CAPITAL CASE NO. SC23-0721

In the

Florida Supreme Court

PAUL G. EVERETT,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Everett beat, raped, and murdered K.M.B. in 2001 by breaking her neck, which rendered her quadriplegic and caused her to suffocate. A jury convicted him of first-degree murder after hearing: (1) his detailed, post-*Miranda* confession; (2) his DNA—to the exclusion of every other living person—was inside the victim's vagina; (3) the victim suffered a vaginal abrasion "consistent with" nonconsensual intercourse; (4) video evidence he purchased a fish bat later found near the victim's home. The jury unanimously recommended death and a judge agreed after finding three aggravators: (1) felon under prison sentence; (2) murder committed during a sexual battery/burglary; (3) heinous, atrocious, or cruel.

Around two decades later, Everett sought DNA testing on miscellaneous items related to the murder scene and Jared Farmer, who he claimed actually killed K.M.B. The court denied his motion because there was no reasonable probability of acquittal or a lesser sentence if the items came back positive for Farmer's DNA.

This Court should affirm because the testing Everett seeks will not negate his participation in K.M.B.'s murder or cast doubt on his sentence.

STATEMENT REGARDING ORAL ARGUMENT

The State opposes Everett's request for oral argument because the issues presented in this appeal are straightforward and would not be materially benefited by oral argument. There is no reason to depart from this Court's practice of refusing to hold oral argument in successive capital postconviction appeals like this one. *See* Fla. S. Ct. Internal Op. Proc. II.A.3.(a) (explaining successive capital postconviction appeals are treated "in the same manner as" cases "in which review is granted without oral argument").

CITATIONS

The State will cite (1) the direct appeal record as DAR[volume number]:[page number/range], i.e., DAR1:1-2; (2) the initial postconviction record as PCR[volume number]:[page number/range] i.e., PCR1:1-2; (3) the first successive postconviction record as 2PCR and the page number/range, i.e., 2PCR:1-2; (4) and the record below as 3PCR and the page number/range, i.e., 3PCR:1-2.

STATEMENT OF THE CASE

This timely appeal arises from the postconviction court's denial of Everett's motion for DNA testing under Florida Rule of Criminal Procedure 3.853.

I. PROCEDURAL HISTORY

A. State Court Proceedings

A grand jury indicted Everett for first-degree murder, burglary of a dwelling, and sexual battery with serious physical force; a petit jury convicted him and unanimously recommended death; and a judge sentenced him to death. (DAR1:5-6, 113-14, 131, 154-65.) This Court affirmed Everett's convictions and capital sentence in 2004, and the denial of initial postconviction relief in 2010, while also denying his habeas petition. *Everett v. State*, 893 So. 2d 1278, 1288 (Fla. 2004) (*Everett I*), *cert. denied*, 544 U.S. 987 (2005); *Everett v. State*, 54 So. 3d 464, 488 (Fla. 2010) (*Everett II*). Later, this Court rejected Everett's right-to-jury-findings claims. *Everett v. State*, 258 So. 3d 1199, 1200 (Fla. 2018) (*Everett III*), *cert. denied*, 139 S. Ct. 2019 (2019).

Everett has also filed four 3.851 motions that have been withdrawn or dismissed below and not appealed. (2PCR:5 (listing docket entries for both a pro se 3.851 motion filed 12/8/2008 and order dismissing the motion filed 12/16/2008); 2PCR:60-67 (pro se 3.851 motion), 2PCR:70-71 (order dismissing pro se 3.851); 3PCR:29-77 (pro se 3.851 motion), 301-03 (order dismissing pro se

3.851); 3PCR:535-59 (counseled 3.851 motion), 894-899 (dismissing 3.851 motion without prejudice), 906 (notice of no intent to file amended 3.851 motion).)

B. 28 U.S.C. Section 2254 Proceedings

Everett unsuccessfully sought relief in federal court under 28 U.S.C. section 2254. *Everett v. Crews*, 11-cv-81, 2014 WL 11350293, at *1 (N.D. Fla. Mar. 28, 2014) (*Everett IV*). The Eleventh Circuit affirmed the denial of relief. *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1254 (11th Cir. 2015) (*Everett V*), *cert. denied*, 577 U.S. 1069 (2016).

II. STATEMENT OF THE FACTS

A. Facts of the Crime

1. Everett's Escape from Alabama

> At the time of the murder, Everett was a fugitive from justice in Alabama, where he previously had received a ten-year suspended sentence for a 1999 conviction of possession of a forged instrument. In February 2000, Everett's probation was revoked, and he was sentenced to ten years in state prison. Everett posted a supersedeas bond pending his direct appeal. When his appeal was denied on October 5, 2001, Everett was required to begin serving his sentence within fifteen days under the terms of the bond. Instead of turning himself in by his October 20, 2001 deadline, Everett fled to Florida.

Everett V, 779 F.3d at 1219. Everett went to Florida and stayed at the

Fiesta Motel with Jared Farmer. (DAR7:146, 167.)

2. K.M.B.

Thirty-one-year-old K.M.B. worked as a medical technologist and lived at 403 Lantana Street in Bay County, Florida. (DAR7:23-24, 31, 37, 43.) She moved to Florida to be near her parents, the Greathouses, who lived just over half a mile from her house. (DAR7:30-31, 37.) She was very close with them, and her stepfather, John Greathouse—who raised her since she was three—would go over to her house two or three times a week. (DAR7:29, 32.) Both K.M.B. and her parents traditionally used the back door to enter and exit her house. (DAR7:34.) She was not dating anyone seriously in November 2001 and kept her house very neat and clean. (DAR7:32-33.)

K.M.B. generally worked the graveyard weekend shift from 7:00p.m. to 7:00a.m., starting on Friday and ending on Sunday. (DAR7:32.) She had a habit of staying "awake Monday through Thursday" so she could sleep on Friday in preparation for her weekend night shifts. (DAR7:32-33.) Her parents did not usually visit her on Fridays for that reason. (DAR7:33.)

3. K.M.B.'s Gynecologist Appointment (10/30/2001)

K.M.B. went to her gynecologist due to an irregular cycle and her doctor performed a pap smear. (PCR6:959.) She was not on birth control, had no sexually transmitted diseases, and reported she was not sexually active. (PCR6:959.)

4. K.M.B.'s Murder (11/2/2001)

In the days leading up to the murder, K.M.B. went out on a date with a coworker on Wednesday, 10/31/2001. (PCR11:2125.) A UPS delivery driver dropped off packages with K.M.B. on Thursday, 11/01/2001 at 2:42p.m. (PCR7:1272; PCR9:1961.) K.M.B.'s mother stopped by her house shortly thereafter to drop off some hangers and spoke to K.M.B at that time. (PCR11:2126.) Later, K.M.B. and her mother spoke again over the phone and K.M.B. shared her thoughts about how the coworker date went. (PCR11:2126.)

On Friday 11/2/2001, K.M.B. was scheduled to work the graveyard shift starting 7:00 p.m. and ending at 7:00 a.m. the next day. (DAR7:24.)

Sometime before 7:00p.m. on 11/2/2001, Everett left the Fiesta Motel and decided to steal money.[1] (DAR7:152-53; DARSupp.2:49-53.) He entered K.M.B.'s house through an unlocked door while carrying his fish bat and saw her purse/pocketbook on a glass table in the living room. (DAR7:153-55, 159.) He found and took $70 from the purse when K.M.B. confronted him. (DAR7:155.)

Everett punched K.M.B.'s face and they fought in the living room until K.M.B. retreated to the bedroom. (DAR7:156, 160.) Everett followed her, grabbed her hair, jerked her head back, knocked her down, and raped her on her bedroom floor while she was still conscious. (DAR7:156-58.) His assault left blood spattered around K.M.B.'s home. (DAR7:54-66; DAR8:206.)

Everett's attacks left brutal injures on K.M.B., including: (1) knocking one of her teeth out; (2) fracturing her nose; (3) swelling and hemorrhaging in her eyes; (4) lacerations to her lips, including one that extended all the way to her cheek; (5) her teeth protruding through the top of her lip; (6) bruising on her tongue; (7) abrasions on her upper arm, forearm, and elbow; (8) potential carpet burns; (9)

[1] Everett claimed he was "tripping" on acid at this time. (DAR7:153.)

cuts on her knee; (10) scrapes on her back; (11) a fresh abrasion in K.M.B.'s vagina "consistent with" nonconsensual sex; (12) fracturing her C-5 vertebra; (13) "spinal shock" that rendered her paralyzed and unable to breath; (14) hemorrhaging in her spinal cord. (DAR8:205-217, 221; PCR15:3006-16.) The spinal injuries left K.M.B. helpless, only able to move part of her shoulder and perhaps a bit of her head. (DAR8:217.)

K.M.B. died of suffocation from the spinal injuries and broken neck Everett inflicted on her. (DAR8:215-16, 218.) These injuries would likely have left her conscious for up to several minutes after the spinal damage. (DAR8:219-20, 222.) There was no indication she was unconscious. (DAR8:219-23.)

After ejaculating inside K.M.B., Everett left his white Nike shirt in her house, grabbed K.M.B.'s jacket, and took off running through the back door to the Fiesta Motel. (DAR7:159, 161.) He dropped his fish bat and K.M.B.'s jacket in his flight and disposed of his bloody shoes in a Fiesta Motel trash can. (DAR7:86, 161-62; DAR8:245.) On a tip from Everett's sister, Alabama bail bondsman[2] picked Everett

[2] These bondsmen were Royce Kiser and Danny Grisham. (PCR16:3149. See also PCR11:2135; PCR12:2390-96; PCR17:3468.)

up later that night, around 9:00p.m. (DAR7:147; PCR17:3468.) He was not wearing shoes at the time and Alabama law enforcement later disposed of his shorts at his request. (DAR7:168; PCR7:1111, 1143; PCR17:3582.)

Around 7:30p.m., when K.M.B. did not show up for her scheduled shift, a coworker called her and ended up leaving six messages on her phone over the next three hours. (DAR7:24-27.) The coworker called K.M.B.'s parents around 8:30p.m. so they could check on her. (DAR7:27, 34.) K.M.B.'s stepfather went to her house and found the lights on, just like always. (DAR7:34.) The back door was not deadbolted, and K.M.B.'s stepfather put his key in the knob lock without checking whether it was locked. (DAR7:35.)

K.M.B.'s stepfather saw K.M.B.'s foot sticking out of the bedroom door, called her name a few times, and then touched her heel. (DAR7:36.) It was ice cold and he realized she was dead, so he called 911 and waited for police. (DAR7:36.) K.M.B. was probably getting ready to take a shower when she was killed. (DAR7:37-38.)

5. The Murder Investigation

There was no sign of forced entry to K.M.B.'s home. (DAR7:47-48, 70.) Dr. Hansen arrived at 10:55 p.m. on 11/2/2001 and examined K.M.B. (PCR6:944; PCR15:3033-34.) While recognizing time of death is "one of the most inexact things we do," she estimated K.M.B. died anywhere from nine to twenty-one hours before her examination. (See PCR15:3033-34 (basing her estimation on the fact K.M.B. was in "full rigor" when examined, which meant she died around twelve to eighteen hours beforehand, with a two-to-three-hour error rate either way).) That estimation put K.M.B.'s death between 2:00a.m. and 2:00p.m. on 11/2/2001. Nothing about K.M.B.'s injuries "strongly suggested strangulation." (PCR15:3039.)

Law enforcement recovered latent fingerprint evidence from the home. (DAR7:42-43, 66-68, 78-79.) None of the prints matched either Everett or Farmer. (DAR7:80-82, 110-13.)

Crime scene technicians utilized a sexual assault kit to collect DNA from K.M.B.'s vagina. (DAR7:82-83, DAR8:184, 192.) Farmer was excluded as a contributor to the male DNA recovered by the sexual assault kit. (DAR7:85, 94-95; DAR8:185-86, 191.) The male DNA from K.M.B.'s vagina matched Everett at all thirteen genetic

markers tested, and the "frequency occurrence of this profile for unrelated individuals in the following population is one in 15.1 quadrillion of the Caucasian population," in the "African-American population it would be one in 1.01 quintillion," and "[o]ne in 11.2 quadrillion of the Hispanic population." (DAR8:189-190; PCR10:1924. See also DAR7:140-41, 147-48; DAR8:185-86.) These DNA results were technically reviewed by another analyst and administratively reviewed by a third in accordance with FDLE's protocols. (DAR8:190-91.)

Law enforcement recovered Everett's white Nike shirt from K.M.B.'s bed, his fish bat (with suspected blood on it and knots in the attached rope) about 133 feet from K.M.B.'s home, and a jacket containing K.M.B.'s visa card about 898 feet from her home. (DAR7:86, 92-94, 166-67, 170-71.) The fish bat and jacket were found in the area between the back of K.M.B.'s house and the Fiesta Motel where Everett stayed. (DAR7:93-94.) The Fiesta Motel was less than half a mile from K.M.B.'s home. (DAR7:167.)

An investigator determined Walmart sold the fish bat on 10/27/2001 at around 5:17p.m. (DAR7:96-98.) Walmart provided a videotape of the sale, the receipt, and information about the check

and ID used to make the purchase. (DAR7:99-104.) The investigator eventually identified Everett as the person on the video buying the fish bat. (DAR7:104, 106-07.) Farmer was with him when he purchased it. (DAR8:234.)

6. Investigation Into Farmer

Law enforcement learned that Farmer told several people that Everett strangled a woman during a robbery the day after K.M.B.'s body was found.[3]

Law enforcement first interviewed Farmer with his mother (Vicky Higgins) on 11/13/2001. (PCR16:3323-32.) Farmer stated that Everett had been visiting with them for a few weeks before being picked up by the bondsmen. (PCR16:3325.) Everett went out walking Thursday night (11/1/2001) and they had a falling out the next day because Everett had been drinking. (PCR16:3327.) Farmer also claimed he had never seen Everett's fish bat and that he did not go

[3] (DAR7:146-47 (jury trial testimony); PCR11:2136 (recounting Frederick's statement); PCR12:2393-96 (Debbie Taylor Interview); PCR12:2397-400 (Majoy Brown Interview); PCR12:2401-12 (Jessica Boyd Interview); PCR12:2428-30 (Jonathan Blackburn Interview); PCR12:2642-44, PCR17:3560-64 (Joel Woods Interviews); PCR17:3406-13 (Michael Frederick Interview); PCR17:3423-26 (Tommy Henderson Interview); PCR17:3466-70 (Ashley Everett Malone Interview).)

with Everett into Walmart. (PCR16:3329-31.)

Law enforcement interviewed Farmer and his mother a second time on 11/15/2001. (PCR16:3307-22.) Farmer, with prompting from his mother, admitted that he was with Everett in Walmart when Everett purchased the fish bat. (PCR10:1965; PCR16:3308-09.) He also admitted that he and Everett were messing with the bat at a party. (PCR17:3310.)

Farmer told law enforcement that, after his mother returned from work, she told him that an old woman walked out of her bedroom and that Everett strangled her. (PCR16:3311.)

Farmer stated that on 11/2/2001: (1) he and Everett got up around 11:00 a.m., road around for a bit, went to Publix for beer, and went to Michael Frederick's house; (2) Everett pointed out a house and said two girls lived there with their grandmother; (3) Farmer and Everett got into an argument when they got back to the Fiesta Motel;[4] (4) he went to hang with Michael Frederick and some other friends after that; (5) Everett was gone when he got back to the Fiesta Motel and Farmer's CD player and the phone in the room were

[4] Frederick placed this argument "two or three" days before the murder happened. (PCR17:3411.)

damaged; (6) he called his mother the next morning (Saturday, 11/3/2001). (PCR16:3314-21.)

Law enforcement interviewed Farmer's mother on 11/15/2001. (PCR17:3452-58.) She went up to Alabama late Wednesday (10/31/2001) and returned late Friday night around 10:30 p.m. (11/2/2001). (PCR17:3456.) Farmer began calling her around 11:00 a.m. or 12:00 p.m. on Friday and they finally spoke around 2:15 p.m., just before Farmer's mother left Alabama to return to Florida. (PCR17:3456.)

Farmer's mother stated that she first heard about the murder while she was working the day after K.M.B.'s body was found (Saturday, 11/3/2001). (PCR17:3452-53.) She was the only hotel housekeeper scheduled to work that day. (PCR17:3454.) She told Farmer about the murder when she got home around 2:00 or 3:00 p.m. and immediately mentioned Everett since he had been gone all night, recently got into a fight with Farmer, damaged his property, and owed the Farmers about $900. (PCR17:3454-55.)

Farmer told his mother Everett mentioned meeting two young girls that lived with their grandmother and that he would stay with them. (PCR17:3455.)

The State charged Farmer with perjury for lying about the fish bat but did not pursue any other charges related to K.M.B.'s murder. (See PCR10:1965.)

7. Everett's First Unadmitted Statement (11/14/2001)

Everett provided a post-*Miranda* statement to law enforcement that he came to Florida with Farmer to use drugs and was there a couple weeks. (DARSupp.1:1-2.) They stayed at the Fiesta Motel until he was picked up by bail bondsmen who returned him to Alabama. (Id. at 2-3.) He purchased a fish bat at Walmart after Jared handed it to him and suggested he buy it. (Id. at 4.) At some point, he tied "three or four knots" in the string on the fish bat. (Id.) The last time he saw the fish bat was in Farmer's truck about a week before the bondsman picked him up. (Id. at 5.) He never took it out or used it on anyone. (Id.) Everett said that a couple of days before the bondsmen picked him up, he threw away his only pair of shoes after a fight on the beach where the shoes got blood stains. (Id. at 6-7.) Everett then unequivocally invoked his right to counsel and the interview ceased. (Id. at 8.)

8. Everett's Second Unadmitted Statement (11/19/2001)[5]

Everett gave a second statement after asking to speak with law enforcement and renewed *Miranda* warnings. (DARSupp.1:9-10, 22.) This time he claimed he and Farmer were cooking, selling, and using drugs in Florida at the Fiesta Motel. (Id. at 9-12.)

The day of the murder, Everett and Freddie "Bubba" Wilson went to get some drugs. (Id. at 13-14.) Everett claimed they stopped by Wilson's girlfriend's house and Wilson left his girlfriend and Everett alone while he went to get drugs. (Id. at 14-15.) Everett said he and Wilson's girlfriend had unprotected, consensual sex and were caught by Wilson, who began to severely beat his girlfriend and then threatened Everett with a gun. (Id. at 15-17, 19-21.) He learned Wilson's girlfriend was K.M.B. during the last interview but wanted to come clean about what he knew to clear his conscious and because his mother encouraged him to. (Id. at 18.)

Everett admitted he had a Nike shirt and the fish bat, which he lost while running out the back of K.M.B.'s house. (Id. at 20.) He also admitted he did not go anywhere without the fish bat and that he

[5] The trial court held this statement admissible. (See DAR1:46-50.)

threw away his shoes because they had K.M.B.'s blood on them. (Id.) Everett said he never talked to Farmer about what happened. (Id. at 18.)

9. Everett's Admitted Confession (11/27/2001)

Everett finally gave a detailed confession to murdering and raping K.M.B. (DAR7:149-166; DARSupp.1:23-31). This confession accurately described the victim's home and crime scene in great detail, but was inconsistent with the evidence on whether the lights and television were on. (DAR8:235-36, 240-48.) Everett claimed he had never seen K.M.B. before the murder, stated Farmer had no knowledge of what happened, and repeated that Bubba Wilson went with him to K.M.B.'s house as a lookout. (DARSupp.1:29-30.) Everett swore that his confession was "the truth, the whole truth, and nothing but the truth." (DAR7:166.)

B. Everett's Guilt Phase

"During the guilt phase of Everett's 2002 trial, the State presented overwhelming evidence of Everett's guilt." *Everett V*, 779 F.3d at 1224-25. Everett's guilt-phase trial began on 11/19/2002 and ended 11/21/2002. (DAR7-DAR8.) Public defender Walter Smith represented Everett. (E.g., DAR3:226.) Everett exercised his right *not*

to testify after a colloquy with the court. (DAR8:227-28.)

The State's "overwhelming" case had five main pieces of evidence: (1) Everett's DNA (and no one else's) was found inside K.M.B.'s vagina; (2) Everett's detailed confession; (3) the abrasion in K.M.B.'s vagina "consistent with" nonconsensual intercourse; (4) video evidence of Everett purchasing the fish bat found near K.M.B.'s home with suspected blood on it; (5) Everett's guilty-conscious disposal of his shoes before he was picked up by the bondsmen. *See Everett V*, 779 F.3d at 1224-25; (DAR8:292-93 (prosecutor emphasizing the shoes in closing). The State's closing argument noted that it did not matter if Everett had an accomplice or murdered K.M.B. alone. (DAR8:283.)

The jury was informed (in vague terms) that Farmer began inculpating Everett shortly after the murder, was at Walmart for the fish-bat purchase, and that K.M.B.'s vaginal abrasion could have been caused by either sexual penetration or penetration with a "blunt object." (DAR7:146-47; DAR8:220-21, 234.)

Counsel Smith pursued a reasonable-doubt defense on premeditation, the force used to commit the sexual battery, and minor discrepancies between Everett's confession and the evidence.

(See DAR8:296-303.) In closing, counsel conceded Everett committed sexual battery without force[6] and argued Everett's case was "simply a bungled burglary committed by somebody who was high, committed by somebody who committed acts which are inexcusable but that don't amount to the main charges that have been asserted by the State." (DAR8:303.) The defense was never misidentification.

The jury convicted Everett as charged in less than an hour. (DAR8:325, 327-30.)

C. Everett's Penalty Phase

Everett's penalty-phase trial took place on 11/22/2002. (DAR4.) The State introduced certified copies of Everett's records from Alabama to show he was on felony probation/under a prison sentence when he killed K.M.B. and victim-impact testimony from John Greathouse while otherwise resting on its guilt-phase presentation for the aggravators. (DAR4:464-68, 482-85.)

Everett introduced testimony from his mother (Glenda Everett) and sister (Cindy Everett Grider) that: (1) Everett was the youngest of eight children and the only boy; (2) Everett was fun loving and not

[6] Counsel's exact words were: "It is sexual battery. I mean there's no way that, you know, I can suggest to you otherwise." (DAR8:303.)

violent or a troublemaker; (3) Everett enjoyed playing with his siblings' children; (4) Everett's mother and father divorced, remarried, and divorced again; (5) Everett lived some with his father and some with friends in 2001; (6) Everett's mother noticed he became involved in drugs when he was around eighteen and was not completely himself in late 2001; (7) Everett tried to overcome his drug addiction but could not; (8) Everett's father was an alcoholic; (9) Everett came down to Florida with Farmer, whose family was affiliated with drugs; (10) Everett was close with his sisters. (DAR4:469, 471-81; PCR16:3153 (listing the children).)

The jury unanimously recommended death after deliberating a little over two hours. (DAR1:128, 131; DAR4:516-17.)

Everett gave a statement during the preparation of his PSI with another version of the victim's murder. (PCR16:3149.) He said that since he was already convicted, he "would relate what really happened." (Id.) In this version, K.M.B. saw Everett and another male cooking meth, and they became paranoid. (Id.) They followed her to her house and broke in a few weeks later. (Id.) Everett punched K.M.B. in her face when she confronted them. (Id.) Everett and his accomplice then tied K.M.B. up in the bedroom and both raped her.

(Id.) During the rape, Everett was called away for a drug deal, went back to the Fiesta Motel, and was picked up by the bondsmen immediately thereafter. (Id.) Everett claimed he found out K.M.B. died weeks later. (Id.)

The court held a *Spencer*[7] hearing where Everett put on evidence that he was 22 years old when he killed K.M.B., was not very mature for his age, never monetarily supported himself, only held food and mill-related jobs, never had his own apartment and lived with his family/friends, and committed no disciplinary infractions while in jail. (DAR5:528-31.) His mother testified she had "no idea" who Jared Farmer was. (DAR5:529.) Everett elected not to make any statements to the sentencing court. (DAR5:536-37.)

The court ultimately issued a detailed order following the jury's recommendation and imposing death after finding three aggravators: (1) felon under sentence of imprisonment; (2) murder committed during a sexual battery/burglary; (3) heinous, atrocious, or cruel. (DAR1:154-65.) Each of the aggravators were individually sufficient to justify the death sentence. (DAR1:164.)

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

D. Initial 3.851 Proceeding

1. Relevant 3.851 Factual Allegations and Claims

Everett—represented by postconviction counsel Charles Lykes, Jr.—filed his initial 3.851 motion. (PCR2:235-36, 294-361.)

This sworn motion alleged the following facts related to Farmer and Everett: (1) Farmer said K.M.B. died by strangulation and started rumors associating Everett with the crimes; (2) Famer told law enforcement that Everett killed K.M.B. and lied about being present for the purchase of the fish bat; (3) Everett's trial counsel dissuaded him from testifying that K.M.B. saw him and Farmer manufacturing drugs, that Everett was afraid she was law enforcement, that Everett and Farmer planned to enter her home to see if she was law enforcement, that Farmer struck K.M.B. while Everett rifled through her belongings to find out if she was law enforcement, that Everett raped K.M.B. while she was on the ground after being struck by Farmer, that Everett had his fish bat but did not use it on K.M.B., and that Everett left Farmer at K.M.B.'s home and did not take any of her belongings. (PCR2:296-97, 303-04, 323.)

Everett's first and second claims alleged, in some part, a dysfunctional relationship with trial counsel that prevented him from telling the jury that Farmer participated in K.M.B.'s murder. (PCR2:307-08, 329.) Everett's "Claim Three" sought to relitigate the admissibility of his confession and its impact on the jury. (PCR2:309-311, 330-35.)

In his legal memorandum supporting his seventh claim, Everett alleged, in part, that he desired to testify that Farmer and Bubba Wilson participated in the offense. (PCR2:346.) While supporting his eighth claim, Everett alleged he was selling drugs with Farmer, and it was "only out of a desire to protect Jared Farmer and his family that the Petitioner did not make extensive mention of the methamphetamine business and use before." (PCR2:349.)

2. Evidentiary Hearing

The postconviction court held an evidentiary hearing 12/17/2007 through 12/19/2007. (PCR3:501-05; PCR5:704-850.)

Before the evidentiary hearing began, postconviction counsel stated Everett did not want to "raise in any substantial manner the matter of whether or not Jared Farmer was brought to court to testify in this case or whether he was called to testify or" any "issues

regarding what Mr. Farmer did or did not do or did or did not say." (PCR5:709.) The court confirmed the waiver of all claims related to Farmer in a colloquy with Everett. (PCR5:711.) The court also confirmed with Everett that no one "forced" or "threatened" him "in order to get" him to waive his Farmer-related claims. (PCR5:712.)

Everett gave sworn testimony in support of his 3.851 motion. (PCR5:744-68, 771-72.) Everett testified he confessed because law enforcement officer Murphy would tell him off-record that "the State of Florida gives lethal injection for murder" and the only way to avoid that was "to confess." (PCR5:752-53.) He would not have made his "second or third" statements but-for these threats from law enforcement officer Murphy. (PCR5:772.)[8]

Dr. Mahtre testified Everett told him that he was high on drugs, the victim accidently came into his motel room, believed the victim

[8] Murphy swore he never threatened Everett. (PCR5:785-87.) It appears an entirely different officer may have mentioned something about lethal injection after the first interview with Everett. (DAR.Supp2:65; PCR10:2066-68.) This Court rejected a belated attempt to raise a claim regarding Lindsey's statement as procedurally barred. *Everett II*, 54 So. 3d at 487; *cf. Martin v. State*, 107 So. 3d 281, 305 (Fla. 2012) (advising a "suspect of potential penalties and consequences does not amount to a threat" and "encouraging a suspect to cooperate with law enforcement is not coercive").

was in law enforcement, and stalked her back to her house at one point. (PCR5:796-98.) He also mentioned Everett's mother reporting that Everett was "never a violent person except when he got on drugs." (PCR5:795.)

Counsel Smith testified Everett concocted numerous versions of the murder before trial and would have been "crucified on cross examination" based just on the versions the prosecution was aware of. (PCR5:814-15.) By the time of trial, Everett had a "fairly outlandish version where the victim was some sort of a double agent and was involved in drugs and they had gone to Alabama and she was in Alabama." (PCR5:815.) In another version, he said Bubba Wilson[9] and "other people" were involved. (PCR5:820.) And in yet another version, Everett "came clean" and said he "did it." (PCR5:820.) Everett's "stories got bigger and bigger as the case progressed." (PCR5:815.) Everett told counsel Smith that his mother counseled him to talk to the police and tell them what happened. (PCR5:832-33.)

[9] Counsel investigated Bubba Wilson and found out he had been trampled by a horse and was in a cast at the time of the murder. (DARSupp.2:59-60; PCR5:816; PCR12:2425-26.)

Everett struck his counsel as a "classic" case of "antisocial personality disorder." (PCR5:819.) After counsel Smith interviewed Farmer, it was clear that Everett was "definitely" the "leader" between the two of them. (PCR5:821, 837.)

The State introduced counsel Smith's file into evidence. (PCR6-17.) This file contained a letter from Everett to "Joe" Garrett stating Everett initially had consensual sex with K.M.B., later became paranoid that she was a cop and investigated her house with Farmer, was caught by K.M.B. as he went through her purse, and punched her when she confronted him. (PCR6:891-93, 897, 900.) Everett claimed Farmer tied K.M.B. up and killed her while Everett was completing a drug deal outside her house. (PCR6:893.)

Everett made another partial statement to counsel about believing K.M.B. was a cop. (PCR6:903-04.) In another statement, he said he, Farmer, and Wilson all went to K.M.B.'s house, that he went through her purse, and he struck her twice and raped her. (PCR6:908.) He suggested Farmer and Wilson killed K.M.B. after he left, and that he did not reveal their involvement because he was afraid for his sister and her family. (PCR6:908-09.) In another statement, Everett said he and another person burglarized the

victim's house, the victim confronted them, and he punched her and passed out. (PCR6:913.)

3. Order Denying Initial 3.851 Relief

The postconviction court issued an order denying Everett's postconviction motion. (PCR4:653-67.) The court noted Everett expressly abandoned his Farmer-related claims. (PCR4:654-55.) It determined Everett's evidentiary-hearing testimony was "extremely questionable" and not credible. (PCR4:659-60.)

E. First Successive 3.851 (Right-to-Jury-Findings)

Everett—through counsel Linda McDermott and Charles Lykes Jr.—filed a successive 3.851 motion raising right-to-jury-findings claims based on the Sixth and Eighth Amendments. (2PCR:15-40.) The postconviction court rejected his claims. (2PCR:121-36.)

F. Second Successive 3.851 (Farmer)

Everett—through counsel Nathan D. Clark—filed a second successive 3.851 motion raising claims related to Jared Farmer. 3PCR:535-59. This motion alleged the following facts: (1) a hearsay statement that Everett was being surveilled by the bondsmen all day on 11/2/2001 and could not have killed K.M.B.; (2) Between 6:00 and 9:00 p.m. on 11/2/2001, Cindy Everett and Ashley Everett

received calls from Jared Farmer's brother and his wife looking for Everett since a girl had been hurt; (3) Farmer said he was with Everett all day on 11/1/2001 and left him at the motel that night; (4) Farmer said Everett was gone the next day; (5) Walmart footage showed Farmer lied to police and was present with Everett for the fish-bat purchase; (6) Farmer began incriminating Everett shortly after the crime; (7) at some point, Farmer told Tasha Todd that he killed a girl while on vacation; (8) Charles Williams overheard Farmer say he killed before; (9) Ethan Rodgers recounting a hearsay statement that someone else overheard Farmer make a statement about killing someone in Panama City; (10) Everett's family perceived threatening looks from Farmer during and after trial; (11) Everett claimed he received a note threatening to rape and kill one of his sisters sometime before trial. (3PCR:536-38, 543-45, 547-49, 557-58, 579-83, 587, 590-93, 595-96.

The postconviction court dismissed the motion without prejudice and appointed Capital Collateral Regional Counsel – Northern Region (CCRC-N) to represent Everett. (3PCR:878-87.) CCRC-N later filed a notice it did not intend to file an amended 3.851 motion. (3PCR:906-07.)

G. Everett's Failed Confession-Related Appellate Claims

Everett has tried and failed to argue his 11/27/2001 confession should have been suppressed at least three times before appellate courts. He argued suppression was required because law enforcement reinitiated with him after he invoked his right to counsel in both his direct appeal and Eleventh Circuit appeal to no effect. *Everett I*, 893 So. 2d at 1283-87; *Everett V*, 779 F.3d at 1239-48. In his postconviction appeal, Everett unsuccessfully argued his confession was procured by improper law enforcement threats from Detective John Murphy and Lieutenant Chad Lindsey. *Everett II*, 54 So. 3d at 474-75, 487.

H. Everett's Third Pro Se 3.851 Motion

Everett's third pro se motion made several factual allegations related to Jared Farmer, including: (1) Charles Williams heard Farmer threaten a woman by saying he had gotten away with murder before and that someone else was convicted for his offense; (2) Farmer actually killed K.M.B.; (3) Everett told trial counsel Smith that Farmer actually committed the crime and Smith refused to investigate it; (4) Farmer recruited him to come to Florida and sell drugs; (5) K.M.B. saw Farmer and Everett cooking meth at the home of Joel Woods; (6)

Everett and Farmer packed up the meth lab due to fear of discovery and returned to the motel to complete the cook; (8) the next day, Everett went jogging saw K.M.B. watering flowers in her front yard; (9) he struck up a conversation with K.M.B. who invited him over for steak that night; (10) before dinner, Everett returned to the motel and berated "Farmer for his stupidity" in a drug deal; (11) Everett and K.M.B. had dinner, sex afterwards, and he remained with K.M.B. until noon the next day; (12) Everett spent the rest of the day fixing Farmer's mistake with the drugs and found out many individuals dated K.M.B.; (13) that night, Bubba Wilson told Everett K.M.B. was an undercover officer; (14) Everett tried to calm everyone down and convince them K.M.B. was neither a cop nor the individual who saw them cooking meth before; (15) Everett, Farmer, and Wilson concocted a plan that Everett would sleep with K.M.B. again while the others looked through her computer; (16) Everett went to K.M.B.'s home the next morning, slept with her, and left around noon; (17) another man looked through K.M.B.'s computer at this time and confirmed there was nothing on it; (18) Everett and K.M.B. spent the next two days together; (19) K.M.B. and Everett were together in her home around 10:30 p.m. on 11/1/2001 when Farmer, Wilson, and

another man entered the house; (20) Everett confronted the men and told them K.M.B. was not a cop, but they were convinced she was; (21) Everett then left and remained in the motel until the bondsmen took him to Alabama; (22) Farmer began threatening Everett's family in unspecified ways; (23) Everett used "his imagination" and perceived Farmer was telling Everett not to snitch or else his family would be in danger; (24) Everett confessed because of this perceived threat; (25) Everett conveyed this story to Smith who discarded it as fictional; (26) Farmer told Michael Frederick, Debbie Taylor, Joel Woods, Travis Woods, that Everett killed K.M.B. soon after the murder. (3PCR:33-36, 39-47, 51-53, 57, 73-74.) Everett claimed he was asserting this claim now since his nephews and nieces were adults able to take care of themselves and away from Farmer. (3PCR:58-59.)

I. 3.853 Motion

Everett filed a 3.853 motion requesting DNA testing on the fifteen items to determine whether Jared Farmer's DNA is present. (3PCR:909, 940.) These items relate to two overarching categories:

Items related to Jared Farmer: (1) saliva sample from Jared Farmer; (2) elimination prints from Jared Farmer; (3) Jared Farmer's

shoes removed at the time of his arrest. (See 3PCR:940.)

Items related to the murder scene: (4) hair removed from K.M.B.'s right hand; (5) hair removed from K.M.B.s left hand; (6) hair removed from K.M.B.'s upper right arm; (7) possible skin and hair removed from K.M.B.'s right hand; (8) nail scrapings/clippings removed from K.M.B.; (9) K.M.B.'s shirt; (10) the sheet used to contain K.M.B.'s shirt; (11) a white t-shirt removed from K.M.B.'s house; (12) the fish bat found near the crime scene; (13) hairs removed from the master bathroom sink; (14) a bed post top; (15) a blue fleece jacket. (See 3PCR:940.)

Everett requested these items be compared with Jared Farmer's known standard DNA. (3PCR:909.)

E. Postconviction Court's Ruling

The postconviction court issued a comprehensive written order denying Everett's motion. (3PCR:1149-64.) The court found there was no reasonable probability the testing Everett sought would produce an acquittal or lesser sentence in light of the overwhelming evidence against him and the minimal value of proving Farmer's DNA was on the proposed items. (3PCR:1156-63.)

Everett timely appealed.

SUMMARY OF THE ARGUMENT

The postconviction court correctly rejected Everett's 3.853 motion for DNA testing. The State's evidence tying Everett to the crime was overwhelming and included: (1) his detailed, post-*Miranda* confession; (2) the fact his DNA—to the exclusion of Jared Farmer and every other living person—was inside K.M.B.'s vagina; (3) K.M.B. suffered a vaginal abrasion "consistent with" nonconsensual intercourse; (4) video evidence he purchased a fish bat later found near the victim's home; and (5) his guilty-conscience disposal of evidence.

Everett's proposed DNA testing will establish (at absolute best for him) that Farmer was also present for the victim's murder. That fact casts no doubt on either Everett's first-degree murder conviction or his sentence. Farmer's mere presence does not undermine any of the evidence against Everett. There is no reasonable probability a reasonable judge/jury hearing Farmer's DNA was on any of the items Everett sought to test would either acquit Everett or impose a life sentence. This Court should affirm.

STANDARD OF REVIEW

This Court reviews the summary denial of DNA testing under Rule 3.853 de novo. *Gosciminski v. State*, 262 So. 3d 47, 55 (Fla. 2018); *see Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005).

ARGUMENT

Everett appeals the lower court's denial of his Florida Rule of Criminal Procedure 3.853 motion for DNA testing and urges reversal. But affirmance is the only appropriate course.

Florida Rule of Criminal Procedure 3.853 and section 925.11(2)(f)3, Florida Statutes, are designed to provide a means for DNA testing when there is a "*credible concern* that an injustice may have occurred *and DNA testing may resolve the issue*." *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) (emphases added) (quoting *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So.2d 633, 636 (Fla. 2001) (Anstead, J., concurring).)[10]

[10] At one point, Rule 3.853 provided a way around the time limitations in Florida Rule of Criminal Procedure 3.851 if the newly discovered evidence claim was based "solely" on the results of DNA testing. *See Amend. to Fla. Rules of Crim. Proc. Creating Rule 3.853*, 807 So. 2d 633, 635, 640 (Fla. 2001) (adopting Rule 3.853(d)(2).) But this Court eliminated that provision in 2007, soon after eliminating

Rule 3.853 "delineates the procedures for obtaining DNA testing under section 925.11." *Consalvo v. State*, 3 So. 3d 1014, 1016 (Fla. 2009). This rule does not authorize "fishing expeditions for genetic material" of questionable relevance. *Lott v. State*, 931 So. 2d 807, 820-21 (Fla. 2006). Instead, DNA testing is only permitted if "there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." Fla. R. Crim. P. 3.853(c)(5)(C); *see also* § 925.11(2)(f)3., Fla. Stat. (containing an identical requirement).

The reasonable probability standard in Rule 3.853 is identical to the prejudice determination on ineffective assistance of counsel claims, and lower than the standard for newly discovered evidence claims. *Van Poyck v. State*, 961 So. 2d 220, 224-25 (Fla. 2007) (explaining the reasonable probability standard derives from *Strickland*[11] and requires undermining confidence in the outcome,

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the time limit for 3.853 motions. *See In re Amends. to Fla. Rule of Crim. Proc. 3.853(d)*, 938 So. 2d 977, 978 (Fla. 2006) (eliminating the time limit for 3.853 motions); *In re Amends. to Fla. Rules of Crim. Proc. 3.170 And 3.172*, 953 So. 2d 513, 515, 518 (Fla. 2007) (eliminating the provision requiring calculation of Rule 3.851 timeliness from the date of the DNA results).

[11] *Strickland v. Washington*, 466 U.S. 668 (1984).

while the newly discovered evidence standard requires a defendant to show the outcome "probably," or more likely than not, would change). But, while reasonable probability requires a lesser showing than preponderance of the evidence, the difference between the two standards is only "slight" and "matters only in the rarest of cases." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Speculation is not enough to show a reasonable probability. *Derrick v. State*, 983 So. 2d 443, 462 (Fla. 2008). Instead, the likelihood of an acquittal or lesser sentence must be "substantial, not just conceivable." *See Richter*, 562 U.S. at 112 (2011).

"It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence." *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004). He must also "show a 'demonstrable nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." *Consalvo*, 3 So. 3d at 1016 (quoting *Hitchcock v. State*, 866 So.2d 23, 27 (Fla. 2004).)

A "trial court does not err in denying a motion for DNA testing where the defendant cannot show that there is a reasonable

probability that the absence or presence of DNA at a crime scene would exonerate him or lessen his sentence." *Lambrix v. State*, 124 So. 3d 890, 896 (Fla. 2013); *Scott v. State*, 46 So. 3d 529, 533 (Fla. 2009) ("[W]hen the defendant cannot show that DNA will prove or negate a material fact, the request for testing should be denied.").

This Court has specifically recognized that DNA testing to show a potential co-perpetrator's mere presence at a murder scene does not demonstrate a reasonable probability of an acquittal or lesser sentence. *Overton v. State*, 976 So. 2d 536, 569-70 (Fla. 2007). *See also Galloway v. State*, 802 So. 2d 1173, 1175 (Fla. 1st DCA 2001). Likewise, there is no reasonable probability of an acquittal or lesser sentence in a case already supported by a defendant's confession and DNA. *Reynolds v. State*, 192 So. 3d 41 (Fla. 2015) (unpublished table decision). *See also Olvera v. State*, 870 So. 2d 927, 928-30 (Fla. 2d DCA 2004) (rejecting a request for DNA testing of hair and blood when eyewitnesses said the victim left the bar with the defendant and the defendant's semen was found in the victim's vagina).

This Court should affirm the lower court's denial of DNA testing under Rule 3.853 for three reasons. First, Rule 3.853's reasonable probability analysis does not include anything other than the trial

evidence and proposed DNA results. Second, there is no reasonable probability of an acquittal even assuming Farmer's DNA is found on some of the items related to the murder scene. Third, there is no reasonable probability of a lesser sentence even if Farmer's DNA is found on some of the items related to the murder scene.

A. Rule 3.853's Reasonable Probability Analysis Is Limited to the Evidence Introduced at Trial and Proposed DNA Results without Factoring in other Unadmitted Evidence or Attempts to Relitigate Already-Decided Issues.

Before a defendant is entitled to DNA testing, he must demonstrate "a reasonable probability that" he "*would have been* acquitted or *would have* received a lesser sentence *if the DNA evidence had been admitted at trial*." Fla. R. Crim. P. 3.853(c)(5)C (emphasis added); § 925.11(2)(f)3., Fla. Stat. (containing identical language). The clear focus of Rule 3.853(c)(5)C is whether the DNA evidence—*standing alone*—would have created a reasonable probability of a different outcome at the defendant's prior trial. *Id.*

Rule 3.853 does not contemplate consideration of additional evidence that was not presented at trial in tandem with the DNA testing to get a defendant over the reasonable probability hurdle. *Mosley v. State*, 285 So. 3d 1016, 1020, 1022 (Fla. 1st DCA 2019)

(refusing to consider consensual-encounter testimony the defendant chose not to present at trial in the reasonable probability calculus). Nor does the rule permit relitigation of issues that should have been brought through other vehicles. *Id.* at 1022 (refusing to consider an ineffectiveness claim as part of the 3.853 analysis).

That is why Florida's courts routinely reject 3.853 motions when the trial defense conceded the defendant's participation in some way. *E.g.*, *Hartline v. State*, 806 So. 2d 595, 595 (Fla. 5th 2002) (no reasonable probability of different outcome where the defendant admitted sexual activity with the child victim); *Marsh v. State*, 812 So. 2d 579, 579 (Fla. 3d DCA 2002) (holding that DNA testing of rape kit would be superfluous because the defendant's unsuccessful defense at trial was consensual sex and not identity); *Scott v. State*, 75 So. 3d 392 (Fla. 4th DCA 2011) (table decision) (rejecting DNA testing because the trial defense was self-defense).

The sole question before this Court is therefore whether there is a reasonable probability that an objectively reasonable jury/judge at Everett's first trial or penalty phase would have acquitted him or given a lesser sentence if they learned Farmer's DNA was on the items Everett wishes to test along with the rest of the trial evidence.

Everett's attempts to pad the record with unadmitted evidence, such as additional details about Farmer's knowledge, and other issues that he did not see fit to litigate in his first trial, are improper under the plain language of both Rule 3.853(c)(5)C and section § 925.11(2)(f)3., Florida Statutes. This Court should therefore limit itself to the proposed DNA testing and trial evidence when determining reasonable probability.

B. There Is No Reasonable Probability of an Acquittal if Evidence that Farmer's DNA Was at the Murder Scene "Had Been" Introduced at Everett's 2002 Guilt Phase.

The postconviction court correctly held there is no reasonable probability of an acquittal if Farmer's DNA is found on the murder-scene-related items Everett sought to test.

The guilt-phase, reasonable-probability analysis requires Everett to show a reasonable probability that an objectively reasonable jury at his 2002 guilt phase would have acquitted him of first-degree murder[12] if it learned Farmer's DNA was on the items he

[12] In noncapital cases, it is debatable whether the language of Rule 3.853 would permit testing on a showing of reasonable probability of a lesser included offense based on the Rule's language. But in a capital case, if there is a reasonable probability of reduction to a lesser-included offense (say manslaughter) then there is

sought to test below. *See* Fla. R. Crim. P. 3.853(c)(5)C.

For example, this Court held there was no reasonable probability DNA testing would result in an acquittal where the defendant sought to test hairs on tape used to bind a victim. *See Overton v. State*, 976 So. 2d 536, 567, 569-70 (Fla. 2007). The defendant argued that, since "the State here did not assert or prove that there were multiple perpetrators, DNA testing of the hair would prove that there was an additional participant in the sexual battery and murder of Susan, which would give rise to the reasonable probability that Overton would have received a reduced sentence." *Id.* This Court rebuffed that assertion and held that "even if the testing of the hair here reveals it did not come from Overton or the victims, the results will not exonerate Overton or mitigate his sentence <u>because</u> *such results would not prove that Overton was neither the perpetrator nor present at the crime scene.*" *Id.* at 570 (emphases added).

Below, Everett latched on to a dictum footnote noting that the circuit court permitted DNA testing of a rape kit and fingernail

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automatically a reasonable probability of a lesser sentence since Florida does not impose the death penalty for manslaughter.

clippings. See *id.* at 570 n.22. But it is well established that holdings control over dictum commentary on an issue that was not argued before this Court. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) (holding a comment by this Court was not "necessary for the holding and constituted dicta" and explaining holdings control over dictum). This Court's clear holding in *Overton* was that the results of the testing he sought would not exonerate him or mitigate his sentence "*because such results would not prove that Overton was neither the perpetrator nor present at the crime scene.*" *Overton*, 976 So. 2d 536 at 570 (emphasis added). Everett's motion for DNA testing fails on the same analysis.

The First District's decision in *Galloway v. State*, 802 So. 2d 1173, 1174 (Fla. 1st DCA 2001), which this Court relied on in *Overton*, makes that even clearer. Galloway sought DNA testing after being convicted with "two co-defendants" of robbery and sexual battery to prove that his "DNA would not match DNA evidence found at the scene of the crimes and on the body of the victim of the sexual battery." *Id.* at 1174-75. The First District held even if the DNA testing showed Galloway's DNA was not at the crime scene, that:

> evidence would not demonstrate that appellant was not

> present at the scene of the crime and participating with his co-defendants in the commission of the crimes when they occurred. The fact that only appellant's co-defendants may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there.

Id. at 1175. The First District accordingly denied a motion for DNA testing based solely on the fact that testing would not show the defendant was not a participant in the crimes even if his DNA was entirely absent. *Id.*

This Court extensively relied on *Galloway* in *Overton*. *Overton*, 976 So. 2d at 569 (explaining *Galloway* affirmed "the trial court's denial of the motion for DNA testing because a mere allegation that the DNA of the defendant would not match DNA evidence was insufficient to establish that the defendant was not present and a coparticipant in the crime," and was based "on the fact that even if testing of the evidence obtained from the crime scene demonstrated that the DNA did not match the defendant, it would not prove that the defendant was not present at the crime scene or a participant in the crime," before holding likewise.)

Everett's attempt to distinguish *Overton* and *Galloway* below (he fails to mention either case on appeal) fell flat because he relied on

three factually inapposite cases them.[13] *See Mitchell v. State*, 179 So. 3d 407, (Fla. 4th DCA 2015); *Cardona v. State*, 109 So. 3d 241 (Fla. 4th DCA 2013); *Hampton v. State*, 924 So. 2d 34 (Fla. 3d DCA 2006). These three cases revolve around a unique, dispositive fact absent from Everett's case: specific victim testimony about the *number* of perpetrators to an assault. K.M.B. has never testified she was assaulted by only one person, or only two, because Everett broke her neck, raped her, deposited his semen inside her, and then confessed to the killing.

Below, Everett first argued his case was more akin to *Cardona*, where the Fourth District distinguished *Overton* and held DNA testing of hairs was required. *Cardona*, 109 So. 3d at 247. But in *Cardona*: (1) the *living* victim described a *single-perpetrator* rape and said *she pulled on the perpetrator's hair*; (2) the defense at trial was misidentification; and (3) the only other DNA evidence came from a toothbrush. *Id.* at 243. Since the victim lived to testify to a single assailant whose hair she pulled, it is no surprise DNA testing was

[13] The State mentions these arguments—raised only below—here because it can only assume Everett will discuss *Overton* and *Galloway* in his reply brief when the State will have no further means of responding.

ordered in *Cardona*.

The next two cases Everett mis-relied on below, *Hampton* and *Mitchell*, distinguish *Galloway* due to the *living* victim's testimony about the *number of people who attacked her*. *See Mitchell,* 179 So. 3d at 408 (holding DNA testing of a rape kit was required when the *victim stated* she was raped by *three* men and the defense at trial was identity); *Hampton*, 924 So. 2d at 36-37 (holding DNA testing of a rape kit was required where the *victim testified* she was raped by *three* men). In both cases, the courts found that DNA testing revealing three semen profiles, none of which matched the defendant, could exonerate the defendant in light of the victims' specific statements about the number of men who raped them. *See Mitchell,* 179 So. 3d at 408-09; *Hampton*, 924 So. 2d at 36-37.

Everett's case is far more like *Galloway* and *Overton* than the three cases he mis-relied on below, a fact made readily apparent by the Third and Fourth District's analyses. *See Mitchell*, 179 So. 3d at 408-09 ("The *Galloway* opinion, on the other hand, suggested one co-defendant committed sexual assault and the other two were guilty as principals for assisting; *in such a case, semen proved to have been deposited by one would not exonerate the other two*.") (Emphasis

added); *Hampton*, 924 So. 2d at 36 (stating in *Galloway* "the fact that there was semen deposited by only one of the three defendants would not exonerate the other two. That is so because the two defendants aided the third defendant in committing the sexual battery.") It is also worth noting the irrelevance of the fact that the State's main theory in Everett's trial was not a principal theory. *See Overton*, 976 So. 2d at 569 (rejecting Overton's attempt to distinguish *Galloway* because the State in his case "did not assert or prove that there were multiple perpetrators").

There is no reasonable probability Everett's jury would have acquitted him if it heard Farmer's DNA was on the evidence Everett now wants to test. The DNA testing would not answer any of the questions needed to exonerate Everett. The testing would not tell the jury who actually killed the victim and how involved Everett was. The testing would certainly not show Everett was not a co-participant in the crimes or not there for them. Those questions are answered by the evidence already existing in this case: (1) Everett's confession; (2) Everett's semen in K.M.B.'s vagina; (3) the vaginal abrasion; (4) video evidence of Everett purchasing the fish bat; and (5) Everett's guilty-conscious disposal of incriminating evidence. While K.M.B. cannot

tell her story due to Everett's heinous actions, the trial evidence speaks for her.

Both on appeal and below, Everett discounts the overwhelming evidence of his guilt by focusing on each piece in isolation. But he is wrong to do so. The State's trial evidence must be viewed as a whole rather than in isolation with a divide-and-conquer approach to determine the reasonable probability of a different outcome. *Cf. D.C. v. Wesby*, 138 S. Ct. 577, 588 (2018) (probable cause requires consideration of the "whole picture" because "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."); *United States v. Vaughn*, 62 F.4th 1071, 1072 (7th Cir. 2023) (Easterbrook, J.) (evidence must be considered as a whole).

Below, Everett first argued his confession was the product of threats from Farmer, law enforcement, and incorrect on minor details. Everett has unsuccessfully relitigated these themes over and over again in his two decades on death row. And his trial counsel expressly argued his confession was inconsistent with the evidence on minor details. None of these arguments carry any weight in the reasonable probability analysis.

On appeal, Everett argues that innocent people sometimes confess. So do guilty people. Everett's arguments do not change the import of a confession or its impact on a reasonable jury, particularly when the inculpatory parts of the confession are consistent with the rest of the trial evidence. The simple truth is that—whether Everett likes it or not—a "confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *see also Kidd v. Gomez*, 2 F.4th 677, 680 (7th Cir. 2021) (recently recognizing the same fact).

Apart from DNA inside the victim in a rape case (like this one), confessions are the most probative, damaging, and unimpeachable source of information the State can offer, and have a profound impact on a jury. *See Fulminante*, 499 U.S. at 296. It is the *self-inculpatory* nature of a confession that makes it powerful, *not* its consistency with the rest of the evidence on ancillary issues. *See Williamson v. United States*, 512 U.S. 594, 599-600 (1994) ("The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.").

That is especially true since Everett's confession does not stand alone. While Everett (below) quibbled about aspects of the DNA testing, he never actually challenged the fact that his semen—to the exclusion of Farmer's—was inside K.M.B.'s vagina at astronomical numbers. Everett's newly-remembered, consensual-sex theory proffered below was not argued at trial and could not be argued for the first time in a motion for DNA testing. *Mosley v. State*, 285 So. 3d 1016, 1020, 1022 (Fla. 1st DCA 2019). It is also contrary to the facts Everett swore were true in his first 3.851 motion. (PCR2:304 (Everett "did perform a sex act on" K.M.B. "after she had been knocked to the ground by Mr. Farmer.") And even if he could rely on a consensual-sex theory, Everett himself is utterly incredible as a witness and no reasonable jury would believe him after hearing his self-inculpatory confession and that his semen was inside the victim.

It is also here that K.M.B.'s vaginal abrasion combines with the rest of the evidence to form the whole picture. While Everett (below) tried to discount the vaginal abrasion due to K.M.B.'s pap smear days before the rape and murder, the fact remains that the abrasion is "consistent with" nonconsensual intercourse and his 2002 jury was expressly told the abrasion could have come from elsewhere. The

potency of the vaginal abrasion comes with viewing it in conjunction with the rest of the evidence in this case instead of in isolation.

Finally, below, Everett argued Farmer was with him when he purchased the fish bat and may have used it against the victim. But Everett was the one caught on video purchasing the bat and the one who said he brought it to the victim's house. Everett is also the one who disposed of evidence (his shoes) because they had the victim's blood on them.

The whole picture in this case is truly greater than the sum of its parts, although the DNA evidence and confession are dispositive of the reasonable-probability question on their own. Everett's improper divide-and-conquer approach and speculative attempt to make the proposed DNA results say far more than they logically could are patently insufficient to show a reasonable probability. *Derrick v. State*, 983 So. 2d 443, 462 (Fla. 2008) (a reasonable probability requires more than "mere speculation"). There is nowhere near a just-under-51% chance an objectively reasonable jury at Everett's first trial would have acquitted him of first-degree murder if the DNA testing Everett proposes came back with Farmer's DNA and was included in Everett's first trial. *See Harrington v. Richter*, 562 U.S. 86,

112 (2011) (recognizing the difference between the reasonable-probability "standard and a more-probable-than-not standard is slight").

Apparently realizing that, Everett tries to show a reasonable probability by speculating that: (1) If Farmer's DNA was discovered at the scene then he would have been charged with murder as well; (2) if that happened, Everett would have been entitled to the principal instruction and independent act instructions; (3) he could have just been present at the scene and witnessed Farmer murder the victim. Everett's attempt to divine the State's charging decisions aside, the mere inclusion of principal and independent act instructions and theory that he was an only-present bystander do not give rise to a reasonable probability of an acquittal. Everett has the burden to demonstrate a just-under-51% chance that an objectively reasonable jury would actually acquit him on those theories to show a reasonable probability. *See Richter*, 562 U.S. at 112. He does not even attempt to do that.

But given the evidence in his case, that is understandable. There is no good argument that a jury instructed on principal and independent act would acquit Everett after hearing the trial evidence

against him. This Court should affirm due to both the overwhelming evidence in this case and the fact that the DNA evidence Everett seeks does not show he was not a coparticipant in the crime under *Overton* and *Galloway*.[14]

[14] Even if this Court determines Rule 3.853 permits consideration of additional non-DNA evidence that could be presented at a future trial when assessing reasonable probability under Rule 3.853, Everett's plea for reversal still comes up short. At Everett's theoretical future trial with the DNA evidence coming out in his favor, the jury would hear: (1) his detailed confession; (2) his DNA was inside K.M.B.'s vagina, corroborating the self-inculpatory part of his confession; (3) K.M.B. suffered a vaginal abrasion "consistent with" nonconsensual sexual intercourse; (4) Everett was caught on video purchasing the fish bat while Farmer was there; (5) Everett disposed of his shoes because they had K.M.B.'s blood on them and was barefoot when the bondsmen picked him up; (6) Farmer called his mother during the broad timeframe where the victim may have been murdered; (7) Farmer made statements about an old lady being strangled shortly after the crime when K.M.B. was neither old nor strangled; (8) Farmer's DNA was on the items Everett wants to test, the most incriminating of which are the fish bat, fingernail scrapings/clippings, and hairs in the victim's hands. There is no reasonable probability a jury hearing all that evidence together would acquit Everett of first-degree murder. Indeed, even if Everett's confession were suppressible at a future trial, it would still be admissible to impeach him if he tried to present his consensual-sex theory to the jury. *See Kansas v. Ventris*, 556 U.S. 586, 593-94 (2009).

C. There Is No Reasonable Probability of a Life Sentence if Evidence that Farmer's DNA Was at the Murder Scene "Had Been" Introduced at Everett's 2002 Penalty Phase.

The postconviction court also correctly held there is no reasonable probability of a lesser sentence if Farmer's DNA is found on the murder-scene-related items Everett sought to test.

The penalty-phase reasonable probability analysis requires Everett to show a reasonable probability that an objectively reasonable jury/judge at his 2002 penalty phase proceedings would have recommended a life sentence had he introduced evidence Farmer's DNA was on the items he sought to test below. *See* Fla. R. Crim. P. 3.853(c)(5)C.

There is no reasonable probability an objectively reasonable judge/jury would agree that life was the appropriate sentence if Farmer's DNA turned up at the murder scene. For the same fundamental reasons as the guilt-phase analysis in the preceding section, Farmer's DNA being present at the murder scene does not give rise to a reasonable probability of a life sentence. Farmer's DNA being at the murder scene does not actually answer the questions necessary to determine the likelihood of a life sentence, like who murdered K.M.B.? (Everett alone? Farmer alone? Both together?).

Everett's attempt to escape from proving a reasonable probability of a different outcome again hinges on his mistaken belief that merely having the jury make additional findings in order to vote for death is enough to show a reasonable probability. *See* I.B. at 27-28. He is wrong. To show a reasonable probability, Everett must show a reasonable probability that an objectively reasonable jury/judge would in fact issue a life recommendation if tasked with litigating the issues he proposes. *See* Fla. R. Crim. P. 3.853(c)(5)C; *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (explaining that a defendant challenging a death sentence must show a reasonable probability that the sentencer would have concluded death was not appropriate).

The problem for Everett is that the DNA testing he proposes—by its nature—does not shed light the level of participation in the murder Everett and Farmer had (assuming for a moment Farmer had any). *See Overton v. State*, 976 So. 2d 536, 569-70 (Fla. 2007) (affirming denial of DNA testing where the testing would not "mitigate" the defendant's "sentence because such results would not prove that" he "was neither the perpetrator nor present at the crime scene"). There is simply no reasonable probability a jury/judge would hand Everett a life sentence despite his detailed confession, semen

inside the victim, the vaginal abrasion, video of Everett purchasing the fish bat, and Everett's guilt-conscious disposal of evidence.[15] This Court should affirm.

[15] Everett also makes a brief, speculative argument that jurors might be "loath to impose the death penalty" even if he was constitutionally eligible for it if he "neither took the victim's life nor intended it to be taken." I.B. at 28. Setting aside the utter speculative nature of this argument and remarkable ability to ignore the evidence against Everett, its focus is misplaced. The question is not whether some of the myriad variations of juries might not want to impose the death penalty in this circumstance. That approach would lead to utter unpredictability. The question is whether there is a reasonable probability an objectively reasonable jury acting according to law would not have imposed the death penalty in the circumstance Everett proposes. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984) (explaining a reasonable-probability analysis should assume the "judge or jury acted according to law," exclude the possibility of "arbitrariness, whimsy, caprice, 'nullification,'" and does not depend on the "idiosyncrasies of the particular decisionmaker").

CONCLUSION

Over twenty years ago, the State conclusively proved Everett raped and killed K.M.B. by breaking her neck. The DNA testing Everett seeks would not exonerate him or mitigate his sentence because the mere presence of Farmer's DNA at the murder scene would not matter to an objectively reasonable decisionmaker. *See Willacy v. State*, 967 So. 2d 131, 145 (Fla. 2007) (affirming denial of DNA testing where "DNA testing would not eliminate significant and substantial evidence directly linking" the defendant to the victim's "murder" and thus would not "give rise to a reasonable probability of acquittal or a lesser sentence.") This Court should affirm the postconviction court's denial of Everett's motion for DNA testing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 2023, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Alice Copek, Assistants CRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, **alice.copek@ccrc-north.org, copeklaw@gmail.com**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045.

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