IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE,

Appellant,

vs. CASE NO. SC00-2141

STATE OF FLORIDA,

Appellee.
________________________/

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State concurs with Wike's preliminary statement concerning the record on appeal and citation thereto, and will refer and cite to the record in the same manner except that the State will include volume numbers to its citation to the record and to the transcript of the evidentiary hearing (i.e., "3R 462" for volume III, page 462 of the record on appeal, or "2EH 206" for volume II, page 206 of the evidentiary hearing transcript). In addition, it should be noted that the original trial transcript and the transcript of the third sentencing proceedings were furnished to the circuit court for its consideration in the 3.850 proceedings (EH 194-95), and are highly relevant to the claims presented. Indeed, the issue of ineffective assistance of counsel demands consideration of the evidence presented at trial and at sentencing, as Wike's counsel acknowledged (EH 195). Both counsel agreed below that the trial court could judicially notice these transcripts (EH 194-95). These transcripts, although not included in their totality in the record on this appeal, will be relied on by the State, and the State asks this Court to judicially notice them. Where necessary or appropriate, the State will cite to the original trial transcript (contained in the record on appeal in case no. 74722) and to the sentencing transcript (contained in the record on appeal in case no. 86537), by "TT" and by "ST," respectively.

STATEMENT OF THE CASE AND FACTS

This case is here on appeal from the denial of Wike's first 3.850 motion for postconviction relief. As discussed below, some of Wike's claims were denied summarily; others were denied following evidentiary hearing and the post-hearing submission of written argument by the parties. The State will set out the procedural history of the case, a statement of the evidence presented at the guilt phase of the trial, a statement of the evidence presented at the third and final sentencing phase of the trial, and a statement of the evidence presented at the postconviction evidentiary hearing.

Procedural History of the Case

Wike was convicted of first-degree murder, kidnapping, sexual battery and attempted murder by a jury in Santa Rosa County, following a trial which began on June 12, 1989. He appealed to this Court, raising six issues: (1) the trial court erred in denying the motion to suppress evidence obtained as the result of a warrantless arrest; (2) the trial court erred in denying a defense challenge for cause; (3) the trial court erred in denying a motion for judgment of acquittal as to kidnapping felony murder based on kidnapping; (4) the trial court erred in shackling the defendant; (5) the trial court erred in denying a continuance of the penalty phase of the trial; (6) the trial court erred in allowing the prosecutor to cross-examine the defendant about remorse at the penalty phase. This Court affirmed the convictions, but reversed the

death sentence, concluding that a continuance of the penalty phase should have been granted. Wike v. State, 596 So.2d 1020, 1024-25 (Fla. 1992). This Court remanded the case to the circuit court for resentencing.

On remand, the jury unanimously recommended a death sentence, and the trial court imposed one. Wike again appealed to this Court, raising eleven issues, of which the first was deemed dispositive. A majority of this Court found that denying defense counsel the final closing argument was reversible error; again, the case was remanded for resentencing. Wike v. State, 648 So.2d 683 (Fla. 1994).

On remand, Wike was once again sentenced to death. As in the second sentencing hearing, the jury recommendation of death was unanimous. The trial court imposed a death sentence, finding four aggravating circumstances: (1) prior violent felony convictions (a 1974 robbery and, as well, the attempted murder, kidnapping and sexual battery committed contemporaneously to this murder); (2) the murder was committed to avoid arrest; (3) the murder was heinous, atrocious, or cruel (HAC); and (4) the murder was cold, calculated and premeditated (CCP). Wike appealed once again to this Court, raising four issues: (1) the trial court erred in refusing to allow Wike's counsel to withdraw after Wike struck him in open court in the presence of the jury; (2) prejudicial and unnecessary details of the crimes committed by Wike against the murder victim's sister were presented in evidence; (3) the jury instructions

regarding CCP, HAC, prior violent felony and committed to avoid arrest were vague and inadequate to define these aggravators, and no anti-doubling instruction was given; and (4) the evidence was insufficient to support the finding of the CCP and avoid-arrest aggravators. This Court found no merit to issues 1, 2 and 4. As to issue 3, this Court found that most of the claims raised in issue 3 were not preserved, but, in addition, were meritless. This Court noted that the CCP instruction given "specifically provided that premeditated means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder," (internal quotation marks omitted), and that the HAC instruction given at trial was the same instruction the Court had approved in Hall v. State, 614 So.2d 473 (Fla. 1993). Thus, Wike's death sentence was affirmed. Wike v. State, supra, 698 So.2d 817 (Fla. 1997), *cert. denied*, 522 U.S. 1058, 118 S.Ct. 714, 139 L.Ed.2d 655 (1998).

On January 8, 1999, Wike filed a motion for postconviction relief in the circuit court, raising fifteen claims: (1) violation of right to speedy trial; (2) denial of Wike's right to be present at all stages of trial; (3) unconstitutional arrest; (4) fruit of unconstitutional arrest should have been suppressed; (5) illegal search of parents' home; (6) insufficiency of evidence to support conviction; (7-11) ineffectiveness of counsel in failing to achieve suppression of evidence, failing to investigate witnesses and present alibi evidence, failing to move for change of venue, failure to ensure

presence of defendant at all critical stages of trial, and failing to ensure presence of defendant at sidebar conferences; (12) ineffectiveness of trial counsel in failing to obtain a jury drawn from a fair cross section of the community; (13) ineffectiveness of counsel at the first resentencing for allowing the state to have the final closing argument; (14) ineffectiveness of counsel at all three penalty phases; and (15) a *Brady* claim of state suppression of exculpatory evidence.

The circuit court summarily denied relief on claims 1-6 on the ground that these claims were or should have been raised on direct appeal. The court summarily denied relief on claim 12, finding it insufficiently pled. The court summarily denied relief on claim 13 and that portion of claim 14 alleging ineffective assistance of counsel at the first two sentencing proceedings, finding that neither of these claims were or could be supported by case law. The court ordered an evidentiary hearing on Claims VII through XI, XV, and so much of Claim XIV as related to the third sentencing hearing. Order on Huff Hearing, filed March 6, 2000 (2R 220-23).[1]

The evidentiary hearing took place on April 19, 2000. The circuit court granted the parties permission to file written argument. On September 27, 2000, the circuit

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[1] This order is not indexed independently in the record, but is attached to the circuit court's final order denying relief and is in the record at the pages cited above.

court issued a 24 page order denying relief (with more than 300 pages of attachments) (2R 195 et seq).

The Evidence Presented at the Guilt Phase of Trial

The evidence presented at the guilt phase of the trial was summarized by this Court on direct appeal:

> The facts reflect that at approximately 6:30 a.m. on September 22, 1988, a couple found eight-year-old Sayeh Rivazfar alongside a rural road in Santa Rosa County. Sayeh was waving one hand and held the other to her throat. The couple noticed that Sayeh's throat was cut and immediately drove her to a store to call for help. During the drive, Sayeh told the couple that a man named "Ray" had taken her and her sister from their home and to the woods where he cut her throat and killed her six-year-old sister, Sarah. Later at the hospital, it was determined that Sayeh suffered a cut throat and two lacerations to her vagina which were consistent with forced penetration.
>
> A search for Sarah Rivazfar began shortly after Sayeh was found. Sarah's body was found in the woods about seventy-five feet from the dirt road where Sayeh was picked up. Footprints were also found at the scene. Sarah's hands were tied behind her back and her throat had been cut. Crime scene technicians recovered several items of evidence from three separate locations near the area where the body was found. These included pieces of shirt material, tire tracks, and blood stains.
>
> On the information investigators gathered from Sayeh and her mother, they determined that Wike was a suspect. Officers immediately went to the Wike residence. From neighbors they learned that an elderly couple, a

thirty-year-old man, and a child lived in the house. They also learned that the elderly man was confined to a wheelchair. Parked in front of the house was an older model green Dodge automobile, with a dent on the side, which fit the description given by Sayeh and her mother as being Wike's car. A computer check revealed that the car was registered to a Raymond Wike. Although no one answered when an officer rang the front doorbell, another officer heard movement inside. The officers had the dispatcher call the house. A man named Ray answered. He was asked to come outside with his hands on his head. When he did, the officers arrested him on the spot. Then the officers conducted a sweep of the house to determine if there were other occupants. After the sweep, the officers obtained a search warrant and searched the house and the car and seized several items of evidence from each. The automobile was also seized. . . .

At trial, Patricia Rivazfar, the girls' mother, testified that she and her children had known Ray Wike for a little over a year. Evidence seized from Wike and his vehicle established that: Wike, being a type "A" secretor, could have contributed to the semen stains found on various items in the car; (2) semen stains from a type "A" secretor were found on the torn pink bathing suit found in the car; (3) a child's sock found on the car had type "O" bloodstains, matching Sayeh's type; (4) the car seat material had type "O" bloodstains, as did the underpants that Sayeh wore; and (5) other bloodstains matching Sarah's type "O" were found on the pine needles obtained from the scene where Sarah's body was located and also on clothing material, tennis shoes, and a blue blanket seized from the carport. Further DNA testing of the blue blanket identified the type "O" blood found as positively coming from Sayeh. Additionally, a hair expert testified that, from a piece of torn material found at the scene, she found two head hairs that were consistent with Wike's hair. She also testified that two

pubic hairs consistent with Wike's were found, and that other head hairs were found consistent with the hair of Sarah and Sayeh. An examination of the clothing from Sarah revealed a pubic hair consistent with Wike's, and a head hair consistent with Wike's was found on both Sarah's and Sayeh's underpants.

Fingerprint evidence was presented that established two palm prints matching Sayeh's were found on the trunk of Wike's car. One of these prints was made in blood or a substance of a high protein content. Two palm prints matching Wike's were located on the edge of the trunk, and these prints were also made in a substance of high protein content. An expert in tire track comparisons testified that plaster casts and photographs of the tire tracks found at the scene matched the tires from Wike's car.

Sayeh testified that she and Sarah went to bed on September 22 around 8 p.m. She explained that they both wore their clothes to bed since they were sometimes late for the bus in the morning. She stated that she woke up in a car parked in front of her house and that she recognized the man's voice as her mother's friend Ray. Since she was not fully awake, she went back to sleep. Furthermore, she stated that the man put Sarah in the back seat of the car and, when she asked for her mother, Ray told her that her mother was coming. Sayeh remembered traveling on a paved road, which then turned into a dirt road. The child stated that, when they stopped, Wike raped her on the trunk of the car. Afterwards, they then got back into the car and proceeded to a different location, where they stopped again and walked in the woods. At that point, Ray pulled a knife with finger grips on it and told Sayeh to say a prayer and then cut her throat with the knife. She explained that Sarah was screaming and then Ray cut her throat and left.

> Wike testified in his own defense and denied involvement in any of the crimes committed against the girls. Wike explained that somebody else could have used the car because he had been drinking and smoking marijuana that night.

596 So.2d at 1021-23.

In addition to these facts summarized above, the testimony presented at trial also showed:

Moes Bauldree was driving his work truck on a one-lane "dam" road just north of the Allentown dump at 5:30 a.m. on September 22, 1988, when he came upon a pale green mid-70's Dodge Monaco with a damaged left front fender and doors sitting in the middle of the road, about a quarter of a mile from highway 89 (5TT 319-22, 328). A man was leaning inside the driver's side rear door (5TT 322-23). This man stepped away from the car and walked toward Bauldree (5TT 324). The man wore a pair of light-colored shorts and light blue tennis shoes with stripes (5TT 325-26). The shorts had dark red, fresh looking blood blotched on the front (5TT 326). The man asked for jumper cables (5TT 327). When Bauldree told him he had none, the man asked him what time it was. Bauldree told him it was twenty till six; the man kind of mumbled to himself, and then told Bauldree he had been there since 2:00 a.m. (5TT 327). The man went back to his car, cranked it after a couple of tries, and drove off (5TT 327). Although Bauldree could not identify Wike at trial almost a year later due

to his changed appearance, he had picked Wike's picture out of a photo lineup the afternoon of September 22, 1988 (5TT 304, 310-15, 333, 429). Bauldree testified that at the time he picked that photograph, there was no question in his mind that the photograph he picked was the man he had seen (5TT 333-34).

When Ronnie and Teresa Wright came by a little later and saw Sayeh standing by the road holding her throat, Sayeh not only identified the man who had hurt her as "Ray" but described his car as large and green, with a dent in the fender (3TT 60, 65, 69).

Wike's car was a green 1975 Dodge Monaco, damaged on the left side (4TT 195, 233-34; 5TT 443-44).

A set of keys found in an "indention" on the rear bumper of Wike's Dodge, next to the license plate (4TT 237-39), was identified by Sayeh's mother Pat Rivazfar as being Sayeh's "play keys" (6TT 543).

Sayeh had been stabbed in the neck with a sharp knife whose blade penetrated all the way to the cervical spine, where the blade was stopped by bone (4TT 119). The knife blade penetrated the carotid cheek, exposing the carotid artery, but just missed that artery, the jugular vein, the trachea and the esophagus (4TT 118-19, 121). The treating physician testified that it was "far beyond amazing" that Sayeh survived

(4TT 121). Sayeh also suffered "deep" lacerations to her vagina that required immediate surgery (4TT 107).

One item found on the ground near Sara's body was part of a torn shirt with metal shavings in the pocket (4TT 146-47). As a machinist who ran a milling machine, drills, lathe, and horizontal mill, Wike would get metal shavings in his pockets and shoes (5TT 439). The shavings in Wike's pocket were compared to shavings taken at each of the four machines Wike worked at; a chemical analysis of the metals contained in these shavings showed that the metal shavings in the shirt pocket at the scene were consistent with the metal shavings at Wike's work place (5TT 459, 466-67, 472-74).

Fingerprint examiner Paul Norkus testified that the prints on the trunk of Wike's 1975 Dodge appeared from his field testing to have been made in blood or a substance with a high protein content (4TT 281). Swabbings were taken of the substance for further, more precise analysis in the crime lab (4TT 206). FDLE serologist Kevin Noppinger conducted this analysis, and his testing affirmatively and positively identified this substance as being "human blood" (5TT 385-86). Swabbings of Wike's hands also revealed the presence of blood (5TT 384-85).

Kevin Noppinger tested additional material taken from the crime scene, Wike's car and his parent's home and submitted to him for the presence of blood and, as well

for identification by type and other genetic markers (i.e., enzymes and proteins) of any blood found (5TT 356 et seq). As a type "A" secretor, Wike not only could have contributed to the semen stains found on various items in his car, but, considering type along with other genetic markers present, was part of only 7% of the male population that could have so contributed (5TT 397-98).[2]

Wike's stepfather Dallas Ober testified that Wike was living out of his car, but often parked his car in front of their house (6TT 510-11). He had come by their house after work on September 21, but left soon afterwards, wearing a dark pullover shirt and a light colored pair of tennis shoes with a stripe down the side (6TT 510-11). Ober next saw Wike at 6:00 a.m. the next morning, walking toward the garden hose by the pool; he heard Wike turn on the hose (6TT 512-13). Ober did not think anything about this, because Wike typically used the garden hose to bathe himself (6TT 518). Wike then came into the house and went to sleep on the living room floor (6TT 514).

The Evidence Presented at the Third Sentencing Proceeding

[2] Other items identified in this Court's opinion matched not only as to type but also as to additional genetic markers, although it is not wholly clear from the testimony what additional identifiers existed with each item, as Noppinger continually referred in his testimony to a chart containing this additional information (e.g., 5TT 355, 391-95)).

The State presented a number of witnesses to acquaint the jury with the underlying facts of the case and the nature of the crime. This evidence basically replicated the guilt-phase evidence set out above.

Wike presented a number of mitigation witnesses, beginning with a defense investigator who testified that a blood test was administered to Wike the day after he was arrested, indicating that he had ingested marijuana sometime within the last 30 days (8ST 725-30).

Next, the previous testimony of Dallas Ober (now deceased) was read to the jury. Ober was Wike's stepfather (8ST 733). He had known Wike's mother for about 30 years; in fact, he had worked for Wike's father in Pennsylvania (8ST 733). Ober testified that "Big Ray" as Wike's father was known, and "Little Ray," as Wike was known, were very close (8ST 735). Wike's father took his son to the park, to work, skating, and fishing (8ST 735). Ober moved away after Wike's father died, but married Wike's mother in 1976, and they moved to Florida in 1987 (8ST 736-37). Wike moved to Florida too; in fact, he drove their U-Haul truck (8ST 737). Ober testified that Wike drank and smoked marijuana, although he usually stayed away from their home until he was "pretty well sobered up" (8ST 737-38). Ober once found marijuana in his boat (8ST 738). According to Ober, Wike got intoxicated quickly: "two beers and a shot of whiskey and he was loaded" (8ST 738). Wike got a job as

a machinist soon after moving to Florida (8ST 738). However, he basically wanted to spend his time and his money on himself; it was like "pulling thorns" to get him to help with household chores or with expenses (8ST 739). Ober asked him to leave (8ST 739). At the time of the murder, Wike was living out of his car (8ST 740).

Dr. Radelet, an award-winning professor of sociology at the University of Florida, testified next, as an expert in criminology and capital punishment (8ST 747-58). Radelet testified that he had done extensive research on the question of future dangerousness (8ST 758). According to him, there are two methods of assessing future dangerousness: (1) a diagnosis after evaluation by a psychologist or psychiatrist; and (2) a prediction based on actuarial or statistical analysis (8ST 759). Dr. Radelet claimed that the latter method, in which the characteristics of a given offender are plugged into a predictive statistical formula, was superior (8ST 759-60). Dr. Radelet's research included an examination of studies conducted by others and a review of newspaper clippings about pending capital cases (8ST 762-65). In the Wike case, he also reviewed the trial transcript, police reports, and prison and jail records going back to Wike's first incarceration in 1974 (8ST 766). Dr. Radelet believed "quite strongly" that, if Mr. Wike were sentenced to life imprisonment, he would "be able to make a satisfactor[y] and non-violent adjustment to prison life" (8ST 767, 779). He based this opinion on these factors: (1) Wike would serve the rest of his life in prison; (2) Wike's

criminal history was not "particularly lengthy", consisting of three prior felony convictions beginning with a robbery in Pennsylvania "about twenty years ago," a theft in Ohio in the 1970's and "another" felony conviction in Texas, none of which had resulted in prison time; (3) Wike had been regularly employed; (4) Wike had not attempted to justify his crime; (5) Wike had close family; (6) Wike had no history of psychosis or other mental abnormality; (7) there was no evidence of a "high degree" of pre-planning in this case; and (8) Wike had mostly behaved himself while incarcerated (8ST 767-72). Dr. Radelet discounted reports of verbal altercations with officers of the Santa Rosa County jail and evidence indicating that Wike was planning an escape attempt (reportedly, a handcuff key had been found in his possession) (8ST 772).

Immediately following Dr. Radelet's testimony, Wike struck his defense counsel, in front of the jury (9ST 809). After the jury was removed, the court told Wike:

> And I hope you realize, Mr. Wike, you personally - and no one else in the courtroom - but you personally just destroyed the credibility of the last witness who testified to the future dangerousness of the defendant as being non existent. And you personally showed to the jury that his testimony was not credible. And that you do pose, based upon your exhibit to the jury, the potential of that future dangerousness. And you did that to yourself, sir. And the public defender did not do it, no one else did; you did.

(9ST 812-13). Defense counsel B.B. Boles concurred, stating to the court:

> We have spent four days trying to establish some credibility with this jury. I can only surmise that any degree of credibility that I may have had was also destroyed because of the testimony of the preceding witness.

(9ST 814). Co-counsel Barksdale opined that it would be difficult to "offset what has happened in this courtroom," noting that counsel had been experiencing difficulties with Mr. Wike. Mr. Boles explained that part of their difficulties with Wike were that he persistently wanted his attorneys to elicit inadmissible or otherwise unhelpful testimony (9ST 831). Another part "of the problem is that what individuals tell us that they would be able to testify to and what Mr. Wike apparently believes they'll be able to testify to are frequently two very different things" (9ST 836). Mr. Boles told the court that he and Mr. Barksdale had "tried to prepare to the best of our ability a penalty phase strategy that would demonstrate as much arguable mitigation as we can find" (9ST 832). Mr. Barksdale added that "we tried to get some degree of defense in this case and at the same time accommodate [Wike]" (9ST 839).

The trial court, noting that it had previously addressed and rejected as meritless Wike's various allegations of ineffective assistance of counsel, denied Boles' motion

to withdraw. The court also denied a defense motion for mistrial because the circumstances giving rise to the motion had been created by the defendant himself.[3]

The defense next called Wike's original trial co-counsel Randall Etheridge (9ST 349). Etheridge testified that, at trial, state's witness Moes Bauldree had identified him as the person Bauldree had seen early in the morning of September 22, 1988 (9ST 849-50). On cross-examination, Etheridge noted that when Bauldree had seen Wike, he had been wearing shorts and had long hair and a beard, while at trial he was wearing a suit and tie, had cut his hair and shaved his beard, and had gained weight (9ST 853).

Rosemary Key testified that Wike was her husband's co-worker, and that Wike had been a regular visitor to her home (9ST 858-59). She frequently saw Wike drink and smoke marijuana (9ST 859-60).

Frank Freeman testified that he had been a co-worker with Wike in 1987 and 1988, and had socialized with him at his home (9ST 861-62). Freeman observed him drinking beer and smoking marijuana (9ST 862-63). Wike was at Freeman's home the evening of September 21, 1988, until 10:00 to 10:30 p.m. (9ST 963). Freeman saw Wike drink two or three beers (9ST 864).

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[3] The denial of these motions was affirmed on appeal. 698 So. at 819-21.

Wike testified on his own behalf. He insisted that he had been wrongfully convicted and that he was innocent (9ST 868). He testified that he had drunk a few beers at a friend's house after getting off work, then had gone to another friend's house to drop off a camera, had gone from there to a gas station to buy gas and cigarettes, and then had gone to a bar he could not name, where he had drunk a few more beers and smoked a "couple of joints" (9ST 870). From there he went to a place called the "Cove," where he drank some more, and then he drove to a bar in Pensacola called the "Eagle Lounge" (9ST 870-71). He got "pretty well intoxicated" there, and called his friend "Angie;" he had made prior arrangements with "Angie" to park his car at a place called the "Scenic Hills Lounge" because he already was on probation for one DUI and had another pending and he did not want to take a chance on getting a third (9ST 871). So he left his car at the Scenic Hills Lounge, where "Angie" picked him up and took him to "her place," where he spent the night (9ST 871).

Wike testified that he was between eight and ten years old when his father died (9ST 871-72). They played ball, roller skated, fished, boated, picnicked and camped together (9ST 872). His father was a school bus driver, and would often take Wike with him (9ST 872). His death was "really hard" on Wike (9ST 873). He blamed it on doctors; he could not understand why his father was gone; he was "lost" (9ST

873). He began having problems with his mother (9ST 873). His mother was hospitalized and he was "passed around between the family," going from "aunt to aunt" (9ST 874). Then he was sent to the Hershey school in Hershey, Pennsylvania (9ST 874). He did not like it there and ran away every chance he had (9ST 875). Once he baked a cake for his mother and ran away to deliver it to her, 171 miles away (9ST 875). At age 17, he joined the military, but was released after 29 days because he had "scoliosis of the spine" (9ST 876). He joined the Job Corps, spending six months in Idaho and then returning to Pennsylvania for another six months (9ST 877). He spent the next four and a half years in Cleveland, Ohio, and the 11 or 12 years after that in Texas (9ST 877). He moved to Florida when he learned that his stepfather's health was bad and his mother's was deteriorating (9ST 877).

Wike testified that he began smoking marijuana at age 15 or 16, and began drinking heavily in Texas; he drank "all the time" and smoked marijuana "all the time" (9ST 878). At the time of the murder, he was making $800 a month and spending all of it on drugs and alcohol (9ST 881). Asked about the earlier incident in the courtroom, Wike testified that he was under a lot of stress and strain, because he had been convicted of something he had not done, and it had been "going on" since 1988 (9ST 882). Wike hoped the "truth" would come out some day (9ST 887).

On cross-examination, Wike admitted that in his previous testimony he had not mentioned the Silver Eagle lounge or having spent the night with "Angie" (9ST 890-92). He also admitted that "Angie" had never testified, claiming that was precisely why he had been trying to get rid of his attorneys, because they had not looked for her and then she had "left town for three years" (9ST 895). He testified that the "little girl's palm print" got on his trunk lid because he had known the family and had dated the mother; asked how that print was "in blood," Wike answered: "That was never said" (9ST 896-97).[4] He also testified that when "Angie" dropped him off at the Silver Eagle that morning, he "jumped in his car" because he was running late, drove to his parents' house, opened the trunk, grabbed the "stuff" and put it on the porch to be laundered (9ST 897). He explained that if his hands touched that "substance" when he closed the trunk, that would explain the "drop" on his shoe (9ST 897).[5] Wike conceded that the pieces of shirt with iron filings or shavings in the pocket could have been from his shirt and the shavings might have come from his work place, where he was a

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[4] Wike was wrong here. As noted earlier, FDLE serologist Kevin Noppinger affirmatively testified at trial that State's exhibit 37 (earlier identified by crime scene analyst Jan Johnson as a swabbing of substance found on the trunk of Wike's car, 4TT 206), was "human blood" (5TT 385-86).

[5] The blood on Wike's shoe was positively identified by Kevin Noppinger as human blood, matching that of Sayeh Rivazfar in type and various enzymes and proteins (Sayeh has Type O blood, Wike has Type A, and Sara had Type B) (5TT 362-64).

machinist; however, he could not say for sure, because he was not wearing that shirt that night and was not the person who put it "there" (9ST 898-99). Wike claimed that if he had committed the crime, he would have washed his hands and police would not have found blood on them later, but he had not even realized there was blood in or on his car or on the blanket (9ST 899). Wike testified that the police had told Mr. Bauldree which photograph to pick out of a lineup, and that Sayeh Rivazfar's identification of him was the product of grownups telling a child what to say (9ST 899-901). Wike testified that prosecution had coerced Teresa Wright's testimony that Sayeh's first words to her were "Ray cut me" (9ST 901-02).

Opel Hagen testified next. She lives in Pennsylvania and is Wike's second cousin (9ST 911). At the time of her testimony, she was 71 (9ST 911-912). She testified that "Big Ray" and "Little Ray" were "always together" (9ST 913). Wike's father passed away when Wike was 11 or 12 (9ST 913). Wike was a "sad kid;" he "just all went to pieces" (9ST 914). His mother had a nervous breakdown and was hospitalized for several months (9ST 915). Wike went to live with his grandfather; he may have moved once, but his grandparents had him most of the time (9ST 915-16). When his mother got out of the hospital, she took Wike back home (9ST 916). Some time afterwards, he was sent to the Hershey school, about a three hour drive away (9ST 916-17). His mother visited often, but Wike wanted to be at home with her (9ST

917). He tried to run away four or five times (9ST 918). His mother tried to obtain psychiatric help for him, but was financially unable to (9ST 918-19). Mrs. Hagen lost touch with Wike after he returned from the Hershey school, but she loved him and asked the jury to spare his life (9ST 919).

Wike's next witness was his aunt Linda Zahurony (9ST 924). She was in the fifth grade when Wike was born (9ST 925). Wike was a "happy child" and a "beautiful child" (9ST 925-26). He and his father were "inseparable" (9ST 926). When his father died, his "whole world changed" (9ST 927). His mother had a nervous breakdown and was hospitalized; Wike stayed with his grandparents (9ST 928-29). After her release, he stayed with her, until one day he locked himself in his room and trashed it (9ST 930-31). Afterwards, his behavior got worse, and he was sent to the Hershey school (9ST 931-32). After he left the school, Mrs. Zahurony lost regular contact with Wike, although she kept in touch with his mother by telephone and mail (9ST 933). She loved Wike; he has had a "troubled" life and, except for her and Opel Hagan, her family had turned their backs on Wike and his mother (9ST 934). On cross-examination, she acknowledged that Wike's father had probably spoiled him and that he had not liked the Hershey school because he could not "handle" the discipline (9ST 936); he consistently had rejected any type of discipline or order in his life (9ST 937).

Ramona Frazier, Wike's stepsister (Dallas Ober's daughter) testified next (9ST 939). She has known Wike all his life, but had no regular contact with him until 1978, when she was 16, while living in Texas with her father and Wike's mother (9ST 939-40). He drank often and smoked marijuana (9ST 942). When he smoked marijuana, he was "mellow," but when drinking he was violent, especially to his wife (9ST 942, 944). She lost contact with Wike in 1979, when she moved to Arkansas (9ST 943).

Wike's final witness was his mother, Alice Ober (9ST 946). She testified that she had married Wike's father when she was 22 or 23 and he was 25 years older (9ST 947). Wike's father had raised two girls, but Wike was his only natural child; the two were inseparable and Wike was spoiled (9ST 949-50). At the time Wike's father died, Mrs. Ober had been in the hospital with kidney, bladder and female problems (9SST 951). His death was unexpected (9ST 951). Wike "threw a fit" (9ST 952). Although Wike was "devastated," he did not cry and or mourn (9ST 952-53). Mrs. Ober had a nervous breakdown and was hospitalized for three months; while she was away, Wike was cared for by his grandmother (9ST 954-55). Afterwards, Wike lived with his mother until 1967, when she was contacted by the Hershey School and was persuaded to put him in a school described to her as being a "fantastic" school for

boys with one parent (9ST 955). Wike was there for three years, although he did not want to be there and continually tried to run away (9ST 956).

Mrs. Ober testified that her financial situation changed dramatically after her first husband's death; she tried living with "other people" for a while, but when "Raymond would maybe cause a little problem," they would say "you can stay but he has to go" (9ST 956). She wanted to obtain psychiatric help for him but could not afford it (9ST 959). She testified that Wike began to drink at age 11, and he drank regularly thereafter (9ST 960). After they moved from Pennsylvania, she learned that he smoked marijuana, and once in 1973 or 1974 saw white powder that a friend told her was cocaine (9ST 961-62). She testified that her son got "mean" when he drank; you could not talk to him or reason with him (9ST 962). She bought him four cars; he demolished them all (9ST 965). When she married Mr. Ober, Wike ruined her wedding reception by getting into a fight with her brother, destroying the wedding cake and destroying "the whole building inside" (9ST 963). Then he took off in her car, getting it stuck and ruining the suit she had rented for him and had paid for (9ST 963).

When the Obers moved to Florida in 1987, Wike rented an apartment from them. Sometimes he paid rent, sometimes he did not; Mrs. Ober picked up the bills because Wike "was busy spending his [money] on booze and dope" (9ST 967). In

1988, when she and Mr. Ober moved to a house on Airport Road, Wike did not move with them (9ST 968). He did, however, drop by almost every day (9ST 968).

Mrs. Ober testified that he son needed help that he should have had and never got (9ST 970).

The Evidence Presented at the 3.850 Hearing

Wike's first witness at the postconviction evidentiary hearing was his mother. She was not present when police first searched their home pursuant to a warrant; however, her husband Dallas Ober could not read (EH 11). She informed Wike's trial attorney Terry Terrell of this fact before trial, during a 10-11 hour meeting with him, as they discussed Wike's life from conception to the present (EH 12). She also told Mr. Terrell of a conversation she had with the victims' mother Pat Rivazfar, in which Rivazfar had stated that she would rather see her children dead than lose custody of them to her husband (EH 19). On cross-examination, Mrs. Ober testified that Mr. Ober could "print his name on a check and that's all" (EH 22). If Mr. Ober had put his name on a consent to search, the name would have been printed (EH 22-23).

Wike testified next. He did not "believe" that he was present at his arraignment (EH 27). He also missed docket calls on January 19, 1989; March 23 1989; and April

4, 1989 (EH 28). On the first two days of jury selection on June 12 and 13, 1989, he came into the courtroom before lunchtime; he did not know how much of the proceedings he had missed on either of those days (EH 29-30). He also missed the beginning of each of the first two trial days, on June 17 and 18, 1989 (EH 30-31). He did not waive his right to be present at any of these times.

Wike testified that he also did not attend 10 or more sidebar conferences at trial and another "handful" at the final penalty phase (EH 31-32). He did not waive his presence at these sidebar conferences (EH 32).

Wike testified there was "quite a bit" of media coverage of his case following his arrest and leading up to the trial (EH 33-34). However, his trial counsel did not move for a change of venue and the case was tried in Santa Rosa County (EH 43).

Wike testified that police had developed 25 rolls of film they had taken out of the trunk of his car - pictures he had taken showing, among other things, his alibi witness Angie Faulk and "happy times" he spent with the Rivazfar family (EH 44-45).

Wike testified that Angie Faulk could have supported his theory of innocence if she had testified; she could have testified that she had picked him up at Scenic Hills Lounge early in the morning, that they had gone in her van to her place and gone to bed, that she had brought him back the next morning to his car at the Scenic Hill

Lounge (EH 46). Wike claimed that he had told his attorney and investigator about Faulk before trial (EH 47).

Wike also claimed that his attorneys failed to discover and/or follow up on a June 28, 1989 newspaper report that the Rivazfar children had been molested by a family member, and failed to locate and present witnesses whose names Wike had given them, including: (1) Tara Leonard, who could have verified that he was at Racetrack shortly before midnight on September 21, and that he had been drinking; (2) Madell Lynn, who could have testified that she had seen Wike in his vehicle at her beauty salon at the same time the police had his parents' home surrounded; (3) Glenda Hillard, who could have verified that he was at Fred's bar at 11 p.m. on September 21; (4) Mike and Rosie Keys, who could verify that Pat Rivazfar had used his car on occasion; (5) Terry Schuster, who could verify that Wike had lost his identification; (6) Kathy Bennett, who could verify that Wike was unfamiliar with the Allentown area; (7) Dallas Smith, who could verify that Wike had gone to her place the night of September 21 and dropped off a camera; (8) Tommy Osborn, a barmaid at the Silver Eagle Lounge who could verify that Wike had lost the alleged murder weapon in a pool game several months earlier; and (9) Angie Faulk Brown, who could have testified that he was with her at her mother's house in the early morning hours of September 22 (EH 49-57).

On cross-examination, Wike denied having told Detective Bryan that he had drunk 3-4 beers that evening and was not drunk (EH 66-67). He denied having been told by defense investigator Jim Martin that he had been unable to find any witnesses to verify his whereabouts between 1 a.m. and 6:00 a.m. the morning of September 22 (EH 67). Wike could not recall if he had told Martin anything about the Silver Hills Lounge when he first talked to him (EH 67). He admitted having the keys to his car when Angie brought him back to the Scenic Hills Lounge at about 5:50 a.m. (EH 69). But, someone could have had the keys duplicated, "used the vehicle and parked it back," because 4-6 months before the crime, he had been "tailed" by two different vehicles (EH 76). He had written the tag numbers down, and, when his stepfather brought him the paperwork out of the glovebox of Wike's car, he found these tag numbers. Sometime in 1993, he asked his attorneys to check them. They told him the numbers were "fictitious," but in 1996 Wike wrote the State of New York himself to find out who the numbers belonged to and one of the vehicles belonged to Mr. Rivazfar (EH 76-77). Wike admitted that soon after obtaining this information, he had written Sayeh Rivazfar a letter in which, inter alia, he had threatened: "If you keep up your lies and do not recant your stories then I will confess that your Dad paid me a little money and promised much more for me to do this crime to you all" (EH 77).

Kathy Bennett Desmond was Wike's final witness. She testified that sometime in 1988, she had a blowout in Pea Ridge and Wike helped her (EH 82). Pea Ridge is not near Allentown (EH 82). She did not know if Wike was familiar with the Allentown area, but he did get lost when he tried to make it to a cookout they invited him to, which was in the Point Baker area (EH 82, 84). She had never been to the crime scene area, and does not know if Wike is familiar with that area (EH 83).

The State's first witness at the evidentiary hearing was Angie Faulk Brown Cooper (EH 85). She acknowledged having met Wike sometime before September 22, 1988 (EH 86). She had known him for a couple of weeks, and had even been intimate with him, but had told him some three weeks before September 22, 1988, not to come to her house (EH 87, 90). He was not at her house at any time on September 22, 1988, and she could not have gone to pick him up because at the time she did not even have a car (EH 87).

Jim Spencer testified next; he stated that he had read the consent-to-search form to Mr. Ober and that Mr. Ober had *signed*, not printed, his name (EH 93-94). Spencer also testified that Mr. Ober appeared to read the form himself (EH 97).

Defense investigator Jim Martin was the State's third witness. Martin. Martin initially met Wike on September 27, 1988, at the Santa Rosa County Jail (EH 104). He took a taped statement from Wike that day and again on September 29, 1988 (EH 105-

06, 109). Wike described his activities the evening of September 21 and gave Martin a list of the places he had been and the people he had talked to (EH 110).[6] Wike did not mention Angie Faulk in either of these two interviews; her name came up for the first time only shortly before trial (EH 110-11). Martin was unable to locate her before trial (EH 111).

Martin did follow up on the information Wike had given him at the outset. He went to the Cove tavern and talked to Angela Jones, who said that Wike had come in around 11:00 p.m., drank a couple of beers, and left (EH 112). From there, he went to Fred's, across from Wal-Mart, and talked to Glenda Hilliard, who said that Wike had come in around 11:00 p.m. and had left at 11:50 (EH 112). Hilliard said Wike "acted weird" and was a "strange person" (EH 112). Martin then talked to Carolyn Neal at the RaceTrac gas station; she said Wike had come in at midnight (EH 113).

At first, Wike told Martin that he could not remember where he had gone after RaceTrac (EH 113). Later, Wike told Martin about the Silver Eagle Saloon, a biker's

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[6] During the September 22 statement, the tape of which was played in open court (EH 208-225), after being apprised of the evidence the State had and being asked if he had an explanation for his fingerprints being on the car, Wike answered, "No. Not unless, you know, I am the guilty person" (EH 217). He also claimed he never loaned his car to anyone (EH 217). He could not remember where he had spent the night (EH 218-19).

bar, so Martin went there and talked to Tammy Osborn, who said that Wike had come there just before midnight and had stayed until 1:15 a.m. (EH 113-14).

Much later, Wike "came up with the Scenic Hills part," first telling Martin that he had gone to the Scenic Hills Lounge and had passed out front, and that someone must have used his car and brought it back (EH 114-15). Later, he told Martin that he had called Angie Faulk from the Silver Eagle Saloon, had met her at the Scenic Hills Lounge, left his car there at about 1:15 a.m. and stayed with her until 5:45 a.m. (EH 114). Martin went to the Scenic Hills Lounge; the man and wife who ran the lounge told Martin that they did not allow people to lay around passed out and they did not allow people to leave their cars overnight; offenders' cars were towed (EH 114).

Martin did locate Angie Faulk in September of 1992, before the first resentencing (EH 115). She failed to corroborate Wike's alibi (EH 115). Martin also talked to Angie's mother, who told Martin that Wike had stopped by her work several days before the murder to ask how he could get in touch with Angie; according to the mother, she had told Wike her daughter did not want anything to do with him and for him to leave her alone or they would have him arrested (EH 116).

Martin testified that the Rivazfar children appeared to have been taken from their home at about 2:00 a.m. on September 22 (EH 120). They only lived 3-4 miles from

the Silver Eagle Saloon, where Wike appeared to have been until 1:15 a.m. (EH 121).

Martin talked to Terry Schuster, who told him she had met Wike at a bar in 1988 and he seemed "creepy" (EH 125). She had dinner with him; while she was cutting her meat, Wike pulled out a huge knife from under his pants leg (EH 125). Schuster told Martin, "Hang him or burn him." Martin did not think she would be a good witness (EH 125).

Martin testified that, in preparation for the penalty phase, he and B.B. Boles had flown to Harrisburg, Pennsylvania, rented a car and drove around Pennsylvania to look for mitigation witnesses (EH 117). They learned nothing helpful from the school records or the psychiatrists they talked to (EH 117).

Guilt-phase trial counsel (now circuit judge) Terry Terrell testified next. At the time of the trial, he was the Chief Assistant Public Defender for the First Judicial Circuit (EH 131). He had been chief assistant since 1979, and had tried in excess of 50 cases before he stopped counting (EH 132). As was his practice in high profile cases, he documented all pre-trial publicity (EH 132). In addition, in this case he obtained some 50 affidavits asserting individual opinions that Wike could not receive a fair trial in Santa Rosa County (EH 133). Although "even in major high profile cases there is a significant degree of inattentativeness of the jury pool members," and it was

“rare” that a motion for change of venue was granted, nevertheless, it was Judge Terrell’s common practice to move for change of venue in major capital cases (EH 152). Judge Terrell discussed the possibility of a change of venue motion with Wike several times; on May 18, 1999, however, Wike told Judge Terrell that he did not want to change venue (EH 134). Wike did not change his mind despite “very clear” discussions of the “significance” of venue issue (EH 134, 152). Heeding his client’s wishes, Judge Terrell did not file a change of venue motion (EH 135, 151). In Judge Terrell’s view, regardless of the “wisdom” of Wike’s decision, he had the final say on this kind of issue (EH 154). Judge Terrell still deemed it appropriate, however, to explore the issue of prejudicial publicity “in detail” during jury voir dire; if for no other reason, such exploration, depending on what was revealed, might have persuaded Wike to reconsider his decision (EH 136). In this case, however, Wike was steadfast in his insistence on trying the case in Santa Rosa County (EH 136).

Judge Terrell testified that “usually for an arraignment when the defendant was in custody, we’d waive their appearance for arraignment and enter a plea of not guilty on their behalf” (EH 138). His “normal practice” was to “have clients present at each docket day so they would know what was happening.” Although he had no specific recollection, he “would presume” that happened in this case (EH 138). Judge Terrell had no recollection of Wike having been absent during any part of the jury selection

or presentation of evidence; if Wike had been absent, he "would have objected and refused to participate without him being present" (EH 139). Wike was not, however, present at sidebar conferences (EH 156).

Judge Terrell testified that work in this case began with the initial intake interview of Wike conducted by defense investigator Jim Martin (EH 140). Martin interviewed most, if not all, of the witnesses whose names were disclosed by Wike; in addition, he contacted additional persons whose names were disclosed in discovery (EH 140). They made a tactical decision to refrain from deposing certain witnesses, but these witnesses were contacted and their information gleaned from various sources (EH 140). This was a "difficult" case (EH 140). On the one hand, Wike was insistent that he was innocent; on the other, his lack of memory about what his involvement may have been "placed us in the posture of having his memory refreshed by Discovery information that was being gathered during the course of the case" (EH 141). The witnesses they discovered were unable to furnish an alibi for Wike as their contact with Wike was before the relevant time (EH 141). After discussing possible strategy with Wike and with co-counsel, Judge Terrell concluded that having the final closing argument was more important that presenting what he would classify as "pre-alibi witnesses" (EH 142).

Another area of "difficulty" was the "willingness of Mrs. Ober and Mr. Ober to cooperate" (EH 143). For some period of time, Mrs. Ober avoided Judge Terrell (EH 144). She and Mr. Ober eventually came to his home in Pensacola, where they spent "the better part of that day" reviewing Wike's background, during which she stated "reasons why she did not want to be involved" (EH 144). At no time during these discussions did anyone suggest that Mr. Ober was illiterate or that either Mr. or Mrs. Ober failed to understand what was going on in connection with the search of their home by law enforcement (EH 144-45).

Larry Bryant testified that he was the lead investigator in the original pre-trial investigation in this case (EH 160). Police found 12 rolls of film in the trunk of Wike's car; they developed them into negatives "just to be sure there was no pictures of the victims or any pictures of any crime committed" (EH 162-63). There were no pictures of the victims (EH 164). Once police reviewed them, an authorization was prepared and signed, allowing release of the negatives to Wike (EH 162-63). They are still in the case file in Bryant's office, and still available to be picked up by the defense (EH 162-63, 169).

The State's final witness was penalty-phase counsel B.B. Boles. His participation in the case began with the first resentencing in 1992 (EH 171). He was assisted by attorney Henry Barksdale, who has since passed away (EH 171). Boles

and Barksdale also represented Wike in the second and final resentencing in 1995 (EH 171). Boles testified that initially he reviewed "what was already a very extensive file that had been handled by Judge Terrell when he was the Chief Assistant Public Defender for this circuit" (EH 172). Counsel then met with Wike on several occasions (EH 172). Although a psychological evaluation had been done in 1989, counsel sought an additional evaluation (EH 172). After speaking with Wike's local family, including his mother an stepfather, he and investigator Martin scheduled a trip to Pennsylvania (EH 172). They were gone a week to ten days (EH 172). They began initially in the eastern part of the state, specifically in Hershey where Wike had been a student (EH 172-73). There, they tracked down the housefather, spoke to the house psychologist, and obtained school records (EH 172-73). From there, they went to the southwestern part of the state, where Wike is from (EH 173). Finally, they tracked down Wike's ex-wife in Ohio (EH 173). They found some witnesses who would testify favorably and consistently with the "operative theory" of defense that Wike's life had been "completely disrupted" when his father had passed away and his mother was no longer physically or mentally capable of taking care of him (EH 174). These witnesses were brought down to testify at resentencing (EH 173). However, they also found many family members and other witnesses whose testimony would have been highly unfavorable, and Boles saw no reason to bring them to the State's or the jury's

attention (EH 175). For example, one witness told them that Wike had held her at knife point in her own trailer (EH 179). Another witness told them that, when Wike was still a teenager, he had sexually molested her child (EH 179). And, although Boles discounted this report, one witness told them she had heard that Wike had sexually assaulted his own mother (EH 179). Still another witness told them that Wike had been mean in high school and had been in trouble all the time; he used to brag about hiding his dope in his mother's radio (EH 179-80). Wike's wife not only did not have anything favorable to say about him, she was almost "venomous" (EH 180). She could not testify to *any* positive character traits, was not willing to ask the jury for mercy for Wike, and did not think he deserved mercy (EH 181). Boles testified that "it was one of those type[s] of interviews," and "we ran into a lot of those when we tried to talk to people about Mr. Wike" (EH 181).

Boles testified that defense counsel can usually "find family members who will beg for their family member's life" (EH 180). But he was hoping to find "contemporaries of Mr. Wike's" that might be able to give the sentencer some insight into why his life had gone wrong; instead, "we just came up with more examples of how it had" (EH 180).

Counsel also obtained psychiatric evaluations for Wike, both for the 1992 sentencing and the 1995 sentencing (EH 176). They also had available to them the

results of a 1989 evaluation (EH 176). For the 1995 sentencing, they used Dr. Larson, who had evaluated Wike previously, and also obtained the services of Dr. Bingham, looking for a second opinion (EH 176-77). In addition, counsel had Wike neuropsychologically tested for possible brain damage (EH 176). Nothing favorable emerged from any of this testing and evaluation (EH 177). It did not show "any kind of organic brain damage that might explain any of the problems tha Mr. Wike suffers from" (EH 177). Although it was clear that Wike was a substance abuser and had been for most of his life, the experts were unable to render an opinion about Wike's mental state at the time of the offense because Wike "essentially refused to speak with them" about that, contending that his mental state at the time of the crime was irrelevant since he was not there (EH 177).

Counsel tried to persuade Wike that his insistence that he was innocent had not worked; they suggested that a more effective strategy might be to admit "to what the jury is going to be told that you are already guilty of and begging for mercy" (EH 178). In Boles' view, admitting guilt and saying "I am sorry" can sometimes be the "most powerful evidence" (EH 177). However, Wike explicitly declined to pursue such strategy (EH 178).

Counsel did not move for a change of venue at the second resentencing (third sentencing overall) because (1) they had moved for one at the first resentencing and

it had been denied, (2) there was minimal publicity attendant to the final sentencing, (3) they had little trouble selecting a jury at the final sentencing that was unaffected by any publicity, and (4) there was a minimizing "effect" with the passage of time, especially in a fast-growing area like Santa Rosa County, 25% of whose residents in 1995 had moved there since 1989 (EH 182, 186-87, 190).

Boles testified that Wike had written him a letter in 1993, requesting his assistance in identifying some tag numbers (EH 191-92). Boles determined that the numbers were "fictitious" (EH 192). Boles testified that Wike later wrote him, informing him "in no uncertain terms that I was full of it, and that the tag numbers in fact belonged to the Rivazfars" (EH 192).

Wike testified in rebuttal (EH 196 et seq). He denied having insisted to Judge Terrell that the case be tried in Santa Rosa County, and claimed that they barely discussed the venue issue (EH 197). He also wanted a change of venue motion filed for the final sentencing (EH 198).

Wiked testified that, in 1996, he contacted the "Department of Transportation" of the State of New York regarding the tag numbers and found out that one of the belonged to Ahmad Rivazfar of Rochester, New York (EH 199). Wike acknowledged that he had not brought these tag numbers to anyone's attention until 1993 (EH 202). He acknowledged receiving the information about the tag numbers in 1996 and that he

had sent his personal letter to Sayeh Rivazfar in 1996 (EH 203). He denied getting her home address from the tag information he received from New York; he claimed he "knew about that beforehand" from "another source" (EH 203, 205).

The letter Wike wrote to Sayeh Rivazfar in 1996 is State's Exhibit 5. Among other things, Wike told Sayeh:

> I don't need to prove my innocence to you cause you already know damn well that I'm innocent; but to point out a couple facts that can't be falsified or changed no matter how hard you try is things like: my hog meat; and now that you're a woman and can handle a good size penis, you'd have a hard time getting this hunk of hog meat of mine to fit in you, so when you was 9 there is no way possible that this thick hunk of beef could ever begin to fit you even if you was well broken in a woman can't accommodate me, so how the hell could you as a child?
>
> . . . I didn't want you hurt then, and I don't want you hurt now; but you're not going to continue this charade without consequences, you've been investigated, watched and followed, and I must say you are not the angel you pretend to be; that incident didn't effect [sic] your life any, you're one hot gal for score and love to pack all the meat you get. . . .
>
> . . . Everyone knows where you are, and will always know . . . you can run but not hide. . . . Two can play dirty! How would you feel if your dad was on death row? *Well if you keep up your lies and do not recant your stories, then I will confess that your dad paid me a little money and promised much more for me to do this crime to you all. . . .*

(Emphasis supplied).

SUMMARY OF THE ARGUMENT

Wike raises five issues on appeal:

(1) In view of Wike's insistence on being tried in Santa Rosa County, trial counsel did not perform deficiently when they heeded his wishes and did not move for a change of venue. Furthermore, the trial record fails to show sufficient media saturation or community prejudice as would have compelled a change of venue, and Wike has therefore failed to show prejudice.

2. Wike has no viable alibi and never did. Trial counsel investigated thoroughly but could not discover and present that which does not exist. Trial counsel were not ineffective for failing to present a viable alibi defense.

3. Wike has not demonstrated that trial counsel failed to ensure his presence at any critical stage of the trial.

4. Under Supreme Court precedent, Wike cannot demonstrate that sentencing counsel were ineffective for failing to invoke a right which, under present law, a defendant no longer has. Furthermore, none of the sidebar conferences from which Wike was allegedly excluded dealt with peremptory challenges. Thus, his reliance on Coney v. State is misplaced, and no ineffective assistance of sentencing counsel has been demonstrated.

5. Because there was no ineffectiveness of counsel, there can be no cumulative ineffectiveness (assuming, arguendo, that there is such a thing).

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED WIKE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR CHANGE OF VENUE AT TRIAL

Wike contended in claim 9 of his 3.850 motion that his counsel at the original trial in 1989 were ineffective for failing to move for a change of venue.[7]

Initially, it is clear that Wike has failed to demonstrate any lack of preparation on the venue issue by trial counsel. They prepared for a change of venue motion. Judge Terrell testified that it was his practice to document all publicity relating to "high profile" cases like Wike's, and he did so in this case. In addition, Judge Terrell collected some 50 affidavits from citizens of the county expressing the opinion that Wike could not get a fair trial in Santa Rosa County. However, Judge Terrell did not

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[7] Although Wike contended below that his resentencing counsel were ineffective for failing to move for a change of venue, he does not argue that claim here, or contest the circuit court's determination that sentencing counsel were not ineffective in failing to move for change of venue. As the circuit court found, there was no pervasive media coverage preceding the final sentencing, and counsel had no difficulty in seating an unbiased jury (2R 207-08).

move for a change of venue, because Wike himself did not want a change of venue; Wike refused to waive his right to be tried in the county in which the crime had occurred.

Wike has failed to show any deficient attorney performance here. His attorneys were prepared to file a motion for change of venue, but, despite being counseled to the contrary, Wike himself dictated that no such motion be filed. Judge Terrell can hardly be faulted for believing that "[r]egardless of the wisdom of his decision, ... [the defendant] certainly he has the final say so on those kinds of issues" (PC 154). Sailor v. State, 733 So.2d 1057 (Fla. 1st DCA 1999) (Florida constitution guarantees defendant right to be tried in county in which crime occurred); Nixon v. State, 758 So.2d 618 (Fla. 2000) ("the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship").

Wike argues not that Judge Terrell misapprehended the law, but that this Court should not credit Judge Terrell's testimony that Wike insisted on being tried in Santa Rosa County (Brief of Appellant at 40). Wike's postconviction counsel made this same credibility argument to the circuit court in his written post-hearing memo (1R 147-48). The circuit court, however, explicitly found that trial counsel "was not ineffective for failing to bring a change of venue motion *against the wishes of his client*" (2R 206) (emphasis supplied). Thus, the circuit court credited Judge Terrell's

testimony and rejected Wike's testimony to the contrary. This Court does not substitute its judgment for that of the trial court on questions of fact or witness credibility. As this Court recently stated:

> The reason we have required postconviction evidentiary hearings on capital postconviction motions claiming ineffective assistance of counsel is to provide a defendant an opportunity to present factual and expert evidence which was not presented at the trial of the case and to have the trial court evaluate and weigh that additional evidence. Following such an evidentiary hearing, we have held that the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference. See Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999). So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Porter v. State, No. SC88562 (Fla. May 3, 2001). Especially given Wike's history of making inconsistent and contradictory statements on almost every subject, the circuit court did not err in concluding that Judge Terrell's testimony is credible and Wike's is not.

Furthermore, as the circuit court recognized, Wike can demonstrate no prejudice because he "has failed to establish that grounds for a change of venue

existed" (2R 206). While obviously there was some pretrial publicity in this case, it did not approach the publicity generated in the Danny Rolling case. Rolling v. State, 695 So.2d 278 (Fla. 1997). In fact, other than an extremely brief report in the June 8, 1989 issue of the Milton Press Gazette simply reporting that Wike's case was set for trial the next Monday, the only pretrial newspaper articles Wike has submitted are three articles from the Press Gazette and 5 from the Pensacola News Journal, *all* published in September and October of 1988, some 8-9 months before trial. Television reports are similarly absent in the months leading up to the trial. Wike has not shown the kind of media saturation as would give rise to any presumption of community prejudice. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Oats v. State, 446 So.2d 90, 93 (Fla. 1984).

Nor has Wike demonstrated that a fair and impartial jury was not selected, or that his trial counsels' voir dire examination was inadequate. He contended in his post-hearing memo that his trial counsel did not ask any questions of trial jurors Hall, Diaferio or Lockett about pretrial publicity during the individual portion of the voir dire examination (1R 149). But Judge Terrell had already determined that these jurors, and, as well, jurors Owen, Outlaw, Volkmann, Foster and Bryant had heard nothing about the crime, when he asked the venire as a whole about publicity (1TT 43-46). As for the extent of Judge Terrell's examination of other jurors, it should be noted that Ms.

Sutton had only heard something about the case that morning, from another prospective juror (1TT 197-98; Mr. Conroy had seen something on television the day Wike was arrested, but remembered no details of the accusation against Wike (1TT 163-64); Mr. Mathews had heard people "discussing" the case "sometime ago," but could remember no details other than that two girls had been found murdered (3TT 442); Ms. Dunn had read about the crime when it had first happened, but remembered little other than that the victims had been two girls and an ex-boyfriend had been charged (3TT 465-66); likewise, neither Ms. Meyers nor Mr. Andrews had heard anything about the crime since right after it first happened, and remembered little about the crime (3TT 494, 508).

As the circuit court noted in its order denying relief, of the 75 persons in the entire jury venire, only six indicated they would have difficulty acting as impartial jurors based on their knowledge of the case and these six were all excused for cause (2R 206). None of the jurors actually selected had formed any fixed opinions of guilt; in fact, only half had heard anything at all about the case (2R 206-07). The circuit court correctly determined that these numbers "fail to demonstrate that the Defendant had substantial difficulty in seating a jury in Santa Rosa County," and that Wike had failed to demonstrate "either a deficient performance by counsel or the probability of a

different outcome based on this alleged deficiency (2R 207). Relief was denied properly on this issue.

ISSUE II

THE TRIAL COURT PROPERLY REJECTED WIKE'S CLAIM THAT HIS TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO DEVELOP AND PRESENT A VIABLE ALIBI DEFENSE

Wike did not address this issue in his post-hearing written argument, but contends on appeal that the circuit court erred in rejecting his claim that trial counsel failed to develop and present a viable alibi defense. It is the State's contention that, in view of Wike's failure to argue this issue below, any complaints about the circuit court's ruling as to the investigation and presentation of potential alibi witnesses has not been preserved for appeal. Moreover, this issue is clearly without merit. Trial counsel did investigate, and investigated thoroughly. Wike's problem is that he never had an alibi and never will, and his trial attorneys were not ineffective for failing to discover and present that which does not exist.

When Wike first talked to the defense team shortly after the murder, he could offer *no* explanation of his whereabouts after about 1:15 a.m. the morning of the murder, as the taped interviews of 9-27-88 and 9-29-88 show (State's exhibits 3 A&B and 4 A&B). Nor could he explain how Sayeh's bloody fingerprints could have

gotten on the trunk of his car "unless I am the guilty person" (PC 217). In fact, when pressed on whether he "did it or not," Wike almost confessed, stating, "I am not saying I didn't, and I'm not saying that I did." State's Exhibit 3B.[8]

The defense investigated, but could find only what Judge Terrell characterized as "pre alibi" witnesses, that is, witnesses who could only account for Wike's whereabouts before the critical period of time when the crime occurred. No one could testify to Wike's whereabouts after 1:15-1:30 a.m. Moreover, many of these witnesses had uncomplimentary things to say about Wike, including Glenda Hillard, who told Jim Martin that Wike acted "weird and was a strange person" (EH 112), and Terry Schuster, who said Wike seemed "creepy" (EH 125). Present counsel, it must be noted, has done no better; the only witness who have ever been found by anyone who have any idea where Wike was between 1:15-1:30 a.m. and 6:00 a.m. are Sayeh Rivazfar and Moes Bauldree, and their testimony, to say the least, fails to support any alibi for Mr. Wike (EH 141-42). The efforts of the defense team were not helped by Wike's purported lack of memory about his whereabouts in the early morning

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[8] In State's Exhibit 3B, this statement is transcribed differently than in the transcript (EH 224). The State would ask this Court to listen to the tape itself, which is the best evidence of its contents. The State is confident that the tape itself, which shows not only *what* Wike said, but *how* he said it, will corroborate its description of Wike's response to being confronted with the evidence against him.

hours of September 22, or the fact that Wike's story evolved as it was "refreshed" by facts uncovered by the defense team (EH 141). For example, although first unable to remember anything after about 1 am, Wike later "remembered" going to the Scenic Hills lounge and passing out; he suggested to his defense team that someone must have borrowed his car and brought it back (EH 115). However, defense investigation revealed that the owners of the Scenic Hills Lounge do not allow persons who have passed out to remain on the premises (EH 114). Wike thereafter presented a new alibi to defense counsel, shortly before trial, when Wike now claimed to "remember" that he had left his car at the Silver Eagle and had left with Angie Faulk to spend the night with her at her mother's house (EH 110-11). The defense team could not locate Angie Faulk prior to trial, but when they did find her later, she did not corroborate Wike's alibi (PC 115). In fact, defense investigator Jim Martin also talked to Angie's mother, who confirmed that Angie was no longer dating Wike at the time of the murder, that Wike was not welcome at her house, and that she had even told Wike she would call the law on Wike if he came around (EH 116).

Angie Faulk, now Angie Faulk Brown Cooper, testified at the evidentiary hearing. She acknowledged having dated Wike briefly and even having been intimate with him, but she testified that she had told him at least three weeks before the murder that he could not come to her house. At the time of the murder she had not seen Wike

in at least two or three weeks. She was “positive” that Wike had not spent the night with her on September 22, 1988, and she had not and could not have come to a bar to pick him up because at the time she did not have a vehicle (EH 85-91). Regardless of why Mr. Wike might think Angie will not corroborate his alibi (EH 47), the fact is she will not now and never would corroborate it.

Moreover, Wike’s story does not even make sense. He claimed that Angie came to pick him up because he was too drunk to drive (9ST 871). But, according to him, he called her from the Eagle Lounge and then drove to the Scenic Hills Lounge to meet her (9ST 871). If he was too drunk to drive, why drive from one bar to the other; why not just have Angie pick him up at the Eagle Lounge? And why on earth would someone borrow his car, commit this crime, and return it to the Scenic Hills Lounge in time for Wike to return for it?

And even if Wike could come up with a witness who would be willing to concoct a alibi for him, why would a jury believe it in the face of Sayeh Rivazfar’s eyewitness identification of him, Mose Bauldree’s testimony, and all the blood, semen, fingerprint, tire track and DNA evidence incriminating him and no one else, especially when Wike has never been able to explain why he failed to notice the blood all over the inside of his car, on his trunk lid, on his shoes, on his hands, or on the blanket he dragged out of his car and to the laundry room of his parent’s house?

Although Wike continues to maintain his innocence, it should be noted that he acknowledged having written a letter in 1996 to the surviving victim in this case in which he had threatened to "confess" that he had been hired by the victim's father to "do this crime" to her and her sister (EH 77-79) State's Exhibit 5.

Wike has not demonstrated any deficient attorney performance in the investigation and presentation of evidence at the guilt phase of his trial. Furthermore, he has not demonstrated any prejudice because he cannot point to any evidence that trial counsel should have discovered and/or presented that could possibly have made any difference in the result of the guilt phase of the trial. Thus, the denial of relief as to this issue should be affirmed.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING WIKE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT WIKE WAS PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL

Here, Wike contends that his trial counsel failed to insure his presence at various portions of the trial, including his arraignment, three docket calls, the first and second days of his jury selection, and the first and second days of his trial.

The record belies Wike's contention that he was not present for his arraignment. In fact, the court asked him a question and he answered (3R 435-36) (Exhibit E1).

Nothing of any significance occurred at any of the three aforementioned docket calls. No motions were heard and no rulings were made. If Wike was absent, he could not possibly have been prejudiced, and trial counsel were not ineffective for failing to insure his presence at such inconsequential proceedings.

As for the trial itself, the record shows that Wike was present at the very outset of jury selection. Immediately after the prosecutor introduced himself to the jury, he identified Wike and his two attorneys; he even asked Wike to stand (1TT 18).

There was, however, an in-chambers conference immediately prior to the beginning of jury selection, which Wike apparently did not attend, at which defense counsel asked the judge for permission to seat someone other than Wike at the defense table and have Wike in the audience once the presentation of evidence began; the ostensible purpose being to ensure that two eyewitnesses did not identify Wike simply because he sat at counsel table. In addition, defense counsel expressed some concern about publicity and asked that the jury be sequestered. The court reserved ruling on both of these motions. Counsel and the court also expressed some concern about the size of the panel (1TT 6-15).

Wike did not expressly address his absence from this in-chambers conference in his 3.850 motion or his post-hearing memo, and the State would contend that he has failed to preserve such issue for appeal. It is clear, however, that no prejudice has

been shown. Especially since the trial court reserved ruling on the issues defense counsel raised, Wike's presence in chambers would not have aided defense counsel in arguing the motions. Thus, any error would have been deemed harmless if this issue had been raised on direct appeal. Garcia v. State, 492 So.2d 360 (Fla. 1986) (defendant's absence from pretrial conference immediately prior to start of jury selection was harmless since defendant's presence would not have aided defense counsel in arguing the motions, the last of which the trial judge granted and the others of which the trial judge deferred ruling on).[9] That being the case, the circuit court correctly determined that Wike had failed to meet his burden of showing prejudice from any omission of trial counsel to ensure his presence (2R 210).

As for the alleged absences during the second day of jury selection and at the first and second days of trial, Wike was unable to state in his testimony what, if any, part of any of those days he missed (PC 59-60). Judge Terrell testified that he could not recall Wike being absent during any significant portion of the trial, including jury

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[9] The State would note that under present Fla.R.Crim.P. 3.180, a defendant is "present" if he is "physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." It is obvious from the transcript of the in-chambers conference that trial counsel had discussed the issues with Wike, and it is by no means clear that he was not "physically in attendance" in the courtroom during the in-chambers conference.

selection or any part of the trial "relating to the presentation of the issues to the jury were being discussed or presented" (PC 138-39). Had Wike been absent, Judge Terrell would have objected and refused to participate without him being present (PC 139).

In light of this testimony, the circuit court did not err in concluding that trial counsel ensured Wike's presence during the first and second days of the trial and that Wike had not demonstrated that he was absent from any proceedings occurring in the presence of the jury.

The record supports the trial court's rejection of Wike's claim that trial counsel was ineffective for failing to ensure Wike's presence at all critical stages of the trial.

ISSUE IV

THE CIRCUIT COURT DID NOT ERR IN DENYING WIKE'S CLAIM THAT SENTENCING COUNSEL WERE INEFFECTIVE FOR FAILING TO INCLUDE WIKE IN ALL SIDEBAR CONFERENCES

Here, Wike complains of his absences from sidebar conferences during the voir dire at his third sentencing hearing, citing Coney v. State, 653 So.2d 1009 (Fla. 1995). Wike conceded below that this issue could and should have been raised on direct appeal but was not. Wike's post-hearing memo at 18 (1R 140). Therefore this issue is procedurally barred except to the extent that is encompassed within an ineffective

assistance of counsel claim. To establish ineffective assistance of counsel, Wike must establish (1) deficient attorney performance and (2) actual prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052. 80 L.Ed.2d 674 (1984). The defendant must establish both prongs of the test; thus, a court need not address both prongs, but may reject a claim of ineffectiveness after concluding that the defendant failed to establish either deficient attorney performance or prejudice. In this case, the circuit court addressed only the prejudice prong, finding that Wike had failed to demonstrate any prejudice (2R 211-13).

The circuit court noted that Wike had in his written post-hearing argument identified (for the first time) sidebar conferences from which he allegedly was excluded (2R 212). There were seven: five conferences in which jurors were excused for cause; one conference in which the trial court granted defense counsel's request to inform the jury venire of Wike's prior conviction and life sentence; and one conference where defense counsel renewed a motion to sequester the jury (2R 212). The circuit court concluded that Wike had failed to show how his presence at the two non-jury-challenge sidebars could have assisted counsel, and concluded that because the jury challenge sidebars involved *cause* challenges and not *peremptory* challenges, they

involved legal issues in which Wike's input could not have assisted counsel (2R 212-13). Thus, Wike had failed to demonstrate any prejudice.[10]

While the circuit court's determination is correct, and is sufficient to justify denying relief on this claim, additional bases support and justify the denial of relief, and, under the right-for-any-reason rule of Caso v. State, 524 So.2d 422 (Fla. 1988), may be considered in support of the judgment rendered.

First of all, any possible application of the (now superseded) rule of Coney is limited essentially to the exercise of peremptory challenges. Wike has not demonstrated that a reasonable attorney in 1995 would have insisted that Wike be physically present at bench conferences dealing with any other subject, especially given Wike's history of making threats and presenting a security risk. Nor has Wike shown that counsel would have had the right under Coney to secure Wike's personal presence at sidebar conferences dealing with subjects other than peremptory challenges. Thus, he cannot demonstrate deficient attorney performance or prejudice.

Furthermore, Wike cannot demonstrate prejudice in reliance on Coney because Coney is no longer the law. As noted in State v. Mejia, 696 So.2d 339 (Fla. 1997), the

[10] It should be noted that Wike has never suggested that he personally would have taken a different position than that taken by counsel at these sidebars, or shown in what way the positions taken by counsel at these sidebars was incorrect, strategically unwise, or otherwise subject to attack.

holding in Coney was superseded on January 1, 1997 - the date the corrective amendment to Fla.R.Crim.P. 3.180 became effective. See Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1254, 1259 (Fla. 1996). Under the new rule, the physical presence requirement is satisfied if the defendant is in the courtroom and has the opportunity to be heard through counsel.[11] Wike has made no demonstration whatever that the manner in which his resentencing was conducted did not fully comply with the new rule. He cannot establish prejudice from any failure to comply with a procedure set forth in Coney which is no longer applicable, or obtain a new trial at this juncture on the basis of a procedural right that defendants no longer have, and that Wike himself would not have at any retrial of his sentence. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (court making prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission).[12]

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[11] The rule reads: "A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed."

[12] The State acknowledges that concurring opinions in two cases suggest that a Coney violation might be raised in 3.850 proceedings via ineffective assistance of counsel, see State v. Brower, 713 So.2d 1005, 1006 (Fla. 1998) (Pariente, J., concurring) and Hill v. State, 696 So.2d 798, 800 (Fla. 2nd DCA 1997)(Altenbernd, J., concurring). However, the State is

For these reasons, as well as the reasons set forth in the circuit court's order, relief was properly denied on this claim.

Although Wike argues no other basis for finding ineffectiveness of penalty phase counsel on this appeal, the State would note that the record clearly supports the circuit court's denial of relief on all other claims that penalty phase counsel were ineffective. Wike failed to establish any deficient attorney performance in the investigation and presentation of mitigation evidence. Further, the record is silent as to any potentially mitigating evidence that Wike contends counsel could and should have presented but did not, and Wike has never alleged or demonstrated that counsel should not have presented any evidence they did present.

Penalty phase counsel were not ineffective for any reason alleged, and the circuit court properly denied relief on this issue.

ISSUE V

WIKE'S CUMULATIVE ERROR CLAIM IS MERITLESS

Because no error has been shown, it is clear that there is no cumulative error to consider.

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unaware of any case so holding, or in which the holding of Lockhart v. Fretwell has been considered and found to be inapplicable in this context. The State would contend that Lockhart v. Fretwell is controlling here.

CONCLUSION

For the foregoing reasons, the judgment denying Wike's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Baya Harrison, III, Esq., Silver Lake Road, P.O. Box 1219, Monticello, Florida 32345-1219, this __th day of May, 2001.

____
CURTIS M. FRENCH
Assistant Attorney General

<u>CERTIFICATE OF COMPLIANCE</u>

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

____
CURTIS M. FRENCH
Assistant Attorney General