IN THE SUPREME COURT OF FLORIDA

JERRY MICHAEL WICKHAM,

Petitioner,

v.

SEC'Y, FLA. DEPT. CORR.,

Respondent.

Case No. SC12-303

RESPONSE OPPOSING PETITION FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR RESPONDENT

The State opposes each aspect of the Petition for Writ of Habeas Corpus.[1]

STATEMENT OF THE CASE AND FACTS

Timeline.

DATE	EVENT
10/1987	Wickham was indicted for robbing and murdering Mr. Fleming in 1986 (R/I 1-3);
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);
7/1989	Assistant Public defender David A. Davis certified as served the **75-page Initial Brief in the direct appeal of this case**; this representation is the subject of the Petition's IAC claims;
1991	Wickham v. State, 593 So.2d 191 (Fla. 1991), affirmed Wickham's conviction and death sentence;
2008	Wickham v. State, 998 So.2d 593, 596 (Fla. 2008), reversed and remanded for a new evidentiary hearing" on a postconviction motion;
2011-2012	Wickham appealed (2PCR/10 1846-47) another denial postconviction relief and filed his Petition, resulting in this case.

[1] This response uses citations and references similar to those in the State's Answer Brief in SC11-1193.

Wickham v. State, 998 So.2d 593, 597 (Fla. 2008), stated: "in light of the remand for a new evidentiary hearing on his postconviction motion, **we dismiss Wickham's petition for a writ of habeas corpus without prejudice to refile**."

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).

Some Aspects of the Penalty Phase & Sentencing.

The Petition attacks the prior violent felony aggravator. In the penalty phase, the State introduced evidence that, in Michigan, Wickham pulled a gun on a cab driver (TT/IX 1928), took $23 from the cab driver (TT/IX 1931), and ultimately directed the cab driver to drive to a secluded location (TT/IX 1928), where Wickham shot the cab driver in the back of the head and then shot

him again (TT/IX 1929). Wickham then dragged the cab driver out of the cab and shot the cab driver again, this third time in the face. (TT/IX 1929) Wickham drove off in the cab. (TT/IX 1930) Wickham's demeanor was "cold," not "bizarre.' (TT/IX 1930-31) Wickham was convicted of armed robbery. (See TT/IX 1942-43)

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 convicted of aggravated motor vehicle theft. (TT/IX 1947)

Wickham was on parole for this incident when he shot victim Morris Fleming. (See TT/IX 1945, 1963-64).

The jury recommended the death sentence by a 11 to 1 vote. (TT/X 2043-44; R/1 164) The trial judge followed the jury recommendation, sentenced Wickham to death, and found several aggravating circumstances (R/2 246-53; TT/X 2043-45) No mitigating circumstances were found. (See R2 251-52)

Direct Appeal.

On direct appeal, Wickham raised several issues, which this Court listed and slightly renumbered in Wickham v. State, 998 So.2d 593, 595 n.2 (Fla. 2008). This appeal is the subject of the

Petition's iAC claims. The following were the direct-appeal Initial Brief's issues and this Court's resolution of each:

> **I. The trial court erred in limiting testimony about his alleged inability to form the specific intent to commit premeditated murder.**
>
> Our review of the record discloses that the 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. The state acquiesced in the admission of this evidence. The only real limitation was that the expert was not permitted to draw purely legal conclusions from her observations of Wickham. It is axiomatic that the resolution of legal issues is properly left to the jury to resolve, using the legal instructions provided by the trial court. Accordingly, we find no error here. [593 So.2d at 193]
>
> **II. The trial court erroneously admitted evidence Wickham had made plans to escape from the Leon County jail while being detained there.**
>
> Wickham contends that the trial court erroneously admitted evidence that he had made plans to escape from the Leon County jail while being detained there. Apparently, nothing beyond mere planning or preparation ever occurred. We find no error. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959), cert. denied, 362 U.S. 965, 4 L. Ed. 2d 879, 80 S. Ct. 883 (1960). [593 So.2d 193]
>
> **III. The trial court erred in finding that the murder was heinous, atrocious, or cruel ("HAC").**
>
> We agree. Recently in *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990), we stated that this aggravating factor requires proof beyond a reasonable doubt of extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another. The facts of the present case do not meet this standard. Id. [593 So.2d at 193]
>
> **IV. The trial court erred in finding the murder was cold, calculated, and premeditated.**
>
> While the murder of Fleming may have begun as a caprice, it clearly escalated into a highly planned, calculated, and

prearranged effort to commit the crime. It therefore met the standard for cold, calculated premeditation established in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed. 2d 681 , 108 S. Ct. 733 (1988), even though the victim was picked at random. We also find no evidence sufficient to establish that Wickham had a valid pretense of justification that would have negated this aggravating factor. *See Banda v. State*, 536 So. 2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087, 103 L. Ed. 2d 852 , 109 S. Ct. 1548 (1989). [593 So.2d at 193-94]

V & VI. The trial court erred in failing to find and weigh mitigating evidence available in the record.

We agree.

As we recently stated in Cheshire, the trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase. Cheshire, 568 So. 2d at 911 (*citing Rogers*, 511 So. 2d at 534). 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. [593 So.2d at 194]

VII. The death sentence was not proportional.

> 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]

ARGUMENT

GROUND I: HAS WICKHAM DEMONSTRATED THAT APPELLATE COUNSEL WAS PREJUDICALLY DEFICIENT IN THE DIRECT APPEAL OF THIS CASE? (PET 6-47, RESTATED)

WICKHAM'S RIGOROUS STRICKLAND BURDENS.

The habeas petition's claims allege that Assistant Public Defender David A. Davis was so prejudicially deficient in his performance in the direct appeal of this case (SC# 73,508) in 1989 that Wickham is entitled to a new appeal or other relief.

Brown v. State, 894 So.2d 137, 159 (Fla. 2004), summarized the application of Strickland v. Washington, 466 U.S. 668 (1984), to the appellate setting:

> The requirements for establishing a claim based on ineffective assistance of appellate counsel ["IAC"] parallel the standards announced in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). '[The] petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable

> performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.' *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *see also Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988).

Brown, 894 So.2d at 159, explained that "[p]rocedurally barred claims not properly raised during trial cannot form a basis for finding appellate counsel ineffective absent a showing of fundamental error . . . ."

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).

"Appellate counsel cannot be ineffective for failing to raise an issue which is without merit." Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000), and the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Freeman, 761 So.2d at 1069.

Appellate counsel need not raise every issue that might possibly prevail on appeal. See Provenzano v. Dugger, 561 So.2d 541, 548-49 (Fla. 1990) ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) ("the point had so little merit that appellate counsel cannot be faulted for not raising it on appeal"; "the assertion of every conceivable

argument often has the effect of diluting the impact of the stronger points").

"Habeas petitions ... should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised." Brown, 894 So.2d at 159. Appellate counsel is not ineffective if the habeas claim was, in fact, "raised on direct appeal," Atkins v. Dugger, 541 So.2d 1165, 1166-67 (Fla. 1989). A claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992).

"After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance." Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990). See also Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000) ("Appellate counsel cannot be ineffective for failing to convince the Court to rule in appellant's favor"). It is "almost always possible to imagine a more thorough job being done than was actually done," Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (trial counsel), but, that is not the test.

"[T]he distorting effects of hindsight" must be avoided and the "circumstances of counsel's challenged conduct" must be reconstructed, "evaluat[ing] the conduct from counsel's perspective at the time." Shere v. State, 742 So.2d 215, 219 (Fla. 1999). Therefore, Appellate counsel is not responsible for

case law that does not yet exist. See State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"). See also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841, 122 L.Ed.2d 180 (1993)(Strickland's prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel). Otherwise, his performance would be judged through prohibited hindsight.

The bottom-line of the prejudice-prong burdening each ineffectiveness claim is whether "counsel's deficiency prejudices defendant" so that "the defendant is deprived of a "'fair [appeal], a[n appeal] whose result is reliable.'" Shere v. State, 742 So.2d 215, 219 (Fla. 1999) (trial counsel).

Applying the principle of "evaluat[ing] the conduct from counsel's perspective at the time," the focus is on Mr. Davis' Initial Brief certified as served in July 1989. Therefore, any review of it must be conducted through the prism of the law and reasonable practice as it existed at that time.

Under the foregoing standards and principles, each of the Petition's claims fails.

GROUND I.A.: DEFENSE COUNSEL'S WAIVER OF WRITTEN ORDER AT THE TIME OF SENTENCING. (PET 9-14)

Wickham claims that his 1989 appellate counsel was unreasonable because he failed to raise as an appellate claim the failure of the trial court to submit written findings when it sentenced Wickham to death.

Wickham's defense counsel explicitly waived this claim in the trial court and therefore it was not unreasonable for appellate counsel not to include it in the appeal. 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 [defense counsel]: 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**.
>
> 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 he wished to say concerning why "sentence should not be imposed," Wickham responded, "No." (TT/X 2046) After sentence was imposed, Wickham refused to be fingerprinted and directed profanity at the jury, calling them "12 mother-fuckers" (TT/X 2048) and not questioning the judge's imposition of sentence.

Citing to a 1981 case, Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991), explained that "this Court has said that fundamental error may be waived where defense counsel requests an erroneous instruction. *Ray v. State*, 403 So.2d 956 (Fla. 1981)." See also Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"); State v. Lucas, 645 So.2d 425, 427 (Fla. 1994).

Here, in 1989, when appellate counsel was formulating the issues on direct appeal, the state of the law would not appear to any reasonable counsel to indicate that written findings were fundamental error. Indeed, the state of the law indicated that written findings were subject to general rules of preservation.

In 1989, Grossman v. State, 525 So.2d 833 (Fla. 1988), appears to have been a leading case in this area of the law. There, the appellant claimed 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." 525 So.2d at 841. Here, Judge McClure entered the written sentencing "findings" on December 20, 1988, (R/2 246 et seq.), only 12 days after sentencing Wickham to death in open court on December 8, 1988 (TT/X 2046-47). Grossman, 525 So.2d at 841, rejected the claim:

> Appellant argues that the circumstances here are virtually identical to those in *Van Royal v. State*, 497 So.2d 625 (Fla. 1986). We disagree. The judge's written findings were made prior to the certification of the record to this Court. It is not determinative that these written findings were made after the notice of appeal was filed seven days after the oral pronouncement of sentence. Under our death penalty statute, appeal is automatic and under Florida Rule of Appellate Procedure 9.140(b)(4), governing capital appeals, the trial court retains concurrent jurisdiction for preparation of the complete trial record for filing in this Court. *Muehleman v. State*, 503 So.2d 310 (Fla.), cert. denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987).

Here, the Notice of Appeal was filed on December 29, 1988. (R/2 254)

Grossman, 525 So.2d at 841, explained some historical background in which the timing of the written order vis-à-vis the oral pronouncement was not critical and announced as a procedural rule, that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing

concurrent with the pronouncement" and announced the procedural rule:

> Since *Van Royal* [Van Royal v. State, 497 So.2d 625 (Fla. 1986)] issued we have been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue. In *Van Royal* and its progeny, we have held on substantive grounds that **preparation of the written sentencing order prior to the certification of the trial record to this Court was adequate**. At the same time, however, we have stated a **strong desire** that written sentencing orders and oral pronouncements be concurrent. *Patterson v. State*, 513 So.2d 1257 (Fla.1987); *Muehleman* [Muehleman v. State, 503 So.2d 310 (Fla. 1987)]. We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of Van Royal and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

Rehearing was denied in Grossman May 25, 1988, so, about a year later, appellate counsel was faced with Grossman's holding that refused to reverse a sentence and announced a procedural rule that in no way suggested to any reasonable appellate attorney that the matter was fundamental in nature. See also Stewart v. State, 549 So.2d 171, 176 n.4 (Fla. 1989)(August 31, 1989; summarizing the status of the law in 1989).

In 2001, Happ v. Moore, 784 So.2d 1091, 1103 (Fla. 2001), confirmed the non-fundamental nature of the matter:

> [T]he record very clearly illustrates that trial counsel did not object to the trial court's oral pronouncement of sentence or the procedure utilized and disclosed by the court

> in rendering sentence. Because of trial counsel's failure to properly object, we conclude that appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal.

Here, the "record very clearly illustrates that trial counsel did not object," and, moreover, the "record very clearly" shows that trial counsel explicitly waived the written findings at the time of oral pronouncement. Accord 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"; "order, with a few minor exceptions, was taken verbatim from the State's proposed order"); Blackwelder v. State, 851 So.2d 650, 652 (Fla. 2003)("procedurally barred because Blackwelder failed to object"); see also Phillips v. State, 705 So.2d 1320, 1321 (Fla. 1997)(rejected as procedurally barred a claim that "Phillips' resentencing proceeding did not comport with the requirements set forth in *Spencer v. State*, 615 So.2d 688 (Fla. 1993)").

If Wickham argues that Happ, Ray, and Blackwelder cannot be a part of the analysis because they were decided well-after 1989, he would be wrong. Lockhart v. Fretwell, 506 U.S. 364, explained that Strickland's prejudice prong does not support a "windfall" for a defendant. It held that Strickland prejudice is inapplicable where counsel was deficient at the time of the prior proceedings because case law at that time would have supported an objection but subsequently that case law was overruled. Pursuant

to Fretwell, the bottom-line is that, on Strickland's deficiency prong, counsel cannot be hindsightedly judged through case law that subsequently develops, but on the prejudice prong, the effect of counsel's performance on the result obtains the benefit of changes in the law supporting whatever s/he did or did not do.

Walton v. State, 847 So.2d 438, 446-47 (Fla. 2003), rejected a claim based upon an alleged deficiency of **trial counsel and appellate counsel**, like Wickham asserts here. Walton, like Wickham here, claimed that "his resentencing trial court improperly relied upon a sentencing order submitted by the State in sentencing him to death." There, the order allegedly contained extraneous information, and here Wickham claims only that the trial court adopted too much of the State's memorandum. There and here, the claim alleged that "the trial judge improperly abdicated his sentencing responsibilities." Walton held:

> This claim is procedurally barred. Clearly, any claims regarding the conduct of the resentencing trial judge in the creation of his sentencing order could and should have been raised on direct appeal. *See Young v. State*, 739 So.2d 553, 555 n. 5 (Fla. 1999). Indeed, in *Swafford v. Dugger*, 569 So.2d 1264 (Fla.1990), this Court specifically foreclosed argument regarding the trial court's failure 'to independently weigh the aggravating and mitigating factors' because 'they should have been raised, if at all, on direct appeal.' Id. at 1267.

Walton's alternative holding on the merits also applies here:

> Even if this claim was not procedurally barred, Walton's contentions here are not supported by the record. The only evidentiary support for Walton's assertions here is the **use**

> **of identical language in somewhat substantial portions of the final sentencing order and the sentencing memoranda submitted to the trial court by the State**. This Court has specifically declared that trial courts must not delegate 'the responsibility to prepare a sentencing order' to the State Attorney. *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987). In the instant case, however, it is clear that the State simply submitted a sentencing memorandum to the trial court for its consideration, which the trial court subsequently considered before writing its sentencing order. This act alone does not constitute error. *See Patton v. State*, 784 So.2d 380, 388 (Fla. 2000) (*citing Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), for the proposition that '**even when the trial court adopts proposed findings verbatim**, the findings are those of the court and may be reversed only if clearly erroneous'). Walton does not assert that any impermissible ex parte discussions regarding the resentencing or any other wrongful acts occurred in the creation of the sentencing order.[FN6] Thus, because there is no evidence contained in the record supporting Walton's contention that the State created or originated the sentencing order, we find no reversible error.
>
> FN6. Likewise, Walton's assertions that the sentencing order recites evidence outside the resentencing record is without merit, because evidence of Walton's active participation in the robbery and behavior while at the murder site was certainly before the court. *See Walton II*, 547 So.2d at 623-24.

Here, as in Walton, "nothing in the record supports ... assertions that the trial court delegated its responsibility regarding preparation of the sentencing order to the State." As in Walton, no reversible error occurred [and] [t]herefore, ... [the] claim of ineffective assistance of counsel is also without merit. *See Engle v. Dugger*, 576 So.2d 696 (Fla. 1991); *Card v. State*, 497 So.2d 1169 (Fla.1986)(holding that counsel is not ineffective for failing to raise meritless claims)." Accordingly, Blackwelder, 851 So.2d at 652, alternatively rejected the claim

on the merits even though "the sentencing order copied almost verbatim the State's sentencing memorandum." While the changes there were more substantive than those here, the changes here nevertheless showed that the trial judge did not merely "rubber stamp" the State's memorandum.

Here, it is apparent that the trial court did not simply, in essence, sign what the State prepared. Although the trial court agreed with the substance of the State's analysis, it demonstrated that it reviewed the State's memorandum and changed some aspects of it. As also detailed in the State's Answer Brief, 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 appellate attorney would have raised the matter.

Wickham also fails to demonstrate Strickland prejudice. Happ and Fretwell negate Strickland prejudice. Indeed, even if this issue had been raise in 1989 and this Court had remanded the case for resentencing by the Circuit Court, all indications are that the result would be the same, given, for example, the 11-to-1 jury recommendation and the overwhelming aggravation against Wickham.

GROUND I.B.: WICKHAM'S PRIOR VIOLENT FELONIES. (PET 14-27)

Wickham contends that his appellate counsel was unreasonably and prejudicially deficient in not contesting on direct appeal his two prior violent felonies. As a threshold matter, the State objects to Wickham's attempted use of cases decided and postconviction proceedings conducted after the briefing in the direct appeal of this case. Appellate counsel is responsible for law or a postconviction record that did not exist when he briefed the direct appeal.

In evaluating these claims, it is important to keep in mind that they do not undermine **confidence in the facts** that Wickham pulled a gun on a cab driver (TT/IX 1928), took $23 from the cab driver (TT/IX 1931), directed the cab driver to drive to a secluded location (TT/IX 1928), and shot the cab driver in the back of the head and then shot him again (TT/IX 1929). Wickham then dragged the cab driver out of the cab and shot the cab driver in the face. (TT/IX 1929) Wickham drove off in the cab. (TT/IX 1930) The victim of that armed robbery identified Wickham in the courtroom of this case without reservation. (See TT/IX 1932) Wickham was convicted of armed robbery (See TT/IX 1942-43), and as of today, Wickham has not disputed that **the conviction still stands**.

These claims also do not undermine **confidence in the facts** of another felony conviction, in which an officer attempted to

stop Wickham while he was driving a stolen vehicle, but Wickham speeded away, resulting in a high speed chase. Wickham rammed the officer's car on the side resulting in the officer losing control of his vehicle. Wickham then rammed the officer's vehicle from behind, and Wickham speeded up and rammed the officer again. (TT/IX 1949-1957) Wickham was convicted of aggravated motor vehicle theft. (TT/IX 1947)

These claims also do not undermine **confidence in the fact** that Wickham was on parole when he shot victim Morris Fleming. (See TT/IX 1945, 1963-64).

Concerning the armed robbery and shooting of the cab driver, during the penalty phase in the trial proceedings the parties discussed its viability at length. (See TT/IX 1892-1914) The prosecutor quoted from the Michigan transcript regarding Wickham's plea that a Michigan appellate court eventually reviewed (TT/IX 1898):

> MR. MARKEY: If Your Honor will look on Page 3 of that plea colloquy, midway down, in the middle down, in the middle of the page, it says, 'The Court: 'Do you understand we are on the second day of a trial and you have a right to continue to have this matter tried by the jury and to have them deliver their verdict with respect to this charge?'
>
> To which the defendant answered, 'yes, sir.'
>
> The Court went further on in to determine the voluntariness of the pleas and that there was in fact a factual basis for it. So Mr. Wickham had confrontation, cross-examination, and a right to a jury trial that he waived.

Wickham claims that a Michigan appellate court's opinion undermines the use of Wickham's robbery-shooting of the cab driver. However, the "Court of Appeals of Michigan, Division No. 3" actually **affirmed Wickham's conviction for armed robbery of the cab driver**. The Michigan opinion reads as follows, in its entirety:

> LEVIN, Judge.
>
> The defendant, Jerry Michael Wickham, appeals his conviction of armed robbery.
>
> Wickham was charged with committing the offenses of assault with intent to commit murder (M.C.L.A. s 750.83; M.S.A. s 28.278) and armed robbery (M.C.L.A. s 750.529; M.S.A. s 28.797). **His trial was interrupted after two days when he offered to plead guilty to the offense of armed robbery. He was sentenced to serve a term of 10 to 25 years**.
>
> Subsequently, Wickham moved for a 'new trial.' At the hearing on the motion, Wickham and his sister testified that he was given to understand that there was a 'chance' he would be sentenced to serve 5 to 15 years if he pled guilty. Neither Wickham nor his sister claimed that he was promised a sentence not exceeding 5 to 15 years. The trial judge found that Wickham's plea of guilty was voluntary and denied the motion.
>
> On appeal Wickham claims that the judge erred (1) in denying his motions, made before he pled guilty, to suppress a revolver taken from his apartment shortly after his arrest and a confessional statement which he gave to the police, and (2) in not granting his post-conviction motion.
>
> Taking the second issue first, we have concluded, in the light of Wickham's and his sister's testimony that he was told only that there was a Chance that he would be sentenced to serve 5 to 15 years, that the judge did not clearly err in denying the post-conviction motion.
>
> Turning to the first issue, the established rule in this state is that a plea of guilty waives the defendant's right to appeal from an earlier order denying a motion to suppress evidence.[FN1] In some other jurisdictions the right of

appeal from an order denying such a motion is preserved without regard to whether the defendant is convicted by a jury's verdict or a judge's finding following a trial, or whether he is convicted on his plea of guilty.[FN2] It would be clearly beyond the province of this Court to adopt a rule recognizing such a right of appeal following a plea of guilty in the face of the established, longstanding practice. If the rule in this state is to be changed, the Supreme Court or the Legislature must change it.

FN1. See People v. Irwin, 24 Mich.App. 582, 180 N.W.2d 638 (1970); People v. Hart, 26 Mich.App. 370, 182 N.W.2d 630 (1970); People v. Knopek, 31 Mich.App. 129, 187 N.W.2d 477 (1971).

FN2. See Cal.Penal Code, s 1538.5, subdivision (m); New York Crim.Proc.Law, s 710.70, subdivision 2, McKinney's Consol.Laws, c. 11-A; Cf. Doran v. Wilson, 369 F.2d 505, 507 (CA 9, 1966). See, also, Perin v. Peuler, 373 Mich. 531, 541, 130 N.W.2d 4 (on rehearing, 1964).

We have examined the plea-taking transcript in the light of People v. Jaworski, 387 Mich. 21, 194 N.W.2d 868 (1972). **When Wickham offered to plead guilty**, he was not advised of his right to a jury trial or of his right to confront the witnesses or of his right against self-incrimination, and under Jaworski he would, therefore, ordinarily be entitled to a reversal of his conviction.

Wickham's plea was, however, offered before June 2, 1969, the date on which Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), was decided. It appears that the Michigan Supreme Court intends to limit its Jaworski rule to Post-Boykin cases. Any implication in People v. Butler, 387 Mich. 1, 6, 195 N.W.2d 268 (1972), that the Jaworski rule would be applied to Pre-Boykin cases through the medium of GCR 1963, 785.3(2) has, we think, been superseded by more recent expressions of our Supreme Court indicating that the Jaworski rule is to apply only to Post-Boykin cases. People v. Carlisle, 387 Mich. 269, 276, 195 N.W.2d 851 (1972); People v. Duffield, 387 Mich. 300 (1972), fn. 17, 197 N.W.2d 25. See Winegar v. Department of Corrections, 41 Mich.App. 318, 199 N.W.2d 874 (1972), where we said that Jaworski applies only to Post-Boykin pleas of guilty.

Affirmed.

People v. Wickham, 41 Mich.App. 358, 358-361, 200 N.W.2d 339, 340-341 (Mich.App. 1972). Thus, the only aspects of the Michigan

case that are known from the opinion, in addition to the egregious facts of the robbery-shooting are that --

- Wickham was in the middle of a trial when **he offered** to plead guilty to armed robbery;
- Wickham, in fact, did plead guilty to the armed robbery; and,
- "When Wickham offered to plead guilty," he was not advised of his right to a jury trial or of his right to confront the witnesses or of his right against self-incrimination.

In other words, in 1972, the Michigan Court of Appeals was concerned that Wickham was not initially told **at the time of Wickham's offer** he had a right to a jury trial when he was in the middle of a jury trial, and he was not told that he could confront witnesses when he was in the middle of forcing the prosecution to its burden of proof. Contrary to Wickham's argument, these facts do not rise to anything approaching "fundamental," as suggested by non-retroactivity. Accordingly, "most constitutional errors can be harmless," Washington v. Recuenco, 548 U.S. 212, 218, 126 S.Ct. 2546, 2551 (2006)(citing, e.g., a 1986 case), and here a court's stating rights shortly after a defendant was in the midst of exercising his right and shortly after the defendant offered to plead guilty is not a constitutional violation or any violation of any consequence.

Juxtaposing the opinion with the record in this case, in which the prosecutor read from the Michigan transcript, it appears that Wickham was actually told, subsequent to Wickham's

initial offer and prior to the completion of the plea colloquy, that he had a right to continue the jury trial (TT/IX 1898), thereby indicating that the Michigan court in 1972 interpreted the law to mean that Wickham should have been told his rights at the moment that he offered to plead guilty. However, ultimately, no one can be certain of all the detailed parameters that were the foundation of the Michigan opinion.

The Michigan case may be interpreted to have imposed a procedural impediment on using a procedural reason to reverse the case. In Florida, Wickham should not be allowed to escape from this egregious prior violent felony given this background by second-guessing what the entire Michigan record showed and by-passing the Michigan court's decision not to apply new case law to Wickham.

Indeed, to demonstrate Strickland prejudice, Wickham must also demonstrate, among other things, that the Michigan Court would not affirm Wickham's conviction today. Similarly, to the degree that the 1972 Michigan opinion appears to question the plea, Wickham must show that he would receive a similar Michigan opinion today.

Put another way, Wickham is asking this Florida Court to speculate on all the Michigan record foundation of the 1972 decision and the application of Michigan and federal case law to that record over time. The State respectfully submits that,

instead of delving into reviewing these aspects of Michigan law and its application, this Court should defer to **the result** of the Michigan case, which affirmed Wickham's conviction.

The gravamen of this claim is actually, under these circumstances, whether the Florida legislature intended for this egregious felony to be used as part of the evaluation of whether someone convicted of murder in Florida deserves the death penalty. The bottom-line to resolving that question is that Michigan still recognizes Wickham's conviction and there has been nothing judicially cognizable indicating that Wickham did not rob and shoot the cab driver, with the last shot fired execution-style like Wickham did to Mr. Fleming here. In Michigan, Wickham is now guilty of robbing and shooting the cab driver. In Michigan, Wickham committed this prior violent felony. The Florida legislature could not have intended the absurd result of pretending that Wickham did not do that robbery-shooting.

Especially when viewed through the eyes of an appellate counsel in 1989, the case could be made that the language of the statute, referring to "previously convicted," §921.141(5)(b), Fla. Stat., can be reasonably interpreted to encompass situations in which the prior conviction was vacated, especially where vacating it had nothing to do with whether the defendant did the violent crime. Accordingly, this Court a number of times has decided that in determining whether a prior crime qualifies under

the statute, the existence of a conviction for a type of crime is sufficient but alternatively, the circumstances of the crime can also be considered and even be sufficient. See, e.g., Williams v. State, 967 So.2d 735, 762 (Fla. 2007)("the trial court properly considered the conviction for indecent assault as a prior violent felony aggravator"); Hess v. State, 794 So.2d 1249, 1264 (Fla. 2001)(discussion of alternative ways of proving the aggravator: definition of the crime or "proving that this crime involved violence or the threat of violence under the actual circumstances in which it was committed"); Bevel v. State, 983 So.2d 505, 518 (Fla. 2008)("Based on the conviction for attempted robbery itself and the testimony presented describing the facts of the crime, we conclude that competent, substantial evidence supports the trial court's finding that the prior violent felony aggravator was applicable based on the attempted robbery conviction").[2] Under Fretwell, See Ground I.A. supra, even case law subsequent to

[2] The facts of a facially violent felony may also be introduced so that the fact-finder can evaluate its weight. See, e.g., Padilla v. State, 618 So.2d 165, 170 (Fla. 1993)(facts of prior felony "led to his pleading guilty to manslaughter" can be considered; collecting cases); Scott v. State, 66 So.3d 923, 936 (Fla. 2011)("circumstances giving rise to the prior violent felony aggravator—in this case, a contemporaneous aggravated assault—although properly found, militate against the weight that a prior violent felony would normally carry").

1988-1989 should be considered if it supports considering the felony here.

Indeed, Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 1986 (1988), does not prohibit the use of the underlying facts of a prior felony when those facts are reliable. As Daugherty v. State, 533 So.2d 287, 289 (Fla. 1988), reasoned:

> In *Johnson*, the sole evidence supporting the finding of Mississippi's comparable aggravating circumstance was a document establishing Johnson's conviction for a 1963 offense in New York state. The Supreme Court concluded that the eighth amendment required a reexamination of Johnson's death sentence when the New York conviction later was reversed. The reversal of Daugherty's 1977 Pennsylvania murder conviction, in light of Daugherty's record, does not compel the same result.

Daugherty was decided November 14, 1988, so it would be reasonable, under Strickland, for appellate counsel to not pursue this claim on appeal in 1988-1989. Here, for the prior violent felony, the State did not just rely upon the piece of paper showing the conviction, but rather, the victim of that prior violent felony testified to the facts of the robbery-shooting and positively identified Wickham in court in this case.

Wickham's appellate counsel would have not only faced Daugherty but language in Johnson that supports that case's reasoning:

> The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct- the document submitted to the jury proved only the facts of conviction and confinement, nothing more.

Johnson, 486 U.S. at 585-586. Here, in contrast, "jury was ... presented with ... evidence describing that conduct."

However, this Court need not address the question of whether the facts of a vacated conviction could ever be used as a prior violent felony. Here, the prior violent felony was **not** "a reversed conviction," Johnson, 486 U.S. at 585, making Johnson inapplicable on its face, especially to an appellate attorney in 1988-1989.

As it stands now, this prior conviction is not "constitutionally invalid" under Johnson. "Might be invalid" or "would be invalid" or "could be invalid" or "if this or that" is not the test.

The foregoing are among the **reasons**, as in Strickland "**reasonable**," that appellate counsel could have chosen to not pursue this issue on appeal.

As the United States Supreme Court indicated, the Strickland test is not whether counsel had "nothing to lose," Knowles v. Mirzayance, but rather whether any reasonable counsel would have pursued the matter. The Strickland test is also not what "we would do," in hindsight.

Here, appellate counsel reasonably pursued seven appellate issues, but not the one that Wickham, in hindsight, now wishes. To provide relief to Wickham on this claim would violate Strickland.

Concerning the Colorado high speed chase in which Wickham rammed the officer's car three times, with the first time knocking the officer's vehicle off-course, then pursuing the officer and ramming the officer's car again, then speeding up and ramming the officer yet again, Wickham contends (Pet 20-27) that the offense was not violent.

Like the other "I.B." claim, the State objects to Wickham's attempted use of the postconviction record (Pet 24-25) and case law decided subsequent to the appellate counsel's work on the direct appeal.

For reasons discussed in the Answer Brief in SC11-1193, the State also disputes Wickham's suggestion (Pet 26 n.7) that he proved any Brady or Giglio claim in his postconviction appeal, which, in any event, are matters irrelevant in this IAC appellate counsel claim. Similarly, the State disputes Wickham's conclusory assertion (Pet 26) that the evidence did not support CCP and avoid-arrest and that there were "constitutional rights" violated.

Respondent-State also disputes Wickham's suggestion (Pet 20-21) that the trial court instructed the jury that the Colorado offense was, as a matter of law, a prior violent felony. Instead, the instruction informed the jury of aggravating circumstances that it "may consider": "The defendant has been previously convicted of another capital offense or of a felony involving the

use or threat of violence to another person." (TT/X 2036-37) The trial court's "finding" was during discussions among counsel and the Judge (TT/X 1997-98) in chambers (See TT/X 1990; compare TT/X 2001).

The State also disputes Wickham's assertion (Pet 20) that an element of "**causes bodily injury to another person**" does not qualify under the prior violent felony aggravator. However, contrary to Wickham's claim, to reject it, the Court need not examine the elements of the Colorado offense. Instead, in Florida, a prior violent felony can be determined either by examining the elements or definition of the offense or by examining how the particular offense was perpetrated. See, e.g., Williams, 967 So.2d at 762; Hess, 794 So.2d at 1264; Bevel, 983 So.2d at 518.

Here, during a high speed chase, Wickham driving a large, weighty mass (a car) multiple times into a car someone else is driving, including speeding up to ram the victim "a second time" (TT/IX 1956), is clearly violent. This conclusion is supported by common sense as well as case law, See Clark v. State, 783 So.2d 967 (Fla. 2001)("Clark intentionally crashed his truck into the vehicles, causing damage to the grille, radiator, and bumper of Lynn's truck."; We agree with the district court below that the trial court correctly submitted the **aggravated battery** charges to the jury in Clark's trial"); Wingfield v. State, 816 So.2d 675

(Fla. 2nd DCA 2002)(defendant rammed police car with "pretty full impact"; **aggravated battery** on a law enforcement officer upheld after remand from Florida Supreme Court in Wingfield v. State, 799 So.2d 1022 (Fla. 2001)(three Justices dissented to the remand because facts clearly supported the aggravated battery)); State v. Rivera, 719 So.2d 335 (Fla. 5th DCA 1998)("due to the threatening conduct of the men in the pickup, Rivera reasonably feared for his life and believed that deadly force was necessary to prevent imminent bodily injury"; "threatened Rivera's life and the lives of other innocent people by engaging in a **high-speed chase** and throwing deadly missiles for the sole purpose of 'messing with' Rivera. Rivera knew McCrae and his friends would pursue him until they caught him because they engaged in such unrelenting violent conduct"); Pacheco v. State, 784 So.2d 459 (Fla. 3rd DCA 2000)(affirmed convictions for "assaulting a police officer by **driving a motor vehicle at the officer**; grand theft third degree of a vehicle; burglary of an unoccupied vehicle with intent to commit theft; possession of burglary tools; resisting arrest without violence; possession of drug paraphernalia; and attempting to elude a law enforcement officer in a **high speed chase**"; violent career criminal).

Perhaps even more importantly, for Strickland deficiency, Wickham bears the burden of demonstrating that the status of Florida law in 1988-1989 was so clearly on point that any

reasonable attorney would have raised this claim. He has failed to meet this burden.

Moreover, in order to demonstrate Strickland prejudice, Wickham must show that both of the prior felonies would have been set aside in the direct appeal **and** must show that the remaining aggravation, including the heavy weight of under-parole and CCP, would not have rendered any such error harmless. To the contrary, any such error would have been harmless. See, e.g., Sweet v. State, 624 So.2d 1138, 1142-1143 (Fla. 1993)("In light of the fact that there were several other convictions supporting the prior violent felony aggravator," harmless); Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990)("three other valid aggravating circumstances applicable to Duest's sentence"; "still be appropriate to maintain the death penalty"); Stano v. State, 708 So.2d 271, 275-76 (Fla. 1998)("even if these convictions were set aside, Johnson would not require a reversal of the death sentence"; "remain three other murder convictions upon which the trial court could have relied to find the prior violent felony aggravator. ... three other valid aggravating circumstances"); Peterka v. State, 640 So.2d 59, 71-72 (Fla. 1994)("trial court's errors in considering the pecuniary gain circumstance and 'doubling' the avoiding lawful arrest and hindering law enforcement circumstances to be harmless"; "three valid

aggravating circumstances remaining," while under imprisonment, avoid arrest, CCP).

Thus, as this Court observed on direct appeal, this case's facts are "aggravated." This Court continued:

> 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.

Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). This case's "aggravated" facts include CCP, which Wickham, 593 So.2d at 194, upheld, making the validity of CCP part of the law of the case:

> Fourth, Wickham contends that the trial court erred in finding that the murder was cold, calculated, and premeditated. While the murder of Fleming may have begun as a caprice, it clearly escalated into a highly planned, calculated, and prearranged effort to commit the crime.

In sum, the evidence in this case embody a "very strong case for aggravation," Id.

Indeed, a low probability of appellate counsel obtaining a reversal on the death penalty supports the reasonableness of appellate counsel not pursuing these claims on direct appeal as well as a finding of no Strickland prejudice.

GROUND I.C.: WICKHAM'S COMPETENCY. (PET 27-34)

The Petition contends that Wickham's appellate counsel should have asserted that Wickham was incompetent to stand trial

(Pet 28-33) and that it was error for the trial court not to sua sponte order a competency hearing (Pet 33-34).

The "short answer" to Ground I.C. is that Wickham fails to demonstrate with specific comparisons of the facts in the record on direct appeal in this case with the facts of binding precedents existing as of 1988-1989 that would have required any reasonable appellate attorney to have raised these matters in the appeal. As such, Wickham has failed to meet his burden of demonstrating Strickland deficiency. Moreover, he has also failed to show that the precedents existing at the time of the direct appeal were so compelling that the result of the direct appeal was "unreliable," thereby failing to demonstrate Strickland prejudice.

A very substantial obstacle to a successful appeal on either substantive competency claim or the competency hearing claim is the absence of a request by defense counsel for a competency hearing and the absence of defense counsel reporting that he has reason to believe that the defendant does not comprehend the proceedings. Moreover, Wickham correctly observes (Pet 32) that, prior to trial, "Dr. Carbonnel had concluded that Wickham was competent." A "possibility" (Pet 32) that Wickham had become incompetent during those same proceedings is insufficient to conclude that appellate counsel was unreasonable in not including competency in the direct appeal.

Given the absence of a trial court ruling on the matter, appellate counsel's burden would have been to make his case so clear that the matter would rise to fundamental error. In essence, while trial defense counsel marshaled many facts from Wickham's childhood in an attempt to formulate an insanity defense and to mitigate the penalty, the question that this habeas claim asks is whether the appellate record in 1989 was so clear that no reasonable appellate counsel would omit arguing a competency as fundamental error.

In addition to a presumption that Wickham's appellate counsel was effective, "[a] defendant is presumed sane," Byrd v. State, 297 So.2d 22 (Fla. 1974), and the direct-appeal record failed to provide a clear case to argue fundamental error under any theory.

Wickham's coverage of the record (Pet 29-31) incorrectly cites to the postconviction record, unavailable for the direct appeal, and self-servingly interprets his 1988 belligerence, which actually illustrates his competence, not incompetence.

The actual appellate record shows that this case was tried in 1988 (TT/I-TT/X), and at the time of trial Wickham was 43 years old (TT/VII 1478). Wickham had been in mental institutions for about 10 years ending in 1966 when he was about 21 years old. (See TT/VII 1497-98, 1531-32; TT/IX 1977, 1984) Therefore, he had

not been in a mental institution for about 20 years. Wickham's full-scale IQ was 85. (TT/VII 1475, 1529; IX 1975).

In 1988, the year of the trial, Wickham provided two psychologists (Dr. Joyce Carbonell and Dr. Harry McClaren) a detailed story concerning the events surrounding the murder that attempted to mitigate his culpability for killing the victim, and, furthermore, the versions were very similar. Among the consistent details of Wickham's version of what happened two years earlier were the following sequence of events:

- He, with others, traveled to Alabama to pickup Darlene (TT/VII 1504; TT/VIII 1634);
- Among Wickham and his companions, there was an effort to work on, or some talk about working on, shrimp boats in Florida's panhandle (TT/VII 1504; TT/VIII 1634);
- Wickham and some of the other males in the group had guns (TT/VII 1507, 1554; TT/VIII 1634-35);
- They needed money (TT/VII 1504; TT/VIII 1634-35);
- They discussed going to a church, but did not go there (TT/VII 1504; TT/VIII 1634, 1635);
- They needed gas (TT/VII 1504, 1553-54; TT/VIII 1635, 1638);
- He told Dr. McClaren that there was discussion of doing a robbery in which some of the men would come out of the woods (TT/VIII 1635); he told Dr. Carbonell that he (Wickham) came out of the bushes immediately before the shooting (TT/VII 1505, 1544);
- He saw the man reaching for something, which he thought might be a gun (TT/VII 1505, 1506, 1588-89; TT/VIII 1637);
- He shot the man twice (TT/VII 1505, 1556; TT/VIII 1637); and,

- Then the next thing he knows, he was standing over the man with the gun still in his hand and the gun clicking (TT/VII 1505, 1551, 1556, 1563; TT/VIII 1637).

Moreover, Wickham had his "wits" about him when psychologist Dr. McClaren, whom the State called as a witness, interviewed him in 1988 about the 1986 shooting in this case:

> He [Wickham] said that 'When we headed back to the interstate and got on the wrong road and got on 319.' Said that they almost ran out of gas, pulled on the shoulder of the road. Then Mr. Wickham became sort of defensive and said, 'Hey, man, no offense, but **I want to stop here**. **I haven't given a statement to anyone and I'm giving you one now**.'

(TT/VIII 1635-36) McClaren then tried to put Wickham at ease by going over with Wickham what he had told McClaren thus far. Wickham began talking freely again and continued with his story, including shooting the victim. (See TT/VIII 1636) Wickham also knew the significance of documentation: He related his story all the way through when McClaren was taking no notes, but **stopped at that critical juncture just before the shooting when McClaren was taking notes**. (See TT/VIII 1636)

While testifying in the guilt-phase of the trial, even Dr. Carbonell, who testified for the defense at trial, indicated that Wickham's mental state has improved due to his pre-trial incarceration:

> Q. [Prosecutor cross-examining] Now, however he was on March 5, 1986 [day of the murder], he's the same now, is he not?
>
> A. Well, one of the differences now is he's been in a **fairly structured environment** for a considerable period of time and he **hasn't been drinking** either. And that was another factor.
> ...

> Q. And you think that has gone on for some 30 years, he's been essentially the same?
>
> A. Well, I think he was probably more acute as a child. I think **he's residual**. ...

(TT/VII 1548-49) Then a little later in the prosecutor's cross-examination, Dr. Carbonell indicated that given some repetition, Wickham is "**capable of learning**" and **could "tell you about" the charges**. (TT/VII 1557) Accordingly, as Wickham correctly concedes, **Dr. Carbonell found Wickham competent to stand trial**.

The trial record confronting appellate counsel shows that Wickham was sufficiently aware of the trial proceedings so that **he "asked" his counsel to request a change of venue** (See TT/IV 913) and he **responsively answered questions** when he wanted a brace removed (See TT/II 524-26).

At one point during the trial while looking at the victim's family in the courtroom, Wickham stated, "**I should have killed the whole g---damned family**" (TT/IX 1884), thereby demonstrating he understood that the victim's family 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 potential significance to his sentence: "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) A defendant's belligerence does not mandate, as a matter of law, and especially not at the level of fundament error, a competency hearing or competency finding.

Arguendo, due process does not necessarily implicate fundamental error, as illustrated by the holdings that a due process appellate argument was not preserved with an objection in the trial court. White v. State, 753 So.2d 548, 549 (Fla. 1999) (state Constitutional due process not preserved); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"). This is especially applicable here, where **the record facing appellate counsel did not indicate that anyone in 1988, at the time of the trial, thought that Wickham was incompetent to stand trial**.

Wickham (Pet 28, 33, 34) repeatedly cites to Hill v. State, 473 So.2d 1253 (Fla. 1985), but the contrast between its facts and those here support an appellate attorney's decision not to pursue a competency claim. There, unlike here, the defendant was mentally retarded, with an IQ of 48, as well as suffering from "grand mal epileptic seizures." There, unlike here, the investigator testified that "Hill could not, for example, relate concepts of time as he was unable to distinguish between three weeks and three months." There, unlike here, the expert indicated

that the defendant "was about as incompetent to stand trial, in my professional opinion, as anyone that I have seen except for several people who are actively hallucinating at the time of the interview."

In Drope v. Missouri, 420 U.S. 162 (1975), which Wickham also cites several times (Pet 28, 32, 33, 34), a defense attorney, unlike here, requested a delay of the trial because of the defendant's psychological condition, but the trial court denied the request. Unlike here, Drope shot himself on the second day of the trial. Moreover, "there [wa]s no reason for believing" that the attempted suicide was a ploy. Wickham engaged in no such self-destructive behavior, but instead demonstrated animosity towards those who he correctly perceived as opposing him in the trial. Here, the record on appeal shows that Wickham fully appreciated the charges and their significance.

Wright v. Secr'y for Dept. of Corr., 278 F.3d 1245, 1253-59 (11th Cir. 2002), illustrates the futility of any substantive appellate competency claim in which the burden is "high" at "clear and convincing evidence." There and here, the defendant in the case under review unsuccessfully attempted an insanity defense. Wright rejected the claim where defendant had "chronic schizophrenia," had been declared incompetent "to stand trial seven and eight months later," and had been "incompeten[t] to stand trial seventeen years earlier." Here, the record on appeal,

instead of indicating symptoms of "chronic schizophrenia," showed that Wickham understood what was transpiring during the proceedings and the significance of those proceedings to his self-interest.

Lawrence v. State, 846 So.2d 440, 444 n.4, 446-448, 453 (Fla. 2003), illustrates the reasonableness of appellate counsel not pursuing a competency hearing claim. There, Lawrence introduced "significant mental mitigation." Evidence showed that "Lawrence was slow and withdrawn," "Lawrence attempted suicide while in prison for a property offense and was thereafter committed to the state mental hospital in Chattahoochee," and "experts testified that Lawrence had organic brain damage and schizophrenia." There, "sometime back" mental health experts had found Lawrence competent During the trial, "Lawrence's attorney informed the trial court that Lawrence reported having hallucinations and flashbacks." Subsequently during the trial, "Lawrence's counsel again informed the trial court that Lawrence indicated he was experiencing hallucinations." As a result of these reports, no experts evaluated Lawrence for competency, no competency hearing was requested, and ultimately no hearing transpired. There, defense counsel indicated that he was satisfied that Lawrence understands "the very serious nature and consequences of this decision [to plead guilty]," and counsel stated that Lawrence is not currently having hallucinations.

Lawrence was responsive during a plea colloquy, and the trial court concluded "that Lawrence was simply uncomfortable hearing certain portions of the evidence." This Court held that "Lawrence has failed to demonstrate that, under these circumstances, the trial court abused its discretion by proceeding with the penalty phase without giving Lawrence a competency hearing." Here, for the trial court proceedings, Dr. Carbonell indicated that Wickham was competent, and there was nothing in the record indicating that defense counsel had concluded that Wickham was incompetent based on his interactions with, and observations of, Wickham. There was no indication that Wickham was hallucinating, and akin to the trial court's colloquy in Lawrence, here Wickham demonstrated by his actions and words in court and on the record that he understood full-well the significance of what was happening.

In conclusion, Wickham's cases and Wickham's claim do not overcome the presumptions attached to his sanity and to his appellate counsel's constitutional performance. Wickham has failed to demonstrate either of Strickland's prongs.

GROUND I.D.: "PREJUDICIAL ATMOSPHERE." (PET 34-38)

Wickham complains that appellate counsel did not raise a number of aspects of the trial court proceedings that Wickham submits as "prejudicial." He mentions that defense counsel moved for a change of venue at Wickham's request, but the record

indicates that the motion was limited to arguing pre-trial publicity (See TT/IV 913-14), which resulted in a burden on a direct-appeal appellant to demonstrate fundamental error for each of the other matters in this ground. Wickham has failed to show that any reasonable appellate attorney would have raised these matters and that an appellate claim would have prevailed.

Ground I.D. fails to develop any argument expressly linked to change-of-venue case law, thereby failing to show that any reasonable appellate attorney would have pursued the matter. Wickham does complain about the "exposure" of a number of jurors to "pre-trial publicity" (Pet 36-37), but he fails to specify the record where any juror indicated that unfairness or partiality that a reasonable appellate attorney in 1988-1989 must appeal. See, e.g., Copeland v. State, 457 So.2d 1012 (Fla. 1984)("Appellant's motion was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors, that may accompany the knowledge").

Indeed, Wickham (Pet 36-37) specifies only three jurors. **Ms. Whiting** said she had not formed any opinion and only "vaguely" recalled anything about the people involved. She thought she may

have gone to high school with the victim, but she thought the last time she had contact with him was in 1977, and it would not have any bearing on how she would decide the case. (TT/I 360-62) **Ms. Jordan** only related that she read something on the front page "years ago," "quite sometime ago," and she had not formed an opinion about the case. (TT/II 603-604) And **Ms. Hoppe** said she read something about the case that morning, but the Court provided more information about the case than the newspaper did, and she had formed no opinion and she does not believe everything that she reads in the newspaper. (TT/II 640-41)

Wickham (Pet 37) cites to the postconviction record, but that would not be part of the record on appeal, and he fails to show any cognizable taint of the jury.

Wickham (Pet 37) self-servingly labels the proceedings as "circus-like atmosphere" and alleges that the victim's father contributed to it.

Wickham (Pet 36) says that the **victim's father** spoke to jurors and "issued threats to defense counsel." About one-third into the voir dire, when the clerk told the Judge that the victim's father was "seen talking with some of the jurors," the Judge inquired "out of an abundance of caution," and the father said he talked with one "gentleman" and detailed their chit-chat that did not concern this case. The father told the Judge, "I didn't realize it would create any -- ... I will avoid it

studiously." (TT/II 527-28) There is no indication in the record that the jury panel was in any way tainted. Near the end of the trial, defense counsel did relate to the Judge that the father made "threatening remarks about me," but he stated that it had occurred "**last Friday night**." Friday was December 2, 1988. (See TT/VI 1285) On that day, the jury was released from the courtroom for the weekend (TT/VI 1339-40), then counsel argued the defense's motion for judgment of acquittal at length (See TT/VI 1340-66). There is no indication in the record that the jury observed anything and not even an indication that it was still at the courthouse at the time. In fact, a reasonable inference is that the jury was gone at the time.

Wickham (Pet 36; see also Pet 37) also complains about "cameras and lighting equipment" that he says that Jimmy Jordan says "were trained on him." At this juncture in the trial, this witness was the only one who complained. In fact, defense counsel told the court that "the press has an absolute right to be here" and followed up with stating he has no sympathy for the witness's complaints. (TT/V 1223-24) Therefore, there was no prejudicial atmosphere, but rather simply the media covering a public trial. See Farina v. State, 680 So. 2d 392 (Fla. 1996)("A defendant must show prejudice of constitutional proportions to have cameras excluded from a courtroom"; citing Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981). And, in any event, any claim based upon

the witness's complaint was expressly waived by counsel, thereby barring any appellate attorney's reliance upon it.

Finally, Wickham (Pet 36) says that a prospective juror overheard reporters talking about the case. The record shows that the prospective juror was "Mr. Lee," who said it was "two reporters and that he could not recall anything said about Wickham, but the Judge excused Mr. Lee (TT/I 434-35), and therefore he was not selected for the jury (See TT/IV 906, TT/IX 1865-67).

In conclusion, this Ground fails to specify anything that even remotely approaches reversible error that appellate counsel should have included in the direct appeal.

GROUND I.E.: JURY SELECTION. (PET 38-43)

This claim (Pet 38-43) alleges IAC appellate counsel based upon alleged jury pool misconduct and Mr. Fleming's misconduct. There is no substance to this claim and therefore the habeas petition has failed to demonstrate either prong of Strickland.

The following sat on the jury and reached a verdict: Ms. Johnson, Ms. Jordan, Ms. Whiting, Major Taylor, Ms. Dupree, Ms. Walby, Mr. Outland, Ms. Field, Ms. Hoppe, Ms. Silvers, Ms. Corley, Mr. Rankin. (TT/IX 1867) This claim complains about Ms. Morrow (R 448) and Mr. Lee (R 434, 435). These potential jurors did not sit on Wickham's jury. Wickham focuses (Pet 40) on the comment one potential juror made that "So, they are not

listening. It is being discussed some." (TT/I 448) However, this was Ms. Morrow (potential juror #176, TT/I 447), who did not sit on the jury. Further, Wickham has shown no record support for his inference that she was referring to other potential jurors or actual jurors when she indicated "they." She may have overheard the media discussing the case; she did not know. (TT/I 449) She heard no facts other than "there were two people involved in the – there were two women involved and that the amount of money that was taken was a very, very small amount." (Id. at 448)

Wickham (Pet 40-41) complains again about Mr. Lee and the victim's father speaking with a potential juror, matters discussed in Ground I.D. supra.

Wickham (Pet 41) argues that the victim's father and the media were present during jury selection, but his record cite to "R 343" only indicates the presence of a media person and Mr. Fleming and no indication whatsoever of anything that would have tainted anything. Perhaps that is why defense counsel did not object. There nothing in the record upon which to base any kind of appellate claim other than a speculative.

Wickham's cite (Pet 41) to the postconviction record at "PCR 4450" is beyond the record on direct-appeal, so appellate counsel could not have been responsible for it.

In contrast with Wickham's speculation of prejudice and taint, it appears that the selected and serving jurors were all

able to follow the law and apply the law to the facts, which established Wickham's guilt beyond a reasonable doubt. There was no improper partiality. There was no record-based basis for an appellate claim.

GROUND I.F.: UPWARD DEPARTURE. (PET 44-46)

Wickham (Pet 44) cites to the Judge's statement that the guidelines "score out from 22 to 27 years," but he fails to demonstrate that the law established that as guidelines range at that time and that the law was so clear that any appellate attorney would have pursued this claim. Here, it was not unreasonable for appellate counsel to winnow out a non-capital claim in a case in which the defendant was sentenced to death and in which the remedy at the time would have been to remand. See State v. Rhoden, 448 So.2d 1013 (Fla. 1984)("purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge"). However, on remand, arguably the judge could reduce his reasons, orally announced on the record (See TT/X 2047), to writing. Moreover, Wickham has not demonstrated that the judge could not depart from a guidelines range in 1988 because of a conviction for a capital felony and therefore, he has not demonstrated Strickland prejudice.

Moreover, the concurrent sentence doctrine provides a clear justification for appellate counsel not raising this claim on

appeal. This doctrine allows an appellate court to decline to review a challenge to a sentence when the defendant has other sentences that are equal to or exceed the challenged sentence. See Hirabayashi v. United States, 320 U.S. 81 (1943). Here, even if somehow Wickham obtained relief from his death sentence, he would still be facing a life sentence for the murder conviction. Of course, if Wickham is executed, the armed-robbery life sentence would also be moot.

Appellate counsel was reasonable in omitting this claim from the direct-appeal, and obtaining any relief would have been problematic. Wickham has shown no Strickland unreasonable-deficiency and no Strickland prejudice.

GROUND I.G.: CUMULATIVE "ERROR." (PET 46-47)

As discussed above under each claim, there is nothing to accumulate.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court deny Wickham's Petition for Writ of habeas Corpus.

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;

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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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