IN THE SUPREME COURT OF FLORIDA

JONATHAN HUEY LAWRENCE, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC06-352

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

Appellant, JONATHAN HUEY LAWRENCE, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. The symbol "EH" will refer to the evidentiary hearing. The symbol "DA T" will refer to the trial record. The symbol "PC R." will refer to the postconviction record. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court denial of a 3.851 motion, following an evidentiary hearing, in a capital case. The facts of the crime are recited in the direct appeal opinion. *Lawrence v. State*, 846 So.2d 440, 442-446 (Fla. 2003). Then Judge, now Justice Kenneth B. Bell, presided at the plea and penalty phase.

On appeal to the Florida Supreme Court, Lawrence raised seven issues: (1) the trial court erred by failing to order a

competency hearing for Lawrence; (2) the trial court erred by refusing to admit into evidence facts in support of the substantial domination mitigator and then rejecting that mitigator; (3) the trial court erred by finding the cold, calculated, and premeditated aggravator; (4) the trial court erred by issuing a defective and unreliable sentencing order; (5) Florida's capital sentencing scheme is unconstitutional; (6) the trial court erred in allowing a lay witness to testify to an opinion reserved for experts (raised in supplemental briefing); and (7) Lawrence's death sentence is disproportionate. *Lawrence*, 846 So.2d at 446, n.9. The Florida Supreme Court affirmed the convictions and death sentence.

Lawrence filed a petition for writ of certiorari claiming that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The United States Supreme Court denied the certiorari petition on October 14, 2003. *Lawrence v. Florida*, 540 U.S. 952, 124 S.Ct. 394, 157 L.Ed.2d 286 (2003).

The Honorable Paul A. Rasmussen presided over the post-conviction proceedings. On July 9, 2004, Lawrence filed his original post-conviction motion, raising eight claims: (1) that his plea was involuntary due to his established history of mental illness; (2) his trial counsel was ineffective for

coercing him into entering a plea; failing to inform him that a defense existed; failing to file a motion to suppress; failing to file a motion to disqualify Judge Bell and misinforming the defendant that if he pled guilty, the photographs of the victim would not be introduced; (3) ineffective assistance of counsel for conceding the existence of an aggravator in violation of *Nixon*; (4) Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (5) restraints on juror interviews; (6) an Eighth Amendment cruel and unusual punishment challenge to lethal injection; (7) incompetency to be executed; and (8) cumulative error. On September 10, 2004, the State filed a response agreeing to an evidentiary hearing on claims 1, 2, 3 and 8. The State asserted that claims 4, 5, 6 and 7 should be summarily denied. On November 24, 2004, the trial court held a *Huff* hearing. On February 15, 2005, Lawrence filed an amended motion for post-conviction relief raising an additional claim: (9) ineffective assistance of counsel for failing to request a competency hearing. An evidentiary hearing was conducted on November 3-4, 2005. Both the State and collateral counsel filed post-evidentiary hearing memorandums. On January 26, 2006, the trial court denied Lawrence's 3.851 motion noting that Lawrence's two defense counsel had "approximately 50 years of

combined litigation experience." As the trial court noted, Ms. Stitt testified, that at the time of the representation, she had been a defense counsel for 20-21 years and Mr. Killam testified that he had approximately 31 years of experience as a felony criminal defense attorney. (EH 319,199).

EVIDENTIARY HEARING

Dr. Frank Wood, a professor of neurology at Wake Forest University, testified. (EH Vol I 12-13.) He is not a medical doctor. (EH Vol I 19,31). He is an expert in neuropsychology and PET scans. (EH Vol I 13-14). He was one of the experts that trial counsel consulted prior to the plea/penalty phase. (EH Vol I 14). Trial counsel had Dr. Wood perform a PET scan on the defendant. (EH Vol I 14-15). Dr. Wood also interviewed the defendant and his mother the weekend prior to his testimony. (EH Vol I 15). Dr. Wood did not discuss the option of pleading guilty with the defendant. (EH Vol I 16). He did not advise trial counsel about pleading. (EH Vol I 16). Ms. Stitt, co-counsel, informed Dr. Wood that Lawrence was hallucinating. (EH Vol I 17). Dr. Wood asked how can we proceed and counsel responded that she was going to keep an eye on it. (EH Vol I 17). Dr. Wood testified that he observed Lawrence during the penalty phase and noted quirks and turnings of the head which

could be interpreted as indications of active hallucinating, but he admitted that he had “no way of confirming that.” (EH Vol I 17). Dr. Wood reviewed Dr. Larson and Dr. Gilgun’s reports. (EH Vol I 17-18) Dr. Gilgun’s report “while thorough in many ways” did not account for the PET scan and did not list all the contact with the defendant which is standard practice. (EH Vol I 18-20). Dr. Larson and Dr. Gilgun’s reports did not use independent testing. (EH Vol I 20). Dr. Wood’s PET scan findings were that Lawrence’s PET scan results were “unquestionable abnormal” in the “very ways that schizophrenic brains are abnormal” (EH Vol I 21). It was the scan of an impaired person with frontal lobe damage. (EH Vol I 21). It was typical of the worst cases of schizophrenia. (EH Vol I 21). Dr. Wood diagnosed Lawrence as a classic schizophrenic. (EH Vol I 21). There are periods when schizophrenics hallucinate. (EH Vol I 25). Neither counsel asked Dr. Wood to evaluate Lawrence during the penalty phase. (EH Vol I 25). Dr. Wood had examined Lawrence on the Saturday or Sunday prior to the penalty phase on Monday. (EH Vol I 26). Dr. Wood testified the Lawrence was incompetent at the time of the penalty phase when he reported hallucinations. (EH Vol I 26). A person who is hallucinating cannot pay attention to courtroom proceedings. (EH Vol I 27). Dr. Wood opined that Lawrence did not understand the “full

significance" of what he was asked during the plea colloquy. (EH Vol I 27-28).

On cross, Dr. Wood admitted that he was not normally consulted by capital attorney about trial strategy or the decision of whether to enter a plea. (EH Vol I 32). Dr. Wood met with Lawrence the weekend following the plea but did not voice any concerns at that time about Lawrence's competency. (EH Vol I 34-35). Dr. Wood testified that Lawrence does not know "in a deep sense" what it means to be a principal to murder and does not understand conspiracy. (EH Vol I 34). Dr. Wood stated that he would not be surprised if Lawrence was hallucinating now because he "does not look engaged or like he is processing what is going on." (EH Vol I 36). Dr. Wood, after he testified at the penalty phase, expressed concerns to Ms. Stitt about Lawrence being sick and taking that seriously. (EH Vol I 36). Dr. Gilgun's report stated that the testing was done by Patrick Hutchinson who worked under his supervision for 15 years (EH Vol I 40). Dr. Wood admitted that this was "standard operating procedure" (EH Vol I 40). Dr. Wood admitted that Lawrence would have understood the judge during the plea colloquy that you could get the death penalty if he entered a plea. (EH Vol I 42).

Dr. Robert Napier, a licensed psychologist, testified at the evidentiary hearing. (EH Vol I 43). He had also testified at

the penalty phase. (EH Vol I 43). He had evaluated Lawrence on February 28, 1996, for Social Security disability (EH Vol I 44). A copy of the evaluation was introduced as Defense Ex. 12 (EH Vol I 44). Dr. Napier diagnosed Lawrence with schizoaffective disorder, which is a form of schizophrenia with an emotional component such as depressional withdrawal. (EH Vol I 45). By the time defense counsel contacted him, the decision to enter a plea had already been made. (EH Vol I 46). Dr. Napier found significant impairment in thought, concentration and attention - Lawrence was a “very impaired young man” (EH Vol I 47). Dr. Napier found Lawrence’s IQ to be between average and low average. (EH Vol I 48). Dr. Napier did not evaluate Lawrence for competency in 1996 but he had doubts concerning his capacity. (EH Vol I 48-49). Dr. Napier expressed strong concerns about Lawrence’s ability to understand concepts such as conspiracy. (EH Vol I 49). Dr. Napier explained that yes or no answers did not clearly indicate a person’s comprehension or understanding of the questions. (EH Vol I 50). Dr. Napier testified that Lawrence was a follower and that schizoids tend to hook into individuals of authority and are easily led. (EH Vol I 50). Dr. Napier agreed that the attorneys would be authority figures to Lawrence and would expect Lawrence to follow their advice. (EH Vol I 52). Dr. Napier, during his

testimony at the penalty phase, recalled wondering whether Lawrence was hallucinating. (EH Vol I 52). Had Dr. Napier been informed of Lawrence's remarks, he would have had strong questions about his competency and would have recommended an evaluation. (EH Vol I 53). Dr. Napier questioned the competency reports because there was no indication of medication being given or recommended. (EH Vol I 53). It is not common for two experts to use the same raw data. (EH Vol I 54). Dr. Napier discussed the practice effect. (EH Vol I 57). Presenting Lawrence with photographs of the crime scene could cause hallucinations. (EH Vol I 58).

On cross, Dr. Napier testified that he generated a report for the evidentiary hearing dated February 19, 2005 (EH Vol I 59). Dr. Napier admitted that he could not determine Lawrence's competency at the time of the plea. (EH Vol I 59).

Dr. Barry Crown, a psychologist, testified at the evidentiary hearing. (EH Vol I 64). Dr. Crown had also testified at the penalty phase. (EH Vol I 66). Dr. Crown interviewed Lawrence again in 2005. (EH Vol I 66). Dr. Crown's report was introduced as defense exhibit 13. (EH Vol I 66). Dr. Crown found Lawrence incompetent to proceed at the evidentiary hearing (EH Vol I 67). Dr. Crown tested for malingering and he was within normal limits. (EH Vol I 68). Both Dr. Gilgun and Dr. Larson had

reported malingering. (EH Vol I 69). His opinion was that he had a better rapport with Lawrence. (EH Vol I 70). Dr. Crown testified that Lawrence has difficulty with language based critical thinking. (EH Vol I 80). Dr. Crown's original finding was that Lawrence was not competent to stand trial. (EH Vol I 84). When Dr. Crown told APD Killam that Lawrence was not competent to stand trial, APD Killam responded that would not get us too far. (EH Vol I 86). Dr. Crown also diagnosed Lawrence as suffering from Asperger Syndrome. (EH Vol I 86). Dr. Crown never discussed trial tactics or entering a plea with Lawrence. (EH Vol I 92). Dr. Crown was under the impression from his conversation with APD Killam and the defendant's mother that Lawrence would get life if he entered a plea but if he went to trial he would get the electric chair. (EH Vol I 95-96). The substance of the conversation was it was "highly likely, certainly more probable than not" that entering a plea would save his life. (EH Vol I 96). It was clear from APD Killam's presentation that if Lawrence went to trial, the death penalty was likely, but if he pled, "very likely life sentence" would result. (EH Vol I 97). Dr. Crown's opinion was that Lawrence did not understand the plea colloquy. (EH Vol I 98). The videotape of the pre-plea session was played for the court and Dr. Crown commented on it. (EH Vol I 100).

On the tape, APD Killam explains that while the State must prove the crime beyond a reasonable doubt, “we feel they have that evidence” and we feel “we would look foolish to the jury in suggesting that they have not met that burden”. (EH Vol I 103). On the tape, Ms. Stitt adds: “and not credible in front of them.” (EH Vol I 104). APD Killam explained that he thought the jury would be less likely to believe the penalty phase mental mitigation if they presented an incredible defense. (EH Vol I 104). Ms. Stitt explained that even though Lawrence had confessed to the crime, he was entitled to litigate the issue of guilt. (EH Vol I 107). Ms. Stitt explained that the decision was Lawrence’s alone. (EH Vol I 109-110). Ms. Stitt explained that if Lawrence entered a plea, the only thing remaining would be to determine the proper punishment which is “either life in prison or death.” (EH Vol I 110). Lawrence said he was not experiencing any hallucinations at that time (EH Vol I 112). Dr. Crown stated that Lawrence was likely to do what his mother wanted. (EH Vol I 116).

On cross, Dr. Crown acknowledged that Dr. Tom had given Lawrence an IQ test which showed a full scale IQ of 89. (EH Vol I 121). Dr. Crown’s results on the Reynolds Intellectual Assessment Scale was verbal IQ of 86 and a non-verbal of 72. (EH Vol I 121). Dr. Crown admitted that Mr. Killam did not make any

promises or guarantees about receiving a life sentence. (EH Vol I 125).

Ms. Iona Thompson, Lawrence's mother, testified at the evidentiary hearing. (EH Vol I 128). She told Detective Hand that her son was mentally disabled when the detective was arresting him. (EH Vol I 130). She informed the detective that if he yelled or was mean to Lawrence, Lawrence would get upset and couldn't talk or think. (EH Vol I 130). Both Mr. Killam and Ms. Stitt went to her house, once or twice a week for a month, to talk with her about getting Lawrence to plead guilty to save his life. (EH Vol I 131,132). They told her that Lawrence would get death if he went to trial. (EH Vol I 131). She had to tell Lawrence that it was okay to say that he was guilty so he could get life. (EH Vol I 131). Lawrence never wanted to plead guilty. (EH Vol I 132). She thought if Lawrence pled guilty, he would get life. (EH Vol I 135,140).

On cross, she admitted that the attorneys in the other capital case in federal court also told her that Lawrence had to enter a plea in order to get life. (EH Vol I 142). She begged the federal attorney not to do that but "it did no good." (EH Vol I 143). Lawrence entered a plea in federal court and got life. (EH Vol I 143). She admitted that she did not recall the two attorneys in this case telling her that the State had made a

plea offer of life in exchange for a guilty plea. (EH Vol I 144).

Lorie Carter, Lawrence's sister, testified at the evidentiary hearing. (EH Vol I 145). She meet with Mr. Killam and Ms. Stitt at her mother's house. (EH Vol I 146). She understood that if Lawrence pled guilty he would get life. (EH Vol I 146). Mr. Killam and Ms. Stitt told her if they went to trial, Lawrence would get death. (EH Vol I 146). Lawrence has a bad memory and writes lists all the time. (EH Vol I 148). On cross, she admitted that neither of the attorneys told her that there was a plea deal with the State. (EH Vol I 149). The attorneys were only saying what they thought would happen. (EH Vol I 149). She admitted the federal case was "a very different type of situation" in which there was a plea deal that if Lawrence pled guilty, then the federal government would not seek the death penalty. (EH Vol I 150). The attorney explained that there was nothing they could do because there was so much evidence against Lawrence. (EH Vol I 151). Ms. Stitt told her that Lawrence was guilty. (EH Vol I 151).

Chief Assistant Public Defender Elton Killam testified at the evidentiary hearing. (EH Vol I 152). He mainly developed the mitigation evidence. (EH Vol I 153). He discussed the case with co-counsel, Ms. Stitt. (EH Vol I 153). Co-counsel, Ms. Stitt,

was responsible for the guilt phase. (EH Vol I 154). They discussed the evidence against Lawrence. (EH Vol I 154). He thinks he read all Lawrence's statements to the officers. (EH Vol I 154). He met with Lawrence approximately 10 times prior to the plea and penalty phase. (EH Vol I 155). He reviewed the evidence with Lawrence. (EH Vol I 155). To get details, he had to lead Lawrence. (EH Vol I 157). Lawrence was bothered about the murder and had a "conscience about it" (EH Vol I 158). Lawrence was upset by the photographs of the crime that he showed him and Lawrence did not want to look at them. (EH Vol I 158). The competency evaluations by Dr. Bingham and Dr. Larson were performed in October of 1998. (EH Vol I 159). Chief Assistant Public Defender Killam read the reports. (EH Vol I 159). Chief APD Killam was aware that Lawrence had had hallucinations and had been on medication. (EH Vol I 160-161). Chief APD Killam had two investigators working with him on the case. (EH Vol I 161). Chief APD Killam did not file a motion to suppress which would have been one of Ms. Stitt's guilt phase areas but he did not think that a motion to suppress would be of any consequence. (EH Vol I 161-162). Chief APD Killam's opinion was that a motion to suppress would not have been successful. (EH Vol I 162). Filing a motion would be inconsistent with the impression that he wanted to create of

Lawrence as a “cooperative, remorseful, compliant” person. (EH Vol I 162). Chief APD Killam could not recall being told that Detective Hand yelled at Lawrence during the statement or that the detective told Lawrence that if he did not cooperate he would get the electric chair. (EH Vol I 163). Chief APD Killam has been a public defender 31 years. (EH Vol I 164). Chief APD Killam did not recall Detective Hand getting Lawrence to consent to a blood draw without his attorney present. (EH Vol I 164). Chief APD Killam did not recall whether Lawrence was questioned for 18 pages after an attorney had been appointed. (EH Vol I 164-165). Chief APD Killam seemed to recall Dr. Crown accompanying him to Lawrence’s mother’s house. (EH Vol I 165). Chief APD Killam met with Lawrence’s mother three or four times. (EH Vol I 166). Chief APD Killam went to the mother’s house to discuss Lawrence agreeing to plead guilty. (EH Vol I 166). Chief APD Killam thought not going to trial would be “strategically wise”, not to waste the judge’s time as the ultimate sentencer. (EH Vol I 167). Chief APD Killam thought Lawrence was guilty. (EH Vol I 167). The idea of videotaping a pre-plea discussion with Lawrence was Ms. Stitt’s idea, which she got from a seminar. He had never participated in something like that before. (EH Vol I 168). Chief APD Killam did not tell Lawrence’s mother that he would save his life; rather, he told

her that the prospects of saving his life would be better if Lawrence entered a plea. (EH Vol I 168). Denying guilt with the evidence in this case would be “counterproductive.” (EH Vol I 169). Chief APD was “pretty adamant” that he did not think that Lawrence had a chance of acquittal. (EH Vol I 169). Chief APD Killam did not recall talking to any of the doctors about entering a plea. (EH Vol I 176). Chief APD Killam was convinced from the evidence that Lawrence did know that Rodgers intended to kill the victim. (EH Vol I 178). Chief APD Killam thought he had enough mental mitigation to get a life sentence for Lawrence. (EH Vol I 179). Chief APD Killam conceded the aggravators because he thought that the mitigation outweighed the aggravation. (EH Vol I 184). Chief APD Killam was aware that there were some things on Lawrence’s incriminating list that were extraneous to the plot but he thought the list was incriminating. (EH Vol I 190). Chief APD Killam testified that Lawrence’s explanation of the list would not have carried the day. (EH Vol I 190). Chief APD Killam repeatedly told the jury that Lawrence belonged in a mental hospital as part of the mitigation to establish that Lawrence was not morally responsible for his actions and therefore did not deserve the death penalty. (EH Vol I 192). Chief APD Killam also wanted the

jury to know that Lawrence's brain was defective and not the same as theirs. (EH Vol I 194-195).

On cross, Chief APD Killam testified that he had prior capital experience before handling Lawrence's case involving approximately 25 prior capital cases. (EH Vol I 199). He has attended capital seminars. (EH Vol I 199). He was a member of the office's capital litigation team with one other attorney. (EH Vol I 200). Ms. Stitt had been part of the capital division for about one year. (EH Vol I 200). It was the office's practice to have two attorneys handle a capital case. (EH Vol II 202). Chief APD Killam testified that to be guilty as a principal did not require that the person actually be the killer, so Lawrence's statement that he did not actually shoot the victim did not affect his guilt. (EH Vol II 202). Chief APD Killam testified that it would be incredible to argue that Lawrence did not know what was going to happen when it had already happened in the prior murder. (EH Vol II 203). Chief APD Killam was aware that there was a prior attempted murder with the same co-defendant. (EH Vol II 203). He was also aware that there was a prior murder in a federal case on U.S. government soil with the same co-defendant as well. (EH Vol II 203). A jury would not have believed that Lawrence did not know what was going to happen with this prior history - it would not

be “fruitful.” (EH Vol II 203,206). Chief APD Killam never promised Lawrence that he would get a life sentence if he pled. (EH Vol II 205). Chief APD Killam accompanied Lawrence to North Carolina to get the PET scan. (EH Vol II 207). Chief APD Killam read the two competency reports by Dr. Bingham and Dr. Larson. (EH Vol II 208). Lawrence seemed to understand Killam. (EH Vol II 209). The decision to plead was Lawrence’s (EH Vol II 210). Both he and Ms. Stitt recommended pleading guilty. (EH Vol II 210). Chief APD Killam recalled the incident during the penalty phase when Lawrence was “hallucinating” (EH Vol II 211). Chief APD Killam testified that it was a possibility that the other prior murder and prior attempted murder could be ***Williams*** Rule evidence in this case. (EH Vol II 214). Chief APD Killam conceded the CCP aggravator because the mitigation was so substantial that it outweighed the CCP. (EH Vol II 216). Chief APD Killam used the guilty plea in mitigation by arguing to the judge that he saved everybody the expense of a trial. (EH Vol II 217). There was no plea offer or bargain. (EH Vol II 217). Chief APD Killam thought the mistake in retrospect was in not waiving the jury for penalty phase and asking for a bench trial in the penalty phase. (EH Vol II 218). Chief APD Killam felt that Lawrence was not actually hallucinating; rather, Lawrence was “having bouts with his conscience.” (EH Vol II 221,223). He

would have asked for a competency hearing if he thought Lawrence was actually hallucinating. (EH Vol II 221). Killam's impression was that Lawrence was just troubled by having to relive the incident. (EH Vol II 226).

Justice Bell, who presided at the penalty phase, testified at the evidentiary hearing via telephone. (EH Vol II 240). He would have granted a competency hearing if counsel had requested one after a short inquiry as to their concerns. (EH Vol II 241-242). Justice Bell had dealt with Lawrence as a juvenile. (EH Vol II 242). Justice Bell was attempting to distinguish whether Lawrence was actually suffering from hallucinations or he was disturbed by flashbacks. (EH Vol II 242). Justice Bell could not say whether he would have granted a request to read the principal instruction if one had been requested. (EH Vol II 244). Justice Bell testified that he held a voluntariness hearing regarding Lawrence's statements (EH Vol II 202). Justice Bell had appointed the public defender at first appearance on May 9, so the May 12 statement was after counsel was appointed. (EH Vol II 248). Lawrence had been arrested on the Jennifer Robinson murder on May 8 but not arrested on the Livingston murder. (EH Vol II 248, 250). During the interview regarding the Livingston murder, Lawrence started to smell his hands and talk about the Robinson murder. (EH Vol II 250-251).

Justice Bell could not say what he would have done regarding a motion to suppress because it depended on what they filed and argued. (EH Vol II 252). On cross, Justice Bell testified that he saw no difference "at all" in Lawrence during the hallucination incident. (EH Vol II 253). Justice Bell explained that there was no difference between first degree murder and principal to first degree murder. (EH Vol II 254). It does not matter whether Lawrence himself pulled the trigger. (EH Vol II 254). Justice Bell explained that it might matter as to the death penalty if it was an *Enmund/Tison* situation.[1] (EH Vol II 255).

Ms. Antoinette Stitt, co-counsel, testified at the evidentiary hearing. (EH Vol II 256). She thought that Lawrence was not competent to stand trial. (EH Vol II 259). She thinks she was the one who filed a motion to determine competency. (EH Vol II 261). They also had the competency evaluations that were performed in the federal case. (EH Vol II 261). She had handled one prior capital case. (EH Vol II 261). She reread the

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[1] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). In *Tison*, the Court held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. *Tison*, 481 U.S. at 158, 107 S.Ct. 1676. This was not a *Enmund/Tison* situation. Lawrence was a major participant in this murder.

transcript of the trial (T. IV 419 and T. IV 464), where Lawrence reported hallucinations. (EH Vol II 263). She discussed Lawrence's behavior with co-counsel Killam who thought that Lawrence was experiencing flashbacks, not hallucinations, so she did not request another competency evaluation. (EH Vol II 264). She regrets that decision and with hindsight would have requested one. (EH Vol II 264). She feels this was error. (EH Vol II 256).[2] She did not file a motion to suppress Lawrence's statements. (EH Vol II 266). She and co-counsel discussed filing a motion to suppress but did not remember her thinking in this area. (EH Vol II 266-268). She testified that suppressing the statements may not have helped at trial. (EH Vol II 269). The statements showed the larger role of the co-defendant. (EH Vol II 269,271). She showed Lawrence some of the photographs

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[2] Trial counsel's opinion regarding his own effectiveness at trial does not matter. *Mills v. State*, 603 So.2d 482, 485 (Fla. 1992)(observing, relying on *Routly v. State*, 590 So. 2d 397, at 401 n.4 (Fla. 1991) and *Kelley v. State*, 569 So.2d 754, 761 (Fla. 1990), that an attorney's own admission that he or she was ineffective is "of little persuasion"); *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000)(en banc)(observing that trial counsel's admission that his performance was deficient at a post-conviction evidentiary hearing "matters little"); *Tarver v. Hopper*, 169 F.3d 710, 716 (11th Cir. 1999) (noting that "admissions of deficient performance are not significant"); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (stating that "ineffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive."). This is because the *Strickland* standard is objective.

that would be introduced at the trial which upset Lawrence. (EH Vol II 272-273). She noted that, regardless of Lawrence's claim of lack of knowledge, there was sufficient evidence that, in fact, Lawrence knew that they intended to kill the victim. (EH Vol II 274). She spoke with Lawrence's mother about entering a plea because his mother had "better communication" with her son and she was worried about whether Lawrence actually understood her. (EH Vol II 277,280,304). Lawrence did not originally want to enter a plea. (EH Vol II 277). She made the pre-plea video as a "precautionary measure" (EH Vol II 282). Judge Bell did not request that the video be made. (EH Vol II 283). She could not identify which doctors she referred to on the tape. (EH Vol II 286,288). Lawrence was charged as a principal to first degree murder and they had no defense to the list (EH Vol II 288-289). She referred to week after week of gory photographs on the video, because that was what she believed that was what would happen in a guilt phase. (EH Vol II 290). If he pled guilty not as many photographs would be introduced as in any possible guilt phase. (EH Vol II 290-291). She was aware that the State had the right to introduce photographs at the penalty phase. (EH Vol II 290). Lawrence only looked at one photograph and refused to look at the rest. (EH Vol II 292). During the video, she asked Lawrence if he had any questions and he said:

“I don’t have any” (EH Vol II 295). She thinks she got the questions on the video from Judge Bell but she cannot recall. (EH Vol II 299-301). On the video, Killam asked Lawrence if there were voices telling him to enter a plea and Lawrence responded: “No, sir.” (EH Vol II 306). She told Lawrence’s mother that they had a better chance of saving his life if he pled guilty. (EH Vol II 307). They made the tape because of Lawrence’s mental state and to show that he had time to discuss this with his mother. (EH Vol II 308-309). Judge Bell, who was originally assigned to both this case and the co-defendant’s case, was disqualified from the co-defendant case’s because he conducted a hearing without Rodgers’s attorney present. (EH Vol II 312). She was not aware of the reason. (EH Vol II 313). Collateral counsel disputed whether Lawrence’s statements were technically confessions. (EH Vol II 314). Lawrence admitted his guilt of certain things. (EH Vol II 315). They discussed disqualifying Judge Bell but thought that he would be a good trier of fact and could “possibly, even if the jury recommended the death penalty, he might override.” (EH Vol II 315). She did not participate in the decision to concede the CCP aggravator. (EH Vol II 318). She did not participate in the sentencing memo which argued against the CCP aggravator. (EH Vol II 318).

On cross, it was established that she had been a defense counsel for 20 years prior to being appointed to represent Lawrence. (EH Vol II 319). She had handled murder cases previously and one capital case. (EH Vol II 320). She was selected for the capital division of the Public Defender Office which was a select group (EH Vol II 320). While she was concerned about Lawrence competency, after the two doctors determined that he was competent, she did not notice any change in his behavior. (EH Vol II 322). Lawrence's behavior remained "pretty consistent" (EH Vol II 322). She did not believe that Lawrence was having hallucinations when he returned to the courtroom. (EH Vol II 323). She told Lawrence that things would come out in greater detail and length during a possible guilt phase than in the penalty phase. (EH Vol II 324). They thought that life was likely because they had scientific evidence of Lawrence's brain damage. (EH Vol II 324). In hindsight, she thinks she should have known that it would not work with a Santa Rosa county jury. (EH Vol II 324). She thought Judge Bell was the best judge they could hope for in terms of understanding Lawrence's problems. (EH Vol II 326). She felt the list Lawrence made was "very damning." (EH Vol II 327). The prosecution had handwriting experts to prove that the list was written by Lawrence. (EH Vol II 327). She testified that the

decision to enter a plea was Lawrence's with her advice, the advice of Mr. Killam and his mother. (EH Vol II 329).

There was some disagreement between her and Mr. Killam in strategy. (EH Vol II 329). Lawrence had entered a plea in other cases prior to this case. (EH Vol II 330). She represented Lawrence in the Smitherman case as well as this case. (EH Vol II 331). The evidence in the Smitherman case and the federal case was admitted in the penalty phase in this case. (EH Vol II 333). She noted whether the other murder and attempted murder would have come in, during the possible guilt phase, depended on the ruling of the judge. (EH Vol II 334).

Detective Hand, who was the lead detective, testified at the evidentiary hearing. (EH Vol II 343). He was involved in the Livingston murder and Smitherman attempted murder investigations as well. (EH Vol II 344). He interviewed Lawrence. (EH Vol II 348). He advised Lawrence of his rights. (EH Vol II 348). He raised his voice to Lawrence. (EH Vol II 350). He did not throw papers at Lawrence and did not tell him that he would get the electric chair. (EH Vol II 351). He was aware the Lawrence had been appointed a lawyer in the Robinson's murder case. (EH Vol II 354,356). While questioning Lawrence about the other case, he noticed Lawrence smelling his hands. (EH Vol II 357). He asked Lawrence if he wanted to talk. (EH Vol II 360). He and

Lawrence spoke for one hour and 35 minutes. (EH Vol II 361). Detective Hand read Lawrence his rights including the right to an attorney. (EH Vol II 362).

Dr. James Larson, a psychologist, testified at the evidentiary hearing. (EH Vol II 364). Dr. Larson conducted a competency evaluation for the post-conviction proceedings. (EH Vol II 365). Because the serious nature of the case and the complexity of the issue, Dr. Larson met with Lawrence several times. (EH Vol II 366). Dr. Larson found Lawrence competent. He and Dr. Gilgun used the same test results. (EH Vol II 368). They shared data but not opinions. (EH Vol II 368). He had examined Lawrence in 1998 for competency in the federal case. (EH Vol II 370). Dr. Larson gave Lawrence the TOMM test for malingering and he concluded that Lawrence was malingering. (EH Vol II 371-372).

Dr. Gilgun, a psychologist, testified at the evidentiary hearing. (EH Vol II 384). Dr. Gilgun spent a great deal of time on this case due to the extensive mental records and the complexity. (EH Vol II 386). Dr. Gilgun met with Lawrence four times. (EH Vol II 386). Because he used the same test-giver as Dr. Larson, the test showed Lawrence was malingering. (EH Vol II 392).

Dr. Barry Crown testified for a second time. (EH Vol II 398). Dr. Crown testified that he gave a test for malingering (EH Vol II 398). He used the RAV 15 figure test. (EH Vol II 398).

The parties argued whether Lawrence was incompetent to proceed (EH Vol III 402-405). The prosecutor noted that both Dr. Larson and Dr. Gilgun found Lawrence to be competent. (EH Vol III 404). The prosecutor noted the finding of malingering. The trial court found Lawrence to be competent to proceed in post-conviction. (EH Vol III 406).

The defendant, Jonathan Lawrence, testified at the evidentiary hearing. (EH Vol III 407). He told his lawyers that he did not kill the victim. (EH Vol III 408). His lawyers told him he would get life if he entered a guilty plea. (EH Vol III 409,412). He was not able to sleep in the holding cell because there are no mattresses and you can not turn off the lights. (EH Vol III 420,428). Lawrence testified that he did not understand his rights. (EH Vol III 423). He was afraid that Detective Hand might shoot him in the woods (EH Vol III 425-426). Lawrence acknowledged that he was given food in the jail. (EH Vol III 427). His lawyer, Mr. Loveless, who had told Lawrence not to talk to the officers, would get mad at him for answering the detective’s questions (EH Vol III 430).

Dr. Barry Crown testified for a third time at the evidentiary hearing. (EH Vol III 453).

Michelle Heldmyer, the Assistant United States Attorney who handled the federal murder prosecution of the Livingston murder, testified at the evidentiary hearing. (EH Vol III 455). Lawrence entered a plea of guilty in the federal case in exchange for the government not seeking the death penalty. (EH Vol III 457).

John Jarvis, who is a detention deputy, testified at the evidentiary hearing (EH Vol III 461). He was assigned to Lawrence during the trip to North Carolina to get the PET scan and during the penalty phase. During the hallucination incident, he was with Lawrence when Lawrence went out of the courtroom.(EH Vol III 462). Lawrence told him that was fine but that he just did not want to hear the tapes. (EH Vol III 463).

Detective Hand testified for a second time, at the evidentiary hearing. (EH Vol III 464). He did not tell Lawrence that he and his lawyer Loveless worked together. (EH Vol III 465). He never pointed his gun at Lawrence. (EH Vol III 467).

SUMMARY OF ARGUMENT

ISSUE I - Lawrence asserts that the trial court erred in finding that his plea was voluntary. Lawrence argues that his

plea was involuntary due to his mental illness and counsel's misrepresentation that he would receive a life sentence. This issue is procedurally barred by the law of the case doctrine. Lawrence raised a version of this same claim in his direct appeal. Moreover, Lawrence's plea was voluntary. While mentally ill, Lawrence was competent. Neither of his counsel ever promised Lawrence that he would receive a life sentence; they merely advised Lawrence that entering a plea increased the chances of a life sentence. The trial court properly found the plea to be voluntary following an evidentiary hearing.

ISSUE II - Lawrence asserts that the trial court improperly denied his claim of ineffective assistance of counsel for (1) informing Lawrence that no defense exists; (2) informing him that photographic evidence would be less if he pleaded guilty; (3) promising him a life sentence if he entered a plea; (4) failing to file a motion to suppress his third confession and (5) failing to file a motion to disqualify the judge. There was no deficient performance. No defense exists. Counsel was correct in her estimation that less evidence would be admitted in the penalty phase. As the trial court found, no promises for a life sentence were made. Any motion to suppress the third confession would not affect the admissibility of the prior confessions and therefore, would not help. Not filing a motion

to disqualify the judge was a reasonable tactical decision based on counsel's view that the judge, who was familiar with Lawrence's mental problems, would be less likely to sentence Lawrence to death than another judge. The trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

ISSUE III - Lawrence asserts that his trial counsel was ineffective for conceding the existence of an aggravator in violation of *Nixon v. State*, 857 So.2d 172 (Fla. 2003)(*Nixon III*). First, *Nixon III* has been overruled by the United States Supreme Court. Moreover, even if *Nixon III* was still good law, it does not apply to the concession of an aggravator. The basis of *Nixon III* was a lack of adversarial testing. Trial counsel may concede every aggravator but establish mitigation and then argue that the mitigation outweighs the conceded aggravation. If counsel did so, there would be adversarial testing at the penalty phase. So, *Nixon III* does not apply to partial concessions. As the trial court found, it was "a good trial strategy for defense counsel to make some halfway concessions." The trial court properly denied the claim of ineffectiveness for conceding the CCP aggravator following an evidentiary hearing.

ISSUE IV - Lawrence, relying on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), asserts that his

mental illness precludes his execution. This claim is procedurally barred because it should have been raised on direct appeal. Lawrence's reliance on *Atkins,* which prohibits the execution of the mentally retarded, is misplaced. As numerous court have held, *Atkins* is limited to mental retardation; it does not extend to mental illnesses. The trial court properly summarily denied this claim.

ISSUE V - Lawrence contends that the trial court erred in summarily denying this claim that he should be allowed to interview the jurors in his case based on a study of juries in other Florida capital cases. This claim is procedurally barred because it should have been raised on direct appeal. Furthermore, this Court has consistently rejected such claims as mere fishing expeditions. The trial court properly summarily denied this claim.

ISSUE VI - Lawrence contends that the trial court erred by summarily denying his claim that electrocution violates the Eighth Amendment ban on cruel or unusual punishment. As the trial court found, this claim is procedurally barred. Moreover, Lawrence lacks standing to challenge the electric chair since this is not the default method of execution in Florida. Additionally, it is meritless because the Florida Supreme Court has rejected Eighth Amendment challenges to electrocution.

ISSUE VII - Lawrence argues he may be incompetent at the time of his execution and, if he is, his execution will violate *Ford v. Wainwright*, 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986), which held that the Eighth Amendment prohibits the execution of a legally insane prisoner. This claim is not ripe and will not be ripe until a death warrant is signed. The trial court properly summarily denied the *Ford* claim.

ISSUE VIII - Lawrence contends that the trial court erred in rejecting his cumulative error claim. Because there was no error, there was no cumulative error. The trial court properly denied the cumulative error claim.

ISSUE IX - Lawrence argues that both of his trial counsel were ineffective for failing to request a competency hearing during the penalty phase when Lawrence reported to counsel that he was having, in trial counsel's words, "auditory hallucinations and flashbacks." This claim of ineffectiveness is procedurally barred. Collateral counsel is raising a issue, as an ineffectiveness claim, the substance of which was decided on direct appeal. There was no deficient performance. Lead counsel testified at the evidentiary hearing that Lawrence was merely "having bouts with his conscience." Therefore, there was no need to request a competency hearing. Nor was there any

prejudice. Lawrence was not having hallucinations. Rather, as both this Court, in the direct appeal opinion, and the trial court concluded, after the evidentiary hearing, "Lawrence was simply uncomfortable hearing certain portions of the evidence." The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY FOUND THE GUILTY PLEA TO BE VOLUNTARY? (Restated)

Lawrence asserts that the trial court erred in finding that his plea was voluntary. Lawrence argues that his plea was involuntary due to his mental illness and counsel's misrepresentation that he would receive a life sentence. This issue is procedurally barred by the law of the case doctrine. Lawrence raised a version of this same claim in his direct appeal. Moreover, Lawrence's plea was voluntary. While mentally ill, Lawrence was competent. Neither of his counsel ever promised Lawrence that he would receive a life sentence; they merely advised Lawrence that entering a plea increased the chances of a life sentence. The trial court properly found the plea to be voluntary following an evidentiary hearing.

Plea

On June 9, 1998, APD Loveless filed a motion to appoint Dr. Bingham as a confidential mental health expert to determine Lawrence's sanity at the time of the crime, which the trial court granted. (TR. 13,14). On September 7, 1999, APD Killam filed a motion to appoint Dr. Crown as a confidential mental health expert to determine Lawrence's sanity, competency and to assist the defense, which the trial court granted. (TR. 22,23). On December 16, 1999, APD Stitt filed an amended motion to appoint Dr. Larson and Dr. Gilgun as mental health experts to determine Lawrence's sanity and competency, with the results to be disclosed to the judge and prosecutor. (TR. 28). In 1998, two competency evaluations were conducted. Both Dr. Bingham and Dr. Larson found Lawrence to be legally competent to proceed (EH 256). On January 27, 2000, APD Killam, filed a motion for a PET scan of the defendant to help diagnosis schizophrenia to be conducted by Dr. Wood. (TR. 30,29,34). The trial court ordered the PET scan to commence on February 25, 2000. (TR. 35).

On March 24, 2000, Lawrence entered a guilty plea. (Vol. I 2-53). The record contains a "Capital Plea Colloquy" which states that the decision to plea is the defendant's alone and he is "captain of the ship." (TR. 302-304). It contains a notion to "Get mother's consent and agreement that this is Jonathan's decision" The plea colloquy is over fifty pages. (Vol. I 2-53).

The trial court noted that there had been further discussion between counsel and Lawrence which was videotaped. (Vol. I 2-3). The trial court noted that he had had his secretary give counsel a copy of a plea colloquy which was taken out of the then recent Florida Supreme Court case of *Nixon* and the trial court noted that the decision to enter a plea must be Lawrence's and Lawrence's alone. (Vol. I 3). The trial court noted that there were "some mental issues and some psychological issues." (Vol. I 4). Mr. Killam informed the trial court that Lawrence was not having hallucinations. (Vol. I 4). (Vol. I 3). The trial court noted his concerns that because Lawrence was a "follower-type", he may just be following his attorney's advice. (Vol. I 11). Ms. Stitt acknowledged that this was also a concern of hers, but she was "satisfied" that Lawrence was not just following what they said. (Vol. I 11). APD Killam noted that Lawrence had been evaluated by Dr. Larson and Dr. Bingham prior to the plea and had been found competent. (Vol. I 11). APD Killam felt that he knew Lawrence well enough to know that he does understand that entering a plea was the best thing for him. The trial court expressly noted that there was no plea agreement with the State. (Vol. I 13). The trial court explained that the two possible sentences were life "with absolutely no chance of parole" and the second possible penalty was "you would be sentenced to death

either by lethal injection or electrocution" at three points in the colloquy. (Vol. I 16,23,25). Lawrence stated under oath that no one had promised him anything to enter the plea including by his attorneys at two points. (Vol. I 19,20,26). The trial court explained that the decision to plead guilty was Lawrence's own, not his attorneys' or his mother's. (Vol. I 24). Lawrence stated that the decision was his own. (Vol. I 25,26). Lawrence specifically stated that no one had promised him a life sentence. (Vol. I 26). The trial court again made it clear that there was no guarantee that the jury would recommend life because Lawrence pled guilty. (Vol. I 27). The trial court also questioned Lawrence's mother. (Vol. I 28-31). She stated under oath that she talked with him about entering a plea but she did not talk him into it. (Vol. I 29). Neither attorney had twisted her arm or brow beat her or Lawrence into entering a plea. (Vol. I 31). The trial court found the plea voluntarily entered and that "even given his limited functioning ability and psychiatric or psychological problems" that the decision was "his and his alone." (Vol. I 32-33).

Penalty phase

A penalty phase was conducted.[3] During the penalty phase, defense counsel presented numerous witnesses, including three mental health experts: Dr. Frank Wood, a neuropsychologist, Dr. Barry Crown, a licensed psychologist, and Dr. Robert Napier, a licensed psychologist, to establish Lawrence's schizophrenia. Two of the three defense mental health experts testified that both statutory mental mitigators applied.

Evidentiary hearing

Dr. James Larson, a psychologist, testified at the evidentiary hearing. (EH Vol II 364). Dr. Larson conducted a competency evaluation for the post-conviction proceedings. (EH Vol II 365). Because the serious nature of the case and the complexity of the issue, Dr. Larson met with Lawrence several times. (EH Vol II 366). Dr. Larson found Lawrence competent. He and Dr. Gilgun used the same test results. (EH Vol II 368). They shared data but not opinions. (EH Vol II 368). He had examined Lawrence in 1998 for competency in the federal case. (EH Vol II 370). Dr. Larson gave Lawrence the TOMM test for malingering and he concluded that Lawrence was malingering. (EH Vol II 371-372).

Dr. Gilgun, a psychologist, testified at the evidentiary hearing. (EH Vol II 384). Dr. Gilgun spent a great deal of time

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[3] No guilt phase was conducted because Lawrence entered a guilty plea.

on this case due to the extensive mental records and the complexity (EH Vol II 386). Dr. Gilgun met with Lawrence four times. (EH Vol II 386). Because he used the same test-giver as Dr. Larson, the test showed Lawrence was malingering. (EH Vol II 392).

At the evidentiary hearing, a videotape of a discussion between Lawrence and his lawyer, which was taped just prior to Lawrence entering his plea, was played. There were extensive discussions between Lawrence and his attorneys about entering the plea.

Trial counsel APD Killam testified that he did not promise Lawrence a life sentence if the he pled guilty. (EH 168, 205, 210). There was no plea bargain from the State offering a life sentence in exchange for pleading guilty. (EH 217). Ms. Stitt testified that she never told Ms. Thompson that if the defendant pled guilty they would save his life. (EH 307).

Standard of review

Whether a plea was voluntarily entered is reviewed *de novo*. *United States v. Frye*, 402 F.3d 1123, 1126 (11th Cir. 2005)(concluding that the voluntariness of a guilty plea is reviewed *de novo*). However, this Court defers to the trial court's factual findings and credibility determinations regarding the mental health experts' testimony.

The trial court's ruling

The Defendant argues that his guilty plea was not knowing and voluntary as illustrated by three sub-claims: 1) due to this mental illness and trial counsel intimidation and misrepresentation he did not understand what he was doing and the consequences of his plea; 2) due to his mental illness and low average intelligence he did not understand many of the substantive words used by the State and the Court; and 3) the trial court's insufficient inquiry coupled with the Defendant's mental illness and trial counsel's actions prevented the trial court from learning about the Defendant's involuntary plea (D. Mot. 5-6).

It is clear that a plea of guilty must be voluntarily made by one competent to know the consequences of that plea and must not be induced by promises, threats or coercion. See *Mikenas v. State*, 460 So.2d 359, 361 (Fla. 1984). The defendant has the burden of presenting substantial evidence establishing incompetence at the time of the plea. See *Gunn v. State*, 379 So.2d 431, 432 (Fla. 2d DCA 1980). A defendant's competency at the time he enters a guilty or no contest plea is an issue bearing upon the voluntary and intelligent character of the defendant's plea. See *Hicks v. State*, 2005 WL 3327342 (Fla. 5th DCA 2005).

It is clear from the record that the Defendant suffers from a mental illness as evidenced by the testimony of several neurology/psychology experts (EH 21, 45, 85). This coupled with the Court's observation of the Defendant as one who is quiet, silently withdrawn, exhibiting no outward reaction to these proceedings is indicative of the experts characterization of various symptoms of his diagnosed illness. However, the Defendant's mental illness is not disputed; the tension exists in whether his mental illness interfered with his ability to enter a knowing and voluntary plea. See generally *Muhammad v. State*, 494 So.2d 969, 973 (Fla. 1986)(stating "one need not be mentally healthy to be competent to stand trial").

Dr. Wood testified that the Defendant is schizophrenic and stated Defendant's statement that he was hallucinating provided a sufficient basis for him to render an opinion based on his knowledge of the psychosis that the Defendant was not competent at the time of the plea (EH 26). However, Dr. Wood qualified his opinion and stated he did not examine the Defendant for competency and that his opinion is generic (EH 26). As such, the Court is of the opinion that Dr. Wood's generic opinion today is

insufficient to establish that the Defendant, Jonathan Lawrence, not a pseudo individual diagnosed with a similar psychosis, was incompetent at the time of his plea.

Similarly Dr. Napier testified that he did not interview the Defendant during or around the time of his guilty plea thus he could not have advised trial counsel of the Defendant's comprehension at that time (EH 46). Dr. Napier's testimony concerning the Defendant's comprehension ability during the 2000 proceeding is based on a 1996 evaluation, which is several years prior to his competency evaluation in 1998 and the entry of his plea agreement (EH 44, 48). In fact, Dr. Napier testified that he was unable to give a formal opinion because he did not do an evaluation and his opinion is based on past history and behaviors and indicated there was "the possibility of not being competent" (EH 60). It follows and this Court finds that Dr. Napier's opinion of Defendant's ability to comprehend the proceedings based on his evaluation in 1996 is insufficient to support the theory that the Defendant was incompetent at the time of this plea. See ***Williams v. State***, 396 So.2d 267, 269 (Fla. 3d DCA 1981) (finding a "more likely than not" probability that the Defendant was incompetent at the time of trial is insufficient to establish that defendant is entitled to a new trial.)

Lastly, Dr. Crown testified that he evaluated the Defendant in 1998 and found that the Defendant had significant language based critical thinking problems and neuropsychological impairments (EH 85-86), which in his opinion would render the Defendant incompetent at the time of his plea in March 2000 (EH 98). The Court finds that Dr. Crown's testimony is insufficient to establish that the plea was involuntary especially when buttressed against the weight of the evidence found in the record and produced during the evidentiary hearing which supports a finding that the Defendant's plea was indeed voluntary and knowingly entered. See ***Wuornos v. State***, 644 So.2d 1000, 1010 (Fla. 1994)(even uncontroverted opinion testimony can be rejected, and especially where it is hard to square with the other evidence at hand); ***Walls v. State***, 641 So.2d 381, 390-391 (Fla. 1994).

The Court finds and it is clear from the record that every effort was taken on the part of the trial court and the defense attorneys to ensure that the Defendant was cognizant of the proceedings and understood the ramifications of his decision in light of his mental illness. For instance, competency evaluations were

conducted in October 1998 by Drs. Bingham and Larson wherein the Defendant was found to be legally competent to proceed (EH 256). See e.g. *Powell v. State*, 464 So.2d 1319, 1319 (Fla. 1st DCA 1985)(finding defendant was not entitled to postconviction relief on his claim that guilty plea was involuntary due to his incompetency where three experts found him competent to stand trial.) Furthermore, Mr. Killam testified that during his representation he did not observe any degeneration of the defendant's ability to communicate, instead "he seemed as he was described to me" (EH 160). In addition, Mr. Killam testified that the Defendant was a good listener and comprehended what was being discussed and he had the impression that Defendant was "capable of sitting through a trial, and conducting himself properly, and making decisions" (EH 209). Similarly, Ms. Stitt testified that she had two reports finding the Defendant competent and during the course of the representation his behavior "remained pretty consistent" thus not prompting her to feel the Defendant needed another competency evaluation (EH 322). The Court finds trial counsel's testimony to be credible considering it was trial counsel who had repeated contact with the Defendant over a 22 month period and was in the position to notice if there was a deterioration of the Defendant's mental state. As such, the Court finds the Defendant has failed to establish that his mental illness effected his ability to understand the proceedings and the consequences of his actions in light of the fact the testimony revealed there was no change in the Defendant's ability to communicate and comprehend the proceeding from the time of the original finding of competence and the entry of his plea.

Moreover, the evidence is clear that trial counsel made no misrepresentations or promises to the Defendant regarding the sentence that he would receive if the Defendant pled guilty. For example, Mr. Killam testified that he did not promise a life sentence if the Defendant pled guilty (EH 168, 205, 210) nor was there a plea bargain from the State offering a life sentence in exchange for pleading guilty (EH 217). Instead after a review of the evidence indicating the Defendant's guilt, a strategic decision was made to plead in the hopes that a presentation of the mitigating evidence would garner a life sentence (EH 204). Likewise, Ms. Stitt testified that she never told Ms. Thompson that if the Defendant pled guilty they would save his life (EH 307). Furthermore, Ms. Thompson

testified that she had no specific recollection of being told by trial counsel that the State had offered life imprisonment in exchange for a plea (EH 144) and Ms. Carter testified that trial counsel never told her that there was an arranged benefit with the State that in exchange for a plea of guilty there would be a recommendation for a life sentence (EH 149). Thus, the Court finds that the Defendant has not established that his mental illness coupled with the actions of counsel resulted in the Defendant not understanding the plea process or the consequences of his plea.

Additionally, the Defendant argues that due to his mental illness he was unable to understand the substantive terms used by the State and trial court. Mr. Killam testified that prior to the videotape conference there had been discussions about the plea process (EH 171). Though Ms. Stitt had concerns about the Defendant's mental state, Ms. Stitt in her professional opinion coupled with repeated discussions and interaction with the Defendant over a 22 month period (EH 260) felt that he understood the process (EH 309). Words such as "confederated" "due process" "combined" "principal" "aider" "abettor" were explained to the Defendant (EH 317, 328). Bearing in mind that the Defendant had a mental illness, counsel with the permission of the Defendant (EH 284) talked with the Defendant's Mother Iona Thompson about the strategy of pleading and had Mrs. Thompson also explain the process because they felt "perhaps she would be the one who could better communicate with Jonathon" (EH 277); that she would be able to say things in a way that the Defendant would understand his position. Thus, the Court finds the Defendant has not established that his plea was not voluntary or knowing based on this sub-claim.

In terms of whether the trial court was prevented by trial counsel's actions to discover that the plea was not voluntary and knowing, the record reveals that the trial court conducted an extensive plea colloquy wherein the trial court repeatedly questioned the Defendant as to the circumstances of the plea and whether the plea was actually the Defendant's decision. Notably on the issue of voluntariness, the Court inquired on two (2) occasions whether there was any form of coercion or promises. The questions were asked with a lapse of subject matter and posed in a different form as follows:

THE COURT: Has anybody threatened you or forced you into this plea?

THE DEFENDANT: No, sir.

THE COURT: Has anybody promised you anything if you entered this plea?

THE DEFENDANT: No. No, sir.

(EH Exhibit 10, Plea Colloquy p. 19-20).

THE COURT: And I need to make it clear that no one has promised you if you make this decision, have they, that if you do this that you are guaranteed a life sentence. Has anybody promised you that if you make this decision that you are guaranteed that you'll get a life sentence?

THE DEFENDANT: No, sir.

THE COURT: And I know it is a hope, and part of the plan of what you are hoping for. And I understand that is a part of the reason for making the decision. But I need to make it clear and make sure that you understand that by making this decision there is not a promise or a guarantee that the jury will recommend life. Do you understand that?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 26-27).

Furthermore, the Court repetitively inquired of the Defendant with questions differing in form whether the decision to plead was his:

THE COURT: And you understand that your attorneys have the right to make some tactical or strategy decisions regarding the trial? But only you, you alone, can determine whether or not to plead guilty or not. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that this is your decision, not your attorney's decision or anyone else's decision; your mother's or anyone else's to make for you? This is your decision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is this decision to plead guilty your decision or is it your attorney's?

THE DEFENDANT: It is mine.

THE COURT: Is this decision to plead guilty your mother's decision or your decision?

THE DEFENDANT: It is mine.

(EH Exhibit 10, Plea Colloquy, p. 24).

THE COURT: And again, only you can decide whether or not to plead guilty. This decision is not your attorney's to make. And only you can make this decision. You're the ultimate authority in making this fundamental decision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And do you have any questions about what I've said or what I said earlier either questioning you or talking to the attorneys?

THE DEFENDANT: No, sir.

THE COURT: Is this decision yours alone?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 25)

THE COURT: And you understand that you are the captain of this ship and the decision to plead guilty is yours and yours alone?
THE DEFENDANT: Yes, sir.

THE COURT: Your attorneys may give you advice and counsel to help you make the decision, but as the captain the final decision is yours; yours alone. You alone can make the ultimate decision. Do you understand this?

THE DEFENDANT: Yes.

(EH Exhibit 10, Plea Colloquy, p. 26)

Similarly, the trial court repeatedly sought affirmation that the Defendant was aware that by pleading guilty that the only determination to be made would be whether he would be sentenced to death or given a life sentence without the possibility of parole:

THE COURT: Do you understand that if you plead guilty to these charges as charged by the state that there are only two sentences available to the court?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that the only two sentences that could be imposed as a result of you pleading guilty to the crime is either spend the rest of your life in prison with absolutely no chance of parole which means that you would never get out of prison. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that the second penalty that is possible is that you would be sentenced to death either by lethal injection or by electrocution? Do you understand that?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 16-17)

THE COURT: Do you understand that if I accept your plea of guilty then that the only trial that would be held on Monday, Tuesday, and Wednesday is the trial on the issue of whether you should spend the rest of your life in prison or should be punished by death. Do you understand that?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 19)

THE COURT: And do you understand that by pleading guilty that you are waiving your right to go to trial on the issue of your guilt and that the only question left for the jury and me would be whether your punishment should be death either by lethal injection or by the electric chair. Or whether you should spend the rest of your life in prison with no chance of ever getting out of prison. Do you understand that?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 23)

THE COURT: Finally, do you understand that a plea of guilty is more than a confession which admits that you did what you are accused of doing, that by a plea of guilty it is itself a conviction? And that nothing will remain but to enter a judgment of guilt and then determine the proper punishment which in your case is either life in prison or death? Do you understand that?

THE DEFENDANT: Yes, sir.

(EH Exhibit 10, Plea Colloquy, p. 25)

With this in mind, the Court finds that the evidence is clear that trial counsel's actions did not prohibit the trial judge from determining whether the plea was voluntary and knowing considering the record is replete with the trial court's concern with the Defendant's predisposition of being a follower (EH Exhibit 10, Plea Colloquy, p. 11). As illustrated above and throughout the plea colloquy, the trial court considered the Defendant's mental limitations and the concern was exhibited throughout the plea colloquy in the manner in which the questions were asked, rephrased, and addressed repeatedly to ensure the Defendant truly understood the nature of his plea and that the decision to plea was ultimately his decision. Any inference that he

> Defendant was given a set of questions to memorize in order to have the proper response is negated.
>
> Consequently, the Court finds that the Defendant's guilty pleas to all four counts: 1) principal to principle to first-degree murder, 2) conspiracy to commit first-degree murder, 3) giving alcoholic beverages to a person under twenty-one, and abuse of a dead human corpse were entered into knowingly and voluntarily. The Defendant has failed to establish that his mental illness coupled with the alleged actions of counsel prohibited the Defendant from understanding the process or the consequences of his plea. The record reveals that the trial court explained that the Defendant was entitled to a jury determination of guilt (EH Exhibit 10, Plea Colloquy, p. 17, 21, 23), that the only sentencing options were life or death (EH Exhibit 10, Plea Colloquy, p. 16-17, 23) and the Defendant stated repeatedly that he understood the consequences of the plea (EH Exhibit 10, Plea Colloquy, p. 14-27), that he was not threatened or coerced (EH Exhibit 10, Plea Colloquy, p. 19, 26) and he was not under any medication that would impair his understanding of the decision (EH Exhibit 10, Plea Colloquy, p. 14-15). See ***Winkles v. State***, 894 So.2d 842, 847 (Fla. 2005).

Procedural Bar

Part of this claim is procedurally barred. Much of the evidence that collateral counsel relies on to attempt to prove that Lawrence's guilty plea was involuntary is Lawrence's conduct at the penalty phase. The issue of Lawrence's competency at the penalty phase was litigated in the direct appeal and decided adversely to Lawrence and he may not relitigate it in postconviction under the guise of the voluntariness of his plea. ***Lawrence***, 846 So.2d at 446-448.

Merits

The statute governing mental competence to proceed, § 916.12(1), Fla. Stat. (2000), provides:

> A defendant is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.

The statute also directs the appointment of an examining expert who shall consider and specifically include in his or her report the defendant's capacity to: (a) appreciate the charges or allegations against the defendant; (b) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant; (c) understand the adversarial nature of the legal process; (d) disclose to counsel facts pertinent to the proceedings at issue; (e) manifest appropriate courtroom behavior; (f) testify relevantly and (g) any other factor deemed relevant by the expert. See also Fla. R. Crim. P. Rule 3.211 (providing for the appointed of experts to make the same determinations).

There is literally videotape evidence that Lawrence had the ability to consult with his lawyers prior to entering his plea. Two experts were appointed by the court prior to the plea to determine Lawrence’s competency. This was an extensive plea colloquy. Prior to the plea colloquy with Justice Bell, both of Lawrence’s trial counsels explained the reasoning for entering a

plea and the rights Lawrence was waiving on videotape to Lawrence. In effect, there were two extensive plea colloquies prior to Lawrence entering his plea. At no point in either the plea colloquy with the judge or the videotaped discussions with his lawyers, did Lawrence exhibit signs of hallucinations. Lawrence appropriately responded to the various questions.

Collateral counsel established and the postconviction court found that Lawrence had mental problems, however, this is not the same as incompetency to enter a plea. *Muhammad v. State*, 494 So.2d 969, 973 (Fla. 1986)(finding the defendant to be competent and observing that while the defendant "suffered mental problems, but one need not be mentally healthy to be competent to stand trial."). This Court has found other defendants who suffered from schizophrenia to be competent. In *Ferguson v. State*, 789 So.2d 306 (Fla. 2001), this Court affirmed a trial court's finding of competency to proceed in postconviction proceedings where the defendant suffered from schizophrenia. Defense presented two mental health experts who diagnosed Ferguson as a paranoid schizophrenic. Another expert found Ferguson's behavior consistent with paranoid schizophrenia, but felt that Ferguson was consciously exaggerated some of his behavior. The expert still concluded that Ferguson was not competent. The State presented three

experts all of whom opined that Ferguson was malingering and exaggerating his condition.

Here, as in *Ferguson*, the State's mental health experts concluded that Lawrence was malingering. Dr. Larson gave Lawrence the TOMM test for malingering and he concluded that Lawrence was malingering. (EH Vol II 371-372). Dr. Gilgun, a psychologist, who used the same test-giver as Dr. Larson, testified that the test showed Lawrence was malingering. (EH Vol II 392). Lawrence, while mentally ill, is exaggerating the extent of his illness.

One of Lawrence's two lawyers, Ms. Stitt, testified that, while she was concerned about Lawrence competency, after the two doctors determined that he was competent, she did not notice any change in his behavior. (EH Vol II 322). She testified that Lawrence's behavior remained "pretty consistent" (EH Vol II 322). She did not believe that Lawrence was having hallucinations when he returned to the courtroom during the penalty phase. (EH Vol II 323).

Not only had Lawrence been evaluated for competency in state court in connection with this murder, Lawrence had been evaluated for competency in federal court in connection with another murder prior to entering his plea. *Lawrence*, 846 So.2d at 443 n.3 (noting that on June 17, 1999, [Lawrence] pled guilty

in Federal Court to the capital felony crime of Murder in *United States v. Lawrence*, Case Number 3:98CR00073-001). APD Killam testified at the evidentiary hearing that he was aware that Lawrence's competency had been determined in the federal murder case as well.

Lawrence's reliance on *Jones v. State*, 740 So.2d 520, 522 (Fla. 1999), is misplaced. First, unlike *Jones*, the issue of Lawrence's competency is not being raised for the first time in postconviction. The closely related issue of his competency to stand trial during the penalty phase was raised in the direct appeal. Moreover, the *Jones* Court reasoned that, because Jones was not evaluated by a qualified expert prior to his trial, a "meaningful retroactive competency determination" was not possible. *Jones*, 740 So.2d at 524. By contrast, here, Lawrence was evaluated by two doctors prior to his plea. In *Jones*, three different defense counsels testified that Jones was incompetent and that had they stayed on or taken the case they would have had him evaluated. Here, Lawrence's two trial counsels did have him evaluated. Two different doctors examined Lawrence prior to his plea. Both trial counsels testified that they saw no major change in Lawrence's mental condition from the time of the two evaluations until the time of the plea. *Jones* is inapposite.

Lawrence's reliance on *Culbreath v. State*, 903 So.2d 338 (Fla. 2d DCA 2005), is also misplaced. In *Culbreath*, the Second District held that a second competency examination and a second competency hearing were warranted. Defense counsel had visited Culbreath in jail and was unable to communicate with him suggesting that Culbreath did not have the ability to consult with his attorney and aid in the presentation of his defense. The Second District concluded that a prior determination of competency does not control when new evidence suggests the defendant is currently incompetent. Here, unlike *Culbreath*, Lawrence had a second hearing on his competency to enter a plea at his evidentiary hearing. More importantly, neither of Lawrence's two lawyers made any claim at the plea hearing that Lawrence was unable to consult with them. Far from it - the videotape of the pre-plea discussions shows Lawrence consulting with both his lawyers. The trial court properly found Lawrence's plea was voluntary following an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED VARIOUS CLAIMS OF INEFFECTIVENESS FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Lawrence asserts that the trial court improperly denied his claim of ineffective assistance of counsel for (1) informing

Lawrence that no defense exists; (2) informing him that photographic evidence would be less if he pleaded guilty; (3) promising him a life sentence if he entered a plea; (4) failing to file a motion to suppress his third confession and (5) failing to file a motion to disqualify the judge. There was no deficient performance. No defense exists. Counsel was correct in her estimation that less evidence would be admitted in the penalty phase. As the trial court found, no promises for a life sentence were made. Any motion to suppress the third confession would not affect the admissibility of the prior confessions and therefore, would not help. Not filing a motion to disqualify the judge was a reasonable tactical decision based on counsel's view that the judge, who was familiar with Lawrence's mental problems, would be less likely to sentence Lawrence to death than another judge. The trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

The trial court's ruling

> The elements to establish a claim of ineffective assistance of counsel is twofold. First, the defendant must show that counsel's performance was deficient, which requires the defendant to establish that counsel made errors serious in nature that said counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The counsel's representation must have fallen below an objective standard of reasonableness. See *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) citing *Strickland*, 466 U.S. at 668. Second, the defendant must show that the deficient performance prejudiced the defense which requires

a showing that but for the counsel's errors there is a reasonable probability the result of the proceedings would have been different. See *Jones v. State*, 845 So.2d 55, 65 (Fla. 2003). Without meeting both prongs, it cannot be said a death sentence resulted in a breakdown of the adversary process which renders the result unreliable. *Strickland*, 466 U.S. 668 at 687.

The Defendant argues that trial counsel performance was deficient based on three sub claims: 1) failed to inform the Defendant of a defense and through misrepresentation convinced the Defendant that it he did not plead he would die; 2) failed to file a motion to suppress statements; and lastly, trial counsel failed to file a motion to recuse the trial judge (D. Mot. 18-19).

This Court has previously addressed the Defendant's contention of misrepresentation in Claim I and found neither trial counsel may any misrepresentations. The testimony revealed that no promises for a life sentence were made (EH 165, 205, 210, 307). As for the alleged misrepresentation concerning the line of witnesses and admission of gory photos, the Defendant fails to establish that counsel's belief that there would be parade of witnesses implicating the Defendant and admission of several gory photos during the trial (EH 290) somehow rendered her performance deficient. Ms Stitt testified that she felt that "things would might come out during the trial in greater depth and length then would come out in the penalty phase" and felt the greater chance of saving the Defendant's life was to forego the guilt phase (EH 324). As such, the Court finds the claim of misrepresentation to be without merit.

Moreover, Mr. Killam denied telling the Defendant there was no defense, instead he testified he probably told the Defendant that he did not think they would win at trial, "but I don't think I left him without any hope. I mean, I try not to deal in absolutes" (EH 167). Though Mr. Killam acknowledged that he did not remember whether he discussed the theory of independent act of a co-defendant with the Defendant, counsel testified there was evidence that indicated that the Defendant's claims "he did not kill her, did not participate, he had no knowledge" were false (EH 178). This contention is reinforced by Ms. Stitt when she testified that the Defendant had admitted that he participated in certain acts that would indicate guilt as a principal (EH 327). See *Boyd v. State*, 912 so.2d 26, 27 (Fla. 4th DCA 2005)(independent act doctrine arises when

one co-felon, who previously participated in a common plan, does not participate in acts committed by his co-felon that fall outside of the common design of the original collaboration). As such, the Court finds that the Defendant has failed to establish that being informed of such a defense would have altered the outcome of the case or would have succeeded at trial. See e.g. *Odom v. State*, 782 So.2d 510, 512 (Fla. 1st DCA 2001) citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("where the alleged error of counsel is a failure to advise of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial").

Next the Defendant argues that trial counsel's actions were deficient when they failed to file a motion to suppress because the statements were used in all three of the Defendant's criminal proceedings and was the basis used to coerce the Defendant to plead guilty (D. Mot. 35). In analyzing the actions of trial counsel, the focus is not whether trial counsel should have taken a different course of action; the primary question is whether the course of action was a reasonable one which resulted from reasonable professional judgment. See Baity v. Crosby, 2005 WL 1684390 (N.D. Fla. 2005). In the instant case, the Court is of the opinion that defense counsel's testimony indicates the basis for not filing a motion to suppress was a reasoned professional decision reached after discussion with co-counsel.[4] (EH 268-269). Ms. Stitt testified that one of the purposes for not filing the motion to suppress was to show the larger culpability of the co-defendant Jeremiah Rodgers (EH 270-271) because at that point they were unsure whether or not to call the defendant to testify considering his particular problems and felt this would be a sound way to show the Defendant was the lesser participant and under the influence of Jeremiah Rodgers (EH 271). Therefore, the Court finds the Defendant has not overcome the presumption that the decision not file a motion to suppress was a strategic decision and this claim is denied as without merit. See e.g. *Dufour v. State*, 905

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[4] Mr. Killam testified that he did not believe a motion to suppress would be successful and thought a motion to suppress would be inconsistent with the defense strategy to show someone who "was cooperative, and who could adjust to prison, and had been a follower and was dominated by someone" (EH 162).

So.2d 42, 51 (Fla. 2005) (there is a strong presumption that all significant decisions are in the exercise of reasonable professional judgment thus the defendant has the burden to overcome the presumption that under the circumstances the challenged action might be considered sound strategy); *Maharaj v. State*, 778 So.2d 944, 959 (Fla. 2000) (counsel cannot be ineffective for strategic decisions). Moreover, the issue of voluntariness of the statements was raised by the State, evidence was presented on the matter wherein the trial court made the determination that the evidence presented adequately demonstrated the voluntariness of statements (EH Exhibit 11, Order on Motion to Determine Voluntariness).[5] As such, the Court finds the Defendant has failed to establish that but for his omission there is a reasonable probability the result of the proceedings would have been different.

Lastly, the Defendant argues that counsel rendered ineffective assistance in failing to move for disqualification of the trial judge after some comments were made regarding the Defendant's previous statements to law enforcement (D. Mot. 35-36). The Court finds that the Defendant has failed to establish that counsel's performance was deficient especially in light of the fact Ms. Stitt testified that a motion to disqualify was discussed and given the circumstances of this case reasoned that Judge Bell was aware of the Defendant's problems considering he had presided over the Defendant's prior cases and "would be the better of any judge that [they] could get, as far as understanding the problems Jonathon had" (EH 326). See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)(strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct). As such, the Court finds the defense counsel's testimony credible that the basis for not moving for recusal was a strategic decision and the Defendant has failed to establish otherwise. *Johnson v. State*, 769 So.2d 990, 1001

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[5] A challenge to the trial court's ruling that the statements given to law enforcement should have been raised on appeal. See *Howell v. State*, 877 So.2d 697, 704 (Fla. 2004); *Brown v. State*, 755 So.2d 616, 621 (Fla. 2000)(a defendant cannot circumvent procedural bar by couching issue as a claim of ineffective assistance).

(Fla. 2000) ("Counsel's strategic decisions will not be second-guessed on collateral attack").

Consequently the Court finds that the Defendant has failed to establish that counsels' respective performances in this case were deficient nor that counsels' alleged errors would have resulted in a different outcome. See *Strickland*, 466 U.S. 668 at 687; Jones, 845 So.2d 55 at 653. The testimony establishes that both trial counsels were aware of the Defendant's impaired mental status and this Court finds given the circumstances, trial counsel made every attempt to assure that the Defendant was aware of his choices and made strategic decisions based on their professional judgment that were perceived to be in the Defendant's best interest.

Standard of review

Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings (if they are supported by competent, substantial evidence), but reviewing the circuit court's legal conclusions *de novo*. *Hannon v. State*, 2006 WL 2507438, *2 (Fla. August 31, 2006)(citing *Stephens v. State*, 748 So.2d 1028, 1032 (Fla.1999)).[6]

Merits

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been

[6] For the sake of brevity, the standard of review and the *Strickland* standard will not be repeated for each ineffectiveness issue.

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Spencer v. State*, 842 So.2d 52, 61 (Fla.2003),citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc)(discussing the performance prong of *Strickland* at length).

Lawrence has an additional hurdle in his post-conviction attempt to prove ineffective assistance of counsel - Lawrence

had two experienced criminal defense attorneys representing him. Chief APD Killam had been a public defender for over 25 years at the time of the penalty phase in this case. Chief APD Killam had handled approximately 25 prior capital cases before handling Lawrence's case. (EH Vol I 199). Ms. Stitt testified that at the time of the representation she had been a defense counsel for 20-21 years. (EH 319). As the trial court observed, they had over 50 years experience between them. The standard for ineffectiveness is that no reasonable attorney would proceed in that manner. Here, two experienced public defenders agreed to the decisions under attack. As one federal circuit recently observed, in rejecting an ineffectiveness claim, when dealing with lawyers who have substantial trial experience, "their experience exceeds our own." *Campbell v. Polk*, 447 F.3d 270, 280 (4th Cir. 2006).

WHETHER A DEFENSE EXISTED

Lawrence asserts that his trial counsel was ineffective for informing him that "no real legal defense" existed. IB at 44. During the videotaped discussions between Lawrence and his lawyers, Ms. Stitt stated: Do you remember us talking about the fact that we had no real legal defense to the charges? The statement that "no real legal defense" existed can mean two things. One is that there was no pure legal defense and the

other is that there was no defense that was remotely likely to succeed. Both these interpretations are accurate in this case and counsel was not ineffective for informing Lawrence of this reality.

As to whether there was a pure legal defense, collateral counsel seems to argue that because Lawrence did not personally, actually kill the victim, this is a defense and trial counsel was ineffective for not explaining this “defense”.

There is no deficient performance. Trial counsel was correct. This is not a defense. Not being the actual shooter is not a defense to first degree murder. Whether or not Lawrence personally fired the fatal shot, he was still guilty of first degree murder. Nor is there any prejudice. There can be no prejudice from not informing Lawrence of a defense that does not exist.

Collateral counsel also argues that Lawrence stated that he did not know that Rodgers was going to kill the victim. This is not a dispute about whether a defense existed, it is a dispute about credibility. Trial counsel, quite reasonably, did not think that a jury would believe that Lawrence did not know this. They had killed one person prior to this murder and they attempted to kill a another person prior to this murder. Worse, presenting such a defense would have entitled the prosecution to

Williams rule in the prior murder and the prior attempted murder to rebut Lawrence's lack of knowledge defense. § 90.404(2)(a), Fla. Stat. (providing: Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.).[7] As Chief APD Killam testified at the evidentiary hearing, it was a possibility that the other prior murder and prior attempted murder could be *Williams* Rule evidence in this case. (EH Vol II 214). While collateral counsel totally ignores the *Williams* Rule problem of presenting this lack of knowledge "defense", trial counsel could not afford to ignore this problem. Given these prior incidents of murder, no jury would have believed a claim that Lawrence did not know that they were going to kill the victim.

Collateral counsel focuses on the list and argues that Lawrence often made lists. First, this focus ignores the

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[7] The State must provide notice of its intent to rely upon *Williams* rule evidence in its case-in-chief ten days prior to trial, however, no notice is required if the State uses the prior bad acts on rebuttal. *Robertson v. State*, 829 So.2d 901, 907 (Fla. 2002)(stating that no notice is required for evidence of offenses used for impeachment or on rebuttal).

Williams Rule problem. This argument also ignores the unique nature of the list and the correlation between the items on the list and the facts of this murder. The list included: coolers of ice, Everclear, 2 scalpels, film, gallon size Ziploc bags, washrags, rope and a .380. The "to do" list also includes: slice, dice and dissect, bag with eatable meats, bag remains and bury. Trial counsel was not ineffective for thinking that presenting such a defense was highly unlikely to result in an acquittal and informing his client that this was not a viable defense. Criminal defense attorney need to make these types of assessments to advise their clients whether or not to enter a plea. Contrary to collateral counsel's assertion that Lawrence's claim of innocence was a question for the jury, it is first a question for the attorney that he must consider in deciding whether to advise his client to present such a defense. IB at 50. According to collateral counsel's logic, no criminal defense attorney should ever advise his client to enter a guilty plea. Defense counsel in capital cases often enter pleas even without a plea agreement to avoid detailed presentation of evidence during the guilt phase.

PHOTOGRAPHS OF THE VICTIM

Lawrence asserts that counsel was ineffective for improperly informing him that the photographs of the victims would not be used in the penalty phase if he pleaded guilty. IB at 53-54. There is no deficient performance. Counsel explained that if he entered a plea, the jury would not see "gory photograph after gory photograph" which "would do nothing but harm our chances." Counsel properly informed Lawrence that if he pled guilty the State's evidence would not be as extensive in the penalty phase. There was no deficient performance. Lawyers in capital cases with overwhelming evidence often enter pleas without a plea deal because less evidence of guilt is introduced in the penalty phase.

Rolling v. State, 695 So.2d 278, 282 (Fla. 1997)(noting on the day set for trial, Rolling changed his plea to guilty on all counts).

Nor is there any prejudice.

COERCING HIM INTO ENTERING A PLEA

Lawrence asserts that both his trial counsel were ineffective for "coercing" him into pleading guilty by speaking with his mother and advising him to enter a guilty plea. IB at 57. Judge Bell informed Lawrence twice during the plea colloquy that death was a possible sentence. Judge Bell explained that the second possible penalty was "that you would be sentenced to

death either by lethal injection or by electrocution". Later, in the colloquy, Judge Bell explained "the only question left for the jury and me would be whether your punishment should be death by lethal injection or by the electric chair". During the plea colloquy, the trial court expressly noted that there was no plea agreement with the State. (Vol. I 13). The videotape inquiry conducted by both defense counsel with the defendant refers to life or death. Judge Bell explained during the plea colloquy that the decision to plead was "your decision, not your attorney's decision or anyone else's decision, you mother's decision or anyone else's to make for you. This is your decision." The judge asked: "is the decision to plead guilty your decision or is it your attorneys'?" Lawrence responded: "it is mine." The judge asked: "is the decision to plead guilty your mother's decision or your decision?" Lawrence responded: "it is mine."

This is simply not coercion as a matter of law. Advice does not amount to coercion. ***Fields v. Gibson***, 277 F.3d 1203, 1212-1214, 1216 (10th Cir. 2002)(holding that counsel did not render deficient performance, in a capital case, in convincing the petitioner to plead guilty, because counsel "did not coerce Fields but merely 'strongly urged' him to do what they thought was in his best interest" and finding no coercion where counsel

"pulled out all the stops" to convince her client to plead guilty, telling her client that if he did not plead guilty he would be sentenced to death, whereas if he pled guilty he very likely would not, and enlisting family members to urge him to plead guilty); *Braun v. Ward*, 190 F.3d 1181 (10th Cir. 1999)(rejecting an ineffective assistance of counsel claim, in a capital case, based on an allegation that his attorney misled him into pleading because they advised him that he had a better shot in front of the judge than a jury of getting life without parole because counsel made no guarantees of a life sentence).

Lawrence asserts that he originally did not want to plead guilty. No doubt, but that is not the test for coercion. During the plea colloquy, Lawrence specifically stated that no one had promised him a life sentence. (Vol. I 26). The trial court again made it clear that there was no guarantee that the jury would recommend life because Lawrence pled guilty. (Vol. I 27). At the evidentiary hearing, Lawrence's mother and sister testified that they were under the impression if he pled guilty he would get life. Neither testified that the lawyers explicitly guaranteed a life sentence. Both APD Killam and APD Stitt testified that they did not promise Lawrence he would receive a life sentence. There was no ineffective assistance of counsel in advising Lawrence to plead guilty.

MOTION TO SUPPRESS

Lawrence argues that trial counsel was ineffective for failing to file a motion to suppress. IB at 58. Collateral counsel argues that the third statement was taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)(establishing a rule that once a suspect is in custody and invokes the right to counsel, law enforcement may not further interrogate him until counsel has been made available, or unless the suspect initiates further conversations or exchanges with the police). Lawrence gave a recorded confession on May 8, 1998 (R. 38-47). In the May 8, 1998 statement, Detective Hand explained to Lawrence his *Miranda* rights. (TR 38-39). Detective Hand asked Lawrence if he knew what a waiver form was, Lawrence said he thought so but could not describe it. (TR 39). Detective Hand then explained to Lawrence that "a waiver is you already know what I've told you but having in mind what I told you, you still want to talk to me." (TR 39). Lawrence admitted cutting her chin and "just her calf" but claimed to think that she was already dead. (TR 45-46,47). Lawrence denied shooting the girl and said he had nothing to do with killing her. (TR 47). Part of the recorded conversation was missing and Detective Hand supplemented that part with a typed report from his notes. (TR 48). In the

written report, Detective Hand noted that Lawrence admitted having a scalpel and a box of surgical gloves in his tool box which he might have used when cutting the victim's calf. Lawrence admitted putting the victim's calf in a zip lock bag. Lawrence planned on making steak with the calf and jerky with the remainder which he and Rodgers were going to eat. Detective McCurdy also wrote two reports (R. 51-55,56-57). The first report concerned the discussions they had with Lawrence as he was taking them to the victim's body. (R. 51-55). Lawrence agreed to take the detectives to the body. (TR. 51). Lawrence admitted that they took a spotlight from his truck and shined it on the body while Rodgers took pictures. Lawrence stated that Rodgers shot the girl with a pistol they had had for two to three weeks. (TR. 52). The battery in Lawrence's truck went dead, so they walked to the BP and called Rodger's girlfriend to come get them. (TR. 52). As they were walking to the store, a white truck passed them on Ebenezer Church Road at 6:00 am. (TR. 52). They returned to the murder scene and threw leaves over the victim. (TR. 52). Lawrence then pointed out the victim's body. (TR. 52). Lawrence stated that they intended to bury her but the ground was too hard. (TR. 52).

The May 14, 1998, statement was introduced at trial. (T IV 451-463). The May 12, 1998 statement was also introduced at trial. (T IV 510-512, 515-542).

Justice Bell had appointed the public defender at first appearance on May 9, so the May 12 statement was after counsel was appointed. (EH Vol II 248). Lawrence had been arrested on the Jennifer Robinson murder on May 8 but not arrested on the Livingston murder. (EH Vol II 248, 250).[8] While they were questioning Lawrence regarding the Livingston murder, Lawrence said that he wanted to straighten out a couple of facts regarding this murder. Lawrence had given prior statements regarding this murder. Prior to the May 12 statement, Detective

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[8] The Sixth Amendment right to counsel, which does not attach until the initiation of adversary judicial proceedings, is offense specific. *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321(2001)(holding that the Sixth Amendment right to counsel attaches only to charged offenses, and there is no exception for uncharged crimes that are "factually related" to a charged offense). The Sixth Amendment does not attach until prosecution is commenced "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 2207, 115 L.Ed.2d 158 (1991). The Fifth Amendment right to counsel, which *Edwards* is based on, is not offense specific. It is not clear whether collateral counsel is arguing that the Fifth or Sixth Amendment right to counsel was violated. *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)(extending the rule in *Edwards* to cases involving the Sixth Amendment right to counsel and holding, if police officers initiate interrogations after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any

Hand reread Lawrence his *Miranda* rights including the right to have his lawyers present during questioning. Lawrence did not assert his right to counsel. He acknowledged that he understood his right to counsel but did not ask to have his attorney present. Lawrence then admitted having sex with the victim prior to the murder. Lawrence admitted to being with Rodgers when Rodgers bought the Polaroid film at the Winn-Dixie a couple of days prior to the murder which Rodgers used to take pictures of the victim.

There was no violation of either the Fifth or Sixth Amendment right to counsel. Lawrence never asserted his Fifth Amendment right to counsel and he waived his Sixth Amendment right to counsel. Regarding the Sixth Amendment right, once invoked at an arraignment or similar proceeding, the defendant cannot validly waive the right to counsel during a police initiated interrogation concerning the charged offense. If the defendant voluntarily, and without police prompting, initiates a conversation about the charged offense, however, any resulting statements are admissible against the defendant at trial. *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2389, 101 L.Ed.2d 261 (1988). Lawrence waived his right to counsel. He was the one who initiated the contact regarding this murder.

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waiver of the defendant's right to counsel for that police

The officers were talking with Lawrence about the Livingston murder, not this murder.

This was a reasonable tactical decision. Even if the trial court granted the motion to suppress Lawrence's May 12 statement based on a violation of *Edwards*, the first confession on May 8 was still admissible. The prosecution could still prove Lawrence's involvement based on Lawrence's first statement. In the first statement, Lawrence admitted to being there and admitted to cutting her calf with a scalpel. Lawrence agreed to take the officer to the victim's body. In the second statement taken on May 9, Lawrence stated that Rodgers shot the victim, admitted to placing the body in his truck when they heard a truck coming and to attempting to bury the victim. During the search for the body, the officers found the victim's keychain with her picture on it. Lawrence admitted to cutting the victim's calf, putting it in a ziploc bag and in a cooler and taking it home in the second statement. In the third statement, Lawrence admitted having sex with the victim. Lawrence, however, was not charged with rape.

Even a successful motion to suppress would not significantly undermine the State's case against Lawrence. The first and second statements were not suppressible. Much of the damning

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initiated interrogation is invalid.).

evidence was contained in the first and second confessions. The physical evidence, including the fact that Lawrence took Detective Hand to the victim's body, existed regardless of any of Lawrence's statements. Additionally, even if the May 12 statement was suppressible at the trial and penalty phase, the statement was not suppressible at the *Spencer* hearing. Judges may hear suppressed evidence for sentencing purposes. ***Del Vecchio v. Illinois Dep't of Corrections***, 31 F.3d 1363, 1388 (7th Cir. 1994) (en banc)(concluding that the exclusionary rule did not bar the consideration at sentencing of a confession obtained in violation of the defendant's *Miranda* rights); ***United States v. Krueger***, 415 F.3d 766, 779 (7th Cir. 2005)(explaining that exclusionary rule is inapplicable at the sentencing stage of a criminal prosecution and noting nine other circuits have held that the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings). Even a successful motion to suppress would only prohibit the jury from considering the May 12 statement in their recommendation, it would not prohibit the jury from considering it his final decision. Trial counsel knew that merely suppressing one of the confessions, when there were earlier,

non-suppressible confessions would not help and therefore, could have reasonably decided not to file a motion to suppress.[9]

Lawrence also asserts that trial counsel should have filed a motion to suppress the statements as being involuntary based on lack of sleep and food and the fact the detective yelled at him. Any motion to suppress, based on these grounds, would have been denied. *Brown v. State*, 565 So.2d 304 (Fla. 1990), *abrogated on other grounds*, *Jackson v. State*, 648 So.2d 85 (Fla. 1994)(stating the confession was not rendered involuntary by his exhaustion and lack of sleep, absent evidence of police coercion); *United States v. Reynolds*, 367 F.3d 294, 297-299 (5th Cir. 2004)(rejecting a contention that his confession was involuntary due to having taken methamphetamine and not having slept for three days because he was advised of his rights and acknowledged that he understood those rights, indicated a willingness to talk with the authorities and throughout the interview, Reynolds was cooperative, listened to questions, and responded appropriately including providing a detailed account

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[9] This earlier confession, the May 8 statement, was not introduced at the penalty phase. The May 12 and May 14 confessions were introduced but the point is that the earlier confession could have been introduced, and would have been, had a motion to suppress the later statements been granted.

of the crime). Counsel is not ineffective for not filing a useless motion to suppress.[10]

MOTION TO DISQUALIFY JUSTICE BELL

Lawrence argues that trial counsel was ineffective for failing to file a motion to disqualify Judge Bell based on a statement during the plea colloquy were the judge referred to Lawrence's statements as a "confession." IB at 69.

There was no deficient performance. Trial counsel had no basis to disqualify Judge Bell. It is not deficient performance to fail to file a legally insufficient motion. The standard for determining whether a motion to disqualify is legally sufficient is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair trial. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335 (Fla.1990)(quoting *Livingston v. State*, 441 So.2d 1083, 1087 (Fla.1983)). A defendant's subjective fears are not sufficient to justify a well-founded fear of prejudice. *Arbelaez v. State*, 775 So.2d 909, 916 (Fla.2000). The Florida Supreme Court has affirmed

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[10] Collateral counsel asserts that neither of his lawyers obtained Lawrence's personal consent to not filing a motion to suppress. IB at 66. Lawrence's personal consent was not required and his lawyers were not ineffective for not obtaining his consent. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998)(rejecting a claim of ineffectiveness for failing to consult with the defendant before deciding not to file a motion

denials of motion to disqualify involving more serious allegations. *Arbelaez v. State* 898 So.2d 25, 42 (Fla. 2005)(finding the denial of a motion to disqualify as legally insufficient was proper where judge stated that if found competent to proceed, the Defendant would be getting “a jolt of electricity” in another capital case and a "tough-on-crime" judicial campaign).

None of these allegations is legally sufficient to disqualify Judge Bell. While the First District disqualified Judge Bell in the co-defendant’s case, the disqualification was based on a conference conducted without the co-defendant’s lawyer present. *Rodgers v. State*, 869 So.2d 604, 605 (Fla. 1st DCA 2004)(concluding “upon careful review of the record, we conclude that a reasonably prudent person, faced with the facts of this case, would be placed in fear of not receiving a fair and impartial trial before the trial judge.”). This, however, did not provide a basis for disqualifying Judge Bell in this case. Nor is there any basis to disqualify Judge Bell based on his use of the word “confession” to describe Lawrence’s statement to the officers. The statements were confessions. Justice Lewis also referred to Lawrence’s statements as a “confession” in the oral argument in the direct appeal. Even if not properly

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to suppress pre-trial motion to suppress a confession “is a

characterized as a confession, this is not judicial bias. A slip of the tongue is not a basis to disqualify a judge. If trial counsel had filed a motion to disqualify, Judge Bell should have merely denied the motion as legally insufficient.[11]

Moreover, Judge Bell had dealt with Lawrence as a juvenile. (EH Vol II 242). Lawrence's attorneys discussed disqualifying Judge Bell but thought that he would be a good trier of fact and "possibly, even if the jury recommended the death penalty, he might override." (EH Vol II 315). Ms. Stitt testified at the evidentiary hearing that she thought Judge Bell was the best judge they could hope for in terms of understanding Lawrence's problems. (EH Vol II 326). Even if grounds existed to disqualify Judge Bell, trial counsel could have declined to do so, if they wanted him to preside at the penalty phase due to

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classic tactical decision" that can be made by counsel alone)

[11] Contrary to collateral counsel's assertion that counsel made the decision not to disqualify Judge Bell without Lawrence's personal consent and this is improper, an attorney may decided not to file a motion without consultation and consent of his client. Not every decision an attorney makes requires the personal agreement of the defendant. Indeed, very few do. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998)(noting the personal decisions include the decision to enter a guilty plea; the decision to waive a jury trial; the decision to pursue an appeal; and the decision to testify at trial and rejecting a claim of ineffectiveness for failing to consult with the defendant before deciding not to file a motion to suppress pre-trial motion to suppress a confession "is a classic tactical decision" that can be made by counsel alone).

this background and their feeling that he might override any death recommendation from the jury. This was, as the trial court found, a reasonable strategic decision. *Robinson v. State*, 913 So.2d 514, 524 (Fla. 2005)(rejecting an ineffective assistance of counsel claim for failing to move to disqualify the judge because "[t]he record demonstrates that trial counsel considered the issue, discussed it with Robinson, and made a strategic decision not to recuse Judge Russell.").[12]

Nor is there any prejudice. The prejudice cannot be just that another judge would have presided at the penalty phase who also would have sentenced Lawrence to death. Lawrence would have to establish actual judicial bias to show prejudice. The standard in post-conviction litigation is higher. It is not merely an appearance of impropriety as in a direct appeal; rather, in post-conviction, collateral counsel must show that Judge Bell

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Nixon does not stand for the proposition that every decision requires the personal consent of the defendant.

[12] Contrary to the import of collateral counsel's questions at the evidentiary hearing, there is no limit on a judge's ability to override a jury recommendation of death. Indeed, a judge's decision to override a death recommendation is not even appealable. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) is limited to a jury's recommendation of life. *Keen v. State*, 775 So.2d 263, 284 (Fla. 2000)(explaining that a *Tedder* inquiry has no place in a death recommendation case). Justice Bell was completely free to override any death recommendation by the jury.

was actually biased. There was no showing of actual judicial bias at the evidentiary hearing.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR CONCEDING THE CCP AGGRAVATOR FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Lawrence asserts that his trial counsel was ineffective for conceding the existence of an aggravator in violation of *Nixon v. State*, 857 So.2d 172 (Fla. 2003)(*Nixon III*). First, *Nixon III* has been overruled by the United States Supreme Court. Moreover, even if *Nixon III* was still good law, it does not apply to the concession of an aggravator. The basis of *Nixon III* was a lack of adversarial testing. Trial counsel may concede every aggravator but establish mitigation and then argue that the mitigation outweighs the conceded aggravation. If counsel did so, there would be adversarial testing at the penalty phase. So, *Nixon III* does not apply to partial concessions. As the trial court found, it was "a good trial strategy for defense counsel to make some halfway concessions." The trial court properly denied the claim of ineffectiveness for conceding the CCP aggravator following an evidentiary hearing.

Penalty Phase

During the opening argument of the penalty phase, defense counsel stated to the jury: "We are not going to contest the

existence of the fact that these aggravators exist. They do." (T. Vol III 318). During closing argument of the penalty phase, counsel conceded the facts of the CCP aggravator but argued that "all this cold calculated, premeditated stuff" was not done acting on his own; rather, Lawrence was being led by Rodgers. (T. Vol. VI 932,936,937). Counsel also argued that the crime was not cold blooded because "there wasn't anything any warmer or colder about Jonathan Lawrence's blood when this happened because he's always been the same." (T. Vol. VI 940). Counsel argued that the mental mitigators outweighed the CCP aggravator. (T. Vol. VI 940). Trial counsel referred to the defendant's "little brain" and to his "little pea brain." (T. Vol. VI 934,935). Trial counsel also referred to the defendant's frontal temporal lobe damage causing him to be back to his "reptilian brain." (T. Vol. VI 943). Trial counsel repeatedly stated that Lawrence should have never been allowed out of the state mental hospital. (T. Vol. VI 929; 941; 944). Trial counsel's closing line was: "he doesn't belong in the electric chair. He belongs in the state hospital where he should've stayed." (T. Vol. VI 944).

Trial counsel filed a sentencing memorandum. (T. Vol. II 317-323). In the sentencing memo, trial counsel admitted the prior violent felony aggravator but argued against finding the CCP

aggravator. (T. Vol. II 318). He argued that the three experts, that were unrefuted by any expert for the State, "defendant was clearly incapable on his own of forming any such plan that rises to the level" of heightened premeditation. Relying on the penalty phase testimony, he asserted the defendant "could not have formed any plan without the help of another." (T. Vol. II 318). He argued that Lawrence's mental illness negated the heightened premeditation required for a finding of CCP, stating "[h]eightened premeditation is reduced to the fantasy of an organically damaged schizophrenic brain bathed in ethanol." (T. Vol. II 319). The prosecution did not file a sentencing memorandum.

Plea

During the plea colloquy, with Lawrence present, Mr. Killam explained his strategy was rather than losing credibility in the face of "overwhelming evidence" by arguing the State did not prove its case, "our best strategy" was the mitigation of his mental impairment. (Vol. I 4-5).

Evidentiary hearing

At the evidentiary hearing, Chief APD Killam testified that he conceded the aggravator because he thought that the mitigation outweighed the aggravation. (EH Vol I 184). Chief APD Killam could not recall whether he discussed the concession of the CCP

aggravator with Lawrence. (EH Vol II 185). Chief APD Killam conceded the CCP aggravator because the mitigation was so substantial that it outweighed the CCP. (EH Vol II 216).

The trial court's ruling

> As noted in the previous claim, the elements to establish a claim of ineffective assistance of counsel is two-fold: the defendant must show that counsel's performance was deficient and a showing that there is reasonable probability that but for counsel's deficient performance there is a reasonable probability the result of the proceeding would be different. See *Jones*, 845 So.2d 55 at 65.
>
> The defendant argues trial counsel were ineffective during the penalty phase for three reasons. First, the Defendant contends that the concession to the jury that the cold, calculated, and premeditated (CCP) aggravator was proved beyond a reasonable doubt without the prior approval of the Defendant is ineffective assistance of counsel.[13] The Court finds that it's common that when counsel is faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime it is commonly considered "a good trial strategy for defense counsel to make some halfway concessions to the truth" to give the appearance of reasonableness and candor to gain credibility with the jury". See *Atwater v. State*, 788 So.2d 223, 230 (Fla. 2001).
>
> During the penalty phase Defendant argues defense counsel made the following statements concerning the

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[13] The Court finds as a matter of law that *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*) and *Nixon v. State*, 857 So.2d 172 (Fla. 2003)(*Nixon III*) is not applicable to the facts of this case. However, the Court notes upon certiorari review, the United States Supreme Court held the "counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." See *Florida v. Nixon*, 543 U.S. 175, 192 (2004).

existence of the CCP aggravator such as "we admit it's there to that extent because you have this note, this planning, and all that business"; "when all this was done - all this cold, calculated, premeditated stuff - Jeremiah was influencing him, a person who, according to testimony which is unrebutted before you, is easily led"; "these mental mitigators greatly outweigh the alleged cold, calculated. . ." (Def. Mot. 40-41). Thus, essentially conceding that the State had proven beyond a reasonable doubt the existence of CCP.

The Court finds the Defendant's characterization lacks merit. The testimony of Mr. Killam establishes that he felt the mitigation outweighed whatever aggravation that had been established and at the end of the day he didn't think the aggravation would "carry the day for the State, given all the other evidence" (EH 184, 216), this testimony corresponds to the statements made during the penalty phase showing a strategic presentation to the jury that mitigators outweighed the CCP aggravator presented by the State.

Second, the Defendant contends that trial counsel made demeaning comments which had a prejudicial effect on the jury. Specifically, the Defendant claims that statements concerning the size of his brain, comment on the effect of damage of the frontal lobe, and a statement describing the Defendant's brain as reptilian were prejudicial in nature (Def. Mot. 42).

Mr. Killam testified the purpose of the statements were to emphasize the fact that the Defendant did not have the same brain as the average person, instead the Defendant's brain was defective (EH 194). Moreover, counsel testified that the references to the Defendant's little pea brain" or "little brain" were used to compel the jury to think the Defendant had mental problems and to illustrate the Defendant's brain was dissimilar to average person's brain (EH 195). Furthermore, defense counsel testified that he used self-deprecating humor to make a point to the jury that the Defendant suffered a disability to his left frontal lobe (EH 195). It appears that each comment referenced by the Defendant has been explained as an attempt to demonstrate that the Defendant was indeed mentally impaired and that impairment was no fault of his own because he suffered brain damage. These comments occurred during the penalty phase, the Defendant had already conceded his guilt (EH Exhibit 10, p. 32) thus the effect of the comments were to diminish the Defendant's

moral culpability for his crimes. See *Brown v. State*, 846 So.2d 1114, 1125-1126 (Fla. 2003)(finding comments made during the penalty phase to lessen negative juror sentient against the defendant by pointing out the defendant's shortcomings was a tactic geared toward the defendant's benefit). As such, this Court finds the comments used by the defense counsel was a reasonable trial tactic in order to dramatize and reiterate to the jury that the Defendant suffered a mental illness that was a direct result of brain damage and interfered with his ability to function. See e.g. *Kenon v. State*, 855 So.2d 654, 656 (Fla. 1st DCA 2003)("Absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective assistance of counsel claims).

Lastly, the Defendant contends trial counsel was ineffective for failing to demonstrate to the jury the lack of reliability of the Defendant's statements to law enforcement. During the evidentiary hearing, Mr. Killam testified that he felt the statements went "hand in hand with the domination mitigator" being proffered at the penalty hearing because the statements blamed the co-defendant Jeremiah Rodgers as the reason/motivation for the crimes (EH 206). The overall theme to be presented to the jury was the fact that the Defendant was a textbook case of mental illness "accompanied by a satanic domination, a Manson like person" (EH 208). Thus, it would have been contrary to the overall theme to contest the reliability of the statements wherein the statements were used to show "follower" relationship. As such, the Court finds the strategic decisions employed by defense counsels did not render their performance ineffective, thus this claim is denied.

Merits

First, *Nixon* was overruled by the United States Supreme Court. *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). The United States Supreme Court held that it can be reasonable trial strategy to concede the defendant’s guilt to the charged crime. The Court held that *Strickland*, not *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657

(1984), governs concessions and the defendant must establish both deficient performance and prejudice.

Even if *Nixon III* was still good law, it does not apply to concessions of aggravators. *Nixon II* and *Nixon III* involved concession to the charged crime. The Florida Supreme Court reasoned that such a concession failed to subject the State's case to meaningful adversarial testing. Conceding to aggravators is not the same as conceding to the charged crime. It is more equivalent to conceding the fact that there was a killing but then arguing that it was self-defense. Many defenses are confession and avoidance defenses, which involve conceding the fact of the crime, but then arguing that is was not a crime because of a defense. The equivalent to a concession to the charged crime in the guilt phase would be conceding that death was the appropriate penalty in the penalty phase. Conceding to an aggravator is not the same as agreeing that the death penalty is the appropriate sentence. If counsel admits the aggravator exists, he is not conceding death is the appropriate penalty. *Nixon III* would only apply if trial counsel conceded that death was the appropriate sentence in the penalty phase. Trial counsel did not concede that death was the appropriate penalty. Trial counsel repeatedly argued for life. Conceding an aggravator but then arguing that the mitigation

outweighs the aggravator is akin to many defenses such as self-defense. The State's case for death is being subjected to meaningful adversarial testing. *Nixon* does not apply to concessions of aggravators.

As the Florida Supreme Court has noted, it is common for defense counsel to make some halfway concessions to the truth to give the appearance of reasonableness and candor to gain credibility with the jury. *Atwater v. State*, 788 So. 2d 223, 230 (Fla. 2001)(quoting *McNeal v. State*, 409 So. 2d 528, 529 (Fla. 5th DCA 1982). Common practices are by definition not deficient performance. Deficient performance means no reasonable attorney would engage in the conduct. When a practice is common among the defense bar, that means that numerous attorneys are engaging in the practice. A common practice is not deficient performance. *Dillbeck v. State*, 882 So.2d 969, 971, n.9 (Fla. 2004)(noting that a claim of ineffectiveness of trial counsel for conceding the HAC aggravating circumstance without his consent must be analyzed under *Strickland* but remanding for additional findings).

Collateral counsel faults trial counsel for not obtaining Lawrence's consent to the concession. IB at 76-77. Lawrence's personal agreement with the strategy of conceding the CCP aggravator was not required. Moreover, the actual testimony was

that APD Killam could not recall whether he discussed the concession with Lawrence. IB at 77;(EH Vol II 185). Furthermore, during the plea colloquy, trial counsel explained that he was advising Lawrence to enter a guilty plea, Mr. Killam explained his strategy was rather than losing credibility in the face of "overwhelming evidence" by arguing the State did not prove its case, "our best strategy" was the mitigation of his mental impairment. (Vol. I 4-5). Trial counsel informed the trial court that Lawrence had "adopted" this strategy as his own. (Vol. I 5). While directly related to guilt, this also shows that counsel's thought, in his own words, his "best case" was the mitigation. (Vol. I 4-5). While counsel may not have directly discussed concession of aggravators with Lawrence, he did explain that the best tactic was to admit what the state could prove but argue the mitigation of Lawrence's mental state. So, the strategy in the larger sense was explained to Lawrence on the record in the courtroom and Lawrence's consent was manifest by his entering the guilty plea.

Collateral counsel also faults trial counsel for taking a different position on the CCP aggravator in front of the jury at the penalty phase than the position in his sentencing memo submitted to the judge. IB at 75-76. Inconsistent defenses are

allowed but they are not a wise strategy with a jury.[14] Trial counsel may concede a fact in front of the jury and then argue a different position in his sentencing memo. Contrary to collateral counsel's argument, the inconsistent position could not have affected trial counsel's credibility with the jury. The jury never read the sentencing memo. Only the judge read the memo. The jury did not know of the inconsistent position. Moreover, the sentencing memorandum's argument against the CCP aggravator depended on the penalty phase testimony about Lawrence's inability to plan.

Nor was there any prejudice. Trial counsel's argument against the CCP aggravator in his sentencing memo was not supported by the law. The CCP aggravator was not rebutted by Lawrence's alleged limited planning abilities. Planning with another is sufficient to establish the heightened premeditation necessary for the CCP aggravator. The planning does not have to be personal. Counsel was not ineffective for conceding the CCP aggravator.

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[14] *Phillips v. State*, 874 So.2d 705, 707 (Fla. 1st DCA 2004)(observing that inconsistent defenses are allowable in criminal cases where the proof of one does not necessarily disprove the other); *Keyes v. State*, 804 So.2d 373, 375 (Fla. 4th DCA 2001) defendant may argue inconsistent theories to the jury so long as the proof of one does not necessarily disprove the other); *Moore v. Johnson*, 194 F.3d 586, 611 (5th Cir.

As for comments relating to the defendant's mental illness, such as he should have never been let out of the state mental hospital, both the United States Supreme Court and the Florida Supreme Court have rejected similar claims of ineffectiveness. In *Yarborough v. Gentry*, 540 U.S. 1, 4, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003), the United States Supreme Court found that trial counsel was not ineffective in closing argument. Trial counsel referred to the defendant as a "bad person, lousy drug addict, stinking thief, jail bird" but argued that these traits were irrelevant to the issues before the jury. The Ninth Circuit had found ineffectiveness based on counsel's "gratuitous swipe at Gentry's character." The *Yarborough* Court disagreed, reasoning while confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. The Court observed that this is precisely the sort of calculated risk that lies at the heart of an advocate's discretion and that by candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p. 10 (1992-1996) ("[I]f you make certain concessions showing that you are earnestly in

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1999)(observing that the criminal law does not preclude

search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). The U.S. Supreme Court also observed that the same criticism could been leveled at famous closing arguments such as Clarence Darrow's closing argument in the Leopold and Loeb case: " 'I do not know how much salvage there is in these two boys.... [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."

In *Brown v. State*, 846 So. 2d 1114, 1125 (Fla. 2003), the Florida Supreme Court rejected an ineffective assistance of counsel claim based on arguments defense counsel made during opening and closing. In opening, his counsel said:

> Mr. McGuire and Mr. Brown, they don't go play golf together. They don't do things like that. They do things like consume a lot of alcohol. They do crack cocaine. They hang out on the Boardwalk area, unemployed. It's not a good life and it's not a--it's not something any of us would do, but it's just a--that's the way it was.

Brown alleged that his trial counsel was ineffective due to remarks he made in his opening statement. The trial court found that counsel made a tactical decision to make the statements that he did, for the purpose of trying to dilute some of the damaging testimony the jury would hear later. The trial court

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alternative, or even inconsistent, defensive theories).

observed that defense counsel was explaining the real world the defendant lived in. The trial court also concluded that prejudice had not been established. The Florida Supreme Court found no error in the trial court's conclusions. Brown also alleged that trial counsel was ineffective as a result of stating that the victim was "gurgling" on his own blood. Counsel’s comment is consistent with his explanation at the evidentiary hearing that he was trying to point out the overdramatization of the prosecutor’s argument. The trial court found that counsel’s statement did not prejudice Brown. The Florida Supreme Court agreed, reasoning that “we will not second-guess counsel's strategic decisions on collateral attack and trial counsel's comment, when weighed against the two-part test in *Strickland*, does not satisfy either prong. The Court observed that “though the word ‘gurgling’ may have shock value, it does not rise to the level required by *Strickland*, particularly where trial counsel chose to use the word as a method of rebutting and minimizing the State’s argument.” Brown also asserted that counsel was ineffective for admitting that Brown had “turned bad” in his closing argument in the penalty phase. At the evidentiary hearing, counsel testified that his purpose in making such a statement was to be honest with the jury about what type of person they were dealing with. The

trial judge found that this statement was a reasonable trial tactic on counsel's part, that he was just being honest with the jury, and that it was not ineffective or deficient. The Florida Supreme Court agreed. They noted that the comment was made during the penalty phase, a point at which Brown had already been found guilty of first-degree murder. At that point, counsel sought to lessen negative juror sentiment against Brown, and appealing to the jurors by pointing out Brown's real life shortcomings was a tactic geared toward Brown's benefit. The *Brown* Court noted that any claim that this particular statement led the jurors to vote to recommend the death penalty is wholly speculative. Accordingly, the *Brown* Court rejected this ineffectiveness claim. [15]

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[15] See also *United States v. Fredman*, 390 F.3d 1153, 1157 (9th Cir. 2004)(explaining that counsel's admission that "Frank Fredman is a meth cook" was manifestly calculated to build credibility with the jury by allowing the jury to learn this fact directly from Fredman's counsel rather than from the prosecution and therfore was not ineffective); *Martin v. Waddington*, 118 Fed.Appx. 225, 226 (9th Cir. 2004)(unpublished)(finding defense counsel's closing remarks calling Martin not a "very nice guy" and admitting that he did some "awful," "rotten" things was strategic to separate the jury's opinion of Martin's character and their determination of whether the government had proven each crime beyond a reasonable doubt); *Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994) (counsel telling jury that he told his wife that he was not "defending" his client but "representing" him and that he thought crime was horrible not ineffective assistance because counsel used tactic to focus jury on lack of intent to kill).

As the trial court found, “the comments used by the defense counsel was a reasonable trial tactic in order to dramatize and reiterate to the jury that the Defendant suffered a mental illness that was a direct result of brain damage and interfered with his ability to function.” Here, trial counsel was attempting to establish the mental mitigation with his comments such as “pea brain.” Counsel was pointing out the damage to the defendant as part of his mitigation case. Here, as in *Gentry* and *Brown*, there was no ineffectiveness.

Counsel’s reliance on *State v. Davis*, 872 So.2d 250 (Fla.2004), is misplaced. IB at 78. The *Davis* Court held that trial counsel's expressions of racial prejudice during voir dire were ineffective assistance of counsel. Defense counsel, during jury selection, said: “Henry Davis is my client and he's a black man, and he's charged with killing Joyce Ezell who was a white lady. . . Sometimes I just don't like black people. Sometimes black people make me mad just because they're black.” This Court concluded that “the expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings that our confidence in the jury's verdicts of guilt is undermined.” The Court observed that “expressions of prejudice against African-Americans cannot be tolerated” and “racial prejudice has no

acceptable place in our justice system." *Davis* involved racial comments made by defense counsel.

Here, unlike *Davis*, there were no racial comments made by defense counsel in this case. Furthermore, Lawrence is white, unlike the defendant in *Davis*, who was black. Both the perpetrators and the victim here were white. There were no racial aspects to this prosecution, unlike *Davis*. *Davis* is simply inapposite.

Collateral counsel also asserts that trial counsel was ineffective for failing to introduce the other confessions in an attempt to prove the two admitted confessions were unreliable. IB at 80. One does not follow from the other. Collateral counsel has a list of things, such as Lawrence's brother was going to come along, none of which establishes the unreliability of the two admitted confessions. The list is a complete *non sequitur*. Indeed, introducing other statements made by Lawrence, in none of which does he deny being a coperpetrator, increases the reliability of the two confessions that were introduced. Collateral counsel provide no rationale why trial counsel would want to admit additional confessions. Trial counsel did not want to establish a "more complete picture" of Lawrence's guilt. As the trial court found, this was a strategic decision, "it would have been contrary to the overall

theme to contest the reliability of the statements wherein the statements were used to show 'follower' relationship." The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT *ATKINS V. VIRGINIA*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) DOES NOT EXTEND TO THE MENTALLY ILL? (Restated)

Lawrence, relying on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), asserts that his mental illness precludes his execution. This claim is procedurally barred because it should have been raised on direct appeal. Lawrence's reliance on *Atkins,* which prohibits the execution of the mentally retarded, is misplaced. As numerous court have held, *Atkins* is limited to mental retardation; it does not extend to mental illnesses. The trial court properly summarily denied this claim.

Standard of review

Whether the Eighth Amendment precludes the execution of a class of defendants is a question of law reviewed *de novo*. Cf. *United States v. Jones*, 143 Fed.Appx. 230, 232, 2005 WL 1943191, **2 (11th Cir. 2005)(reviewing argument that a sentence violates the Eighth Amendment *de novo*).

The trial court's ruling

> Notwithstanding the procedural bar, the Defendant makes an argument based on *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Florida Capital sentencing scheme deprives the Defendant of equal protection and renders the sentence of death cruel and unusual in violation of the Fourteenth and Eighth Amendment (D. Mot. 58). The Court finds *Atkins* inapplicable in light of the fact that the Defendant is not contending that he is mentally retarded but mentally ill. Additionally, the Defendant has not sought a determination of mental retardation. Fla.R.Crim.P. 3.203(4).[16] The Florida Supreme Court has already considered the issue of proportionality in this case and found the sentence of death to be proportionate. See *Lawrence*, 846 So.2d 440 at 453-455. What is more the arbitrariness of Florida's death penalty is not cognizable on collateral attack because they should or could have been raised on direct appeal. See *Booker v. State*, 441 So.2d 148, 150 (Fla. 1983).

Procedural Bar

Lawrence should have raised his Equal Protection claim on direct appeal. *Atkins* was pending in the United States Supreme Court at the time appellate counsel filed his supplemental initial brief. He could have included his Equal Protection claim in his supplemental initial brief.

Merits

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[16] Futhermore, when the Defendant was evaluated by Dr. Crown on 2-4-05, the Defendant had a scaled score of 81 on the Weschsler Test of Adult Reading (WTAR) which indicates an estimated WAIS-III FSIQ of 86 which is low average/average (EH Exhibit 13, Neuropsychological Consultation, p. 3). Such a finding would not exempt the Defendant from execution under *Atkins*. See *Zack v. State*, 911 So.2d 1190, 1201 (Fla. 2005)(finding that in order to be exempt from execution under *Atkins*, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below).

Lawrence improperly relies on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which prohibits the execution of the mentally retarded. *Atkins* is limited to mental retardation, it does not extend to mental illnesses. Numerous courts have rejected any invitation to expand *Atkins*. *State v. Hancock*, 840 N.E.2d 1032, 1059-1060 (Ohio 2006)(declining to extend the holding of *Atkins* to the mentally ill explaining that mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees and such an expansion would create an ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case); *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005)(declining to extend the holding of *Atkins* to a capital defendant who is competent but mentally ill); *James v. State*, 2006 WL 1121232, *11-*12 (Ala.Cr.App. April 28, 2006)(declining to extend the holding of *Atkins* to emotional and mental impairments and explaining that the Supreme Court did not hold it unconstitutional to execute those who were ‘like’ the mentally retarded or ‘functionally indistinguishable from’ the mentally retarded); *Freeney v. State*, 2005 WL 1009560, *11

(Tex.Cr.App. 2005)(declining to extend the holding of *Atkins* to the mentally ill).

Lawrence argues that equal protection requires that *Aktins* be expanded to cover the mentally ill citing a law review article. Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293 (2003)(arguing that imposing capital punishment on those who are mentally ill violates equal protection since it is unconstitutional to impose the death penalty upon the mentally retarded). He claims that those with mental illness are similarly situated to those with mental retardation. First, equal protection does not apply because the Eighth Amendment already prohibits the execution of those with serious mental illness, *i.e.*, the insane. *Ford v. Wainwright*, 477 U.S. 399 (1986)(holding that the Eighth Amendment prohibits the execution of the insane). Indeed, the insane not only will not be executed, they often will not be prosecuted or, if prosecuted, found not guilty due to insanity. Cf *Clark v. Arizona*, - U.S. -, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006)(upholding Arizona's narrowing of the definition of insanity against a due process challenge). The deeply mentally ill are protected more, not less, than the mentally retarded. However, Arizona may preclude such a defense citing *Fisher v. United States*, 328 U.S. 463, 466-476, 66 S.Ct. 1318, 90 L.Ed. 1382

(1946)). Lawrence's claim is really a diminished capacity as to penalty claim. Diminished capacity is not constitutionally required to be recognized in the guilt phase and by extension, not required to be a *per se* mitigator as to penalty.

Furthermore, Equal Protection only requires that those who are similarly situated be treated equally. Lawrence and a mental retarded person are not similarly situated. Lawrence, unlike a mentally retarded person, could have controlled his mental illness by taking his medication. *Palma v. State*, 830 So.2d 201, 203 (Fla. 5th DCA 2002)(holding that violation of probation was willful, despite a bipolar disorder, because she had made the decision to stop taking her medication). The law review article cited by Lawrence seems to miss these two points entirely. The Equal Protection Clause does not require that mental illness preclude the death penalty.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE JUROR INTERVIEWS CLAIM? (Restated)

Lawrence contends that the trial court erred in summarily denying this claim that he should be allowed to interview the jurors in his case based on a study of juries in other Florida capital cases. This claim is procedurally barred because it should have been raised on direct appeal. Furthermore, this Court has consistently rejected such claims as mere fishing

expeditions. The trial court properly summarily denied this claim.

The trial court's ruling

> The Defendant argues that a study has found that capital jurors in Florida fail to apply the statutory sentencing guidelines in the manner required by law (D. Mot. 61) and this study coupled with the assertion that Florida Rule of Professional Conduct 4-3.5(d)(4) is constitutionally vague allegedly results in the Defendant being denied due process of law and access to the courts (D. Mot. 63).[17] The Defendant's constitutional challenge to the rule governing juror interviews is procedurally barred. See ***Elledge v. State***, 911 So.2d 57, 77-78 (Fla. 2005); ***Sochor v. State***, 883 So.2d 766, 788 (Fla. 2004)("constitutional attack on the rules prohibiting lawyers from contacting jurors because the claim should have been raised on direct appeal and, therefore, is procedurally barred").
>
> Notwithstanding the bar, the Court finds that the Defendant's claim is without merit. The Florida Supreme Court has consistently rejected constitutional challenges to Rule 4-3.5(d)(4). See e.g., ***Power v. State***, 886 So.2d 952, 957 (Fla. 2004); ***Johnson v. State***, 804 So.2d 1218, 1224-1225 (Fla. 2001)(rejecting contention that Rule Regulating the Florida Bar 4-3.5(d)(4) conflicts with defendant's constitutional rights to a fair trial and effective assistance of counsel). Furthermore, the rule provides a method for defendants to interview jurors; in this instance the Defendant has not alleged any specific jury misconduct instead the Defendant references a study. The Court finds this assertion evidences nothing more than a fishing expedition. See e.g. ***Arbelaez v. State***, 775 So.2d 909, 920 (Fla. 2000)(finding that a defendant does not have a right to conduct "fishing expedition" interviews with the jurors after a guilty verdict is returned). This claim is summarily denied.

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[17] The Defendant stated this claim contains factual issues to be determined at an evidentiary hearing. An evidentiary hearing was scheduled pursuant to Fla.R.Crim.P. 3.851(5)(i). See Ex. 1, Order Setting Evidentiary Hearing. The Defendant failed to present any evidence on this matter as such the claim has been waived.

Procedural Bar

As the trial court found, this issue is procedurally barred because it should have been raised on direct appeal.[18]

Merits

The Florida Supreme Court has consistently rejected claims regarding juror interviews. In *Suggs v. State*, 923 So.2d 419, 440 (Fla. 2005), this Court noted it "has consistently rejected constitutional challenges to rule 4- 3.5(d)(4). *Suggs*, 923 So.2d at 440 (citing *Power v. State*, 886 So.2d 952, 957 (Fla. 2004) and *Johnson v. State*, 804 So.2d 1218 (Fla. 2001)). The *Suggs* Court also explained that the rule provides a mechanism for defendants to interview jurors when there are good faith grounds for a challenge but Suggs did not file a motion requesting permission to interview jurors, alleged any specific

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[18] *Suggs v. State*, 923 So.2d 419, 440 (Fla. 2005)(finding that a constitutional challenge to the rule prohibiting lawyer from communicating with jurors could have and should have been brought on direct appeal and therefore, the "postconviction court was correct to find that the claim was procedurally barred."); *Elledge v. State*, 911 So.2d 57, 77 (Fla. 2005)(rejecting a constitutional challenge to the rule governing an attorney's ability to interview jurors and determining that the substantive constitutional challenge to the rule governing juror interviews is procedurally barred as it was not raised on direct appeal); *Rose v. State*, 774 So.2d 629, 637 n. 12 (Fla. 2000) (holding that the claim "attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors [was] procedurally barred because Rose could have raised this issue on direct appeal").

juror misconduct, nor submitted any sworn statements in this regard. See also *Elledge v. State*, 911 So.2d 57, 77-78 (Fla. 2005)(finding such a claim to lack merit citing *Johnson v. State*, 804 So.2d 1218, 1224-25 (Fla. 2001)(rejecting contention that Rule Regulating the Florida Bar 4-3.5(d)(4) conflicts with defendant's constitutional rights to a fair trial and effective assistance of counsel)).

Lawrence, like *Suggs*, did not file a motion requesting permission to interview jurors, alleged any specific juror misconduct, nor submit any sworn statements. Indeed, as the trial court noted, while collateral counsel alleged that the issue required factual development and therefore, he was entitled to an evidentiary hearing, he presented no evidence at the evidentiary hearing regarding this claim. Instead, Lawrence relies on a study. The study cited, William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J.Crim. L. 1 (1988), does not change the law regarding juror interviews that are merely fishing expeditions. *Arbelaez v. State*, 775 So.2d 909, 920 (Fla. 2000)(finding that a defendant does not have a right to conduct "fishing expedition" interviews with the jurors). The study concluded that the single most operative factor in the recommendation of life was the "existence of some

degree of doubt about the guilt of the accused." *Way v. State*, 760 So.2d 903, 923 n.20 (Fla. 2000)(Pariente, J., concurring)(discussing study and residual or lingering doubt). The jurors in Lawrence's case, who recommended death eleven to one, if they improperly considered lingering doubt, obviously had no lingering doubt. They were certain of Lawrence's guilt. While this Court has held that lingering doubt is not a proper mitigator, if jurors improperly considered lingering doubt, Lawrence was not the one harmed. The second most important factor in life recommendations, according to the study, was *Witherspoon* scrupled jurors who "did not really think about it during voir dire and just answered the way the other members of the venire were answering." In other words, the two biggest factors in life recommendations are jurors not following that law, but in a manner that harms the prosecution, not the capital defendant. This study may provide prosecutors with a basis to interview jurors but it does not provide defendants with a basis to interview jurors.[19] The authors of the study also incorrectly believed that lingering doubt as mitigation might be

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[19] Of course, double jeopardy precludes a retrial of the penalty phase, so there is no point in prosecutors interviewing jurors to determine if they did not reveal their death scruples during jury selection. But the point is the study shows jurors not following the law in two ways, both of which harm the State, not capital defendants.

constitutionally required. *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J.Crim. L. at 31-32. The United States Supreme Court recently reaffirmed that the Eighth Amendment does not require that a defendant be permitted to argue residual doubt as mitigation. *Oregon v. Guzek*, - U.S. -, 126 S.Ct. 1226, 1227, 163 L.Ed.2d 1112 (2006)(observing that "[t]his Court's cases have not interpreted the Eighth Amendment as providing such a defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction). The trial court properly summarily denied this claim.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE EIGHTH AMENDMENT CHALLENGE TO ELECTROCUTION? (Restated)

Lawrence contends that the trial court erred by summarily denying his claim that electrocution violates the Eighth Amendment ban on cruel or unusual punishment. As the trial court found, this claim is procedurally barred. Moreover, Lawrence lacks standing to challenge the electric chair since this is not the default method of execution in Florida. Additionally, it is meritless because the Florida Supreme Court has rejected Eighth Amendment challenges to electrocution.

The trial court's ruling

> The Defendant argues that the process of judicially mandated electrocution exposes him to substantial risks of suffering and degradation considering Florida's practice of botching electrocutions (D. Mot. 64). This fact coupled with the legislatively proffered choice between electrocution or lethal injection subjects the Defendant to psychological torture which renders the provision unconstitutional (D. Mot. 65). Thus, the Defendant contends his rights as guaranteed by the Eighth and Fourteenth Amendments will be violated.
>
> The Court finds the constitutional challenges not raised on direct appeal are procedurally barred. See *Suggs v. State*, 2005 WL 3071927, 17 (Fla. 2005) (finding claims that execution by electrocution or lethal injection constitutes cruel and unusual punishment not raised on direct appeal are procedurally barred). Moreover, the claim that both electrocution and lethal injection constitutes cruel and unusual punishment is without merit. See *Provenzano v. Moore*, 744 So.2d 413, 415 (Fla. 1999)(holding that execution by electrocution is not cruel and unusual punishment); *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000)(holding that execution by lethal injection is not cruel and unusual punishment). Accordingly the claim is summarily denied.

Procedural bar

This claim is procedurally barred. *Suggs v. State*, 2005 WL 3071927, 17 (Fla. 2005)(finding a claim that execution by electrocution or lethal injection constitutes cruel and unusual punishment was procedurally barred because the claim was not raised on direct appeal).

Waiver/lack of standing

Lawrence lacks standing to challenge the electric chair since he will not be executed by electrocution unless he so chooses. *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998)(determining that the petitioners lacked standing to challenge the

constitutionality of lethal gas since they had not chosen execution by that method). The default method of execution is lethal injection, not electrocution. § 922.105(1), Fla. Stat. (2004)(providing: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."). If Lawrence chooses to be executed by the electric chair, he will have waived any challenge by such a choice. *Stewart v. LaGrand*, 526 U.S. 115 (1999)(holding capital defendant had waived his right to challenge execution by lethal gas because he opted for it over the over the default method of execution of lethal injection). Basically, only the default method of execution in a state is subject to constitutional challenge.

Merits

Lawrence asserts that electrocution exposes him "to substantial risks of suffering and degradation through physical violence, disfigurement and torment." The Florida Supreme Court has rejected claims that electrocution violates the Eighth Amendment ban on cruel and unusual punishment. *Provenzano v. Moore*, 744 So.2d 413, 415 (Fla. 1999)(holding that execution by electrocution is not cruel and unusual punishment).[20]

[20] The Florida Supreme Court has also repeatedly rejected claims that lethal injection is cruel and unusual punishment and

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT LAWRENCE'S COMPETENCY TO BE EXECUTED CLAIM WAS NOT RIPE? (Restated)

Lawrence argues he may be incompetent at the time of his execution and, if he is, his execution will violate *Ford v. Wainwright*, 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986), which held that the Eighth Amendment prohibits the execution of a legally insane prisoner. This claim is not ripe and will not be ripe until a death warrant is signed. The trial court properly summarily denied the *Ford* claim.

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repeatedly affirmed summary denial of such claims. *Suggs v. State*, 2005 WL 3071927, 17 (Fla. 2005)(affirming a summary denial in post-conviction and finding a constitutional challenge to lethal injection to be "without merit because this Court has consistently rejected arguments that these methods of execution are unconstitutional."); *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005)(rejecting a claim execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions as being "without merit" and "properly denied without an evidentiary hearing"); *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003)(rejecting a claim that lethal injection is cruel or unusual or both because "we previously have found similar arguments to be without merit."); *Bryan v. State*, 753 So.2d 1244, 1253 (Fla. 2000) (stating that lethal injection is "generally viewed as a more humane method of execution"); *Sims v. State,* 754 So.2d 657 (Fla. 2000)(holding lethal injection is constitutional). This Court has recently reaffirmed this solid wall of precedent. *Hill v. State*, 921 So.2d 579, 582-583 (Fla. 2006)(concluding that a research letter published in the Lancet did not require the Court to reconsider its holding in *Sims*); See also *Rutherford v. State*, 926 So.2d 1100, 1113-1114 (Fla. 2006)(rejecting a claim that the Lancet article required the

Standard of review

Whether a claim is ripe is a question of law reviewed *de novo*. *Lehn v. Holmes*, 364 F.3d 862, 866 (7th Cir. 2004); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003)(noting that mootness, ripeness, and standing are questions of law reviewed *de novo*).

The trial court's ruling

> Defendant contends that statistics have shown that an individual incarcerated over a long period of time will suffer diminished capacity. As such, the Defendant argues that he may be incompetent at the time of execution (D. Mot. 65). The Defendant concession that this issue is not ripe for review is correct considering a defendant may not legally raise the issue of his competency to be executed until after a death warrant is issued. See *Hunter v. State*, 817 So.2d 786, 799 (Fla. 2002); Fla.R.Crim.P. 3.811(c). This claim is legally insufficient on its face and is denied.

Merits

Lawrence's claim is not ripe and will not be ripe until the Governor signs a death warrant.[21] Indeed, this Court has

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Court to reconsider its holding in *Sims* citing *Hill*, 921 So.2d 579 at 582-583).

[21] *Trotter v. State*, 932 So.2d 1045, 1053 (Fla. 2006)(rejecting a claim that a capital defendant may be incompetent at the time of execution as not ripe for review); *Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)(denying a claim that a defendant was insane to be executed because the claim is not ripe for review); *Parker v. State*, 904 So.2d 370, 380-381 (Fla. 2005)(concluding Parker's concession that this issue is not yet ripe is accurate, and we deny relief on this claim); *Hall v. Moore*, 792 So.2d 447, 450 (Fla. 2001)(stating that consideration of death-sentenced defendant's claim of incompetency or insanity to be executed is premature if death warrant has not been signed); see also Fla. R.Crim. P. 3.811(c)-

rejected the exact argument that Lawrence makes about statistics showing that mental capacity diminishes over a long period of incarceration. *Ferrell v. State*, 918 So.2d 163, 180 (Fla. 2005)(rejecting a claim that a capital defendant may be incompetent at the time of execution because he has been incarcerated since 1992 and statistics show that mental capacity diminishes over a long period of incarceration as not ripe for review because he has not been found incompetent and a death warrant has not been signed.). Capital defendants often raise this claim, acknowledging that it is not ripe, asserting it is necessary "to preserve" the issue. However, no preservation is required. This Court does not require such a claim be raised in postconviction before it will be considered at the time of execution. *Provenzano v. State*, 751 So.2d 37, 40 n.4 (Fla. 1999)(noting that "this is the first time that Provenzano has raised a competency to be executed claim" but remanding for an evidentiary hearing pursuant to rule 3.812 to determine his competency to be executed). The United States Supreme Court allows petitioners to file second habeas petitions raising *Ford* claims, where the first claim was dismissed as not ripe, without the petition being considered a successive petition. *Stewart v.*

(d)(stating that court may not consider motion to stay execution on grounds of incompetence or insanity to be executed until

Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)(holding petitioner was not required to get authorization to file a "second or successive" application before his *Ford* claim could be heard). This Court should explain to the bar that *Ford* claims do not have to be "preserved" by raising them in postconviction.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY FOUND NO CUMULATIVE ERROR? (Restated)

Lawrence contends that the trial court erred in rejecting his cumulative error claim. Because there was no error, there was no cumulative error. The trial court properly denied the cumulative error claim.

The trial court's ruling

> As evidenced by the applicable law and findings of this Court, the Defendant has failed to demonstrate a cumulative error which deprived him of a fundamentally fair trial. See *Suggs*, 2005 WL 3071927 at 18 ("a claim of cumulative error will not be successful if a petitioner fails to prove any of the individual errors he alleged").

Merits

Because there is no individual error, there is no cumulative error.[22] Lawrence improperly argues that: "there has been no

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governor has signed death warrant and, following statutory proceedings, has determined the prisoner is sane).

[22] *Branch v. State*, 2006 WL 2505988, *8 (Fla. August 31, 2006)(concluding "having found no individual error in the trial

adequate harmless error analysis." IB at 93. It is not proper in postconviction litigation to reargue the harmless error analysis this Court conducted in the direct appeal.[23] If counsel wanted to take issue with this Court's harmless error analysis in the direct appeal, he needed to file a motion for rehearing in the direct appeal. Collateral counsel may not file a year

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court's rulings, we also find no merit in Branch's claim of cumulative error."); *Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)(stating that: "[t]his Court considers the cumulative effect of evidentiary errors and ineffective assistance claims together"
and affirming the trial court's denial of relief because there was no error with respect to each individual claim, "we also find that no cumulative error resulted."); *Davis v. State*, 928 So.2d 1089, 1121 (Fla. 2005)(observing: "[w]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail" citing *Griffin v. State*, 866 So.2d 1, 21 (Fla. 2003)); *Vining v. State*, 827 So.2d 201, 219 (Fla. 2002) (concluding that "[b]ecause the alleged individual errors are without merit, the contention of cumulative error is similarly without merit."); *United States v. Balderas*, 163 Fed.Appx. 769, 2005 WL 3113559, 11 (11th Cir. 2005)(stating that "if there are no errors on the individual arguments, there can be no cumulative error" citing *United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004), *cert. denied*, 543 U.S. 867, 125 S.Ct. 208, 160 L.Ed.2d 112 (2004)); *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001)(stating that "[i]f there are no errors or a single error, there can be no cumulative error.").

[23] *Foster v. State*, 810 So.2d 910, 916 (Fla. 2002)(explaining that a postconviction motion is a vehicle to challenge collateral issues related to the trial court proceedings, not appellate decisions); *Sireci v. State*, 773 So.2d 34, 40 n.12 (Fla. 2000)(explaining that challenges the sufficiency of this Court's harmless error analysis on direct appeal may not be appropriately raised in a motion for postconviction relief citing *Shere v. State*, 742 So.2d 215, 218 n. 7 (Fla. 1999)).

late motion for rehearing via his 3.851 motion. When this Court states that it considers the cumulative effect of evidentiary errors and ineffective assistance claims together, it does not mean that it reopens the direct appeal. Rather, this statement means that this Court considers proper postconviction claims cumulatively.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO REQUEST A COMPETENCY EVALUATION DURING THE PENALTY PHASE? (Restated)

Lawrence argues that both of his trial counsel were ineffective for failing to request a competency hearing during the penalty phase when Lawrence reported to counsel that he was having, in trial counsel's words, "auditory hallucinations and flashbacks." This claim of ineffectiveness is procedurally barred. Collateral counsel is raising a issue, as an ineffectiveness claim, the substance of which was decided on direct appeal. There was no deficient performance. Lead counsel testified at the evidentiary hearing that Lawrence was merely "having bouts with his conscience." Therefore, there was no need to request a competency hearing. Nor was there any prejudice. Lawrence was not having hallucinations. Rather, as both this Court, in the direct appeal opinion, and the trial court concluded, after the evidentiary hearing, "Lawrence was

simply uncomfortable hearing certain portions of the evidence." The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Penalty Phase

At the penalty phase, Laura Rousseau, a FDLE crime analyst, was testifying. (T. Vol IV 402). She was describing the photographs she took of the crime scene. (T. Vol IV 403,406). The crime scene photographs were being placed on the overhead one by one. (T. Vol IV 407-413). Jan Johnson, a FDLE crime analyst and blood stain technician, was testifying. (T. Vol IV 414). She had worked the crime scene with Rousseau and was describing a shallow grave, (T. Vol IV 415). She was describing the photographs she took and the diagrams she drew of the grave. (T. Vol IV 416-418). She was specifically testifying regarding photograph 7A which depicted the head of the victim. (T. Vol IV 418). There was a bench conference where the trial court asked if the defense needed a break. (T. Vol IV 419). Ms. Stitt told the trial court that: "[o]ur client has just reported that he is having hallucinations and flashbacks." (T. Vol IV 419). The trial court had the jury take a 15 minute break and with the jury out, the bench conference continued. (T. Vol IV 419). Ms. Stitt reported that "during the State's talking about the pictures and the position of the body and etcetera, he began

to have not only visual, but auditory hallucinations and flashbacks." (T. Vol IV 419). Ms. Stitt asked for Officer Jarvis to be with Lawrence during the break because "he likes Officer Jarvis, he is very calming." (T. Vol IV 419). Ms. Stitt asked to have Lawrence excused from the courtroom "if he is still experiencing those." (T. Vol IV 419). The trial court suggested that they inquire of Officer Jarvis after the officer had a chance to talk with Lawrence and having a jail nurse come out. (T. Vol IV 419-420). After the recess, the trial court asked Lawrence how he was. (T. Vol IV 420). Lawrence responded that he was okay. (T. Vol IV 420). The trial court asked counsel if counsel was satisfied he is ready to proceed and Ms. Stitt responded yes. (T. Vol IV 420). The penalty phase proceeded with the jury present. The prosecutor returned to overhead projection of the crime scene photographs. (T. Vol IV 420). The photographs included a picture of the victim's leg with the right calf removed. (T. Vol IV 421).

Detective McCurdy was testifying. (T. Vol IV 446). He had questioned Lawrence along with Detective Hand on May 14, 1998. (T. Vol IV 447). The prosecutor was introducing Lawrence's taped confession into evidence. (T. Vol IV 447-448). The tape of the confession was being played along with a transcript prepared by the State. (T. Vol IV 449). Ms. Stitt, during a

bench conference with the court reporter, stated that she was concerned and talked with Lawrence about the details and said that if she stood up “that means we need a break” and “that he is having some problems.” (T. Vol IV 450). The tape was played. (T. Vol IV 450). During the playing of the tape, Ms. Stitt said that Lawrence is beginning to hallucinate again and he would like to be excused for the playing of the tapes.” (T. Vol IV 464). The trial court excused the jury. (T. Vol IV 464). Ms. Stitt said that Lawrence’s earlier feelings with “the auditory, visual, and flashbacks are again present and he would like to be excused for the playing of these tapes.” (T. Vol IV 464). The trial court asked Lawrence if he understood that he had a constitutional right to be present during the entire trial. (T. Vol IV 464). And Lawrence responded: “Yes, sir.” (T. Vol IV 464). The trial court asked Lawrence if it was his desire to step out of the courtroom while the tape is being played? (T. Vol IV 464). And Lawrence responded: “Yes, yes, sir.” (T. Vol IV 464). The trial court noted that counsel used the word “hallucinations” but what we are actually talking about is flashbacks remembering what happened? (T. Vol IV 465). And Lawrence responded: “Yes” (T. Vol IV 465). The trial court asked Lawrence if that was what was bothering him and he responded: “Yes, sir. It is bothering me pretty bad.” (T. Vol

IV 465). The trial court clarified you just wish to remove yourself for the period of the tape being played. (T. Vol IV 465). Both counsel, Ms. Stitt and Mr. Killam, noted that there were two tapes and Lawrence wanted to be absent for the playing of both tapes. (T. Vol IV 465). The defendant directly responded to the trial court that he wanted to be absent for both tapes. (T. Vol IV 465-466). The trial court asked the prosecutor if he wanted to asked him any questions and there was an off-the record discussion. (T. Vol IV 466). One of the prosecutors stated that the State had no objection if it is an issue of discomfort rather than competency. (T. Vol IV 466). The prosecutor noted that both Ms. Stitt and Mr. Killam assured him that it was. (T. Vol IV 466). If it was just discomfort the State had no objection. (T. Vol IV 466). The trial court noted that it was trying to distinguish between hallucinations and flashbacks or from remembering the event. (T. Vol IV 466). The trial court asked defense counsel to talk to Lawrence and clarify the matter. (T. Vol IV 466). The record reflects that defense counsel conferred with Lawrence. (T. Vol IV 466). The trial court asked Lawrence to describe to him what was going on. (T. Vol IV 467). Lawrence said that he would rather not be here to hear his own voice on there. (T. Vol IV 467). Ms. Stitt asked Lawrence to tell the trial court about it being the voice

of his brother. (T. Vol IV 467). Ms. Stitt reported that Lawrence told her he heard the voice of his dead brother. (T. Vol IV 467). Lawrence said that is what the tapes sounds like and he just did not want to hear it. (T. Vol IV 467). Lawrence said that he was “back out in the field and he did not want to be out there.” (T. Vol IV 467). The trial court clarified that he was remembering the actual event. (T. Vol IV 467). The trial court asked if, while the tape was being played, he was reliving it in his mind and Lawrence responded: “yes” (T. Vol IV 468). It made him nervous and sweat real bad. (T. Vol IV 468). The trial court noted that he was trying to distinguish between your replaying it in you mind “as opposed to real strange things going on” (T. Vol IV 468). Lawrence was not sure. (T. Vol IV 468). The trial court asked if the reason Lawrence wanted to be excused was because he was uncomfortable hearing himself describe what happened and Lawrence responded yes. (T. Vol IV 468-469). Lawrence guessed that was the reason. (T. Vol IV 469). The trial court found that Lawrence had voluntarily waived his right to be present. (T. Vol IV 469). There was an off-the record discussion and Lawrence left the courtroom. (T. Vol IV 469). The jury returned and the trial court explained that he excused the defendant for the playing of the tapes. (T.

Vol IV 470). The playing of the tapes continued. (T. Vol IV 470).

The next day, prior to the playing of the second confession for the jury, the trial court inquired of Lawrence whether he was hearing any noises or anything in his head and Lawrence responded: “no, sir.” (TR. IV 503). The trial court then excused Lawrence from the courtroom for the playing of the tape of the confession. (TR. IV 503).

Evidentiary hearing

At the evidentiary hearing, lead counsel at the penalty phase, Chief APD Killam testified that he felt that Lawrence was not actually hallucinating; rather, Lawrence was “having bouts with his conscience.” (EH Vol II 221,223). He would have asked for a competency hearing if he thought Lawrence was actually hallucinating. (EH Vol II 221). Killam’s impression was that Lawrence was just troubled by having to relive the incident. (EH Vol II 226).

Co-counsel, Ms. Stitt, testified that after consultation with co-counsel it was determined that the Defendant was not hallucinating but he was experiencing flashbacks thus she did not request a competency hearing at that point (EH 264). Ms. Stitt testified that after the allowed recess to access the Defendant's mental condition, she felt the Defendant was not

having any hallucinations upon his return. (EH 323). The current competency reports of Dr. Gilgun and Dr. Larson were introduced. (EH Vol. I 8-9). Justice Bell, appearing via telephone, testified that he would have granted a competency hearing if the lawyers had requested one. (228).

The trial court's ruling

> The Defendant argues that trial counsel was ineffective in failing to request a competency evaluation when he informed counsel that he was hallucinating in two separate occasions during the penalty phase. The Court notes that in determining whether counsel's performance was deficient, the reviewing court must be highly deferential and must make every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances of the challenged conduct and evaluate such action from the counsel's perspective at the time. See *Ferrell v. State*, 2005 WL 1404148, 3 (Fla. 2005).
>
> In the instant case, Mr. Killam testified that based on his conversations with the Defendant and his experience that the Defendant was not having a "competency problem; he was having a bout with his conscience" (EH 223, 225). As such, Mr. Killam testified that based on his experience and what was observed during the penalty phase hearing he did not think the Defendant was incompetent thus there was no need for a competency evaluation (EH 227). Ms. Stitt testified that after consultation with co-counsel it was determined that the Defendant was not hallucinating but he was experiencing flashbacks thus she did not request a competency hearing at that point (EH 264). However, Ms. Stitt testified that in hindsight she would have requested a competency hearing (EH 264).[24]
>
> Hindsight analysis of what actions should have been taken is not the appropriate standard in determining deficiency, the question rests on what the circumstances

[24] Also of note, Ms. Stitt testified that after the allowed recess to access the Defendant's mental condition, she felt the Defendant was not having any hallucinations upon his return (EH 323).

were at the time that the particular decision was made. See *Ferrell*, 2005 WL 1404148 at 3; *Dufour v. State*, 905 So.2d 42, 51 (Fla. 2005) ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). The decision not to seek a competency evaluation at the time of the alleged hallucination was based on counsels' interaction with the Defendant, as discussed previously, his demeanor remained constant throughout the representation (EH 322), discussions with the Defendant following the alleged hallucinations, and approximately 50 years of combined litigation experience.[25] Therefore, the Court finds counsels' decision not to request a competency hearing was based on reasoned professional judgment. See *Brown*, 846 So.2d 1114 at 1121 (the standard is not how present counsel would have proceeded in hindsight but whether there was both a deficient performance and a reasonable probability of a different result).

Moreover, the Defendant has failed to establish that but for counsel's alleged deficient conduct there is a reasonable probability the results would have differed. In fact, Justice Bell testified that having dealt with the Defendant in juvenile court and through the process he made the informed decision the Defendant was not hallucinating but disturbed by flashbacks of what happened during the victim's murder (EH 242). Consequently, this claim is denied.

Procedural Bar

The Florida Supreme Court, in the direct appeal, addressed the related issue of whether the trial court should have held a competency hearing:

> Lawrence claims that the trial court erred by failing to appoint mental health experts and order an evidentiary competency hearing during the trial. While a State witness

[25] Ms. Stitt testified that at the time the representation she had been a defense counsel for 20-21 years (EH 319). Mr. Killam testified that he had approximately 31 years of experience as a felony criminal defense attorney (EH 199).

was explaining photographs depicting the discovery of Robinson's body, Lawrence's attorney informed the trial court that Lawrence reported having hallucinations and flashbacks. After a break, Lawrence's counsel indicated that Lawrence was prepared to proceed, and the penalty phase resumed. Subsequently, during the playing of one of Lawrence's recorded statements, Lawrence's counsel again informed the trial court that Lawrence indicated he was experiencing hallucinations. The trial court took a break, engaged in a colloquy with Lawrence, and allowed Lawrence to leave the courtroom while his recorded statements were played. No competency hearing was requested. Lawrence asserts in this appeal that the trial court was constitutionally required to order an evidentiary hearing.

Decisions regarding competency, including whether a defendant need be given a competency hearing after previously being declared competent to proceed, are within the sound discretion of the trial court. See *Bryant v. State*, 785 So.2d 422, 427 (Fla.2001); *Hunter v. State*, 660 So.2d 244, 248 (Fla.1995) ("Once a defendant is declared competent … only if bona fide doubt is raised as to a defendant's mental capacity is the court required to conduct another competency proceeding."). A trial court's decision regarding whether to hold a competency hearing will be upheld absent an abuse of discretion. See *Hunter*, 660 So.2d at 247.[26] In the instant case, the trial court did not abuse its discretion by not conducting a competency hearing during the penalty phase.

Prior to trial, Lawrence's counsel made several motions to appoint experts to evaluate Lawrence for competency to stand trial. The trial court granted the motions. Those experts did not, however, evaluate Lawrence, because Lawrence decided to offer the guilty plea. Prior to the plea colloquy, the trial court asked Lawrence's counsel, "Are you satisfied that given [Lawrence's] current mental situation and any psychological issues there may be that he

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[26] Lawrence asks this Court to recede from its cases which hold that a trial court's decision regarding whether to grant additional competency hearings is reviewed for abuse of discretion. We decline to do so. We continue to conclude that the trial judge's resolution of the ongoing mental status of the defendant involves a credibility determination and observations of the defendant in the courtroom. These are decisions that a trial judge must make.

> understands the very serious nature and consequences of this decision [to plead guilty]?" Lawrence's counsel answered:
>
> > Yes, judge. We addressed that in our private consultation with him on the video. And I inquired of him if he was having any hallucinations, either auditory or visual, and having anything to do with his decision to enter a plea of guilty. And he did not. He is not on any medication. We do recognize that our mitigation will establish that there is some problem with his judgment and his ability to reason and think. But we think that he has the capacity to appreciate the effect of his guilty plea upon the penalty phase of the proceeding.
>
> Lawrence's counsel further stated, "We'll point out that [Lawrence] was evaluated sometime back by Dr. Larson and Dr. Bingham and found competent to proceed." The trial court then engaged Lawrence in an extensive plea colloquy, wherein Lawrence answered the court's questions and informed the court that the decision to plead guilty was his decision.
>
> When Lawrence later displayed signs of discomfort in the courtroom, the trial court stopped the proceedings and discussed the matter with both Lawrence's counsel and Lawrence. Lawrence's counsel never requested a competency hearing during the penalty phase and gave all indications that Lawrence was competent to stand trial. *Cf. Kilgore v. State*, 688 So.2d 895, 899 (Fla. 1996)(finding trial court did not err by not holding competency hearing where defense counsel did not request a hearing and defendant had previously been declared competent). The trial judge then thoroughly questioned Lawrence about the nature of the hallucinations and flashbacks. After speaking with Lawrence, the trial court determined that Lawrence was simply uncomfortable hearing certain portions of the evidence. Lawrence has failed to demonstrate that, under these circumstances, the trial court abused its discretion by proceeding with the penalty phase without giving Lawrence a competency hearing.

Lawrence, 846 So.2d at 446-448 (footnote included but renumbered).

Procedural bar

Lawrence is improperly using a postconviction ineffectiveness claim to relitigate an issue already decided in the direct appeal.

"It is well recognized that a defendant may not couch a claim decided adversely to him on direct appeal in terms of ineffective assistance of counsel in an attempt to circumvent the rule that postconviction relief proceedings may not serve as a second appeal." *Zack v. State*, 911 So.2d 1190, 1210 (Fla. 2005).[27] This Court concluded, in the direct appeal, that: [t]he trial judge then thoroughly questioned Lawrence about the nature of the hallucinations and flashbacks. After speaking with Lawrence, the trial court determined that Lawrence was simply uncomfortable hearing certain portions of the evidence." *Lawrence*, 846 So.2d at 448. This Court necessarily decided that Lawrence was competent in the direct appeal.

Merits

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[27] See also *Robinson v. State*, 913 So.2d 514, 524 (Fla. 2005)(rejecting an attempt to reframe an issue raised on direct appeal and rejected on the merits as one of ineffective assistance of counsel and explaining such an attempt "must fail where the underlying issue was decided on appeal and the evidence supports a conclusion that the issue lacks merit."); *Cherry v. State*, 659 So.2d 1069, 1072 (Fla. 1995)(observing: "[w]e have consistently recognized that '[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal.'" *citing Medina v. State*, 573 So.2d 293, 295 (Fla. 1990)).

There was no deficient performance. As lead counsel at the penalty phase testified, Lawrence was "having bouts with his conscience." (EH Vol II 221,223). Killam's impression was that Lawrence was just troubled by having to relive the incident. (EH Vol II 226). As the Florida Supreme Court explained, the trial judge thoroughly questioned Lawrence about the nature of the hallucinations and flashbacks. After speaking with Lawrence, the trial court determined that Lawrence was simply uncomfortable hearing certain portions of the evidence. *Lawrence*, 846 So.2d at 448. Basically, trial counsel came to the same determination as the trial judge and this Court did, which was that Lawrence was simply uncomfortable hearing certain portions of the evidence. The trial judge had the exact same information as trial counsel. If the trial court was not required to hold a competency hearing as the Florida Supreme Court held, then trial counsel was not required to request a competency hearing either. There was equally no need for counsel to request a competency hearing as there was no need for the trial court to hold a competency hearing. There was no deficient performance.

Nor was there any prejudice. This Court necessarily decided that Lawrence was competent and therefore, there can be no prejudice. For there is be any prejudice from counsel's failure to request a hearing, Lawrence had to be actually incompetent.

If counsel had requested a hearing and the trial court merely concluded that Lawrence was competent, then there was no prejudice. Collateral counsel, however, has not established that Lawrence was incompetent at any stage of these proceedings. Lawrence was examined pre-trial by two experts and again at the evidentiary hearing by those experts. The postconviction court found Lawrence to be competent. There was no prejudice. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to

Michael P. Reiter, 4543 Wedgewood Drive, Tallahassee FL 32309

18th day of September, 2006.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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