IN THE SUPREME COURT OF FLORIDA

JERRY MICHAEL WICKHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1193

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The following are examples of references used in this brief, with volume numbers and page numbers added after "/":

"**2PCR**" refers to the postconviction record as created during the remand of this case from this Court to the trial court 2008-2011 and as transmitted to this Court for this appeal; "**2SPCR**" designates the supplemental portion of that record; "1PCR" refers the postconviction record transmitted to this Court in SC05-1012, resulting in the opinion reported at Wickham v. State, 998 So.2d 593 (Fla. 2008);

"**R**" refers to the record of the original direct appeal of this case to this Court; "**TT**" refers to the trial transcript of the original direct appeal of this case to this Court;

"**IB**" references the Initial Brief dated February 17, 2012; "**IAC**" is a common acronym for "ineffective assistance of counsel"; "**Postconviction Motion**" references Wickham's 2003 Motion to Vacate Judgment and Sentence (1PCR/15 2740 et seq.)

Bold and **bold underlined** typeface indicate supplied emphasis, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The State disputes Wickham's rendition of the "facts" and submits the following as authorized by Fla.R.App.P. 9.210(c):

Case Timeline.

DATE	EVENT
3/1986	Wickham killed Morris Fleming after Mr. Fleming had stopped to assist Tammy Jordan who was standing next to a car alongside the road that appeared disabled; Wickham shot the victim in the back, then, after Mr. Fleming fell to the ground, shot Mr. Fleming twice in the head (See, e.g., TT 960, 1078-88, 1148-51, 1174-78, 1191-1200, 1232-40, 1322-26);
10/1987	Wickham was indicted for robbing and murdering

DATE	EVENT
	Mr. Fleming (R/I 1-3);
1987	James C. Banks, Thomas F. Woods, Anthony L. Bajoczky appointed and withdrew as Wickham's attorney in this case (See R/I 18, 81, 94, 95, 97, 107, 111-12);
4/21/1988	Philip J. Padovano[1] appointed to represent Wickham (R/I 113);
11/30/1988 to 12/8/1988	Jury trial (TT/IV to TT/X), resulting in a finding of Wickham guilty as charged of First Degree Murder and Armed Robbery with a firearm (R/I 160-62; TT/IX 1863-68) and a jury recommendation of death by an 11-to-1 vote (R/I 164; TT/X 2043-44);
12/8/1988	Wickham sentenced to death (R/2 246-53; TT/X 2043-45);
1991	Wickham v. State, 593 So.2d 191 (Fla. 1991), affirmed Wickham's conviction and death sentence;
1995	Wickham filed a motion for post-conviction relief (1PCR/1 1 et seq.);
2003	Wickham filed an amended 122-page motion to vacate his conviction and sentence of death, raising twenty-one claims (1PCR/15 2740 et seq.);
2004	Evidentiary hearing on Wickham's motion for post-conviction relief (1PCR/17 3271 et seq.);
2005	Trial court denied postconviction relief through a 40-page order (PCR/40 7723-63);
2008	Wickham v. State, 998 So.2d 593, 596 (Fla. 2008), decided that "[b]ecause we conclude that the postconviction court erred by denying Wickham's motion to disqualify the postconviction judge, we reverse and remand for a new evidentiary hearing" on the postconviction motion;

[1] The State's references to now-Judge Padovano as "Mr. Padovano" or "Padovano" in this brief are not any indication of lack of respect for this distinguished jurist.

DATE	EVENT
4/2010	Multi-day evidentiary hearing with Judge Willard Pope presiding (See 2PCR/11 et seq.)
4/7/2011	Judge Pope rendered a 65-page final order, with extensive attachments, denying Claims II, VI, VII, VIII, IX, X, and XXI (2PCR/5 822 et seq.);
2011	Wickham moved for rehearing (2PCR/10 1827-38), the State responded in opposition (2PCR/10 1839-44), and the Judge denied the motion (2PCR/10 1845); Wickham appealed (2PCR/10 1846-47), resulting in this case.

Basic Facts Surrounding the Murder.

This Court's opinion on direct appeal summarized the underlying facts of this case:

> In March 1986, Wickham together with family members and friends, including children, were driving along Interstate 10 when they discovered they were low on money and gas. While at least some members of the party felt they should stop at a church for help, Wickham and others decided they would obtain money through a robbery. The group continued along Interstate 10 and exited at Thomasville Road in Tallahassee.
>
> Proceeding north almost to the Georgia border, the group decided to trick a passing motorist into stopping. They placed one of the vehicles conspicuously on the roadside. One of the women, apparently accompanied by some of the children, then flagged down the victim, Morris 'Rick' Fleming. The woman told Fleming her car would not work. Wickham later told a fellow inmate that he had deliberately used the woman and children because 'that's what made the guy stop and that's what I was interested in.'
>
> After examining the car, Fleming told the woman he could find nothing wrong with it. At this time, Wickham came out of a hiding place nearby and pointed a gun at Fleming. Fleming then turned and attempted to walk back to his car, but Wickham shot him once in the back. The impact spun Fleming around, and Wickham then shot Fleming again high in the chest. While Fleming pled for his life, Wickham shot the victim twice in the head.

> Wickham then dragged the body away from the roadside and rummaged through Fleming's pockets. He found only four dollars and five cents. At this point, Wickham criticized the woman-decoy for not stopping someone with more money.
>
> The group drove to a gas station and put two dollars' worth of gas in one of the cars, and two dollars' worth in a gas can Wickham changed his clothes and threw his bloodstained pants and shoes into a dumpster Wickham directed one of the others to throw the empty bullet casings and live rounds out the window. A short while later, the group drove past the murder scene and saw that the police and ambulances had begun to arrive. They then headed back south and drove to Tampa, obtaining more gas money by stopping at a church along the way.
>
> At trial, defense counsel submitted extensive evidence about Wickham's prior psychological problems, which included extended periods of confinement in psychiatric hospitals during his youth. There also was evidence that Wickham was alcoholic, had suffered an abusive childhood, and that his father had deserted the family.
>
> Other evidence, however, indicated that Wickham was not legally insane during the events in question and had not been drinking at the time of the murder, and that he had not been confined in mental institutions for many years. One expert, Dr. Harry McClaren, stated that Wickham both appreciated the criminality of the murder and chose to engage in this conduct despite his awareness of its nature. Dr. McClaren stated his opinion that Wickham had murdered Fleming to avoid arrest, because Wickham previously had been incarcerated for another robbery in Michigan. Although Dr. McClaren agreed that Wickham suffered from alcohol abuse, an antisocial personality disorder, and schizophrenia in remission, he concluded that these conditions did not impair Wickham's ability to understand the nature of his actions in murdering Fleming.

Wickham v. State, 593 So.2d 191, 192-93 (Fla. 1991).

The Penalty Phase.

Wickham, 593 So.2d at 193, provided an overview the defense's penalty-phase evidence:

> At trial, defense counsel submitted extensive evidence about Wickham's prior psychological problems, which included extended periods of confinement in psychiatric hospitals

> during his youth. There also was evidence that Wickham was alcoholic, had suffered an abusive childhood, and that his father had deserted the family. ... Our review of the record discloses that the [defense] expert was allowed to testify fully about matters relevant to intent, including Wickham's brain damage, psychiatric history, low IQ, and inability to cope with normal life.

In the penalty phase of the trial, defense counsel's opening statement to the jury explained that guilt-phase evidence of Wickham's mental condition also pertains to the penalty phase. (TT/IX 1921) Defense counsel's penalty-phase opening statement referenced the "great deal of" details that the jury had already heard about Mr. Wickham's background in the guilt phase. (TT/IX 1923). Accordingly, for example, Dr. Joyce Carbonell had already testified in guilt phase (See VII 1462-1580; see also proffer at TT/VI 1408-1421); however, defense counsel indicated that, in the penalty phase, he will recall Dr. Joyce Carbonell (TT/IX 1921).

In the penalty phase, the State introduced evidence that, in Michigan, Wickham pulled a gun on a cab driver, directed the cab driver to drive to an isolated place, shot him twice, dragged him out of the cab, shot the cab driver again, this time in the face, and took money and the cab. (TT/IX 1928-31)

The parties stipulated that Wickham was on parole at the time of this homicide (TT/IX 1945), then the State called a Colorado officer who testified about a high speed chase (TT/IX 1951-60) in which he was in a marked police car (TT/IX 1951) and in which Wickham rammed the officer's car multiple times, including Wickham

following the officer's car, ramming the officer's car from behind, speeding up, and ramming the officer a again. (TT/IX 1956-57) Wickham was arrested from aggravated motor vehicle theft. (TT/IX 1957) Wickham was on parole for this incident when he shot victim Morris Fleming. (See TT/IX 1963-64).

The state rested. (TT/IX 1968)

The defense recalled Dr. Carbonell for the penalty phase. (TT/IX 1969) She testified about aspects of Wickham's criminal and institutional background. (TT/IX 1969-71) She reiterated that Wickham is mentally ill (TT/IX 1972), and he has a "long history of mental illness" (TT/IX 1973). She detailed aspects of "schizophrenics." (TT/IX 1973) She testified that Wickham was "battered and abused" and "raised by alcoholic parents." According to Carbonell, the institutions in which Wickham was placed were 'fairly horrendous places," where Wickham was abused. (TT/IX 1973) Carbonell discussed the causes of anti-social behavior. (TT/IX 1974) She also indicated that Wickham was "brain damaged." (TT/IX 1975) She opined that the two mental mitigators applied. (TT/IX 1976-77)

The defense rested, and, in rebuttal, the State called Dr. McClaren as a witness. (TT/IX 1978) McClaren said that Wickham meets the criteria for alcohol abuse, anti-social personality disorder, and schizophrenia in remission. (TT/IX 1982) McClaren

disputed the applicability of the substantially-impaired capacity mental mitigator. (TT/IX 1979)

In his penalty-phase closing argument, Mr. Padovano argued against the weight of the aggravation (See TT/X 1687), argued against some aggravation applying at all (See T/X 202-23), and argued the mental, and other, mitigation and its weight (See TT/X 2023-29, 2032-35). Mr. Padovano argued that the jury should consider the relatively favorable treatment of accomplices (See TT/X 2029) and the adequacy of a life sentence (See TT/X 2031-33).

The jury recommended the death sentence by a 11 to 1 vote. (TT/X 2043-44; R/1 164)

Sentencing and Attendant Trial Court Findings.

The trial judge followed the jury recommendation, sentenced Wickham to death, and found six aggravating circumstances (R/2 246-53; TT/X 2043-45): Under sentence of imprisonment; Prior violent felony due to the Armed Robbery in Michigan and First Degree Aggravated Motor Vehicle Theft in Colorado; during the commission of a robbery of the murder victim, as the jury found Wickham guilty of Count II; avoid arrest; cold, calculated and premeditated ("CCP"); and, heinous, atrocious, and cruel ("HAC"). (R/2 247-50) No mitigating circumstances were found. (See R2 251-52)

Direct Appeal.

On direct appeal, Wickham raised several issues. Wickham, 593 So.2d at 193-94, found no error concerning the scope of the evidence concerning Wickham's mental state, upheld the admissibility of Wickham's plan to escape, struck HAC, and upheld the CCP finding. Wickham, 593 So.2d at 194, concluded that the trial judge did not properly find and weigh all available mitigation, but affirmed:

> Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. Rogers, 511 So.2d at 534. Clearly, the evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters, should have been found and weighed by the trial court. Id.
>
> However, we also must note that the State controverted some of this mitigating evidence, thus diminishing its forcefulness. Wickham had not been hospitalized for mental illness for many years and was not drinking at the time the murder was committed. His schizophrenia was in remission. Expert testimony indicated that he was not insane, and that he was able to appreciate the criminality of his actions in March 1986. This testimony is consistent with the facts of the murder and the actions and statements of Wickham.
>
> In light of the very strong case for aggravation, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence. Having reviewed the entire record, we find this error harmless beyond a reasonable doubt. *Rogers*, 511 So.2d at 535.
>
> Seventh, Wickham argues that death is not a proportional penalty in this instance. The cases cited by Wickham for this proposition all deal with domestic violence, 'heat-of-passion' murders, persons who were severely mentally disturbed at the time of the murder, or similar reasons. The facts of none of

> these cases approach the aggravated quality of the facts of the present case.
>
> In killing Fleming, Wickham planned and executed a roadside ambush designed to lure a victim who believed he was helping a stranded woman and children. While some mitigating evidence was available, the case for aggravation here is far weightier. If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose. Accordingly, this Court may not disturb the sentence on this ground. The conviction and sentence are affirmed.

593 So.2d at 194. Justice Barkett dissented and highlighted the mitigating mental health evidence that Wickham's trial counsel introduced. See Id. at 194-95.

Postconviction Evidentiary Hearings.

There have been two rounds of postconviction evidentiary hearings.

After a first round of postconviction proceedings and am evidentiary hearing, (PCR/17 3271 et seq.) the trial court denied postconviction relief through a 40-page order (PCR/40 7723-63). Because Mr. Padovano became a judge, Wickham v. State, 998 So.2d 593, 594 (Fla. 2008), reversed and remanded to the trial court "for a new evidentiary hearing on his postconviction motion."

On remand, Judge Willard Pope presided. (See 2PCR/1 et seq.) In April 2010, the trial court held a multi-day evidentiary hearing. (See 2PCR/11 et seq.) Philip Padovano testified again. (2PCR/11 15-196) Wickham also called the following witnesses: Jenny Greenberg, an investigator who worked on Wickham's case (2PCR/12 203-239); Bonny Forrest, an attorney who represented

Wickham during some of the postconviction phase of the case (2PCR/12 238-77); Terry Walsh, an investigator who had worked on Wickham's case during some of the postconviction phase of the case (2PCR/12 277-93); James Hankinson, the prosecutor handling the case at the trial (2PCR/13 358-409); Michael Moody, a trial witness (2PCR/14 415-22); Ann Jacobs, an attorney who represented Wickham during some of the postconviction phase of the case (2PCR/14 424-47); Steve Gustat, an investigator who worked on Wickham's case in the postconviction phase (2PCR/14 460-77); Larry Schrader, a trial witness (2PCR/14 484-523); Rosa Greenbaum, an investigator who worked on Wickham's case in the postconviction phase (2PCR/14 523-27).

SUMMARY OF ARGUMENT

ISSUE I contains multiple Brady and Giglio allegations. Many of them were not preserved, and none of them demonstrate a basis for reversing the trial court. A common thread to many of the claims is Wickham ignoring the trial court court's credibility determinations.

ISSUE II contends that Philip Padovano was ineffective at the penalty phase in marshalling mitigation evidence, in failing to object to similarities between the trial court's sentencing memoranda, and failing to object to a prosecutorial argument to the jury in the penalty phase. Wickham erroneously ignores the trial court's accrediting of Judge Padovano's postconviction

testimony, and, the record demonstrates that Padovano labored long, hard to present mitigation for Wickham. Judge Padovano reviewed records, enlisted the assistance of a psychologist, elicited extensive mitigation-type evidence from the psychologist in the guilt and penalty phases of the trial, and also adduced mitigating-type evidence from Wickham's family.

However, Padovano's Strickland-effective efforts were not enough to overcome the extremely weighty aggravation in this case, including the evidence showing that, north of Tallahassee, Wickham and his companions needed money, Wickham lay in wait as the victim attempted to assist one of his accomplices feigning car trouble on the side of the road, Wickham gunned down the victim, shooting him in the back, then shooting him again, then walking over to the victim, and as the victim begged for his life, standing over the victim and shooting him in the head.

In addition to the CCP-nature of this murder, Wickham had prior violent felonies, including forcing a cab driver to drive to an isolated area, shooting the cab driver in the head, dragging that victim out of the cab, and shooting the cab driver in the head again. Wickham also rammed an officer's car a number of times during a high-speed chase. Wickham was also on parole.

Wickham's postconviction evidence demonstrated neither Strickland deficiency nor Strickland prejudice.

ISSUE III fails to show that the trial court should be reversed based on allegations that more process should have been devoted to determining whether Wickham is incompetent. Procedural bars apply, his claim that counsel was ineffective because he did not pursue a competency hearing is negated by trial court findings grounded on 2010 postconviction proceedings. ISSUE IV mentions a couple of more claims and asserts that the cumulative impact of all Wickham's claims entitle Wickham to a new trial, but none of Wickham's claims have merit and many have not been preserved. ISSUE V erroneously asserts that Wickham cannot be executed because of his mental status. He is not mentally retarded.

None of the appellate issues merit any relief.

ARGUMENT

"TIPSY COACHMAN" STANDARD OF APPELLATE REVIEW.

Rulings of the trial court[2] are purportedly the subject of an appeal. Accordingly, this Court has re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason"

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[2] Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that should have been rendered.

principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("summary judgment for the defendant was appropriate, but for a different reason").

ISSUES I & II: LACK OF PREJUDICE.

Issue I alleges Brady and Giglio violations, and Issue II asserts IAC in the penalty phase. The State will argue that some of the claims under these issues are not preserved and that, for all of the ISSUE I and II claims, Wickham has failed to prove various elements. As discussed under those issues, each of these theories has a prejudice-related element, which is not established in this case. Rather than repeat under each issue many of the detailed facts supporting the State's prejudice-related argument, several are tendered. See also Wickham, 593 So.2d at 192-93, for a summary of the evidence, excerpted in the Facts supra.

Tammy Jordan was a witness in Wickham's trial (See TT/1093-1222) and the subject of portions of ISSUE I. In a perpetuated postconviction deposition, Tammy Jordan testified that Wickham

"put[] a gun up to my daughter's head like this (indicating) and threaten[ed] to blow her brains out if I told anything about what happened." (1PCR/22 4294) During her deposition, Ms. Jordan reiterated that Wickham had threatened her through her daughter. (See 1PCR/22 4296; 1PCR/23 4326-27) Wickham's threats to a witness would be admissible and highly inculpatory in any re-trial, thereby further negating the prejudice prong of any legal theory. Compare England v. State, 940 So.2d 389 (Fla. 2006)(holding as admissible defendant's statement "If he got me in trouble I would kill him" because it showed the defendant's desire to evade prosecution); Heath v. State, 648 So.2d 660, 664 (Fla. 1994)(evidence admissible regarding defendant's plan to escape and kill two witnesses by "blow[ing] their fucking brains out" because they could tie him to a murder); King v. State, 988 So.2d 111, 113 (Fla. 4th DCA 2008)("Murdering or attempting to murder potential witnesses who 'know too much' about a first murder is an extreme attempt to evade prosecution..."; collecting out-of-state cases); Waller v. State, 943 So.2d 865, 866 (Fla. 3d DCA 2006)("defendant threatened witnesses").

Moreover, the overwhelming prejudice-negating guilt-phase evidence introduced against Wickham at trial included the following:

- Multiple witnesses testified that Wickham shot the victim in the back then in the front, then walked over to the victim and, standing over the victim, shot him one or more times in the head:

- Larry Schrader's testimony that Wickham walked over and shot the victim in the head (TT/IV 1086);

- John Hanvey's testimony that Wickham said he shot the victim and "then maybe twice or three times in the head" (TT/VI 1324); Wallace Boudreaux's testimony that Wickham said he "emptied the gun in his head" (TT/VI 1293-94);

- Michael Moody's testimony that Wickham admitted shooting the victim four or five times, shooting him in the body and in the head because he did not want to leave a witness (TT/VII 1613);

- Dr. McClaren's testimony that Wickham admitted that he shot the victim then his second shot was to "drop him," and he aimed for chest, the victim fell, and the next thing Wickham said he remembered is standing over the man clicking an empty revolver (TT/VIII 1637);

- Accordingly, the medical examiner testified that the victim sustained four bullet wounds, with one involving the back and abdomen, one in the chest, and two in the head (TT/IV 968-70); one of the bullet holes to the head went through an earlobe, lodged into the brain, and indicated that Wickham was standing directly above the victim when he fired (TT/IV 976-77);

- Wickham fired shots into the victim after the victim was begging for his life, according to --

  - Matthew Norris, who testified that the victim said, "Don't shoot me" (TT/V 1175);

  - Sylvia Wickham, who testified that the victim asked for help (TT/V 1150-51);

  - Tammy Jordan, who testified that the man begged for his life, Wickham walked over to him and shot him in the head (TT/V 1199);

  - Inmate Boudreaux, who testified that Wickham said that the victim "was copping deuces" (begging) and Wickham "emptied the gun in his head" (TT/VI 1293-94);

- Wickham had a Rossi pistol (TT/IV 1082; TT/V 1131) and used wad cutters (See 1131-32; see also TT/IV 1082), and bullets recovered from the victim's body and from crime scene were all fired from the same weapon and that weapon was probably a Rossi (TT/IV 1046-48); the bullets were wad cutters (TT/IV 1048);

- After shooting the victim multiple times, Wickham dragged the victim's body around the car, away from the road (TT/IV 1086-87; TT/V 1176, 1200, 1237), and Deputy Gunther testified that he observed a "suspected blood trail that we followed going around as the body had been moved or carried ... to the side away from the road" (TT/IV 1001; see also TT/IV 1012);

- Multiple witnesses testified that Wickham and his group needed money and that Wickham suggested a robbery (Schrader at TT/IV 1078-79; Sylvia Wickham at TT/V 1145; Tammy Jordan at TT/V 1191; Jimmy Jordan at TT/V 1230-31); accordingly, Wickham told Dr. McClaren: "I said that I felt like doing a robbery but somebody might get hurt possibly if someone tries to run or grab the gun, no telling what might happen," "somebody might get killed" (TT/VIII 1635);

- Consistent with Wickham's statement to Dr. McClaren suggesting that robbery could involve a homicide --

  - Tammy Jordan testified that Wickham said there might be a killing involved (TT/V 1191), and Detective Livings in October 1987 took Ms. Jordan to the crime scene where she pinpointed the locations where people were standing and where people had waited in the woods, all consistent with knowledge he had gained at crime scene on March 5, 1986 (TT/V 1134), and Detective Bruce testified that Ms. Jordan showed basic locations at crime scene, consistent with his knowledge of the crime (TT/V 1260-61);

  - Hanvey testified that at rest area Wickham told his wife, Sylvia Wickham,[3] that he would not leave any witnesses behind, that he was going to kill whoever stopped (TT/VI 324);

- Multiple witnesses testified that Wickham and others were hiding as they watched others pretend to have a broken down car to lure someone into a robbery, and Deputy Lee testified that he found where greenery had been pushed over and matted down going into a nearby wooded area, that he followed footprints in that area, and that he observed a couple of indentations where it looked like someone had knelt down or

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[3] Sylvia denied that Wickham said he was planning on shooting the victim. (1156)

squatted down about 25 yds from the victim's vehicle (TT/IV 1032)

- Sylvia Wickham's testimony (TT/V 1153) and Matthew Norris' testimony (TT/V 1177-78), in essence, that Wickham lied to Norris by stating that he did not kill the victim;

- Wickham's murder-related threats to others:

  - Sylvia Wickham testified that Wickham told Matthew Norris and "Mark" that if they ever told anyone, we would get the chair (TT/V 1154);

  - Norris testified that Wickham told him that if we talked about it "they" would all get the electric chair (TT/V 1179);

  - Jimmy Jordan testified that Wickham told Schrader over jail phone that his mouth could get him killed (TT/V 1241-42);

  - Boudreaux testified that Wickham said, "I'm going to see you in hell before you testify against me in court" (TT/VI 1296).

The foregoing guilt-phase facts also negate any prejudice that Wickham might argue pertains to the penalty-phase. Accordingly, the trial court found as aggravators during the commission of a robbery of the murder victim, as the jury found Wickham guilty of Count II; avoid arrest, as the trial court found that "the dominant motive for this Murder was to eliminate a potential witness"; cold, calculated and premeditated ("CCP"), as the trial court found that Wickham planned the armed robbery, suggested that there might be a killing involved in it, armed with a gun, concealed himself, and then shot the victim in the back and executed the victim by walking to the victim and shooting him in the head twice at close range. (R/2 247-50)

Concerning the death-penalty outcome, Wickham's postconviction claims pale in comparison with evidence that the State introduced in the penalty phase concerning Wickham's prior violent felonies in which Wickham shot a cab driver multiple times, rammed a police officer's vehicle multiple times, and was on parole, as discussed in the facts section supra.

With the overwhelming evidence of guilt and "very strong" aggravation in mind concerning prejudice-related elements of Brady, Giglio, and IAC, the State next discusses each issue.

ISSUE I: HAS WICKHAM DEMONSTRATED THAT THE TRIAL COURT ERRED BY REJECTING BRADY AND GIGLIO CLAIMS? (IB 44-57, RESTATED)

This issue poses a number of allegations under the rubric of Brady and Giglio in Wickham's issue statement. Wickham also interjects (IB 57) a conclusory IAC claim that is undeveloped and thereby unpreserved on appeal or below. Concerning an appellant's undeveloped appellate arguments, see, e.g., Bryant v. State, 901 So.2d 810, 827-28 (Fla. 2005)(state habeas petition alleging IAC claim concerning appellate counsel, "cursory"; "waived"); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("a sentence or two"; unpreserved); concerning insufficient allegation below, see, e.g., Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000)(mere conclusory allegations are not

sufficient); Parker v. State, 904 So.2d 370, 378 (Fla. 2005)(postconviction allegations that "then either the police ..., or the police ... no factual support for these allegations but simply asserts that either one of these theories might be true … conclusory"). Indeed, elements of IAC and elements Brady and Giglio are generally mutually inconsistent.

Next, the state discusses the standard of review for each legal theory and then discusses each ISSUE-I sub-claim, beginning with the trial court's ruling.

Standards of Review for Brady, Giglio, New Evidence; Deference.

Wickham failed to meet his burdens to sufficiently allege and to prove the elements of his claims. See, e.g., Wright v. State, 857 So.2d 861, 870 (Fla. 2003)("The burden is on the defendant to demonstrate that the evidence he claims as *Brady* material satisfies each of these elements").

Riechmann v. State, 966 So.2d 298, 307-308 (Fla. 2007), summarized a postconviction defendant's burdens to establish a claim pursuant to **Brady** v. Maryland, 373 U.S. 83 (1963):

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti*, 894 So.2d at 168 [Mordenti v. State, 894 So.2d 161 (Fla. 2004)] (*citing Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263 (1999).

> To establish prejudice or materiality under Brady, a defendant must demonstrate 'a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial.' …

"In other words, the favorable evidence must place 'the whole case in such a different light as to undermine confidence in the verdict." Jones v. State, 998 So.2d 573, 581 (Fla. 2008)(quoting Smith v. State, 931 So.2d 790, 796 (Fla.2006), quoting Strickler v. Greene, 527 U.S. 263, 290 (1999)).

Davis v. State, 26 So.3d 519, 532 (Fla. 2009), summarized the burdens under **Giglio** v. United States, 405 U.S. 150 (1972):

> A *Giglio* violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *See Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *See* id. at 1050-51.

According to Davis v. State, 26 So.3d 519, 532 (Fla. 2009), it is only after the defendant alleges and proves the first two Giglio elements that the burden shifts to the State to demonstrate non-prejudice.

Because some of Wickham's argument may be construed as asserting **newly discovered evidence**, the State adds its elements:

> A legally sufficient claim of newly discovered evidence must establish two elements. First, the evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Second, the evidence must be of such nature that it would probably produce an acquittal or yield a less severe sentence on retrial. *Id*.

Geralds v. State, 2010 WL 3582955, *14 (Fla. September 16, 2010).

Davis v. State, 26 So.3d 519, 526 (Fla. 2009)(quoting Jones v. State, 591 So.2d 911, 915 (Fla. 1991) (Jones I), explained that "[i]n applying this two-prong test, the postconviction trial court must 'consider all newly discovered evidence which would be admissible,' and must 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" Thus, alleged newly discovered evidence must be admissible at trial as relevant. See, e.g., Lambrix v. State, 39 So.3d 260, 273 (Fla. 2010)(affirmed exclusion of defendant's postconviction expert and lay evidence). Thus, the defendant must demonstrate that the alleged facts of evidence support admissibility as non-hearsay or as an exception to the hearsay rule. See Williamson v. State, 961 So.2d 229, 234-35 (Fla. 2007)(lengthy discussion of hearsay rule; no facts alleged that supported a hearsay exception); Kokal v. State, 901 So.2d 766, 775-76 (Fla. 2005)(no facts for a hearsay exception alleged).

Impeachment evidence and evidence that is cumulative to trial evidence are usually not grounds for a new trial. See Davis, 26 So.3d at 526; Pagan v. State, 29 So.3d 938, 953 (Fla. 2009)("only ... more impeachment").

Williamson, 961 So.2d at 234-35, applying some of these principles, not only upheld the summary denial of a newly-discovered-evidence claim based on hearsay principle, it also held

that the thrust of the new evidence was to show a motive for the murder, which had already been introduced at trial, making the "new" evidence "merely cumulative" and insufficient even for an evidentiary hearing.

Concerning these legal theories, "[t]his Court does not second-guess the trial court's **credibility determinations and factual findings** to the extent they are supported by competent, substantial evidence. *Melendez v. State*, 718 So.2d 746, 747–48 (Fla. 1998)." Wyatt v. State, 78 So.3d 512, 523 (Fla. 2011).

Trial court's overarching finding.

The trial court's finding merits deference (2PCR/5 867):

> The defendant in this case offered no evidence to support the claim that the state withheld any evidence or favorable information, either willfully or inadvertently, and if the specifically claimed information had been withheld, defendant has failed to establish any prejudice as a result. Because there was no evidence of the withholding of any evidence favorable to the defendant, there was no *Brady* violation. *See Taylor v. State*, 3 So.3d 986, 994 (Fla. 2009).

The State next addresses each of ISSUE I's claims.

A. Tammy Jordan.

Wickham argues (IB 46-47) that prosecutor Hankinson should have disclosed to the defense some February 1988 notes from an apparent meeting with Ms. Jordan and her attorney. Wickham contends that, in contrast with prior law enforcement interviews, this was the first time that Ms. Jordan disclosed Wickham's statement that "'there might be a killing involved in it []' (R 1191)." Wickham also contends (IB 48) that "[t]he State failed to

disclose Ms. Jordan's July 1988 guilty plea to felony burglary, falsely arguing to the jury that she had 'never been in trouble before.'" Wickham's arguments fail to explicitly interrelate these allegations with the elements of either a Brady violation or a Giglio violation, and, at another juncture within Wickham's discussion, he appears to interject (IB 47), without sufficiently interrelating the alleged facts with a legal principle, a claim sounding like it may be alleging newly discovered evidence because in postconviction Ms. Jordan admitted to lying about Wickham's statement.

Concerning each of the appellate claims pertaining to Tammy Jordan, the record, evidence, and the law support the trial court's order denying each claim.

1. The Trial Judge's Order.

The trial court found and ruled:

> The defendant alleges that the prosecutor (Judge Jimmy Hankinson) 'falsely stated in closing argument at the penalty phase that Tammy Jordan had "never been in trouble before."' (Movant's Post Hearing Brief, page 83, citing to Trial Transcript, Volume X, page 1684). The defendant claims this was false because Ms. Jordan had previously pleaded guilty to a burglary charge while in custody waiting to testify in his trial. (Movant's Post Hearing Brief, page 80).
>
> Upon review of the defendant's post conviction motion, it appears that this claim was not included in either Claim IX or X and therefore is not preserved. Nonetheless, it was not proven that the prosecutor knew of the charge against Ms. Jordan. Judge Hankinson testified that he [has] no recollection that Ms. Jordan had been charged with any felony, and specifically a burglary, and that he had no recollection of any reference in Ms. Jordan's pre sentence investigation report to an outstanding capias for her in Tampa, Florida for

burglary. He further testified that he had not seen the documents offered him by the defense to refresh his recollection on Jordan's transfer from Hillsborough County, and that the documents were originated in Hillsborough County, not in Leon County. (2010 Evidentiary Hearing Transcript, pages 382-388). Judge Hankinson went on to state that he was aware of his obligation to disclose evidence favorable to the defense, and he would have disclosed information relating to any of his witnesses if he was aware of it. (2010 Evidentiary Hearing Transcript, pages 400-401).

Moreover, the prosecutor did not mention Ms. Jordan's lack of record for purposes of assessing her credibility, but rather in terms of her degree of involvement in the murder robbery, and he grouped her with 'Jimmy and Sylvia.' (See Trial Transcript, Volume X, page 1684). Indeed, the evidence was that Ms. Jordan's involvement was substantially less than Wickham's. Further, compared with defense counsel's impeachment of Ms. Jordan, and the aggravating circumstances in the case, especially Wickham's prior violent felonies and the execution style method of this murder, this issue is inconsequential as to Wickham.

There is no *Giglio* violation as to this issue because there is no proof that the prosecutor knew of any Hillsborough County charge.

Moreover, as this issue may relate the *Brady* claim, Wickham has not established a sufficient nexus between the prosecutor and a law enforcement agency's information. The allegation that Hillsborough County appears to have retrieved Ms. Jordan f[ro]m Leon County is insufficient. In *Jones v. State*, 998 So.2d 573, 581 (Fla. 2008), the court rejected a *Brady* claim based on the reasonableness of constructively charging the prosecutor with knowledge of the information. The Court held:

> [W]e find it unreasonable to expect the prosecutor in this case, having no knowledge of Prim's illegal activity, to become informed of and disclose such information in the less than twenty-four-hour period between Prim's arrest and Jones's sentencing hearing. *See Breedlove v. State*, 580 So.2d 605[,] 607 (Fla. 1991) (rejecting the defendant's *Brady* claim because the detectives' knowledge of the witnesses' criminal activities was not readily available to the prosecution).

Breedlove v. State, 580 So.2d 605, 607 (Fla. 1991), reasoned:

> Thus, there is no support for Breedlove's claim that the prosecution knew, either actively or constructively, of

> Ojeda and Zatrepalek's criminal activities. This court has repeatedly observed that "'[i]n the absence of actual suppression of evidence favorable to an accused ... the state does not violate due process in denying discovery.'" ... Breedlove has not met the first part of the *Brady* rule because he has not demonstrated that the prosecution 'suppressed' evidence.
>
> Wickham also alleges that Ms. Jordan's testimony that []Wickham had told her before the robbery that 'there might be a killing involved in it [...] was a fabrication intended to [g]et her to a plea deal.' Wickham alleges this statement 'first appeared in some notes dated February 11, 1988, which were not disclosed to Mr. Wickham's trial counsel.' (Movant's Post Hearing Brief, page 85). However, Judge Padovano cross examined Ms. Jordan extensively at trial regarding her prior statements, and insinuated in a question that Ms. Jordan made her statement (referring to her deposition) after she had entered into her plea agreement with the State. (Trial Transcript, Volume V, pages 886-895, 901-902).
>
> As mentioned above regarding the *Brady* claim, the prosecutor testified that he did not suggest or condition any plea agreement with Tammy Jordan upon her testifying in a manner directed by him, specifically, that she must testify that the defendant told her 'th[ere] might be a killing.' (2010 Evidentiary Hearing Transcript, pages 404-406).

(2PCR/5 867-69; some internal citations omitted)

2. The trial court's denials of these claims merit affirmance.

Preservation.

As the trial court found, any Brady or Giglio claim concerning **Ms. Jordan's Hillsborough-County burglary charge** was not preserved by any specific corresponding allegation in Wickham's 2003 postconviction motion (See 1PCR/15). Claim IX of Wickham's postconviction motion cited to Brady (1PCR/15 2821, 2826) and discussed other aspects of Ms. Jordan in the case (See 1PCR/15 2826-27) but failed to mention any undisclosed

Hillsborough charge Ms. Jordan may have had at the time of the trial. Giglio is mentioned only in passing (See 1PCR/15 2827), leaving any Giglio theory totally undeveloped.

In Hitchcock v. State, 991 So.2d 337, 349 (Fla. 2008)(alternative holding; citing Green v. State, 975 So.2d 1090, 1104 (Fla. 2008)), like here, appellant-defendant briefed an "argument ... procedurally barred because" the defendant "did not raise it in his postconviction motion." See also, e.g., Geralds v. State, 2010 WL 3582955, *15 (Fla. 2010)("Geralds merely provided facts and failed to allege any of the proper elements of a *Brady* or ineffective assistance of counsel claim"; "Geralds bears the burden of establishing a prima facie case based upon a legally valid claim"); Jones v. State, 998 So.2d 573, 587 (Fla. 2008)(held that facts for prejudice prong insufficiently alleged where defendant did "not contend that any venire members who ultimately sat on his jury saw him in restraints"); Owen v. Crosby, 854 So.2d 182, 187-188 (Fla. 2003)("unclear as to when Owen obtained the information he claims that the State withheld"; "Owen fails to allege this material was in the State's possession as required under *Brady*"); cf. Henyard v. State, 883 So.2d 753, 759 (Fla. 2004)(IAC claim; "Initially, we would note that this specific claim was not made in Henyard's postconviction motion, and therefore it is procedurally barred").

The trial court also reviewed Claim X of the postconviction motion and correctly determined that it did not include this claim. CLAIM X concerned the prosecutor's arguments to the jury (1PCR/15 2828-34), and when it specified the basis of the allegations, it did not include any allegedly improper argument concerning any charge or lack of charge against Ms. Jordan (See 1PCR/15 2830-33).

Similarly, the trial court's denial of the **handwritten-note allegation** should be affirmed, under right for any valid reason, See "Overarching Standard Of Appellate Review" section supra, because it was not alleged as a Brady or Giglio violation in Wickham's postconviction motion the way it is now. Instead of affirmatively alleging that the prosecution possessed exculpatory or impeaching Brady material, the postconviction motion engaged in raw speculation that the note's existence "**suggest[s]**" (See 1PCR/15 2826) that the note indicated a coaching session and that that could have changed the outcome. Indeed, no specificity whatsoever was alleged concerning Giglio's elements based upon the handwritten note. (See 1PCR/15 2826-27) And, accordingly, even now, there is no specificity alleged in the Initial Brief that could prima facie make out a Giglio violation. See, e.g., Hall v. State, 823 So.2d 757, 763 (Fla. 2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is

procedurally barred from making this argument in his reply brief").

Meritless claims.

If somehow the claim concerning **Ms. Jordan's burglary charge** (See IB 48) is reached on the merits, it has none. There is competent substantial evidence that the prosecutor was not aware of any pending burglary charge on Ms. Jordan, as the trial court found, and Wickham has failed to meet his burden to prove to the contrary. In any event, Wickham has failed to prove prejudice requisite to his Brady burden and there is no Giglio prejudice, especially in light of the totality of the trial record. As the trial court found, "compared with defense counsel's impeachment of Ms. Jordan, and the aggravating circumstances in the case, especially Wickham's prior violent felonies and the execution style method of this murder, this issue is inconsequential as to Wickham." (2PCR/5 868)

As the trial court found, former-prosecutor Hankinson testified that he was aware of his duties to disclose evidence favorable to the defense and that he would have disclosed it if he had been aware of it at the time:

> Q. Judge Hankinson, at the time of the trial of Mr. Wickham, you would have been aware of your obligations under Brady, is that correct?
>
> A. Absolutely.

(2PCR/13 400) Accordingly, as the trial court found, former-prosecutor Hankinson testified that he had no recollection of Ms. Jordan being charged with a felony or to paperwork referencing an outstanding capias for her from Tampa:

> Q. Do you recall that Ms. Jordan had been charged with a felony before she was involved in the crime that Jerry Wickham was convicted for? A. I do not recall that.
>
> Q. Specifically, it was a felony burglary that had been committed in Tampa? A. I have no recollection of that.
>
> ...
>
> Q. Does that [presentence investigation, 2PCR/DE ZZZ] refresh your recollection at all as to whether she had a felony charge before she became involved in the crime that Mr. Wickham was convicted for? A. No, it does not. [2PCR/13 382-83]
>
> ...
>
> Q. ... Have you seen this one [2PCR/DE AAAA] before? A. Not that I recall.
>
> Q. If you turn to what's numbered here Pages 18 to 19. A. Yes, sir.
>
> Q. Just take a look at that quickly and I want to ask you if it refreshes your recollection that Tammy Jordan had been charged with a felony before. A. I still have no recollection of that.
>
> Q. No recollection of her pleading guilty? A. No.
>
> Q. This is a plea form/sworn statement of defendant? A. I'm not going to try to say what it is. You've handed me a document that, as far as I know, I've never seen and I have no recollection of it.
>
> Q. Were you aware that she had been transported out of Leon County down to Tampa in order to enter her plea on this burglary charge? A. Am I aware of that as I sit here today?
>
> Q. Are you aware of it as you sit here today? A. No. [2PCR/13 384]
>
> ...

Q. Would you have been aware if a witness who was coming up in a case of yours was being transported out of the jurisdiction to go enter a guilty plea in a felony in another jurisdiction? A. Not necessarily. I know that may sound surprising. Not until I got on the bench did we sort that issue out. Prior to that, the jail would send people off. I had one that we had an armed robbery charge on, it took us 18 months to get him back here after the jail had sent him off. So, I would not necessarily have been aware of that, no.

Q. But, clearly, somebody in Leon County had to be aware that she was being sent off? A. That's what I'm saying. Not necessarily. The jail, up until 2002, 2003, if they received a request from Hillsborough County to prosecute someone, they would just send them without checking with anyone here. [2PCR/13 385-86]

...[A]pparently the writ [writ of habeas corpus ad prosequendum] did not issue from our court, now that I'm looking at the document. It issued from Hillsborough County. [2PCR/13 386]

...

Q. Is that the writ that you were referring to? A. Right.

Q. And have you seen this before, before looking at it just now? A. No. ...

Q. That's a writ that's asking the warden at the Leon County Jail to deliver up Tammy Jordan? A. It's a writ signed by a Hillsborough County judge asking the jail to give them Tammy Jordan, although they have her as Tammy Darlene Morgan, also known as Tammy Darlene Jordan.

Q. You don't have any reason to believe that they didn't act on that writ? A. As I said, they probably did. And they probably didn't check with anyone before doing so.

Q. Well, the warden would at least have had to know that she was going off to Tampa? A. I doubt that the warden was involved.

Q. Somebody who was working for Leon County surely has to know that she's being transported out to Tampa? A. I'm sorry, it's a bit a pet peeve of mine. It may have been at midnight. It may have been a jailer that had no supervisory authority, who said, here's a writ, give them to whoever came to get them. So, anyway, that may have been what happened.

Q. And somebody at some point has to get her back into Leon County because she's being -- she's testifying in Leon County in your case? A. Right.

Q. So somebody knows she's there, somebody knows she leaves, and somebody knows she's brought back? A. In the jail, yes. [2PCR/13 386-88]

Concerning Ms. Jordan's presentence investigation ("psi"), Mr. Hankinson acknowledged that his handwriting appeared on "the bottom" (2PCR/13 382), but, as the trial court found and as block-quoted above, the prosecutor did not recall any information about a capias, and, moreover, Wickham did not prove **when** the prosecutor wrote on the psi cover letter. Instead, a date of "8/5/88" next to handwriting appears to be an event that may have been written there any time. (See 2SPCR/1 22)[4] Thus, Wickham did not prove that prosecutor notes were affixed prior Ms. Jordan testifying at trial on December 8, 1988 (See TT/V 1185-1222), or for that matter, at any material period.

In sum, as the trial court ruled concerning Ms. Jordan's burglary charge, it was Wickham's burden to prove elements of his theory and he failed.

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[4] Ms. Jordan was sentenced on July 13, 1988, in Hillsborough County (See 2SPCR/1 61, p. 25), and her sentence appears to be three years prison for the burglary (See 2SPCR/1 60, p.24). At her 2004 deposition she testified that she received 17 years for this murder (1PCR/22 4263); thus, she testified at trial that she pled guilty to Second Degree Murder "because they would probably 'convi[ict]' me anyway." (TT/V 1218)

Moreover, **concerning Brady**, as the trial court ruled, "Wickham has not established a sufficient nexus between the prosecutor and a law enforcement agency's information." It is not reasonable to require a Leon County prosecutor to know what is transpiring concerning a Hillsborough County case. Analogously, Brady does not constructively charge a prosecutor with knowledge of very recent criminal activity within the prosecutor's Circuit, See Jones v. State, 998 So.2d 573, 581 (Fla. 2008), or with other information "not readily available to the prosecution" at the time of the defendant's trial, Breedlove v. State, 580 So.2d 605, 607 (Fla. 1991)(information subject to officer's right to not incriminate self).

Accordingly, a seminal case in this area, Kyles v. Whitley, 514 U.S. 419 (1995), concerned Henry Williams' inconsistent descriptions of the perpetrator that he provided **to the officers involved in the investigation** of the murder being tried, 514 U.S. at 441-42. See also Strickler v. Greene, 527 U.S. 263, 281 (1999)("'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf **in this case**, including the police'"; quoting Kyles, 514 U.S. at 437). **However, here the precise scope of imputation need not be addressed because the Tampa burglary clearly falls outside of imputation by any reasonable measure**.

Consistent with imputation of knowledge being at least limited to police investigators within the same circuit, U.S. v. Naranjo, 634 F.3d 1198, 1212-13 (11th Cir. 2011), held that "[k]nowledge of information that state investigators obtain is not imputed for *Brady* purposes to federal investigators who conduct a separate investigation when the separate investigative teams do not collaborate extensively. ... Because Grunwald conducted a federal investigation separate from Young's investigation, the government did not possess Young's report for *Brady* purposes." Naranjo cited to the holding of Moon v. Head, 285 F.3d 1301, 1310 (11th Cir.2002), "that knowledge obtained by investigators in one state is not imputed to investigators that conduct a separate investigation in another state." Here, there has been no demonstration that the Leon County prosecutor was collaborating in the investigation or prosecution of the Hillsborough case.

Owen v. Secretary for Dept. of Corrections, 568 F.3d 894, 921 (11th Cir. 2009), applied the principle to reject imputing federal materials to the state, using as a foundation whether the jurisdictions "sufficiently pooled their resources such that the information in the FBI's possession could be imputed to the State." Owen referenced the reasoning in United States v. Antone, 603 F.2d 566, 569-71 (5th Cir. 1979), "that where federal and state authorities cooperate sufficiently extensively in investigating and prosecuting a defendant, the knowledge of one

group can be imputed to the other because the state and federal agents were 'in a real sense **members of the [same] prosecutorial team**.'" Here, there was no proof of "pooling' between prosecutors in Leon County and Hillsborough County or of a team effort between the two offices. See also U.S. v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)("*Brady*, then, applies only to information possessed by the prosecutor or **anyone over whom he has authority**").

Indeed, in Florida, in contrast with prosecutors reviewing the investigative work of officers in their own Circuit, each State Attorney is a separate and distinct constitutional-level official, and each is generally[5] limited to cases within the State Attorney's specific circuit. See Art. 5 §17, Fla. Const. ("Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts **in that circuit** and shall perform other duties prescribed by general law"); §27.02(1), Fla. Stat. ("state attorney shall appear **in the circuit and county courts within his or her judicial circuit** and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party, except as provided in chapters 39, 984, and 985"). As such, Wickham bore a burden of proving that there was some sort of

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[5] Here, there has been no allegation or proof of the Statewide Prosecutor's involvement or of a Governor's special assignment.

special relationship between the prosecutors in the two circuits or that the officer in Leon County, prior to Tammy Jordan testifying at Wickham's trial, had actual knowledge of the specific facts on which he attempts to base his Brady claim. Wickham failed to meet his burden.

Parker v. Allen, 565 F.3d 1258, 1277-78 (11th Cir. 2009), applies. There, information from a prosecutor in another Alabama County ("Lauderdale County prosecutor") was not constructively imputed to the Colbert County prosecutor.

Here, the trial court correctly ruled that information in Tampa and information that Leon County jailer may have had that Tampa authorities were initiating transfers of Ms. Jordan were not imputed to the Leon County prosecutor. Wickham failed to show that his defense counsel did not have equal access to the information, including any information at the jail. Moreover, any speculation concerning precisely what information a jailer may have had cannot be the basis of a Brady claim. See, e.g., Hurst v. State, 18 So.3d 975, 999 (Fla. 2009)("We agree with the trial court that 'this claim is without merit as the Court finds that "he" obviously refers to Defendant and not Mr. Smith or some unnamed third party' and 'such claim as pled does not amount to a *Brady* violation because it depends on speculation' ... no *Brady* violation has been shown in the failure to disclose the notes for that reason"); Roberts v. State, 995 So.2d 186, 190 (Fla. 2008)("the evidence-a

message note from Rimondi requesting money and a letter addressed to Rimondi's father advising him that his daughter must stay in contact with him or the State-is totally speculative at best and does not support the existence of a *Brady* violation").

Moreover, here the defense was on notice of Ms. Jordan's arrest for burglary and potential existence of a Tampa case. On March 22, prior to the jury trial,[6] defense counsel for Wickham, and other counsel, deposed Ms. Jordan. She testified then: "I was arrested for -- As a matter of fact, I was arrested twice besides now. I was arrested -- I was accused of **breaking and entering** into -- in a **garage**." She said she did not know the status of the charges. (See 2SPCR/2 394) The documents that Wickham located as attempted support for his claim apparently involved Ms. Jordan in the victim's garage. (See 2SPCR/1 42, p. "6") Thus, the defense, along with the Leon County prosecution, was put on notice of the existence of the arrest for burglary. As such, there was no failure to disclose the information. See Taylor v. State, 62 So.3d 1101, 1116-1117 (Fla. 2011)(initials disclosed the existence of other witness); see also Maharaj v. Secretary for Dept. of Corrections, 432 F.3d 1292, 1315 (11th Cir. 2005)("Our case law is

[6] The date on the cover page of the deposition indicates "1987," but defense counsel called the court reporter as a witness to impeach Ms. Jordan and the court reporter testified that the date was March 22, 1988 (TT/VI 1380). In any event, the deposition was well before the jury trial.

clear that '[w]here defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government'"; collecting cases); cf. Hitchcock v. State, 991 So.2d 337, 349 (Fla. 2008)("evidence does not qualify as newly discovered evidence because .. a separate claim ... that his trial counsel was ineffective for not presenting evidence").

Moreover, the addition of any suggestion of currying favor with the State due to an out-of-county burglary pales compared with the other facts as well as defense counsel's impeachment of Ms. Jordan. Mr. Padovano's cross-examination was very effective without adding a burglary to it (See TT/V 1211-18), as the trial court found (2PCR/835). Defense counsel pursued the matter in his argument to the jury. (TT/VII 1784-87, 1794-96) Indeed, for both phases of the trial, Ms. Jordan's plea-down to Second Degree Murder, alone, (See defense counsel's argument at Id. 1793-96) renders, the existence of a burglary non-prejudicial. See also Kilgore v. State, 55 So.3d 487, 507 (Fla. 2010)(remedy of retrial for the State's suppression of evidence favorable to the defense available when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict; citing Strickler; Kyles). Cf. Williamson v. State, 961 So.2d 229, 237 (Fla. 2007)(newly discovered evidence; the witness had previously admitted to

multiple prior convictions and been subjected to other impeachment; "new" evidence "would not be a revelation to jurors on retrial").

Jones v. State, 998 So.2d 573, 581 (Fla. 2008), like here concerned a Brady allegation that did not rise to the level of "plac[ing] 'the whole case in such a different light as to undermine confidence in the verdict.'" There, as here, the alleged Brady material failed to add sufficient material beyond the cross-examination that defense counsel conducted. And, there, as here, there was other corroborating evidence. In Jones, as here, the defendant failed to meet his Brady burden of proving prejudice.

Concerning Giglio, Wickham has also failed meet his burdens of proof. The alleged Giglio violation concerns only the penalty phase. To demonstrate a Giglio violation, Wickham must prove that "prosecutor knew the testimony was false." Here, as the trial court found, "[t]here is no Giglio violation ... because there is no proof that the prosecutor knew of any Hillsborough County charge." Furthermore, as the trial court found, "the prosecutor did not mention Ms. Jordan's lack of record for purposes of assessing her credibility, but rather in terms of her degree of involvement in the murder robbery, and he grouped her with 'Jimmy and Sylvia.' (See Trial Transcript, Volume X, pa[g]e 1684)." (2PCR/5 868) The prosecutor mentioned, **at the penalty phase** and **in**

passing, that "Tammy, Jimmy, and Sylvia ... have never been in trouble before":

> ... [I]n closing argument, Mr. Padovano suggested that all the co-defendants should be treated equally. In anticipation of that, I want to say just a little about that.
>
> First, you all heard those witnesses from the stand. You make your own assumptions about it. But you remember the testimony and the issue is, do we have equally culpable people? Are those people in any way similar in culpability to this defendant? First, remember the testimony of Tammy, Jimmy, and Sylvia that they have never been in trouble before, never been in trouble before they got drug into this with this defendant. Look at their level of participation. Jimmy Jordan was so scared on the hill that he hid his face and didn't even look when he heard the shooting. And Mr. Padovano would suggest that that's someone equal in culpability with this defendant? 17 years for Jimmy Jordan, who was so scared that he hid his face in his hands.
>
> Mr. Padovano talks about Schrader having a prior record. Sure, Larry Schrader said he had ten prior felony convictions. But Schrader was willing to come forward of his own volition to tell us what he knew about Rick Fleming's murder, so that Rick Fleming's murderers -- and he was included in that -- could be brought to justice.

(TT/X 2015-16) The prosecutor continued by characterizing Wickham as a murderer with a prior violent record. (See Id. at 2016; see also the prosecutor's discussion of Wickham's prior violent felonies at TT/X 2005-2006) Thus, defense counsel's penalty phase closing argument stressed, for example, Wickham's background and mental status (See TT/X 2023-29), and, as the prosecutor indicated, also emphasized that the prosecution "literally gave up four first degree murder cases for pleas to second degree murder." (TT/X 2029) Further, the evidence was that Ms. Jordan's involvement actually was substantially less than Wickham's, and,

for the penalty phase, the aggravation against Wickham, by itself, renders the prosecutor's passing reference inconsequential.

The Issue-I suggestion (See IB 46-48) that the **prosecutor's handwritten note** is significant is wrong. As a preliminary but important matter, and as bulleted above and as found by the trial court (2PCR/V 869), Mr. Padovano made full use of Ms. Jordan's initial statement. On cross-examination, Ms. Jordan admitted that she did not tell a detective that Wickham said that they had to rob someone and that there might be a killing (TT/V 1213-14), and on cross-examination of Detective Bruce defense counsel made a similar point (TT/V 1264), and then defense counsel harnessed this cross-examination in his closing argument. (See TT/VIII 1786-87)

Contrary to Wickham's suggestion that there may be a material link between anticipated trial testimony from Tammy Jordan concerning there "might be a killing" and plea negotiations, the trial court (2PCR/V 870) accredited the prosecutor's evidentiary hearing testimony that he did not require her to testify as to anything specific as a condition of her plea (See 2PCR/13 405-406). Indeed, in the testimony that the trial court accredited, Judge Hankinson clearly and unequivocally indicated that as the prosecutor, "I didn't try to pressure anyone to say one thing or another. ... I didn't pressure anyone to say anything." (2PCR/13 406)

Further, Wickham's assertion (IB 46-47) that Ms. Jordan first indicated in February 1988 he said there "might be a killing" is raw speculation. Wickham must prove his assertions, not infer them.

Perhaps most importantly, as discussed above, defense counsel fully harnessed Ms. Jordan's early omission in her statement to the police.

Wickham mentions (IB 47-48) **Ms. Jordan's 2004 deposition**. However, he fails to develop any argument concerning how the deposition assists with a Brady or Giglio claim. See, e.g., Bryant, 901 So.2d at 827-28 ("cursory"; "waived"); Whitfield, 923 So.2d at 379; Patton, 878 So.2d at 380; Lawrence, 831 So.2d at 133. Moreover, Wickham purports to count the number of times that Ms. Jordan denied Wickham said there could be a killing, but he ignores, for example, Tammy Jordan's pre-trial deposition in which she testified multiple times concerning Wickham's "killing" statement. (See 2SPCR/2 300, 302, 345, 346, 347, 357) She also indicated to Wickham's attorney, then Anthony Bajoczky (See 2SPCR/2 284), that she had told the prosecutor what had happened (2SPCR/2 389).

Yet further, Wickham also ignores significant aspects of Ms. Jordan's 2004 deposition. For example, as the trial court pointed out, Ms. Jordan said multiple times in her deposition that she is trying to forget the details of this case (2PCR/5 857-59),

indicating her extreme fear of Wickham and indicating that, in spite of her best efforts to forget details of what Wickham said, she was beginning to recall them:

> Ms. Jordan [in her 2004 deposition] ... referred to Wickham as 'the murderer' and stated that 'he's the one who pulled the trigger.' She stated that 'if he gets off death row that he's gonna escape and come find us and kill us. I'm scared to death of that man. I'm just constantly looking behind me because of that. ... I want to disappear, to go away." (Id. at 63, 64). She then confirmed that '**this is all coming back, you know, about talking about the killing, talking about money, talking about everything else**.' (Id. at 66 [1PCR/23 4324]). She then repeated her fear that Wickham would escape 'and kill us.' (Id. at 67).
>
> At one point, she related another basis for her fear of Wickham. She stated: 'I recall Jerry putting a gun up to my daughter's hea[]d like this (indicating) and threatening to blow her brains out if I told anything about what happened.' (Id. at 36). She later volunteered: 'I am frightened of him. I am scared of him. I see him killing that man, and then I see him putting a gun to my daughter's head, my oldest daughter's head. I see that. ... I cannot sleep at night.' (Id. at 68, 69).

(2PCR/5 858-59) At another point, Ms. Jordan stated that she is not denying that a "conversation ... took place,' but rather, "I don't recall." (1PCR/23 4321) After Ms. Jordan stated that her recanting affidavit is the truth "[a]s best I can tell" and said that she said that her trial testimony about a killing was false (1PCR/23 4329-30), she again indicated she is "trying to block some things out" (1PCR/23 4332) and denied recalling the specific meeting at which Wickham mentioned a killing (76-78). Finally, as the trial court pointed out, **Ms. Jordan again recanted her recantation** (2PCR/5 859):

> On cross examination, Ms. Jordan admitted that there could have been 'talk of a killing' that she has blocked out of her mind. She stated:
>
> > Q. ... Because you don't recall whether or not there was any talk of a robbery now that, I think you put it, you've blocked it out of your mind, could that also be the same for the talk of the killing, if you've blocked it out of your mind?
> >
> > A. Probably.
>
> (Id. at 79 [1PCR/23 4337]).

In sum, **prior to the trial**: the defense knew that Ms. Jordan had made a statement to the police in which she did not mention that Wickham said there could be a killing; the defense knew that she had been allowed to plead guilty to Second Degree Murder; and the defense knew that she would testify that Wickham did make the statement. And we know that, in 2004, Ms. Wickham did not want to know any more about this case and "[p]robably" blocked out of her mind that Wickham made the "killing" statement because she was terrified of him. In light of all these facts and in light of the totality of evidence adduced at trial, the prosecutor's February 1988 notes are inconsequential under any theory.

B. Wallace Boudreaux.

Wickham argues (IB 49-51) that Brady violations occurred through a failure of the State to disclose a "deal" with Boudreaux; a failure to disclose that Boudreaux attempted to escape "was to be 'housed in max custody as an escape risk'"; and a failure to disclose the opinion of Captain Schleich that

Boudreaux was a "'very dangerous person in whom he would not trust.'"

The trial court's order merits affirmance because, as it found, this claim was not preserved in the postconviction motion and, alternatively, it is meritless:

> Judge Padovano testified at the evidentiary hearing that he was not aware of any deals made with Mr. Hanvey, Mr. Moody, or Mr. Boudreaux, even after the fact. (2010 Evidentiary Hearing Transcript, Volume I, page 173).
>
> ...
>
> Wickham ... claims that Wallace Boudreaux received an undisclosed deal from the State in exchange for his trial testimony. (Movant's Post Hearing Brief, page 88). This claim is not alleged in Claim VIII or IX of the defendant's post conviction motion, and is not timely and not preserved. (See Defendant's motion for post conviction relief, Claims VIII and IX, pages 66-75).
>
> Nonetheless, like the other un-preserved claims, the allegation is inconsequential, immaterial, and non-prejudicial. It was established at trial that Mr. Boudreaux was in jail when he encountered Wickham and entertained an escape attempt. Further, defense counsel's cross-examination of Boudreaux included him being in jail for grand theft, escape, conspiracy to commit first degree murder; Boudreaux's actually attempting to escape previously; three prior incarcerations in the Louisiana State Penitentiary; and the implication of Boudreaux getting a 'break' on his sentence. Further, Boudreaux had already been sentenced by the time he testified at trial, and the prosecutor testified at the 2010 evidentiary hearing that there was no quid-pro-quo plea bargain with Boudreaux, and he would have disclosed it if there had been one. (See Trial Transcript, Volume V, pages 946-947; Volume VI, pages 967-958, 974-975; 975-986; 2010 Evidentiary Hearing Transcript, Volume III, pages 390-391).

(2PCR/5 864-65, 870-71; <u>see also</u> trial court's order discussing Boudreaux at 2PCR/5 835-36, 865-66)

As the trial court found, Wickham failed to assert this claim in the postconviction motion. The postconviction motion's Claim VIII (See 1PCR/15 2819-21) and Claim IX, which discusses Brady, (See 1PCR/15 2821-28) do not develop any Brady-type argument regarding Boudreaux.

And, as the trial court found, if this claim is reviewed on its merits, it has none. The trial court accredited the prosecutor's postconviction testimony that there was no deal with Boudreaux. Prosecutor Hankinson testified that, a deposition transcript appears to reflect that, at that time, another prosecutor was handling Boudreaux's case, and that he was not aware of any plea agreement regarding Boudreaux's testimony. (2PCR/13 388-90) When asked whether he followed up with the other prosecutor to determine if there was a plea agreement with Boudreaux, prosecutor Hankinson testified that, "I believe I'm stating here that there is no specific plea agreement." (2PCR/12 390) The prosecutor then testified that, if there had been a plea agreement, he would have disclosed it to defense counsel and that "I don't believe there was a plea agreement." (Id. at 391) A little later, he also testified (2PCR/13 401-402):

> I would have disclosed any agreements that I had to whoever was defense attorney at the time. Of course, I would have become more focused on that as we got closer to trial. So, it would be most likely to be to Judge Padovano. **I didn't have any secret deals that I didn't disclose to Judge Padovano**.

Thus, the accredited prosecutor's testimony contradicts Wickham's reliance on a nolle pros of charges and a judge's sentence directing that Boudreaux be kept separate from Wickham, and Wickham fails to meet his burden of proving that any such matters were part of any undisclosed plea bargain or other deal related to his testimony against Wickham. Indeed, keeping a witness separate from a murderer against whom he testifies should be commonly expected.

Wickham's assertion about Captain Schleich is not only unpreserved through its absence as a Brady claim in his postconviction motion, Wickham has failed to point out where he obtained a ruling on this allegation, thereby compounding the unpreserved nature of the allegation. See Simpson v. State, 3 So.3d 1135, 1146 (Fla. 2009)("failure to obtain a ruling on a motion fails to preserve the issue for appeal"; citing Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994)). In addition, Wickham's Initial Brief fails to meet his additional burden of demonstrating the admissibility of such an opinion. Compare, e.g., Geralds v. State, 2010 WL 3582955, *15 (Fla. September 16, 2010)("not established that the letter would even be admissible in evidence or as impeachment material"); Jennings v. State, 782 So.2d 853, 859 (Fla. 2001)("create a 'phantom suspect' rather than present admissible evidence that someone else committed the crime"); with §90.401,402, Fla. Stat., beyond any "expertise" of the witness and

lacking a proven foundation of personal observation, See 90.604,701,702, and improper character evidence, See 90.404,405,609.[7]

Indeed, as the trial court found, Wickham's postconviction allegations added nothing judicially cognizable beyond what defense counsel had already covered at trial. It was clear at the trial that Mr. Boudreaux was in jail when he encountered Wickham and so he was in trouble with the law and collaborated in escape discussions and entertained an escape attempt. (See TT/V 1266-67; TT/VVI 1290-92) Defense counsel's cross-examination of Boudreaux elicited testimony that Boudreaux attempted to escape before he talked with Wickham (TT/VI 1297, 1303), Boudreaux was in jail for grand theft, escape, and conspiracy to commit first degree murder, which defense counsel emphasized by repeating (TT/VI 1297). Defense counsel also used deposition impeachment (Id. at 1298-1300, 1302-1303); three prior incarcerations in the Louisiana State Penitentiary (Id. at 1306); and the implication of Boudreaux getting a "break" on his sentence (Id. at 1307-1309). Boudreaux

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[7] See also discussion of Captain Schleich at trial, TT/V 1272-73. Captain Schleich testified at trial that Boudreaux contacted him and indicated that he had some information about Wickham, that it was "about an escape attempt," and that Wickham and Boudreaux were in a cell together. The testimony occupies one page of trial transcript. (See TT/VI 1315)

had already been sentenced by the time he testified. (See TT/VI 1309)

The rationale in Mansfield v. State, 911 So.2d 1160, 1177-78 (Fla. 2005), applies:

> The jury was made aware of Randall's past federal convictions, his current state charges, the fact that he had escaped from a federal halfway house, and the numerous times Randall had informed on other fellow inmates. We find no error in the trial court's determination that extra charges pending against Randall would not have made Randall sufficiently less credible in the jury's eyes than he already was, and thus there is no reasonable likelihood that the jury would have found Mansfield not guilty had the jury known about these federal charges.

See also Ponticelli v. State, 941 So.2d 1073, 1089 (Fla. 2006)(citing as analogous Marshall v. State, 854 So.2d 1235, 1251-52 (Fla. 2003) (denying *Giglio* claim based on the State's alleged promise to a witness because "even assuming that the alleged promise was made," defense counsel impeached the witness regarding the subject of the promise, and the witness was not "the sole witness to testify in regard to the events surrounding the murder").

Therefore, the trial court's rejection of the claims concerning Boudreaux should be affirmed. See also Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000)(subjective beliefs of witnesses regarding the possibility of future favorable treatment are insufficient to trigger the State's duty to disclose under *Brady* and *Giglio*).

C. John Hanvey.[8]

Wickham contends (IB 51-52) that Hanvey told the jury only that he was in jail at that time because of an escape and aggravated battery, but the jury was not told that when Hanvey was charged with aggravated battery with a deadly weapon, he had already pled no contest to escape and lesser offense of misdemeanor battery and received a withhold and community control and that his record included convictions of 24 counts of forgery.

The trial court's rejection of Hanvey-related claims should be affirmed (2PCR/5 864-65, 867):

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[8] Concerning newly discovered evidence allegations based on Hanvey, the trial court summarized 2004 proceedings in which Hanvey testified that he was pressured into signing a false affidavit on Wickham's behalf:

> At the 2004 post conviction evidentiary hearing, Hanvey testified concerning his plea agreement with the State on a pending aggravated battery charge. He further testified that the affidavit he signed in May, 1995, was already prepared for him and he was promised help getting his arrest records cleared up in exchange for signing the affidavit. He testified he was told he could go back to jail for perjury if he did not agree to testify to everything that was in the affidavit, which he considered a threat. He was told it was ok if he remembered the facts differently, but he then testified that he did not, in fact, remember them differently, and he signed the affidavit because he thought he was going to benefit from it. Hanvey then said what was in the affidavit was not the truth. (2004 Evidentiary Hearing Transcript, Volume 5, pages 541-543; 554-556; 564, 565, 566).

(2PCR/5 861; Hanvey testified about the coercion at 1PCR/20 3823 et seq., 3834-39)

The defendant alleges the State withheld information that John Hanvey, an alleged jailhouse informant, had received a favorable sentence in a separate and unrelated case against him in exchange for his cooperation in the case against Wickham, 'a deal that was not disclosed to the defense.' Part of Hanvey's plea agreement was that he was to '[c]ooperate with the State and testify truthfully.' Hanvey was placed on community control as part of a plea agreement in an aggravated battery and escape case against him. Hanvey testified at Wickham's trial that Wickham had been involved in an escape effort and that Wickham told him he had planned in advance to kill whoever stopped along the roadside, and that Wickham had told his wife Sylvia prior to the robbery that he was not going to leave any witnesses behind. (Defendant's post conviction motion, claim IX, pages 69, 70, paragraphs 7-10; Trial Transcript, Volume VI, page 1001). The defendant argues that because the deal between Hanvey and the State was not disclosed he was deprived of 'powerful impeachment evidence.' (Defendant's post conviction motion, Claim IX, pages 70, paragraph 10). ...

The prosecutor at trial, now Judge Jimmy Hankinson, testified that the comment on Hanvey's plea agreement that reads 'cooperate with State and testify truthfully' does not necessarily relate to Wickham's case, that he would not have provided that information to defense counsel if it did not relate to Wickham's case, and that he would certainly have disclosed any agreement wherein Hanvey was to receive something in return for testifying against Wickham. He testified that he had no secret deals that were not disclosed to Judge Padovano about any witness who he anticipated calling, including Mr. Boudreaux, Mr. Hanvey, Mr. Schrader, and Ms. Jordan. (2010 Evidentiary Hearing Transcript, page 399-402). ... He further testified that he absolutely did not attempt to get any witness to say anything, and particularly that he did not suggest or pressure Mr. Hanvey ... to testify untruthfully by putting pressure on them to testify a certain way, and that he absolutely would not have put testimony he knew to be untruthful on the stand. (2010 Evidentiary Hearing Transcript, page 404-406). ...

Mr. Hanvey testified at the 2004 evidentiary hearing that he did not recall having an agreement that if he did not testify for the State he would have his community control revoked and be sent back to jail. (2004 Evidentiary Hearing Transcript, Volume 5, page 543). ...

Wickham also claims that the prosecutor did not disclose Mr. Hanvey's sentence for forgeries. (Movant's Post Hearing Brief,

page 91). This allegation is not contained in the defendant's post conviction motion. (See defendant's motion for post conviction relief, Claim IX, pages 68 - 75). Nonetheless, in light of Judge Padovano's cross examination of Mr. Hanvey at trial (see Trial Transcript, Volume VI, pages 1004 - 1006), and the weight of Wickham's prior violent felonies, and the evidence of the execution-style killing, this matter is immaterial and non-prejudicial.

In addition to the trial court accrediting the prosecutor's postconviction testimony that there was no undisclosed deal with Hanvey, the jury was made aware of Hanvey's basic situation, rendering these complaints immaterial and non-prejudicial. The jury knew that Hanvey had been in jail in solitary confinement, was a high-security risk, and had been charged with aggravated battery and escape (TT/VI 1322-23, 1327-29). Wickham baldly states that the battery charge involved "in fact beat[ing] the victim in the head with a heavy iron skillet numerous times" (IB 51), but he has failed to prove that, ultimately, those were the facts that the State could have proved against Hanvey when he pled to Battery. Indeed, the charging document only states "by striking him with a IRON SKILLET" (1PCR/23 4479), specifying neither any blows to the head and not specifying "numerous." Even a police report suggests that 15 minutes after striking the victim, Hanvey turned himself in: "Approximately fifteen minutes later, he walked up to Ofc. E. Smith (567) and confessed to hitting the victim" (1PCR/23 4486). At the postconviction evidentiary hearing, the prosecutor testified that the victim in Hanvey's case "was quite a colorful character also" and that, ultimately the victim's

injuries turned out to be "pretty minor." (2PCR/13 397-98) Moreover, there is no evidence that the prosecution concealed the details of Hanvey's case from the defense, but instead, it appears to have been a public record.

Concerning the allegation regarding Hanvey's prior forgery record, in addition to it being unpreserved (See 1PCR/15 2822-24) as the trial court ruled (2PCR/5 867) and in addition to it being immaterial/non-prejudicial due to the Hanvey's testimony at trial that he was already incarcerated, in solitary confinement, a high-security risk, and charged with aggravated battery and escape (TT/VI 1322-23, 1327-29); and due to the massive additional incriminating evidence against Wickham, as the trial court ruled (2PCR/5 867), Wickham's citation to the 2004 evidentiary hearing testimony (IB 52) is incorrect for two reasons. First, he cites to Mr. Padovano's 2004 postconviction testimony at "PCR 4038-39,"[9] but the core reason for this Court's 2008 remand was for another Judge to re-evaluate Mr. Padavano's live testimony anew; therefore, Wickham attempts to rely on evidence that he argues helps prove his claim but that the Judge rendering the order now on appeal did not hear. Second, Mr. Padavano did not testify in 2004 that "he had no information about Hanvey's conviction on 24 counts of

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[9] It does not appear that, at the 2010 hearing, Wickham's postconviction counsel asked Padovano specifically about the allegation of Hanvey's forgeries. (See 2PCR/11 137-38)

perjury" (IB 52) but instead testified that he could not recall. "**I just can't say**. I don't recall it, no." (1PCR/21 4039)

D. Michael Moody.

Wickham asserts a newly-discovered-evidence-type claim that Moody has recanted. (IB 53) Wickham poses a Brady-type claim that Moody obtained a deal from the State for concurrent sentences that was not disclosed to the defense. (IB 52-53) Finally, Wickham stacks his own self-serving inferences by arguing that Larry Schrader's 2011 testimony and Darnell Page's 2004 testimony corroborate the allegation that the State was pressuring witnesses. (IB 53-54)

As a threshold and dispositive matter, the trial court correctly ruled that Wickham's Moody and Page allegations were not preserved in Wickham's postconviction motion. (2PCR/5 850, collecting cases)

Alternatively, the trial court also correctly found that the **recantation claim** had no merit. The trial court pointed out that "[r]ecantation is among the weakest types of purported newly discovered evidence" and elaborated on the extensive case law that recantations are "exceedingly unreliable" "'[e]specially where the recantation involves a confession to perjury,'" discussing and citing Lambrix v. State, 39 So.3d 260, 272 (Fla. 2010); Hurst v. State, 18 So.3d 975, 993 (Fla. 2009); Lowe v. State, 2 So.3d 21, 39 (Fla. 2008) and other cases. (2PCR/5 851-52) The trial court

applied these principles in rejecting the claim that Moody has recanted (2PCR/5 856-57):

> **Moody's testimony at the 2010 evidentiary hearing** was that he now feels like he lied in some respects when he testified at trial, and that he added to what actually happened. (2010 Evidentiary Hearing Transcript, page 419). On cross examination it was brought out that Moody has 57 prior felony convictions, several of which are for theft and dishonesty, and his own admission that he would lie. Moody said he feels like he lied because 'I just don't remember [Wickham] ever saying that to me.' Then Moody testified that he was telling the truth when he said that Wickham told him that he (Wickham) shot Mr. Fleming in the body and in the head four or five times. (2010 Evidentiary Hearing Transcript, pages 420-422).
>
> This court finds that Moody has no credibility, his testimony is unreliable, and gives no weight to his testimony.
>
> [I]f Moody's post conviction testimony is credible at all, it included the following that corroborated Wickham's execution style shooting of the victim:
>
>> Q. Now, were you telling the truth when you said that Mr. Wickham told you that he had shot Mr. Flemming?
>>
>> A. Yes, sir. I was telling the truth on that.
>>
>> Q. And were you telling the truth whenever that he had **shot him in the body and in the head**?
>>
>> A. Yes, sir.
>>
>> Q. And that he had **shot him four or five times**?
>>
>> A. Yes, sir.
>
> (2010 Evidentiary Hearing Transcript, page 422).

Contrary to Wickham's suggestion (IB 53), Moody did not wholesale "corroborate[]" a 2004 affidavit. Instead, Moody testified that an affidavit "**[p]retty much**" was accurate (2PCR/14 418), without specifying what was accurate and what was not accurate. Thus, he acknowledged that he "add[ed] to what actually happened about Mr. Wickham," (2PCR/14 419) without specifying what

he supposedly had "added." On cross-examination, Moody still did not specify what he supposedly lied about, but rather, he said he "felt" he had lied because "I don't remember him ever saying that to me" because "[i]t's been a long time." (2PCR/14 421) He then said he would perjure himself because he was "facing a lot of time in prison," but again failing to specify what he supposedly lied about, and then he re-affirmed that he had told the truth at trial regarding Wickham stating that he shot the victim in the body and in the head and had shot the victim four or five times. (2PCR/14 422) When asked why he would add that Wickham said he did not want to leave witnesses, Moody suggested that he merely changed Wickham's wording: "I was 21 years old. I think I would have said anything to -- **my wording**." (2PCR/14 422) He really did not "think those words were important" but he would have lied about something he did not think was important. (2PCR/14 422) Thus, Wickham failed to ask Moody exactly how he (Moody) changed the wording of what Wickham said about not leaving witnesses. It was Wickham's burden to prove that it was materially and prejudicially different from what Moody actually heard, and Wickham failed to meet his burden.

Concerning Wickham's **Brady-type claim that Moody obtained a deal from the State** for concurrent sentences that was not disclosed to the defense, the trial court correctly found that it was not preserved and, alternatively, it is meritless:

> Wickham also argues that Michael Moody received a reduced sentence that was not disclosed. (Movant's Post Hearing Brief,

> page 87). This claim was not raised in the post conviction motion. (See Defendant’s motion for post conviction relief, Claims VIII, IX, pages 66-75). This claim is procedurally barred and not preserved. Nonetheless, Moody was cross examined at trial regarding his plea deal with the State. Moody's trial testimony was that he received '[t]hree ten year sentences and eight five year sentences, running concurrent;' and he thought he received the ten year maximum. (Trial Transcript, Volume VII, pages 1289-1294).

(2PCR/5 870) Accordingly, pertinent facts were provided to the jury. Moody, in fact, testified at trial that he was incarcerated when he heard Wickham's statements (See TT/VII 1611, 1613-15, 1617) and when he testified (See TT/VII 1618). He admitted that, when he heard Wickham's statement, he was in jail for violating probation and for dealing in stolen property. (TT/VII 1615) and that he knew the property was stolen (TT/VII 1617). Moody told the jury that he was also charged with attempted escape and that he had tried to escape from custody. (TT/VII 1619) Moody told the jury that he and his attorney were trying to cut a deal with the prosecution and pursuant to that endeavor, he talked with the State about Wickham. (See TT/VII 1615-16) He said he made a "deal" with the State but that it was not "guaranteed" and that ultimately "they [the State] went ahead and did what they wanted to do." (TT/VII 1616)[10] He told the jury that when he testified he

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[10] It should be noted that Moody's lawyer's motion to amend Moody's sentence did not indicate that there was some sort of new deal, but rather merely contended that the judgment and sentence needed to be clarified to reflect that Moody's attorney and

had already been sentenced (TT/VII 1616) to "[t]hree ten year sentences and eight five-year sentences, **running concurrent,**" which was "essentially" a "**[t]en-year sentence**" (TT/VII 1618). Thus, when Moody was asked about "the maximum penalty for the offense" he was charged with and he said he "th[ought]" he received the maximum, it appears that he did, in fact, get the maximum for "the offense" (singular)[11] and Moody's answer, depending much upon its intonation, could have been a reflection of his dissatisfaction with how the "deal" turned out.

In any event, Moody's extensive criminal history, his motive to get a deal, and the already-imposed very substantial prison sentence upon him were all in front of the jury, rendering this claim ineffectual.

Concerning Wickham's contention that **Larry Schrader's 2011 testimony and Darnell Page's 2004 testimony** corroborates testimony that Moody and Tammy Jordan were pressured by the State "to testify favorably," (IB 53-54) Wickham overlooks that he has failed to prove that the State pressured anyone to testify to

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prosecutor Poitinger agreed to a total sentence of 10 years. (See 1PCR/37 7201)

[11] Florida case law is replete with cases and controversies concerning the maximum penalties for various crimes. See, e.g., Carawan v. State, 515 So.2d 161, 171 (Fla. 1987)(lengthy discussion of case law pertaining to dual punishments; "We therefore conclude that dual punishments for attempted manslaughter and aggravated battery arising from the single act committed by Carawan are impermissible").

anything that they did not witness, and, indeed, to the degree that any witness felt any pressure, it was because of the witness's internal, subjective motives, not because of any State misconduct.

Thus, in testimony that the trial court accredited (2PCR/5 870), the prosecutor clearly and unequivocally indicated, "**I didn't try to pressure anyone to say one thing or another**. ... I didn't pressure anyone to say anything." (2PCR/13 406) The trial court also accredited (2PCR/5 868) the prosecutor's testimony that he would provide the defense any Brady material that he was aware of (2PCR/13 400-402).

As discussed supra, Wickham also overlooks Ms. Jordan's postconviction testimony that Wickham tried to shut her up by putting a gun to Ms. Jordan's daughter's head. (1PCR/23 4295-96, 4326-27)

Thus, not only did the trial court accredit the prosecutor's testimony that he did not pressure a witness to testify in any way, Ms. Jordan's postconviction testimony is a two-edged sword and the edge that inculpates Wickham is by-far sharper.

Moody did not even testify at postconviction that the State pressured him into anything. Instead, Moody's postconviction testimony confirmed Wickham's culpability, which the trial court quoted (2PCR/5 856-57, quoting 2PCR/14 422).

Schrader's 2010 postconviction testimony also was damaging to Wickham. The trial court found (2PCR/5 866):

> Larry Schrader ... **there was no testimony or evidence offered about any pressure on him to testify for the State, to testify in any manner other than truthfully, or that his sentence was contingent upon his testimony being a certain way**. (2010 Evidentiary Hearing Transcript, Volume IV, pages 484-523).

The trial court pointed to Schrader's postconviction testimony consistent with his trial testimony (2PCR/5 871):

> ... Schrader testified at trial that '[w]e planned a robbery' and that Wickham was the leader in the conversation (Trial Transcript, Volume IV, pages 761-762), as he essentially testified at the 2010 post conviction evidentiary hearing. (See 2010 Evidentiary Hearing Transcript, Volume IV, pages 484-523).

At another section in the Order, the trial court discussed Schrader at length. (See 1PCR/5 852-56) For example, the Order pointed to Schrader's postconviction testimony that "Wickham was "older and like a 'father figure'" (1PCR/5 852) and the idea of using the decoy to do the robbery was Wickham's idea (Id. at 852-53). The trial court continued, quoting Schaeder (Id. at 853, quoting 2PCR/14 495):

> [H]e [Wickham] shot him once, and the guy spun around and was facing us because he had his back to us before. And then Jerry shot him again. And then he walked over and shot him three more times.

The trial court pointed to Schraeder's postconviction re-affirmance that Wickham dragged the victim's body so that it couldn't be seen from the road, and Wickham went through the victim's pockets. (2PCR/5 854)

Contrary to Wickham's self-serving inference (IB 53-54 n.16), the trial court then quoted Schraeder at length in support of its conclusion that Schraeder in the postconviction proceedings did "confirm[] his trial testimony about Wickham's motive for the shooting," including this excerpt (2PCR/5 855, quoting 2PCR/14 522-23):

> Q. At Mr. Wickham's trial in killing Mr. Flemming, you were asked the question, **why did he kill the man** on the side of Thomasville Road? And you indicated it was **because - it was because he was going to be a witness**.
>
> A. I guess I did, sir.
>
> Q. And you testified here today during my cross-examination of you that that was a true statement, didn't you?
>
> A. Yes, sir, sure did.
>
> Q. And **is it a true statement**?
>
> A. **Yes, sir**.

In this sub-section, Wickham also asserts (IB 53-54) that **Darnell Page** testified that the State failed to disclose that it pressured Page to "fabricate testimony." As the trial court found (2PCR/5 850), this Brady claim was not preserved as a specific allegation in Wickham's postconviction motion (See 1PCR/15 2819-28). Indeed, Page is barely mentioned in the IAC claim of the motion (See 1PCR/15 2802), and, as such, does not even allege a viable IAC claim. The trial court, alternatively, correctly found that Page's deposition does not demonstrate a Brady claim (2PCR/5 859-60):

> Wickham claims that Darnell Page 'corroborates' his post conviction allegations. However, Page essentially stated that

> the police nagged him to give them 'something' on Wickham. But Page did not testify that the police told him what to say against Wickham, and he did not state that the police told him to lie. (Deposition of Darnell Page dated May 27, 2004, page 13 [1PCR/22 4223]). Further, Page's minimal use to a trial defense in any future trial would have been more than offset by the harmful post-conviction evidence discussed above and Page's admission that he had been convicted of about ten felonies (Id. at 23, 24). Even in 1988, Page had convictions for possession of a firearm, auto theft, and marijuana (Id. at 25). Page also admitted to multiple escapes, including one in which he 'jumped' an officer in a plan that involved 'drilling a hole throughout the toilet' in 1988. He explained on direct examination from Wickham's attorney: 'I was planning to go through the toilet and chip away at the base of the concrete, and try to go through the walls and come up on the second floor and leave that way.' (Id. at 6-7; see also Id. at 26-27, 29-31). He said he concocted his plan 'prior to them moving some guys in there.' (Id. at 7).

E. Sylvia Wickham and Matthew Norris.

Wickham alleges (IB 54-55) that the prosecutor wrote two notes that are exculpatory because they supposedly show that Schrader's role was greater "in planning and executing the robbery." One note concerned Norris and the other concerned Sylvia Wickham. The trial court correctly rejected these claims (2PCR/5 871; see also Id. at 866):

> The post conviction motion alleges, in Claim IX at page 72, that the prosecution did not disclose a tape recording of a statement by Matthew Norris and the prosecutor's notes regarding Norris that would have conflicted with other evidence. But there has been no proof that there actually was a tape or what specifically was on the tape. Further, the prosecutor indicated that he did not think his notes were 'contemporaneous,' rather it appeared to be trial preparation notes. (2010 Evidentiary Hearing Transcript, Volume III, page 366 [2PCR/13 365-66, 369; see also 2PCR/13 406-409]). Wickham's proposed use of the tape and the notes is based on speculation of not only the existence of the tape, but also its newly mitigating content, which is that Larry Schrader

> played a greater role in the robbery than did Wickham. (See Movant's Post Hearing Brief, page 91-93).
>
> But Schrader testified at trial that '[w]e planned a robbery' and that Wickham was the leader in the conversation (Trial Transcript, Volume IV, pages 761-762 [TT/IV 1078-79]), as he essentially testified at the 2010 post conviction evidentiary hearing. (See 2010 Evidentiary Hearing Transcript, Volume IV, pages 484-523 [2PCR/14 484-523]). Schrader testified at trial that he, Wickham, and 'Jimmy' traveled together and they each had a gun, and they all waited in the woods. Schrader also testified at trial that Wickham exited the woods and shot the victim. Sylvia Wickham testified at trial to similar facts. (Trial Transcript, Volume IV, pages 764-771; Volume V, pages 824-833; 872-883, 909-921).

Concerning the Brady allegation of notes about Sylvia Wickham, it does not appear that this allegation was included in Wickham's postconviction motion (See 1PCR/15 2819-21[12]), and it does not appear that the trial court ruled on it (See 2PCR/5 862-72), making it unpreserved below for compound reasons. Moreover, like he did with the Norris notes, which the trial court accredited, the prosecutor also indicated that the notes regarding Sylvia Wickham appeared to be trial preparation notes with the source of its content of unknown origin (See 2PCR/13 370-72). In any event, any statement from Sylvia about Wickham and Schrader saying something about robbing someone was consistent with Schrader's trial testimony, as the trial court pointed out concerning Norris. Accordingly, Sylvia Wickham testified at trial

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[12] The postconviction motion argues Sylvia Wickham as an IAC claim and does not discuss prosecutor notes. (See 1PCR/15 2799-2800).

that, at one point at the rest area, a robbery was "just mentioned," without specifying by whom, and that the Defendant said that "we might have to" do a robbery. She continued by referring to the defendant's statements about the robbery, then she indicated, "**They** didn't say nothing about how it was going to be done or nothing" (TT/V 1144-45; see also TT/V 1162), indicating more than one participant in the planning. Sylvia testified at trial that Tammy Jordan, Jimmy Jordan, and herself wanted to go to a church instead (Id. at 1145), thereby excluding Larry Schrader from proposing this alternate, non-robbery plan. Further, the notes says nothing like, "Larry convinced Jerry" or "D just went along with the idea"; but rather, it makes "D" a full participant and even lists "D" first. Wickham was a leader and, as the evidence overwhelmingly proved, **THE PERPETRATOR** of this cold blooded execution. Both notes are totally inconsequential to anything material.

F. Cumulative claim (IB 55-56).

There is nothing judicially cognizable to accumulate that merits any relief.

G. Preservation.

Wickham claims (IB 56-57) that the trial court's findings that several of the claims were unpreserved is "inexplicabl[e]." He conclusorily states (IB 57), without any specificity whatsoever, "Wickham preserved all of the Giglio/Brady claims in

his 3.850 motion." Similarly, Wickham fails to specify which of his Brady and Giglio claims that were not in his postconviction motion were previously litigated as such.

And, similarly, Wickham (IB 57) throws in an IAC claim without any developed argument whatsoever. This argument is unpreserved at the appellate level. An appellant's Initial brief frames and must specify the appellate claims. It is not the prevailing party's responsibility to guess at what may be the Appellant's arguments and then rebut those guesses. Indeed, IAC claims are generally inconsistent with Brady and Giglio claims.

Without specifying anything anywhere in the past history of this case, Wickham also suggests that it is the State's duty to inform his counsel of any deficient claims so that Wickham's postconviction counsel can correct his deficiencies. In addition to Wickham's argument being facially deficient as conclusory, Wickham turns preservation upside down and sideways.

Moreover, after Wickham had the benefit of the trial court's order (2PCR/5 822 et seq.), Wickham filed a motion for rehearing (2PCR/10 1827-38) and argued aspects of his Brady claims (2PCR/10 1835-37) but failed to make an argument akin to the one he makes in his Initial Brief, thereby failing to preserve his argument that his previous failure to preserve should be excused.

Wickham, as the **non-prevailing party-below**, has failed to meet **his burden to demonstrate that these rulings were erroneous**.

ISSUE II: DID THE TRIAL COURT ERR IN FINDING THAT WICKHAM FAILED TO PROVE IAC IN THE PENALTY PHASE? (IB 57-82, RESTATED)

In ISSUE II, Wickham raises three claims concerning the penalty phase of the trial by alleging that (A) defense counsel Philip Padovano was ineffective in his investigation (IB 57-76), (B) Mr. Padovano was ineffective by failing to object to the trial court's "[Failure To Weigh Aggravating And Mitigating Circumstances Prior To Issuing Its Death Sentence" (IB 77-81), and (C) Mr. Padovano was ineffective by failing to object to "The State's Inflammatory Language During Its [Penalty Phase] Closing Argument" (IB 81-82).

The State contends that the trial court's rejection of Wickham's penalty-phase IAC claims should be affirmed. The State next provides a brief overview of the rigorous IAC burdens that Wickham must meet, then the State discusses each of the claims.

WICKHAM'S RIGOROUS STRICKLAND BURDENS.

For ineffective assistance of trial counsel ("IAC") claims, including those in ISSUE II, Strickland v. Washington, 466 U.S. 668 (1984), and its progeny impose upon the defendant rigorous burdens of demonstrating that defense counsel was deficient and that this deficiency was prejudicial. "[B]ecause the *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a

showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the **deficiency prong**, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland, 466 U.S. at 689.) "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. U.S., 218 F.3d 1305, 1316 (11th Cir. 2000). See also, e.g., Jones v. State, 732 So.2d 313, 319-20 n.5 (Fla. 1999).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. **The standard is not whether counsel would have had "nothing to lose"** in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals). Wickham must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v.

Singletary, 691 So.2d 466, 471 (Fla. 1997). Accord Chandler, 218 F.3d at 1315.

For the **prejudice prong**, Dillbeck v. State, 964 So.2d 95, 99 (Fla. 2007)(quoting Strickland, 466 U.S. at 694), summarized: "To establish prejudice, '[t]he defendant must show that 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.'"

For any claim on which an evidentiary hearing is granted, the determinations of Strickland's prongs are not measured by the volume of the postconviction evidence but rather how it measures up to the specific Strickland criteria.

On appeal, the trial court's factual findings are presumed correct and merit deference if supported by competent, substantial evidence. See, e.g., Parker v. State, 3 So.3d 974, 980 (Fla. 2009)("credibility of the witnesses as well as the weight to be given to the evidence by the trial court'").

"'In assessing prejudice,'" the appellate court "'reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.'" Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006)(quoting Wiggins v. Smith, 539 U.S. 510 (2003)).

A. Investigation (IB 57-76).

Concerning **Strickland's deficiency prong**, the trial court, in a record-grounded, extensive analysis pursuant to this Court's 2008 remand, found that defense counsel Philip Padovano adequately prepared for the penalty phase of the trial. (See 2PCR/5 832-33, 841-50) The trial court's finding and its predicate findings are supported by competent substantial evidence. The trial court's rejection of this claim merits affirmance.

The prior record-grounded findings of this Court on direct appeal are important aspects of the background of this case that are consistent with the trial court's findings and set the stage for them. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991), on which it based its holdings:

> At trial, defense counsel submitted **extensive evidence** about Wickham's prior psychological problems, which included extended periods of confinement in psychiatric hospitals during his youth. There also was evidence that Wickham was alcoholic, had suffered an abusive childhood, and that his father had deserted the family. ... Our review of the record discloses that the [defense] expert was allowed to testify fully about matters relevant to intent, including Wickham's brain damage, psychiatric history, low IQ, and inability to cope with normal life.

In spite of the mitigation that defense counsel adduced at trial,[13] Wickham, 593 So.2d at 194, pointed to the extreme aggravation in this case in upholding the death penalty:

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[13] Justice Barkett's dissent, at Wickham, 593 So.2d at 194-95,

> In killing Fleming, Wickham planned and executed a roadside ambush designed to lure a victim who believed he was helping a stranded woman and children. While some mitigating evidence was available, the case for aggravation here is far weightier. If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose.

Pursuant to this Court's 2008 remand, the trial court's Order evaluated Judge Padovano's preparation that produced what this Court characterized the "extensive evidence about Wickham's prior psychological problems,...extended periods of confinement in psychiatric hospitals... alcoholic,...suffered an abusive childhood,...his father had deserted the family."

As part of the trial court's evaluation, in a separate "credibility" section of its Order (2PCR/5 883-85), the trial court explicitly found the 2010 postconviction testimony of **Philip Padovano** (as well as James Hankinson) as "**very credible**." (2PCR/5 884) This credibility determination is entitled to deference on appeal. See, e.g., Parker, 3 So.3d at 980.

The evidence that Padovano marshaled for the trial was undoubtedly informed by his extensive experience, which entitles his decisions to additional deference. See Chandler, 218 F.3d at 1316; Jones, 732 So.2d at 319-20 n.5; Provenzano, 148 F.3d at 1332. More specifically, by the time that Padovano handled

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detailed much of defense counsel's "extensive" work on the penalty phase.

Wickham's case, he had tried about 100 jury trials. He had previously tried a capital case to completion, and he had tried other murder cases. He had published bar journal articles. Padovano had won the second "Tobias Simon Pro Bono Service Award" primarily for "handling capital cases," mostly at the postconviction and appellate levels. (2PCR/11 17-20, 152-54)

Wickham contends (IB 63) that then-defense counsel Philip Padovano spent his time running for a judgeship rather than working on Wickham's case, making his preparation Strickland deficient. Wickham's speculation was explicitly contradicted by Philip Padavano's 2010 evidentiary hearing testimony that the trial court accredited and that merits deference on appeal: "Judge Padovano testified ... that running for judge 'had nothing to do with' his readiness for trial." (2PCR/5 832; see 2PCR/11 96-97)

Wickham (IB 63 n.17) also incorrectly attempts to rely upon Padovano's billing record filed in this case. Padovano had proved his devotion to pro bono work as evinced by his "Tobias Simon Pro Bono Service Award" primarily for "handling capital cases," mostly at the postconviction and appellate levels (2PCR/11 17-20, 152-54). Consistent with Judge Padovano's pro bono orientation, as well as consistent with his belief that he was duty-bound to stay in this case even though he could have easily dumped it (See 2PCR/11 193-94), Judge Padovano testified that he had done a "lot of things [for Wickham's case] that were not written down for

billing." (2PCR/11 157, 179-84) Judge Padovano discussed the case with Dr. Carbonell "several times" in a grocery store parking lot (Id. at 187), even woke up "in the middle of the night thinking about the case," (Id.) did not bill for these times; he did not do this case "for the money" (Id. at 186).

Even though Judge Padovano's billing statement underestimated the time that he spent on this case (2PCR/11 39, 157), he could recall significant aspects of his preparation for trial in this case. Judge Padovano, having inherited the case from three other attorneys (2PCR/11 25, 154), explained that his work on the case was almost entirely focused on the penalty phase. (2PCR/11 154-55) He indicated that "almost [all] of the depositions of the principle witnesses were already done" when he got the case. (2PCR/11 25)

Judge Padovano testified regarding two of his personal visits with Wickham at the jail (2PCR/11 34-35, 39) and, due to the incomplete notekeeping probably "more" (2PCR/11 39); hiring an investigator and a successor investigator (See, e.g., 2PCR/11 42-45, 47-48); speaking with Wickham over the phone many times (See 2PCR/11 39-40); speaking with Wickham in the holding cell before and after the events of the trial each day (2PCR/11 120-21); and, speaking with Wickham during the trial itself (2PCR/11 121).

Padovano testified about his review of the Wickham's medical records and interviews of "several potential penalty witnesses."

(2PCR/11 53-54) Padovano obtained Wickham's psychiatric records through medical releases and they contained a "great deal of information." (Id. at 55) Counsel explained that he "was attempting to learn everything I could about [Wickham's] condition. (Id. at 57) He continued (2PCR/11 59-60):

> Q. Okay. And did you have a view as to whether a non-medical doctor, psychologist, is capable of analyzing the effects of organic brain dysfunction? A. Well, as I said, there was a big debate, excuse me, long after this trial. It was a debate about that in the law, about whether they could be, but at the time there was -- it was general -- generally not questioned. And Dr. Carbonell had in many, many cases testified that witnesses had organic brain damage, one of the reasons I selected her.

Trial counsel appropriately focused on key points for mitigation: psychiatric records, alcoholic home, beaten as a child, "entire adolescence in a mental hospital," troubled childhood, organic brain damage, …. (2PCR/11 68-69, 71), and, he followed-up these and many other salient points at trial. He wanted to avoid details from DOC records, but rather, present a picture that this crime was not Wickham's fault. (Id. 71-72)

Wickham argues mitigation such as "brain damage" (IB 61), "Severe physical abuse" (IB 61) and "extreme abuse and violence" (IB 68). However, as reflected in this Court's observation of the "extensive evidence" that defense counsel marshaled for the trial, Wickham, 593 So.2d at 194, the trial court's order pointed to the Strickland-effective work Padovano did for the penalty phase of Wickham's case (See 2PCR/5 841-48: Wickham's "abusive childhood

and his poor mental health history," elicited from defendant's sister and Dr. Carbonell; "Wickham's prior psychological problems, which included periods of confinement in psychiatric hospitals during his youth"; Wickham "was an alcoholic"; "Wickham had suffered an abusive childhood"; and, Wickham's "father had deserted the family")

Dr. Carbonell ultimately testified at length at the trial concerning substantially all of the mitigation that Wickham tendered in postconviction. (See TT/VII 1462-1580; TT/IX 1969-78) At one point in discussing competency, the trial court correctly found that Mr. Padovano reasonably relied upon Dr. Carbonell. The trial court found (2PCR/5 829):

> Much is made by the defendant of the issue that a psychologist was utilized by Judge Padovano rather than a psychiatrist. It is clear from the record that neither Judge Padovano, Dr. Carbonell, or Dr. McClaren thought it necessary to obtain an evaluation by a psychiatrist. Judge Padovano testified that, at the time (in 1988), it was generally not questioned and Dr. Carbonell had testified in 'many, many cases.' (2010 Evidentiary Hearing Transcript, Volume 1, pages 59, 60).

Accordingly, the trial court found that Mr. Padovano's penalty-phase decisions were "informed." (2PCR/5 848)

The trial record shows that Dr. Carbonell was a clinical psychologist and a tenured professor with an extensive pertinent background. She had published relevant articles, had done "a lot of" research on "personality testing and the use of personality tests" and extensive practical work in forensic psychology, and

had previously testified as an expert for both the State and the defense. (TT/VII 1462-65)

The trial court explained some of the significance of Dr. Carbonell's work on the case for Padovano (2PCR/5 843):

> Dr. Carbonell testified at trial that she had interviewed members of the defendant's family and reviewed his medical records. She told the jury that she learned from Ed Wickham that the defendant was badly abused as a child, that his step grandparents were particularly cruel to him, that his father was an alcoholic, that his mother was killed while he was still in an institution, he was nervous and shaky, could not cope with the outside world, and was not mentally capable of handling anything. (Trial Transcript, Volume VII, page 1165).

The trial court's continued extensive evaluation of the trial record, including details from Dr. Joyce Lynn Carbonell's trial testimony and Wickham's family, further demonstrates Padovano's Strickland-effectiveness. (See 2PCR/5 842-48)

The extensive mitigation evidence that trial defense counsel prepared and presented at trial includes the following:

- Wickham was **badly abused as a child**. (TT/VII 1490) and **severely beaten** (TT/VII 1490-91). Wickham's older sister characterized the beatings as "**something awful**" (TT/VII 1491);
- Wickham's step[grand]parents were particularly cruel to him (TT/VII 1490);
- Wickham's **father was an alcoholic** (PTT/VII 1490);
- Wickham's family had a history of mental problems. (TT/VII 1491)[14];

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[14] Thus, Alice Bird, Wickham's younger sister, admitted to Dr. Carbonell that she "had had mental health problems." (TT/VII 1491)

- Wickham's mother was killed while Wickham was hospitalized (TT/VII 1490);
- Sometimes Wickham, in his childhood, was **made to sit at the table all night** (TT/VII 1490-91);
- Wickham was **nervous and shaky** (TT/VII 1490, 1491);
- Wickham **could not cope** with the outside world (TT/VII 1490);
- Wickham's history of **mental** problems resulted in his **hospitalization at Northville and Ionia** (TT/VII 1490-91);
- Ed, Wickham's older brother said that Wickham was **not mentally capable of handling anything** (TT/VII 1490); his older sister, Sue, said that due to his mental problems, she did **not** think he was **capable of living on his own** (TT/VII 1491);
- Wickham was a loner and had spells (TT/VII 1492);
- Wickham **walked around and talked to himself** (TT/VII 1492); sometimes he would stop his truck and walk away, **not knowing where he was** (TT/VII 1492);
- A number of events in Wickham's life can lead to **brain damage**, including his history of drinking, being beaten rather severely as a child, and car accidents; the closed head injuries can lead to serious brain damage (TT/VII 1479);
- Extensive testing consistently showed that Wickham had **brain damage**, and "not a personality problem" (TT/VII 1476-81, 1479);
- Wickham's father abandoned the family (<u>See</u> TT/VII 1490),
- Wickham "always had mental problems" (TT/VII 1491);
- "[H]e had borderline convulsive tendencies" (TT/VII 1493-94); and,
- Medical records showing the diagnosis of Wickham as **schizophrenic** (TT/VII 1499).

At the 1988 trial, Judge Padovano prompted Dr. Carbonell to discuss her schizophrenia diagnosis of Wickham. (TT/VII 1499-1500) She continued her trial testimony and indicated that "He's **brain damaged.**" (TT/VII 1500) She reiterated Wickham's miserable home environment and testified that Wickham's schizophrenia has "been

there since this man was ten years old." (TT/VII 1500) Wickham does not have any strengths. (TT/VII 1507)

Dr. Carbonell summarized for the jury **Wickham's hospitalizations**, concluding, "He was institutionalized throughout his entire developmental years." (TT/VII 1500)

At trial, in addition to Dr. Carbonell, defense counsel called a number of witnesses who testified on Wickham's behalf. These included two of Wickham's sisters[15] and his wife, who testified, for example, about --

- Wickham being **abused** many times (Id. at 1397);
- Wickham being **beaten** in the head (Id. at 1387);
- Beatings while Wickham was hospitalized at Ionia (Id. at 1388-89), **heavy bruising on his face** (Id. at 1387), being **"beat[en] half to death"** (Id. at 1397);
- His **inability** to obtain a **driver's license and balance a checkbook** (Id. at 1389, 1400, 1402, 1457);
- His "**mentality** ... like a **ten-year-old**" (id. at 1402; see also id. at 1399);
- His completion of only the **fourth grade** (See Id. at 1389, 1399).

Wickham's trial counsel re-called Dr. Carbonell for the penalty phase, and the doctor specifically discussed the application of two statutory mitigators, stressing Wickham's "long history of schizophrenia" and "brain damage[]." (See TT/IX 1975-77) She highlighted that Wickham has been institutionalized "[v]irtually

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[15] Wickham was 42 years old at the time of the trial according to his sister. (TT/VI 1384)

all his life." (TT/IX 1971) She also testified concerning the etiology of antisocial behavior. (See Id. at 1974-75) At one point, in her penalty phase testimony, Dr. Carbonell re-emphasized (TT/IX 1975):

> He was an abused child. He was placed in an additional abusive situation. Also a schizophrenic child. He's also brain damaged. He had an abnormal EEG in 1960. He was clearly brain damaged on psychological testing, and he's also got an IQ of 85, which doesn't help him cope.

Accordingly, based upon evidence that he had provided to the jury, in his guilt-phase closing argument, trial defense counsel vigorously advocated the lack of any planning or premeditation. (See TT/VIII 1773-1815). In defense counsel's penalty-phase closing argument to the jury, he stressed evidence supporting mitigators of under extreme mental or emotional disturbance and substantially impaired capacity. (See TT/X 2023-2025. See also Id. at 2033-35) He also highlighted evidence of Wickham's remorse (Id. at 2025-26), organic brain damage (Id. at 2026-27), Wickham being "severely beaten as a child" (Id. at 2027), Wickham's hospitalization (Id. at 2028-29), and the relative culpability of the accomplices (See Id. at 2029-31).

Wickham attempts to rely upon the testimony of "specialist Greenberg" (IB 59-61). However, the trial court discounted her testimony (2PCR/5 830):

> [A]t the time Ms. Greenburg worked on this case, she was a student in law school and worked with Judge Padovano on this case only for three weeks. (2010 Evidentiary Hearing Transcript, Volume 2, pages 203, 227, 228). Ms. Greenburg's

> testimony is not particularly persuasive in light of her limited legal experience, her brief exposure to the case, the testimony of Judge Padovano, Dr. Carbonell, and Dr. McClaren, and in light of the evidence that was put before the jury as mitigation in the penalty phase by trial counsel, Judge Padovano.

Thus, the trial court accredited Padovano's postconviction testimony that stressed the "big picture ... a guy who really did have a troubled childhood . . . ." (2PCR/5 842, quoting 2PCR/11 70-71)

Wickham also contends (IB 68-69) that trial counsel should have interviewed Darnell Page to dispute Hanvey's testimony and to relate his "observations of Wickham's mental dysfunction." However, it appears that Wickham failed to develop an allegation concerning Page as part of his IAC/penalty phase claim (See 1PCR/15 2804-2819), thereby rendering it unpreserved. See, e.g., Henyard v. State, 883 So.2d 753, 759 (Fla. 2004)("this specific claim was not made in Henyard's postconviction motion, and therefore it is procedurally barred"); see also, e.g., Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000)(postconviction motion's conclusory allegations insufficient on its face). It also appears that Wickham failed to obtain a ruling from the trial court concerning an IAC/penalty claim based upon Page, thereby compounding the unpreserved status of this claim. Thus, Wickham fails to cite to the 2010 postconviction transcript where he inquired of Padovano concerning any preparation Padovano had done

or not done regarding Page; Wickham bears to the rigorous burden to prove what reasonably should have been done **and** was not done.

Further, as discussed supra concerning another claim, the trial court correctly found that "Page did not testify that the police told him what to say against Wickham" and Page's criminal history would have undermined any marginal utility of his testimony. (See 2PCR/5 859-60) Concerning whether "Page ... would back up Hanvey's story," (IB 69) Hanvey testified at trial that Wickham's statement was not made to any specific person (TT/VI 1327), so Hanvey may have heard Wickham's statement and Page not heard it; accordingly, Page testified in his postconviction deposition that he was not in the cell three times for 35 to 45 minutes each time (1PCR/22 4242). In any event, Page's lay-criminal observations pale in comparison to the penalty phase evidence that defense counsel marshaled.

Given the obvious extensive preparation that Judge Padovano had conducted, as well as his postconviction testimony, the trial court's conclusion that his preparation and decisions were "informed and strategic" (2PCR/5 848) merits affirmance.

As in Jones v. State, 845 So.2d 55, 68-70 (Fla. 2003), the expert here reviewed extensive records (TT/VII 1469-72, 1493-1504, 1538, TT/IX 1970-71), communicated with trial defense counsel (See, e.g., 2PCR/11 187; PCR/18 3500), and interviewed laypersons familiar with the defendant (TT/VII 1489-93, 1522-24,

1532, 1538). Indeed, here Dr. Carbonell met with Wickham five times (TT/VII 1467, 1506) and conducted extensive testing with him (See TT/VII 1467-69, 1472-89, 1529-32, 1569-76). Counsel was not deficient.

Accordingly, the hindsighted ability of a postconviction defendant to find additional experts who may be able to testify more favorably to a defendant is not a measure of Strickland's deficiency prong. See, e.g., Buzia v. State, 82 So.3d 784, 792 (Fla. 2011)("'This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert'"; Wyatt v. State, 78 So.3d 512, 533 (Fla. 2011)("new expert who has a more favorable report"; citing Peede v. State, 955 So.2d 480, 494 (Fla. 2007) ("more favorable expert testimony at his evidentiary hearing"); Mendoza v. State, 2011 WL 2652193, *9-10 (Fla. 2011) (psychologist's jury penalty phase testimony; "cumulative evidence"). Accordingly, the trial court collected authorities and concluded that "[t]he presentation of changed opinions and additional mitigating evidence in the postconviction proceeding does not establish ineffective assistance of counsel." (2PCR/5 849).

Much of the foregoing discussion also relates to Wickham's failure to meet his burden of proving **Strickland's prejudice prong**. As discussed above, Wickham, 593 So.2d at 194, pointed to

the extreme aggravation in this case in upholding the death penalty, and as detailed in the foregoing pages and in the trial court's order, defense counsel marshaled extensive mitigation evidence, albeit paling in comparison with the egregious aggravation.

The trial court properly concluded that the cumulative nature of Wickham's postconviction evidence undermines not only his attempted proof of Strickland's deficiency prong but also the prejudice prong. (2PCR/5 848-50)

Contrary to Wickham's assertion (IB 76), the trial court properly found guidance in Kilgore v. State, 55 So.3d 487, 501 (Fla. 2010), and Bobby v. Van Hook, __U.S.__, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009). (2PCR/5 882-83) For example, as here, trial counsel reasonably relied on an expert, there Dr. Dee, 55 So.3d at 501, and here Dr. Carbonell. As here, in Kilgore, "This ineffective assistance of counsel claim appears to be a veiled attempt to relitigate the weight that the trial court assigned to the mental health mitigators found in the sentencing order," 55 So.3d at 505. And, Van Hook rejected a claim where, "Despite all the mitigating evidence the defense did present, Van Hook and the Court of Appeals fault his counsel for failing to find more."

Wickham now argues that his postconviction evidence would have "substantially weakened statutory aggravators," but it appears that he developed no such argument in his postconviction

motion (See 1PCR/15 2804-2819). Instead, the postconviction motion made insufficient conclusory allegations concerning prejudice (See Id. at 2816, 2819), thereby barring such an allegation here.

Moreover, Wickham had the mental wherewithal to know he needed money, to participate in the staging the decoy by the road, to time when to come out of the woods and shoot the victim in the back, to pursue the victim where he lay and execute him by firing bullets into his head, to drag the victim away from the road where passersby would not see him, and to search for cash. In a prior violent felony, Wickham also had the mental wherewithal to pull a gun on a cab driver and steal his money, to direct him to an isolated area, to shoot the driver, to drag the driver out of the cab and attempt to execute him by shooting him in the head, and to drive off in the cab. In another prior violent felony, Wickham also had the mental wherewithal to recognize the police, in a vehicle run from the police, and manipulate the officer's vehicle so he could ram the officer's vehicle a number of times. **When Wickham wants to commit crimes, Wickham is smart enough**.

B. Trial court's weighing process. (IB 77-81)

Wickham contends that when the sentencing judge, Judge McClure, sentenced Wickham, he had not written his findings and that ultimately, the judge simply adopted the State's proposed findings.

If Wickham is attempting to raise a free-standing claim that he is entitled to a new sentencing because the trial judge did not initiate his own sentencing order prior to sentencing Wickham or because he supposedly adopted the State's proposed order, such a claim would be procedurally barred by the direct appeal. See Walton v. State, 847 So.2d 438, 446-47 (Fla. 2003)("claim is procedurally barred"). See also Ray v. State, 755 So.2d 604 (Fla. 2000), rejected a claim that "the trial court erred in relying on the State in preparing its order. This issue was not preserved for appellate review and is procedurally barred." Compare Card v. State, 652 So.2d 344, 345 (Fla. 1995)("allegations in this case that the information concerning Judge Turner's sentencing practices was **newly discovered**, we cannot say that the procedural bar appears on the face of the pleadings").

Therefore, the trial court correctly summarily denied such a free-standing claim. (See 1PCR/17 3117). However, the trial court appears to have afforded an evidentiary hearing on the IAC portion of this claim. (Compare par. 55 of Claim VII at 1PCR/15 2818 with 1PCR/17 3119; see also 1PCR/15 2904)[16] Accordingly, Wickham's

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[16] As Wickham pointed out in his Reply Brief in SC05-1012 (p. 25 n.18), at the Huff hearing the State objected to an evidentiary hearing on a jury-instruction portion [and a prosecutor comment portion] of Claim VII of the postconviction motion but did not object to an evidentiary hearing on the "rest" of the claim. (1PCR/16 3026) Accordingly, the State's written response to the

counsel asked defense counsel Padovano about this matter at the 2004 evidentiary hearing. (See 1PCR/18 3482-83)

Therefore, turning to the IAC portion of this claim (IB 80-81), at trial the defense affirmatively waived any requirement that the Court specify written reasons prior to imposing sentence. More specifically, when the jury returned its 11 to 1 death recommendation, the Judge announced, "I am prepared to proceed to sentencing," and the prosecutor asked to "approach the bench." A prosecutor started to informed the Judge of a "waiver of the requirement of any written -- (inaudible)," when defense counsel stated: "An I'll represent to you that I spoke with Mr. Wickham about it and he concurs in that recommendation." The prosecutor responded, "We need to clarify what you are waiving." At this juncture, the following exchange occurred:

> MR. PADOVANO: If there is any authority which would require the Court to set out written reasons before imposing a grounds [sic] for the sentence, we waive that requirement. I don't see any need to postpone the sentence.
>
> THE COURT: Have you confirmed this with your client or discussed it with him?
>
> MR. PADOVANO: Yes. And **that also is his wish**.

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postconviction motion did not object to this claim. (See 1PCR/15 2904)

However, under Walton, 847 So.2d at 446-47, it appears the Strickland claims charging defense counsel and charging appellate counsel, like here, are procedurally barred by the direct appeal. Therefore, providing Wickham with an evidentiary hearing on the trial-counsel claim was an erroneous gratuity.

> MR. MARKY [prosecutor]: In that regard, we would like the written findings within a reasonable period of time and request permission to file a written memorandum in support of the jury's recommendation.
>
> THE COURT: That will be fine, setting forth the aggravating and mitigating circumstances.

(TT/X 2044-45) A little later, when the trial court asked Wickham if there was anything to say concerning why "sentence should not be imposed," Wickham responded, "No." (TT/X 2046)

Thus, the trial record shows that, with Wickham's consent, the defense affirmatively waived written findings. Wickham has not demonstrated where he has rebutted this record waiver. The State has not found where Wickham presented any evidence on this claim at the 2010 evidentiary hearing or obtained a trial court ruling on it. Instead, he cites (IB 80) to portions of some notes containing hearsay, at "PCR 6826 and "PCR 6834." If Wickham wanted to pursue this claim, Wickham's counsel should have clarified with the trial court that it was part of the evidentiary hearing and then asked Judge Padovano, in the 2010 evidentiary hearing, about the sentencing order. For an IAC claim, Wickham's burdens are rigorous. He has failed to prove that he did not fully consent to the waiver or that trial counsel's waiver was otherwise unreasonable.

Further, Wickham cites to a number of post-December 1988 appellate decisions, which cannot be the basis of an IAC claim. See, e.g., Bradley v. State, 33 So.3d 664, 682 (Fla.

2010)("counsel cannot be deemed ineffective for failing to predict a later Supreme Court decision"; citing Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982)). Indeed, there is authority indicating that Wickham has self-servingly provided himself with the benefit of his inferences concerning the status of law in 1988. See Stewart v. State, 549 So.2d 171, 176 n.4 (Fla. 1989)(collecting cases); Grossman v. State, 525 So.2d 833, 841 (Fla. 1988)(rejected appellate claim that "the sentence should be overturned because the trial judge did not enter his written findings until three months after orally sentencing him to death"; "judge's written findings were made prior to the certification of the record to this Court").

Wickham (IB 79) also simplifies a comparison of the State's memorandum and the sentencing order by reducing the differences down to only "grammatical[]" changes. Differences include the omission of "[t]he law is well settled" (Compare R/2 229 with 247); change of a general statement of the law ("Where there is substantial ...", Id. at 230) to a judicial finding of that aggravator ("The capital felony was committed for the purpose of ...," at Id. at 248); the trial court's addition of the status of Tammy Jordan and Larry Schrader as "co-defendants" (Compare Id. at 230 with Id. at 248); rewording of "The conclusion is buttressed by ..." to "Supportive of the Defendant's intention ..." (Compare Id. at 230 with Id. at 248); change from "no serious alternative

explanation" to "no plausible alternative explanation" (Compare Id. at 231 with Id. at 248); edited and truncated sentence that begins with "Of course, Morris Fleming in no way provoked" (Compare Id. at 232 with Id. at 250); re-wrote paragraph beginning with "This witness's opinion should be given no weight (Compare Id. at 232-33 with Id. at 250); restructured prosecutor's list of nonstatutory mitigators as separate paragraphs (Compare Id. at 233 with Id. at 251); agreeing with the State's argument, "submits," by "finding" it and editing the State's version (Compare Id. at 233-34 with Id. at 251-52); changes of the prosecutor's argument concerning remorse (Compare Id. at 234 with Id. at 252); and adding as an explicit decision imposing death as a decision not to override the jury's death recommendation (Compare Id. at 234-35 with Id. at 252). In sum, the trial court did not simply sign the State's proposed order, but rather, its editing indicated that it considered the proposal and agreed with its substance. Wickham cannot assume that the trial court failed to independently determine the sentence. Under Strickland, he must prove it and that any reasonable attorney would have raised the matter. See also Blackwelder, 851 So.2d at 652 (alternative holding rejecting the claim on the merits where "the sentencing order copied almost verbatim the State's sentencing memorandum"; judge made changes).

Yet further, for an IAC claim, Wickham must demonstrate Strickland prejudice. Especially given the 11-to-1 jury

recommendation, the overwhelming aggravation against him, and the trial court's observations of the guilt and penalty phase evidence (See TT/IV-IX), the trial court's observations of the penalty phase arguments (See TT/IX 1916-240, TT/X 1990-2035), and the trial court's participation in jury-instruction and related discussions (See TT/IX 1868-84, 1890-1914, TT/X 1990-2001; see also R/2 215-20), Wickham has failed to prove Strickland prejudice. Cf. Carratelli v. State, 961 So.2d 312, 320-27 (Fla. 2007)(distinction between jury claim on direct appeal and IAC claim, which requires showing of actual bias).

C. Prosecutor's penalty-phase closing argument (IB 81-82).

In his final IAC penalty phase claim, Wickham argues that defense counsel was prejudicially deficient in not objecting to an argument of the prosecutor to the jury (at TT/X 2016-17).

The trial court correctly ruled that Wickham had not pursued this claim at the 2010 evidentiary hearing. (2PCR/5 872-73) Accordingly, the trial court had granted an evidentiary hearing concerning IAC (Compare 1PCR/17 3119 with Claim 10, at 1PCR/17 3115, 3119, 3145), and defense counsel in the 2004 evidentiary hearing had testified concerning his tactical reasoning. (See 1PCR/18 235-237) See also Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2003) (recognizing that a decision not to object to an otherwise objectionable comment may be made for strategic reasons). Put another way, this Court's remand provided Wickham an

opportunity to prove this claim, but Wickham failed to pursue it. Wickham abandoned the claim. See Booker v. State, 969 So.2d 186, 194-95 (Fla. 2007)("When a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived").

Furthermore, assuming arguendo that this claim is addressed on the merits, the State disagrees with Wickham's contention (IB 82) that Teffeteller v. State, 439 So.2d 840 (Fla. 1983), applies. There, the prosecutor was more explicit concerning the degree of the defendant's dangerousness and repeated the warning about the defendant killing again multiple times. Thus, the prosecutor's penalty phase argument surrounding his comment that "I'm sure that Mr. Padovano is going to get up here and say that 25 years before parole." (TT/X 2016) The prosecutor was correct. For example, defense counsel argued that the death penalty is "reserved for the worst of the cases." He argued: "But I ask you to ask yourselves whether it would be appropriate to use the death penalty for a pathetic lost soul like Jerry Wickham. I don't think it is." (Id. at 2032) Thus, the prosecutor's argument was at worst commensurate with the defense argument.

In any event, given the totality of the aggravating **evidence** and given the trial court's jury instruction that the jury was limited to the aggravating circumstances it **enumerated** "that are

established by the **evidence**" (TT/X 2036), which reinforced a parallel instruction prior to the guilt-phase attorney's argument that attorneys' arguments are not evidence (TT/VIII 1741), there is no Strickland prejudice. (See also trial court discussion of jury instructions and scope of argument, at 2PCR/5 873)

ISSUE III: DID WICKHAM PROVE THAT HE WAS TRIED WHILE INCOMPETENT OR THAT HIS COUNSEL WAS PREJUDIALLY INEFFECTIVE FOR FAILING TO REQUEST A COMPETENCY HEARING? (IB 83-95, RESTATED)

The trial court's 2004 (1PCR/17 3113) and 2011 (2PCR/5 826-32) orders examining competency-related claims should be affirmed. The 2004 order denied, as procedurally barred by the direct appeal, the claim alleging that the court trying this case should have conducted a competency hearing. The 2011 order examined the record at length and accredited defense counsel Padovano's 2010 testimony that he "never had any indication" that Wickham "wasn't competent to stand trial." He conversed with Wickham about "complex matters," and Wickham "understood everything" and provided "his point of view." (2PCR/5 827-28, quoting 2PCR/11 60-61) In its extensive discussion, the trial court also pointed to defense counsel Padovano hiring Dr. Carbonnel, who "opined that the defendant was competent to stand trial" (2PCR/5 828; see also Dr. Carbonnel's 2004 testimony discussed at Id. at 831) and to Dr. McClaren's 2004 testimony (2PCR/5 830-31). (See also 1PCR/19 3623) Indeed,, in Dr. Carbonnel's November 1988 deposition, which Phil Padovano attended, she unequivocally stated, "**I think he is**

competent to stand trial." (1PCR/24 4523) The trial court's ruling on the free-standing competency claim and the trial court's denial of the IAC claim should be affirmed.

CLAIM II (1PCR/15 2766-73) of Wickham's Postconviction Motion had alleged as a claim that Wickham was unlawfully deprived of **a hearing** to determine his competency to stand trial. Wickham's IAC claim in his Postconviction Motion (See 1PCR/15 2771-73) also discussed competency as part of an allegation that "his attorney provided ineffective assistance of counsel by failing to obtain adequate mental health evaluations and to request a competency hearing" (1PCR/15 2771-72). The trial court denied Wickham an evidentiary hearing concerning the free-standing **competency-hearing claim** and granted an evidentiary hearing concerning IAC. (1PCR/17 3113) See Lawrence v. State, 969 So.2d 294, 313 (Fla. 2007)("question … on direct appeal … whether the trial court erred in failing to sua sponte order a competency evaluation … an entirely different legal question than whether defense counsel should have requested the hearing").

In denying Wickham an evidentiary hearing on the **competency-hearing claim**, the trial court correctly relied upon Carroll v. State, 815 So.2d 601 (Fla. 2002).[17] See also Patton v. State, 784

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[17] Applying an IAC prong, Carroll also held that "Carroll has not demonstrated prejudice under *Strickland*" because the defendant

So.2d 380, 393 (Fla. 2000)(adequacy of competency hearing procedurally barred by direct appeal).

In addition to a competency-hearing claim, Wickham's Initial Brief raises (IB 83, 84-88) **a substantive due process competency claim**, which as James v. Singletary, 957 F.2d 1562, 1571-72 (11th Cir. 1992), explained, is a different claim by discussing (a) a federal claim that the trial court should have sua sponte conducted a competency hearing, which is a claim pursuant to Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975), and, (b) a "substantive incompetency claim," which would be a claim pursuant to Dusky v. United States, 362 U.S. 402 (1960). Here, while Wickham's postconviction motion mentions Dusky in passing (1PCR/15 2766), it failed to develop any argument on it. Instead, it repeatedly discussed and cited to Pate and Drope. (See Id. at 2766-68; see also Wickham's initial post-evidentiary hearing memorandum at 2SPCR/4 622-26). Therefore, Wickham failed to preserve a substantive due process claim through his postconviction motion. See also Thomas v. Wainwright, 788 F.2d 684, 688 (11th Cir. 1986)(federal procedural bar, in essence, applied to a substantive competency claim where the defendant

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failed to present evidence proving a different result. 815 So.2d at 610.

attempts to "invoke[e] the competency issue in a piecemeal fashion").

Moreover, Nelson v. State, 43 So.3d 20, 33 (Fla. 2010), applied the direct-appeal procedural bar to both the hearing and substantive types of competency claims. See also Ragsdale v. State, 720 So.2d 203, 205 n.1, n2 (Fla. 1998)(claim "(6) ... Ragsdale's competency claim" rejected as procedurally barred by the direct appeal).

The State also notes that while the reliance of the postconviction motion upon Fla.R.Crim.P. 3.210-3.215 (See 2PCR/15 2767, 2768, 2770, 2771) reinforces that Wickham was attempting to raise a competency-hearing claim, its discussion of those rules remained at a conclusory level and thereby failed to develop any argument, making any such procedural claim unpreserved below. Further, these procedural rules are not at a constitutional level.

Wright v. Secretary for Dept. of Corrections, 278 F.3d 1245, 1253-57 (11th Cir. 2002), is instructive. It discussed the differences between a competency hearing claim and a substantive due-process competency claim[18] and upheld the District Court's

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[18] Wright v. Secretary for Dept. of Corrections, 278 F.3d 1245, 1259 (11th Cir. 2002), explained that "Wright's substantive due process claim relating to mental competency is not procedurally barred [from federal review], and we will address its merits." See also Battle v. U.S., 419 F.3d 1292, 1298 (11th Cir. 2005)(distinguishing procedural from substantive federal

rejection of both claims. There, the evidence in front of the trial court during the trial-era indicated, like here, some history of mental illness. There, the defendant "suffer[ed] from schizophrenia," which had previously caused him to be judged mentally incompetent and had been previously "adjudicated not guilty by reason of insanity." There, the defendant was treated for mental illness and his "mental competency had been restored." "Wright's illness was one that went into periods of remission from time to time" and Wright had also been "tried and convicted on a number of occasions without any finding (or apparent suggestion) that he was mentally incompetent." There and here, the defendant in the case under review unsuccessfully attempted an insanity defense. There, the mental health expert who opined about insanity did not opine that the defendant was mentally incompetent and, instead, indicated that "during the evaluation Wright had been responsive in answering questions about his name, address, and similar things, and that Wright had accurately described to him the crime and Wright's role in it." There, evidence indicated that Wright engaged in "perfectly normal activities" prior to the trial. 278 F.3d at 1257. However, there, less than a year after the trial under review, for another criminal case, a number of mental health experts indicated that Wright was incompetent to

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competency claims).

stand trial, and the trial court found him incompetent; Wright was again treated, and he was again found competent. 278 F.3d at 1251. Here, like Wright's situation, Wickham's background includes evidence of mental illness and also evidence of the ability to reason and communicate. Also, here, during the postconviction proceedings apparently Wickham was competent enough to "knowingly and voluntarily" waive his appearance at the 2010 postconviction evidentiary proceedings. (See 2PCR/4 614; see also 2PCR/4 605-11, 628-29, 640-48) Here, unlike Wright, an expert even expressly found Wickham competent shortly prior to the trial. (See 1PCR/24 4523) Wright rejected the competency claims, and, to the degree either claim is reached on the merits, it should be rejected here.

Wickham mentions (IB 94) his acting out during trial proceedings, but, if probative at all, Wickham's bizarre behavior in 1988 illustrates his competence, not incompetence. At one point during the trial while looking at the victim's family in the courtroom, he stated, "I should have killed the whole g---damned family" (TT/IX 1884); he thereby demonstrated he understood that they were, in effect, on the other side of the matter being tried and that he had a stake in it. Similarly, after the guilty verdict and while the lawyers and the trial judge were discussing Wickham's robbery of a Michigan taxicab driver as one of Wickham's prior violent felonies, Wickham demonstrated his recall of the event and its significance: "S—t, no. Relax, my -ss.

(unintelligible). I hope the son-of-a-b---- gets hit by a car and dies. … Yes, I'm getting upset. It's my life." (TT/IX 1914) This behavior was consistent with Padovano's assessment of Wickham as "underst[anding] everything that was going on in the trial" (2PCR/11 61). Belligerence and meanness are not incompetency, as, for example, Wickham executed his meanness through the ruse of luring Mr. Fleming to his death and dragging his body away from the road and the through his directions to a cab driver to an isolated location so he could shoot the cab driver in the head and leave him for dead.

ISSUE IV: IS WICKHAM ENTITELD TO RELIEF BECAUSE ERROR ACCUMULATED? (IB 96-98, RESTATED)

ISSUE IV looks like the "kitchen sink" claim. It incorrectly refers to "errors" discussed in the other issues then it lists in passing "multiple additional errors." None of these supposed matters contain any developed argument that discusses how it was preserved below, the elements of the claim, and then applies those elements to the facts. As such, they are not preserved for appellate review. See, e.g., Bryant, 901 So.2d at 827-28 ("cursory"; "waived"); Whitfield, 923 So.2d at 379 ("merely conclusory arguments"); Lawrence, 831 So.2d at 133 ("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet, 810 So.2d at 870 (Fla. 2002)("a sentence or two"; unpreserved); Freeman, 761 So.2d at 1061 (mere conclusory allegations); Parker, 904 So.2d at 378 (alternative postconviction

allegations that "either ... or ... simply asserts that either one of these theories might be true … conclusory "). Apparently none of these matters were significant enough for Wickham to allocate separate issues to them.

Further, these claims are procedurally barred by the direct appeal. See, e.g., Owen v. State, 773 So.2d 510 n.5, 515 n.11 (Fla. 2000)(claims procedurally barred by direct appeal: "(4) the HAC instruction was improper ... (5) the felony murder instruction was improper; (6) the 'avoiding arrest' instruction was improper; (7) the 'prior violent felony' instruction was improper; ... (9) details of prior violent felonies were improperly admitted during the penalty phase; ... (13) the prosecutor made inflammatory remarks during closing argument; ... (15) the court erred in failing to allow a change in venue"); Bates v. State, 3 So.3d 1091, 1104 (Fla. 2009)("Attacks on a jury selection process must be raised on direct appeal"); Jones v. State, 928 So.2d 1178, 1183 n.5 (Fla. 2006) ("use of a contemporaneous conviction to support the prior violent felony " procedurally barred by direct appeal); Knight v. State, 923 So.2d 387, 393 (Fla. 2005)("(4) juror misconduct").

At most, Wickham discusses (IB 97) one his some, but, he states that it is the subject of one of his habeas claims, so, here, the claim is barred by the direct appeal, and the State will address the claim in its habeas response.

In any event, none of these claims have any merit. Wickham failed to demonstrate that any juror sitting on his trial was prejudiced (IB 96) with anything other than admissible and probative evidence. See, e.g., Copeland v. State, 457 So. 2d 1012 (Fla. 1984)("Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity ..."); Dillbeck v. State, 964 So.2d 95, 102 (Fla. 2007)(publicity, prima facie insufficient for relief). There was no "carnival-like atmosphere" (IB 96). Instead, the trial was orderly and judicious. (See TT/IV-X)

And, the prosecutor's arguments (IB 96) were based upon the evidence and fair advocacy. The prosecutor argued that because the State's case against Wickham is so "insurmountable," Wickham is contending he is insane and then commends the question to the jury for it to answer (See TT/IV 936). The prosecutor did not wholesale tell the jury to "disregard" the jury instructions (IB 96-97). Instead, he told the jury to base its decision on the facts that were introduced into evidence "and the law that the judge gives you" (TT/VIII 1743) and the right reasons for its decision "are going to be the law that the judge gives you" (TT/VIII 1745). He then said that he will discuss what the State submits are the jury instructions that have the most direct bearing on the jury's decision in this case and proceeded to discuss the elements of the offense and instructions concerning evaluating witness testimony.

(See TT/VIII 1746-52) The context for the "almost fell out of my chair" was a discussion of the details of the evidence concerning the insanity defense (See TT/IX 1833-36).

Concerning the victim's father (IB 97-98, citing "PCR 4450"), the opinion of a victim's family member expressed **to a judge** is inconsequential here. Indeed, Payne v. Tennessee, 501 U.S. 808, 827 (1991), enlarged what could be presented to the jury, and it did not concern opinions expressed to the judge.

In conclusion, the claims in Wickham's Initial Brief fail to demonstrate any error cognizable on appeal that might otherwise accumulate. See, e.g., Bell v. State, 965 So.2d 48, 75 (Fla. 2007)("where individual claims of error alleged are either procedurally barred or without merit, ... claim of cumulative error must fail"; Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003).

ISSUE V: DOES ATKINS BAR THE EXECUTION OF SOMEONE WITH MENTAL ISSUES BUT WHO IS NOT MENTALLY RETARDED? (IB 98-99, RESTATED)

No. See, e.g., Connor v. State, 979 So.2d 852, 867 (Fla. 2007)("To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position"). Moreover, as this court observed in its direct-appeal affirmance, it "must note that the State controverted some of this mitigating evidence, thus diminishing its forcefulness" and then pointed to "the facts of the murder and the actions and statements of Wickham," 593 So.2d 191, 194 (Fla. 1991). Indeed, for example,

as discussed supra, even Dr. Carbonnel found Wickham to be competent.

Moreover, Wickham fails to show where he presented this to the trial court to preserve it for this appeal. (See 1PCR/15 2740 et seq.).

To the degree that this claim seeks to re-litigate proportionality review, it is procedurally barred by the direct appeal. See, e.g., Lukehart v. State, 2011 WL 2472801, *16 (Fla. June 23, 2011).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denials of postconviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on May 22, 2012: Frederick T. Davis, Kristen D. Kien, Corey S. Whiting, Elizabeth A. Kostrzewa, Debevoise & Plimpton LLP, 919 Third Avenue, New York, NY 10022; Martin J McClain, McClain & McDermott, 141 N.E. 30th St, Wilton Manors Florida 33334.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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