do well in school and to participate in athletics. (R1343,1344).Dr. Jeffrey Danziger, a psychiatrist, reviewed records and documents and examined Willacy prior to the evidentiary hearing. (R1484, 1488, 1489, 1490). Willacy denied committing the murder and any involvement with drugs. (R1496, 1499). DOC records did not suggest that Willacy suffered from any sort of mental defect or disease. (R1503). Although there was a "possible history of Attention Deficit Hyperactivity Disorder," Danziger determined that it was not likely. He also found Willacy exhibited an Antisocial Personality Disorder. (R1495,1504-05,1523). In

[8] Willacy was hit because he had done something, "a bad report card, whether the teacher called to complain about something he had done in school." In addition, if he did something at home, “...broke something, supposed to come at a certain time and he didn't ... @ (R1340-41).

addition, his behavior as a juvenile was consistent with a conduct disorder rather than ADHD. (R1506, 1514, 1523). Upon reaching the age of 18, Willacy became a "sociopath, meeting the criteria for Antisocial Personality Disorder." (R1523). Although Willacy's school principal recommended counseling, Willacy's parents had not been receptive to the idea. (R1524).

In reviewing an audiotape and subsequent videotape of Willacy taken after the murder, Willacy's “...answers to questions were logical, coherent, rational. There was no disorganized thought flow or bizarre statement.” Dr. Danziger did not see anything to indicate agitation or restlessness. There did not appear to be anything from either the audiotape or the videotape that would have been consistent with acute intoxication. (R1500, 1556). Dr. Danziger determined that:

> [t]here was nothing here to suggest anything other than a rational criminal motive, a plan designed to rob and take items ... there is nothing that I saw to show anything other than a rational calculated attempt to steal ... the facts as I saw them suggested deliberation.

(R1510). In sum,

> [a]ll of those things to me suggest someone was thinking, planning in a premeditated sort of way, not the actions of someone who was able to control their behavior or simply in some sort of violent frenzy. If anything, the facts suggest entirely the opposite.

(R1511). Willacy's actions were goal-directed, and showed deliberation, planning, forethought, and organization. (R1512). Dr. Danziger testified that ADHD, according to the DSM-IV[9] requires the showing that some hyperactive, impulsive, or inattentive symptoms cause impairment prior to the age of seven. (R1513-14). Willacy has above normal intellectual capabilities with no history of a mood disorder or psychotic illness. (R1518). It was Dr. Danziger=s opinion that, at the time of the offense, Willacy had the ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. (R1518-19). Although Willacy denied setting the victim on fire, the fire would eliminate evidence and other signs of his presence in the house. (R1520).

There was evidence that Willacy was physically abused as a child. (R1527). However, many people grow up in backgrounds of deprivation and abuse who do not go on to lives of criminality. (R1528). Further, genetic and environmental factors play a role. If a person has relatives in prison or living a life of criminality and there were risk factors with an environment of abuse, the risk of that person engaging in crime is higher than the general population. Merely being abused does not necessarily mean a person would pursue a life of crime. (R1528-29). Dr.

[9]*Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition.*

Danziger reiterated that Willacy's behavior during the crime was rational, deliberate, and purposeful. (R1534). Besides suffering physical abuse, Dr. Danziger could not find any other mitigators that applied to Willacy.[10] (R1565).

Donald Bauman, a detective for twenty-seven years, interviewed Carlton Chance regarding the murder of Ms. Sather. (R1675, 1676-77). Chance told him he was picked up in the morning by a Reverend Ronald Whittaker and was transported to Cocoa. He worked on a church with the Reverend and other people, and was at that location the entire day except for going to lunch. (R1680). Bauman, along with Detective Ciccone, subsequently interviewed Reverend Whittaker. (R1680). Reverend Whittaker " ... was adamant about that day and about picking him up and taking him to work, and being with him the entire day." (R1684). Neither Reverend Whittaker nor Carlton Chance indicated that Chance called the Reverend in order to verify his whereabouts. (R1685).

Reverend Ronald Whittaker befriended Carlton Chance. (R1469-70). He hired Chance as a day laborer to do repair work on a church in Cocoa, Florida. (R1470). He recalled Chance had worked one day at the church, but could not remember the exact date. (R1470, 1471). After being shown a statement he had given

[10]Willacy denied being abused or neglected as a child when questioned by defense investigator, Rose Valdez. (R1573).

to police subsequent to the murder of Ms. Sather, Reverend Whittaker recalled that Chance had worked with him "all day" at the church on September 5, 1990.[11] (R1475-76). No one asked him to check his payroll records for the time period of the murder. (R1481-82).

Detective Frank Ciccone, a police officer for thirty years, interviewed Marisa Walcott, Willacy=s fiancée. In addition, he interviewed Alonzo Love, and James Brown, acquaintances of Willacy's. (R1691-92,1694-95,1696,1697,1710). Although James Brown was a confidential informant, Ciccone had never met him before he interviewed him. (R1704).[12]

Officer George Santiago, employed with the Palm Bay Police Department for eighteen years, was the lead investigator in this case. (R1708, 1709). Willacy and Walcott were Mrs. Sather's neighbors. (R1710). Initially, law enforcement thought Willacy was the victim of a burglary as well as Ms. Sather. (R1711). The day after the murder, Santiago encountered Willacy at the crime scene as he drove up in Walcott’s car. (R1710, 1711). Willacy appeared "just like all the other neighbors, pretty casual, nothing suspicious ... very well-dressed ...very, very handsome

[11]Ms. Sather was murdered on September 5, 1990. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997).

[12]James Brown was Officer Greg Bowden's confidential informant. Brown had contacted Officer Bowden regarding information he had on Willacy.(R1705).

... " He spoke in a logical, intelligent manner. (R1711). He did not appear to be under the influence of any drugs or alcohol. (R1712). Willacy gave Santiago Carlton Chance's name, as another person that had been in the victim's residence. (R1716).

Walcott and Chance told Santiago about Willacy=s acquaintance with Alonzo Love. (R1717). Santiago said Carlton Chance " ... was a big, very big thug, drug-dealer type person." Alonzo Love was tall, "appeared gay in mannerisms," and was thin. He appeared to be educated. (R1718-19).

During his evening interview with Willacy, Willacy appeared to be "excited" but not under the influence of drugs or alcohol. (R1722). Detective Santiago did not know whether Willacy was under the influence of drugs or alcohol at the time of Ms. Sather's death[13]. (R1724-25). Alonzo Love told Santiago that Willacy bought cocaine the night of September 5th and used it with Love. (R1725). James Brown told Santiago that Willacy and Love were using drugs and were in possession of the victim's credit cards and cash from the ATM. (R1727). In Santiago's opinion, there was no doubt Willacy acted alone. (R1740).

Marisa Walcott testified during the trial that her father and she found the victim=s checkbook in Willacy=s house (in the garbage). (R1777-78). They called Detective Santiago at home. (R1779). Walcott told Santiago that Willacy was Atrying to take

[13] Mrs. Sather was murdered September 5, 1990.

it (the checkbook) from me.@ Santiago told her, ADon=t let him do that.@ (R1780). Willacy was not initially suspected of this crime. (R1781-82).

The trial court entered an Order Denying Defendant's "Amended Motion for Postconviction Relief" on November 19, 2004. (R2545-2585). The Order included multiple attachments (R 2586-4572). The trial court also made the additional findings of fact which were supported by attachments from the original trial record:

> The evidence at the guilt phase showed that Ms. Marlys Sather (victim) left work on September 5, 1990, between 11:00 and 11:30 A.M. and never returned. (See Exhibit "W", pg. 824). The following day when Ms. Sather did not show up for work, her boss asked two co-workers to go to her home and check on her. (See Exhibit "W", pg. 828). When no one answered the door at her house, the co-workers returned to work, and her employer notified Ms. Sather's son-in-law of her absence. (See Exhibit "W", pg 855). Ms. Sather's son-in-law and his father went to her home and found items on the back porch that were normally inside the home; such as, a small television, a video cassette recorder, a tape rewinder, and a shotgun. (See Exhibit "W", pgs. 855 & 861). On entering the house through an unlocked sliding glass door, they smelled gasoline and found the kitchen and living rooms in disarray. (See Exhibit "W", pgs. 866-867). They also found Ms. Sather's dead body. (See Exhibit "W", pg. 868). "Her ankles and wrists had been taped and bound a cord was tightly wrapped around her neck, she had been struck several times in the head with a force so intense that a portion of her skull was dislodged, and she had been set afire."

Willacy v. State, 640 So. 2d 1079,1081 (Fla. 1994). (See Exhibit "W," pgs. 1029-1031, 1114-1119). A fan from another bedroom was at her feet and was turned on. (See Exhibit "W", pg. 870). A gasoline can was on the kitchen counter. (See Exhibit 'W," p.875). Ms. Sather's son-in-law called 911 (See Exhibit "W", pg. 872). The medical examiner testified that the cause of Ms. Sather's death was smoke inhalation following strangulation and blunt force injury to the head." (See Exhibit "W", pg. 1120).

Detective George Santiago testified that he went to the victim's home before 11:00a.m. on September 6, 1990. (See Exhibit "W", pg. 1234). He saw the items on the back porch (See Exhibit "W", pg. 1238) and noticed a strong odor of gasoline in the house. (See Exhibit "W", pg. 1239). In the kitchen, he noticed the gasoline can and an iron with the cord cut. (See Exhibit "W", pg. 1242). Detective Santiago also saw two smoke detectors that had been disabled and were placed on the floor. (See Exhibit "W", pg. 1250).

The Defendant lived next door to the victim, and Detective Santiago initially spoke with him about a broken window at his house because law enforcement first thought that his house possibly had also been burglarized. (See Exhibit "W", pgs. 1275-1277). However, after walking through his house, the Defendant advised that nothing was missing. (See Exhibit "W," pgs. 1278-1279). The Defendant said he had mowed the victim's lawn, but when Detective Santiago asked for fingerprints to eliminate the Defendant, the Defendant refused to give them. (See Exhibit "W", pg. 1279-1281). The Defendant agreed to go to the police station around 5:00 p.m., but never showed up. (See Exhibit "W", pg. 1282 & 1286-1287). Later that evening, Detective Santiago received a telephone call from the Defendant's girlfriend and he returned to the

Defendant's house. (See Exhibit "W", pg. 1289-1290). The Defendant pointed out Ms. Sather's checkbook ledger in the Defendant's wastebasket. (See Exhibit "W," pgs. 1290-1291). Detective Santiago arrested the Defendant and secured his house. (See Exhibit "W", pg. 1291-1293). After obtaining a search warrant, the Defendant's house was searched. (See Exhibit "W", pg. 1293-1294). Among the items seized in the Defendant's house were coins and jewelry (See Exhibit "W", pg. 1742 & 1754) that the victim's daughter identified as belonging in her mother's home. (See Exhibit "W", pg. 1849-1854).

Sergeant Russell Cockriel, a fingerprint examiner with the Brevard County Sheriff's Office testified that the Defendant's fingerprints were on the fan found at the victim's feet, on the gasoline can, and on the tape rewinder. (See Exhibit "W", pgs. 1662-1664, 1698, 1700, 1724). Yvette Opal McNab, a serologist from the Florida Department of Law Enforcement testified that the victim had type A blood, while the Defendant's was type 0. (See Exhibit "W", pgs. 1992-1993). Blood consistent with the victim's blood was found on several items taken from the Defendant's house: a paper towel (See Exhibit "W", pg. 2017-2018), a tennis shoe (See Exhibit "W", pg. 2023), and a pair of shorts. (See Exhibit "W", pg. 2028-2035). Duct tape found in the Defendant's home was consistent with the type of duct tape that the perpetrator used to bind the victim. (See Exhibit “W” pgs. 1966-1983).

Barnett Bank employee testified about ATM activity on the victim's bank account on September 5, including two $100 withdrawals. (See Exhibit "W", pg. 2097-2121). A photograph of the Defendant with the victim's car in the background, taken by the ATM machine was introduced into evidence. (See Exhibit "W", p.1786-1797). A person

> matching the Defendant's description was seen coming out of the bushes near Ms. Sather's home and driving Ms. Sather's car. (See Exhibit "W," pgs. 951-960, 964-980,1184-1190, 1476-1484, 1488- 1495).

(R2547-2550). Willacy filed a motion for rehearing which was denied (R4573-4589, 4594). This appeal follows.

SUMMARY OF ARGUMENT

Argument I: The trial court did not abuse its discretion in denying an evidentiary hearing on Claims IV, VI, and XV: issues regarding either Juror Clark who sat on the guilt phase jury or whether the clerk swore the guilt phase jury. This court decided the Juror Clark issue on direct appeal, and raising the claim as ineffective assistance will not avoid the procedural bar. The issue whether the venire was sworn was also before this court on direct appeal and is likewise procedurally barred. Furthermore, the issues have no merit. This court held Juror Clark was not "under prosecution" and was eligible for jury service. The hearing at which counsel testified was not a trial but a post-trial hearing. The Erlenbachs testified favorably for Willacy, and there was no prejudice. Lucille Rich, clerk of court, testified at the hearing in 1992 that she did, in fact, swear the jury.

Argument II: Trial counsel was not ineffective because he did not pursue an "Independent Act" defense. Mr. Erlenbach testified that he followed a trial strategy of eliminating evidence and creating reasonable doubt. Mr. Erlenbach succeeded in suppressing Willacy's second, most incriminating, statement and the identification of John Barton. Present counsel would have Mr. Erlenbach admit the incriminating statement which would

be a confession to felony murder. The strategy followed was reasonable.

Argument III: Re-sentencing counsel was not ineffective for not moving to disqualify Judge Yawn. Counsel managed to create an issue on appeal, which he did. There were no grounds to disqualify the judge, and this issue has no merit. This Court previously held in this case that the mere fact that a judge sentences a defendant to death is not grounds to recuse him/her if the case comes back for re-sentencing. The issue raised is basically an attempt to avoid the procedural bar.

Argument IV: Re-sentencing counsel was not ineffective for failing to present negative evidence that Willacy is anti-social, was beaten as a child, had a drug-abuse problem and was thrown out of his parent's home, or other negative information. Counsel was trying to present Willacy as a life worth saving, a reasonable strategy. He presented a substantial amount of mitigation at the re-sentencing. Much of the testimony now presented was either denied by Willacy, contradicted by the State mental health expert, or cumulative to that which was presented.

Argument V: The issue regarding Juror Clark being "under prosecution" was decided by this Court on direct appeal. All issues regarding this juror should have been raised at that time. Therefore, this issue is procedurally barred. The issue

has no merit. Since Juror Clark was not "under prosecution," he had no responsibility to answer that he was under prosecution.

Argument VI: *Lowrey v. State*, 705 So.2d 1367 (Fla. 1998), was decided after Willacy's conviction became final. Even if *Lowrey* applied to this case, *Lowrey* is not a case of fundamental significance and should not be applied retroactively.

Argument VII: This issue has been waived for failure to file a timely notice of appeal. This issue is not properly before this court as it has never been appealed. Even if it were, the trial court did not abuse its discretion in denying DNA testing. The motion was insufficient. If the items were tested, it would not exonerate Willacy. The jury knew Marisa Walcott's (Willacy's girlfriend) blood type was the same as the victim's. Whether Willacy's epithelial cells may are present on clothing proves nothing.

ARGUMENT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON CLAIMS IV, VI, AND XV

Willacy takes issue with the trial court's denial of an evidentiary hearing on:

> (1) Claim IV – that counsel was ineffective for failing to request independent counsel at the hearing on the motion for new trial regarding the Juror Clark issue;
>
> (2) Claim VI – that defense counsel was ineffective for failing to object to Juror Clark's ineligibility; and
>
> (3) Claim XV – that counsel was ineffective for failing to object that the venire was not sworn.

Claim I. Juror Clark conflict issue. The trial court found:

> Under claim four, the Defendant alleges that his counsel was ineffective for waiving the appointment of an independent counsel to litigate the facts and circumstances regarding Juror Clark's pending felony charges.
>
> On October 12, 1992, an evidentiary hearing was held on the Defendant's motion for new trial based upon the claim that Juror Edward Paul Clark, the foreman of the Defendant's trial in 1991, was under prosecution for grand theft in Case No. 90-16082CFA at the time he served on the Defendant's jury. At the evidentiary hearing, the Court was advised that Kurt and Susan Erlenbach, the attorneys representing the Defendant at the motion for new trial evidentiary hearing,

would be testifying as to matters that allegedly occurred during the Defendant's trial. The Court expressed concern that such action by the Erlenbachs might violate rule 4-3.7, Rules of Professional Conduct. (See Exhibit "E," pgs. 56-60). The Defendant waived an objection to his defense attorneys acting in the dual role of attorney and witness at the post-judgment, motion for new trial evidentiary hearing. (See Exhibit AE,@ p.61-63). The judge=s law clerk presented a memorandum of law on the subject to the judge, and the Court advised Athere appears to be no conflicts insofar as the matter raised by the Court are concerned so we will allow you to proceed." (See Exhibit "E," p. 64.) Thereafter, the direct examination of Kurt Erlenbach was conducted by Susan Erlenbach and the direct examination of Susan Erlenbach was conducted by Kurt Erlenbach. (See Exhibit "E," pgs. 63-68,119-124.)

To prevail on a claim of ineffective assistance of counsel, the Defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 *(1984).* The Court finds that the Defendant failed to satisfy both elements, and this claim can be summarily denied.

First, no conflict of interest existed requiring appointment of an independent counsel at the evidentiary hearing. Rule 4-3.7, Rules of Professional Conduct, provides that with some specified exceptions "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client." In Columbo v. Puig, 745 So. 2d 1106, 1107 (Fla. 3d DCA 1999) explained that the keywords in rule 4-3.7 were "at a trial" and that "a lawyer may act as an advocate at pre-trial (before the start of the trial) and post-trial (after the judgment is

rendered) proceedings." Here, the motion for new trial evidentiary hearing was a post-trial proceeding. Therefore, no conflict of interest existed under rule 4-3.7, Rules of Professional Conduct. Equally important, the Defendant has failed to show any prejudice, where he fails to allege how the use of independent counsel would have provided a different outcome. At the hearing on October 12,1992, Mr. Christopher White testified that he discussed with Mr. Mark Rappel during a break sometime during the trial about Juror Clark being in the Pre-Trial Intervention Program at the time or a being a candidate for Pre-Trial Intervention. Mr. White then testified that he approached the defense table and told either Mr. or Mrs. Erlenbach, or both of them, that he believed Juror Clark might be in the Pretrial Intervention Program. (See Exhibit "E," p.101-102). Mr. Rappel testified that Mr. White approached him in the courtroom after a lunch break after jury selection but early into the trial and informed that he believed Juror Clark might be in the Pretrial Intervention Program. Mr. Rappel testified that Mr. White immediately got up and went over and spoke with Mrs. Erlenbach about this. (See Exhibit "E," pgs. 115-116,118.)

Mr. Kurt Erlenbach testified that no one told him that Juror Clark was pending prosecution. (See Exhibit "E," p.65). Similarly, Susan Erlenbach testified that she never had a conversation with Mr. White regarding this issue. (See Exhibit "E,." p. 123.) The Erlenbachs' testimony was favorable to the defense and all testimony at the hearing was under oath The facts would not have changed so how the outcome would have changed with the use of independent counsel at the motion for new trial hearing who may have used a different strategy is inconceivable and pure speculation at best. Moreover, as previously discussed in detail, the Supreme Court of

> Florida concluded that the Defendant was not under prosecution for purposes of section 40.013(1), Florida Statutes (1991), so no prejudice was shown.

(R 2592-2595). First, this issue is procedurally barred since the new trial hearing was before this Court in the 1992 direct appeal. All issues regarding Juror Clark and/or a conflict of counsel were, or should have been, raised. This issue is procedurally barred.

Further, this Court addressed the Juror Clark issue on direct appeal and found that Clark was not "under prosecution." ***Willacy I.*** Second, as the trial court found, the hearing on the motion for new trial was not a "trial," so the Rule of Professional Conduct does not apply. Third, Willacy personally waived any conflict. (R62-63). Collateral counsel now argues the waiver of conflict was not voluntary, an issue not raised in the 3.851 motion. That issue is procedurally barred. Fourth, there was no prejudice to Willacy. Both Erlenbachs testified favorably for Willacy at the new trial hearing and claimed the prosecutor did ***not*** tell them Mr. Clark was in the pre-trial intervention program. Fifth, this issue is raised as failure to conduct an evidentiary hearing. This issue had a full hearing in 1992. At that hearing, the trial judge addressed the conflict issue and made findings. Any complaint with those findings should have been raised on direct appeal.

Claim VI. Ineffective assistance for failing to object to Juror Clark eligibility. The issue raised in the amended motion was failure to object to Clark's eligibility, not counsel's failure to use a peremptory challenge on Juror Clark. To the extent Willacy now argues counsel was ineffective for failing to strike the juror, that issue is waived.

Interestingly, Claim III in the Amended Motion for Postconviction Relief was that the State failed to inform defense counsel that Juror Clark was in the pre-trial intervention program. This issue was the subject of the hotly-contested hearing motion for new trial in 1992, and should have been raised on direct appeal. However, at that time, the trial judge held that the State had, in fact, advised Mr. or Mrs. Erlenbach of Juror Clark's status. So now Willacy raises the issue as ineffective assistance because the trial court found in favor of the State. The fact remains that both Mr. and Mrs. Erlenbach testified in 1992 that Mr. White did *not* tell them of Juror Clark's status. In any case, this Court found in *Willacy I*, that there was no merit to the claim. Therefore, even if Willacy could show at this point that Mr. and Mrs. Erlenbach *were* told about Juror Clark's status, there is no prejudice because he was not "under prosecution," and eligible to serve.

The fact that trial counsel testified that in hindsight they certainly would have excluded the juror had they known his

status is not conclusive because the 20/20 vision of hindsight is not the standard. *Strickland* is the standard. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* specifically cautions against the distorting effect of hindsight. This Court found in *Willacy I* that Clark was eligible. This claim did not require an evidentiary hearing because, as the trial court found:

> Under claim six, the Defendant alleges that trial counsel was ineffective for failure to object to Juror Clark's ineligibility to serve as a juror. The Defendant contends that in failing to do this, defense counsel failed to preserve this potential reversible error for appellate review. On direct appeal of the judgment and sentence, the Supreme Court of Florida held that the Defendant was Anot under prosecution" and therefore, Willacy's motion for a new trial was properly denied." Willacy v. State, 640 So. 2d 1079, 1082-1083 (Fla. 1994). The issue of Juror Clark's alleged ineligibility to serve was raised in the motion for new trial and resolved adversely to the Defendant by both the trial court and the Supreme Court of Florida. Objecting during the trial to Clark's alleged ineligibility to serve as a juror would have preserved the objection for appellate review; however, no prejudice can be shown because the Supreme Court of Florida examined the issue of Clark's ineligibility to serve as a juror in the context of the motion for new trial and specifically determined that Clark was not under prosecution. If Edward Paul Clark was not under prosecution, then Clark was statutorily eligible under section 40.013(1), Florida Statutes (1991), to serve as a juror. Thus, under Strickland, even assuming *arguendo* that counsel's performance was deficient for failing to object to

> preserve the objection for appellate review, the Defendant has still shown no prejudice to entitle him to postconviction relief on this claim.
>
> Also, under claim six, the Defendant alleges that he was never informed by his defense counsel of Juror Clark's pending felony charges or his ineligibility to serve as a juror. The Defendant alleges that had he been properly informed, he would not have allowed Juror Clark to be a juror. However, as aforementioned, the Supreme Court of Florida determined that Juror Clark was not under prosecution, thus, he was eligible to serve as a juror. Furthermore, the Erlenbachs testified at the hearing on October 12, 1992, that they were not informed during the trial that Juror Clark had charges filed against him by the State of Florida; therefore, consistent with this testimony, they could not have told the Defendant something that they did not know about. (See Exhibit "E," pgs. 65 & 123). Accepting Judge Yawn's factual determination that the State did inform the Erlenbachs after the voir dire examination had concluded but in the beginning of the trial that Juror Clark did have pending felony charges, and *assuming* arguendo, that the Defendant insisted that Juror Clark not remain on the jury and the Erlenbachs refused to object, the Defendant still has shown no prejudice where the Supreme Court of Florida determined that Juror Clark was not under prosecution and thus, was eligible to serve on the jury. See Willacy v. State, 640 So. 2d 1079, 1082-1083 (Fla. 1994).

(R 2596-2597).

Every fact which needed to be developed on this issue was developed after the first trial when trial counsel discovered Juror Clark’s status.

To the extent Willacy argues that Clark disregarded his oath, that issue was not raised in the Amended Motion and is waived. Further, the issue should have been raised on direct appeal. This Court found Clark was not "under prosecution," so this complaint is unfounded.

Claim XV. Swearing jury venire. The trial court found:

> Under claim fifteen, the Defendant alleges that counsel was ineffective for failure to object to the failure to swear the venire prior to voir dire as required by rule 3.300(a), Florida Rules of Criminal Procedure. As mentioned above, the record shows that the venire was sworn pursuant to rule 3.300(a), Florida Rules of Criminal Procedure; therefore, the Defendant has failed to satisfy both prongs of the Strickland analysis (See Exhibit "E," p.48). See Davis v. State, 848 So. 2d 418 (Fla. 2d DCA 2003); Pena v. State, 829 So. 2d 289 (Fla. 2d DCA 2002); Gonsalves v. State, 830 So. 2d 265 (Fla 2d DCA 2002).

(R2602).

As the trial judge held, this has absolutely no merit. In fact, in the trial court order for Claim XIV, the judge notes that Lucille Rich, the jury clerk, testified on October 12, 1992, that she *did, in fact*, swear the jury. (R2601-2602). The trial judge attached that hearing to his order. (R2677-79). Willacy's complaints about the jury being sworn outside the courtroom should have been raised on direct appeal since that evidence was before this Court at that time.

ARGUMENT II

COUNSEL WAS NOT INEFFECTIVE BECAUSE HE DID NOT PURSUE AN "INDEPENDENT ACT" DEFENSE

Willacy claims that his videotaped statement (which Mr. Erlenbach succeeded in suppressing) was evidence that another person committed the murder, and that Willacy was only present for the robbery but was not involved in the murder which happened after he left. This argument relies solely on Willacy's ambivalent and questionable account of events and is supported by no evidence. To the contrary, the theory is contradicted by the evidence: Willacy's fingerprints were found on the gas can and fan used to incinerate Ms. Sather, he left property to retrieve later knowing she was dead, her check ledger and personal property were found in Willacy's house, and he used the victim's ATM card. The alleged co-defendant, Carlton "Goose" Chance had an alibi which Mr. Erlenbach thoroughly explored.

This issue was afforded an evidentiary hearing, after which the trial court held:

> Under Claim I, the Defendant alleges that his counsel was ineffective for failure to consider or discuss with him the defense of independent act. The Defendant asserts that trial counsel should have presented the defense that the Defendant robbed his neighbor, saw her tied up, and then simply left the scene in her car to retrieve money from her bank account, leaving a co-defendant at the scene who committed the actual murder and arson. The Defendant contends that the independent act defense

provided a plausible explanation for the Defendant's fingerprints, possession of stolen property from the victim, and potentially his photo at the bank ATM. To support the independent act defense, the Defendant asserts that counsel should have placed into evidence the Defendant's videotaped statement to Detective Santiago on September 7, 1990, at the Palm Bay Police Department, which the trial court had suppressed on Mr. Erlenbach's motion. (See Exhibit "S," Transcript of 9/7/90 Statement, Motion to Suppress Statements by the Accused, and Order on Motion to Suppress Statements.) In the statement, the Defendant admitted that he robbed the victim, saw her tied up, then left the scene before she was beaten and set on fire by Carlton Chance, nicknamed "Goose." (See Exhibit "S.")

At the evidentiary hearing, Mr. Erlenbach testified that his trial strategy was to eliminate as much of the evidence as possible, which included seeking suppression of the Defendant's statement to Detective Santiago, then to provide innocent explanations for the remaining evidence. (See Exhibit "T," 12/3/2003 Evidentiary Hearing Transcript, p. 47, and Exhibit "W," Trial Transcript Composite, pgs. 2528-2573). Mr. Erlenbach succeeded in having the Court suppress the Defendant's statement to Detective Santiago and the show up identification of the Defendant by a school boy, John Barton. (See Exhibit "T" p. 47, and Exhibit "S."). Mr. Erlenbach testified that he considered the Defendant's statement to Detective Santiago to be so damaging that he would have considered another defense such as the independent act defense only if the Court did not suppress the statement. (See Exhibit "T," p. 65, 123). Mr. Erlenbach considered allowing the Defendant's statement to be introduced, but it was "largely a confession of at least a felony murder" and, "of all the pieces of evidence

that statement was by far the most damaging." (See Exhibit "T," p 49)

This Court finds this was a sound trial strategy under the circumstances of this case, made by experienced trial counsel[14]. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." Occhicone v. State, 768 So. 2d 1037,1048 (Fla. 2000). "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Id. It is important to note that Strickland instructs that "[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.

For an independent act defense to have any hope of success, the Defendant would have had to convince the jury that there was in fact another person involved. In the Defendant's statement to Detective Santiago at the Palm Bay Police Department, the Defendant identified Carl ("Goose") as a co-perpetrator. Mr. Erlenbach investigated Carton Chance, but "he had a good alibi." (See Exhibit "T," pgs. 47, 55-56, 120-121). Mr. Erlenbach concluded based upon his investigation of Mr. Chance's alibi that he was "a dead end." (See Exhibit "T," p.55-56). Moreover, Mr. Chance could not be

[14] Mr. Erlenbach was an Assistant State Attorney from 1982 to 1987 and during this tenure, prosecuted several murder cases. From 1987 until 1990 when he began Defendant's case, he had five second-degree murder trials and other trials. (See Exhibit "T," p.108). In addition, since 1987, Mr. Erlenbach authored The Florida Criminal Cases Notebook, a legal treatise on criminal cases. (See Exhibit "T," p.111).

connected to the scene by any witness or physical evidence, despite comparison of his known prints to the latent prints found at the scene. (See Exhibit "T," pgs. 125-126 and Exhibit "N," pgs. 2668-2670). The description of the black male seen driving Ms. Sather's car was six feet tall and muscular. (See Exhibit "T," p.129). Chance was a heavier build than the Defendant. (See Exhibit "U," 2/16/2004 Evidentiary Hearing Transcript, p.52) Mr. Erlenbach also investigated Lonzo Love based on an indication from Detective Santiago that Love might have been involved. (See Exhibit "T," pgs. 47-48, 54-57, 59,123-125). However, Love's employer verified that Love was at work at the time of the crime. (See Exhibit "T," pgs. 54,123- 125). Love was effeminate and of slight build, and did not match the description of the person driving Ms. Sather's vehicle. (See Exhibit "T," p.129). The State could have easily shown that neither Chance, nor Love was in any way involved in the murder of Ms. Sather. (See Exhibit "T," p.66). Even if the defense succeeded in acquitting the Defendant of the homicide on the independent act defense, the Defendant would have convictions for armed burglary with an assault, robbery with a deadly weapon, and first degree arson. (See Exhibit "T," p.125). Consequently, the independent act defense would have been extremely risky compared to the strategy employed by Mr. Erlenbach. It is all too easy in hindsight after the Defendant has been convicted to conclude that since the strategy employed by Mr. Erlenbach at the Defendant's trial ultimately was unsuccessful, he should have considered and employed a more risky defense.

Moreover the Defendant has failed to show any prejudice by the failure of his trial counsel to present an independent act defense. Both Carlton Chance's and Lonzo Love's fingerprints were compared to those fingerprints at the scene and did not match.

> (See Exhibit "T," p.66 and Exhibit "N," pgs. 2668-2670). Both men had verified alibis. (See Exhibit "T," pgs. 47-48, 54-55, 57, 59, 120,123- 125). If the Defendant had named or suggested anyone other than Chance or Love as co-perpetrators, he would have been impeached with his own statement given to Detective Santiago, in which he contended that Carlton Chance also known as "Goose" was his accomplice. (See Exhibit "S" and Exhibit "T," pgs. 119-120). Additionally, the veracity of the Defendant's self-serving statement to Detective Santiago that Carl or Goose was involved would be attacked given that the victim's ATM card. (See Exhibit "W," p.1796). As aforementioned, Love and Chance's fingerprints were not found at the scene of the crime and both men had alibis.

(R2554-2559).

The trial judge attached each section of the transcript or evidence which supported the order. This argument is a classic case of hindsight. Collateral counsel would have Mr. Erlenbach forego the motion to suppress the statement and present a defense that Willacy robbed his neighbor, saw her tied up, then simply left the scene in her car to go retrieve money from her bank account and left her alive in the house. Some unidentified co-defendant then killed Ms. Sather and somehow Willacy's fingerprints appeared on the gas can and fan used to fan the flames. Although Willacy contrived a lawn-mowing explanation for the prints on the gas can, there was no explanation for his prints on the fan. Both oscillating fans were kept in the victim's house, and Willacy denied ever being in the house.

As stated in *Strickland*, the Court must be highly deferential to counsel, and in assessing the performance, every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689.

Mr. Erlenbach's trial strategy was to eliminate as much of the evidence as possible. He succeeded in suppressing Willacy's statement and the show-up identification. He investigated an alternative theory of how Willacy's fingerprints came to be on the items. The person Willacy said was with him, Carlton "Goose" Chance, had a "pretty good alibi." (R638). Mr. Erlenbach investigated every angle, even Lonzo Love. (R 639).

Willacy also claims trial counsel was ineffective for failing to investigate the confidential informant. Mr. Erlenbach was aware of a confidential informant, James Brown, who said Lonzo Love was involved in the murder, but he was unable to secure Brown's appearance. (R648). Mr. Erlenbach deposed Lonzo Love rather than continue looking for Mr. Brown. (R649-50).

Brown's statement said Love had some checks, but there were no checks missing and Love's employer verified he was at work. (R714-15). The police had compared the prints at the scene to those of Love and Chance. Everyone who saw a black male driving Sather's car described him as 6 feet tall and muscular.

Love was effeminate and slight. (R720). The State could have easily shown that neither Chance nor Love was involved in the murder. (R657).

Erlenbach considered allowing Willacy's statement to be introduced, but it was "largely a confession of at least a felony murder" and, "of all the pieces of evidence that statement was by far the most damaging." (R640). If the statement had been admitted, it would have done great harm to the innocent explanations for the fingerprints: Erlenbach argued Willacy had been in the garage in order to mow the grass, which explained his fingerprint on the gas can and fan. (R641). If he allowed the statement into evidence and the jury did not believe the "strawman" murderer story, then Willacy had just admitted to felony murder. (R716). When asked whether the defense strategy was to eliminate evidence, Mr. Erlenbach stated he considered Willacy's statement so damaging that any other route would only be considered if the statement were not suppressed. (R656).

Willacy fails to establish trial counsel was deficient or that there is a reasonable probability the outcome of trial would be different. Trial counsel managed to suppress significant State evidence: a confession to felony murder and an eyewitness identification. His theory of defense was that the State could not prove its case. The decisions trial counsel made

were based on strategy. The Florida Supreme Court has clearly stated that counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

The statement Willacy now argues should have been presented in the defense case ("second statement")[15] shows that Willacy was at the scene, intended to take Ms. Sather's car and other items, and was aware the victim was tied up. Willacy points the finger at Carlton Chance[16] as being the perpetrator. The second statement contradicts the first statement which the State introduced at trial. (State Exhibit #80, 1991 trial).

In the first statement, Willacy said he had mowed Ms. Sather's lawn on Sunday but was out of town with family on Monday. (R1751, 1763). On Tuesday he was at Labor Force. (R1765). On Wednesday, a man named "Larry" who worked at House

[15] The first statement was made to Detective Santiago at Willacy's house on September 6, 1990. The second statement was made on September 7, 1990 at 4:00 a.m. at the police station.

[16] Carlton Chance was working with Reverend Whittaker on the day Ms. Sather was murdered. Counsel was aware of the solid alibi evidence. In fact, Rev. Whittaker testified to the same facts at the evidentiary hearing.

of Beauty, was supposed to drive Willacy to a job interview but did not arrive until later. (R1767). Willacy first said he was not home at 12:05 p.m. when the man came to see Sather's car, then said he was working on the roof. (R1768). Willacy denied driving Sather's car. (R1770-71). He denied jogging in the area on Wednesday. (R1773). Willacy was aware Sather wanted to sell a car, but he did not test drive it. (R1755). In the first statement, Willacy denied ever being inside Sather's house. (1756-57).

In the second statement, Willacy said someone was in the house and opened the door for him from the inside. (R3588). Willacy identified "Goose" (Carlton Chance) as the alleged co-perpetrator. (R3589). Willacy denied being in the house when Mrs. Sather arrived. He said he must have driven the car to park it some place when Mrs. Sather came home. (R3591). When asked why he left the car somewhere if he had gone to Mrs. Sather's only to rob the car, Willacy said "I was trying to, (unintelligible) leave it there, that's a good question." Willacy then decided "the car wasn't even really part of the whole thing." He was just going to take the keys and drive the car. When asked what the whole thing was about, Willacy said "I guess it was supposed to be taking some stuff." (R3592). Willacy also said the man who tied up Mrs. Sather put the victim's check register in his house. (R3592-93). Willacy then tried to explain

why he didn't want to say he had been in Sather's house. However, he "thought" he saw her tied up. (R3593). When asked where Willacy was when the other man was fighting with Mrs. Sather, he said "I must have been with the car." (R3596). He then said that when he "came back she was pretty much (unintelligible)." Willacy never smelled fire or gasoline even though he saw "some commotion in there going on." The unidentified assailant then left in a taxi. (R3597). The next day, "Goose" came by and said he had to tie up the victim. Willacy was concerned that his story was not exonerating him or "coming out straight." (R3599).

There was no evidence of anyone except Willacy being involved. *See Sweet v. State*, 810 So. 2d 854, 859-60 (Fla. 2002). Willacy's fingerprint was found on the motor of the fan placed at the victim's feet to fan the flames. (DAR17 1662-64). His fingerprint was also found on the gas can left in the house that was apparently used to pour gas on the victim before using matches to set her on fire. (DAR1700). Police found blood consistent with the victim's on several items in Willacy's house, i.e., a paper towel (DAR 2545), a tennis shoe (DAR 2550-52), and a pair of shorts (DAR2552). Property belonging to Ms. Sather was found hidden in Willacy's home in a gym bag

[17] "DAR" refers to the 1992 record on direct appeal, FSC Case No. 79,217.

containing a health club card belonging to Willacy's girlfriend. (DAR1755). Willacy was seen alone driving the victim's car and he was alone in photographs taken at the ATM while he used Ms. Sather's ATM card (DAR1796). There was only one person in the car when it was seen being abandoned. Finally, Willacy's prints were found on a videotape re-winder found on the back porch (DAR1698), and all of the stolen items, including the victim's check register, jewelry and coins, were recovered in his bedroom. (DAR3004-06).

The independent act defense is established only when one co-felon, who previously participated in a common plan, does not participate in acts committed by his co-felon, "which fall outside of, and are foreign to, the common design of the original collaboration." *Pittman v. State*, 841 So. 2d 690 (Fla. 2d DCA 2003), citing *Ray v. State*, 755 So. 2d 604, 609 (Fla. 2000), quoting *Dell v. State*, 661 So. 2d 1305, 1306 (Fla. 3d DCA 1995). If a co-felon performs acts exceeding the scope of the original plan, the defendant is exonerated from any punishment that is imposed as a result of the independent act. However, if a murder is committed in furtherance of an initial criminal scheme, then the doctrine does not apply. *Id.*; *Barfield v. State*, 762 So. 2d 564 (Fla. 5th DCA 2000). There was no evidence of any co-felon, and law enforcement investigated both Chance and Love who Willacy said were the true

perpetrators. Carlton Chance was with a minister the entire day Ms. Sather was murdered. Lonzo Love was cutting hair all day, a fact confirmed by his employer. *See Sweet*, supra.

There was no evidence warranting an independent act defense. Counsel cannot be ineffective for failing to present a defense for which there is no evidence. To find counsel deficient, Willacy must first show that a reasonable investigation would have uncovered the evidence. *Freeman v. State,* 858 So. 2d 319, 325 (Fla. 2003). Willacy has offered no evidence that was not known by trial counsel. By suppressing the statement and the Barton identification, Erlenbach eliminated two key pieces of State evidence. He made strategic decisions that are now being second-guessed by collateral counsel, a process condemned by *Strickland*.

ARGUMENT III

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO DISQUALIFY JUDGE YAWN AT THE *SPENCER* HEARING BECAUSE HE BELIEVED THE SENTENCING ORDER WAS PREPARED BEFORE THE HEARING.

In this claim Willacy argues that counsel was ineffective for not moving to disqualify Judge Yawn because he had prejudged the matter and decided on a death sentence.

An evidentiary hearing was conducted on this claim, after which the trial judge held:

> Under Claim XIII, the Defendant alleges that Mr. Kontos, his defense counsel at the

penalty phase in 1995, was ineffective for failure to seek disqualification of Judge Yawn based on the judge's alleged use of a sentencing order that had been prepared prior to the Spencer hearing. The Defendant contends that Judge Yawn had prejudged the matter and decided on a death sentence prior to the evidence presented at the Spencer hearing or the argument of counsel, thus, this was bias requiring Judge Yawn's disqualification.

After the evidence and testimony was presented at the 1995 sentencing hearing, Mr. Kontos requested Judge Yawn to recess and reschedule the hearing to a future time to impose sentence so that Judge Yawn would have more time to consider the evidence that was presented that day. (See Exhibit "I," p.104). Judge Yawn advised that he brought a "tentative written order" with him, but it was only tentative. (See Exhibit "I," p.105). Judge Yawn stated that he made changes to his tentative order as the evidence was presented that day. (See Exhibit "I," p.105). Mr. Kontos again requested that Judge Yawn recess so the court could consider the evidence that was presented that day and all the arguments. (See Exhibit "I," p.106). Judge Yawn denied Mr. Kontos's request explaining that:

> [W]hat I heard here today is nothing that I haven't heard throughout these proceedings really. I've heard it time and time and time again. It's in a different form or more expansive or through other vehicles, but it is precisely the same evidence that we've been hearing since the 18th day of September.

(See Exhibit "I," p.108). Nevertheless, Mr. Kontos argued that after the evidence was presented, including, the Defendant's own statements, Judge Yawn should postpone the sentencing and review the evidence

> sufficiently to make a final decision in the case. (See Exhibit "I," pgs. 109-110). Judge Yawn insisted that he had done that. (See Exhibit "I," p.110). Mr. Kontos again contended that he did not think that Judge Yawn had sufficient time to consider the evidence presented that day, and Mr. Kontos pointed out that Judge Yawn had indicated that the sentencing order had already been prepared. (See Exhibit "I," p.110). Judge Yawn again stated that the order he brought to court was only tentative, and he denied Mr. Kontos' request for a continuance. (See Exhibit "I," pgs. 110- 111).
>
> At the evidentiary hearing on the postconviction motion, Mr. Kontos testified that he believed that Judge Yawn had prepared the sentencing order before the Spencer hearing and Mr. Kontos wanted to preserve that issue for appeal. (See Exhibit "T," p.470). Mr. Kontos testified that he never thought of moving to disqualify Judge Yawn. (See Exhibit "T," p.470).
>
> The Defendant has shown no prejudice under the Strickland standard. On direct appeal from the penalty phase in 1995, one of the issues specifically raised was "whether the trial court erred in refusing to continue the final sentencing after additional evidence was presented." (See Exhibit "J," paragraph 10). This claim was denied by the Supreme Court of Florida. Willacy v. State, 696 So. 2d 693 (Fla. 1997). Judge Yawn indicated on the record that he did not have a final order, and that he made changes to his tentative order as he heard evidence and testimony presented at the Spencer hearing. The Supreme Court of Florida ruled that Judge Yawn did not err. Counsel cannot be deemed ineffective for failure to do a futile act.

(R2565-2567). These findings are supported by the record, and the judge attached each relevant section to his order.

Mr. Kontos testified that, in actuality, he wanted the judge to issue his final order that day because he felt the judge had already prepared his sentencing memorandum. (R1050, 1052). If the judge had already prepared his order before the *Spencer* hearing, it would be an issue on appeal (R1052).

Willacy now claims Mr. Kontos should have moved to disqualify the trial judge because he had already prepared his order before the *Spencer* hearing. The issue regarding the trial judge preparing his order in advance was before this court on direct appeal18, and this court found the claim had no merit. If the allegation that the trial judge prepared his order before the *Spencer* hearing has no merit, then a motion to disqualify the judge because he "pre-prepared" his order has no merit.

Further, a motion to disqualify Judge Yawn would not be well-taken because there no reasonable person would believe he would be denied a fair trial simply because the judge, who had heard the evidence repeatedly, had been working on a tentative order. The test a trial court must use in reviewing a motion to disqualify is set forth in *MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So. 2d 1332 (Fla. 1990). In *MacKenzie,* this

[18] Point X on appeal from resentencing alleged Willacy was denied the right to a fair trial for multiple reasons, one of which was the trial court's failure to recess the *Spencer* hearing to consider evidence because the judge had a "pre-prepared sentencing order." (Initial Brief on direct appeal in Case No. 86,994)

Court held 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.'" *Id.* at 1335 (quoting *Livingston v. State,* 441 So. 2d 1083, 1087 (Fla. 1983)). In fact, this Court ruled on a similar issue in *Willacy II* which shows this claim has no merit. In Note 5 of *Willacy II* this Court held that a pre-trial motion to recuse Judge Yawn because he was "biased in favor of death" was "speculative and without basis."

Willacy has now couched the recusal issue in terms of ineffective assistance of counsel which will not save the claim from procedural bar. *State v. Riechmann*, 777 So. 2d 342, 353 (Fla. 2000); *Medina v. State*, 573 So. 2d 293, 295 (Fla.1990). This issue should be denied for several reasons: First, the issue has no merit as previously discussed. Second, Mr. Kontos was preserving another issue for appeal. *See Spencer v. State*, 615 So. 2d 688 (Fla.1993); *Armstrong v. State*, 642 So.2d 730 (Fla.1994) (judge should take recess between presentation of evidence and imposing sentence). This issue was, in fact, raised on direct appeal.

ARGUMENT IV

PENALTY PHASE COUNSEL WAS NOT INEFFECTIVE IN THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE

In these claims, Willacy alleges that re-sentencing counsel was ineffective for not presenting more mitigating evidence and for not introducing mental health testimony to rebut the cold; calculated, and premeditated aggravator. This claim was afforded an evidentiary hearing, after which the trial judge held:

> Claims XXI, XXII, XXIII, and XXIV in the Defendant's post-conviction motion all pertain to the Defendant's allegations that penalty phase defense counsel in 1995 was ineffective in the presentation of mitigating evidence. Both post-conviction counsel and the State consolidated their written closing argument as to these claims, because the evidence presented at the evidentiary hearing as to these claims overlaps. This Order will also address these four claims together.
>
> Under Claim XXI, the Defendant alleges that counsel was ineffective for failure to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(f), Florida Statutes; namely, that at the time of the homicide, the Defendant was unable to conform his conduct to the requirements of law because he was suffering from Attention Deficit Hyperactivity Disorder (ADHD), bipolar illness, and substance abuse. The Defendant contends that counsel should have called Dr. Riebsame to testify in support of this mitigator. In addition, the Defendant contends that Mr. Kontos was ineffective for failing to furnish Dr. Riebsame with necessary background documents regarding the Defendant and the case. The Defendant further contends that Mr. Kontos was ineffective for failing to direct Dr. Riebsame to perform a thorough examination

or evaluation as to potential statutory and non-statutory mitigating factors.

Under Claim XXII, the Defendant alleges that counsel was ineffective for failing to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(b), Florida Statutes; namely, that the homicide was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The Defendant contends that "[a] mental health expert would have analyzed the significance of the Defendant's prolonged drug use on existing mental health conditions and then discussed the correlation between the magnitude of the Defendant's drug addiction and the facts of the crimes charged."

Under claim XXIII, the Defendant alleges that his counsel at the 1995 penalty phase was ineffective for failing to present as non-statutory mitigation that the Defendant was physically abused by his father and witnessed domestic violence by his father on his mother on an on-going basis during his childhood and adolescence.

Under claim XXIV, the Defendant alleges that counsel was ineffective for failing to present a mental health expert to testify that the Defendant was in a drug-induced psychosis at the time of the homicide and therefore was unable to form the conscious intent necessary for a cold, calculated, and premeditated homicide.

At the evidentiary hearing, Mr. Kontos testified that he consulted with Dr. Riebsame, a psychologist, prior to trial. Dr. Riebsame indicated that his testing showed indicators that the Defendant might be a sociopath or psychopath. (See Exhibit "T," p.435). As a result, Mr. Kontos decided to not employ Dr. Riebsame or allow him to proceed further to see if that diagnosis was accurate. (See Exhibit AT@ p.435). In Mr.

Kontos's words, he closed [that door] and locked it." (See Exhibit "T," p. 435). Mr. Kontos believed that the jury would not be receptive at all to the Defendant being anti-social, a sociopath, or psychopath, and Mr. Kontos concluded that Dr. Riebsame would not be helpful to him in the penalty phase. (See Exhibit AT" p.435-436, 488-490).

Mr. Kontos also testified that he had information that the Defendant's father was a strict disciplinarian, but he was not aware that Colin Willacy abused alcohol and that the Defendant suffered physical abuse as a result. (See Exhibit AT," p.425-426). Mr. Kontos testified that he interviewed the Defendant, his family members, and friends, and that there was no indication from them that the Defendant had suffered an abusive or dysfunctional family life, or that the Defendant had been referred to a psychologist as a child. (See Exhibit T," p.424,491).

At the evidentiary hearing, Dr. Riebsame testified that after being supplied documents from post-conviction counsel and conducting further examination, his opinion remained the same that the Defendant was anti-social. (See Exhibit AT@ p. 545-546). Dr. Riebsame testified that the Defendant met the diagnosis for Attention Deficit Hyperactivity Disorder, Antisocial Personality Disorder, and the Defendant likely met the criteria for a diagnosis of cocaine intoxication and cocaine withdrawal. (See Exhibit "T," p.581). As to the statutory mitigating factors, Dr. Riebsame testified that the Defendant's ability to appreciate the criminality of his conduct was not impaired. (See Exhibit "T," p. 594). Dr. Riebsame also testified that the Defendant's capacity to conform his conduct to the law was impaired, but not substantially. (See Exhibit "T," p. 594). Dr. Riebsame testified that A[y]es, I would suggest there are very extreme mental or

emotional disturbances in this case given the crack cocaine intoxication at the time and symptoms of the other mental disorder." (See Exhibit "T," p.598). Dr. Riebsame testified that his expert testimony would not be useful in terms of attacking the cold, calculated, and premeditated aggravator. (See Exhibit "T," pgs. 601-603). Dr. Jeffrey A. Danziger, a board certified forensic psychologist, called by the State at the post-conviction evidentiary hearing, contradicted Dr. Riebsame's opinions. (See Exhibit "U" 12/19/2003 Transcript, pgs. 144,153). Dr. Danziger testified that the Defendant's conduct as a child was not indicative of Attention Deficit Hyperactivity Disorder, but rather a "conduct disorder," and when the Defendant reached the age of eighteen, he met the last requirement to be diagnosed a "sociopath, meeting the criteria for Antisocial Personality Disorder." (See Exhibit "U," 12/19/2003 Post-conviction Evidentiary Hearing Transcript, pgs. 154-155, 172). Dr. Danziger's diagnoses, according to the DSM-IV-TR, were cannabis abuse, cocaine abuse, alcohol abuse, and Anti-social Personality Disorder. (See Exhibit "U," 12/19/2003 Transcript, p.144). Dr. Danziger testified that there was no evidence that the Defendant met the criteria for Attention Deficit Hyperactivity Disorder and even if he had ADHD, it "did not rise to the point of affecting the Defendant's behavior." (See Exhibit "U," 12/19/2003 Transcript, pgs. 153, 157). Dr. Danziger opined that the Defendant was not under an extreme mental or emotional disturbance at the time of the crime, and that the Defendant was not under the influence of cocaine to any substantial degree at the time of the crime. (See Exhibit "U" 12/19/2003 Transcript, pgs. 157, 166, 204). Dr. Danziger further opined that the Defendant had no psychiatric illnesses relevant to this offense at the time of the offense and that the Defendant had the ability to appreciate the

criminality of his conduct and did have the ability to conform his conduct to the requirements of the law. (See Exhibit "U,"12/19/2003 Transcript, pgs. 167-168).

The Court finds that defense counsel was not ineffective in failing to present testimony at the penalty phase in 1995 that the Defendant allegedly suffered from bipolar illness and Attention Deficit Hyperactivity Disorder, coupled with a history of substance abuse. Mr. Kontos also was not ineffective in failing to present evidence of the Defendant's physical abuse as a child. Mr. Kontos made a sound strategic decision not to further pursue the mental mitigation evidence described under claims XXI and XXII in the Defendant's post-conviction motion. This evidence would have conflicted with Mr. Kontos's strategy during the penalty phase. Mr. Kontos testified at the evidentiary hearing that his strategy in presenting mitigating evidence was to try "to paint a picture of Chad Willacy as a life worth saving." (See Exhibit "T," p. 430). Mr. Kontos elaborated:

I tried to show the jury what kind of a person he was separate and distinct to our period that the prosecutor was trying to focus on. Trying to get them to just look at him like a regular person as opposed to what I hoped they wouldn't do which is look at him as a cold-blooded murderer.

(See Exhibit "T," p.430). In order to accomplish this strategy, Mr. Kontos took "snippets of Mr. Willacy's life" which told the jurors about him. (See Exhibit "T," p. 430). At the penalty phase, Mr. Kontos called a number of witnesses that testified to the Defendant's good deeds in his life, as well as some reference to the Defendant's drug problems. (See Exhibit "T," pgs. 430-431).

Eric Jiles testified that he had known the Defendant for twenty years. Mr. Jiles testified that the Defendant was a thoughtful, non-violent person, who would help others. Mr. Jiles gave examples of this; such as, the Defendant helping take a drunk, homeless person in the winter into a restaurant so he would not freeze to death, and he helped people push their cars that had broken down. (See Exhibit "N," pgs. 2751-2755). Mr. Jiles testified that the Defendant had a drug problem during his senior year in high school, volunteered for admission at a drug detox center, but relapsed and ultimately moved to Florida to escape the bad elements in New York. (See Exhibit "N," pgs. 2755-2758). Mr. Jiles testified that he never saw the Defendant have violent episodes when he used drugs. (See Exhibit "N," p.2758).

Eric Jiles's father, Andrea Jiles, also testified at the 1995 penalty phase. He testified that he had known the Defendant for twenty years. (See Exhibit AN@ pgs. 2762-2763). Andrea Jiles characterized the Defendant as a polite child, who was respectful to adults, and a peacemaker. (See Exhibit "N," pgs. 2764- 2765). Andrea Jiles testified that the Defendant began using cocaine and wanted help to stop, so Jiles arranged for the Defendant to be hospitalized in a detox center for seven days. (See Exhibit "N," pgs. 2766-2767). The Defendant ultimately relapsed and avoided Jiles because of his embarrassment over the situation; (See Exhibit "N," p.2767-2768).

Paul Limmer the Defendant's New York high school track coach, testified that the Defendant was bright, captain of the high school track team, popular with his peers and teachers, respectful, responsible, and not violent. (See Exhibit "N," pgs. 2770-2780). Limmer would loan the Defendant money, and unlike other students, the Defendant would actually re-pay him. (See

Exhibit "N," p.2775). Coach Limmer testified that the Defendant was a model citizen. (See Exhibit "N," p.2778).

Arthur Anderson, a friend of the Willacy family, testified that the Defendant was a leader, role model to his friends, athletic, honest, and respectful of others. Mr. Anderson testified that the Defendant was someone you would want as a son and the type of person who believed in doing right and achieving something worthy in this world. (See Exhibit "N," p.2785).

Ismail Viena, a close high school friend of the Defendant; testified that the Defendant was like a brother. Viena testified that the Defendant was a good friend, popular in school, and had a close relationship with his parents. Viena further testified that the Defendant never displayed a violent temper. (See Exhibit "N," 2787-2793).

The Defendant's sister, Heather Willacy testified that the Defendant was very helpful to others and the family's neighbors. The Defendant assisted one of the elderly neighbors in the neighborhood when she fell down and could not get back up. Heather Willacy described her brother as kind and generous, without a violent temper. (See Exhibit "N," pgs. 2797-2816).

The Defendant's maternal grandfather, Joseph Robinson, testified that the Defendant was very respectful of adults, never displayed a violent temper, and he liked to work. (See Exhibit "N," pgs. 2817-2821).

Audrey Willacy, the Defendant's mother, testified that the Defendant participated in Little League, went to Catholic school, played the piano, and attended Sunday School. (See Exhibit "N," p.2824). Ms. Willacy testified that the Defendant "was brought up in a loving family." (See Exhibit "N," p.2824). She also testified that the

Defendant was offered numerous scholarships. (See Exhibit "N," 2825). The Defendant's mother described him as respectful to adults, polite, and helpful to neighbors. (See Exhibit "N," p.2825-2826). She testified that she was aware that the Defendant was involved in drugs, and he moved to Florida to get away from these influences. (See Exhibit "N," p.2829). Audrey Willacy testified that the Defendant was not violent and the charges against him were out of character for him. (See Exhibit "N," p.2825). Audrey Willacy testified that the Defendant "was brought up in a loving, religious home, went to church. He knows about God. Just think about that.'' (See Exhibit AN@ p.2828).

The last person to testify on the Defendant's behalf at the 1995 penalty phase was the Defendant's father, Colin Willacy. He testified that his son was popular in school, average academically, and an exceptional athlete. (See Exhibit "N," p.2832). Colin Willacy described his son as a caring person who once talked a classmate out of committing suicide, then continued to help the classmate to resolve her emotional problems afterwards. (See Exhibit "N@ pgs. 2834-2835). Like his other family members and friends, the Defendant's father described the Defendant as helpful to others and neighbors, and loved by teachers. (See Exhibit "N," 2835). Cohn Willacy told the Court and jury, "I feel to myself that it's like night and day that he should come to Florida and find himself so much changed and be so out of character after the good human being that I knew up until four months ago prior to his being charged with this. That's all I can say." (See Exhibit "N," p.2838).

After speaking with Dr. Riebsame, Mr. Kontos made a strategic decision not to pursue mental health mitigation further because of the potential diagnosis of anti-social personality disorder, a mental health

condition that Mr. Kontos believed would be devastating to the defense. The Court finds this was a sound strategic decision because the conclusion that the Defendant was a sociopath, psychopath, or had antisocial behavior would have conflicted with 1995 penalty phase counsel's strategy of presenting the Defendant as an ordinary person whose life was worth saving. At the penalty phase in 1995, defense counsel "humanized" the Defendant with the testimony of the Defendant's friends and family, and the Defendant's drug problem was presented as a possible explanation for the Defendant's out-of-character behavior on the day of the homicide. (See Exhibit "N," pgs. 2751-2837, 3113-3124). Even though Mr. Kontos was unsuccessful in persuading the jury and Judge Yawn to sentence the Defendant to life imprisonment, this Court cannot conclude Mr. Kontos was ineffective. Mr. Kontos had a legitimate concern, recognized in the legal profession that presenting the Defendant's antisocial personality disorder might have left the jury with the impression that the Defendant was a dangerous man; thus, acting as an aggravator instead of a mitigator. See Banks v. State, 842 So. 2d 788 (Fla. 2003); Rose v. State, 617 So. 2d 291 (Fla. 1993); Reed v. State, 875 So. 2d 415, 437 (Fla. 2003). "The issue is not what present counsel or this 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." Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000). Humanizing the Defendant is an accepted strategy that falls within the broad range of reasonably competent performance under prevailing professional standards. See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (penalty phase counsel employed the strategy of humanizing defendant); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994) (defendant's penalty phase counsel's. strategy of

humanizing the defendant was upheld). By the strategy employed by 1995 penalty phase counsel for the Defendant, the jury was able to hear about the Defendant's drug use without delving into the potential pitfalls associated with calling Dr. Riebsame; such as, opening the door for extremely damaging testimony on cross-examination regarding the Defendant's anti-social behavior. See Windom v. State, 29 Fla. L. Weekly S191 (Fla. May 6, 2004) (explaining that trial counsel is not deficient for failing to present additional testimony that would have informed the jury of negative information about the defendant); Breedlove v. State, 692 So. 2d 874,877-78 (Fla. 1997) (holding Breedlove not prejudiced by failure to present witnesses at penalty phase where State would then be able to cross-exam witnesses and present rebuttal evidence that would have countered any value Breedlove might have gained from the evidence.) The facts that the Defendant had antisocial personality disorder could have been considered as negative by the jury. The mental mitigation evidence would have opened the door to testimony about the Defendant's threat to kill a teacher, setting a school bulletin board on fire, setting squirrels on fire, running over squirrels with a lawnmower, and descriptions by a school principal of the Defendant as incorrigible and needing counsel (See Exhibit AT" pgs. 556, 559 and Exhibit "U," 12/19/2003 Transcript, pgs. 163,171-173).

Mr. Kontos also was not ineffective for his failure to present mitigation evidence regarding the physical abuse the Defendant suffered as a child and adolescent. At the evidentiary hearing, Mr. Kontos testified that he had information that the Defendant's father was a strict disciplinarian, but he was not aware that Colin Willacy abused alcohol and that the Defendant suffered physical abuse as a result. (See Exhibit "T," p 425-426). Mr. Kontos interviewed the

Defendant and his family members and friends, but there was no indication from them that the Defendant had suffered an abusive or dysfunctional family life. (See Exhibit "T," p.491). At the first penalty phase in 1991, then the second penalty phase in 1995, the Defendant's family described under oath their family relationship as very loving, and the befendan4's father was a strict disciplinarian, which was consistent with Mr. Kontos's recollection of what they told him. (See Exhibit "N," pgs. 2816, 2828, 2837 and Exhibit "V," 1st penalty phase trial record, pgs. 43-65). At the evidentiary hearing, Heather Willacy testified that she knew if physical abuse had taken place she should have volunteered the information, but she never informed Mr. Kontos of the physical abuse. (See Exhibit "T," p.727). Dr. Riebsame testified that the Defendant denied to him a history of physical abuse. (See Exhibit "T," p. 549). The Defendant has failed to show that counsel's performance was deficient under the first prong of Strickland. Counsel cannot be deemed ineffective for relying on information that the Defendant's family gave under oath regarding a loving and caring family which drastically conflicted with a dysfunctional family where the father was an alcoholic and when drunk beat the Defendant and his mother.

The Defendant's ineffective assistance of counsel claims also fail because the Defendant was not prejudiced by 1996 penalty defense counsel's failure to present the mitigation evidence. The Defendant has failed to show that there is a reasonable probability that the outcome of the penalty phase would have been different had this evidence been introduced. First of all, both Doctors Reibsame and Danziger testified that the Defendant was able to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law was not substantially impaired.

Second, the facts of this case show a deliberate, methodical process, not the activities of someone under the influence of an extreme emotional disturbance and cocaine intoxication, who is unable to conform his conduct to the requirements of law. (See Exhibit "U," 12/19/2003 Transcript, pgs. 158-160,167-169). This case involved a criminal episode that lasted several hours. When Ms. Sather found the Defendant burglarizing her home, he beat her, then retrieved household items to tie her up, including an iron cord, duct tape, and screen spline. (See Exhibit "W@ pgs. 996, 1029-1031, 1114- 1119, 1242); The Defendant obtained the victim's ATM pin number, her ATM card, and the keys to her car, and drove to her bank and withdrew money out of her account. (See Exhibit "W," pgs. 2097-2121). The Defendant hid the victim's car around the block while he made trips from the house. The Defendant placed stolen items on the victim's porch for later retrieval and took a significant amount of property from Ms. Sather's house to his house, then drove the car to Lynbrook Plaza where he left it and jogged back home. (See Exhibit "W," pgs. 1742, 1754, 1849-1854). The Defendant disarmed the smoke detectors, and doused Ms. Sather in gasoline which he had obtained from the garage. (See Exhibit AW" pgs. 875,1250). He placed a fan from the guest bedroom at her feet to provide more oxygen to the fire, then struck several matches as he set her on fire. (See Exhibit "W," p.870). The Defendant knew that Ms. Sather could identify him, so he eliminated her as witness and tried to eliminate fingerprints and other evidence by burning her house. (See Exhibit "W," pgs. 866-868). The Court having considered the testimony of Doctors Riebsame and Danziger finds that the Defendant was not intoxicated by cocaine at the time of the commission of the crime. Fourth, Dr. Riebsame, testified that his expert testimony would not necessarily be useful in terms of attacking the cold,

> calculated, and premeditated aggravator. (See Exhibit "T," pgs. 601-603). Therefore, his testimony would not have rebutted this aggravator.
>
> Lastly, there was overwhelming evidence of the Defendant's guilt of first degree premeditated murder, and there was substantial, compelling aggravation found by the jury and the trial court. Even if Mr. Kontos had abandoned the Anormal person whose life was worth saving" strategy and pursued and presented all of the mitigation as proposed by the Defendant, the outcome at the penalty phase would not have been different. There were five aggravating factors in this case, and even if all of the mitigators had been proven as the Defendant contends, they would not have outweighed any one of the aggravators.

(R2569-2582).

These findings are supported by the record, and the trial judge attached each excerpt.

Willacy never told Mr. Kontos of childhood problems and never admitted the crime. Kontos was not aware that there had been a recommendation for Willacy to see a psychologist when he was a child. (R1015). He was not aware that Willacy's father abused alcohol, and that Willacy suffered physical abuse as a result. (R1016-17). Although Mr. Kontos interviewed Willacy’s family members and friends and presented their testimony at the penalty, they testified at re-sentencing in a manner directly opposite to their testimony at the evidentiary hearing. There

was no indication from Willacy or any of his family members that he had suffered an abusive or dysfunctional family life. (R1082)

Mr. Kontos made a strategic decision to present testimony regarding the positive aspects of Willacy's life. That testimony was detailed in the trial court's order. Kontos made a decision not to present negative testimony regarding anti-social personality. Had Mr. Kontos presented this additional testimony, it would have opened the door to extremely damaging testimony about the Defendant on cross-examination. *See Breedlove v. State*, 692 So. 2d 874, 877-78 (Fla.1997) (holding that trial counsel was not ineffective for failing to present testimony of friends and family members that would have been subject to cross-examination that would have countered any value defendant might have gained from favorable evidence). As the lower court held, trial counsel is not ineffective for failing to present background information which would have allowed the presentation of damaging or derogatory evidence, including violent tendencies, in rebuttal. *Breedlove*; *Windom v. State*, 886 So. 2d 915 (Fla. 2004); *Medina v. State*, 573 So. 2d 293, 298 (Fla.1990). The trial strategy status of such a decision is unassailable when, as here, counsel knew about and interviewed the witness and then made a decision not to present the testimony. *See, Jones v. State*, 528 So. 2d 1171 (Fla. 1988). Unless no reasonable lawyer would have made the decision not to

present the witness, counsel cannot have been ineffective. *Waters v. Thomas*, 46 F.3d 1506, 1511-12 (11th Cir. 1995).

This Court has consistently held that strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected, *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998); *Melendez v. State*, 612 So. 2d 1366, 1368 (Fla. 1992); *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla.1987); *Bryan v. Dugger*, 641 So. 2d 61, 64 (Fla.1994) and that tactical decisions are not subject to collateral attack. *Buford v. State*, 492 So. 2d 355, 359 (Fla. 1986); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

Furthermore, the fact that Dr. Riebsame has now partially changed his diagnosis does not render counsel's background investigation ineffective. As in *Pace v. State*, 854 So. 2d 167, 175 (Fla. 2003), the experts at the evidentiary hearing testified that they currently believed that Pace was suffering from an emotional disturbance at the time of the murder and his ability to conform his conduct to the requirements of the law was impaired. However, the information those experts attributes to this change in opinion was comprised primarily of individuals who had changed their accounts of Pace's behavior or other information that counsel had no reason to pursue due to the representations of Pace and others. Willacy claimed innocence and no involvement with the murder of Ms. Sather. Presentation

of evidence of emotional disturbance at the time of the offense would be inconsistent with his continued claim of innocence. Mr. Kontos did conduct a sufficient investigation of mental health mitigation before trial, but made a strategic decision not to present such evidence. For example, in *Rose v. State*, 617 So. 2d 291, 294 (Fla.1993), where a psychologist determined the defendant had an antisocial personality disorder, but not an organic brain disorder, the court denied an ineffective assistance of counsel claim based on counsel's failure to investigate further. *See also Banks v. State*, 842 So. 2d 788, 791 (Fla. 2003). Willacy has failed to demonstrate that counsel's strategy for the presentation of the penalty phase evidence was deficient. *Windom v. State*, 886 So. 2d 915 (Fla. 2004).

Recently in *Reed v. State*, 875 So. 2d 415 (Fla. 2004) this Court acknowledged that a diagnosis of anti-social personality disorder was just as likely to have resulted in aggravation against rather than mitigation for Reed." The fact that Willacy was thrown out of the house for drug use, was beaten and is a psychopath could well be considered negative information by a jury.

As to the prejudice prong of *Strickland*, there is no reasonable probability the additional evidence presented at the evidentiary hearing would have changed the outcome of the

verdict. Kontos made a strategic decision not to present negative testimony such as antisocial behavior. Kontos was not aware of the physical abuse, and Willacy denied such abuse as recently as 2002 when Dr. Riebsame evaluated him. The parents' and sister's testimony was hardly credible since they had testified several times to the contrary. Although given an opportunity to reveal who his alleged partner in crime was, there was no evidence of any such person. Willacy claimed his role was minor compared to the real murderer; however, he presented no evidence as to the identity of that person. As in *Sweet v. State*, 810 So. 2d 854 (Fla. 2002), the evidence at trial showed Defendant's motive and intent to eliminate a witness after he robbed her. The facts of the crime show a deliberate, methodical process, not the activities of someone under the influence of extreme emotional disturbance and unable to conform his conduct to the requirements of law. Dr. Danziger testified that the facts of the crime were inconsistent with cocaine intoxication. (R1510-1511). It was Dr. Danziger's opinion that at the time of the offense Willacy did have the ability to appreciate the criminality of his conduct and did have the ability to conform his conduct to the requirements of the law. (R1518-19).

Dr. Riebsame based his finding of "extreme emotional disturbance" on the recent invention of a cocaine intoxication

defense. Without drug use, Riebsame would not offer the opinion that Willacy was under extreme mental or emotional disturbance (R1269). An intoxication defense is not supported by the facts of the case. There was no evidence of cocaine ingestion except Willacy's statement which he retracted. Willacy did not testify at the evidentiary hearing regarding cocaine intoxication; in fact, he continues to deny involvement. Willacy's girlfriend, Marisa Walcott, was with Willacy in the morning and afternoon. (R2319-2320). She mentioned nothing about him acting strangely. Dr. Riebsame based his opinion that Willacy ingested cocaine on a memo from a CCRC investigator relaying what Carlton Chance had said. (R1160). Unfortunately, the CCRC investigator had the dates wrong. The statement of Chance given to Detective Bauman showed that the cocaine ingestion Chance referred to was the day after the murder. *See Henry v. State*, 862 So. 2d 679 (Fla. 2003).

The question is how Dr. Riebsame found that Willacy was under the influence of cocaine and suffering from extreme emotional distress when Willacy continues to deny involvement (R1206). *Groover v. State*, 489 So. 2d 15, 16 (Fla. 1986). Dr. Reibsame's conclusions are based on speculation. In fact, Willacy told Dr. Danziger he had not been using drugs the day of the murder. (R1498). As Dr. Danziger testified:

> And since he said that he did not do it I therefore was not able to discuss with him if there were any contributing factors or things in his mental state that might have influenced his behavior at the time since he simply said I didn't do it.

(R1496).

Willacy's answers to questioning on the September 6, 1991, videotape were "logical, coherent, rational. There was no disorganized thought flow or bizarre statements." (R1500). Lonzo Love saw Willacy approximately 6:00 p.m. the night of the murder, a fact consistent with Marisa Walcott's penalty phase testimony that they all went out to dinner. Love described Appellant as calm, no agitation. Love also spoke to Appellant on September 5, 1991, about renting a room and noticed nothing abnormal. (R1501). Carlton Chance's September 8, 1991, statement said he did not see Willacy on September 5, but saw him three times on Thursday, the day after the murder. (R1502). The statement by the CCRC investigator stated Chance sold Willacy a rock of cocaine the night before, a statement which contradicted Chance's September 8, 1991, statement. (R1502).

Further, Dr. Riebsame's conclusions are contradicted by the facts of the case. The trial court outlined the facts of this case in its re-sentencing order (R2622-2632) which was affirmed in *Willacy II*. The trial court in the present case outlined further facts in the Order Denying the Amended Motion

for Postconviction Relief. (R2547-2550). Those facts are inconsistent with someone who was intoxicated and extremely emotionally disturbed. Willacy retrieved household items, including an iron cord and screen spline, to tie up his victim. He disarmed the smoke detectors. He trussed the victim for immobility. He secured the ATM code and withdrew $200 from the victim's bank. He drove to the bank and disposed of the car without incident or being stopped for erratic driving. He carefully stashed items on the porch for later retrieval. When this was all accomplished, he doused the victim in gasoline which he obtained from the garage and placed a fan from the guest bedroom at her feet to direct the flow of air. Willacy knew the victim, he made sure he eliminated her as a witness. (DAR614-624).

The fact that a defendant secures favorable testimony of mental mitigation and brain damage at a later date does not render counsel's investigation into mitigation ineffective. *See Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993). *See also Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) (stating 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). Mr.

Kontos diligently obtained a mental health professional to examine Willacy prior to trial, but this resulted in unfavorable information. Counsel was not deficient for reasonably relying upon Dr. Riebsame's opinion and not seeking out additional experts. *See Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir.1990) (stating counsel is not required to shop for a psychiatrist who will testify in a particular way).

In *Cooper v. State*, 856 So. 2d 969, 976 (Fla. 2003), this Court held that trial counsels' decision not to present a mental health expert as a mitigation witness, because his conclusions regarding Cooper's culpability were potentially damaging, is precisely the type of strategic decision which *Strickland* protects from subsequent appellate scrutiny. The issue before the court was not what present counsel or this 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, *Occhicone v. State*, 768 So. 2d 1037, 1049 (Fla. 2000). In connection with Cooper's ineffectiveness claim, the Court noted that the presentation of testimony during postconviction proceedings of more favorable mental health experts does not automatically establish that the original evaluations were insufficient. *See Carroll v. State*, 815 So. 2d 601, 618 (Fla. 2002); S*ee also Gaskin v. State*, 822 So. 2d 1243, 1250 (Fla. 2002) (holding that counsel's mental

health investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert) and *Rivera v. State*, 859 So. 2d 495 (Fla. 2003)(failure to present mitigating evidence defendant was under influence of cocaine did not amount to ineffective assistance even though counsel has now secured new mental health experts).

ARGUMENT V

THE TRIAL COURT DID NOT ERR IN DENYING A CLAIM BASED ON JUROR CLARK; THIS ISSUE IS PROCEDURALLY BARRED

This issue is yet another Juror Clark issue, an issue which was decided in *Willacy I* in 1994. Willacy claims trial counsel was ineffective for failing to "inquire of Juror Clark regarding his failure to respond to questions posed by the State." (Initial Brief at 80). Since the Juror Clark issue was heard while the direct appeal was pending, this issue was apparent from the face of the record and any ineffectiveness claim should have been raised on direct appeal. As such, this issue is procedurally barred.

Further, this issue has no merit. Willacy cites to the portion of Mr. Erlenbach's testimony in which he states he would have stricken the juror *if* he had known he was in PTI diversion. It was the sworn testimony of both Mr. and Mrs. Erlenbach that they did *not* know of Juror Clark's arrest or pending charges;

therefore, this statement is nothing more than hindsight. The trial court held:

> Under claim VII, the Defendant alleges that Mr. Erlenbach was ineffective for failure to inquire during voir dire regarding Juror Clark's eligibility to serve as a juror. In the direct appeal to the Supreme Court of Florida, the Defendant asserted that Juror Clark was not qualified to sit as a juror because he was under prosecution. Willacy v. State, 640 So. 2d 1079, 1080 (Fla. 1994). The Supreme Court of Florida found that no error occurred requiring a new trial because Juror Clark was not under prosecution. Id. The Defendant is improperly attempting to couch an issue raised on direct appeal and resolved adversely to him into an ineffective assistance of counsel claim. See Medina v. State, 573 So. 2d 293,295 (Fla. 1990). Even assuming *arguendo* that defense counsel's performance was deficient, the Defendant has failed to show any prejudice. The Supreme Court of Florida found that Clark was not under prosecution. Even if counsel had asked whether Clark was Aunder prosecution," Juror Clark had no obligation to answer in the affirmative.

(R2560-2561).

These findings are supported by competent, substantial evidence, particularly, this Court's decision in ***Willacy I.*** There was a hearing at the motion for new trial in which all issues were raised. As the trial court found, raising this issue as an ineffective claim is merely an attempt to resurrect an otherwise defaulted issue. The fact is this Court found no merit to the Juror Clark issue in ***Willacy I***. Willacy fails to explain how counsel can be ineffective when Clark was eligible to serve on

the jury. This is a classic example of hindsight which *Strickland* specifically cautions against. In perhaps the most puzzling statement made in the initial brief, Willacy states in footnote 25 that *Mrs.* Erlenbach questioned Juror Clark, not *Mr.* Erlenbach. Yet every statement quoted in this claim is Mr. Erlenbach's opinion on the issue, implying it was Mr. Erlenbach who was at fault. The lesson of *Strickland* is that a defendant is not entitled to perfect counsel, but to reasonable counsel. This claim is total speculation: that *if* Mrs. Erlenbach had known of Juror Clark's status, and *if* she had known Willacy would be convicted, and *if* she had known to ask a specifically phrased question in order to elicit certain testimony from Clark, then Willacy would not have been convicted. This logic fails to recognize the fact that Clark was *not* "under prosecution."

ARGUMENT VI

THE TRIAL COURT DID NOT ERR BY NOT APPLYING *LOWREY V. STATE* RETROACTIVELY; THIS ISSUE IS PROCEDURALLY BARRED.

Willacy next claims that the trial court applied an incorrect standard of law in denying the Motion for New Trial. This is an issue that could have been raised in *Willacy I* and is procedurally barred. To avoid the procedural bar Willacy argues that *Lowrey v. State*, 705 So.2d 1367 (Fla. 1998), should be applied retroactively, an argument which was not made in the

Amended Motion for Postconviction Relief. Therefore, this issue is not reviewable on appeal. The trial court held:

> Under claim eight, the Defendant alleges that the trial court applied an incorrect standard of law in denying Defendant's motion for new trial. The Defendant asserts that in ruling on the motion for new trial, Judge Yawn determined that the Defendant had failed to demonstrate any prejudice resulting from Juror Clark's service. Citing Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), a case that was issued years after Judge Yawn's ruling, the Defendant contends that Ainherent prejudice to a defendant is presumed when a juror is under prosecution by the same state attorney's office that is prosecuting the defendant."
>
> The Defendant's claim that Judge Yawn applied the wrong legal standard when ruling on the Defendant's motion for new trial is barred from being raised at this postconviction juncture of the case, because it is an issue that could have been raised on direct appeal. See Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001)(AA claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion.")

(R2597-2598). These findings are supported by the record. Again, Willacy fails to acknowledge ***Willacy I*** and that Clark was not "under prosecution," as was the defendant in ***Lowrey***. Even if the retroactivity issue had been raised below, the ***Lowrey*** decision should not be held retroactive. As this Court recently held in ***Chandler v. Crosby***, 30 Fla. L. Weekly S661 (Fla. Oct.6, 2005):

> In deciding whether a new rule should apply retroactively, this Court balances two important considerations: (1) the finality

> of decisions; and (2) the fairness and uniformity of the court system. *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). In *Witt*, we stated that a new rule of law will not apply retroactively unless the new rule "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id*. at 931.
>
> . . . .
>
> Under *Witt*, a decision is of fundamental significance when it either places "beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or when the rule is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967), and *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)." *Witt*, 387 So. 2d at 929.

The *Lowrey* case is not of fundamental significance, does not apply to Juror Clark who was not under prosecution, and will not save Willacy from the procedural bars.

ARGUMENT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR DNA TESTING.

Willacy sought DNA testing on men’s shorts, a green tank top, a man’s shirt, and a napkin, alleging that the blood on the items belonged to his girlfriend, Marisa Walcott. His motion was filed December 1, 2003. (R2322-2324). The State moved to strike the motion for being facially insufficient. (R2325-2327). Before the trial court could rule on the motion to strike, Willacy

filed a Second Amended Motion for Post-Conviction DNA Testing (R2329-2331). The trial court denied the motion on February 12, 2004. (R2332-2336).

First, this issue has been waived for failure to timely appeal the trial court's order. The order denying DNA testing was rendered February 12, 2004. (R2332-2357). The Notice of Appeal of the denial of postconviction relief was filed January 13, 2005. (R4602). That notice appeals the Order rendered November 19, 2004, with rehearing denied December 17, 2004. (R 4602). Appellant never appealed the denial of DNA testing, much less within the time limits of Rule 3.853(f)19, Fla. R. Crim. P. Rule 3.853(f) requires an appeal be taken "by any adversely affected party within 30 days from the date the order on the motion is rendered." Willacy failed to appeal the order within 30 days and, in fact, has never appealed that order.

Even if this issue were not waived, this issue has not merit. Rule 3.853 provides formal requirements for a defendant seeking postconviction DNA testing of evidence. Among other

[19] That subsection also provides that the judge must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered. However, that does not affect the waiver of this issue. A notice of appeal is jurisdictional, not procedural. Jurisdiction over the cause is acquired by the appellate court upon the timely filing of the notice of appeal. *See Walker v. State*, 457 So. 2d 1136, 1137 (1st DCA 1984), *citing Hollywood v. Clark*, 153 Fla. 501, 15 So. 2d 175 (1943). Willacy has never appealed the denial of the DNA testing motion, yet it is a point in his Initial Brief.

pleading requirements, a defendant must include a statement that the evidence sought to be tested has not previously been tested or that new testing technology exists that may obtain better results than the original test. See Fla. R. Crim. P. 3.853(b). Rule 3.853 also requires several specific factual allegations as well as a statement about how the new DNA evidence will help exonerate the defendant or mitigate the sentence. Respecting Rule 3.853, this Court stated in *Hitchcock v. State*, 866 So. 2d 23, 27-28 (Fla. 2004):

> Rule 3.853 is not intended to be a fishing expedition. Rather, it is intended to provide a defendant with an opportunity for DNA testing of material not previously tested or of previously tested material when the results of previous DNA testing were inconclusive and subsequent developments in DNA testing techniques would likely provide a definitive result, and when a motion for such testing provides a basis upon which a trial court can make the findings expressly set forth in subdivision (c)(5) of rule 3.853.

The trial judge's order is supported by the record, and this issue has no merit. As to the napkin and man's shorts (Exhibit 182), the trial court held:

> The Defendant alleges that the napkin and the man's shorts contain small amounts of blood and were initially recovered from the Defendant's home by Palm Bay Police Department. At trial, the State presented testimony that the blood found on these items was Type A positive blood, consistent with blood Type A of the victim, Ms. Sather. The Defendant argued at trial that he and

> his girlfriend, Marisa Walcott, had engaged in a physical fight prior to the homicide and that Ms. Walcott had the same blood type as the victim.
>
> In *Hitchcock v. State*, 29 Fla. L. Weekly S13 (Fla. Jan. 15, 2004), the Supreme Court of Florida explained that it is the movant's "burden to explain, with reference to specific facts about the crime and the items he wished to have tested, 'how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime.'" Just like Hitchcock's motion, the Defendant has failed to explain with reference to specific facts about the crime, how the results will exonerate the Defendant or mitigate the death sentence on the minor participant theory.

(R2334-2335).

As to the green tank top (Exhibit #210) and man's white shirt (Exhibit #CZ), the trial court held:

> At the hearing on February 6, 2004, on this motion, Harry Hopkins, a crime laboratory supervisor in the serology department in Orlando (a subsidiary of FDLE) testified that the absence of the Defendant's DNA on the green tank-top or the man's white shirt would not scientifically preclude the conclusion that the Defendant wore either shirt. Moreover, Mr. Hopkins explained that the presence of someone else's DNA on the shirt would not necessarily mean that he/she wore the garment. As aforementioned, in order for postconviction DNA testing to be authorized, the Defendant must prove there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

> Fla.R.Crim.P. 3853(c)(5)(C). The Defendant has not met this burden. Even assuming *arguendo* that the green tank top and white shirt could be tested using STR DNA typing and DNA was or was not conclusively identified on either garment, the Court cannot make the required finding under section 925.11 or rule 3.853 that there exists a reasonable probability that the defendant would be acquitted, or that he would receive a life sentence if the requested testing were allowed on the white shirt or green tank top.

(R2335-2336).

The factual findings regarding Mr. Hopkins are supported by the record of the hearing February 6, 2004. (R1598-1650). Mr. Hopkins discussed skin "sluffing" and whether epithelial cells could be tested for DNA (R1600). He discussed the likelihood of finding cellular material through epithelial cell transfer and the potential for contamination. (R1602-1604). The absence of cells on a tank top would not necessarily prove the person had not worn the top (R1607). Some people are "good sluffers" and some people don't "sluff" at all. (R1600-1601). The motion was facially insufficient and to this day Willacy has not alleged how the evidence would exonerate him. The jury was aware Marisa Walcott's, Willacy's girlfriend, blood was same blood type as Mrs. Sather. If Willacy's epithelial cells were not on the tank top or white shirt, it would prove nothing. As the experts testified, retrieving DNA from epithelial cells is difficult, and if a person is not a "sluffer," it is impossible.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the denial of Willacy's Motion for Post Conviction Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Brian N. Onek**, Balgo, Onek & Mawn, 1329 Bedford Drive, Suite 1, Melbourne, FL 32940 and **Elizabeth Siano Harris**, Stadler & Harris, 1820 Garden Street, Titusvile, FL 32796, on this _____ day of December, 2005.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

BARBARA C. DAVIS
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