IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC09-780
L.T. No. CR97-13379
DEATH PENALTY CASE

ON APPEAL FROM DENIAL OF RULE 3.851 MOTION TO VACATE
CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The record on direct appeal will be cited throughout this brief as “DAR” with the appropriate volume and page number (DAR V#/page#).

The post-conviction record will be cited as “PCR” with the appropriate volume and page number (PCR V#/page#).

STATEMENT OF THE CASE AND FACTS

Following a jury trial, Ray Lamar Johnston was convicted for the 1997 murder of Leanne Coryell and sentenced to death. *Johnston v. State*, 841 So. 2d 349 (Fla. 2002). The facts of this case are summarized in this Court's opinion on direct appeal.

> Leanne Coryell, a clinical orthodontic assistant for Dr. Gregory Dyer, went to work at 1 p.m. on August 19, 1997. At approximately 8:15 p.m., Dr. Dyer went home, leaving Melissa Hill and Coryell to close the office. Coryell clocked out at 8:38 and, after some difficulty setting the office's alarm, left within the next ten minutes. Coryell picked up groceries at Publix Super Market where the store's surveillance cameras documented her checking out at 9:23. She was not seen alive again.
>
> Ray Johnston, Gary Senchak, and Margaret Vasquez shared a three-bedroom apartment at the Landings Apartment Complex-the same apartment complex in which Coryell lived. On the evening that Coryell was murdered, Johnston argued with his roommates over the utility bills and left the apartment between 8:30 and 9:30 p.m. Vasquez noted that around 9:45, Johnston's car [FN1] was still in the parking lot although Johnston had not returned. Sometime after 10:00, Johnston came back to the apartment and threw $60 at Senchak, telling him, "That's all you're getting from me, you son-of-a-bitch."
>
> [FN1] Johnston drove a Buick Skyhawk that had recently been in a collision, causing one of his headlights to be out of adjustment. One of the taillights was also out.
>
> Coryell's body was discovered around 10:30 p.m. on the evening of August 19 by John Debnar, who was playing catch with his dogs in a field close to St. Timothy's Church. While there, he noticed that a car with an out-of-place headlight entered St. Timothy's property and stopped briefly beside an empty black car. When Debnar walked his dogs home, one of his dogs

stopped at a pond on the church's property, causing Debnar to notice the body of a woman floating in the water.

Hillsborough County sheriff's officers arrived at St. Timothy's Church shortly before 11:30 p.m. and found Coryell's body lying face down in the pond, completely nude. Her clothes were found on a nearby embankment. Dental stone impressions were taken of some shoe prints that were in the general area where the clothing was found. Coryell's empty black Infiniti was in the church's parking lot with the keys in the ignition and the engine still warm. Some, but not all, of her groceries were sitting in the back seat. Although the police were unable to lift any prints from the interior of the car, they did lift a fingerprint matching Johnston's from the exterior.

Dr. Russell Vega performed the autopsy and opined that the victim died sometime after 9 p.m. Based on the extensive bruising of the external and internal neck tissues, Dr. Vega concluded that the victim died from manual strangulation, as opposed to the use of a ligature. Dr. Vega also observed a laceration on the left side of the victim's lower lip and a laceration on her chin, both of which were caused by blunt impact. There were vertical scrapes on the victim's back which suggested that she was dragged to the pond. There were two unusually shaped bruises on Coryell's buttocks which were similar to the metal appliques on her belt, causing Dr. Vega to believe that she was hit with her own belt while still alive. Finally, the victim suffered both internal and external injuries to her vaginal area, injuries which were consistent with vaginal penetration. Her hand still clutched strands of grass.

In the late evening hours of August 19 and again early the next morning, the victim's ATM card was used to withdraw the $500 daily limit. The police used the ATM surveillance videos to capture pictures of the person who was using the victim's card, and these photographs were provided to the news media, which aired them. Juanita Walker, a friend of Johnston, saw the televised pictures and called the authorities,

identifying Johnston as the person in the photos. She also told police that she and Christine Cisilski saw Johnston a little before 10 p.m. on the night of the crime, driving a black, mid-size car out of the Landings Apartment Complex.

Based on telephone calls identifying Johnston as the person in the photos, the police obtained a warrant to search his apartment and found a pair of wet tennis shoes and shorts. The imprints from the tennis shoes matched three partial impressions that were found at the scene of the crime. However, the shoes did not have any individual characteristics which would enable an expert to conclude that Johnston's shoes were the exact shoes which made the impressions.

Johnston saw his picture on television and volunteered to give a statement in which he initially told police that he was a friend of Coryell and that they had gone out to dinner a few times. He told Detective Walters that on the evening of the 19th, he had met Coryell at Malio's for drinks at 6:15 p.m. The pair then went to Carrabba's and left around 8:30 or 9:00. According to Johnston, the victim indicated that she needed to stop at a grocery store before she went home, but before they parted, the victim gave Johnston her ATM card and PIN so that he could withdraw $1200 in repayment of a loan she had obtained from him. When he arrived home, he changed, went jogging, and then withdrew $500 from her account. He withdrew another $500 the following day.

Johnston was placed under arrest for grand theft, was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and agreed to continue the interview. The detective confronted Johnston with the fact that Coryell did not leave work until 8:38. Johnston's response was that other employees must have covered for her because he was with her at that time, but he was unable to provide the names of anybody who could corroborate this explanation. The detective then told Johnston that they had found his jogging shoes, which were completely wet. Johnston justified the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off

after his run. The detective asked several times whether Johnston was involved with Coryell's death and Johnston responded by saying that they would not find any DNA evidence, hair, or saliva which would link him to the victim.

In response to Johnston's contention that he loaned Coryell money, the State introduced several witnesses who testified that Johnston near the time of the murder did not have the financial ability to make a $1200 loan. The State also called Laurie Pickelsimer, the defendant's pen pal in prison, who testified that Johnston asked her to provide a false alibi for him. Johnston suggested that she tell his attorneys that on the night of the murder, she and Johnston were working out in the gym at the apartment complex from 9:00 until about 10:30, except for a short time when he walked back to his apartment to get them a drink for the hot tub. **The jury found Johnston guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault.**

The penalty phase of the trial began on June 16, 1999. The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.

Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim

was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.

Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.

Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain, making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a

psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the perfect husband-he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard,

Johnston's younger sister, stated that Johnston never acted normal-he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.

Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. **The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.**

The jury unanimously recommended the death penalty. After holding a *Spencer* hearing, [FN2] the trial court found four aggravating factors, [FN3] one statutory mitigator, [FN4] and numerous nonstatutory mitigators, and followed the jury recommendation.

[FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

> [FN3] The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel.
>
> [FN4] The court found defense counsel proved that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired and gave it moderate weight.

Johnston, 841 So. 2d at 351-355 (e.s.)

Johnston appealed his convictions and sentences, raising four issues and multiple sub-claims in a 100-page amended initial brief, SC00-979. On December 5, 2002, this Court affirmed Johnston's first-degree murder conviction and death sentence for the murder of Leanne Coryell. This Court also affirmed his convictions and sentences for kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. *Johnston*, 841 So. 2d at 361. Rehearing was denied on March 13, 2003.[1]

Johnston filed a Rule 3.851 Motion to Vacate on March 11, 2004; this motion was first amended on June 11, 2004 and a second amended motion was filed on December 8, 2005. Johnston's amended motion raised twelve claims and multiple sub-claims. (PCR

[1] Johnston also has another murder conviction and death sentence, for the murder of *Janice Nugent*. *Johnston v. State*, 863 So. 2d 271 (Fla. 2003).

V1/171-193; PCR V2/203-267; 355-404). The trial court held post-conviction evidentiary hearings on December 1, 2006; June 14-15, 2007; and July 12-13, 2007 on eight of Johnston's post-conviction claims. (PCR V52/601 – PCR 62/1804). The post-conviction witnesses included: Simon Cole, Ph.D. (Proffer re: fingerprint identification) (PCR V49/447-517); Elizabeth Tower (Jail Records Custodian) (PCR V52/601-618); Mark Cunningham (Clinical and Forensic Psychologist) (PCR V52/618-PCR V54/948); James O'Donnell (Pharmacologist) (PCR V55/951-1025); James Iverson (Sergeant, Hillsborough County Sheriff's Office); (PCR V55/1026-PCR V56/1065); Gerard Hooper (Defendant's former co-counsel in *Nugent*) (PCR V56/1070-1122); Carolyn Fulgueira (Mitigation Specialist, Public Defender's Office) (PCR V57/1149-1170; 1204-1233); Michael Maher, M.D. (Psychiatrist, one of the defendant's mental health experts at the Penalty Phase) (PCR V57/1171-1200); Ray Lamar Johnston, the defendant (PCR V57/1243-1288; PCR V62/1785-1804); Joseph Registrato (Co-counsel, Penalty Phase) (PCR V58/1296-1388; PCR V62/1730-1752); Kenneth Littman (Co-counsel/Guilt Phase) (PCR V59/1394-1517); Diane Busch (friend of the defendant) (PCR V60/1533-1597); Sharon Mercer (CCRC-M Investigator) (PCR V60/1600-1605; PCR V62/1775-1782); James Caimano (FBI Agent, former Hillsborough County Sheriff's Detective) (PCR V61/1626-1652); Anthony Shephard (Detective

Sergeant, Hillsborough County Sheriff's Office) (PCR V61/1675-1692); Caridad Taylor (SAO Investigator, former Detective, Hillsborough County Sheriff's Office) (PCR V61/1695-1705); John Skye (Assistant Public Defender) (PCR V62/1753-1774).

All post-conviction relief was denied in the trial court's 136-page written order of February 5, 2009. (PCR V16/3102 - V17/3237). Johnston's Initial Brief did not include any "Statement of Facts," and the majority of Johnston's arguments on appeal involve sub-claims of ineffective assistance of counsel. Therefore, the State will address the pertinent facts adduced in post-conviction which are relevant to Johnston's IAC sub-claims within the argument section of the instant brief.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Johnston's IAC/guilt and penalty phase claims under *Strickland*. The trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

Johnston's attempt to resurrect his substantive claim of juror Robinson's alleged non-disclosure, held procedurally barred on direct appeal, remains procedurally barred in post-conviction. Moreover, defense counsel, as a matter of trial strategy, wanted to keep juror Robinson on the jury panel because she fit the profile (young/minority) recommended by the defense-retained jury consultant after Johnston's mock trial.

Trial counsel was not ineffective in failing to seek suppression of Johnston's pre-*Miranda* statements to law enforcement. Johnston was not "in custody" when he volunteered his statements, his exculpatory statements were not taken in violation of *Miranda*, the admission of Johnston's statements during the guilt phase enabled the defense to explain Johnston's possession of the victim's ATM card without subjecting Johnston

to cross-examination and disclosure of his numerous felony convictions, and Johnston's statements to law enforcement were cumulative to his similar taped statements to the press, which were also admitted at trial.

The trial court correctly denied Johnston's additional IAC sub-claims after several days of evidentiary hearings. The fact that Diane Busch had $10,000 in cash is irrelevant to Johnston's well-documented meager financial circumstances. Moreover, the fact that Johnston "shook" up people during Ms. Busch's hospitalization in the summer of 1997 is hardly mitigating when juxtaposed against the brutal murder of Leanne Coryell during that same summer. Dr. Cole's proffered testimony was irrelevant and inadmissible. All of the members of the defense team at trial and the mental health experts who contemporaneously evaluated Johnston at the time of trial refute any claim of Johnston's alleged impairment by psychotropic medication.

Trial counsel, with 20+ years of experience, was not ineffective in failing to conduct individual *voir dire*. The trial court correctly summarily denied the remaining post-conviction claims. The trial court's comprehensive orders detailed its fact-specific rationale and attached those portions of the record that refute the defendant's claims.

THE *Strickland* STANDARDS AND STANDARDS OF REVIEW

The majority of the issues raised in this post-conviction appeal involve claims of ineffective assistance of trial counsel and these IAC sub-claims were denied after the multi-day evidentiary hearings. In *Bradley v. State*, 2010 WL 26522, 3 (Fla. 2010), this Court summarized the following standards of review applicable to these IAC claims:

> . . . the test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. See *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995). On the contrary, a claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. *Id*. When examining counsel's performance, an objective standard of reasonableness applies, *id*. at 688, 104 S.Ct. 2052, and great deference is given to counsel's performance. *Id*. at 689, 104 S.Ct. 2052. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 669, 104 S.Ct. 2052.
>
> Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. A defendant must do more than speculate that an error

> affected the outcome. *Id*. at 693, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. Both deficient performance and prejudice must be shown. *Id*. 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 that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*. See *Sochor v. State*, 883 So.2d 766, 771-72 (Fla.2004).
>
> *Bradley,* 2010 WL 26522.

The above-cited standards of review apply to all of the claims of ineffective assistance of counsel raised in the Appellant/Defendant's Initial Brief.

ARGUMENT

ISSUE I

THE IAC/GUILT PHASE CLAIM (BASED ON JUROR TRACY ROBINSON)

On direct appeal, *Johnston v. State*, 841 So. 2d 349 (Fla. 2002), this Court (1) ruled that juror Robinson was not statutorily disqualified from serving on the jury, (2) declined to consider the claim of Robinson's alleged "deliberate failure" to disclose her misdemeanor plea because this specific ground was not raised in the motion for new trial, and (3) agreed that the trial court was correct to deny Johnston's motion to interview juror Robinson, which was based on mere speculation. In his first post-conviction issue, Johnston attempts to resurrect his unsuccessful direct appeal and bootstrap a procedurally-barred "juror non-disclosure" claim onto his claim of ineffective assistance of trial counsel. The ONLY claim which is cognizable in post-conviction is the IAC/guilt phase claim. Moreover, Johnston cannot prevail on his IAC claim because, among other things, Robinson's alleged non-disclosure during *voir dire* was not material in this case and trial counsel strategically wanted to *keep* Juror Robinson on the jury panel -– Robinson fit the profile for the type of juror (young/minority) recommended by their own jury consultant after Johnston's mock trial.

Any claim of juror non-disclosure/juror misconduct is procedurally barred in post-conviction. *Elledge v. State*, 911 So. 2d 57, 77 n.27 (Fla. 2005); *Happ v. Moore*, 784 So. 2d 1091, 1094 & n.3 (Fla. 2001). Moreover, the juror non-disclosure claim was raised on direct appeal and *denied as procedurally barred*:

> **Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled *nolo contendere* to a misdemeanor charge within the past year.** Appellate counsel concedes that defense counsel failed to specifically raise this claim with the trial court. **As this specific ground for a new trial was not raised with the lower court, it will not be considered on appeal.** [FN8] To the extent that Johnston is claiming his counsel was ineffective, we find that this issue should be addressed in a rule 3.850 motion-not on direct appeal. [FN9]

Johnston, 841 So. 2d at 357 (e.s.) (footnotes omitted)

The substantive claim of juror Robinson's alleged non-disclosure, held procedurally barred on direct appeal, remains procedurally barred in post-conviction. Moreover, Johnston's alleged "fundamental error" argument likewise must fail. As this Court emphasized in *Carratelli v. State*, 961 So. 2d 312, 325 (Fla. 2007), "if an appellate court refuses to consider unpreserved error, then by definition the error could not have been fundamental." And, as this Court has further explained, an error constitutes fundamental error when it deprives the defendant of his due process right to a fair trial. *See Jackson*

v. State, 983 So. 2d 562, 575 (Fla. 2008); *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000). Since the standard for prejudice under *Strickland* and the standard for fundamental error both look at whether a defendant was deprived of a fair trial, the trial court did not err in denying Johnston's IAC claim of prejudice.

Johnston's IAC/guilt phase claim asserts that trial counsel was ineffective in failing to (1) question Juror Tracy Robinson about her response on the juror questionnaire and (2) include a claim of Robinson's alleged "deliberate failure to disclose" in Johnston's amended motion for new trial. This IAC/guilt phase claim was denied after an evidentiary hearing. The trial court entered a detailed, fact-specific order denying this post-conviction claim (PCR V16/3104-3115) and found, *inter alia*, that (1) Ms. Robinson was *not* statutorily disqualified from serving on the jury, (2) Johnston failed to present any evidence that he advised anyone on the trial team that he wanted to request a new trial based on juror Robinson's deliberate failure to disclose that she pled *nolo contendere* to a misdemeanor charge within the preceding year, (3) Ms. Robinson did not deliberately lie about the existence of the prior misdemeanor, but failed to disclose such information and the failure to disclose was *not material* to the extent of warranting a new trial, (4) based on trial counsel Ken Littman's testimony, the fact that Ms. Robinson had pled *nolo*

contendere within a year before the trial to a misdemeanor of obstructing or opposing an officer was not something the defense would have raised in the motions because she was a young, African-American female who fit the young, minority juror profile recommended by Dr. Harvey Moore, the individual who conducted Johnston's mock trial, (5) even after Ms. Robinson was arrested between the guilt and penalty phases, the defense team still wanted her to remain on the jury for the penalty phase, and (6) Johnston failed to demonstrate how he was prejudiced by trial counsel's failure to include juror Robinson's alleged deliberate failure to disclose her *nolo contendere* plea to a misdemeanor charge as such information was not material to the extent of warranting a new trial. The trial court's order denying this post-conviction IAC/guilt phase claim (Claim 2/Supplement to Claim 2) states, in pertinent part:

* * *

> When asked if he [Mr. Registrato] ever, at the time Ms. Robinson was being questioned, stopped and considered that possibly she had been arrested herself at some time in the past, he responded in negative, and further elaborated as follows:
>
> > REGISTRATO: I can't imagine why I would have thought that, Judge. I mean, she gave an answer. I can't imagine why I would sit there and say, well, I wonder if she has a bad record. Or I wonder if she has something in her past that she's not telling us outside of the general - - I mean, these jurors in these death cases are questioned and are gone over

> way, way more thoroughly than in most other cases. And it was a very, very thorough - - it was a very thorough job on all of these - - on all of these jurors. As I was saying, the - - **the conventional wisdom is the prosecutor is going to ask them about their past. Let him be the bad guy. I don't need to get up there and start alienating these jurors. Let him do it and he did it. And, no, we wouldn't have done that, sir. We'd be - - it would be work of a novice to do that.**

(*See* January 31, 2008, transcript, pps. 752-754, attached).

On cross-examination, he [Mr. Registrato] testified juror Tracey Robinson was an acceptable juror to the defense. (*See* January 31, 2008, transcript, p. 775, attached). He further testified that even if he knew that within a year before the trial, juror Tracey Robinson pleaded *nolo contendere* to a misdemeanor, that would not have made a huge impact for them regarding her qualification as a juror or her acceptability to the defense. (*See* January 31, 2008, transcript, pps. 775-776, attached). He further elaborated as follows:

> **REGISTRATO: It would not have had a big impact on the defense, because again, conventional wisdom would have been that that - - that would - - that would have been a reason for the State to not want her on there, for sure. You know, you have somebody who is at least in some respect in conflict with law enforcement, in conflict with the state attorney. You know, it would be somebody that they would not want on it. It would not have had a big impact on the defense, I don't think.**

(*See* January 31, 2008, transcript, pps. 777-778, attached).

Mr. Littman testified that anyone that Defendant did not like was stricken, if not for cause, then peremptorily. (*See* January 31, 2008, transcript, p.

920, attached). **He further testified that because Ms. Robinson was a young African-American woman, she fit the profile of a young, minority juror that was recommended by Dr. Harvey Moore who conducted the mock trial.** (*See* January 31, 2008, transcript, pps. 919-920, attached). **He also testified that the fact that Ms. Robinson had pled nolo contendere within a year before the trial to a misdemeanor of obstructing or opposing an officer would not have caused him to strike her because she fit the profile of people they were looking for and typically the prosecutor tries to strike people that have prior involvement with the law.** (*See* January 31, 2008, transcript, pps. 920-92 1, attached). **He further testified that even after she was arrested between the guilt and penalty phase, Mr. Hooper opposed her removal from the jury because the defense team still wanted her on the jury.** (*See* January 31, 2008, transcript, p. 921, attached).

After reviewing this portion of claim 2, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds "[g]enerally, a person is statutorily disqualified from serving on the jury if he or she is under prosecution for a crime. § 40.013(1), Fla. Stat. (1999) ('No person who is under prosecution for any crime...shall be disqualified to serve as a juror.')." *Johnston v. State*, 841 So. 2d 349, 356-57 (Fla. 2002). **However, on direct appeal, the Florida Supreme Court found the following**:

> Robinson's criminal charges were resolved prior to jury selection and the only outstanding item was payment of the fine. Although she was threatened with arrest for the failure to pay the fine, it is undisputed that this involved civil contempt charges, as opposed to criminal charges. **Robinson did not commit a criminal offense when she failed to pay her fine and, accordingly, was not statutorily disqualified from serving on the jury.**

Id. at 357. **Therefore, Ms. Robinson was not statutorily disqualified from serving on the jury**.

The Court further finds Defendant failed to present any evidence that he advised anyone on the defense trial team that he did not want Ms. Robinson on the jury. Additionally, based on Mr. Ken Littman's testimony, the fact that Ms. Robinson had pled nolo contendere within a year before the trial to a misdemeanor of obstructing or opposing an officer would not have caused him to strike her because she was a young, African-American female who fit the young, minority juror profile recommended by Dr. Harvey Moore, the individual who conducted the mock trial. (*See* State's exhibit #2, attached). The Court also finds further support in Mr. Littman's statement because even after she was arrested between the guilt and penalty phases, the defense team still wanted her to remain on the jury for the penalty phase. Therefore, the Court finds Defendant failed to demonstrate how he was prejudiced by counsel's alleged failure to question Ms. Robinson about her responses on the juror questionnaire. As such, no relief is warranted upon this portion of claim 2.

With respect to counsel's failure to include the claim of Robinson's deliberate failure to disclose in the post-trial amended motion for new trial, Defendant alleges that trial counsel's amended motion for new trial included only two grounds: 1) that Robinson was under prosecution during the time she served as a juror and 2) that Robinson could have been abusing drugs during the guilt phase proceedings. Defendant alleges trial counsel failed to request a new trial based upon juror Robinson's deliberate failure to disclose that she pled *nolo contendere* to a misdemeanor charge within the past year. Defendant further alleges juror Robinson's deliberate failure to disclose her record, if properly presented by trial counsel, was a legal ground that would have earned Defendant a new trial, either by the granting of the motion by the trial court or by the Florida Supreme Court on direct appeal by reason of reversible error.

At the January 30, 2008, evidentiary hearing, Mr. Hooper testified that it is possible that Ken Littman told him that juror Robinson had been arrested in part for drug charges. (*See* January 30, 2008, transcript, p. 538, attached). The State introduced and the Court admitted into evidence, State's exhibit #5A which was Defendant's motion for judgment of acquittal and motion for new trial and **Defendant's amended motion for judgment of acquittal and motion for new trial, which contained Mr. Hooper's signature, and alleged the trial court erred in dismissing juror Tracey Robinson from the penalty phase because she was not convicted of the felony.** (*See* January 30, 2008, transcript, pps. 542-543, attached). Mr. Hooper admitted that he did not include in either the original motion or amended motion a claim that juror Robinson had deceived the Court during voir dire. (*See* January 30, 2008, transcript, pps. 546-547, attached).

Mr. Hooper testified regarding this claim, and when asked why he failed to raise that specific issue within the original motion or amended motion, Mr. Hooper responded as follows:

> HOOPER: Yes. No. 1, I was - - I didn't conduct voir dire. I wasn't at voir dire. I don't know if the question was even ever asked of her during voir dire, so I don't know if she responded truthfully or not. I mean, it's possible that no one even asked her. So I didn't have that information at the time of these motions.
>
> HENDRY: Okay.
>
> HOOPER: Like I said, I'm still trying to recall why I filed them as opposed to Mr. Littman unless he had left the office in the interim. I don't know.

(*See* January 30, 2008, transcript, p. 547, attached).

Mr. Registrato also testified, and admitted that Mr. Gerod Hooper's signature was on the motion for judgment of acquittal or motion for new trial and the

amended motion for judgment of acquittal or motion for new trial (State's exhibit #5A). (*See* January 31, 2008, transcript, pps. 730-731, State's exhibit #5A, attached). When asked why Mr. Hooper filed them as opposed to he or Ken Littman, Mr. Registrato gave the following explanation:

> REGISTRATO: Well, you got to understand the public defender's office, it's a — basically it's a team - - it's a team effort. Hooper - - Mr. Hooper was an attorney who worked on many cases with me and other people; and it doesn't surprise me at all that he would have signed these motions, and that he - - that he did these. I mean, that's perfectly normal course of events for people who work together. **Mr. Hooper may very well have contributed on this case in other ways. Mr. Hooper was the chief investigator. As well as being an attorney with the office, he was the chief investigator. So he worked on a lot of cases in that capacity. And it doesn't surprise me at all that he signed these motions.**

(*See* January 31, 2008, transcript, p. 731, attached). However, he testified although he may have assisted in these motions, he does not remember doing so. (*See* January 31, 2008, transcript, p. 731, attached).

When asked why the motions failed to address the specific issue of juror Tracey Robinson's deliberate failure to disclose her criminal history, he responded as follows:

> REGISTRATO: As an independent recollection, I do not remember that. But in reading this motion, it says the defense discovered that the foreperson was under prosecution and it's raising the issue of this woman's - - the problem we had with this woman. So it looks like it was raised to me, but I don't have an independent recollection of it. But it looks to me like it was raised. The record would - - the record would surely indicate what steps we took and what steps the Court deemed, you know,

proper as to the - - as to this juror.

(*See* January 31, 2008, transcript, p.733, attached). He further testified that he did not remember having any discussion with any members of the trial team about her deliberate failure to disclose her criminal history should be raised as a separate issue in the motions. (*See* January 31, 2008, transcript, p. 735. attached). **During the trial, Judge Allen, during pages 1687 and 1688 of the trial transcript, admitted as State's exhibit #5, indicated that she was going to remove juror Tracey Robinson and the defense objected.** (*See* January 31, 2008, transcript, pps. 778-781. State's exhibit #5, attached).

At the evidentiary hearing, Mr. Kenneth Littman admitted to recognizing the motion for judgment of acquittal or new trial and amended motion for judgment of acquittal or new trial filed by Gerod Hooper. (*See* January 31, 2008, transcript, pps. 825-826, attached). He testified the reason his name was not on the pleadings was because he was working as an Assistant Public Defender in Palm Beach County, came to Tampa just to try the case, and was back in Palm Beach County at the time the pleadings were filed. (*See* January 31, 2008, transcript, pps. 848-849, attached). He testified he did not independently recall consulting with Mr. Hooper on the motions. (*See* January 31, 2008, transcript, p. 849, attached). He further testified he could not offer any reason why the motions failed to raise juror Robinson's deliberate failure to disclose her criminal history because he did not write the motions. (*See* January 31, 2008, transcript, p. 850, attached). Additionally, he testified at the time of voir dire, he did not believe they knew juror Robinson had an active case. (*See* January 31, 2008, transcript, p. 856, attached). Subsequently. Mr. Littman was given the following inquiry and gave the following response:

> HENDRY: I want you to assume that she was the jury foreperson. And I want you to **assume that she was under active capias status. And I want to ask you that question, might that cause you a concern as defense counsel?**

LITTMAN: **No. It would concern me if I was the prosecutor. It wouldn't concern me as defense counsel.**

HENDRY: **Might you - - might you have a concern as defense counsel that this potential juror might try to curry favor with the prosecutor due to her own criminal case?**

LITTMAN: **No.**

(*See* January 31, 2008, transcript, pps. 856-857, attached). **He further testified such would not have disqualified her from jury duty.** (*See* January 31, 2008, transcript, pps. 857-858, attached).

After reviewing this portion of claim 2, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds as previously discussed, Ms. Robinson was not statutorily disqualified from serving on the jury. *See* § 40.013(1), Fla. Stat. (1999); *see also Johnston*, 841 So. 2d at 357. The Court further finds Defendant failed to present any evidence that he advised anyone on the defense trial team that he wanted to request a new trial based on juror Robinson's deliberate failure to disclose that she pled *nolo contendere* to a misdemeanor charge within the past year. The Court finds Ms. Robinson did not deliberately lie about the existence of the prior misdemeanor, but failed to disclose such information. However, the Court finds the failure to disclose such information was not material to the extent of warranting a new trial.**

Additionally, based on Mr. Ken Littman's testimony, the fact that Ms. Robinson had pled *nolo contendere* within a year before the trial to a misdemeanor of obstructing or opposing an officer was not something the defense would have raised in the

> **motions because she was a young, African-American female who fit the young, minority juror profile recommended by Dr. Harvey Moore, the individual who conducted the mock trial. The Court also finds after she was arrested between the guilt and penalty phases, the defense team still wanted her to remain on the jury for the penalty phase. Therefore, the Court finds Defendant failed to demonstrate how he was prejudiced by counsel's alleged failure to include in the motions juror Robinson's alleged deliberate failure to disclose that she pled *nolo contendere* to a misdemeanor charge within the past year as such information was not material to the extent of warranting a new trial**. As such, no relief is warranted upon this portion of claim 2.
>
> (PCR V16/3107-3115, e.s.)

In reviewing this IAC/guilt phase claim under *Strickland*, this Court employs a mixed standard of review, deferring to the post-conviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004). The trial court's order is supported by competent substantial evidence and should be affirmed for the following reasons.

Again, to the extent Johnston attempts to resurrect his direct appeal claim of juror non-disclosure/misconduct, this claim is procedurally barred. *See Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008); *Pooler v. State*, 980 So. 2d 460, 472 (Fla. 2008) (applying procedural bar and further noting that Pooler did not state a *prima facie* case of jury misconduct) *Id*. at 472, citing *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001), and

stating ("[J]uror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding [ ]."). Without more than what was pled, this claim is nothing more than an impermissible fishing expedition after a guilty verdict has been returned. *See Griffin v. State*, 866 So. 2d 1, 20 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000).

Johnston's IAC claim is based, in part, on speculation regarding Ms. Robinson's *assumed* knowledge of a capias in her misdemeanor case. Such speculation is insufficient to support Johnston's IAC/guilt phase claim. First of all, this Court repeatedly has held that "[r]elief on ineffective assistance of counsel claims must be based on more than speculation and conjecture." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Second, as this Court found on direct appeal, Robinson's failure to pay her misdemeanor court costs meant only that she faced the possibility of *civil contempt;* she was not statutorily disqualified from jury service. *See* § 40.013(1), Fla. Stat. (1999); *Johnston*, 841 So. 2d at 357-358. Third, because this Court has already held that Robinson was not disqualified from jury service, Johnston's derivative IAC complaint is without

merit. *See Willacy v. State*, 967 So. 2d 131, 140 n.9 (Fla. 2007) (because this Court previously determined that a juror who entered PTI program was not "under prosecution" during trial, claim that trial counsel was ineffective for failing to object to juror's alleged "ineligibility" to serve was also without merit).

Fourth, and most notably, the fact that Ms. Robinson had pled *nolo contendere* within a year before the trial to a misdemeanor of obstructing or opposing an officer would not have caused the defense to strike her *because she fit the profile of people they were looking for and typically the prosecutor tries to strike people that have prior involvement with the law*. (PCR V16/3109; 3110; 3115; PCR V59/1487-1488; 1492). Even after Juror Robinson was arrested (between the guilt and penalty phases), the defense opposed her removal from the jury. Thus, as a matter of trial strategy, the defense team still wanted to keep Tracy Robinson on the jury panel. In addition, as the State previously emphasized on direct appeal, one factor in determining whether the withheld information was sufficiently material is whether the defendant would have exercised a peremptory challenge at the time of trial. At trial, the defense argued that Judge Allen erred in dismissing Juror Robinson. (DAR V5/778-786). In post-conviction, attorney Littman confirmed that Robinson's misdemeanor plea would not have caused the defense to strike

Robinson because Robinson fit the profile of the defense-preferred juror and the State is the party who typically tries to strike those individuals with a prior involvement with law enforcement. (PCR V59/1487; 1491-1492). Attorney Littman informed Johnston, prior to trial, of the mock jury trial results and the recommended strategy of seeking a young and minority jury. (PCR V59/1487-1488). Juror Tracy Robinson was a young African-American woman; therefore, she fit the profile of a defense-preferred juror, as recommended by their mock trial specialist, Dr. Harvey Moore. (PCR V59/1491-1492). Any juror that the defendant did not like was stricken; and, even after Robinson was arrested, the defense still wanted to keep Robinson on the jury panel. *Id*.

Fifth, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004). Moreover, in this case, the "reasonableness of trial counsel's course of action is further underscored by his experience." *Fennie v. State*, 855 So. 2d 597, 603 (Fla. 2003). Guilt phase counsel Littman's prior experience in criminal law is considerable. Attorney Littman earned his J.D. and his LL.M. in criminal justice from New York University in the 1970's. (PCR

V59/1464). Before coming to Florida, Littman worked as a prosecutor in New York; and, in addition to numerous felony trials, he'd also prosecuted to verdict more than a hundred murder cases. (PCR V59/1465-1466). Before representing Johnston in the late 1990's, Littman had been with the Public Defender's Office for three years and served as defense counsel at approximately 45 felony trials. (PCR V59/1466). Thus, trial counsel, with 20+ years of experience in criminal law at the time of trial, strategically did not want Robinson removed from the jury panel. Trial counsel's strategic decision is unassailable under *Strickland*.

Sixth, Johnston failed to show that he was not accorded a fair and impartial jury or that his substantive rights were prejudiced by Ms. Robinson's service. Instead, in CCRC's view, there could have been grounds to challenge juror Robinson and CCRC would have exercised a challenge to juror Robinson. This is a classic case of impermissible second-guessing. Under *Strickland*, this Court's review must be highly deferential and not second-guess judgments made by counsel. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2073 (1984). Trial counsel cannot be deemed ineffective merely because collateral counsel disagrees with trial counsel's strategy. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Moreover,

any alleged basis for an alleged cause challenge, based on Ms. Robinson's misdemeanor plea and capias, was rejected on direct appeal and Johnston has not alleged, nor demonstrated, any actual bias. *See Lugo v. State,* 2 So. 3d 1, 13 (Fla. 2008), citing *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) ("[W]here a post-conviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased."). In addition, even showing that trial counsel might have wanted to use a peremptory challenge at the time of trial, which is NOT a factor in this case, would not show that the defendant was deprived of a fair and impartial jury because the denial of a peremptory challenge does not give rise to a claim that the jury was not impartial. *See Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273 (1988).

Seventh, Juror Robinson's undisclosed information was not material in this case and the defense did not exercise diligence in attempting to discover the information. This Court has made it clear that not all failures to disclose information in *voir dire* are material. Instead, the focus is on whether the information was material to the juror service in the particular case at hand. *Roberts v. Tejada*, 814 So. 2d 334, 341-42 (Fla. 2002). In light of the inconsequential nature of the undisclosed

information and the contemporaneous defense strategy, any claim of entitlement to a new trial could not be "earned," as Johnston asserts, under *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995) and its progeny. Johnston's renewed argument, based on *De La Rosa and its progeny*, was raised on direct appeal and, therefore, is procedurally barred in post-conviction. Furthermore, as argued on direct appeal, a juror's answer cannot constitute deliberate concealment where counsel does not inquire further to clarify any ambiguity relating to the information sought.

Lastly, even if Johnston could arguably demonstrate a deficiency of counsel, which the State emphatically disputes, Johnston has not demonstrated any resulting prejudice under *Strickland*, *i.e.,* that any juror was actually biased and that the unanimous verdict would have been different. *See Barnhill v. State*, 971 So. 2d 106, 114 (Fla. 2007) (defendant failed to allege or demonstrate that any of the jurors who sat were prejudiced as a result of any action or inaction by counsel during *voir dire*); *Cox v. State*, 966 So. 2d 337, 349 (Fla. 2007) (IAC claims insufficient where the defendant failed to allege how he was prejudiced by allegedly incomplete *voir dire*). The trial court correctly denied this IAC/guilt phase claim.

Lastly, Johnston renews his previously-denied request for a juror interview and he cites to the *direct appeal* decision in

Massey v. State, 760 So. 2d 956 (Fla. 3d DCA 2000). On direct appeal in this case, this Court affirmed the trial court's denial of Johnston's speculative request for the juror interview and *Massey* does not establish any authority for reconsideration of this successive request in post-conviction. Here, as in *Willacy,* the defendant's underlying juror eligibility claim is both procedurally barred and without merit. On direct appeal, this Court ruled:

> **Finally, the defendant asserts that he is entitled to a new trial, or at a minimum, a juror interview, to determine whether juror Robinson abused drugs during the guilt phase of the trial. Specifically, he contends that based on the addictive nature of crack cocaine and the timing of Robinson's arrest for drug possession, she may have been under the influence of illegal substances during the guilt phase.** In order to be entitled to juror interviews, a party must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State*, 804 So.2d 1218, 1225 (Fla.2001). **In this case, Johnston is not entitled to relief because his request for an interview was based on mere speculation. [FN10] Johnston never alleged that any juror, party, or witness observed Robinson appearing to be intoxicated during the course of the trial, nor did anybody see Robinson abusing drugs. Accordingly, the trial court did not err in its decision to deny the motion to interview Robinson.**

Johnston, 841 So. 2d at 357-358 (e.s.)

Rule 3.575, Florida Rules of Criminal Procedure, which became effective in January 2005, establishes the procedure for

seeking juror interviews *at the time of trial*, where a party has reason to believe that the verdict may be subject to legal challenge. *Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008). In post-conviction, Johnston invoked Rule 3.575 as a basis to renew his motion to interview juror Robinson. In response, the State asserted, *inter alia*, that Johnston's motion was successive, untimely and procedurally barred. Furthermore, Johnston's reliance on Rule 3.575 is misplaced because (1) a Rule 3.575 motion is a trial motion which, absent a showing of good cause, must be filed within 10 days after rendition of the verdict and, therefore, is time-barred, *See Belcher v. State*, 9 So. 3d 665 (Fla. 1st DCA 2009); (2) inasmuch as Rule 3.575 authorizes the filing of a juror-interview motion at the time of trial, a Rule 3.575 motion is procedurally barred in post-conviction, *See Israel*, *supra*; *Suggs v. State*, 923 So. 2d 419, 440 (Fla. 2005), *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); (3) Rule 3.575 has not been declared retroactively applicable in post-conviction; (4) Rule 3.575 does not authorize reconsideration of a juror-interview claim which was raised, and rejected, on direct appeal, and, therefore, is successive and procedurally barred; (5) Johnston's Rule 3.575 motion, even if arguably cognizable in post-conviction (which the State strongly disputes) is untimely under both Rule 3.575 and Rule 3.851(d)(2), Florida Rules of

Criminal Procedure; and (6) Johnston's grounds for a juror interview were in reality, a renewed attempt to resurrect the same facially insufficient juror-interview claim denied by the trial judge in 1999 and rejected by this Court in 2002.

During the post-conviction hearing held on September 13, 2006, the trial court addressed Johnston's successive request for a juror interview and reviewed, in court, both the record excerpt wherein the predecessor trial judge, the Honorable Diana Allen, denied Johnston's post-trial motion to interview Juror Tracy Robinson (SC00-979, DAR V21/2232-2242), and this Court's opinion on direct appeal, *Johnston v. State*, 841 So. 2d 349 (Fla. 2002). Based on this Court's decision on direct appeal and what transpired at trial, the trial court denied Johnston's successive motion to interview Juror Tracy Robinson. (PCR V48/387-389). In *Suggs v. State*, 923 So. 2d 419, 440 (Fla. 2005), this Court affirmed the denial of the defendant's post-conviction juror interview claim as procedurally barred and without merit and stated:

> . . . Moreover, the rule provides a mechanism for defendants to interview jurors when there are good faith grounds for a challenge. **Before an attorney will be allowed to interview any member of the jury, the moving party must make sworn allegations that, if true, would require a new trial.** [*Johnson v. State*, 804 So.2d 1218, at 1225 (Fla. 2001)]. Suggs has neither filed a motion requesting permission to interview jurors, alleged any specific juror misconduct, nor submitted

> any sworn statements in this regard. **His claim appears to be nothing more than a request to investigate possible grounds for finding juror misconduct**. *See 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).
>
> *Suggs*, 923 So. 2d at 440 (e.s.)

In this case, Johnston's renewed request for a juror interview, which was denied at trial, denied on direct appeal, and reasserted under the guise of Rule 3.575, was correctly denied in post-conviction, again. The trial court's comprehensive and fact-specific order should be affirmed.

ISSUE II

THE IAC/GUILT PHASE CLAIM
(Failure to Seek Suppression of Johnston's volunteered statements to law enforcement)

In this issue, Johnston first asserts a procedurally-barred claim under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Johnston's *Miranda* claim is one which could have been raised at trial and on direct appeal; therefore, it is procedurally barred in post-conviction. *Johnson v. State*, 921 So. 2d 490, 505 (Fla. 2005) (ruling suppression of confession claim, based on *Miranda,* procedurally barred in post-conviction).

As to the IAC claim based on trial counsel's failure to seek suppression of Johnston's statements, based on an alleged violation of *Miranda*, the lower court found, *inter alia*, that Johnston was not in custody for purposes of *Miranda*.[2] Therefore,

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[2] As this Court noted on direct appeal, *Johnston,* 841 So. 2d at 352-353, Johnston initiated contact with law enforcement and volunteered his self-serving version of events:

> **Johnston saw his picture on television and volunteered to give a statement in which he initially told police that he was a friend of Coryell and that they had gone out to dinner a few times**. He told Detective Walters that on the evening of the 19th, he had met Coryell at Malio's for drinks at 6:15 p.m. The pair then went to Carrabba's and left around 8:30 or 9:00. According to Johnston, the victim indicated that she needed to stop at a grocery store before she went home, but before they parted, the victim gave Johnston her ATM card and PIN so that he could withdraw $1200 in repayment of a loan she had obtained from him. When he

Johnston failed to demonstrate any deficiency of counsel in failing to file a motion to suppress which would have been meritless. Moreover, trial counsel did not want the statements suppressed because it enabled the defense to rely on Johnston's exculpatory explanation for possession of the victim's ATM card without subjecting Johnston to cross-examination and disclosure of his felony convictions during the guilt phase.

In denying this post-conviction IAC claim, the trial court set forth an extensive fact-intensive analysis (PCR V16/3209-V17/3236) and ultimately concluded, in pertinent part:

> arrived home, he changed, went jogging, and then withdrew $500 from her account. He withdrew another $500 the following day.
>
> **Johnston was placed under arrest for grand theft, was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and agreed to continue the interview.** The detective confronted Johnston with the fact that Coryell did not leave work until 8:38. Johnston's response was that other employees must have covered for her because he was with her at that time, but he was unable to provide the names of anybody who could corroborate this explanation. The detective then told Johnston that they had found his jogging shoes, which were completely wet. Johnston justified the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off after his run. The detective asked several times whether Johnston was involved with Coryell's death and Johnston responded by saying that they would not find any DNA evidence, hair, or saliva which would link him to the victim.
>
> *Johnston,* 841 So. 2d at 352-353 (e.s.)

* * *

After reviewing claim 11, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds "*Miranda* warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation." *Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997). "Absent one or the other, *Miranda* warnings are not required." *Id***. Moreover, **the Court finds the single fact that law enforcement had a warrant for Defendant's arrest at the time he arrived at the station does not automatically demonstrate that Defendant was in custody**. *Id*. ("Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody."). The Court finds "there must exist a 'restraint on freedom of movement of the degree associated with a formal arrest." *Id*; *see also Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985).

Moreover, the Court finds the testimony of Detective Iverson to be credible. Therefore, the Court finds Defendant was free to leave up until Detective Iverson realized that Defendant's time frames when he was with Coryell were inconsistent with what co-workers were saying she was at work, and when Detective Iverson realized the inconsistency in his time frames, he advised Defendant he was under arrest and gave him his *Miranda* warnings. The Court further finds if Defendant would have given Detective Iverson a plausible explanation for why he was on video using Ms. Coryell's ATM card, it would not have been necessary for Detective Iverson to make an arrest at that time. The Court finds post-*Miranda* he talked to Defendant about searching his vehicle and Defendant signed the consent form to search the vehicle and handed over the keys.

Additionally, the Court finds Defendant initiated contact with law enforcement, drove himself to the Sheriff's office, was sitting in a chair in the lobby without law enforcement personnel around him, was wearing a suit and his chamber of commerce pin, and was not handcuffed or restrained physically in the lobby. The Court also finds as Detective Walters, Detective Iverson, and Defendant walked to the interview room, Defendant initiated small talk about his golf game, and neither Detective Walters or himself laid a hand on Defendant, raised their voice towards Defendant, made any type of threatening or menacing gesture towards Defendant, or were confrontational with Defendant either verbally or physically prior to advising Defendant he was under arrest. The Court further finds that at no time prior to *Miranda* did Defendant ever indicate to Detective Iverson in words or substance that he did not want to talk anymore and wanted to leave, and prior to his arrest, Defendant's freedom of movement was not restrained in any way as Defendant could have exited the side door by merely pushing the push bar and it would open.

Moreover, the Court finds, by Defendant's own admission, he called the sheriff's office and advised Lieutenant Caimano that he wanted to talk to the detective on the case. The Court further finds when Defendant arrived at the building, he was buzzed in and patted down for weapons. The Court also finds Defendant gave permission for Lieutenant Caimano to search his briefcase and a search for weapons was conducted. The Court finds once Detectives Iverson and Walters arrived, they escorted Defendant to a room where they shut the door. The Court also finds that although Defendant testified that he did not know if the door was locked, he testified he felt like he could not leave. However, when asked at what point he felt that he was not going to be able to leave the police station, Defendant replied, "That's hard to say. I think I knew before I even went there I wouldn't be able to leave." (*See* January 30, 2008, transcript, p. 684, attached). Therefore, the Court finds although Defendant voluntarily went to the station, he had a preconceived notion that he was going to be arrested

prior to entering the station. However, **Defendant admitted that prior to *Miranda* being read to him, the detectives were courteous to him, never did anything physically threatening or intimidating to him, and never raised their voice to him. The Court further finds after Defendant admitted to using the ATM card, he was arrested. However, the Court finds that prior to such admission, Defendant was not in custody for purposes of *Miranda*.**

Based on Detective Ernest Walters' deposition to perpetuate testimony (State's exhibit #68), **the Court finds when he met with Defendant, Defendant voluntarily went with him into the interview room and did not indicate to him that he did want to speak with him or that he wanted an attorney present.** (*See* trial transcript, p. 554, State's exhibit #6B, attached). **The Court further finds Detective Walters did not promise Defendant anything to go back and speak with him.** (*See* trial transcript, p. 554, attached). **The Court also finds it was not until Defendant admitted to using Ms. Coryell's ATM card that he was arrested, and then read his *Miranda* rights.** (*See* trial transcript, pps. 56 1-562, attached).

Additionally, the Court finds that prior to his arrest, Defendant did not indicate to Detective Walters that he wanted to terminate the interview, did not indicate any hesitancy in speaking with Detective Walters, did not appear to be intoxicated, appeared to understand the questions being asked of him, appeared to understand who Detective Walters was and where he was, and did not at any time ask to speak with an attorney regarding the situation. (*See* trial transcript, pps. 562-563, attached). **The Court further finds, based on Detective Walters' testimony, Defendant indicated that he understood the *Miranda* rights as they were being read to him, and agreed to speak with him and Detective Iverson.** (*See* trial transcript, pps. 563-566, attached).

Furthermore, the Court finds Mr. Littman to be credible. Therefore, the Court finds although he

considered filing a motion to suppress those statements, because he was familiar with the law on suppressing statements, he concluded that he did not want his statements suppressed. The Court further finds the statements Defendant made to law enforcement prior to being given his *Miranda* rights were denials of guilt and he never incriminated himself in Ms. Coryell's death. The Court further finds with respect to the discrepancy between the time Defendant alleged to have had dinner with Ms. Coryell and the time she punched out of work at the dental office, Mr. Littman admitted that he would want to exclude any evidence which could show Defendant had made a false statement, but asserted there was no legal basis for suppressing his statements in addition to the fact that Defendant made those statements before he was arrested. The Court further finds Mr. Littman was a very experienced criminal attorney who based on the version of events relayed to him by Defendant and depositions taken by he and Ms. Goins concluded Defendant was not under custodial interrogation at the time he made the statements to law enforcement. The Court also finds that if Mr. Littman had somehow successfully prevented admission of Defendant's statements to law enforcement as evidence at trial, the jury would have been left with the fact that Defendant was on video using the victim's ATM card in close proximity to the time of her death, which would have left the jury to infer that the only way he could have obtained the victim's ATM card was he obtained it at the time of and as a result of Ms. Coryell's murder. Consequently, the Court finds Mr. Littman wanted his statements to law enforcement to come in so the jury would have a lawful and rational reason for Defendant having possession and use of her ATM card, evidence the State intended to present to the jury.

Additionally, the Court finds Defendant never advised Mr. Littman that when he arrived at the sheriff's office on the night in question that sheriff personnel took his car keys from him, that they made him remove his jewelry, empty his pockets, took his wallet, and put all that stuff in his briefcase. The

Court further finds at the time Mr. Littman made the decision not to file a motion to suppress, there was no fact before him that Defendant was in custody or that his freedom was restrained in any fashion at the time Defendant gave his statement and, therefore, he did not believe he had a valid basis to file a motion to suppress.

The Court also finds former Hillsborough County Sheriff detective Jim Caimano (currently FBI agent) to be credible. Therefore, the Court finds although Agent Caimano patted Defendant down for officer safety, he did not take any of Defendant's personal items such as briefcase, wallet, keys, or money for the entire time Defendant was there. The Court further finds Defendant did not indicate to Agent Caimano that he wanted to leave the criminal investigations division, nor did Agent Caimano conduct any questioning of Defendant before the arrival of Detectives Iverson and Walters. The Court also finds although Agent Caimano did not tell Defendant he was free to leave, Defendant was free to leave the Sheriff's Office after he entered the Sheriff's Office, and if Defendant asked him to leave, he would have conferred with the on-scene supervisors and called the detectives saying that Defendant wanted to leave.

Moreover, the Court finds Agent Caimano's contact with Defendant was in no way different than that of a citizen not involved in this case and who had appeared at 1:30 in the morning, including that a citizen unrelated to the Coryell case would not have been allowed to roam freely throughout the entirety of the offices. Consequently, the Court finds Defendant was treated as a normal citizen unrelated to the Coryell case would have been treated.

The Court also finds Detective Tony Shepherd's testimony to be credible. Therefore, the Court finds on August 21, 1997, Detective Shepherd did not at any time search Defendant, nor did he take from him any personal items, including his wallet, keys, money, or briefcase, nor did he witness anybody else take any items from Defendant.

> **In conclusion, the Court finds Defendant was not in custody for the purposes of *Miranda*. Therefore, the Court finds Defendant failed to demonstrate how counsel acted deficiently in failing to file the alleged motion to suppress when Defendant was not in custody for purposes of *Miranda*. The Court further finds Defendant failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as the alleged motion to suppress would have been meritless. As such, no relief is warranted upon claim 11.**
>
> (PCR V16/3231 - V17/3236, e.s.)

The trial court's comprehensive fact-specific order is supported by competent, substantial evidence and should be affirmed for the following reasons.

Trial counsel cannot be deemed deficient under *Strickland* for failing to file a motion to suppress which is without merit. In this case, the deputies were not required to give *Miranda* warnings to Johnston when he voluntarily came to the CID division and offered his self-serving explanations. Johnston was not "in custody" simply because questioning took place at the Sheriff's office. *See California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711 (1977). And, whether a suspect was in custody depends on the objective circumstances, not on subjective views of the defendant. *See Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526 (1994); *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004).

At trial, the State presented evidence that Johnston was interviewed by Detective Ernest Walters just after 2:00 a.m. on August 21, 1997; Detective Iverson was also present. (DAR V9/553; V11/757-58). Johnston was not under arrest. Johnston, acting on his own, went to the Sheriff's Office after his photograph had been televised; Johnston wanted to explain the situation. (DAR V9/955; V10/592-93; 603; V11/767). According to Johnston, on August 19th, at about 6:15 p.m., they met at Malio's, had a drink and decided to go to Carrabba's for dinner. They arrived at Carrabba's, in separate cars, around 7:30 or 7:45, and left between 8:30 and 9:00 p.m. Johnston said that he was going to go for a run, and Ms. Coryell was going to shop for groceries. (DAR V9/557-59; V10/607-09; V11/759). When they separated at Carrabba's, Ms. Coryell gave Johnston her ATM card and PIN number to repay $1200 which he had loaned her. (DAR V9/559-60). Johnston went home, changed his clothes, and went for his run. When he returned to his apartment, Johnston had a disagreement with his roommate, Gary, over rent and cable TV payments. (DAR V9/56-61; 573-74; DAR V10/585-86; 613). Johnston said he took a shower, went to Taco Bell, then to Barnett Bank, where he found that the ATM wasn't working, and then to Nations Bank, where he withdrew $500 in cash. (DAR V9/560-61; DAR V10/586; 613-14). At this point, Johnston was placed under

arrest for grand theft and read his *Miranda* rights. Johnston indicated that he understood his rights and agreed to continue speaking with the officers. (DAR V9/562-66; DAR V11/770-71).

Johnston went to the sheriff's station on his own and volunteered his self-serving version of events. The officers were not required to refuse Johnston's calls and volunteered statements. They did not seize Johnston, or take Johnston into custody, or place him under arrest, or handcuff him, or place him in a locked cell, or threaten him in any way. Moreover, the issuance of an arrest warrant for grand theft did not support Johnston's IAC complaint. As this Court emphasized in *Davis v. State*, 698 So. 2d 1182 (Fla. 1997),

> *Miranda* warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation. Absent one or the other, *Miranda* warnings are not required. *Alston v. Redman*, 34 F.3d 1237, 1243 (3d Cir. 1994) (citing *Miranda,* 384 U.S. at 477-78); *Sapp v. State*, 690 So. 2d 581 (Fla. 1997); see also *Rhode Island v. Innis*, 446 U.S. 291, 300, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980) ("It is clear that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."). Although custody encompasses more than simply formal arrest, **the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody.** Rather, there must exist a "restraint on freedom of movement of the degree associated with a formal arrest." *Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985). . .

Davis, 698 So. 2d at 1188 (e.s.)

Johnston failed to show that any motion to suppress his statements would have been meritorious and that trial counsel's actions were not the result of reasonable professional judgment. To the contrary, as trial counsel confirmed in post-conviction, there was no legal basis for suppressing the defendant's exculpatory statements (PCR V59/1405-1406; 1412-1413); Johnston was not in custody at the time he made the statements. (PCR V59/1410; 1412-1414). Moreover, defense counsel wanted to use Johnston's denials of guilt and volunteered statements because they enabled the defense to rebut the presumption of possession of recently stolen property and present Johnston's exculpatory version of events without "opening the door" to Johnston's prior convictions. (PCR V59/1473-1476). Trial counsel's strategic decision at the time of trial is unassailable under *Strickland*.

Even if Johnston could arguably establish any deficiency of counsel in failing to seek suppression of Johnston's volunteered statements, which the State emphatically disputes, he cannot demonstrate any resulting prejudice under *Strickland*. *See Bruno v. State*, 807 So. 2d 55, 65 (Fla. 2001) ("Bruno has failed to demonstrate that there is a reasonable probability that, but for the admission of his exculpatory statement, the verdict would have been different.")

At trial, the State also introduced videotapes of two news broadcasts in which Johnston spoke with reporters by telephone from the jail. (DAR V12/965-968; 978; 957-58). During these broadcasts, Johnston essentially repeated his earlier volunteered statements to law enforcement. According to Johnston, he and Leanne Coryell were friends, and she had given him her ATM card and PIN number to withdraw money to repay a loan. (DAR V12/966,978). According to Johnston, he was supposed to meet her the next day at Malio's; and when he got there, he learned of her death, and some people said that they'd seen his picture on TV. Johnston left, drove around, and then called the Sheriff's department and went there on his own. (DAR V12/966-67). Therefore, Johnston's same volunteered explanations were obtained from an *independent source* unrelated to any alleged *Miranda* violation and would have been, and were, *inevitably* discovered.

To the extent that Johnston attempts to substantively challenge both his pre-arrest statements *and* his post-arrest statements, as allegedly inadmissible under *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004), any such claim is procedurally barred. And, even if *Seibert* arguably applied, which it does not, under *Seibert*, "the two-step interrogation technique [must be] used in a calculated way to undermine the *Miranda* warning." 542 U.S. at 62. In *Davis v. State*, 990 So. 2d

459, 465 (Fla. 2008), this Court noted that in *Seibert*, the plurality held that when an officer intentionally questioned a suspect without giving *Miranda* warnings in order to elicit an unwarned confession and then used that unwarned confession to elicit a second warned confession, *Miranda* was violated. Because this is not such a case, Johnston's volunteered statements to law enforcement could not qualify for any relief under *Seibert*. *See Seibert*, 542 U.S. at 622. Furthermore, Johnston has not established that *Seibert* is retroactive. *See Davis*, 990 So. 2d at 466, fn. 9; *Davis v. Secretary Dept. of Corrections*, 2009 WL 3336043 (M.D. Fla. 2009) (noting that "*Seibert* is not subject to retroactive application under *Teague*"); *Young v. State*, 942 So. 2d 980 (Fla. 4th DCA 2006) ("*Seibert* is an application of the *Miranda* decision, not the establishment of a fundamental constitutional right which has been held to apply retroactively.")

Johnston's volunteered statements were not taken in violation of *Miranda*, the defense relied on Johnston's exculpatory statements to explain his possession of the victim's ATM card, and Johnston's statements to law enforcement were cumulative to his taped statements to the press. The trial court correctly denied this IAC claim.

ISSUE III

THE ADDITIONAL IAC/GUILT PHASE AND PENALTY PHASE CLAIMS DENIED AFTER THE MULTI-DAY EVIDENTIARY HEARINGS

Next, Johnston repeats five of the IAC sub-claims which were denied after several days of evidentiary hearings. For the following reasons, the trial court's in-depth order denying these IAC sub-claims should be affirmed.

Failure to Call Diane Busch[3]

Johnston alleges that trial counsel was ineffective in failing to call Diane Busch during the guilt phase and the penalty phase. During the guilt phase, in response to Johnston's claim that he had loaned money to Leanne Coryell, the State introduced several witnesses who testified that near the time of the murder, Johnston did not have the financial ability to make a $1200 loan. *Johnston*, 841 So. 2d at 353. Johnston asserts that Ms. Busch "refuted the notion" that Johnston "was in desperate need of money at the time of Ms. Coryell's murder." *Initial Brief of Appellant* at 54. Johnston also asserts that Diane Busch should have been called during the 1999 penalty phase because,

[3] Diane Busch met Johnston in June of 1997, and she dated him for a brief period of time. Ms. Busch was hospitalized on June 17, 1997. While Ms. Busch was in the hospital, she saw something on television which indicated that law enforcement was looking for Johnston. (PCR V60/1550). Ms. Busch called the Crime-Stoppers number and Detective Taylor interviewed Ms. Busch at the hospital on August 26, 1997. Leanne Coryell was murdered on August 19,

approximately 2 1/2 years before her post-conviction testimony in 2008 (i.e., 2005 or so), Ms. Busch wrote to Johnston and thanked him for his attention to her medical care in the summer of 1997 and she now credits Johnston with saving her life during that hospitalization because he "shook people up and gave attention" to her medical needs. During that same summer of 1997, in which Diane Busch now credits Johnston for his fervent attention to her, Johnston brutally murdered Leanne Coryell.[4]

In denying this IAC sub-claim (9.2c below), based on the failure to call Diane Busch, the trial court's in-depth order (PCR V16/3156-3170) states, in pertinent part:

* * *

> When asked if she requested a favor of him involving cash, [Ms. Busch] responded as follows:
>
> > BUSCH: It was possibly the second day I was in the hospital. I know I was still on Dale Mabry University Community Hospital. I had been estranged from my husband for approximately a year-and-a-half and had some cash in the house. I asked Mr. Johnston if he would go and get that with my girlfriend. And - - and they counted it out. And I asked him if he would give that to her and she would deposit it into her bank account and that was carried out.
>
> (*See* February 1, 2008, transcript, pps. 982-983, attached). She further testified she trusted Defendant

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1997. *Johnston*, 841 So. 2d at 351.

[4]Leanne Coryell was described as a thirty-year-old, physically fit, blond-haired, attractive woman. *Johnston*, 863 So. 2d 271, 277 (Fla. 2003). Ms. Busch was also blonde, tan, 5'6" tall and she weighed approximately 135 pounds. (PCR V60/1559-1560).

to carry out that request. (*See* February 1, 2008, transcript, p. 984, attached).

Additionally, she testified while she was in the hospital, Defendant had access to her personal effects, her car, and her credit cards, but Defendant did not ever steal anything from her or ask to borrow any of the ten thousand dollars cash. (*See* February 1, 2008, transcript, pps. 984-985, attached). She testified although she was available in June of 1999 to testify and would have testified, during the years 1997 through 1999, nobody contacted her to testify. (*See* February 1, 2008, transcript, pps. 986-988, attached).

On cross-examination, she admitted that although she asked him to go with her girlfriend to get the ten thousand dollars cash, Defendant never had use or possession of that money, other than counting it. (*See* February 1, 2008, transcript, p. 995, attached). **She further admitted she had no reason to believe Defendant had access to the ten thousand dollars while it was in her girlfriend's account.** (*See* February 1, 2008, transcript, p. 996, attached). However, she testified that Defendant access to her home and he could have stayed there if he wanted to and used her credit cards that were in her purse, but he did not. (*See* February 1, 2008, transcript, p. 996, attached).

On March 7, 2008, Mr. Joseph Registrato testified he recognized Detective Taylor's summary of interviews of Diane Busch and her mother Ms. Klug as one of the many investigative reports that was in the Public Defender's Office possession during the pretrial discovery phases. (*See* March 7, 2008. transcript, pps. 1159-1160, attached). Detective Taylor's report was admitted into evidence as State's exhibit #28. (*See* March 7, 2008, transcript, p. 1160, State's exhibit #28, attached). He further testified he did not have any specific recollection from the time of trial and preparing for trial of any discussion with Mr. Littman and the trial team regarding Ms. Busch and trusting Defendant with ten thousand dollars, nor did he have any specific recollection of any discussion with Mr. Littman and the trial team regarding whether or not to call Ms. Busch either at guilt phase or penalty phase.

(*See* March 7, 2008, transcript, pps. 1180-1181, attached).

* * *

On cross-examination, Defendant testified he physically took the ten thousand dollars, counted it out on the bed, put it in a bank deposit envelope, and physically gave it to Trena. (*See* March 7, 2008, transcript, p. 1220, attached). **However, he admitted that at the time of Ms. Coryell's murder, he did not have access to the ten thousand dollars because it remained in Mr. Busch's neighbor's account**. (*See* March 7, 2008, transcript, pps. 1221-1222, attached). Defendant also confirmed the fact that the Sheriff's Office honored the fact that he had been appointed counsel and did not send a detective to interview him about Ms. Busch or any other matter relating to the Coryell homicide. (*See* March 7, 2008, transcript, p. 1231, attached).

After reviewing this portion of claim 9.2c, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds Mr. Registrato's testimony to be more credible than that of Defendant. Therefore, the Court finds Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify regarding the ten thousand dollars she entrusted with Defendant. However, even if were to find that Defendant did ask his counsel to interview and call Ms. Busch to testify during the guilt phase about the ten thousand dollars, the Court finds by Ms. Busch's own admission, other than for the purpose of counting the ten thousand dollars, Defendant never had use or possession of the money, nor did she have any reason to believe Defendant had access to it while it was in her girlfriend's account. The Court further finds by Defendant's own admission, he did not have access to the ten thousand dollars at the time of Ms. Coryell's**

murder because it remained in Ms. Busch's girlfriend's account.

Because Defendant did not have access to the ten thousand dollars at the time of Ms. Coryell's murder, the Court finds Ms. Busch's testimony would not have refuted the State's theory that Defendant murdered Ms. Coryell for pecuniary gain. Consequently, Defendant failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as Ms. Busch's testimony would not have changed the verdict. As such, no relief is warranted upon this portion of claim 9.2c.

Defendant further alleges Ms. Busch could have testified during the penalty phase in support of nonstatutory mitigation. At the evidentiary hearing, Hillsborough County Sheriff's Office Detective Caritad Taylor testified on August 26, 1997, she interviewed Diane Busch at University Community Hospital. (*See* March 6, 2008, transcript, pps. 1125-1126, attached). When asked to testify to everything Ms. Busch told her, she responded as follows:

> TAYLOR: During my interview with Ms. Busch, she did indicate that she had had a short term relationship with Mr. Johnston. And she told me that she had suffered a medical problem, during the course she was hospitalized. She also said that during that hospitalization originally she was under a lot of medication. **But as time went on, there were other issues that came up with Mr. Johnston's visits to her and that she requested that he not be permitted to enter her ICU room any longer. The nurses carried out her request.**

(*See* March 6, 2008, transcript, p. 1126, attached). When asked to read off her report, she responded:

> **TAYLOR: She stated that it wasn't until she was transferred to UCH, Fletcher and her family was with her that she realized how possessive and obsessed Johnston had been behaving towards her. She learned that he was telling everyone**

> **he was her fiancé when, in fact, they had only - - she had only known him for two weeks. She said that he was verbally abusive to her family and the nurses, but because of the medication she was under, she was not able to do a whole lot. She said that when she finally realized how out of control things were getting, she requested that Johnston not be permitted to enter her ICU room any longer. And this request was carried out by the nurses who were caring for her in ICU. She also requested they not accept any phone calls from him.**

(*See* March 6, 2008, transcript, p. 1127, attached).

On cross-examination, she testified she went to the hospital in response to a directive to respond to leads provided to the Hillsborough County Sheriff's Office. (*See* March 6, 2008, transcript, pps. 1128-1129, attached). **She testified Ms. Busch was not heavily medicated or sedated when she interviewed her as she was very clear in her conversation with her.** (*See* March 6. 2008, transcript, pps. 1129 and 1132, attached). She further testified that she interviewed Ms. Busch's mother and sister. (*See* March 6, 2008, transcript, p. 1129, attached). When asked what the mother and sister said, she responded as follows:

> TAYLOR: That she [Ms. Busch's mother] was saying that her - - I mean, I'd have to read from here to recollect what was said. She was staying at her daughter's house while she was in the hospital. She spoke up when she was originally hospitalized, she came to the hospital and met Johnston for the first time. **She was upset over his behavior, his language and his treatment of Diane and the nurses.**
>
> She said he used Diane's car the entire time that he was permitted to visit her in ICU. He left his car at Diane's house. She said that she looked inside the car because Johnston had advised that there was a tag that could be used - - to be used in the vehicle in case they

> needed it. **She looked at the vehicle but could not find the bag, instead she found a paper bag in the back seat, back passenger side which contained a pair of surgical gloves, an elastic wristband and a knife similar to a paring knife with an approximate two-inch pointed blade. She said that she also found a Barnett Bank checking account receipt that indicated that he had $24 in his account.**
>
> **She became concerned over the items that she found in the back seat and contacted the Sheriff's Office to file a report and had property impounded**, and then that number attached to my supplement indicating that she did call back in June. She said that the deputy that responded advised no crime has been committed; therefore, the call was cleared NRA, which is no report written.
>
> **She said that her other daughter, Susie Reed came in town and had demanded - - had commanded Johnston return Diane's car.** There's been no further information.

(*See* March 6, 2008, transcript, pps. 1130-1 131, attached). However, she testified she never spoke with Joseph Registrato, Kenneth Littman, or any investigators from the Public Defender's Office. (*See* March 6, 2008, transcript, pps. 1131-1132, attached). She further testified she was never deposed in Defendant's case. (*See* March 6, 2008, transcript, p. 1132, attached). When asked if Ms. Busch could have been medicated but she just might not have known, she responded, "I make it a point to ask the nurses if she is under medication that would prohibit her from giving a statement and/or she would not want me to talk to her. That's one of the first things I do is make sure that the person is able to communicate with me." (*See* March 6, 2008, transcript, p. 1133, attached).

At the February 1, 2008, evidentiary hearing, Ms. Busch testified that when she was ill, Defendant managed all of her medical care, was caring, loving,

and wanted the best possible care for a successful recovery. (*See* February 1, 2008, transcript, p. 978, attached). When asked why he advised the hospital staff that he was her fiancé, she responded, "When I was wheeled into the emergency room and had come to, Ray had bent down and whispered to me that he had told everybody that he was my fiancé so he could be back in the back in the emergency room to be with me because they would only allow family back there." (*See* February 1, 2008, transcript, p. 978, attached). **She testified she first became aware Defendant was in trouble when while she was in intensive care unit at the hospital, she saw something on the television which indicated law enforcement was looking for him.** (*See* February 1, 2008, transcript, p. 979, attached).

She then testified that she called the Crimestoppers number and a detective called her back. (*See* February 1, 2008, transcript, p. 979, attached). However, she testified that she did not recall telling anyone at the hospital that Defendant was verbally abusive to her family, nor did she ever hear Defendant being verbally abusive to her family. (*See* February 1, 2008. transcript, p. 981-982, attached). She further testified she did not recall telling anyone that she requested that Defendant not be permitted in the intensive care unit anymore or that she stopped taking his calls. (*See* February 1, 2008, transcript, p. 982, attached).

When asked if she ever attempted to contact Defendant after she recovered from her illness and resumed her life, she responded in the affirmative and further elaborated, **"Approximately two to two-and-a-half years ago, I wrote him a letter. I wanted to express my gratitude for everything that he had done in my life as far as the medical problems that I had. I felt that he had saved my life and I wanted to express that for myself as well as my children."** (*See* February 1, 2008, transcript, pps. 985-986, attached). When asked why she felt Defendant was responsible for saving her life, she responded as follows:

> BUSCH: Because nobody in the hospital would listen to the pain I was in. Nobody was doing

> anything, by the minute I was failing. And Mr. Johnston was very, very concerned and protective and listened to everything that I said, and **he was the only one that shook people up and gave attention to my needs.** And my needs were the fact my organs were shutting down and he got me to another hospital and orchestrated the doctors to coordinate what is going on, and just complete management. Without him, I would have died that fourth day.

(*See* February 1, 2008, transcript, p. 986, attached).

However, **she testified if she knew about Defendant's prior convictions and his incarceration in Florida State Prison, she would not have carried on a relationship.** (*See* February 1, 2008, transcript, pps. 989-990, attached). **She further testified he did not tell her that he was a convicted felon**. (*See* February 1, 2008, transcript, p. 990, attached). **She testified her family cut off all her contact with Defendant in June of 1997, while she was in the hospital because they had heard things about his past and did not feel they wanted him around her.** (*See* February 1, 2008, transcript, pps. 996-997, attached). She testified her family then retrieved her purse and personal belongings from Defendant. (*See* February 1, 2008, transcript, pps. 997-998, attached). However, **she testified she never went out with Defendant socially again.** (*See* February 1, 2008, transcript, pps. 998-999, attached).

When confronted with her deposition testimony about her sexual encounter with Defendant, she repeatedly stated she did not recall her testimony of said issue. (*See* February; 1, 2008, transcript, pps. 1018-1019, attached). However, she testified that she could not recall any instance when Defendant frightened her in any manner or mistreated her in any way. (*See* February 1, 2008, transcript, p. 1019, attached). When asked having known Defendant was facing murder charges, if she ever contacted anyone about helping Defendant, she responded as follows:

> BUSCH: I believe if I was in a healthy normal state, I would have felt that way. My estranged

> husband served divorce papers on me when I was in ICU. I was not in a state of mind of doing anything other than trying to get well, and all of a sudden dealing with a divorce. I've gone through a tremendous amount of stress and started feeling the pressure lift off a couple years ago. And basically started seeing through the clouds. And that's when I was feeling like I wanted to do something.

(*See* February 1, 2008, transcript, p. 1020, attached).

When asked to read his notes with regards to Ms. Busch, Defendant responded as follows:

> JOHNSTON: I put page 27, Diane Bush. A lot of history here, needs to be interviewed by herself with no one else in the room. I stayed with her for 15 days and nights. Saved her life three times. I'm the one who called EMS the three times and call them, 911. So records will show this. I was very protective of her but not to the point to where I was rude to others. The deposition I gave for her divorce will more clearly explain the role I played in her life. Need to talk to her dad and not to her mother. He will tell you more truthfully. She had female problems and I felt it was more appropriate to have a female nurse take care of her.

(*See* March 7, 2008, transcript, pps. 1218-1219, attached).

However, Mr. Registrato testified he did not recall Defendant ever speaking to him about her in the context of a witness he wanted called in the penalty phase and does not recall meeting or talking to her himself. (*See* March 7, 2008, transcript, pps. 1160-1161, attached). Moreover, he testified he was sure he had Detective Taylor's report at the time of preparation for penalty phase, but does not recall Defendant ever raising her as a possible mitigation witness. (*See* March 7, 2008, transcript, pps. 1161-1162, attached). When asked if Ms. Busch had been called to the stand, with the information he had

available to him at the time, would her testimony have come with some degree of risk to your mitigation of the case, he responded as follows:

> REGISTRATO: **The testimony from this woman would have been bad, as far as I'm concerned, very bad, based on what's in this report.** I wouldn't have called her. If Ray would have raised her as, you need to talk to this woman, she's a good witness, we would have done it. **We talked to dozens of people, but Ray, to my recollection Ray did not raise her as a friendly witness.**

(*See* March 7, 2008, transcript, p. 1168, attached).

On cross-examination, Mr. Registrato admitted that at the time of preparing for trial, he was not aware of information from Ms. Busch that she felt that Defendant had saved her life. (*See* March 7, 2008, transcript, p. 1177, attached). He admitted they sent investigators out to talk to everybody and if she was out there, they would have sent somebody to talk to her. (*See* March 7, 2008, transcript, p. 1179, attached). However, he testified Ms. Busch never talked to him and never said to him that Defendant did anything for her. (*See* March 7, 2008, transcript, pps. 1179-1180, attached). He further testified he did not know if an investigator from the Public Defender's Office talked with Ms. Busch, and did not have any specific recollection of specifically requesting an investigator to go out and speak with Ms. Busch. (*See* March 7, 2008, transcript, p. 1179, attached). He further testified he did not do any weighing of the pros and cons of prospective testimony from Ms. Busch because he did not know there was any Ms. Busch that would have helped them. (*See* March 7, 2008, transcript, p. 1180, attached).

After reviewing this portion of claim 9.2c, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the

> record, **the Court finds Mr. Registrato's testimony to be more credible than that of Defendant. Therefore, the Court finds Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify as a nonstatutory mitigation witness during the penalty phase. Moreover, the Court finds, by Ms. Busch's own admission, she never contacted anyone about testifying on Defendant's behalf. Consequently, Defendant failed to demonstrate how counsel acted deficiently in failing to call Ms. Busch when Defendant did not make such a request.**
>
> **Moreover, the Court finds based on the contents of Detective Taylor's report regarding Ms. Busch's statements, Ms. Busch would not have been a good nonstatutory mitigation witness for the defense as the introduction of such testimony would have allowed the State to call Ms. Busch's mother and Ms. Busch's sister and the jury would have heard how the family had to intervene because he was being overprotective of Ms. Busch.** Therefore, after reviewing the testimony, evidence, and argument presented at the penalty phase hearing, as well as the testimony presented at the evidentiary hearings, the Court finds **Defendant failed to demonstrate how counsel's failure to call Ms. Busch during the penalty phase would have resulted in the jury choosing life over death. As such, no relief is warranted upon this portion of claim 9.2c.**
>
> (PCR V16/3156-3170) (e.s.)

The trial court's comprehensive and fact-specific order is supported by competent substantial evidence and should be affirmed for the following reasons.

Johnston did not inform Diane Busch of his criminal background; and she would not have had any relationship with Johnston if she had known, in 1997, that he was a convicted felon who had recently been released from state prison. Ms. Busch

would not have entrusted Johnston around her children or with her money; it "wouldn't have gotten that far." (PCR V60/1560-1561). When Diane Busch was hospitalized in 1997, she wanted to make sure that her estranged husband would not find $10,000.00 in cash that she had hidden under her mattress. (PCR V60/1565-1566). Ms. Busch essentially asked Johnston to act as her security and accompany her girlfriend, Trena, when Trena retrieved the $10,000.00 in cash. Trena deposited the cash into her own bank account. (PCR V60/1566). Johnston never had possession of Ms. Busch's cash, other than counting it. (PCR V60/1566-1567).

Johnston admitted that he did not have access to the $10,000.00 at the time of Leanne Coryell's murder and the money remained in Trena's bank account. Furthermore, even if Ms. Busch arguably "entrusted" her $10,000.00 in cash to Johnston, it would not have rebutted the fact that for the entire week leading up to the homicide, Johnston had a balance of $52.33 in his checking account. (DAR V8/1036). Johnston did not maintain a savings account. (DAR V7/971). Any claim that Johnston "could" have taken Diane Busch's $10,000 -- either by force or deception or even a legitimate loan -- would not have rebutted the fact that during calendar year 1997, Johnston's checking account was assessed $1537 in fees for fifty-three (53) separate insufficiently funded transactions. (DAR V8/1034). Notably, the

murder of Leanne Coryell occurred only minutes after Johnston argued with his roommate, Gary Senchak, about the $163.92 that Johnston owed Senchak for utility bills. (DAR V3/357-360). Furthermore, the alleged "entrusting" of money by Diane Busch did not alleviate Johnston's need to borrow money from Gary Senchak during the three months before the homicide. (DAR V3/371). Ms. Busch's testimony on her $10,000 would not have rebutted the fact that five weeks before the homicide, Johnston filed a sworn Family Law Financial Affidavit wherein he alleged that his monthly expenses exceeded his monthly income. (DAR V7/950-953). In short, trial counsel was not deficient in failing to call Diane Busch during the guilt phase to testify about Johnston's limited role in assisting Trena when she retrieved the $10,000.00 which belonged to Diane Busch – money which Trena placed into her bank account, not Johnston's. Furthermore, Johnston has not demonstrated any resulting prejudice. Johnston admittedly did not have any access to this $10,000 in cash at the time of Leanne Coryell's murder (PCR V62/1792-1793) and the overwhelming evidence demonstrated that he was virtually impecunious at the time he murdered Leanne Coryell. Moreover, Ms. Busch's testimony would not have ameliorated the demonstrable lie that Johnston told investigators when he claimed to legitimately have come into possession of Ms. Coryell's ATM card following dinner with her at

a restaurant, at a time when her time-clock records and co-workers placed Ms. Coryell at work.

With respect to the penalty phase, Johnston likewise failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. In retrospect, Diane Busch now credits Johnston with saving her life in 1997 because he "shook" up people at the hospital. However, at the time of trial, the defense had been provided with Deputy Taylor's 1997 report of her interview regarding Diane Busch and it was not favorable to the defense. Johnston confirmed that Detective Taylor's report, furnished to the defense at the time of trial, included Ms. Busch's instructions to the nurses, in 1997, to not let Johnston have any further contact at the hospital and also included the family's report of finding a knife, surgical gloves, and a plastic tie in Johnston's car.[5] (PCR V62/1796-1797). Moreover,

[5] At the March 20, 1998, hearing on the motion for individual *voir dire*, the defense introduced an article by David Karp which had been published that week in the Tampa edition of the *St. Pete Times* (DAR V19/1926-1928; DAR Supp. Record, V1/42, Defense Exhibits 1 and 2). This article stated, among other things:

> Sheriff's reports and interviews with hospital staff members show Johnston acted unusually possessive. He would not allow male nurses to touch [Diane] Busch. He threatened female nurses, and Anderson asked security officers to walk her to her car. Johnston bought Busch a nightgown and painted her toenails. When she was medicated, he dropped sexual suggestions that Busch could not respond to. One time, medical

the fact that Johnston masqueraded as a concerned caretaker to Diane Busch would be cumulative to Susan Bailey's similar experience with Johnston; and it would be overwhelmingly outweighed by Johnston's nefarious true character and his violent attacks against strangers, including other attractive, blonde women, such as murder victim, Leanne Coryell.

Failure to Inform the Jury of Appellant's Psychotropic Medication

Next, Johnston argues that the trial court erred in denying his IAC claim based on the failure to inform the jury of his psychotropic medications. Once again, the trial court's order (Claim 9.2f below) is extensive, detailed and fact-specific. (*See* PCR V16/3183-3206). The trial court painstakingly addressed and rejected Johnston's extensive reliance on Drs. Cunningham and O'Donnell and stated, in pertinent part:

* * *

> . . . When asked if the trial team considered advising the jury that Defendant was taking psychotropic medication, Mr. Littman responded as follows:

> alarms in the intensive care unit went off, and nurses found Johnston on top of Busch's bed. Busch's family grew suspicious. They told authorities that Johnston took Busch's Volkswagen Cabriolet and put about 2,900 miles on it. He left his car at her house. Inside his car, her relatives found a paring knife and surgical gloves -- the same kinds of instruments that had been used against [Gillian] Young, the escort.
> (DAR V19/1926-1928; DAR Supp. Record V1/42, Defense Exhibits 1 and 2).

> LITTMAN: No. I understand what you're saying. I'm still not sure that that would be relevant. I mean, we wanted the jury to believe that what he was saying was the truth and was sincere, that he was basically fessing up. I'll put it that way. But there were reasons why they should spare his life. And of course that tied in with the frontal lobe information which Mr. Registrato did present, that there was a mental impairment in this gentleman, which was not in any way his own fault.

(*See* January 31, 2008, transcript, pps. 880-881, attached).

Mr. Littman testified he had several face-to-face conversations with Defendant in the months between his arrest and trial. (*See* January 31, 2008, transcript, p. 895, attached). **He further testified he came to know him as a person, became familiar with his demeanor, personality, and intellect, and discussed various legal procedures and legal principles with Defendant which applied to his case.** (*See* January 31, 2008, transcript, pps. 895-896, attached). **He testified Defendant appeared to indicate an understanding of the evidence against him, including taking issue with certain items and requesting that the investigators follow up on several witnesses.** (*See* January 31, 2008, transcript, p. 896, attached).

Additionally, he testified that following his arrest and up until the penalty phase recommendation, Defendant never expressed to him, nor did he detect, that Defendant was confused or experiencing mental confusion resulting from his consumption of prescribed medications. (*See* January 31, 2008, transcript, pps. 896-897. attached). **He further testified Defendant did not express any difficulty in concentrating, did not express that he was in a fog, and did not indicate he was almost unable to get out of his jail cell**. (*See* January 31, 2008, transcript, pps. 897-898, attached). He testified he was aware Defendant suffered from a seizure disorder and was taking seizure medication, but stated Defendant did not advise him that he was

suffering any side effects of any type from the medication he was taking. (*See* January 31, 2008, transcript, pps. 898-899, attached). He admitted that it was his ongoing responsibility to raise Defendant's incompetency as an issue if he had a good faith basis to do so, but reiterated that he had no reason to, so he did not. (*See* January 31, 2008, transcript, pps. 899, attached).

Mr. Littman testified Defendant was very attentive, participated, conversed with him, and took notes during the guilt phase of the trial. (*See* January 31, 2008, transcript, p. 918, attached). **He testified he did not want to inform the jury via an instruction that Defendant was on anti-seizure medication during the guilty phase because "it could suggest to the jury that perhaps this gentleman has seizures and acts violently. Of course he's charged with a violent crime."** (*See* January 31, 2008, transcript, p. 918, attached).

After reviewing claim 9.2f, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds by Dr. Cunningham's own admission, he could not testify within a reasonable degree of medical probability that the medication caused Defendant to exert bad judgment in his decision to testify. The Court further finds based on Dr. Cunningham's testimony, the medications may have a blunting affect on Defendant's judgments. However, **Dr. Cunningham acknowledged that although some of Defendant's penalty phase testimony sounded glib, because Dr. Cunningham was not present to observe Defendant at the time he testified, he does not know for a fact whether or not Defendant testified with a blunted or calloused demeanor.**

Moreover, the Court finds although Dr. O'Donnell opined Defendant was impaired at the time of the trial and sentencing hearing, he could not express his

opinion with a reasonable degree of pharmacological certainty whether or not Defendant was impaired from the ingestion of these drugs at any time before trial because he did not probe that. The Court finds Dr. O'Donnell further admitted that a finding of impairment from the ingestion of psychotropic medication doesn't necessarily mean that an individual is legally incompetent to proceed at a phase of trial.

Additionally, the Court finds Dr. Maher, who examined Defendant between the guilt and penalty phases, to be a very credible witness. Therefore, the Court finds based on his testimony, Defendant was not suffering from any clinical impairment, had no flat affect, and did not express to Dr. Maher that he was confused or feeling the effects of overmedication from drugs. The Court further finds Defendant did not give Dr. Maher any reason to question Defendant's competency. The Court also finds, based on Mr. Registrato's testimony, Defendant participated in conversations with Defendant throughout the guilt and penalty phases, was alert, well-spoken, articulate, smart, and never complained to him or anyone else in his presence that he was in a fog or having problems concentrating as a result of his medication or any other cause.

Furthermore, the Court finds through his representation of Defendant, Mr. Littman became familiar with Defendant's demeanor, personality, and intellect, and Defendant never expressed to him, nor did he detect, that Defendant was confused or experiencing mental confusion resulting from his consumption of prescribed medications. The Court further finds Defendant never expressed to Mr. Littman any difficulty in concentrating, did not express that he was in a fog, and did not indicate he was almost unable to get out of his jail cell, nor did Defendant advise him that he was suffering any side effects of any type from the medication he was taking. The Court also finds based on Mr. Littman's testimony, Defendant was very attentive, participated, conversed with him, and took notes during the guilt phase of the trial.

> Therefore, after reviewing the Hillsborough County Sheriff's Office medical records, the testimony of Dr. Cunningham, Dr. O'Donnell, Dr. Maher, Mr. Registrato, and Mr. Littman, **the Court finds Dr. Maher had the benefit of examining Defendant between the guilt and penalty phases and Mr. Registrato and Mr. Littman extensively interacted with Defendant throughout their representation of Defendant. Consequently, the Court gives great weight to their testimony and finds the medications, including the psychotropic medications, did not interfere with Defendant's ability to understand the proceedings. The Court further finds neither Mr. Registrato or Mr. Littman coerced Defendant to confess during the penalty phase, nor did they coach Defendant regarding the contents of his confession. Lastly, the Court finds, based on the fact that Defendant's demeanor was not impacted by the psychotropic medication, counsel did not act deficiently in failing to request that the jury be instructed that Defendant was on psychotropic medication.** As such, no relief is warranted upon claim 9.2f.
>
> (PCR V16/3202-3206) (e.s.)

Johnston failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. The defendant's post-conviction experts' assessment of Johnston's alleged impairment is belied by the contemporaneous evaluations of Dr. Maher and the eyewitness observations of *every member* of the defense team who interacted with Johnston at trial, were familiar with his demeanor, and uniformly described Johnston as alert, lucid, and articulate at the time of the penalty phase. Moreover, a defendant is "entitled" to have the jury instructed pursuant to

Florida Rule of Criminal Procedure 3.215(c)2, that he is taking psychotropic medications during trial only when there is a prior adjudication of incompetence or restoration, *or when a defendant exhibits inappropriate behavior and it is shown that the inappropriate behavior is the result of the psychotropic medication*. *Alston v. State*, 723 So. 2d 148 (Fla. 1998). In the absence of either event, such evidence would not be material to any issue before the jury. Trial counsel cannot be deemed ineffective for failing to introduce otherwise inadmissible evidence. More importantly, as all defense counsel uniformly agreed in post-conviction, Johnston did not exhibit any inappropriate behavior or "flat affect" at the time of trial, it would not have served any beneficial purpose to seek such an instruction, and it could have undermined the contemporaneous defense arguments at the time of trial.

Improper Advice About the Need to Testify at the Penalty Phase

In denying this IAC sub-claim, the trial court specifically found, "Mr. Registrato, Mr. Littman, and Ms. Fulguiera *all discouraged* Defendant from testifying during the penalty phase but Defendant insisted on testifying because he wanted to apologize to the victim's mother and show his remorse to the jury." (PCR V16/3154-3155). Johnston does not dispute this dispositive factual determination which is fatal to his IAC

complaint. The trial court's order denying this IAC sub-claim (Claim 9.2b below, denied at PCR V16/3146-3156) states, in pertinent part:

> **Mr. Registrato testified that he was aware that the decision to testify ultimately and finally rests with Defendant**. (*See* January 31, 2008, transcript, p. 786, attached). **He further testified he knew he could not prevent Defendant from testifying if he wanted to**. (*See* January 31, 2008, transcript, p. 786, attached). During the trial, Judge Allen, contained within pages 1708 through 1710 of the trial transcript, went through a colloquy with Defendant regarding his right to or not to testify, and such was admitted into evidence as State's exhibit #8. (*See* January 3 1, 2008, transcript, pps. 786-788, State's exhibit #8, attached). He testified Defendant was able to decide whether or not he wanted to testify during penalty phase, and recollected that Defendant testified coherently, his answers were responsive to his questions, his demeanor was not blunted, emotionless, cold, callous, or impaired, and he actually became emotional during the penalty phase. (*See* January 31, 2008, transcript, pps. 788-789, attached).
>
> Mr. Littman testified although he was present when Defendant told them he wanted to testify during the penalty phase, he had nothing to do with that because that was Mr. Registrato's aspect of the trial. (*See* January 31, 2008, transcript, pps. 877-878, attached). However, he further testified as follows:
>
> > LITTMAN: Well, I understand what our goal was, to save his life, if he were to testify. I said I was present for those discussions from the very first time he made any kind of incriminating statement to us. I remember that very well. And I know you asked me about this last year. I remember that very vividly, and it was rather dramatic. But it was actually Mr. Registrato's advice. I mean, not in a vacuum. We were all present for that, the whole three or four of us.

(*See* January 31, 2008, transcript, p. 878, attached). When asked what was Mr. Registrato's advice, he responded as follows:

LITTMAN: Well, let me back up. Our - - we convinced Mr. Johnston, we explained to him, the only way this would be beneficial to him would be - - he'd already been found guilty. He was facing at least life in prison, is if he, A, did not blame Ms. Coryell in any way, which was contrary to the way he first expressed what happened. And we said, you can't be testifying like that. We had quite a bit of discussion about this. **We went over it with him several times. Okay. And as I said, remember, we had already done a mock trial. We had seen potential problems in I'll say the manner in which he testified. He's a very smart man. It's not a matter of his intellect. But at that point, all we were trying to do was to save his life. Because we knew the State had a lot of good aggravators including his prior record, of course, and the means of this homicide. And it was his decision after discussing it with us.** That's about the best I can - - that's the short version of what I can tell you.

(*See* January 31, 2008, transcript, pps. 878-879, attached).

A copy of Mr. Littman's case activity record was admitted into evidence as State's exhibit #7. (*See* January 31, 2008, transcript, pps. 927-928, State's exhibit #7, attached). **He admitted that during their June 14, 1999, meeting, Defendant advised the defense team that he had killed Ms. Coryell and wanted to testify dur ing the penalty phase to express remorse to the jury.** (*See* January 31, 2008, transcript, p. 928, attached). **However, he testified he never had any concern about Defendant's mental ability to make that decision.** (*See* January 31, 2008, transcript, p. 928, attached).

After reviewing this portion of claim 9.2b, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and

March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds the testimony of Mr. Hooper, Ms. Fulguiera, Mr. Registrato, and Mr. Littman to be credible. Therefore, the Court finds Mr. Hooper did not notice anything wrong with Defendant, nor did he notice anything about his speech or affect that caused him any concern. The Court finds Ms. Fulguiera did not have any concerns Defendant was overmedicated between the guilt phase and penalty phase. The Court further finds Mr. Registrato, Mr. Littman, and Ms. Fulguiera all discouraged Defendant from testifying during the penalty phase but Defendant insisted on testifying because he wanted to apologize to the victim's mother and show his remorse to the jury.**

Additionally, the Court finds that prior to penalty phase, the Court inquired of Defendant as follows:

> REGISTRATO: I believe we're going to call Mr. Johnston, Judge. I would like to have a two-minute time to talk to him one more time, but I believe we're going to put him on.
>
> COURT: All right. Mr. Johnston, the reason I had the jury taken into the jury room was to inquire of you at this time whether or not you were going to testify and **to advise you that you do have the right to testify in this proceeding, but you cannot be forced to testify and the decision whether you testify or not is still your decision in this proceeding as it was in the first phase. So I encourage you to consult with your attorneys and to follow your attorney's advice, but the decision is yours** and I'll give you a couple of minutes to speak with your attorneys again.
>
> REGISTRATO: We'll put him on, Judge. We'll call him as a witness.
>
> COURT: All right. All right, Mr. Registrato,

you and your client have had sufficient time to confer?

REGISTRATO: Yes, Judge.

COURT: And, Mr. Johnston, have you made a decision?

DEFENDANT: Yes, ma'am, I want to testify.

(*See* trial transcript, pps. 1708-1709, attached). Therefore, Defendant assured the Court he wanted to testify.

Consequently, the Court finds based on the testimony presented Defendant was able to decide whether or not he wanted to testify during penalty phase, and Defendant testified coherently, his answers were responsive to his questions, his demeanor was not blunted, emotionless, cold, callous, or impaired, and he actually became emotional during the penalty phase. Moreover, the Court further finds based on Mr. Registrato's experience in dealing with Defendant throughout the case, the medications did not have a blunting affect on Defendant. The Court further finds Mr. Littman never had any concerns about Defendant's ability to make the decision to testify. Therefore, the Court finds Defendant failed to demonstrate that either Mr. Registrato or Mr. Littman provided Defendant with ill-considered and improper advice about the need to testify at the penalty phase of the trial as the evidence demonstrates they actually discouraged Defendant from testifying during the penalty phase. As such, no relief is warranted upon this portion of claim 9.2b.

(PCR V16/3152-3156) (e.s.)

The decision whether or not to testify is a uniquely personal decision which belongs entirely to the defendant. *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551 (2004). At the

time of trial, Johnston was repeatedly informed, both by defense counsel and by the trial court, that they could neither prohibit, nor require, Johnston to testify; it was Johnston's decision, alone. (DAR V13/1137-1138; DAR V14/1234-1235; DAR V18/1708-1709). Prior to the commencement of the penalty phase, the defense team (Attorneys Littman and Registrato and mitigation specialist, Carolyn Fulguiera) met with Johnston at the county jail on three consecutive days, June 13 through 15, 1999. (PCR V59/1498-1499). They met with Johnston for two hours on June 13, 1999 (1:00–3:00 p.m.) and for 3 1/2 hours (2:00–5:00 p.m.) on June 14, 1999. (PCR V59/1498-1499). This was the first time that Johnston admitted that he had killed Leanne Coryell. (PCR V59/1499). Trial counsel discouraged Johnston from testifying. (PCR V58/1329; 1331-1332; 1355; 1357). Nevertheless, Johnston elected to testify and, at trial, Johnston admitted that he was the one who told [counsel] that he wanted to testify and no one was forcing him to testify. (DAR V18/1708-1709). Johnston insisted on testifying; it was Johnston's idea to try and garner sympathy from the jury by apologizing to the victim's mother. (PCR V58/1329; 1332). Johnston's overriding personal decision to testify because he hoped to garner sympathy from the jury by saying that he was "sorry [for] what [he] did to Leanne" (DAR V18/1226), precludes any claimed deficiency of counsel. Trial

counsel cannot be deemed ineffective for the defendant's own personal election to testify, despite counsel's contrary advice. *See Evans v. State*, 975 So. 2d 1035, 1045 (Fla. 2007).

Failure to Consult Fingerprint Expert (Dr. Simon Cole)

This IAC sub-claim is based on the proffered testimony of Dr. Simon Cole. (Claim 2.e below). The trial court's order denying this IAC sub-claim states, in pertinent part:

> With respect to the fingerprints, in the defense's written closing arguments, the defense asserts they are relying on the proffered testimony of Simon Cole to support this claim. On December 1, 2006, the Court allowed Defendant to proffer the testimony of Dr. Simon Cole in the postconviction evidentiary hearing in Defendant's other death case (Hillsborough County Case 99-11338—Nugent victim). (*See* December 1, 2006, transcript, pps. 20-91, attached). On August 24, 2007, upon stipulation of both defense and the State, the Court allowed the proffer of Dr. Simon Cole's testimony in case 99-11338 to be used in the postconviction evidentiary hearing in this case. (*See* August 24, 2007, transcript, attached).
>
> **However, the Third District Court of Appeal found "Dr. Cole's 'informed hypothesis' is nothing more than a creative attempt to attack the predicate for the admission of latent fingerprint comparison analysis." *State v. Armstrong*, 920 So. 2d 769, 771 (Fla. 3d DCA 2006). Therefore, the Court finds Dr. Cole's testimony is irrelevant and, therefore, inadmissible**.
>
> When asked if the trial team ever consulted a fingerprint expert in this case, Mr. Registrato responded as follows:
>
> > REGISTRATO: If there were - - if there would have been a fingerprint issue, it would have been during the guilt phase and there - - there was - - I believe there was a fingerprint

> issue, but I don’t remember if we specifically had our own expert look at it or not. It would - - it was not one of the focuses of my attention because it was a guilt phase issue, it was not a penalty phase issue.

(*See* January 31, 2008. transcript, pps. 765-766, attached). Mr. Littman testified he probably did not consult a fingerprint expert regarding the fingerprint found on Ms. Coryell’s car. (*See* January 31, 2008, transcript, pps. 883-884, attached). **However, he testified it was his recollection that the only fingerprint belonging to Defendant that was lifted was from the exterior of Ms. Coryell’s car, and the expert could not identify with precision the time the fingerprint was left on the car, nor could the expert establish it was left at the time of her abduction and murder.** (*See* January 31, 2008, transcript, pps. 930-931, attached).

Additionally, he testified a possible explanation for the presence of the latent print was that Defendant in his statement to police indicated that he had been with her socially on several occasions. (*See* January 31, 2008, transcript, p. 931, attached). **He also testified in his opinion, the fingerprint evidence did not conclusively identify Defendant as the murderer because the car was in a public place, he lived across the parking lot from her in the same apartment complex, he parked in the same parking lot, and claimed to know her socially.** (*See* January 31, 2008, transcript, pps. 93 1-932, attached).

After reviewing this portion of claim 9.2e, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds Defendant has the burden of proving his ineffective assistance of counsel claim at an evidentiary hearing. *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007). **Defendant failed to**

> **present any competent, admissible evidence to support his claim that an expert could testify two or more individuals could possess the same characteristics by estimating frequencies of the patterns by counting. Therefore, the Court finds Defendant failed to meet his burden, thereby failing to demonstrate any deficient conduct or any resulting prejudice. As such, no relief is warranted upon this portion of claim 9.2c**.

Any substantive fingerprint challenge is procedurally barred in post-conviction; and any claim for relief based on Dr. Cole's proffer is precluded by *State v. Armstrong*, 920 So. 2d 769, 769-770 (Fla. 3d DCA 2006), rev. denied, *Armstrong v. State*, 945 So. 2d 1289 (Fla. 2006).

Failure to Challenge Shoe Tread Evidence (Reebok Affidavit)

Lastly, Johnston relies on an internal memorandum from the Public Defender's investigator at trial and asserts that trial counsel was ineffective in failing to "present the most accurate, highest, and most defense friendly statistic for the number of shoes that could have made the treadwear impressions at the crime scene." *Initial Brief of Appellant* at 83. In denying this IAC sub-claim, the trial court's fact-intensive order detailed the efforts by defense counsel to obtain the most defense-friendly statistic from Reebok at the time of trial (PCR V16/3175-3183) and concluded, in pertinent part:

> . . . **the Court finds an affidavit was admitted into evidence at trial which reflected that over 588,000 pairs of Reebok shoes existed with that tread.**

> The Court further finds Defendant has the burden of proving his ineffective assistance of counsel claim at an evidentiary hearing. *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007). **Defendant failed to present any competent admissible evidence at the evidentiary hearing to support his claim that 14,700,000 pairs of shoes could have made those impressions. Moreover, the Court finds Defendant has failed to demonstrate how counsel's alleged failure to pursue independent tests and analysis from their own experts of the shoes resulted in prejudice. As such, no relief is warranted upon this portion of claim 9.2e.**
>
> (PCR V16/3183) (e.s.)

In short, at the time of trial, Reebok prepared the affidavit which was submitted by the defense and the information provided to the defense at the time of trial was the latest information provided by Reebok. (PCR V59/1500-1501). In post-conviction, CCRC is likewise unable to obtain any more "defense-friendly" statistic from Reebok than defense counsel was able to obtain at the time of trial. This IAC claim is utterly specious.

ISSUE IV

THE IAC/INDIVIDUAL *VOIR DIRE* CLAIM

On direct appeal, Johnston's second claim raised the issue of whether he was entitled to a new trial based on the failure of the trial court and counsel to ascertain the extent of the exposure of eight prospective jurors (including two who served on the jury) to allegedly inflammatory pre-trial publicity. *See Johnston v. State*, 841 So. 2d 349, 358 (Fla. 2002). On direct appeal, this Court (1) held that the trial court did not abuse its discretion by refusing to independently *voir dire* the jury and those jurors who had exposure to pretrial publicity and (2) denied the IAC claim without prejudice because it should be raised in a post-conviction motion. *Johnston*, 841 So. 2d at 358.

Johnston now argues that the trial court erred in denying his post-conviction claim of ineffective assistance of counsel based on the failure to individually *voir dire* the jury venire about pre-trial publicity. This IAC claim was denied after an evidentiary hearing. The trial court's detailed post-conviction order (1) quoted relevant excerpts from the trial/direct appeal record, (2) addressed the testimony and evidence presented in post-conviction, (3) set forth its fact-specific rationale and (4) concluded that Johnston failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. The trial

court's order of February 4, 2009 states, in pertinent part:

> Defendant alleges ineffective assistance of counsel due to counsel's failure to individually voir dire members of the jury venire about pretrial publicity. Specifically, Defendant alleges prior to trial, the trial court granted Defendant's request to individually question prospective jurors at the bench relative to the juror's prior knowledge about the case. Defendant further alleges that of the fifty prospective jurors, eight prospective jurors, including Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Ursetti (18), Mr. Arnold (15), Mr. James (20), and Mr. Rice (39), recalled that they had read or heard about the case after limited information gained from the reading of the indictment and voir dire. Defendant alleges that based on the trial court's granting of Defendant's request to individually question prospective jurors, these jurors could have been questioned individually to determine the extent of their knowledge of the case from the media reports, and whether they had been exposed to prejudicial and inadmissible information. However, Defendant alleges counsel failed to individually question the eight potential jurors.
>
> Of the eight potential jurors, only jurors Ursetti and James, served on Defendant's jury. "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). With respect to juror Ursetti, the record reflects the following transpired during voir dire:
>
> LITTMAN: First row over here, which is the third row?
>
> URSETTI: I recall something.
>
> LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. What that fact alone, Mr. Ursetti, keep you from being fair and impartial?
>
> URSETTI: It would not.

LITTMAN: You can put aside anything? As I said, it may have been reported accurately or inaccurately.

(*See* trial transcript, p. 179, attached). With respect to juror James, a review of the record reflects the following transpired during voir dire:

LITTMAN: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that's not what happened at all because you have been a juror on the case.

LITTMAN: Next row?

JAMES: I just remember it from the news.

LITTMAN: One person feels they were influenced by it. Next row, which would be Row 4?

(*See* trial transcript, p. 180, attached).

At the evidentiary hearing, when asked whether there was any reason why he did not individually voir dire members of the jury panel about pretrial publicity, he responded as follows:

> REGISTRATO: Well, as I recall, there was a laundry list - - there was - - there's a lot of ground that was covered on each juror, and whether they had been exposed to pretrial publicity I'm sure was covered by somebody. And I may not have done it myself, but either they had done it on the written questionnaires or Mr. Pruner had done it or Mr. Littman had done it or I did it. I don't remember who did it, but I'm sure somebody went over that with them, pretrial publicity. I'm basically almost certain.
>
> I don't have a specific recollection of it, but I can't imagine that it wasn't done somewhere along the line, they weren't asked about whether they were - - had been exposed to

> pretrial publicity on this case. I'm sure somebody did. Again, it's not something that you hammer four or five times. If they were asked about it and they said they didn't know about the case, I'm - - you know, you don't want to start reminding them that, well, now, you know, there was a lot of publicity about this thing. That's not something you would do.

(*See* January 31, 2008, transcript, p. 743, attached). He further testified that he did not remember whether or not the trial team individually voir dired the panel about pretrial publicity. (*See* January 31, 2008, transcript, p. 744, attached).

Mr. Littman testified if Judge Allen granted individual voir dire, they would have done it, and would have covered pretrial publicity. (*See* January 31, 2008, transcript, p. 861, attached). After having his recollection refreshed with portions of the trial transcript, Mr. Littman testified there was a pretrial written motion to have individual voir dire, but Judge Allen denied the motion stating if any jurors indicated they had heard about the case, she would question them individually at the bench. (*See* January 31, 2008, transcript, p. 864, attached). He admitted he did not know if either Mr. Ursetti or Mr. James heard about Defendant's prior criminal record. (*See* January 31, 2008, transcript, p. 875, attached). **He also testified Defendant contributed to the pretrial publicity by giving an interview over the phone from jail to a news reporter.** (*See* January 31, 2008, transcript, pps. 932 and 943, attached).

After reviewing claim 3, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds with respect to the eight jurors Defendant is challenging, the Court finds only jurors Ursetti and James actually served on the jury that convicted Defendant**. Therefore, the Court finds Defendant is unable to demonstrate prejudice with

respect to jurors Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Arnold (15), and Mr. Rice (39).

Moreover, the Court finds "[a] prospective juror is presumed impartial if he or she can set aside a performed opinion or impression and return a verdict based on evidence presented in court." *Johnston v. State*, 841 So. at 358. **With respect to Ursetti, the record clearly reflects Mr. Ursetti assured Mr. Littman that what he recalled about the case would not keep him from being fair and impartial. (*See* trial transcript, pps. 179-180, attached). Therefore, the Court finds Mr. Ursetti was competent to serve as a juror, and Defendant failed to demonstrate prejudice as a result of counsel's failure to individually voir dire Mr. Ursetti about pretrial publicity**.

With respect to Mr. James, the record reflects the following transpired during voir dire:

> LITTMAN: Anyone here think they've heard, or read, or seen anything about this particular case?
>
> [Several prospective jurors raise their hands.]
>
> LITTMAN: My question to you, sir - - I believe, Mr. MacMinn, you already answered it. You have read something that you feel would prevent you from being a fair and impartial juror.
>
> MACMINN: More in the line of news report, not read but seen.
>
> LITTMAN: Of course, we know if something's in the newspaper, it must be accurate because they wouldn't make a mistake. I say that, in large, tongue and cheek. Mr. Pruner and I have done this for a long time, so has Ms. Stanley and Mr. Registrato, and we say we know that's not what we have heard, so had Judge Allen, who's presiding over this case. Do you think you can be fair and impartial in giving this man a fair trial?

MACMINN: I think I'm already predisposed with a feeling in my gut.

LITTMAN: Let me ask the folks over here. Anyone in the first row heard or read about the case?

MCGEE: I just remember the face.

LITTMAN: The face?

MCGEE: I didn't remember him at first, but I remember his face. I just remember he was in the news or in the newspapers.

LITTMAN: You don't remember anything specifically?

MCGEE: But I don't remember what was developed.

LITTMAN: The reason we ask these questions, I guess. gee, if I read about the case, I guess I can't be a juror. That's not true at all.

The follow-up question in your case, which you answered the fact you read and think you know something about the case, does not prevent you from being a fair and impartial juror and listening to the evidence with an open mind?

Now, if you say no, I can't do that, then, of course, you can't be a juror. But if you said, look, I can make up my mind based on what's presented in court, which is what you're supposed to do, I don't care what they said on some network channel or newspaper, that's okay.

If you think of all the famous cases in this country in the last years, you can't say none of the jurors have ever heard of it. That's not the test. The test is, you keep and open mind and judge what the State presents, or what they don't present in court. Can you do that?

MCGEE: (Indicating affirmatively.)

[Prospective jurors indicating affirmatively.]

LITTMAN: Anybody in the second row heard anything about the case?

[Prospective jurors indicating negatively.]

LITTMAN: First row over here, which is the third row?

URSETTI: I recall something.

LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. Would that fact alone, Mr. Ursetti, keep you from being fair and impartial?

URSETTI: It would not.

LITTMAN: You can put aside anything'? As I said, it may have been reported accurately or inaccurately. Sir, I'm sorry. Your name'?

ARNOLD: David Arnold. I have seen him before in a different setting and heard information about the case, and I didn't recall until just now.

LITTMAN: All right. Now, as the case goes on, certain things may refresh your recollection or may not, but the question is, simply, can you put that aside and judge the case just on what's presented here?

ARNOLD: Yes.

LITTMAN: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that's not what happened at all because you have been a juror on the case.

LITTMAN: Next row?

JAMES: I just remember it from the news.

LITTMAN: One person feels they were influenced by it. Next row, which would be Row 4?

(*See* trial transcript, pps. 176-180, attached). **Therefore, Mr. Littman was referring to juror MacMinn as the individual who felt he was influenced by the pretrial publicity, not Mr. James. Mr. James simply stated that he remembered it from the news.**

Moreover, "[t]he mere existence of extensive pretrial publicity is not enough to raise a presumption of unfairness of constitutional magnitude." *Johnston*, 841 So. 2d at 358. **The Court finds Mr. James simply stated he remembered it from the news, and did not express any preformed opinion or impression regarding the case. The Court further finds when it came time to determine whether Mr. James was accepted by the defense, the defense still had some remaining preemptory challenges and chose not to exercise them on juror James.** (*See* trial transcnpt. pps. 236-242, attached). **Therefore, the Court finds Mr. Littman and the State were satisfied that Mr. James' ability to be fair and impartial was not impacted by what he remembered from the news. Consequently, the Court finds Defendant failed to demonstrate that counsel acted deficiently in failing to request individual voir dire of Mr. James. Lastly, the Court finds Defendant failed to demonstrate prejudice as a result of counsel's failure to individually voir dire Mr. James. As such, no relief is warranted upon claim 3.**

(PCR V16/3115-3122) (e.s.)

Johnston does not challenge the trial court's dispositive factual findings but argues, instead, that the trial court "was wrong in finding this claim procedurally barred." *Initial Brief*

of Appellant, at 86. However, the trial court did not apply a procedural bar to Johnston's IAC complaint. Although Johnston now attributes various quotes to the trial court's order, these excerpts and post-conviction record citations are, instead, from the State's closing arguments below. *See Initial Brief of Appellant* at pages 86-87, citing, PCR V15/3019-3020 and PCR V15/3021.

Johnston also misreads this Court's opinion on direct appeal –- the only sub-claim denied "without prejudice because it should be raised in a post-conviction motion" is the IAC sub-claim. *See Johnston*, 841 So. 2d at 358. Any substantive "pre-trial publicity" claim is procedurally barred. *Spencer v. State*, 842 So. 2d 52, 68 (Fla. 2003) (pretrial publicity and juror bias claims were cognizable on direct appeal and, therefore, procedurally barred in post-conviction). Moreover, as the State emphasized on direct appeal, the print and broadcast publicity occurred sufficiently prior to the trial so as to preclude a need for individual *voir dire*.[6] Johnston does not dispute that only

[6]At the time of trial, Johnston provided nine newspaper articles which appeared consecutively on August 21, 23, 24, and 26, 1997, and March 16 and 20, 1998. (DAR V1/87-98; DAR Supp. R42). The television reports cited by Johnston were aired between August and October, 1997. (DAR V1/100-101; 134-143; 144-147). Jury selection did not begin until June 7, 1999; more than one year after the latest newspaper publicity presented by Johnston at trial.

two of the prospective jurors who indicated some prior knowledge of the case actually served on the jury: Mr. Ursetti and Mr. James. After Juror Ursetti indicated that he recalled "something" about the case, he stated that his prior knowledge would not keep him from being fair and impartial. (DAR V7/179). During post-conviction, attorney Littman verified that, in light of this response by Juror Ursetti, there was no reason why Juror Ursetti would be asked about this matter privately. (PCR V59/1437). And, the context of the questioning and defense counsel's comments at trial demonstrate that only one person, [MacMinn] not Mr. James, felt influenced by pretrial publicity. (DAR V7/179-180). Counsel's perspective *at the time of trial* is paramount; *Strickland* requires the reviewing court "to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; *See also*, *Wainwright v. Witt*, 469 U.S. 412, 435, 105 S. Ct. 844, 867 (1985) (reasons which may not be crystal clear from the printed record may have been readily apparent to those viewing the jurors as they answered questions during *voir dire*).

In this case, the post-conviction hearing commenced in January of 2008 and *voir dire* took place in the summer of 1999. Attorney Littman's inability to recall, in 2008, the specifics of his rationale during *voir dire* in 1999, does not remotely satisfy the defendant's burden to overcome the "*presumption that, under*

the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (e.s.). Moreover, Johnston does not dispute that when it came to jurors Ursetti and James, the defense still had four remaining peremptory challenges and specifically chose not to exercise them on either Ursetti or James. Thus, the responses of Jurors Ursetti and James indicated to counsel, *at the time of trial*, that any prior knowledge of the case would not impact their ability to be fair and impartial.

Johnston failed to establish any deficiency of counsel and resulting prejudice under *Strickland* and failed to demonstrate that any biased juror actually served. *See Lugo v. State,* 2 So. 3d 1, 13 (Fla. 2008), citing *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007); *See also Damren v. State*, 838 So. 2d 512, 518 (Fla. 2003) (IAC claim, for failing to request individual *voir dire,* facially insufficient); *Johnson v. State*, 903 So. 2d 888, 897 (Fla. 2005) (no error to summarily deny IAC claim where defendant did not show any prejudice by the failure of counsel to request individual *voir dire).*

ISSUE V

THE SUMMARILY DENIED IAC CLAIM (Based on Legally Insufficient Motion to Disqualify)

In this issue, Johnston lists a perfunctory IAC claim and alleges that he "deserves" an evidentiary hearing on his IAC/motion-to-disqualify-the-trial-judge claim. Johnston's 1/2-page identification of the IAC claim summarily denied below is insufficient to fairly preserve any issue for appeal. This issue is waived. *See Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.") Moreover, Johnston's IAC sub-claim was correctly summarily denied. The trial court's order of August 24, 2007 (PCR V3/558-601) states, in pertinent part:

> Defendant alleges ineffective assistance of counsel due to counsel's failure to file a legally sufficient motion to disqualify the trial judge based on alleged disparaging comments she made about Positron Emission Tomography (PET) scans. [FN2] Specifically, Defendant asserts that when Defendant's Motion for Disqualification, filed March 19, 1998, was denied for legal insufficiency, counsel should have re-filed a legally sufficient motion. Defendant alleges counsel was ineffective for failing to have the trial judge removed from the case, and that Defendant was prejudiced by the resulting unfair proceedings.
>
> [FN2] On February 27, 1998, Defendant filed a motion for positron emission tomography testing, which the trial court granted on March 12, 1998.

Whether the trial judge should have been disqualified for alleged judicial bias is an issue for direct appeal. *See Schwab v. State*, 814 So. 2d 402, 406-408 (Fla. 2002). **Claims of judicial bias based on grounds that were known at the time of direct appeal are procedurally barred**. *Asay v. State*, 769 So. 2d 974, 978-980 (Fla. 2000). **Further, the bare assertion of ineffective assistance of counsel is insufficient to overcome this procedural defect**. *Freeman v. State*, 761 So. 2d 1055, 1067-1068 (Fla. 2000).

In this case, Defendant did not raise the denial of trial counsel's motion for disqualification on appeal. *Johnston v. State*, 841 So. 2d 349 (Fia. 2002). **Also, at the September 13, 2006, case management conference, Defendant conceded that the trial judge's comments about PET scans were the only factual basis of the alleged judicial bias.** (*See* September 13, 2006, transcript p. 30, attached). **Because these comments were known at the time of direct appeal, Defendant is procedurally barred from raising the claim of judicial bias in his present postconviction motion.**

Moreover, Defendant has failed to establish a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must establish that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Griffin v. State*, 866 So. 2d 1, 8 (Fla. 2003). When a defendant has failed to establish one prong, it is unnecessary to consider whether the remaining prong has been established because absent both showings it cannot be said that Defendant's conviction and sentence resulted from a breakdown in the adversarial process rendering the result unreliable. *Id*.

In *Griffin*, the postconviction court summarily denied the defendant's postconviction claim of ineffective assistance of counsel for failure to file a motion to disqualify, finding the grounds cited by the defendant legally insufficient to support such a motion. *Id*. at 11. **Upholding this denial, the Florida Supreme Court further found that prejudice could not be**

established under *Strickland* because trial counsel would not have prevailed on a motion to disqualify based on the defendant's asserted grounds. *Id*.

A review of the record reflects on April 1, 1998, the trial court denied Defendant's motion for disqualification. (*See* order on Defendant's motion for disqualification, attached). On May 19, 1998, the State filed a motion for the trial court to reconsider Defendant's motion for disqualification as well as its own motion for disqualification which was based upon, but not limited to, the trial judge's comments regarding PET Scans. (*See* State's motion for trial court to reconsider Defendant's motion for disqualification and State's motion for disqualification, attached). On May 21, 1998, the trial court denied the State's motion. (*See* order denying State's motion for trial court to reconsider Defendant's motion for disqualification and State's motion for disqualification, attached). Subsequently, the State filed a petition for writ of prohibition with the Second District Court of Appeal seeking review of the trial court's May 21, 1998, order. (*See* petition for writ of prohibition, attached). **On May 29, 1998, the Second District Court of Appeal denied the State's petition for writ of prohibition with prejudice**. *See State v. Johnston*, 718 So. 2d 186 (Fla. 2d DCA 1998) (table). **Because the State's motion sought disqualification on the same basis as Defendant's motion, and the Second District Court of Appeal denied the State's petition for writ of prohibition on the disqualification issue, Defendant is unable to demonstrate how counsel's alleged deficient conduct resulted in prejudice. As such, no relief is warranted upon claim one or the supplement to claim one.**

(PCR V3/559-561) (e.s.)

To support the summary denial of post-conviction relief, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims. *See Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006),

citing *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). In this case, as evidenced by the foregoing excerpt cited above, the trial court set forth a detailed fact-specific rationale *and* also attached those portions of the record that refute the defendant's claim. At the September 13, 2006, case management conference, collateral counsel conceded that the trial judge's comments about PET scans were the only factual basis of the alleged judicial bias claim; and, "[b]ecause the State's motion sought disqualification on the same basis as Defendant's motion, and the Second District Court of Appeal denied the State's petition for writ of prohibition on the disqualification issue, Johnston is unable to demonstrate how counsel's alleged deficient conduct resulted in prejudice." (PCR V3/561). The trial court correctly summarily denied this post-conviction IAC claim. This issue is procedurally barred and also without merit.

CLAIM VI

CUMULATIVE ERROR

Johnston's perfunctory one-sentence "cumulative error" complaint is insufficient to fairly present any issue on appeal; therefore, this claim is waived for appellate review. *See Pagan v. State,* 2009 WL 3126337, 13 (Fla. 2009), citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Furthermore, as this Court reiterated in *Bradley v. State*, 2010 WL 26522 (Fla. 2010):

> Where, as here, the alleged errors urged for consideration in a cumulative error analysis "are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit." *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008); see also *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008) (holding that where individual claims are either procedurally barred or without merit, the cumulative error claim must fail); *Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) (same). **Bradley has failed to provide this Court with any basis for relief in any of his postconviction claims. Therefore, the cumulative error claim is without merit**.
>
> *Bradley*, 2010 WL 26522 (e.s.)

Johnston's *pro forma* allegation of cumulative error is waived under *Duest*; and, even if adequately presented on appeal, must fail under *Bradley*.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court should AFFIRM the trial court's order denying Johnston's Rule motion to vacate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to David D. Hendry, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 26th day of April, 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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