IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-632

Thomas Anthony Wyatt,

Petitioner

VS.

Walter McNeil, Secretary
Florida Department of Corrections

Respondent

RESPONSE TO PERITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Thomas Anthony Wyatt, Defendant below, will be referred to as "Wyatt" and Respondent, Walter McNeil, Secretary Florida Department of Corrections, will be referred to as "State". Reference to the appellate record will be by "R", and supplemental materials will be designated by the symbol "SR," Wyatt's petition will be notated as "P" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On May 10, 1989, Wyatt, was indicted[1] for the first-degree murder murders of William Edwards, Frances Edwards and Matthew Bornoosh (Counts I, II and III) (R 3960-66). The indictment also charged Wyatt and Michael Lovette with sexual battery, kidnapping, robbery with a firearm, grand theft, arson and possession of a firearm by a convicted felon (R 3960-66). There was also one count charging the first-degree murder of Cathy Nydegger (Count IV), which was later severed, and is the subject of this litigation.

[1] Presently, Wyatt has four cases pending before this Court arising from his May 10, 1989 indictment. Postconviction appeal SC08-655 and habeas petition SC09-556 for triple homicide ("Wyatt I" or "Wyatt-Dominos") and postconviction appeal SC08-656 and habeas petition SC10-632 for murder of Cathy Nydegger ("Wyatt II" or "Wyatt-Nydegger") The evidentiary hearing for these cases were held together, however, separate records were prepared.

Wyatt was tried separately for Nydegger's murder (R 4172) and after a jury trial, was found guilty as charged on Count IV. The jury recommended a sentence of death, by a vote of 11 to 1. The judge followed the recommendation, sentencing Wyatt to death on December 20, 1991, for the first-degree murder of Cathy Nydegger (R 2477-2484) finding the following aggravators: (1) Wyatt was under a sentence of imprisonment at the time of the murder; (2) Wyatt had prior violent felonies; (3) the murder was committed during the course of a felony, to-wit, a robbery; (4) the murder was committed for the purpose of avoiding arrest; (5) the murder was committed for pecuniary gain; and (6) the murder was CCP. The court merged factors three and five, weighing them together. Also, the court found no statutory mitigators and one nonstatutory mitigator–that in Wyatt's his early youth, he had lived in a broken and unstable home provided by his stepfather while his mentally ill mother was in and out of mental hospitals.

The judge found the following aggravators: (1) Wyatt was under a sentence of imprisonment at the time of the murders; (2) Wyatt had prior violent felonies; (3) the murders were committed during the course of felonies to-wit, robbery and sexual battery; (4) the murders were committed for the purpose of avoiding arrest; (5) the murders were committed for pecuniary gain; (6) the murders were CCP and (7) the murders were HAC.

The court found no mitigators.

On direct appeal, Wyatt presented 16 issues.[2] In affirming Wyatt's convictions and sentences on appeal, this Court found the following facts:

> Wyatt and Michael Lovette escaped from a North Carolina road gang on May 13, 1988. The pair then set out on a crime spree throughout Florida. [FN1] On May 19, 1988, Cathy Nydegger was at a bar near Tampa where she was seen talking to and playing the "skill crane" with Wyatt. They left together carrying several stuffed animals they had won. Wyatt returned to the bar ten or fifteen minutes later and left again with Michael Lovette. Nydegger's body was found the next day in a ditch in a deserted area in Indian River County. She had been shot once in the head.
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> FN1. According to evidence presented at the guilt and penalty phases of the trial, Wyatt and Lovette: kidnapped and robbed someone on their way to Florida; stole a car in Jacksonville and later burned it in Indian River County; robbed a Taco Bell in Daytona Beach; and killed three Domino's Pizza employees with Wyatt committing sexual battery on one of them. Also, Wyatt stole a car in Madeira Beach.

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[2] (1) Court Erred in Instructing the Jury on Flight; (2) State improperly cross-examined Wyatt; (3) Wyatt Was Precluded from Conducting Relevant and Timely Discovery; (4) Court Erred by Preventing Wyatt from Asking Specific Questions to the Venire; (5) the Trial Court Erred by Admitting a Photograph of the Victim; (6)Court Improperly Precluded Wyatt from Cross-examination of Material Outside the Scope of Direct; (7) Court Engaged in Judicial Misconduct; (8) Court Erroneously Allowed Admission of Improper Character Evidence; (9)Closing Argument Included Improper Comments; (10) Reasonable Doubt Instruction Was Erroneous; (11) Court Incorrectly Found the Existence of the Aggravators; (12) Court Failed to Consider All the Mitigators; (13) the Jury Was Not Properly Instructed During the Penalty Phase; (14) Admission of Prior Violent Felonies Violated the Confrontation Clause; (15) the Prosecutor's Penalty Phase Argument Was Impermissible; (16) Florida's Death Penalty Statute Is Unconstitutional.

> The day Nydegger's body was found, Wyatt checked into a motel in Clearwater using an assumed name. He arrived at the motel in Nydegger's car, which he abandoned a few days later. While at the motel, Wyatt met Freddie Fox and gave him some bullets matching the fatal bullet. Fox also took a gun from Wyatt with rifling characteristics similar to those of the gun used to kill Nydegger. Wyatt was later arrested in South Carolina on an unrelated charge. While in jail, he told Patrick McCoombs, another inmate, that he had killed Nydegger. At trial, Wyatt denied killing Nydegger and blamed the murder on Lovette. He admitted to twenty-one prior felony convictions.

Wyatt v. State, 641 So.2d 355, 357 (Fla. 1994). On March 20, 1995, Wyatt's certiorari petition was denied. Wyatt v. Florida, 514 U.S. 1023 (1995).

On or about March 14, 1997, Wyatt's initial motion for post-conviction relief was filed.[3] After several years of public records litigation and three amendments, the last being on March 24, 2006. An evidentiary hearing was granted on various claims addressed to ineffectiveness of counsel, and new evidence related to the use of comparative bullet lead analysis testing ("CBLA") evidence and the alleged recantation of Patrick McCoombs. The hearing was held on August 6th through 9th, 2007, in conjunction with the postconviction hearing on the Domino's murders, and during which Wyatt presented, former prosecutors, The Honorable Lawrence Mirman and the Honorable David Morgan,

[3] By leave of this Court, on July 22, 1996, Wyatt was given until August 21, 1996 to be designated counsel and until July 21, 1997 to file his postconviction relief motion.

Patrick McCoombs, The Honorable Diamond Litty (Wyatt's penalty phase counsel, previously practicing as Diamond Horne), Dr. Faye Sultan, William Tobin, and Dr. Ernest Bordini.

On February 29, 2008, the court denied all relief, and stayed three claims raised after the conclusion of the evidentiary hearing. Wyatt appealed, and after receiving additional documentation on the CBLA issue, relinquishment was granted to litigate the previously stayed claims. Subsequently, relief was denied and jurisdiction was returned to this Court. Simultaneously with the filing of his initial brief on postconviction appeal (SC08-656), Wyatt filed the instant petition and the State was ordered to respond.

SUMMARY OF THE ARGUMENT

Issue I - Appellant counsel was not ineffective as the issues were either raised and rejected on direct appeal or meritless, so that even if they should have been raised, the result of the appeal would not have been different. The writ should be denied.

ARGUMENT

ISSUE I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE (restated)

Wyatt asserts appellate counsel failed to raise challenges to the trial court's rulings on (1) the admissibility of evidence tags with notations on them; (2) the admissibility of an autopsy photograph of one of Nydegger's tattoos which also showed her face with blood on it; and (3) the prosecutor's *voir dire* of the jury regarding witness elimination. Additionally, Wyatt assert counsel should have argues on appeal that Florida Rule of Professional Responsibility 4-3.5(d)(4). The State disagrees as Wyatt has failed to carry his burden of proving both deficiency and prejudice as defined in Strickland v. Washington, 466 U.S. 668 (1984). The petition for the writ of habeas corpus should be denied.

Claims of ineffective assistance of appellate counsel are presented appropriately in a petition for writ of habeas corpus. See Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). When analyzing the merits of the claim of ineffectiveness of appellate counsel, the criteria parallel those for ineffective assistance of trial counsel outlined in Strickland). See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective

assistance of appellate counsel raised in a habeas petition mirrors the Strickland standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency)).

In Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000), this Court set out the review appropriate for claims of ineffective assistance of appellate counsel stating:

> In evaluating an ineffectiveness claim, the court must determine
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> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
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> *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.2d at 470; *Hardwick*, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id. at 1001*. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So.2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger

points.”).

Freeman, 761 So.2d at 1069. Appellate counsel cannot be deemed ineffective for failing to raise issues “that were not properly raised during the trial court proceedings,” or that “do not present a question of fundamental error.” Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). “If a legal issue ‘would in all probability have been found to be without merit’ had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.” Rutherford, 774 So.2d at 643. (quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994).

Also, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). See also Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989) (stating “habeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.”). As noted in Chavez v.

State, 12 So.3d 199, 213 (Fla. 2009):

> capital defendants may not use claims of ineffective assistance of appellate counsel to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be ineffective for failing to raise a meritless issue. *See Lawrence v. State*, 831 So.2d 121, 135 (Fla. 2002); *see also Kokal v. Dugger*, 718 So.2d 138, 142 (Fla. 1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim.").

Chavez, 12 So.3d at 213.

Evidenced Tags - Wyatt submits that appellate counsel was ineffective for not arguing on appeal that the trial court erred in admitting over defense objections[4] seven brown paper evidence bags containing a piece of evidence each. Counsel did not object to the physical evidence only the bags containing the evidence. The paper bags were not submitted separately, thus, they will be identified by the physical evidence numbers which are **identification #V-3-evidence #67** (rolled prints); **identification #X-3-evidence #6**8 (rolled prints); **identification #A-3-evidence #74** (remnants of bank bag); **identification #Y-2-**

[4] In his petition, Wyatt cites to record pages 910, 928, 950-51, 1001-02 of volumes 6 and 7. He does not cite to page 925-926, thus, he has waived/abandoned any argument of ineffective assistance arising from State evidence items 69 through 73. See Chamberlain v. State, 881 So.2d 1087, 1103 (Fla. 2004) (stating because appellant failed to advance an argument in his brief, the court would consider it abandoned); Hall v. State, 823 So.2d 757, 763 (Fla. 2002) (stating petitioner was "procedurally barred" from making an argument in the reply brief that he did not raise in the initial brief).

evidence #77 (two cartridges); **identification #Z-2-evidence #78** (paper coin wrapper); **identification #Q-3-evidence #83** (Budget Bed and Breakfast registration card); **identification #G-5-evidence #84** (bank bag) (R.6 910, 928-930; R.7 950-51, 1001-04). Defense counsel had an evolving objection, thus, each piece will be address in turn. However, as will be evident from the record, the trial court cured any complaint, overruled the objections properly, and admitted the evidence properly. As such, even if raised on appeal, the claim would be found meritless, thus, counsel may not be deemed ineffective under Strickland for not asserting the issue.

Identification #V-3 and X-3/ Evidence #67 and 68 - With respect to the bags containing the rolled prints of Wyatt and his co-defendant, Lovette, Ernon Sidaway ("Sidaway") argued that the jury would know that the items were related to another trial "because they have no exhibit number." (R.6 910). The State offered that the evidence related to both Wyatt and Lovett, thus, the defense had not proven prejudice. The trial court agreed and overruled the objection. Such was proper as the jury was aware the co-defendant had been charged with the same crime, thus, it was reasonable he had been tried or would be tried in another trial.

Identification #A-3-evidence #74 - In objecting to the evidence bag containing the remnants of the bank bag, Sidaway

objected to the word "homicides" marked on the outside and stated "we want the entire word marked out on the bank bag." (R.6 929) The State had no objection and the trial court complied. Then Wyatt's co-counsel Diamond Horne ("Horne-Litty")[5] speculated that the jury may know what was covered, but the trial court found it could not be read. Given that the trial court granted Sidaway's request, and Sidaway did not adopt Horne-Litty's objection at trial, (R.6 929) the matter should be deemed waived for direct appeal. As such, appellate counsel cannot be ineffective for not raising and unpreserved claim which is not fundamental error. See Archer v. State, 934 So.2d 1187, 1205 (Fla. 2006) (recognizing "appellate counsel cannot be ineffective for failing to raise issues not preserved for appeal. The only exception to this rule is when the claim involves fundamental error.") (citations omitted) However, if it is not, as will be argued below, neither prong of Strickland was met.

Identification #Y-2 and Z-2-evidence #77 and #78 - When objecting the bags containing two cartridges and a paper coin wrapper Sidaway objected to the word "homicides," the relevance

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[5] Presently, Diamond Horne is the Public Defender for the 19th Judicial Circuit and is known as Diamond Litty. In her testimony for the postconviction evidentiary hearing and in the brief on appeal (#SC08-655 and #SC08-656), she was referred to as Diamond Litty. Because this case is linked to the postconviction appeal, she will be referred to here as "Horne-Litty."

of the bags themselves, and that the jury could see what the judge was doing. (E.7 950-51). The prosecutor, Assistant State Attorney David Morgan noted the bags were necessary so the witnesses could identify the items and State Attorney Bruce Colton reported, "Just so it's clear, we are doing this [arguing and marking the evidence bags] at a bench conference, the jury not only can't hear what's going on but can't see what the Judge is crossing out or on what piece of evidence it's being crossed out." The court responded "Nope" smilingly agreeing the juror could not see what he was doing. (R.7 952).

Identification #Q-3-evidence #83 and **identification #G-5-evidence #84** - Here, Sidaway again objected to the writings on the bags with the registration card including what Sidaway thought indicated a prior trial on "May 17th or May 16th;" and the bag for the bank bag noting where the bank bag was collected, identifying Wyatt as a suspect, the notation this was for a homicide case, with victim noted as Domino's Pizza. (R.7 1001-04) Sidaway also objected to the court merely blocking out the writings. The State argued that there were hundreds of pieces of evidence and it had to prove chain of custody. (R.7 1004). The trial court blocked out the challenged words, noting the "objection is cured." (R.7 1004).

Appellate counsel was not ineffective for not raising a challenge to this matter on appeal. First, the "objections" to

the writings on the outside of the bags was cured by blocking them out; it is merely speculation as to what the jury would try and do to see what was written underneath (P 12). With respect to that argument, defense counsel could and should have made a record below as to what could be seen under the redaction. Moreover, the trial court refuted that the jury could see the writings underneath. As to this point the matter is not preserved.

Also, Wyatt's suggestion that these seven bags are merely examples of the same problem, he cannot point now to any other alleged improperly admitted bags as proof of his ineffectiveness claim. (P 12) Having failed to cite them in his petition, he has waived those matters. See Pagan v. State, 29 So.3d 938, 957 (Fla. 2009) (finding issue waived on appeal were defendant merely references, without elaboration, issue raised below); Chamberlain v. State, 881 So.2d 1087, 1103 (Fla. 2004) (stating because appellant failed to advance an argument in his brief, the court would consider it abandoned); Hall v. State, 823 So.2d 757, 763 (Fla. 2002) (stating petitioner was "procedurally barred" from making an argument in the reply brief that he did not raise in the initial brief).

Moreover, the pith of Wyatt's objection at trial was the jury learning of a prior trial or homicide through the writings on the bag. The trial court cured that alleged problem, thus,

the claim on appeal would be meritless. With respect to relevancy, the prosecutor was correct as maintaining the integrity of the evidence - chain of custody through proper handling and identification were paramount should another trial be necessary or if this Court wanted to review the evidence. See Murray v. State, 3 So.3d 1108, 1115-16 (Fla. 2009) (noting "[g]enerally, relevant physical evidence can be admitted unless there is evidence of probable tampering. Taylor v. State, 855 So.2d 1, 25 (Fla.2003). Once the objecting party produces evidence of probable tampering, the burden shifts to the proponent of the evidence "to establish a proper chain of custody or submit other evidence that tampering did not occur." Id. (quoting Taplis v. State, 703 So.2d 453, 454 (Fla.1997)); Taplis v. State, 703 So.2d 453, 454 (Fla. 1997) (acknowledging that a fair reading of Dodd v. State, 537 So.2d 626 (Fla. 3d DCA 1988), is that the "State's failure to account for a gap in the chain of custody which, when considered together with the other evidence of tampering, support[s] a conclusion of probable tampering"). Clearly, it would be difficult if not impossible to remove each piece of physical evidence from its identifying bag so the persons who collected, handled, and tested the items may not be able to reconstruct the chain of custody.

Furthermore, the admission of the evidence bags which contained redactions was not error. See Battle v. State, 19

So.3d 1045, 1047 (Fla. 4th DCA 2009) (finding no error in admitting evidence bag with defendant's alias noted on it). As such, appellate counsel was not deficient under Strickland. Counsel cannot be faulted for not raising a meritless claim. "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Rutherford, 774 So.2d at 643. (quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994).

Furthermore, the evidence against Wyatt was overwhelming,[6]

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[6] Jennifer, the Club 92 bar maid, placed Wyatt at the bar with Nydegger, subsequently leaving with her, only to return alone to ask Lovette to accompany him and she was not seen alive again. (R 545-56, 735-39). Forensic evidence including hair, fiber, and fingerprint, as well as eye-witness testimony, place Wyatt in Nydegger's car and later abandoning it, carrying a gun and bullets consistent with those used to kill Nydegger, and at a motel close to the bar which Nydegger frequented. (R 806-11, 843-44, 847, 850-53, 878-87, 890-91, 1418-20, 1561-77). Wyatt admitted to possessing the suspected murder weapon just days before the killing. (R 1196-97. 2015). Forensic and eye-witness testimony placed Wyatt near the place where Nydegger's body was found. There was testimony Wyatt was seen driving a stolen red Cadillac, later abandoned and burned off State Road 60 a few miles from Nydegger's body. Wyatt and Lovette were picked up by a trucker as they hitchhiked along State Road 60 near where a fire had been set, and then dropped off at a Lake Wales motel. Wyatt and Lovette were known to have been in the area via the records of the Budget Inn and a pillow from that Inn recovered from near Nydegger's body. The pillow was made by the same company supplying Budget and it was covered with two pillow cases, in the same way Budget covered its pillows. (R 978-82, 1015-24, 1054-58, 1064-65, 1070, 1078, 1087, 1108-21, 1127-34, 1174). Wyatt's roommate after the murders turned over evidence

thus, the possibility the jury surmised Lovette had been tried separately or that Wyatt had been tried previously does not undermine confidence in the conviction. Likewise, it would have no impact on the sentencing as the jury was informed of the Domino's murders for the prior violent felony aggravator. (R 2160). Wyatt has failed to show that the result of his appeal would have been different had counsel raised the instant claim. Relief should be denied.

Gruesome Photograph - Wyatt asserts his trial counsel objected to a photograph of Nydegger with blood on her face on the ground that the photograph was gruesome, but that the trial court failed to require the State to offer the probative value of the item, instead merely overruling the objection and noting there was nothing "gory anyway." (R.5 633). He maintains appellate counsel failed to raise the issue on appeal, thus, he was ineffective. (P 13-14). Contrary to Wyatt's suggestion otherwise, the admission of the photograph was raised and

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Wyatt left behind which link Wyatt to the stolen Cadillac (R 964-66, 828-29). Wyatt admitted to much of the evidence linking him to Nydegger's murder. He confessed to possessing the Charter Arms .38 pistol, the bag of bullets, and stealing the Cadillac with Lovette, only to leave it burning on State Road 60 west of Vero Beach. After abandoning the car, Wyatt admitted he hitched a ride with Darrell Booth to Lake Wales. Later, he and Lovette went to the Club 92 in Brandon, where he played a "skill crane" game with Nydegger. Wyatt confessed he told investigators his alter-ego "Jim" had killed and done bad things. He admitted he was friendly with Patrick McCoombs, but denied admitting to Nydegger's murder. (R 1628, 1644, 1647-50, 1655-57, 1698-1701, 1828).

rejected on appeal, thus, the claim is procedurally barred as Wyatt is not entitled to re-litigate the matter.

On page 16 of Wyatt's corrected initial brief on direct appeal in the Nydegger case, case number CS60-79245 - new numbering) appellate counsel argued it was error to admit the autopsy photograph showing Nydegger's face bloodied as it was not relevant. Without discussion, this claim was denied as meritless. Wyatt, 641 So.2d at 359, n.4 (denying "(3) the trial court erred in admitting an autopsy photograph of Nydegger").

As provided in Blanco, 507 So.2d at 1384, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. See Parker, 550 So.2d at 460 (stating "habeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.") Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Wyatt appellate counsel challenged the admissibility of the autopsy photograph citing Czubak v. State, 570 So.2d 925, 928-29 (Fla. 1990) where this Court found a photograph of badly decomposed body of the victim gruesome and more prejudicial that probative. Having raised the

issue Wyatt is barred from obtaining a second review.

Moreover, even if appellate counsel should have also claimed the trial court erred by failing to have the State offer how the photograph was probative and for the court not announcing its analysis, the record refutes the allegations. When read in context, it is clear that the State was offering the photograph (State's Exhibit R-11 for identification) to assist the medical examiner with identity and the trial court found that the photograph was not gruesome, thus, admissible. (R.5 631-34). The record establishes:

> Q [by Prosecutor]: Doctor, let's go on, if we could, as to your external examination. I believe you described the unknown white female, young female, that you said she was a chubby girl. . . . .
>
> Q Where there any other marks as far as external examination that you took note of?
>
> A [by Dr. Hobin] Yes. **In the conduct of a death investigation it's a general goal to try to observe distinctive physical characteristics about an individual that might confirm the identity or aid in the identification of an unknown person, so, basically, you look at scars and tattoos** or deformities or unusual dental work, or things of that nature. In this case Cathy Nydegger had some very distinctive tattoos present on her body.
>
> Q Did you photograph those or cause them to be photographed, Doctor?
>
> A Yes, we did.
>
> Q Let me show you what's marked for identification as P-11, Q-11 and R-11 and just ask you if those tattoos that you've just described are shown and demonstrated in those particular photographs?

A Yes, they are.

Q **<u>Now, does the one photograph, State's R-11, also give somewhat of a side to front view of Cathy Nydegger - - we now know as Cathy Nydegger's face for identification purposes</u>**?

A Yes, it does.

MR. Morgan: We would move for admission at this time State's Exhibit R-11, P-11 and Q-11. . . .

MR. SIDAWAY: Could I voir dire the witness?

. . .

Q Dr. Hobin, as to the tattoo that you've talked about which is shown in R-11, do you have any other photographs that you took at the autopsy that show that particular tattoo?

A I have these Polaroid photographs.

Q Could you keep those separate for a moment, please?

A Yes, sir.

Q Mr. Morgan, I think, asked you a question as to Cathy Nydegger's face. Do you have any other photographs that were taken at the autopsy?

A Yes, I do.

Q Can I see that?

. . .

MR SIDAWAY: We have no objection to these two which are P-11 and Q-11

. . .

MR. SIDAWAY: Judge, **<u>as to R-11, I would have an objection to this one. For identification purposes I have an objection if Mr. Morgan has available to him</u>**

> **other photographs that don't have the blood all over the face. If he does not I would not have an objection to that particular one** but - - if the Court understands my objection, I don't know what else - - what he's got available to him.
>
> THE COURT: **Is your objection** on the grounds that it's **gory**?
>
> MR. SIDAWAY: **yes, sir, in that there may be other pictures available**, there may be.
>
> MR. MORGAN: They have not stated a legal objection under Halliwell versus State, 323 So.2d 557.
>
> THE COURT**: I'll overrule the objection. I don't see anything gory anyway. That identifies the body upon which he performed**, (sic) [the autopsy] so the objection is overruled. I not the objection so that will be number 27.

(R.5 631-34)(emphasis supplied)

The review of the admission into evidence of autopsy photographs is for abuse of discretion. Philmore v. State, 820 So.2d 919, 930-31 (Fla. 2002); Mansfield v. State, 758 So.2d 636, 648 (Fla. 2000); Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997). Even gruesome photographs will not be found inadmissible "[a]bsent a clear showing of abuse of discretion by the trial court." Rose v. State, 787 So. 2d 786, 794 (Fla. 2001). "[P]hotographs will be admissible into evidence 'if relevant to any issue required to be proven in a case.'" Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). See Mansfield, 758 So.2d at 648; Gudinas, 693 So.2d at 963; Adams v. State, 412 So.2d 850 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981). Even

gruesome photographs are admissible if they fairly and accurately represent a fact at issue, Preston v. State, 607 So. 2d 404, 410 (Fla. 1992), or when they show the condition and location of the body when found or illustrate a witness' testimony, assist the jury in understanding the testimony, or bear on issues of the nature and extent of the injuries, the cause of death, nature and force of the violence used, premeditation or intent. Rose, 787 So. 2d at 794 (noting "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."); Rutherford v. Moore, 774 So.2d 637 (Fla. 2000); Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995).

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.... It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So. 2d 196, 200 (Fla. 1995).

From the context the above exchange, it is clear trial counsel was objecting on the grounds the photograph was gruesome, but only if the State had other photographs available, otherwise, it appears trial counsel may have withdrawn the objection. Nonetheless, the trial court found the photograph

was not gruesome, and it went to identity. As such, had the claim been raised on the grounds it was gruesome as well as that the trial court did not ask the State what the probative value was, and the trial court did not state his rationale on the record, the matter would be found meritless. As such, Wyatt is unable to prove both deficiency and prejudice under Strickland and relief should be denied.

State's *Voir Dire* Questions - Here, Wyatt claims appellate counsel was deficient for not challenging on appeal the State's voir dire examination of Venirewoman Pedrick (R. 102-03) on the ground he was claiming Wyatt killed witnesses and the trial court's instruction did not cure the "creation of an unconstitutional presumption that Mr. Wyatt probably committed a homicide." (P15-16). The record does not bear out Wyatt's allegations, thus, appellate counsel was not deficient in not raising the claim and no prejudice has been shown.

When the *voir dire* examination is read in context, it is clear that the State was asking the juror questions addressed to her view on the lack of an eye-witness to the murder, the fact that the co-defendant would not be tried with Wyatt, and the utilization of circumstantial evidence to prove the case.

> MR. Colton: Now, as I said earlier, there are two people that are charged with this crime and only one's on trial, you understand that. And you said when I asked the jury as a whole, and I think you agreed, you would be willing to consider all of the

evidence in the case and the evidence that applies to this defendant in determining whether he’s guilty or not guilty. You could do that?

VENIREWOMAN PEDRICK: Yes.

MR. COLTON: Do you understand you won’t even see the other defendant, you won’t hear the co-defendant testify in this case, the State will not be calling that person as a witness, do you understand that?

VENIREWOMAN PEDRICK: Yes.

MR. COLTON: In regard to witnesses in general, do you agree or do you understand that many times in criminal cases, in first degree murder cases, people kill people so there won’t be witnesses to what they did? Do you agree with that that can be the case? That sometimes their reason for killing the victim is so that the victim can’t tell what they saw or what they know about the defendant?

VENIREWOMAN PEDRICK: Yes.

MR. COLTON: Okay. So oftentimes the reason that the murder is committed is to eliminate - -

MR. SIDAWAY Your Honor, I’m going to object.

THE COURT: Okay, So oftentimes the reason that the murder is committed is to eliminate - -

MR. SIDAWAY: Your Honor, I’m going to object.

THE COURT: Well, I don’t see anything basically wrong with it, but this is not to say that the necessarily occurred in this case through, but I think that that’s a - - let’s go on. You should not take that to mean that this necessarily happened in this case.

MR. COLTON: Right, just in general. Sometimes the witness can’t testify because the eyewitness is dead, the eyewitness is the victim, do you understand that?

VENIREWOMAN PEDRICK: Yes.

MR. COLTON: Now do you understand that even aside from that, even aside from when the victim is the eyewitness that oftentimes people who commit crimes and people who carry out especially very serious crimes like murder do it in a way that there won't be witnesses. Can you agree with that?

VENIREWOMAN PEDRICK: Yes.

MR. SIDAWAY: Judge, again, I'm going to object. Can we approach the bench?

BENCH CONFERENCE:

MR. SIDAWAY: My objection is Mr. Colton, in effect, is trying to give an opening statement on voir dire. He's more or less attempting - - it's been going on, he's basically lecturing the jury about the case without asking a question.

THE COURT: I think he's - - I'll overrule the objection. Go ahead.

BENCH CONFERENCE TERMINATED:

MR. COLTON: You understand the question is whether or not you can understand and agree that in some cases, and in this case, the witness to the murder is not here to testify because that witness is dead. Do you understand that, that in some cases there will just not be an eyewitness?

VENIREWOMAN PEDRICK: Yes.

MR. COLTON: But, do you agree that the State still can prove its case through other witnesses and through other evidence? We will have to meet our burden of proof, but the law doesn't require that it be met through the use of eyewitnesses?

VENIREWOMAN PEDRICK: Yes, I can.

(R. 101-04). The same line of questioning, whether the jurors could keep an open mind about the case even though there were no

eye-witnesses (R.2 110-11, 129, 154, 160).

It is well settled that a trial court possess discretion on the scope of voir dire and absent a showing that no reasonable jurist would have ruled as the court did, an appellate would not prevail on appeal. See Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996); Stano v. State, 473 So.2d 1282, 1285 (Fla. 1985). This Court, in [Mark Allen] Davis v. State, 928 So.2d 1089, 1128-29 (Fla. 2005) found there was not fundamental error in permitting the State to ask potential jurors regarding "whether the defendant's age would impact the jurors' ability to sit as jurors, whether the jurors would have particular empathy for Davis because he was a young man, and whether the jurors could put aside pity and sympathy in accordance with the law." The case of [Eddie Wayne] Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997) makes clear that a prosecutor may ask jurors questions regarding their impartiality based on the facts the prosecutor knows will be at issue, i.e., whether a juror may be biased given the type of evidence or specific characteristics of witnesses the State would produce. In Davis, the prosecutor was permitted to ask the jurors about their impartiality given the fact the prosecutor intended to show the defendant targeted a learning disabled child and this Court found not abuse of discretion. Id. at 1285.

Here, Wyatt has failed to show that the State asked an

improper questions, pre-tried its case, or elicited promises from the jurors as to how they would decide the case. Instead, the jurors were asked whether the lack of eye-witnesses would impact their partiality and sought whether they would keep an open mind even though there would be no eye-witnesses. Such was proper inquiry. Moreover, the trial court instructed the jury that what the attorneys discuss in *voir dire* is not necessarily the facts or what happened in the case. This instruction cured any taint that Wyatt may speculate occurred. Further, he has not shown that the *voir dire* diminished the fairness of his trial or improperly excluded qualified jurors, thus, he has not shown that but for appellate counsel's failure to raise the issue on appeal, a different result would have been obtained.

Constitutionality of Florida Regulating the Florida Bar 4-3.5(d)(4) - Wyatt asserts that it was ineffective assistance for appellate counsel to not challenge the constitutionality of the bar rule prohibiting juror interviews. It is Wyatt's position that appellate counsel should have argued the rule is unconstitutional because it: (1) conflicts with the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; (2) it unconstitutionally burdens his right to due process; and (3) denies him access to the courts of Florida in violation of Article I, §21 of the Florida Constitution. Recently this Court concluded:

> In his final claim, Floyd contends that appellate counsel was ineffective for failing to assert that Rule Regulating the Florida Bar 4-3.5(d)(4), which imposes restrictions on post-trial juror interviews, violates his equal protection and due process rights as well as the First, Sixth, Eighth, and Fourteenth Amendments. However, we have repeatedly rejected claims that rule 4-3.5(d)(4) is unconstitutional. *See, e.g., Israel v. State*, 985 So.2d 510, 522 (Fla. 2008); Barnhill v. State, 971 So.2d 106, 116-17 (Fla. 2007); *Farina v. State*, 937 So.2d 612, 626 (Fla. 2006). Accordingly, appellate counsel was not ineffective for the failure to raise this nonmeritorious issue on direct appeal. *See Rutherford*, 774 So.2d at 643.

Floyd v. State, 18 So.3d 432, 459 (Fla. 2009). See Power v. State, 886 So.2d 952, 957 (Fla. 2004); Johnson v. State, 804 So.2d 1218 (Fla. 2001).

Further, in Israel v. State, 985 So.2d 510 (Fla. 2008), this Court reasoned that both Florida Rule of Criminal Procedure 3.75 Fla. R. Crim. P. and Rule Regulating the Florida Bar 4-3.5(d)(4):

> . . . provide a mechanism for defendants to interview jurors when there are good faith grounds for a challenge. Even before rule 3.575 was adopted, an attorney was required to make sworn allegations that, if true, would require a new trial before being allowed to interview any member of the jury. Johnson, 804 So.2d at 1225. Under rule 3.575, the party who wants to conduct juror interviews must file a motion stating the name of the juror to be interviewed and the reasons the party believes the verdict is subject to challenge. As noted above, Israel has not alleged that he filed a motion requesting permission to interview jurors, nor has he alleged any specific juror misconduct. As in many other cases, Israel's claim appears to be nothing more than a request to investigate possible grounds for finding juror misconduct. Suggs, 923 So.2d at 440; 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).

Israel, 985 So.2d at 523. Given this, Wyatt has failed to offer a basis for appellate counsel to challenge the rule on appeal, nor has he offered a basis for this Court to revisit its well settled conclusion that appellate counsel are not ineffective for not challenging the rule on appeal. Habeas relief should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court deny the petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Rachel L. Day, Esq., and M. Chance Meyer, Esq., Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite #400, Fort Lauderdale, FL 33301 this 9th day of July, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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