IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Case No. SC05-611

Appellant/Cross Appellee,

v.

VIRGINIA LARZELERE,

Appellee/Cross-Appellant.
____________________/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY/CROSS-ANSWER BRIEF OF APPELLANT/CROSS APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLANT/CROSS APPELLEE

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Statement of the Case

Larzelere filed an amended motion to vacate judgment of conviction and sentence on August 31, 2000. (R389-517). The State filed a response on October 12. 2000. (R520-580). A *Huff* hearing was held on November 1. 2000.[1] (R5077—5133). An evidentiary hearing was held before the Honorable John W. Watson, III, Circuit Court Judge for the Seventh Judicial Circuit of Florida, in and for Volusia County, on May 13-24, 2002, and Jun 3-4, 2002. (R5357-8005). An Order denying claims I B, I D, II, III B, III D, III E, IV B, XIV, and XV and granting a new penalty phase based on claims IV C and V, of Larzelere's motion to vacate was issued on March 24, 2005. (R3343-2414). The State filed a notice of appeal on April 4, 2005. (R3417-3418). A notice of cross-appeal was filed by Larzelere on April 8, 2005. (R3420-3422).

Statement of the Facts

The Evidentiary Hearing Facts

Larzelere's first witness was John Howes, co-counsel at Larzelere's trial and original lead counsel for Larzelere's co-defendant son, Jason.[2] (R5388-89, 5397). After the trial court

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[2] Jason Larzelere was tried and acquitted of all charges after his mother's trial. *Larzelere v. State*, 676 So. 2d 394, 399 (Fla. 1996).

granted the State's motion to sever, Howes began representing Virginia Larzelere.[3] (R5389). He had represented many defendants in first-degree murder trials during both the guilt and penalty phases. He and Jack Wilkins[4] were responsible for Larzelere's penalty phase. (R5390). He said, " ... Jack looked to me for the majority of the decision making." (R5390-91). Howes had more experience in penalty phase litigation and would start preparing for a penalty phase "upon receipt of the indictment or the first contact with the client," whichever occurred first. (R5391, 5392-93). He would consult with psychologists or psychiatrists in preparation for a potential penalty phase. (R5394). He had extensive conversations with co-counsel Jack Wilkins, as well as Larzelere's family, in order to prepare for a penalty phase and to try "to figure out what we could present that would be of benefit to her." (R5394-95). He had many conversations with Virginia, both before and after the trial. In addition, there was a considerable period of time between the guilt and penalty phases. (R5395). He remembered talking to Jeanette Atkinson (Virginia's sister) about aggravating and mitigating circumstances that could be presented. He asked her to "tell me

[3] In addition to a waiver by the defendants, the trial court conducted "an extensive colloquy with the Larzeleres ..." (R5459). Eventually, William Lasley took over representing Jason Larzelere. (R5459).

[4] Jack Wilkins was lead counsel for Virginia Larzelere. (R5408).

anything you can that can help us keep her from getting the electric chair." (R5396). He pursued every avenue available to him in order to avoid the death penalty. (R5398). He and Wilkins tried the case together and had a "joint theory on what the defense was going to be ... " (R5398). Information regarding Virginia's case and Jason's case was shared between Howes and Wilkins. (R5399). He did not feel the need to help Watkins prepare for Virginia's penalty phase "because I knew from experience that he was capable and competent to do that." After Howes came to represent Virginia as well as Jason, he paid more attention to the penalty phase issues. (R5400). He was not aware of any sexual abuse suffered by Virginia Larzelere. (R5400, 5422, 5491).

Howes contacted Dr. Krop to get him involved in the case, but did not remember what materials were sent to him for his preparation in interviewing Virginia. (R5402). He did not recall that no witnesses or evidence was presented by the defense during the penalty phase. (R5404). From the beginning, Howes made evaluations as to whether any particular person would be a good witness and would give favorable information. (R5406). It would not have been beneficial to have Virginia's 14-year-old daughter, Jessica, testify at the penalty phase. (R5404, 5406-07). Howes did not recall why co-defendant Jason was not called

to testify on his mother's behalf at her penalty phase.[5] (R5414). Howes said there are tactical reasons " ... under certain circumstances you don't fight certain aggravators. There are tactical decisions made when you're standing up there looking at the jury as to whether or not they're accepting what you're saying about certain things." (R5408). He has to maintain credibility with the jury in order to serve his client well. (R5409).

Howes was well-aware of Dr. Krop's expertise and ability to testify. He did not attend a deposition of Dr. Krop (in this case) as "he could handle whatever was going to be presented to him ... " He had used Dr. Krop in quite a few cases. (R5415).

After reviewing a deposition taken on July 27, 1992[6] of Harry Mathis, Virginia's previous husband, Howes became aware that Virginia's sister, Peggy Beasley, had told Mathis that Peewee Antley, Virginia's father, had sexually abused all four of his daughters.[7] (R5421-23). Virginia never told Mathis that

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[5] Virginia Larzelere's penalty phase took place March 3-4, 1992. (TT5957-6275). The *Spencer* Hearing took place September 4, 1992. (TT6671-6691). Jason Larzelere's trial took place August through September, 1992. He was acquitted of all charges on September 22, 1992. (R6591). Virginia Larzelere was sentenced to death on May 11, 1993. (TT7318-7360).

[6] This is after the trial and penalty phase, but before sentencing, which took place on May 11, 1993.

[7] Virginia, Peggy, Patsy and Jeanette. (R5423).

she had been abused by her own father.[8] (R5422). Howes was not aware if Virginia had told Dr. Krop about any sexual abuse but he would have alerted Dr. Krop if he had known this information. (R5424). Howes did not know that Jason Larzelere also claimed abuse by his grandfather, Peewee Antley. (R5428). Howes believed a jury would "look down at any mother who puts her child in a situation where the child is sexually abused." (R5429). If he had been aware of these allegations, Howes would have spoken to Virginia's sister, Jeanette Atkinson, as she "was the one most accessible, stable and cooperative, to confirm the information or have her deny it to go anywhere with it." (R5430). Howes explained to Larzelere what a penalty phase involves and asked her "what in her life could possibly help us keep her from getting the death penalty." (R5446).[9]

Howes said Jack Wilkins handled the arrangements for costs involving depositions. (R5450).[10] However, Howes also paid for various costs involving the case. (R5451). The fee he received

[8] Mathis believed his former wife, Virginia Larzelere, had engineered a plot to send him to a rural area in Polk County where he was shot in the stomach. (R5482, 5483).

[9] A report by defense investigator Gary McDaniel, did not indicate any sexual abuse. (R5446). In addition, Howes said "it was always necessary to sift through and find fact from theory ..." regarding McDaniel's reports. (R5446). McDaniel's reports were not accurate. (R5473).

[10] Wilkins received a Nissan Pathfinder as an initial fee. (5450-51).

in Larzelere’s case came after Jeanette Atkinson’s (Virginia’s sister) bankruptcy proceeding. (R5452).

Howes and Wilkins were law partners at one time. They would refer cases to each other and have remained friends through the years. (R5453). He has never seen Wilkins drink alcoholic beverages in the morning or during the day. (R5453-54). He socialized with Wilkins, and would see him at his lake house on the weekend. Wilkins would drink at night, but he was a “private person.” (R5454). He did not see him drink during a trial; not in the courtroom, during a break, or at lunchtime. (R5455). He did not recall Wilkins drinking “any stupendous amount of alcohol at some point in time.” (R5456). Howes never saw Wilkins “drink to excess to the point to where it affected him.” (R5457). Only on the last night of Larzelere’s trial, did he see Wilkins drink “half bottle of wine and one drink besides that.” (R5456). Howes never saw Wilkins act intoxicated. (R5456).

Larzelere was not cooperative with Howes. She was not consistent and direct in her conversations. (R5462). Her responses would be “whatever she perceived the hearer wanted the answer to be.” (R5463). She had made several pre-arrest statements to law enforcement which were inconsistent. Larzelere was “quite pleased” that Howes and Wilkins determined that she should not testify. (R5463). Had they called her to testify on

her own behalf, he believed "she would have been convicted." (R5463).

Howes became aware that Larzelere was contacting defense investigator Gary McDaniel for direct consultation, outside of his supervision. (R5464). McDaniel provided privileged documents to the Edgewater, Florida, Police Department. (R5465).

Larzelere was very alert and responsive during the trial. She followed and understood the strategic and tactical decisions made by her defense team. (R5485).

Howes was aware that Jack Wilkins had represented Larzelere (under the name Gail Antley) in a case that involved embezzlement charges. (R5489-90). However, had this information been revealed to the jury, he did not feel the jury would have been compelled to give Larzelere the death penalty because of those charges. (R5490). Larzelere was also involved in a scheme where she had obtained gold coins and written them off as a dental expense. Howes said, "There were a number of circumstances concerning Virginia's life at or about the time of Dr. Larzelere's death that caused me concern about putting on this testimony, because the testimony that we had available was comparatively weak in relation to the other damaging information that would have come out if we went into it." (R5490-91). Any sexual abuse suffered by Larzelere was never presented by her or Dr. Krop. (R5491-92). Howes would have questioned his client on

why she would expose her own children to potential abuse and why would she have allowed them to "be around this man at any time, ever, under any circumstances, period." (R5493).

Having used Dr. Krop before, Howes was "confident with his ability to testify." (R5508-09). He recalled that Dr. Krop told him "there wasn't much he could do." He told Larzelere that Dr. Krop could not provide them with any beneficial information and would not be called as a witness. (R5510). At that point she should have told Dr. Krop any other information that might have helped in mitigation. (R5511). Larzelere knew "it was important to have experts and lay witnesses testify." (R5514). Further, "Virginia Larzelere's certainly intelligent enough to understand the pressure she was under at that time." (R5516).

Prior to and during the trial, Howes did not see co-counsel Wilkins drink excessively. (R5518-19). He did not have any doubt as to Wilkins' abilities to handle legal issues or effectively cross-examine witnesses. (R5519). Wilkins, Howes, and Larzelere often had conferences, "where there's three heads together like a football huddle ..." There was never any concern expressed by anyone regarding a problem with alcohol. (R5520, 5521). Wilkins and he were together "virtually 24 hours a day for five weeks" during the trial.[11] (R5523).

[11] They rented a condominium together during the course of the trial. (R5522).

It was not his job to hire a mitigation expert prior to Larzelere's trial. (R5534). There are times when he had been appointed as counsel and he did not hire anyone. He said, "I seek the appointment of people in circumstances where I feel it is ... appropriate to do." He was actively involved in the guilt phase of this trial and Jack Wilkins looked to him to handle the penalty phase aspects. (R5537).

Gladys Jackson was Jack Wilkins' office manager/bookkeeper for fifteen years. (R5580-81). She recalled Larzelere hiring Wilkins to "clear up her record, worthless check" prior to her arrest for first-degree murder. (R5581). Jackson saw Wilkins drink alcoholic beverages in his office. "He always had social drinks." (R5582). On occasion, she would buy alcohol for him "when we made office runs for any supplies ..." (R5583). She had seen him have several drinks throughout the day. (R5586). She did not recall ever seeing John Howes drinking with Wilkins in his office. (R5589). There was approximately $25,000.00 in costs spent on the Larzelere case. (R5590-91). The Larzelere case put a financial strain on the office. (R5593). In 1994, Wilkins was served with a Federal subpoena that ordered him to turn over his receipt books from the office. (R5593-94). Jackson had three receipt books in her desk. Wilkins told her to get rid of one of them. She did not, and told him to do it. (R5594). Ultimately, the "cash receipt" book was destroyed. (R5596). Jackson

testified in front of the Federal Grand Jury regarding Wilkins' illegal practices in his law firm. (R5598). On occasion, Wilkins would receive a cash payment and only report half or some of it. (R5601). Jackson did not recall any receipts in the "cash receipt" book that belonged to the Larzelere case. (R5606). If she wrote out the cash receipt in the book, it would reflect the correct amount received from the client. (R5608).

Wilkins received a 1991 Nissan Pathfinder as a partial retainer. (R5607). Jackson understood that Wilkins' fee for the Larzelere case would be paid from the insurance proceeds. (R5621). She did not recall a time when Wilkins requested payment for costs for the Larzelere case that she was not able to cover. (R5610). She did not recall any illegal financial dealings of any kind connected with this case. (R5615).

Larzelere called Wilkins frequently. He always accepted her calls. (R5612). Howes and Wilkins consulted quite frequently leading up to Larzelere's trial. (R5614).

Jackson did not see any increase in alcohol consumption during the Larzelere trial. (R5613).

Wilkins had defended other murder cases besides Larzelere's, in addition to drug-related cases. (R5627-28). Jackson did not remember specific instances where Wilkins gave her cash from clients, but did recall making cash deposits. (R5640).

Jackson said the proceeds from selling the Pathfinder would have been deposited into the office account. There may not have been a receipt written for it. (R5642). When Wilkins received cash from clients, it should have been deposited to the office account. (R5644). Jackson was never questioned by Federal prosecutors about financial matters involving the Larzelere case. (R5644).

Jack Wilkins, lead counsel for Larzelere, initially spoke with Jeannette Atkinson, Larzelere's sister, about representing Larzelere in this case. (R5646-47). He had been counsel in numerous murder cases but had not previously tried a capital case. (R5647, 5648, 5649). Wilkins practiced law for over twenty years and only did criminal work. (R5652).

Wilkins' fee for the Larzelere case included a $100,000.00 retainer fee plus $3000.00 per day during the trial, plus expenses. The Nissan Pathfinder was part of the retainer. (R5656). Wilkins' fee was to be paid whether the insurance policy (on the decedent, Dr. Norman Larzelere) was paid out or not. (R5656). He did not believe there was a financial risk (to himself) regarding this case. (R5661).

Initially, Jeannette Atkinson asked Wilkins to represent both Virginia and Jason Larzelere. Wilkins would not represent both (due to a potential conflict) and subsequently referred Atkinson to John Howes. (R5673-74). Larzelere tried to terminate

his representation various times prior to trial but she always changed her mind. (R5675).

Although Howes became the lead lawyer for the penalty phase, Wilkins prepared for the second phase, as well. (R5681, 5684). He did not see any issues with regard to physical or sexual abuse. (R5686). After reviewing a report purportedly written by Defense Investigator Gary McDaniel, Wilkins said he probably would have talked to Larzelere's sister, Jeannette Atkinson, about the abuse referenced in the report, as well as Larzelere, herself. (R5690). Dr. Krop eventually examined Larzelere in anticipation of sentencing. (R5692). **Wilkins recalled that Dr. Krop asked Larzelere about any alleged abuse and she denied it.** (R5693).

Wilkins did not recall discussing McDaniel's report with co-counsel, Howes. (R5701). He did not believe the report had any credibility. (R5707). In addition, for various reasons, Wilkins and Howes decided not to call certain witnesses in the penalty phase, including ex-husband Harry Mathis, and Larzelere's daughter, Jessica. (R5703). **Dr. Krop's letter, dated April 15, 1992, indicated there was no evidence of abuse.** (R5709).

Wilkins did not hire any additional experts (except for Dr. Krop) as " ... there were no areas that I felt needed an expert

witness." (R5773).[12] Although there were voluminous cell phone records, Wilkins did not hire an expert to sort out the documents as it " ... didn't make any difference anyway. We had Jason back at the house at the time it was committed ... but Jason was not at the scene." (R5774). Wilkins did not believe there was strong evidence to prove Larzelere's guilt or involvement in this case. (R5774-75). It was always Larzelere's position that the murder of Norman Larzelere was the result of a foiled robbery attempt. (R5814).

Money received from Larzelere's sister, Jeanette Atkinson, was used to pay for any expenses or costs involved with the case. (R5779). Wilkins eventually hired another investigator, Don Carpenter, because "Gary McDaniel had caused all kinds of tremendous problems, including writing unauthorized letters to the Judge and lying on his reports, and I fired him." (R5781, 5782).

In 1995, Wilkins pled guilty to various federal crimes including money laundering, obstruction of justice, income tax evasion, and perjury. (R5817, 5819). He personally destroyed a cash receipt book that belonged to his office. (R5824). None of the receipts had anything to do with the Larzelere case. (R5824).

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[12] Wilkins consulted with experts "that were listed by the State (and) may have been experts in their own field." (R5773).

During Larzelere's trial, Wilkins usually had a glass of wine with dinner, but "during the trial, never." He did not drink to the point where someone might smell alcohol on his breath or where he would have a hangover the next morning. (R5825). On occasion, Wilkins drank alcoholic beverages in his office. (R5696).

After Larzelere was convicted, her sister, Jeanette Atkinson, was solely responsible for Wilkins' fees. (R5841).

Wilkins received one of Investigator McDaniel's reports and subsequently spoke with Larzelere about purported abuse she suffered from her father. He said, " ... as a part of our preparation for this trial and the ongoing parts of it, we were looking for all those things that might have to do with our presentation on the mitigation." However, "She denied it." (R5856, 5861). Once he received a report from Dr. Krop, he did not feel the need to do any further investigation. (R5857).

Wilkins did not want to call any of Larzelere's former husbands as character witnesses because, "For every reason that we found to call a witness, there were dozens of reasons not to." (R5862). He did not want to call daughter Jessica as a witness as there were indications that Larzelere had other lovers "even with her husband's knowledge ... and she was meeting some of these people and, at the same time, that's inconsistent ... that the jury would believe, as the definition

of a good mother." (R5862-63). Based on the overall evidence presented in this case during the trial, the court found that Larzelere was not credible. (R5864).[13]

Larzelere and Investigator McDaniel (unbeknownst to Wilkins) started having meetings at the jail. Ultimately, McDaniel gave "investigative material" to the Edgewater police department. Detective William Bennett subsequently alerted the chief prosecutor in this case, Dorothy Sedgwick, regarding this information, who also informed the trial judge. (R5867-69).

At the end of the penalty phase, Wilkins "was begging" for a life sentence for his client. (R5878).

Wilkins believed his Federal case did not affect his representation of Larzelere and had no effect on her case at all. (R5885).

Rodney Kent Lilly, attorney, handled the Larzelere insurance claim litigation. (R5735). Wilkins had recommended him and there was no referral fee involved. (R5736, 5739). He and Wilkins were neighbors and friends, and also belonged to the same country club. (R5737). On occasion, he would see Wilkins having lunch at the country club. Other patrons told Lilly that Wilkins sometimes drink at lunchtime. (R5738).

Since Wilkins was handling the criminal aspect of the

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[13] See, ROA (TT.7354, Sentencing Hearing). Larzelere was very inconsistent with her descriptions of the purported "robber." (R5865).

Larzelere case and Lilly was handling the civil aspect, there were times that they talked about what was going on in each case. (R5740). Lilly provided Wilkins with insurance charts that he had created in order for Wilkins to show them to the jury. (R5741). A receivership was established to handle any insurance proceeds that were paid to various beneficiaries. (R5741, 5744). Wilkins was not one of the beneficiaries. (R5745).

Dr. Harry Krop, a licensed psychologist, evaluated Larzelere in April 1992, after the trial and penalty phase had taken place.[14] (R5897, 5900, 5907). Dr. Krop reviewed police reports and depositions, interviewed several witnesses, and had three "fairly lengthy interviews" with Larzelere. (R5905). In addition, he received copies of correspondence that Larzelere had sent to her attorneys and he also spoke with Wilkins. (R5906). Larzelere had acknowledged, prior to the *Spencer* hearing, that Krop would not be testifying at that hearing. (R5909).

Larzelere denied any history of abuse, which Dr. Krop indicated in his report to Wilkins. Had he known of any abuse, he would have "confronted" her with that information. (R5916). In addition, he would have sought permission to speak with other family members and would have encouraged Larzelere that it would be important to talk about it. (R5917, 5918). Due to Larzelere's

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[14] This was before the final sentencing hearing. (R5901).

"adamant denial of culpability despite the conviction, the focus strategically was to show that Ms. Larzelere is a pretty normal person, does not have a personality disorder, does not have any mental illness, is an intelligent individual, would not present any management problems, and, therefore, the focus would be to show the normalcy of her background ..." (R5919). His evaluation showed Larzelere lacked antisocial tendencies. (R5920).[15]

Larzelere admitted a previous husband, Harry Mathis, had physically abused her on a few occasions. She never told Mathis she had been sexually abused. (R5923). Krop was specifically told that there would be no family members available to talk to him. (R5932).

Larzelere's MMPI test results indicated a normal profile. There was no evidence of a thought disorder or any kind of psychotic process. (R5941). Dr. Krop encouraged trial counsel to present Larzelere in a "positive light." She had denied any involvement in the offense as well as any history of physical or sexual abuse. (R5943). He estimated that, intellectually, she was in the "high average range or above average ... between 110 and 120 ..." She did not exhibit any neurological deficits or give any history that would have suggested any type of brain

[15] This contrasts sharply with the testimony of the later experts. See 51-57, *infra*.

damage.[16] (R5945). There was no evidence of any kind of mental illness. (R5948). It was Larzelere's choice to decide what to tell him regarding family history. (R5951). It is not uncommon for a criminal defendant to manipulate a psychologist, and occasionally even lie to them. (R5958). He explained to Larzelere how important his evaluation (of her) would be. (R5959). He asked Larzelere for names of any other potential sources that could provide helpful information. (R5960).

Larzelere had not been near her alleged sexual abuser (her father) for a substantial period of time. In addition, there was no proof to support the notion that her daughter, Jessica, was a product of incest. (R5962). Murdering a spouse in order to collect insurance proceeds is not typical behavior of someone who has been sexually abused. In addition, women that are sexually abused by someone are very cautious in allowing their own children to be around the abuser. (R5965). Dr. Krop did explore the possibility of sexual abuse with Larzelere. (R5978). She did tell him about previous embezzlement and bad check charges that had been filed against her. (R5978).

Lawson Lamar, elected State Attorney for the Ninth Judicial Circuit since 1989, received this case as a Governor's Assignment due to a conflict. He conducted the grand jury

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[16] Dr. Krop did not conduct any neurological, psychological or intellectual tests. (R5945).

proceedings with Assistant State Attorney Dorothy Sedgwick. As the case developed and became time-consuming, Lamar turned it over to Sedgwick. (R5983-85). Steven Heidle and Kristen Palmieri's testimony did not vary from the time they testified to the grand jury to the time they testified at trial. (R5988, 5990). Although Heidle and Palmieri knew where the murder weapon was, Lamar was not convinced "at any time" that Heidle was the shooter. (R5991, 5993). "We looked appropriately at everybody as being the potential murderer." (R5994). Sedgwick, as a senior attorney in the office, would have authority to make immunity deals with witnesses, or reduce or drop charges. (R6000-01). However, Lamar could not remember any time where Sedgwick granted someone immunity even after she had consulted with Lamar. (R6003). Lamar was not aware of special consideration given to Heidle. (R6004). Lamar did not have any relationship with Heidle nor was he ever his lawyer. (R6005). It was normal practice for Lamar to tell witnesses to call the police or prosecutors if they were being intimidated or pressured. (R6006). Lamar did not recall his office ever giving "transactional immunity" in recent history. (R6006). There was no case where someone's sentencing in a criminal case was continued pending the outcome of a different case where that person was testifying for the State. (R6008).

Evidence indicated that Heidle learned about the murder the

same day it occurred. Heidle was very close with the Larzeleres. (R6001). Heidle produced a Burger King receipt containing a date/time stamp on it as his alibi for when the murder took place. (R5992).

Jeanette Atkinson, Larzelere's next younger sister, got involved in this case when Larzelere named her as the next contingent person to receive the insurance proceeds. This was done at Jack Wilkins' suggestion, in order for him to take the case. (R6012). She signed an agreement that Wilkins' fees and costs would be paid contingent upon the insurance settlement. (R6013). Wilkins knew he would not be paid if the insurance money was not paid out. (R6013-14). Wilkins also received a 1991 Nissan Pathfinder and $17,000.00 for expenses and costs.[17] (R6014). Her sister, Peggy, also gave him $1000.00 for expenses. (R6028). The discussions she had with Wilkins were always about the finances. (R6015).

According to Jeanette, although there was sexual abuse within her family, Wilkins never asked her about it. Their father, William (Peewee) Antley sexually abused both her and Virginia. (R6017). She saw Antley abuse Virginia. (R6040-41). She never told her other sisters about any abuse. (R6057).

Wilkins only discussed finances with her, not mitigation.

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17 The $17,000.00 was the difference between a vehicle Virginia had returned under the "Lemon Law" and the cost of the Pathfinder. (R6014).

(R6032). He never sat with both her and Virginia at the same time to discuss "humanizing" her. (R6038). Virginia was a good mother, who "doted on her children and spoiled them rotten." (R6037).

When discussing finances in Wilkins' office, she saw him drink alcoholic beverages. (R6027-28). She recalled smelling alcohol on him at the bond hearing. (R6028). She did not report this to Virginia as "that was her decision; that's who she wanted." (R6059). Larzelere never complained to her of smelling alcohol on Wilkins. (R6061).

At one point, Wilkins told her Virginia wanted to terminate his services but if that happened, "he would see that John Howes dropped Jason's case." Virginia backed off so that Jason would have an attorney. (R6034).

The first time she saw John Howes was at the trial but she never spoke with him. (R6038). Neither Wilkins nor Howes ever discussed the penalty phase with her. (R6039). She would have been willing to testify on her sister's behalf. (R6040).

When Larzelere was initially arrested, she called Atkinson and told her she wanted Wilkins to represent her. (R6042). Larzelere did not raise concerns about Wilkins' representation until "during the trial." (R6052). Wilkins presentation of himself was consistent from the first time she met him throughout the trial. (R6054). At the point when Larzelere

wanted to terminate Wilkins' representation, she wanted to hire Mr. Lasley. (R6054).

She is the closest sister in age to Virginia, and they are very close and communicate with each other - - it was her opinion that Virginia did not need any kind of psychological assistance. (R6057). While growing up, Larzelere was sexually promiscuous. (R6058).

Atkinson does not believe her sister had good representation. She formed this opinion after Larzelere was found guilty. (R6064).

DorrieJean Muller had a book deal with Virginia Larzelere. She knew Larzelere and had been a guest in her home. Muller provided Larzelere with clothes during the trial. (R6075, 6092). Muller observed the pre-trial and trial proceedings in Larzelere's case as well as Jason Larzelere's trial.[18] (R6076). Muller recalled one time when she smelled alcohol on Jack Wilkins' breath during Larzelere's trial, after the lunch break. (R6077, 6078, 6086). She did not know where Wilkins had gone for the lunch break. (R6088). She did not report anything to the bailiff. (R6089). Muller met with Wilkins and Howes at their hotel one night and listened to their "war stories." (R6088, 6090). Wilkins kept having his glass refilled with some type of

[18] Jason Larzelere was represented by William Lasley. (R6077).

liquor, more than Howes. (R6091). Wilkins and Howes knew Muller was writing a book and were very careful in not discussing anything that would create a conflict of interest. (R6093). Sometime during the trial, Muller overheard Jack Wilkins and John Howes discussing "we only stay at the best." She did not believe Wilkins did a good job in representing Larzelere. (R6080). John Howes, however, was " ... a good attorney. He was forceful ... he seemed to be in the trial. He was one of the players ..." (R6081). Muller did not know if Larzelere wanted to hire William Lasley for her own defense. (R6082). Muller believed William Lasley's theory of the case during Jason's trial was that Virginia was responsible for Dr. Norman Larzelere's murder. (R6084). However, Muller was shocked when Virginia Larzelere was found guilty. (R6090).

Leslie Hess, prosecutor, assisted Dorothy Sedgwick in Larzelere's case. (R6095). At some point during the trial, he and Sedgwick discussed an odor of alcohol they noticed on Wilkins' breath. (R6096, 6098). However, "just smelling something didn't mean there was a problem that needed to be brought to the Court's attention." (R6097, 6099). He and Sedgwick agreed to watch Wilkins' performance carefully to note if there were any deficiencies. (R6097). He and Sedgwick did not see anything that was substandard performance on Wilkins' part during that day. (R6097-98, 6100, 6113). He and Sedgwick did not

mention anything to Wilkins, Howes or Larzelere. (R6100-01). Larzelere was sitting between Howes and Wilkins. (R6101). Hess has been a prosecutor for 23 years, starting in the traffic division. (R6099). Based on his experiences in that division, he had ample opportunity to observe the behavior of people who were under the influence of alcohol. (R6108). He does not have any specialized training in drug or alcohol impairment and has not been trained on field sobriety tests. (R6099). Hess has had limited exposure to alcohol but many years of experience in observing attorneys. Wilkins could have had some other odor emanating from his breath during the trial. (R6106). There were many occasions during the trial that Hess and Wilkins were in close proximity to each other. He did not smell an odor similar to alcohol during those times. (R6107). There were times during his years of prosecuting that he observed substandard performance by defense attorneys. (R6112). Had he noticed anything in Wilkins' performance that concerned him, Hess would have consulted with Sedgwick and brought it to the attention of the Court. (R6117).

Mr. Hess said Harry Mathis, Jason Larzelere's biological father, was not called as a witness in Larzelere's case because the State did not know who he was. (R6102).

Patsy Antley is Larzelere's younger sister by five years. (R6121). She said her father, Peewee Antley, sexually abused her

when she was a young girl. (R6122-23). She did not tell anyone about the abuse until the night Antley committed suicide and she and older sister Jeanette discussed it. (R6124, 6125).

Wilkins and Howes never explained the bifurcation process to her; she did not know what mitigation meant and they did not interview her. (R6127, 6128). During the trial, Wilkins would take her to lunch. She said, "He didn't eat. He drank during lunch." (R6129).

Antley was so upset during the trial that she blocked out parts of it. She did not recall the specific occasions that she had lunch with Wilkins. (R6132). She did not tell Virginia about any concerns she had regarding Wilkins' drinking. (R6133). Had Larzelere's attorneys asked her to testify, she would have been willing to do so. (R6131).

Peggy Beasley is the youngest of Larzelere's sisters. (R6139). She was not involved in any of the finances regarding Larzelere's case except when she gave Wilkins $1000.00 to be used to call additional witnesses to testify. (R6139-40, 6141-42).

Wilkins and Howes did not explain the two-part process of Larzelere's trial. (R6142). They did not interview her so she did not realize how relevant the girls' upbringing would have been to Larzelere's trial. (R6143, 6153).

She was also abused by her father but could not recall when

it started. (R6145). She never told anybody. (R6146). On one occasion, her father abused her four-year-old daughter. (R6149-50).

She was aware that Larzelere's first husband, Harry Mathis, physically abused Virginia. (R6151). After Virginia married Dr. Larzelere, they gave Peggy money for expenses involving her premature baby. (R6152).

Prior to her arrest, Larzelere gave Beasley gold coins to pawn so she could pay household expenses. Larzelere had no other cash funds available to her. (R6154-55).

Beasley was not aware that her sister, Patsy, ever had lunch with Wilkins. (R6155). She never saw Wilkins drink or consume any drugs. (R6156). She did not visit Larzelere while in jail and did not speak to her by phone, but would have testified on her behalf. (R6153-54, 6156).

David Waller, Special Agent Supervisor with the Florida Department of Law Enforcement (FDLE), was part of a task force that investigated individuals involved in illegal drug distribution in 1991. Initially, Jack Wilkins represented Roy Joiner, one of those arrested from the drug ring. (R6168). The task force learned that Wilkins had been accepting cash payments from a number of traffickers for legal fees that he did not properly report. (R6169). Karen Joiner filed a Bar complaint against Wilkins regarding a cash payment of $25,000 for a

retainer fee for which Wilkins gave her a receipt. (R6170, 6171). Wilkins did not file a "currency transaction report" regarding this cash retainer. Agent Waller did not investigate Wilkins with regard to the Larzelere case. (R6172). Karen Joiner's complaint led to an investigation and a subpoena being served on Jack Wilkins in 1993.[19] (R6180). The Joiner compliant was filed within the time period that Larzelere's trial took place. (R6183-84). Wilkins worked with subsequent counsel for Joiner, Mr. Freeman - - Wilkins briefed him on the case, and felt he did not need to return the retainer. Wilkins informed Karen Joiner and the Florida Bar of this decision. (R6186). Joiner's complaint led to a Federal indictment for Wilkins. Wilkins voluntarily gave up his license to practice law. (R6187).

Wilkins (and Howes) represented other individuals involved in the methamphetamine ring after Wilkins had entered an appearance in the Larzelere case. (R6188-89, 6191, 6194, 6197, 6202). In April 1993, Waller met with Wilkins in Wilkins' office sometime in the afternoon. Wilkins was drinking alcohol at that time. Waller did not know if Wilkins was meeting with any clients that afternoon. (R6195, 6210-11). Larzelere's final

[19] The subpoena requested Wilkins' financial records pertaining to methamphetamine defendants. He did not turn over all the documents that had been requested. Wilkins purportedly destroyed a receipt book. (R6180, 6181).

sentencing took place on May 11, 1993. (R6196).

Wilkins gave receipts when he received large cash amounts as a retainer. (R6204). In sum, the task force determined Wilkins engaged in currency violations, under-reported income tax, destroyed a cash receipt book, and perjured himself. (R6206-07).

Gayle Gordon worked for Michael Lambert, Virginia and Norman Larzelere's attorney. Lambert handled matters for Dr. Larzelere's practice. (R6219, 6220). Three days after Dr. Larzelere was killed, Virginia and Jason Larzelere came to see Lambert. (R6221). Although Lambert met with Virginia a few times after that initial meeting, he terminated his representation because Virginia could not pay him. (R6222).

Detective Casper Johnson arrested Steven Heidle for driving under the influence (DUI) on October 26, 1995. (R6226, 6239). Heidle told Johnson that "Lawson Lamar was his attorney, personal friend and that he was also an attorney." (R6228). These were not unusual statements to make considering Heidle was under the influence. "Everybody knows a judge and everybody knows a congressman." (R6241). No one from the State ever contacted Detective Johnson with regard to favorable treatment for Heidle. (R6238).

Jonathan Stidham, attorney, represented Jeanette Atkinson in the insurance litigation and custody matters involving the

Larzeleres' two youngest children. (R6244-45). Stidham only had contact with Virginia Larzelere one time while she was in jail awaiting her trial. (R6246). Although Jack Wilkins had referred Atkinson to him, Atkinson terminated his services as "Jack Wilkins had come to her and told her if she did not fire me and hire another lawyer in Polk County named Robin Gibson that he would not represent her sister any longer." (R6246, 6250). Atkinson did not want to fire Stidham but felt she needed to for Virginia's sake. (R6251). Atkinson was the only person who gave him this reason; he did not know whether or not she was telling the truth. (R6259). At one time, Stidham encountered Wilkins in court during a trial for Steve Ruth, a defendant in Bartow, Florida. (R6252, 6255). He noticed Wilkins hands shaking and "I suspected that it was because he needed a drink, but I didn't know that." (R6252). He had never noticed Wilkins' hands shaking before. (R6258, 6260). Stidham believed Wilkins drank all the time. (R6257). Stidham's partner, John Purcell (now deceased), handled the Larzelere's estate matters. (R6253). Purcell received the case from Jerry Wells, an attorney located in Daytona Beach. (R6253, 6254).

Lieutenant Michael Wilfong, a State trooper with the Florida Highway Patrol, arrested Steven Heidle in February 1993 on a DUI charge. (R6269, 6270). Heidle told Wilfong that he had been a State's witness in a murder trial. He feared his life

would be in jeopardy if he was arrested. (R6270). Heidle asked Wilfong to call Lawson Lamar. (R6271). Wilfong did not contact Lamar. (R6277). During his career, Wilfong encountered many individuals under the influence of alcohol. He never heard those individuals make comments like Heidle did. (R6276-77).

Gary McDaniel, a private investigator since 1975, was hired by Wilkins for the Larzelere case in 1991. (R6287, 6288). At their initial meeting, he remembered Wilkins drank at least three alcohol beverages. (R6289). Wilkins asked him to "do the debriefing of the client" and told McDaniel there would be financing available to cover his expenses. (R6289, 6290). Subsequently, a contract was written for Pretext Services, McDaniel's company. (R6291). He understood that his fee would be contingent on the payment of the insurance policies taken out on the victim, Dr. Larzelere. (R6292).

McDaniel's investigative report, dated June 7, 1992, indicated that there had been abuse in Larzelere's past. He spoke with either John Howes or Jack Wilkins regarding this information. (R6296). McDaniel spoke with Howes about this report as he "had a rapport with Howes ... and ... Wilkins would never give me the time on any issue ... so we were in contact frequently ... " (R6299). He was told not to worry about the penalty phase and to concentrate on finding whether the evidence was there to establish the guilt or innocence of Virginia and/or

Jason Larzelere. (R6299-6300).

McDaniel attended a case conference with Wilkins and Howes in Orlando. Wilkins was "drinking, as usual ... He always has five or six to my one." (R6302-03). Nothing about the Larzelere case was discussed at this meeting. (R6304). McDaniel believed there were potential witnesses in California that could help in the Larzelere case. He did not interview them because he was not paid for his services. (R6307-08). At one point, Wilkins offered the Larzelere's boat as payment for McDaniel's expenses. (R6309). Eventually, McDaniel's employment was terminated by Wilkins and Howes. (R6310, 6317-18).

Howes told McDaniel that Wilkins and Larzelere did not have a good relationship. In addition, Larzelere called McDaniel and told him this, as well. (R6323). McDaniel spoke with Larzelere "intermittently" even after his termination. (R6324). He was paid $52,000.00 (from Jeannette Atkinson's bankruptcy proceedings) for his work. (R6324, 6343).[20] Eventually, McDaniel's visiting privileges ended at the jail, pursuant to Wilkins' request. (R6329). He still maintains a relationship with her. (R6334).

McDaniel had suggested various experts to Wilkins and Howes that could assist in the case, including an accident reconstruction person, a handwriting expert, an insurance

[20] He sued Atkinson for the money. (R6344).

expert, and "a ballistics expert and an expert relevant to the issue of the disposed weapons in the river." (R6332-33). In addition, he also recommended a blood splatter expert. (R6367). Any leads furnished in his final report were never followed up. (R6335-36).

McDaniel attends mitigation seminars annually. He is a "prolific reader on the subject" and is "very active in educating" himself. (R6347-48). He was involved with Larzelere's case for three months. (R6350). Although he believes Wilkins and Howes did not pursue any of the "leads" he gave them, he did not know what they may have done, independent of those leads. Nor was he aware of the basis for any of the decisions they made as lawyers for Larzelere. (R6350). However, Larzelere and her son, Jason, "always wanted me on the case." (R6353).

McDaniel gave the Edgewater police department a cover letter with police reports attached, which contained "various police leads" that he felt was his "obligation" to give to authorities. Although he did not speak with counsel, both Virginia and Jason Larzelere told him to give this information to law enforcement. (R6357). Howes ultimately terminated McDaniel. (R6363).

Jessica Larzelere, Virginia's daughter, lived with Virginia, Jason, and Virginia's first husband Harry Mathis, in Ohio for a short time. Mathis had a nice home but, "He was an

abusive type of guy. He had a short temper." (R6393, 6395). Mathis was verbally and physically abusive to Virginia and Jason but not to Jessica. (R6395, 6435). Eventually the Larzeleres left Mathis and moved to Lake Wales, Florida. (R6396). Jason and Jessica lived with Jeanette Atkinson while Virginia left to find a job and "get on her feet." During this time, Virginia re-married. (R6397, 6398). Jason and Jessica moved to New Smyrna Beach to live with their mother and new husband. (R6398). Jessica could not recall the new husband's name. He was verbally and physically abusive to her mother but not to her. At one point, he chipped one of Virginia's teeth and tried to strangle Virginia with a telephone cord. (R6398, 6399, 6424, 6436). Virginia never made efforts to remove her children from this environment until he tried to strangle Virginia. (R6425, 6437). Although Virginia was never physically or verbally abusive to Jessica, "She was not the nurturing type of mother ... but she provided for us the best way she knew how. It just wasn't with hugs and kisses. But she made sure that we were taken care of otherwise." (R6399-6400, 6422). Jessica and Jason were left alone quite often, "latchkey kids." (R6419).

Virginia went to see Dr. Norman Larzelere about have her chipped tooth fixed. (R6400). Subsequently, Virginia had her marriage annulled and she moved her two children to Edgewater, Florida. (R6400). Virginia and Dr. Norman Larzelere married and

Dr. Larzelere adopted both Jessica and Jason. Jessica had a good relationship with Dr. Larzelere, "He was the only dad I ever knew." (R6401, 6426).

Two weeks prior to Dr. Larzelere's murder, Jessica moved out and went to live with Jeannette Atkinson. (R6402). Jessica said she was a rebellious teenager and "my mother and I locked heads a lot." (R6404,6429-30). Virginia and Dr. Larzelere got along fine, " ... they had their ups and downs, but, for the most part - - there was love there." Dr. Larzelere "worshipped her." (R6426). However, Jessica became aware that her mother was having multiple affairs. (R6402, 6426). Jessica told Dr. Larzelere that she saw her mother kissing another man. (R6403). Jason also moved out because Dr. Larzelere did not like the fact that "my brother was gay." She did not see animosity between her brother and father. (R6405, 6429). After her father was murdered, Jessica continued to live with Atkinson. (R6407).

Jessica was sexually abused by her grandfather, Peewee Antley, when she was four years old. She told her brother Jason who in turn, told their mother. (R6408). Jessica would avoid being alone with her grandfather on subsequent visits. Atkinson told Jessica that she and her sisters had been abused by Antley, as well as Jessica's three-year old cousin. (R6410). Jessica informed her uncle, her cousin's father. (R6411). Jessica's aunts and uncles brought their children to the Antley household.

(R6438). When Peewee Antley committed suicide, Jessica was happy, "I was just glad that the - - it was over." Virginia Larzelere was upset. (R6434). Jessica and Atkinson discussed the sexual abuse after her mother's trial but before she was sentenced. (R6412). Jessica knew Steven Heidle, but had only met him once. After her father died, Heidle started calling Jessica everyday. He told her, " ... what my mother and brother were up to after my father's death and to see if I had talked to the police yet." (R6413). Heidle told Jessica that her mother and brother "were both acting guilty and he knows that they did it." (R6414). Jessica had her own suspicions and spoke to her mother about it the night her father was murdered. (R6416, 6431). Larzelere told Jessica she did not kill Dr. Larzelere and had nothing to do with it. (R6417). Jessica contacted the police and gave a statement to Detective Dave Gammell. (R6414, 6432). Jessica questioned her mother's guilt throughout the trial. (R6431). Her mother did not always tell her the truth, but she could tell when her mother was lying to her. (R6418). Their relationship suffered when Virginia started lying to Jessica's father. (R6427). Virginia started telling Dr. Larzelere lies about Jessica and it damaged her relationship with her father. (R6427). Jessica said her mother was a "pathological liar." (R6429). Larzelere eventually told Jessica that she, too, had been abused by Peewee Antley. (R6418).

Jessica's brother Jason was physically abusive toward her. (R6429). She told her mother but Virginia did nothing about it. (R6429). In 1989, Jessica's parents discussed getting a divorce. Jessica would have gone to live with her father but her parents reconciled. (R6430).

Jessica knew there were insurance policies but was not aware of the amounts involved. (R6438).

In 1991, no one explained to Jessica that a first degree murder trial consisted of two separate proceedings. (R6567). Jack Wilkins and John Howes never asked Jessica about any abuse within her family. (R6568-69). She did not know what mitigation meant. (R6569). Jessica did not attend the trial but attended the sentencing hearing. (R6570-71). Neither defense attorney asked Jessica to testify at the penalty phase or sentencing hearing. (R6572). Had anyone explained the significance of the abuse she would have told someone. (R6572). The only time Jessica talked to Wilkins was to discuss Steven Heidle and if anything odd occurred between her mother and brother. (R6574). Jessica did talk to a defense investigator about her mother's background and the sexual abuse that had occurred. (R6576).

Dorothy Sedgwick, lead prosecutor on this case, interviewed most of the witnesses in preparation for trial. (R6454-55). Steven Heidle and Kristen Palmieri never admitted pre-trial that they knew the murder was going to take place. (R6455-56, 6467).

However, during closing arguments at trial, Sedgwick said Palmieri and Heidle had to have known about the murder beforehand based upon the evidence presented. (R6456-57, 6459). Heidle and Palmieri were offered "use immunity" on this case for their testimony. (R6468, 6527). Heidle seemed to understand what "use immunity" was. (R6556). Sedgwick did not have any evidence that Heidle or Palmieri committed perjury. (R6529). Heidle was cross-examined during Larzelere's trial about his pending DUI charge. (R6532). Heidle's legal troubles "would have gone the normal course ... not had any benefit requested or done by me." (R6536).

During jury selection, a newspaper article stated that Gary McDaniel, former investigator for the defense team, released evidence to the police, claiming he had discovered exculpatory evidence. He (McDaniel) asked that the Governor appoint a special prosecutor to look into the matter. (R6533, 6534).

There was one occasion when Sedgwick noticed an alcoholic smell on Wilkins' breath outside the courtroom, after the lunch break. It was a relaxed day and there were a number of people in the foyer area. (R6473-74). She noticed a moderate smell of alcohol on Wilkins and was surprised by it. Sedgwick discussed her concern with co-counsel Les Hess. (R6474). She spoke with Wilkins and he seemed absolutely normal; he did not appear to be intoxicated in any way. She and Hess decided to watch Wilkins

carefully. If they had noticed anything unusual, they would have reported it to the court. (R6475).

Sedgwick wanted to make sure Wilkins was not trying to "stage a trick" and have the State make accusations about him to the court. Subsequently, she watched and listened to him during the course of the proceedings. Wilkins was skilled and detailed every day. (R6484-85). She never felt concern over Wilkins' performance. (R6500). Sedgwick had no concerns that Larzelere was receiving inadequate representation. (R6502).

The state considering using Harry Mathis as a witness during the penalty phase as "he was a live husband, ex-husband, who was knowledgeable concerning Virginia Larzelere and had personal knowledge of a lot of negative things to say about her, including her criminal conduct and so forth." (R6504-05). Had the defense called family witnesses, Sedgwick believed, "Their testimony would be negative for Virginia Larzelere and would not be mitigating, that there was so much cross-examination available of Harry Mathis ... so much negative material about Virginia Larzelere that they would have been aware of." (R6507-08). The defense team appeared ready to go each day. (R6513).

After the penalty phase had concluded, Dr. Krop was appointed to evaluate Virginia Larzelere. (R6516). Dr. Krop told Sedgwick that the defense team did not intend to call him as witness because, "I'm not going to be of help to them." (R6517).

In 1998, Kristen Palmieri contacted Sedgwick to tell her that Gary McDaniel had been trying to contact her. Subsequently, Palmieri gave a recorded statement concerning it. (R6537). Sedgwick did not remember having any further contact with Steven Heidle after Jason Larzelere's trial. (R6540). Sedgwick never offered any kind of legal assistance to Palmieri or Heidle. (R6540).

If Jason Larzelere had revealed during his mother's trial that he had been sexually abused by his grandfather, Sedgwick would have brought this evidence out to counter-balance Larzelere's "good character." In addition, evidence of Virginia Larzelere using her son to receive packages of illegal drugs would also have been used against her. (R6543-44).

Kimberly Fletcher, a court reporter, recorded depositions during the Larzelere trial. Jack Wilkins and Fletcher had a personal relationship from 1989 though 1998. Wilkins was a drinker. (R6490-91). Wilkins would have a few drinks at lunchtime, some in the evening, and, on the weekends, start drinking in the morning. (R6491). She never saw him out of control, he was not "a sloppy drunk. He never acted drunk." (R6492). During the course of her relationship with Wilkins, she never knew him to drink during a trial. He would drink water at lunchtime. (R6493-94). Fletcher was not present during the Larzelere trial but spoke with him by phone. She did not detect

any impairment during those conversations. (R6494, 6495).

Jason Larzelere, Virginia's son and co-defendant, was initially represented by John Howes while Wilkins represented his mother. Although it became joint representation, Jason fired both of them as "they seemed mainly focused on monies." (R6577-78). Upon Gary McDaniel's recommendation, Jason retained William Lasley for $40,000, which was paid by Harry Mathis, Jason's biological father. (R6579, 6581, 6582). Jason was acquitted. (R6582). Jason had frequent meetings with McDaniel; "he was a man of his word." (R6580). Howes and Wilkins were each to be paid $100,000 for their representation. But, "They walked away with a lot more, because they were concerned about getting money and not my mother's freedom." (R6581). Gary McDaniel was fired by Wilkins and Howes because they "didn't meet eye to eye." (R6581).

Steven Heidle worked for the family and Kristen Palmieri was a secretary at Dr. Larzelere's office. (R6583). On a few occasions, Jason and Heidle picked up dental supplies in Orlando and met Palmieri to deliver them. (R6584). Heidle carried a .45 pistol. (R6584).

Wilkins and Howes never discussed defense strategy nor did they explain the bifurcated system in the event of a guilty verdict. (R6585). They did not retain a mental health expert for Jason. After Jason fired them, Lasley hired Dr. William Myers to

examine Jason. (R6586, 6590). Lasley told Jason he should tell Dr. Myers about any type of mitigating circumstances. (R6587). Lasley explained to Jason what mitigation was and how it works. (R6631). Jason told Dr. Myers that his grandfather, Peewee Antley, had sexually abused him when he was six years old. (R6591, 6642). At that time, Virginia Larzelere had left Jason at his grandparents' house for the weekend. (R6617). Jason told his mother about the abuse when he was 15 years old. (R6593). When Jason and Jessica were older, Jessica confided to him that she, too, had been abused. (R6595). Jason would have testified at his mother's penalty phase if he had been asked. (R6595). He did not tell anyone involved in his mother's proceedings about the sexual abuse suffered by the family. (R6633). Although he took no action to tell anyone about the abuse, "If it would have saved my mother's life, I would have talked about it." (R6636).

Wilkins received the Larzelere's 1991 Pathfinder and 19 foot boat from Dr. Larzelere's estate. (R6598-99). Wilkins and Howes each received a monetary figure as payment for their representation, as well. (R6600-01). Wilkins never told Jason Larzelere that he had a bar complaint against him. (R6615).

After Jason was acquitted in September 1992, he continued to maintain a relationship with his mother prior to her sentencing in May 1993. (R6620). During his evaluation, Jason told Dr. Myers there were occasions when his mother asked him to

make an illegal drug delivery. (R6626). Had he been called as a witness on his mother's behalf, Jason would have told the court about the illegal drug activities. (R6627).

When Jason was 14 years old, his mother told him his biological father was deceased. Although his mother provided for him, she was not a good mother, was self-absorbed, and could have been more loving. (R6627-28, 6644).

Daniel Rollins drove by Dr. Larzelere's office on the day he was murdered. (R6660-61). He saw a person carrying a sawed—off shotgun exit the office, who was wearing a black mask with a long-sleeved shirt. That person was in a hurry to get to his car, a 1985 green Toyota or Nissan. (R6662). Rollins was 15 years old at the time. He was afraid and did not go to the police. (R6663-64, 6672). Later on, he saw members of the media conducting a re-enactment. Rollins told them what he had seen on the day of the murder. (R6664-65, 6673). He was later contacted by the defense team. (Mr. McDaniel) (R6665).

Rollins said there was no traffic in the area the day he witnessed this scene. (R6667). Rollins saw the masked person for four to five seconds, as the person was running toward the car. Rollins was 200 feet away, riding his motorcycle, traveling 30 miles per hour. (R6668, 6669). Although he had never seen a sawed-off shotgun before, Rollins said this person appeared to be carrying one. (R6670).

William Lasley represented Jason Larzelere, Virginia's son and co-defendant, who was acquitted. (R6684). At one point Lasley had a retainer to represent Virginia Larzelere, as well.[21] (R6703). During his career, Lasley handled or consulted on over a hundred first-degree murder cases. (R6688-89). It was Lasley's practice to hire a mental health expert immediately in his murder cases. (R6691-92). In Jason's case, Lasley hired Dr. Myers within a month after being retained. (R6954). Gary McDaniel, the investigator in Virginia's case, was very helpful in Jason's case.[22] Lasley believed information provided by McDaniel helped prove Kristen Palmieri was involved in Dr. Larzelere's murder. (R6708).

Lasley said it is absolutely necessary to have an investigator in a first-degree murder case. (R6740). Since Jason Larzelere was indigent, Lasley sought payment from Volusia County for costs and fees for experts. (R6740-41). Lasley would have used an insurance expert in Virginia's case to demonstrate that the amount of insurance carried on Dr. Larzelere was not

[21] Jeanette Atkinson hired Lasley by assigning him her interest from the insurance proceeds. She asked Lasley to file a notice of appearance on Virginia's behalf and argue a conflict of interest. However, Atkinson revoked her assignment. (R6756).

[22] During his proffered examination, Lasley said McDaniel told him he was terminated from the Virginia Larzelere case because "He wanted to be paid and was not going to be paid." (R6710). Further, Lasley would have suggested Jason Larzelere was the guilty party if Lasley had represented Virginia. (R6713).

excessive. (R6758-59). In addition, he would have hired a crime scene expert, "good counsel, competent counsel, would ask for a crime scene expert." (R6771).[23] One of the most important experts that should be hired is a defense psychologist/psychiatrist. (R6807). The issues in Jason's case mirrored those in Virginia's case except, "There were some statements that Virginia had made to two or three men about wanted her husband dead." (R6813).

Lasley said the dental practices expert he hired for Jason's trial was "an excellent witness and pivotal, I think, in the case." There was an enormous quantity of valium held at Dr. Larzelere's office and "Dr. Larzelere was himself involved in some of this." (R6829). This expert's testimony inculpated Virginia and "cast a little dirt on Doc ..." (R6830).

Lasley knew from the very beginning, "from a multitude of sources" that Peewee Antley had sexually abused his own daughters as well as Jason and Jessica Larzelere. (R6850). He would have used this information if Jason had had a penalty phase. (R6850).

[23] In addition, Mr. Lasley consulted or utilized many experts in Jason Larzelere's trial that included the following: 1) dental office practices (R6772); 2)firearms and ballistics (R6775); 3)handwriting (R6780); 4)concrete (R6785); 5)battered child syndrome (R6787); 6)marine biologist (R6789); 7)neurology (R6792); 8) telecommunications (R6794); 9)pharmacology (motion denied)(R6797). He would have utilized these experts in Virginia Larzelere's case. (R6807). Except for the mental state testimony, the "concrete expert," and Don West, "attorney expert," no expert testified at the 3.850 hearing. Any benefit from such experts is speculative, at best.

Virginia Larzelere eventually waived any conflict of interest issue and asked Lasley to, "Just save my son for me." (R6853, 6896-97, 6947). Larzelere told Lasley she could not afford to pay him because Wilkins and Howes had taken all of her assets. (R6854, 6937). All of Lasley's time was focused on winning Jason's trial. (R5858).

Lasley had conducted four penalty phases prior to Jason's trial. (R6882).[24]

Lasley was aware that investigator McDaniel had filed a lawsuit against Jeanette Atkinson for unpaid fees and costs. (R6893). Lasley believed that Steven Heidle actually shot Dr. Larzelere but Virginia or Jason had motive to want Dr. Larzelere killed. (R6921). However, Lasley believed the evidence against Virginia was not compelling. (R6922).

Lasley spoke with family members on a daily basis during Jason's trial. (R6950). Since Virginia Larzelere fits the profile of a sexually abused child, Lasley doubts her credibility. (R6951). Lasley did not tell Judge Watson about the suspected abused suffered by Virginia Larzelere and he thought Wilkins and Howes "could care less one way of the other." (R6956). If Wilkins and Howes were not aware of the abuse, "they were the only ones ... in the dark." (R6957). Lasley never evaluated the significance of potential witnesses' testimony for

[24] Lasley no longer practices law. (R6885-86).

Virginia’s penalty phase. (R6963).

When Lasley initially contacted Dr. Myers for Jason’s evaluation, Lasley did not mention sexual abuse. (R6981).

Jason Larzelere told Dr. Myers that he and his mother were sexually abuse by his maternal grandfather, Peewee Antley. (R6991). Had Jason been convicted of Dr. Larzelere’s murder, Lasley would have used this information in the penalty phase. (R6992). The cement that encased the gun used to kill Dr. Larzelere did not match the cement found in Virginia Larzelere’s home. Lasley would have presented this information to Virginia’s jury. (R7003-04).

George Vouvakis, owner of Vouvakis Court Reporting, testified regarding the trial record of Jason Larzelere.[25]

Sandra Peppard, legal secretary for the State Attorney’s Office, assisted Dorothy Sedgwick in preparing for Virginia Larzelere’s case. (R7041-42). She was the only secretary that worked on the Larzelere case. (R7047). Any agreements or documents relating to any witnesses in a homicide case would have been typed by Peppard. (R7044). Peppard was not aware of any agreement with Steven Heidle outside of use immunity. He was

[25] Steven Heidle testified on three separate occasions and Kristen Palmieri testified on one occasion, during Jason Larzelere’s trial. (R6867). Vouvakis has a copy of the “Clerk’s Log” which indicated all witnesses that testified during Jason’s trial. (R6870-71). Since one day of Heidle’s testimony was not on the CD, the State objected to the introduction of the CD as a defense exhibit, and the Court sustained. (R6873).

not treated any differently than any other witness in this case. (R7045). At one point, Heidle was arrested on a DUI charge and claimed he had special connections with State Attorney Lawson Lamar. (R7046). Dorothy Sedgwick did not take any action with regard to Heidle's arrest. (R7047). Peppard was responsible for copying the discovery documents. (R7052-53).

Ann Marie Gilden, a former assistant state attorney, worked on a case involving Steven Heidle. (R7057, 7058-59). Gilden did not receive any suggestions on how to handle the disposition of the case even though she knew Heidle was a witness in a murder case. (R7059-60, 7062). Gilden and Sedgwick did not discuss Heidle's involvement in the Larzelere case. (R7063). Heidle pled no contest to first-degree misdemeanor battery. (R7068). Gilden's secretary would have entered the outcome of Heidle's case into the computer at the State Attorney's office. (R7072).

Marc Lubet represented Steven Heidle regarding his involvement in the Larzelere case, the aggravated battery case, and the DUI case. (R7074, 7076, 7081). Lubet also spoke with Heidle's mother. (R7076). Lubet recalled that Heidle got immunity from anything he said regarding the Larzelere matter but "there was no guarantee that he wasn't going to be prosecuted." (R7078). Heidle did not get transactional immunity. (R7079). Lubet was not told if Heidle would receive any special benefit for his testimony in the Larzelere cases. (R7082). Lubet

did not recall speaking to Dorothy Sedgwick or Les Hess about Heidle's unrelated criminal prosecutions. (R7082, 7102). Lubet said, "There was nothing that I can remember that him being a witness for the state helped him with, that I can recall." (R7083).

Lubet did not recall Heidle saying he knew about the Larzelere murder beforehand. (R7087). Heidle had a Burger King receipt that he used as an alibi for the time period when Dr. Larzelere was murdered. (R7089-90). None of the traffic prosecutors ever mentioned that they had received instructions from Sedgwick on how to proceed in Heidle's cases. (R7103).

Steven Heidle[26] told his mother, Patricia Heidle, about his involvement in the Larzelere murder. (R7109). Mrs. Heidle told her son to tell the police and advised him to consult with an attorney regarding any liability he might have in the case. (R7109). Mrs. Heidle retained Mark Lubet to represent Steven's interests. (R7109). Steven lived with his mother periodically and she was aware of Steven's criminal matters. (R7110, 7112). She knew Steven got use immunity for his involvement in the Larzelere murder. (R7113). Steven got no special treatment with regard to his own criminal cases. (R7114).

Sergeant William Bennett, Edgewater Police Department, was one of the investigating officers for the Larzelere murder. He

[26] Steven Heidle died on December 16, 2000. (R7088).

interviewed several witnesses and reviewed the 911 tape, making notes while he reviewed the tape. (R7115, 7116, 7118).

Sergeant Bennett thought Emma Lombardo, a witness in the Larzelere case, "was in a confused state of mind" when she made the 911 call from Dr. Larzelere's office. (R7120). Lombardo said she did not see the gunman and therefore Bennett thought she could not have known if the gunman had left the office or not. (R7120). Bennett believed there were communication problems with Lombardo because she spoke with a heavy accent and may not have understood the 911 dispatcher. (R7121).

Bennett interviewed both Steven Heidle and Kristen Palmieri. (R7123). During Palmieri's interview, Heidle came in the room and said he had told the police everything and Palmieri should cooperate. (R7123, 7128). Within a short period of time, arrest warrants were issued for Virginia and Jason Larzelere. (R7125). Kristen Palmieri was not a suspect in Dr. Larzelere's murder. (R7135).

Dr. Bill Mosman is a licensed psychologist who specializes in forensic work, neuropsychology, mitigation and post traumatic stress disorder. (R7154, 7167). In reviewing a vast amount of material (R7170-78) and interviews with Virginia's family members, he determined that Virginia grew up in a very dysfunctional, traumatic family. (R7184). When Virginia and her sisters turned four years old, the sexual abuse (by their

father) began. (R7185-86). Virginia tried to shield her sisters from the abuse so she would "offer herself up" in order to protect them. (R7187). She was taught at a very early age to "trade sex" for "options and opportunities." (R7193-94).

Dr. Mosman gave Larzelere a battery of tests. (R7204-06). He ruled out "organic brain damage ... no history of exposure to toxic substances, no closed-head injuries with substantial symptoms." (R7209-10). In addition, there was no indication of any psychosis, schizophrenia, paranoias or manic depressives. She has a "host of personality disorders." (R7210). Larzelere does suffer from post traumatic stress disorder. (R7214). She described her relationship with Dr. Larzelere (the victim) as "absolutely ideal." She requires "constant attention and admiration and will keep fishing and manipulating for compliments."(R7226). She has a narcissistic personality disorder. (R7228).

Larzelere has been arrested more than once. The fraud and check-writing charges were "related to times of stress, marital difficulties ..." (R7238). There was an indication of Larzelere having contracted Legionnaire's disease prior to 1991. (R7247). He did not find the presence of any mental disturbance. (R7253). Larzelere's age at the time of the murder was "clearly" a mitigating factor. He said, "Age, has never been - - limited to the chronological age from birth to what it says on your

driver's license. Age includes physical age, mental age, emotional age, intellectual age, moral age, developmental age ..." (R7256).

During his proffered testimony, Dr. Mosman said Larzelere did not have a meaningful understanding of mitigation. She believed she had "the abuse-excuse defense." (R7284). She discussed the PTSD to some extent but did not want to put her siblings in jeopardy in discussing any sexual abuse. Mosman said, "She had been completely told and conditioned throughout these years that discussing this would harm them. And her perception was one of to bring this up would embarrass, humiliate ..." (R7285). In his opinion, Larzelere's "waiver" of presenting mitigation was not voluntary "because of the duress and ... clinical impairments ..." (R7296). **Mosman could not have assisted trial counsel in determining "mitigation or the waiver issues" because the appropriate data had not been provided.** (R7300).

During his proffered cross-examination, Dr. Mosman said Larzelere never had clinical treatment for the sexual abuse she suffered. (R7312). She knew she had exposed her own children to being sexually abused by her own father. (R7315).

During cross-examination, Dr. Mosman said he was aware that Larzelere had made attempts to have individuals that she knew try to kill her husband. This was not an impulsive crime.

(R7321). It was committed so Larzelere could collect 3.5 million dollars in life insurance. (R7323). Larzelere denied her guilt. (R7326).

Larzelere claims her son, Jason, is disabled. Medical records would indicate a seizure disorder, abnormal EEG, neurological impairments, and a military discharge based on a disability. (R7330). Dr. Mosman has no first-hand knowledge regarding these claims. (R7331).

Larzelere had made attempts to kill two previous husbands and was engaged in multiple extramarital affairs. She had solicited various individuals to murder Dr. Larzelere and had embezzled from a previous employer. (R7338). She is quite adept at lying and conning people. (R7353, 7377). Larzelere self-reported that she re-experiences aspects of her childhood sexual abuse. (R7343). This crime was not an impulsive crime. (R7352). Her husband was understanding and gave his blessing to her extramarital affairs. (R7356).

Mosman did not diagnose Larzelere as having a borderline personality disorder. However, she does have anger management problems and adult antisocial behavior. (R7371, 7374). She does not have Legionnaire's Disease. (R7378). Larzelere claimed Dr. Larzelere was a homosexual but there was no information to support it. (R7397). She does not have any mental impairments or organic brain damage. (R7382, 7402). **Larzelere is an exploitive**

person who is adept at assessing someone else's weaknesses. (R7419).

Dr. Harry McClaren, a licensed psychologist, conducted a thorough psychological evaluation of Larzelere on three separate occasions. (R7463, 7479).[27] In addition, he interviewed all three of Larzelere's sisters and her two oldest children, Jason and Jessica. (R7481).

Larzelere's score on the MMPI-2 indicated "a lot of anger, both repressed anger and probably hostility ..." (R7486). There was no evidence of post traumatic stress disorder. (R7491).

One of Larzelere's former lovers described her as " ... devilish, manipulative ..." (R7494). Her daughter, Jessica, did not think Virginia was a good mother, and that she tried to drive a wedge between Jessica and her father, Norman (the victim). Larzelere lied to Norman about things that Jessica did. Jessica "didn't forgive her mother until her mother owned up to being a bad mother." (R7495).

Jason Larzelere told Dr. McClaren that the Navy had discharged him for "being gay." (R7497).

After talking with Virginia's sisters, it was clear that Virginia had been sexually abused by her father, and possibly

[27] April 2, 2002, April 3, 2002, and April 16, 2002. (R7479).

her uncle.[28] None of her sisters were currently incarcerated. (R7498). In addition, none of her sisters reported that they had committed any major felony offenses. (R7499). Dr. McClaren concluded that Larzelere "does not suffer from any psychotic disorder ... has average intelligence ... suffers from hysteroid and narcissistic (disorders)... has some features of borderline obsessive-compulsive personality disorder." She did not meet the criteria for post traumatic stress disorder, "though she has some symptoms of it." (R7500). Larzelere denied any substance abuse or dependence although she did indulge in using diet pills. (R7501). She did not meet the criteria for antisocial personality disorder. (R7502).

Dr. McClaren relied on his professional experience with posttraumatic stress disorder (PTSD) in determining that Larzelere did not meet the diagnostic criteria. (R7506). Although she denied any substance abuse, her son, Jason, said, " ... she liked to take diet pills and Valium, and that after Norman's death, she became much worse in this regard, as far as taking more stimulants ..." (R 7506-07). Jason was not aware if Larzelere used cocaine, but his mother and he were involved in cocaine drug trafficking. (R7507).

Virginia and her sisters described her life as "the best of

[28] Her sister reported being sexually abused by their father, as well. (R7498).

times” prior to the murder of Dr. Larzelere. (R7508). No one suggested that “she was mentally ill in the sense of any kind of a psychotic break with realty.” (R7508). In Dr. McClaren’s opinion, Larzelere was not under the substantial domination of another or under duress. Jason commented to Dr. McClaren that, ”he couldn’t picture his mother being dominated by anybody.” (R7509).

The mitigator “appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired” would not apply to Larzelere. (R7509). Larzelere’s age at the time of the murder would not be a mitigator, either. (R7510).

Larzelere is “exploitative, has a grandiose sense of self-importance, sense of entitlement, requires constant attention and admiration, lacks sympathy.” (R7511). In addition, she also “seeks or demands reassurance, approval, or praise, is inappropriately sexually seductive in appearance and behavior, is overly concerned with physical attractiveness, is uncomfortable ... where she is not the center of attention ...” (R7512). In conclusion, narcissistic personality disorder and histrionic personality disorder are the two primary diagnoses that apply to Larzelere.[29] (R7512-13). Larzelere has told

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[29] Along with personality disorder “not otherwise specified.” (R7513).

multiples lies, was very deceitful, and used various aliases. (R7518, 7519). In reviewing notes that Larzelere took during her trial, Dr. McClaren concluded, "she was being very vigilant in tracking court proceedings and very actively aiding and assisting her attorney." (R7521).

One of Virginia's sisters, Patsy, told Dr. McClaren that she, Patsy, has PTSD. (R7526). Jessica Larzelere also told Dr. McClaren that she was abused as a child but did not tell Dr. McClaren that she suffers from PTSD. (R7527). Jason was diagnosed as having PTSD by Dr. Myers. (R7527).

Dr. McClaren believes that Virginia, her sisters, and their children were all sexually abused by Virginia's father, Peewee Antley. (R7530). Virginia denied "reexperiencing" any of the sexual abuse and therefore, the diagnosis of PTSD does not apply. (R7531). Larzelere's "complete denial," Dr. Krop's evaluation, and her prison records all indicated the lack of PTSD. (R7533).

Virginia was not "bothered by unwanted memories, no nightmares, not jumpy ..." She avoided reliving when her husband died, but it was not related to the sexual abuse. (R7560). She did not think she had PTSD, "had gotten some type of book about survival ..." (R7561). She was very prone to conning and manipulating people. (R7562). There were no medical records indicating she had ever had a heart attack or Legionnaire's

disease. (R7564). During his evaluation of her, Larzelere was very "animated, engaged, smiling, batting her eyes ... just very gregarious ..."[30] She has a "high capacity for deception." (R7575). Larzelere is charming, intelligent, and does not suffer from any delusions other than signs of irrational thinking. (R7575-76). She does not show any remorse for murdering her husband. (R7577).

Donald West, a criminal defense attorney,[31] was qualified by the court to testify as to ineffective assistance of counsel matters. (R7616-22, 7634). Wilkins and Howes put all their energy into the guilt phase and "they were expecting to win." (R7639). They did not spend any time at all in developing mitigating issues or preparing witnesses to testify. (R7639). Wilkins had no experience in capital cases. He did not mention any mitigation to the jury and did not argue against aggravation. (R7640, 7644, 7646). Although Wilkins claimed co-counsel John Howes was responsible for the penalty phase, Howes was never involved in Virginia Larzelere's penalty phase investigation. He did not contact any family members, except for the time period during the trial itself. (R7648, 7649). Gary McDaniel's report of June 1991 indicated various areas of

[30] During the evidentiary hearing, she appeared sad, and showed very little facial expression. (R7574).

[31] Mr. West has not handled any capital post-conviction cases. (R7626).

potential mitigation. This report should have been sent to Dr. Krop because "that would have given him insight ... as to how to interview Mrs. Larzelere ..." (R7650). Wilkins told Dr. Krop there were no family members to interview. (R7653). "Family members are always a source of mitigation." (R7665). Wilkins should have explained to the jury what "life without the possibility of parole for 25 years" meant, so the jury did not think it was "a get out of jail free ..." (R7661, 7662). The prosecution presented Larzelere "as a cold and vicious killer who arranged to have her husband killed for the worst human reasons ..." Larzelere's family members could have testified that Larzelere performed various kind, generous and charitable acts throughout her life. (R7667). Harry Mathis' deposition, taken in July 1992, indicated there was sexual abuse in the family. This information should have been presented to the trial court. (R7675). The mental health expert, Dr. Krop, should have been more involved through the proceedings. (R7679-82).

West never spoke with Wilkins or Howes regarding their strategy for the penalty phase. (R7696). West did not familiarize himself with the entire trial record. (R7700-01). Both Wilkins and Howes had contact with Dr. Krop regarding mitigation. (R7705-06). West would have argued to the penalty phase jury in a different manner. (R7723).

West agreed that a witness has to be taken, "for better and

worse." There is a risk if the witness has a wealth of information; family members are likely to have both bad and good information. (R7725). It would not have been helpful if Jason Larzelere had testified at Virginia's trial that his grandfather had sexually abused him after Virginia had left him alone with him. (R7732-33). West would have first considered whether or not he would have had Jessica Larzelere testify that her mother was a pathological liar. (R7734).

Although Larzelere's sisters (prior to evidentiary hearing) told Dr. Mosman about the sexual abuse, his contact with them was very brief. (R7768-69). (R7769). West was not aware of any extensive interviews with witnesses that occurred during post-conviction proceedings. (R7770). West did not believe that family members would have given any damaging facts from Larzelere's childhood because "it would have overcome the evidence that they did give us because of the significance, the compelling nature, and the critical importance in mitigation of what they did say." (R7772). Virginia Larzelere followed her attorneys' advice and concurred in not presenting mitigation. (R7791). Larzelere's abuse ended by the time she became an adolescent. Twenty years had passed between the time the abuse stopped and the time she murdered Dr. Larzelere. (R7794-95). Although Virginia exposed her own children to being sexually abused by her father, the "evidence is so compelling to a jury,

in my view, that any argument the State might make to minimize it is worth the risk." (R7798). Further, "bad things that have happened ... help explain the bad things that they have done." (R7803-04).

Jerry Wells was hired by Virginia Larzelere to probate Dr. Larzelere's estate. (R7737). In September 1991, a check in the amount of $14,971.92 was issued to the Estate of Norman Larzelere. (R7740, 7742). These funds were disbursed at the request of Virginia Larzelere as she said they were her personal funds, and not part of the estate. (R7748, 7757). Wells believed this check was intended to pay off the outstanding balance of an auto loan. (R7750). Wells did not specifically recall handling a "Lemon Law" claim for Virginia Larzelere. (R7752-53).

Dr. Richard Seely, M.D., has several years experience working in psychiatric hospitals and addiction medicine. He helps monitor impaired doctors, lawyers, and judges throughout Florida. (R7849-50).[32] Dr. Seeley reviewed a vast amount of information in connection to this case, including depositions and court transcripts and transcripts of this evidentiary hearing. (R7854-7857). Given the testimony of various witnesses, Dr. Seeley determined that Jack Wilkins abused alcohol. (R7858-59, 7862-63). An individual who consumed as much alcohol as

[32] During voir dire by the State, Dr. Seeley said he did not personally evaluate any individual in connection to the Larzelere case. (R7853).

Wilkins did would have “neurocognitive impairment at the levels of operating at 70 to 80 percent of what their normal functioning is when retested after at least three to six months sobriety.” (R7864). Although Wilkins qualified himself as a “social drinker,” this is “not uncommon commentary for someone with an alcohol problem.” (R7870). There is a direct correlation between alcoholism and substandard work by a doctor or a lawyer. (R7871). In Dr. Seeley’s opinion, Jack Wilkins was alcohol-dependent, an alcoholic. Hypothetically, Jack Wilkins’ failure to investigate Larzelere’s case fully could have been a result of Wilkins’ alcohol dependency. (R7873).

Dr. Seeley did not personally evaluate any individual in connection to the Larzelere case. (R7853). Dr. Seeley never met or evaluated Jack Wilkins. (R7878-79). He never saw Wilkins’ medical or prison records. (R7879, 7893). **There were no records indicating Jack Wilkins suffered from alcohol withdrawal after he entered Federal prison.** (R7894-95). Although Jonathan Stidham testified that he saw Wilkins’ hands shaking one time in court (unrelated matter), there could be some other factors that cause Wilkins’ hands to shake at that time. (R7882-83, 7891). Dr. Seeley was not aware of any complaints filed against Wilkins at the time of Larzelere’s trial. (R7885, 7888). Although three witnesses testified during this hearing that they smelled alcohol on Wilkins during Larzelere’s trial, Dr. Seeley was not

certain if they meant the same occasion or three separate occasions. (R7895-96).

Dr. Seeley pled no contest to a felony, "self-prescription of a cough syrup." (R7899).[33]

John Whelan, a chemist and college teaching assistant, formerly conducted concrete testing for an engineering firm.[34] (R7937, 7938). The firm tested concrete for "compaction, strength. We also did some ... composition tests for concrete, asphalt, soil cement ..." (R7939). Whelan did not know what affect muriatic acid would have on concrete except that " a one-time exposure to muriatic acid is really not going to change concrete unless it hasn't been cured properly, and that's if you're trying to mix it up when it's still wet." "Tannic acid" might change the color of concrete. Muriatic acid would not change concrete "aggregate-wise." (R7944-45, 7971). Cement is 60-75 percent aggregate. (R7945).

During his proffered examination, Whelan read from an FBI lab report that discussed examination of samples of concrete taken from a silver cooking pot (Q1-FDLE report from trial) from the Larzelere residence and (Q2) sample of concrete that encased

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33 The parties stipulated to enter the "Case Summary Action Report" from Collier County Clerk's Office, Florida, as State's Exhibit 23. (R7906-07). The conviction was for "Obtaining Prescription Drugs by Fraud." (R7903, 7905).

34 The court qualified John Whelan as an expert in chemistry. (R7982).

two weapons believed to be used in the death of Dr. Larzelere. (R7952). The cement in Q1 was different in color and exhibited some differences in particle size than the cement in Q2. (R7956). However, the cement that encased the weapons was exposed to extreme weathering which can affect the properties of the cement. (R7956). Although it was unlikely the weathering could have affected the properties of the cement, it could not be eliminated as a possibility. (R7956).

Whelan did not do any independent testing of these two samples. (R7957). Two different concretes with different particle size distribution are not going to be the same. (R7959). If concrete is exposed to extreme weathering conditions, it is not going to change much with the exception of the color. (R7961). However, there would not have been an extreme weathering condition in a two month period. (R7964).

John Whelan has never before been qualified as an expert witness in court. (R7967). Whelan explained that concrete is a mixture of cement (Portland cement), water, and aggregates (gravel and sand). (R7967, 7968). Whelan said you cannot buy cement at a local home improvement store, only a "ready mix concrete." (R7968, 7976). When the FBI referred to the concrete specimens in this case as "cement," they were mistaken. (R7986). If the concrete that encased the weapons was still wet when placed in the water, the color could have been affected.

(R7972).

Harry Blakeslee, formerly a structural masonry inspector, is a construction project manager with the Volusia County, Florida, School District. (R7990). Blakeslee has worked in the construction industry for thirty years. (R7991). Blakeslee explained that Portland cement is the basis of concrete. In order for it to be concrete, water must be added, along with an aggregate (sand or rock mixture). The aggregate holds the concrete together and gives it its strength. (R7991). Portland cement, without the aggregate, is available for purchase in the DeLand, Florida, area[35] as well as Volusia County and was available in the early 1990's, as well.[36]

SUMMARY OF THE ARGUMENT

Larzelere's *Answer Brief* continues the trial court's erroneous treatment of the penalty phase ineffectiveness claim as being a "waiver of mitigation" situation. No precedent from this Court treats potential mitigation evidence that was affirmatively kept from defense counsel as a "waiver" of the presentation of mitigation. That result is contrary to the law, and is inconsistent with common sense.

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35 Portland cement can be purchased directly through Rinker, Tarmac or a local lumber supply store, such as Home Depot. (R7992).

36 The Larzelere family lived in DeLand, Florida, in 1991. (R6405).

The "fatal variance/constructive amendment" claim was correctly denied on procedural bar grounds -- that claim was raised at trial but not raised on direct appeal. That is a procedural bar under settled law. Further, Larzelere is not entitled to simultaneously litigate this claim in this appeal and in her contemporaneously-filed state habeas corpus petition. Finally, the alternative denial on the merits is correct and should not be disturbed.

The "conflict of interest" claim is an attempt to apply an incorrect legal standard to the scenario presented in this case. The *Cuyler v. Sullivan*, 446 U.S.335 (1980), presumptive prejudice standard does not apply outside the context of multiple representation, a situation that is not present in this case. Larzelere cannot carry her burden of proof under *Strickland v. Washington,* 466 U.S. 668 (1984), which is the proper standard under which this claim is evaluated.

The cumulative error claim was properly denied by the circuit court as meritless. Moreover, this claim is insufficiently briefed, and is not a basis for relief for that additional reason.

REPLY BRIEF

THE COLLATERAL PROCEEDING TRIAL COURT ERRED IN GRANTING SENTENCE STAGE RELIEF

On pages 10-36 of the *Answer Brief*, Larzelere argues that

the collateral proceeding trial court correctly granted sentence stage relief based on ineffectiveness of counsel. Despite the arguments contained in that brief, Larzelere has done no more than ask this Court to uphold a decision that is factually and legally wrong.

Larzelere perpetuates the trial court's error by arguing that she did not "waive" the presentation of mitigating evidence. However, for the reasons discussed at length in the State's *Initial Brief*, this is not a "waiver" case at all, and the trial court applied the wrong legal standard in conducting its analysis. The true facts, which are uncontroverted, are that Larzelere absolutely refused to reveal her claims of sexual abuse to her lawyers. (R5491, 5506, 5516). It makes no sense at all to find that trial counsel can be ineffective for not presenting something that was kept from them by their client.[37] Larzelere has made no attempt to square that result with common sense, and has not even discussed the multiple cases from this Court which expressly hold that there is no ineffectiveness when the client refused to provide "mitigating" evidence. *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000); *Walton v. State*, 847 So. 2d 438, 459 (Fla. 2003); *Marquard v. State*, 850 So. 2d 417, 429-30 (Fla. 2003); *see also*, *Power v. State/Crosby*, 886 So. 2d

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[37] Likewise, it makes no sense to find that something that was kept from counsel was "waived."

952, 959-61 (Fla. 2004).

The collateral proceeding trial court applied the wrong legal standard when it did not follow *Cherry, Walton* and *Marquard.* And, when it applied the "waiver of mitigation" standard from *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), the lower court misapplied the law to the uncontroverted facts.[38] The grant of sentence stage relief should be reversed, and the death sentence reinstated.

CROSS-ANSWER BRIEF

I. THE "FATAL VARIANCE/CONSTRUCTIVE AMENDMENT" CLAIMS IS NOT A BASIS FOR RELIEF.

On pages 36-58 of her *Initial Brief*, Larzelere argues that she was "embarrassed in her defense due to fatal variances and constructive amendments of the indictment at trial." This claim was raised as supplemental claim XVI in the trial court, and was denied on alternate grounds of procedural bar and no merit. (R3379-80). This claim is also raised as an ineffective assistance of appellate counsel claim in Larzelere's contemporaneously filed petition for writ of habeas corpus.

38 Larzelere did not testify at the evidentiary hearing, and, for that reason, the testimony of counsel that she refused to reveal the now-offered claims of sexual abuse must be accepted. The collateral proceeding trial court ignored that evidence which demonstrates the absence of a factual basis for the court's grant of relief. As the testimony demonstrates, present counsel's theory of defense would have resulted in a massive amount of negative information becoming admissible. Larzelere cannot establish the prejudice prong of *Strickland.*

Larzelere Does Not Get Two Appeals on the Same Issue.

The State notes that Larzelere's brief argues the habeas petition and the habeas petition argues the brief. Respectfully, Larzelere cannot combine arguments in this fashion in an attempt to obtain two bites at the apple. The issues in the two proceedings are different, and combining them as Larzelere has done is needlessly burdensome on the Court. In the final analysis, the circuit court properly denied relief on procedural bar grounds, because the "fatal variance" issue could have been but was not raised on direct appeal. That result is correct for the reasons set out below. Likewise, since this claim was (at least for the most part) preserved at trial by a timely objection, the "failure" to raise the claim on direct appeal is properly raised in a state petition for writ of habeas corpus as a claim of ineffectiveness of appellate counsel. Larzelere is not entitled to litigate this issue beyond those parameters.

Denial on Procedural Bar Grounds was Correct.

The Circuit Court's primary basis for denial of relief was that this claim was procedurally barred because it could have been but was not raised on direct appeal. Florida law is well-settled that a claim that could have been but was not raised on direct appeal cannot be raised on collateral attack. *See, Fla. R. Crim. P.* 3.850. There is no claim that the "fatal variance" claim was raised on direct appeal -- this claim is procedurally

barred, and the circuit court properly denied relief on that basis. (R3379). *See, Zeigler v. State*, 452 So. 2d 537, 539 (Fla. 1984) (claim that indictment was "invalid" is procedurally barred).

Larzelere's Claim was Properly Denied as Meritless.[39]

In addition to being procedurally barred, Larzelere's "fatal variance" claim is meritless. As this Court has stated, the purpose of the rule requiring that the indictment comport with the proof at trial is:

> A material variance between the name alleged, and that proved, is fatal. Primarily, it is a question of identity and the essential thing in the requirement of correspondence between the allegation of the name in the indictment and the proof is that **the record must be such as to inform the defendant of the charge against him and to protect him against another prosecution for the same offense.**
>
> It is general knowledge, and we take judicial notice of the fact that a person named "Michael" is generally referred to as "Mike." We hold that the proof of the identity of the deceased was established beyond a reasonable doubt. The defendant could not have been embarrassed in the preparation of his defense, and the identity of the victim as alleged in the indictment with the person who was shot by the defendant is clearly shown by the record. This protects the accused against another prosecution for the same offense.

Raulerson v. State, 358 So. 2d 826, 830 (Fla. 1978). (emphasis added). Larzelere cannot be prosecuted for a different offense arising out of the murder of her husband, nor can she reasonably

[39] To the extent that the merits of this claim are properly litigated in this proceeding, there is no basis for relief.

assert that she did not know the offense with which she was charged.

The indictment in this case reads, in pertinent part, as follows:

> VIRGINIA GAIL LARZELERE and JASON ERIC LARZELERE did, on the 8th day of March, 1991, in Volusia County, Florida, in violation of *Florida Statute* 782.04, from a premeditated design to effect the death of NORMAN LARZELERE, murder NORMAN LARZELERE in the County and State aforesaid, by shooting him with a firearm.

(R2915).[40] Larzelere's argument, as understood by the State, is that because a limited instruction on conspiracy was given in the course of defining the law of principals and the admissibility of a con-conspirator's statement (which Larzelere herself requested), there was either a fatal variance from, or a constructive amendment to, the indictment. The record demonstrates that Larzelere **requested** a part of the standard jury instruction on conspiracy and co-conspirator's statements (R5718, 5874), and that the trial court gave the standard accomplice (principal) instruction. (R5739). The trial court has wide latitude in instructing the jury, and, in this case, the instructions about which Larzelere complains were necessary to fully explain the legal principles that the jury was called upon to decide. The evidence at trial clearly showed that one or more persons in addition to Larzelere were involved in the murder of

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40 Jason Larzelere was tried separately and acquitted.

the victim, and, because that is so, there can be no error from the giving of the principal instruction. *Martin v. State*, 218 So. 2d 195, 196 (Fla. 3rd DCA 1969) ("In view of the showing at trial that others were involved, the trial court did not commit error in charging the jury regarding aiding and abetting, under § 776.011 Fla.Stat., F.S.A.").[41] Further, given that Larzelere requested that conspiracy instruction, it is disingenuous for her to now complain that she received what she requested.

Moreover, there is no question but that the jury was necessarily instructed on the rule governing the admissibility of a co-conspirator's statement -- that was at Larzelere's request, and she cannot complain about it.[42] (R5876). It makes no sense to suggest, as Larzelere now does, that the jury should be given explicit instructions concerning the admissibility of a "co-conspirator's" statement, but be left to wonder what a "conspiracy" is in the first place.[43] When stripped of its

41 *State v. Dene*, 533 So. 2d 265, 266 (Fla. 1988), discusses the evolution of accomplice liability law in Florida.

42 The mere use of the word "conspiracy" does not transform the prosecution into one for an inchoate crime. *See, Brooks v. State*, 918 So. 2d 181 (Fla. 2005); *Gamble v. State*, 659 So. 2d 242, 245 (Fla. 1995); *Gordon v. State*, 704 So. 2d 107, 117-18 (Fla. 1997).

43 The *Standard Jury Instruction* on accomplice liability in effect at the time of the 1992 trial when the "active participant was hired by defendant" made use of the word "co-conspirator."

pretensions, Larzelere's strained argument has no basis in the law, and is not a basis for relief.

To the extent that further discussion is necessary, the collateral proceeding trial court properly relied on *State v. Roby*, 246 So. 2d 566, 571 (Fla. 1971), in denying relief on the merits. The law is clear that the indictment for premeditated murder included liability as a principal -- Larzelere's efforts to construct an error, while creative, have no basis in law, and are not a basis for reversal. The denial of guilt stage relief should be affirmed.

II. THE "CONFLICT OF INTEREST" CLAIM[44]

On pages 58-98 of her brief, Larzelere sets out a lengthy argument which relies, in large part, on unproven, speculative claims as a basis for asserting that trial counsel had a "conflict of interest" at the time of her capital trial.[45] To the extent that this claim is actually a conflict of interest claim, the trial court denied relief following an evidentiary hearing. This Court has held that "[a]s long as the trial court's

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[44] Larzelere's claim seeks to expand the scope of the *Cuyler v. Sullivan* standard of review far beyond its settled applicability, which is, and has been, limited to "active representation of competing interests." *Teffeteller v. Dugger,* 734 So. 2d 1009 (Fla. 1999); *Herring v. State,* 730 So. 2d 1264 (Fla. 1998.

45 This claim was Claim III in the Rule 3.850 motion -- the Court's discussion of this claim appears at R3356-3368.

findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998); *Trotter v. State/McDonough*, 2006 Fla. LEXIS 940 (Fla. May 25, 2006); *Windom v. State/Crosby*, 886 So. 2d 915, 927 (Fla. 2004). To the extent that this claim is one of ineffective assistance of counsel, whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness claim; *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, *i.e.,* deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998)); *Strickland*, 466 U.S. at 698 (observing that both the

performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.)

The Substance Abuse Component.

On pages 58-66 of her brief, Larzelere argues that claimed substance abuse by trial counsel Wilkins created a "conflict of interest." Despite the hyperbole of Larzelere's brief, this claim is not a basis for relief because it has no legal basis. In order to establish a conflict of interest claim, Larzelere must establish that counsel (1) actively represented competing interests, and (2) that that actual conflict of interest adversely affected counsel's performance. *See, Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980); *Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355-58 (11th Cir. 2005); *Herring v. State,* 730 So. 2d 1264 (Fla. 1998). Like the two-part *Strickland* test, this standard is in the conjunctive -- unless Larzelere can establish both actual conflict and an adverse effect, she is not entitled to relief. A speculative or possible conflict is insufficient to undermine a criminal conviction. *Hunter v. State*, 817 So. 2d 786 (Fla. 2002). Whatever this claim may be, it is not a "conflict of interest" claim -- *Cuyler* does not control, and is not a basis for relief because there was no "active representation of competing interest." *Cuyler* does not apply outside the multiple representation context.

To the extent that this claim is a traditional ineffectiveness of counsel claim under *Strickland,* there is no *per se* rule that substance abuse by defense counsel relieves the claimant of proving both prongs of *Strickland.* In addressing this sort of claim, this Court has held:

> In his brief before this Court, Bruno asserts several instances of ineffectiveness. We address each of the subclaims in turn. In subclaim two, Bruno contends that defense counsel was ineffective during the trial due to alcohol and drug impairments. Bruno points to the previous hospitalization of trial counsel for drug and alcohol use. Private counsel was retained in August 1986 to represent Bruno. Over the next few months, counsel developed a drinking problem and, when he was drinking, would occasionally use cocaine. He enrolled in Alcoholics Anonymous on October 15, 1986, and remained alcohol and drug free from then until March 1987, when he began drinking again but not using cocaine. He admitted himself into a hospital on March 15, 1987, for his drinking problem, remained hospitalized for twenty-eight days, and subsequently remained alcohol- and drug-free. After being released, counsel apprised both Bruno and the court of his problem and offered to withdraw, but Bruno asked him to continue as counsel. The trial, which originally had been set for March 30, 1987, was rescheduled for August 5, 1987, and began on that date. Counsel testified at the evidentiary hearing below that he never was under the influence of alcohol or drugs while working on this case. The trial court concluded that Bruno "failed to meet his burden of demonstrating how [counsel's] drug and alcohol usage prior to trial rendered ineffective his legal representation to the Defendant and how such conduct prejudiced the Defendant." We agree.

Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001) [footnotes omitted]; *Bryan v. State*, 753 So. 2d 1244, 1247 (Fla. 2000) ("There being no specific evidence that Kermish's drug use or

dependency impaired his actual conduct at trial, Kelly has not met his initial burden of showing that Kermish's representation fell below an objective standard of reasonableness. *See Strickland [v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)]." *Quoting Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) [footnote omitted]; *White v. State,* 559 So. 2d 1097, 1099 (Fla. 1990).

In denying relief, the collateral proceeding trial court held:

> Atkinson, Defendant’s sister, testified that she observed Wilkins drinking in his office during the trial. See Evidentiary Hearing Transcripts, May 15, 2002 — Vol. V at 651. She also testified that she smelled alcohol on Wilkins’ breath at the bond hearing, but that she did not report it to Defendant. See id. at 651-52; 681-83. Muller, a court observer, testified that she smelled alcohol on Wilkins one time after a lunch or afternoon break during the trial, but she did not notice a decline in Wilkins’ performance. See Evidentiary Hearing Transcripts, May 15, 2002 — Vol. V at 698-99; 706-08. Antley, Defendant’s sister, testified that she went to lunch with Wilkins during the trial and Wilkins drank straight liquor and did not eat, but she did not report it to anyone. *See* Evidentiary Hearing Transcripts, May 15, 2002 — Vol. V at 749-50; 752-53. Wilkins’ secretary testified that Wilkins did drink in his office, he was a social drinker and not a heavy drinker, she occasionally restocked the big bottles of liquor in his office because he took the bottle home, and that during Defendant’s trial he may have come back to the office on a Friday and he probably had a drink. See Evidentiary Hearing Transcripts, May 14, 2002 — Vol. II at 226-32; 255-58. Fletcher, Wilkins’ girlfriend at the time of the trial, testified that Wilkins was a heavy drinker, but he would never drink during a trial. See Evidentiary Hearing Transcripts, May 17, 2002 — Vol. VIII at 1098-1105.

The second-chair prosecutor testified that he smelled alcohol on Wilkins' breath one time during the trial, discussed it with the lead prosecutor, and they decided to watch Wilkins and noticed nothing substandard about his performance. *See* Evidentiary Hearing Transcripts, May 15, 2002 — Vol. V at 717-19; 733; 736-37. The prosecutor testified that he did not bring the incident up to the Court because just a smell does not mean that there is an effect on the trial. *See id.* at 719; 722. The prosecutor also testified that he had many opportunities to be close to Wilkins during the five-week long trial, including bench conferences, and never smelled alcohol on his breath at any other time. *See id.* at 727-28. The lead prosecutor also testified that she smelled alcohol on Wilkins breath after lunch one time during the trial, discussed in with co-counsel, and they decided to watch Wilkins and noticed nothing substandard about his performance that day or any other day during the trial. See Evidentiary Hearing Transcripts, May 17, 2002 — Vol. VIII at 1082-86; 1093-95; 1108-09. Howes, Wilkins' co-counsel, testified that he did not see Wilkins drink alcohol during breaks in Defendant's trial in the day, never saw Wilkins drink more than three drinks in one sitting, and never saw Wilkins drink to the point where it adversely affected him. See Evidentiary Hearing Transcripts, May 13, 2002 — Vol. I at 97-102. Howes also testified that he never saw Wilkins drink a significant amount of alcohol during the trial, and never had any concerns about Wilkins ability to pursue legal issues. *See id.* at 162-67. Wilkins testified that during Defendant's representation he did occasionally have a drink in his office. Evidentiary Hearing Transcripts, May 14, 2002 — Vol. II at 335. Wilkins also testified that during Defendant's trial he never drank alcohol during the day, usually had a glass of wine at supper, but never drank to the point that he had a hangover in the morning or someone could smell the odor the next day. *See id.* at Vol. III, 457-58.

Based on the totality of this evidence, this Court finds that Defendant has failed to meet her burden of proof on this claim. As such, this claim is insufficient. *See also Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001) (finding that defendant failed to meet

> his burden of demonstrating how counsel's drug and alcohol usage, and hospitalization therefrom, prior to trial rendered ineffective legal representation and how such conduct prejudiced defendant where counsel testified at the evidentiary hearing that he never was under the influence of alcohol or drugs while working on this case); *White v. State*, 559 So. 2d 1097, 1099 (Fla. 1990) (finding insufficient evidence to support claim that representation was incompetent because counsel was intoxicated during the course of the trial where assistant state attorney testified that counsel was not under the influence of any intoxicant during trial because assistant state attorney checked counsel's breath daily and he had numerous contacts with counsel during the process of trial which indicated that counsel was not intoxicated).

(R3357-59).[46]

Those findings of fact by the trial court are supported by competent substantial evidence, and should not be disturbed. Larzelere has pointed to nothing more than speculation, innuendo, and *ad hominem* abuse directed toward Wilkins to support her claim for relief. Such speculation is insufficient to impugn the validity of her conviction.

With respect to the witness Seely (R7873), his conclusion, as conceded by Larzelere, was that Wilkins was "more likely than not" and alcoholic. *Initial Brief* at 60. Seely testified that "[w]e certainly **may surmise** that at times, he **may** not have given adequate attention, adequate time, adequate preparation for the

[46] Atkinson could not have observed Wilkins "drinking in his office during the trial." This case was tried in Daytona Beach, and Wilkins' office was in Bartow, approximately 120 miles away. (R5647). Wilkins and co-counsel Howes were staying in Daytona during the trial. (R5522).

case **if** he were spending this much time" using alcohol. (R7867). In that phrase alone are three different qualifiers which leave no doubt that this testimony is based on nothing more than speculation and inference. Such speculation is insufficient to establish deficient performance under *Strickland*, and does not establish a basis for relief.

With respect to the claims of drug usage, the collateral proceeding trial court stated:

> This Court finds that Defendant has not shown an actual conflict from the allegations of Wilkins' substance abuse during trial. *See Cuyler,* 446 U.S. at 348, 350. Nor has Defendant presented sufficient evidence to show that Wilkins' alleged substance abuse during trial was ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).
>
> Defendant presented the deposition testimony of Dennis Harris regarding counsel's substance abuse during the time that counsel represented her. Harris testified that Wilkins, who was also Harris' counsel, told him that Wilkins was using Methamphetamine during 1991-1992, and at times stayed awake for seven days and hallucinated. Harris testified that Wilkins also informed him that Wilkins was using cocaine during this time frame. Harris stated that Wilkins admitted doing drugs before seeing him at the jail, and observing Wilkins still sniffing and snorting during those visits. Harris stated that during the visits, Wilkins appeared to be under the influence of the drugs, was jittery, talked a lot, and never followed up on discussed courses of action. Harris also testified that he knew Wilkins' drug supplier, and the drug supplier stated that he had been selling to Wilkins for over two years, as well as using the drugs with Wilkins. Harris stated that Wilkins requested that Harris set Wilkins up with his supplier when Harris was released. Harris also stated that he never observed Wilkins using or buying drugs.

> Based on the totality of this evidence and the evidence outlined under the previous subclaim (Drinking/Alcohol Use), this Court finds that Defendant has failed to meet her burden of proof that Wilkins' alleged substance abuse prejudiced her in any way. As such, this claim is insufficient. *See also Bruno*, 807 So. 2d at 62; *White*, 559 So. 2d at 1099.

(R3359-60).

There is no basis for relief because, as the lower court found, Larzelere has failed to demonstrate deficient performance or prejudice as a result of any alleged drug use.

Failure to Hire Experts.

On pages 67-98 of her brief, Larzelere argues that "conflicts of interest" caused her trial attorneys not to hire expert witnesses for use at trial. The foundation for this claim is the *ipse dixit* statement that "[b]ecause of Jack Wilkins' financial problems and misdealings, he failed to consult even one expert."[47] *Initial Brief*, at 94. This argument suffers from three deficiencies, each of which is independently fatal to this claim.

<u>There is no conflict of interest.</u>

As was discussed in connection with the preceding claim, the defendant must show actual representation of competing interests that adversely affected counsel's performance in order to carry her burden of proof under *Cuyler*. Larzelere has not,

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47 Larzelere neglects to mention that Dr. Krop was consulted. (R5415).

and cannot, make that showing. There is no evidence that Wilkins actually represented competing interests, and, in fact, no allegation of such representation is even set out in the brief. Larzelere's argument is an attempt to expand *Cuyler* far beyond its scope -- her reason for attempting this is apparently based on recognition of the fact that she cannot carry her burden under *Strickland*. That is not a reason to twist the holding of *Cuyler* beyond recognition.

<u>Larzelere failed to carry her burden of proof.</u>

If this claim is treated as a traditional ineffectiveness of counsel claim, Larzelere is not entitled to relief because she has failed to carry her burden of proof. With the exception of the testimony of a "concrete expert" which is addressed *infra* (and a mental state expert), Larzelere presented no expert testimony from the "15 different areas" which are now regarded as vital to the defense of this case. *Initial Brief*, at 67. The law is well-settled that the defendant has the burden of proving an ineffectiveness of counsel claim, and the record in this case is equally clear that Larzelere presented no expert testimony in support of this component of this claim.[48] The total of the evidence is that the attorney who represented Larzelere's co-

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48 Larzelere did present mental state experts who testified at the evidentiary hearing about penalty phase issues. Those experts are not involved in this claim.

defendant testified that he used many experts in the case that he defended, **there is no evidence to show how such experts would have testified in Larzelere's case.**[49] Assuming *arguendo* that these types of experts should have been hired, Larzelere has failed to demonstrate *Strickland* prejudice because there is nothing but speculation to support the notion that such testimony would have even been helpful. That is a failure of proof.

The trial court decided the issue correctly.

The third reason that this claim is not a basis for relief is because the trial court's decision is correct as a matter of law. The Court held:

> Regarding the financial difficulty and the failure to hire experts or seek indigency status because Wilkins wanted to maximize the amount of insurance proceeds received, this Court finds that Defendant has provided nothing but mere speculation on these claims. First, the bookkeeper's testimony, as outlined in the previous subclaim (Federal Charges and Convictions) shows that although money may have been tight during Defendant's trial, Wilkins' operating expenses were always met. Second, Wilkins explained that he did not seek indigency status for his costs (i.e., lodging, food, gas, etc.) or for the investigator's (McDainel's) costs because the employment contracts [FN14] executed by Defendant and Atkinson contained payment provisions for those types of costs. See Evidentiary Hearing Transcripts, May 14, 2002 – Vol. III at 432-33. Wilkins also explained that assuming he wanted certain experts, he would have made other financial arrangements, which may or may not

[49] And, the co-defendant's case was defended on the theory that Larzelere was guilty. That strategy was obviously not available to Larzelere.

have included petitioning the Court for indigency status, depending on what expert, etc. *See id.* at 433-36. Third, although Defendant presented testimony that Wilkins did not hire any experts, she has not shown how the failure to hire a telecommunications expert, an insurance expert, a marine biologist and/or concrete expert or a dentistry expert adversely affected her representation or the outcome of her trial. *See generally* Evidentiary Hearing Transcripts, May 14, 2002 — Vol. Ill at 433-450. Defendant presented testimony from Jason's counsel that he would have hired the same type of experts if he had represented her. *See generally* Evidentiary Hearing Transcripts, May 20, 2002 — Vol. II at 118-68. However, this testimony does not show what these experts would have opined regarding the facts and circumstances in Defendant's case. As such, this evidence failed to meet Defendant's burden of proof. Also, Wilkins testified to reasonable trial strategy as the basis for not hiring these types of experts. ~ Evidentiary Hearing Transcripts, May 14, 2002 — Vol. III at 433-450. Such intended, strategic decisions will not be second-guessed by this Court. *Gordon v. State*, 29 Fla. L. Weekly S1 (Fla. Dec. 18, 2003) (citing *Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000)).

[FN14] This Court notes that all attorneys, i.e., Wilkins, Howes, Lasley, and Lilly, sought counsel regarding these employment contracts and were advised that they were not contingency fee contracts. ~ Evidentiary Hearing Transcripts, May 14, 2002 — Vol. II at 296-98; May 12, 2002 — Vol. I at 113-17; May 14, 2002 — Vol. II at 382-85; and May21, 2001 — Vol. III at 261-65. Further, this testimony showed that the insurance proceeds were not contingent on the result of the criminal case, and that no matter the verdict in Defendant's criminal case, the insurance proceeds would be sufficient to cover the fees and costs outlined in the contracts. *See id*. Hence, Defendant has not shown that Wilkins needed to limit the amount of costs in her murder case to maximize the insurance proceeds received by him for his fees and costs.

Finally, as pointed out in its previous Order, this Court finds that based on the other evidence in Defendant's murder trial, there was not a reasonable probability that expert testimony in these areas (as well as the areas mentioned in the testimony of counsel for Jason) would have changed the outcome of the case. *See generally* December 14, 2001 Order on Amended Motion to Vacate Judgment of Conviction and Sentence at 19-44, Claim IV B & corresponding appendices. This Court found that evidence regarding the phone calls would not have, in a reasonable probability, changed the outcome of trial in light of the extensive cross-examinations of Heidle and Palmieri and other evidence in the case. *See id*. at 43-44, Claim IV B, Paragraphs mmmmm and nnnnn & Appendices B, C, E, & F. This Court found that introduction of an estate planning expert and insurance expert would not have discounted the motive for murder, i.e., obtaining the funds. *See id*. at 28, Claim IV B, Paragraphs ee & Appendix B at 274-76; *see also* Evidentiary Hearing Transcripts, May 20, 2002 — Vol. I at 89-91; 102-03; 105-07 (Jason's counsel testifying that an insurance expert in Defendant's case may have been helpful and may have diminished the motive, but would not have discredited the motive or created reasonable doubt). This Court also found that evidence was presented regarding drugs being in the dental office safe and that in light of the theory of the case (i.e., a faked burglary), more evidence regarding the drugs or gold coins would not, in a reasonable probability, have changed the outcome of trial. *See id*. at 25-26; 35, Claim IV B, Paragraphs u and mmm & Appendices B, C, E, & F. Further, this Court found that the extensive cross-examinations of Heidle and Palmieri, and the fact that defense counsel specifically pointed out that there was no evidence introduced by the State that the cement in the pot and the cement around the guns matched, there is not a reasonable probability that the outcome of trial would have changed if expert testimony regarding the concrete in the pot and the concrete encasing the guns did not match, and that weathering would not likely account for the non-match, were presented. See Li. at 6 fn. 6, 21 & 33, Claim IV B, Paragraphs b and bbb & Appendices B, C, E, & F. Thus, Defendant has not shown that the alleged, possible conflict affected counsel's

performance regarding the hiring of experts.

(R3362-64).

Those findings are supported by competent substantial evidence, and should be affirmed in all respects.

Evidentiary matters.

As discussed above, Larzelere presented one mental state expert and a "concrete expert." This so-called "concrete expert" was produced at the last minute, and his testimony (and his "expertise") was substantially rebutted by the testimony of Harry Blakeslee. In any event, the "no-match" testimony that Larzelere says is so vital was presented at trial, as the trial court found. (R3364). This component is baseless.[50]

To the extent that Larzelere argues that the fact that Wilkins responded to a bar complaint while this trial was ongoing demonstrates some basis for relief (either under a conflict or ineffectiveness theory), that claim proves too much. The record shows that Wilkins wrote his response to the bar complaint over the weekend after the defense had rested and before closing arguments were given. (R6183-86). *Initial Brief*, at 80. Rather than showing disregard for his client, the sequence of events seems to be that Wilkins waited to conclude

50 The post-conviction testimony of Detective Gamell quoted at page 77 of the *Initial Brief* does not change the trial testimony, which speaks for itself.

the evidentiary portion of Larzelere's trial **before** turning his attention to the bar complaint. That is hardly deficient.[51] To the extent that Larzelere suggests that Wilkins should have requested an extension of time from the Bar to file his response, there has been no showing that such an extension would have been granted, and, even assuming that it had been, there has been no showing that an extension of sufficient length to last beyond the conclusion of this case would have been given.[52]

The basic premise of Larzelere's brief is that Wilkins "mismanaged" the case and "made decisions and omissions based on financial considerations." *Initial Brief,* at 87. To support this theory, Larzelere relies not on fact, but rather on speculation growing from Wilkins' ultimate criminal convictions. While Wilkins' actions leading to his incarceration were certainly reprehensible, those actions do not translate to deficient performance and prejudice for *Strickland* purposes, nor do they relieve Larzelere from her burden of proof. She cannot bootstrap those matters into a basis for relief in her cases -- what her

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51 According to Larzelere, Wilkins was deficient in his representation of her because he responded to the bar complaint while counsel for Jason Larzelere felt he was too busy during trial to get a haircut. *Initial Brief*, at 80. The state suggests that getting a haircut is not as serious a matter as is filing a timely response to a bar complaint.

52 Wilkins' response appears at Defense Exhibit #6, pages 6-8. That response is not so lengthy that it is likely that it took many hours to prepare.

trial counsel did in **her** case is what matters, not what present speculation can be offered. The trial court had all of this evidence before it, and, as this Court has repeatedly pointed out, was in the best position to evaluate the credibility of the witnesses. *State v. Mills*, 788 So. 2d 249 (Fla. 2001); *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997). The court was well aware of Wilkins' criminal convictions, and decided the credibility issue against Larzelere. There is no legal basis for setting those determinations aside.[53] In short, whatever can be said about Wilkins' actions outside this case, those actions (which were inexcusable) had no effect on Larzelere's defense -- no evidence supports that speculation, and the trial court properly denied all relief. Viewed in the light most favorable to the State, the trial court's order should be affirmed.

III. THE "CUMULATIVE ERROR" CLAIM

On pages 98-99 of her brief, Larzelere argues that she is entitled to relief "when the totality of the errors in this case

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53 With respect to the boat discussed at page 91 of the *Initial Brief*, the testimony makes it clear that Wilkins had possession of that boat for the purpose of selling it, and was not given it as part of his fee. (R5795-97). Likewise, **all** of the testimony about the investigator McDaniel was that his services were terminated because he would not follow counsel's directions. (R3365). With respect to the claim that Wilkins' should have hired an "insurance expert," no such expert testified at the hearing, and this claim fails because Larzelere did not carry her burden of proof. *Initial Brief*, at 95. The same holds true for the claim that a "handwriting expert" should have been called. *Initial Brief*, at 86.

are viewed cumulatively." *Initial Brief*, at 98. This claim was Claim XIV in the postconviction motion, and was denied by the circuit court as meritless because "all other claims have been found to be procedurally barred, legally insufficient, or meritless." (R3376). That ruling is correct under controlling Florida law, and should not be disturbed. *See, Johnson v. State*, 769 So. 2d 990, 1006 (Fla. 2000).

Florida law is settled that the purpose of an appellate brief is to present legal argument and to set out authority in support thereof. *Simmons v. State*, 31 Fla. L. Weekly S285, 294 n.12 (Fla. May 11, 2006); *Jones v. State*, 31 Fla. L. Weekly S229 (Fla. Apr. 13, 2006). Larzelere's brief does not meet that standard with respect to this issue, and leaves the Court and counsel for the State in the position of guessing what matters Larzelere believes support the cumulative error claim. To the extent that the matters at issue can be discerned, the "conflicting joint representation of co-defendants" claim was denied on procedural bar grounds by the circuit court.[54] (R683). Larzelere has not acknowledged this ruling, nor has she explained why it is in error. Wilkins' "alcohol and drug abuse," "financial misdealings," and the "constructive amendment" claims are discussed *infra*. None of those "issues" supply a basis for

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54 This Court rejected the conflict claim on direct appeal. *Larzelere v. State*, 676 So. 2d at 402-3. Larzelere has offered no argument to explain why that claim should be reopened.

reversal of the conviction. Wilkins' alleged "inexperience in capital cases" has nothing to do with the guilt stage of Larzelere's trial -- Wilkins was an experienced criminal defense attorney, as Larzelere herself concedes at page 18 of the *Initial Brief.* The "failure to hire experts" claim is discussed *infra* -- the circuit court properly found that this claim was not a basis for relief. (R3363). The "circumstantial nature of the case" issue has never been raised before. In fact, Larzelere herself described the case as "almost entirely circumstantial" on direct appeal -- this Court rejected the sufficiency of the evidence claim, finding it "to be totally without merit." *Larzelere v. State*, 676 So. 2d at 406.

Larzelere's brief is not sufficient to present any issue for appellate review, and relief should be denied on that basis. Alternatively and secondarily, the issues that seem to be included in this claim are not a basis for relief either individually or cumulatively.

CONCLUSION

Based on the foregoing, the grant of sentence stage relief should be reversed. The denial of guilt stage relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.

ATTORNEY GENERAL

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KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **David Hendry,** CCRC – Middle**,** **Richard Kiley,** CCRC – Middle**,** and **April Kiley,** CCRC – Middle, Capital Collateral Regional Counsel – Middle 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, on this ____ day of May, 2006.

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Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL