IN THE SUPREME COURT OF FLORIDA

JAMES AREN DUCKETT,

Appellant,

v. **CASE NO. SC01-2149**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts as set out on pages 1-19 of Duckett's brief is argumentative and is denied.

The Facts from Direct Appeal

On direct appeal, this Court summarized the facts of this case in the following way:

> The facts in this opinion are set forth in extensive detail since the convictions are based on circumstantial evidence. Duckett, a police officer for the City of Mascotte, was the only officer on patrol from 7:00 p.m., May 11, 1987, to 7:00 a.m., May 12, 1987. Between 10:00 and 10:30 p.m. on May 11, Teresa McAbee, an eleven-year-old girl, walked a short distance from her home to a convenience store to purchase a pencil. Teresa left the store with a sixteen-year-old Mexican boy, who was doing laundry next door. The boy testified that they walked over to the convenience store's dumpster and talked for about twenty minutes before Duckett approached them. A clerk at the convenience store testified that Duckett entered the store and asked her the girl's name and age, at which time she advised him that Teresa was between ten and thirteen years old. After indicating that he was going to check on her, Duckett exited the store and walked toward the dumpster, where he located the two children. Duckett testified that he conversed with the children and subsequently, acting in his capacity as a police officer, instructed Teresa to return home. The sixteen-year-old boy testified that, after speaking with Duckett, he went to the laundromat to wait for his uncle, who arrived soon thereafter; that Duckett and Teresa were standing near the patrol car; and that Duckett asked the uncle the nephew's age. Subsequently, Duckett suggested that the uncle talk to his nephew while he spoke to Teresa. According to the uncle and the boy, Duckett placed Teresa in the passenger's side of his patrol car and shut the door before proceeding to the driver's side. The uncle also testified that he never saw Teresa touch the hood of Duckett's car.

At approximately 11:00 p.m., Teresa's mother walked to the convenience store, searching for her daughter. Upon arrival, she was told by the store's clerk that Duckett may have taken her daughter to the police station. The mother then left the store and spent about an hour with her sister driving around Mascotte in search of Teresa. During this time, the mother did not see a police car. She next went to the Mascotte police station and, finding no one there, she drove a short distance to the Groveland police station. There, she told an officer that she wanted to report her daughter as missing. The officer told her that he would contact a Mascotte officer to meet her at the Mascotte police station. Teresa's mother returned to the Mascotte police station and waited for fifteen to twenty minutes before Duckett arrived. After arriving, Duckett told her that he had spoken with Teresa at the store; that she had been in his police car; and that he had directed her to return home. Before returning home, the mother also filed a missing person report with Duckett. Subsequently, Duckett went to the mother's residence to get a picture of her daughter, called the police chief to inform him of the missing person report, and advised the police chief that he had made a flyer and did not need any help in the matter. Duckett then returned to the convenience store with a flyer but told the clerk not to post it since it was not a good picture. Although he told the clerk that he would return with a better one, he never did. Duckett did bring flyers to two other convenience stores. The clerk at one of these stores testified that, while the police usually drove by every forty-five minutes to an hour, Duckett came by at 9:30 p.m. but failed to return until he brought the flyer later that evening. A tape of Duckett's radio calls indicated none between 10:50 p.m. and 12:10 a.m. At 1:15 a.m., Duckett went to the uncle's house to question his nephew about Teresa, and Duckett returned to the mother's home around 3:00 a.m.

Later that morning, a man saw what he believed to be a body in a lake and went to find the police chief, who determined that it was Teresa's body. The lake is less than one mile from the convenience store where Teresa was last seen.

A medical examiner testified that the perpetrator had sexually assaulted the victim while she was alive, strangled her, and then drowned her, causing her death. Prior to this incident, the victim had not engaged in any sexual activity. Blood was found on her underpants but not in or about Duckett's patrol car. Semen was discovered on her jeans.

A technician for the sheriff's department examined the tire tracks at the murder scene and indicated that they were very unusual. While leaving the crime scene, he observed that the tracks of a Mascotte police car appeared to be similar. He stopped his vehicle, examined the tracks, and determined that they were consistent with the tracks at the crime scene. An expert at trial corroborated this evaluation. The tracks were made by Goodyear Eagle mud and snow tires, which are designed for northern driving. While the local tire center had not sold any of those particular tires during its nine years of existence, it had received two sets by mistake and placed them on the two Mascotte police cars.

Evidence revealed that the vehicle which left the impressions had driven through a mudhole. However, no evidence was presented that Duckett cleaned his vehicle, and no debris from the scene was found in or on his vehicle. Evidence was also presented that Duckett was neat and clean later that night, as if he had just come on duty.

Both Duckett's and Teresa's fingerprints were discovered on the hood of Duckett's patrol car. Duckett's prints were commingled with the victim's, whose prints indicated that she had been sitting backwards on the hood and had scooted up the car.

A pubic hair was found in the victim's underpants. While other experts could not reach a conclusion by comparing that hair with Duckett's pubic hair, Michael Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding that there was a high degree of probability that the pubic hair found in her underpants was Duckett's pubic hair. Malone also testified that the pubic hair did not match the

hairs of the sixteen-year-old boy, the uncle, or the others who were in contact with the victim that evening.

On June 15, 1987, before his arrest, Duckett gave a statement in which he denied driving his vehicle to the lake that evening. He further stated that the victim had not been on the hood of his patrol car and that he had stopped at the Jiffy store for coffee after the girl went home.

The state presented testimony of three young women who allegedly had sexual encounters with Duckett. Prior to the introduction of this testimony, the trial judge instructed the jury that the testimony was for the limited purpose of showing motive, opportunity, plan, and identification. The first woman, a petite nineteen-year-old, testified that, in either January or February, 1987, she ran into Duckett while she was attempting to find her boyfriend. After indicating that he, too, was searching for her boyfriend, he drove her in his patrol car in search of her boyfriend. While in the car, Duckett placed his hand on her shoulder and attempted to kiss her. After she refused to kiss him, he desisted and she got out of the car. The second woman, a petite eighteen-year-old, stated that, on May 1, 1987, Duckett picked her up while she was walking along the highway. After Duckett drove her to a remote area in an orange grove, he parked the car, placed his hand on her breast, and attempted to kiss her. When she refused to kiss him, he desisted and drove her to where she requested. The third woman, a petite seventeen-year-old, testified that on two occasions, once in February or March, 1987, and again in April or May, 1987, she voluntarily met Duckett at a remote area while he was on patrol and performed oral sex on him.

At trial, Duckett testified that, on the night of the murder, while running stationary radar near the convenience store, he noticed a girl talking to three Mexicans at a laundromat. After he saw the girl and one of the boys walk over to an ice machine, he went into the store to ask the clerk some questions about the girl. He then left the store, asked the children their ages, requested that they walk to his car, and

questioned the boy further. At this time, the boy's uncle arrived at the scene with some other men. Subsequently, Duckett placed the girl in his car while he spoke with the uncle about his nephew. After the boy's uncle left with the other men, Duckett obtained more information from Teresa and told her to go home. He did not see her again after she got out of the car and walked in front of the store.

Duckett also stated that he then returned to the station for a short period of time, went to one of the convenience stores for coffee, and went on patrol. He subsequently responded to a call by a Groveland police officer and returned to the station in Mascotte, where he met the girl's mother. After visiting the uncle's home to ask some questions concerning the girl, he drove to the mother's home to get a picture. He then returned to city hall, called the police chief, and told him he was going to make a poster and contact all the stores.

With regard to Teresa's fingerprints on the hood of his car, he explained that it was possible that she sat on the hood when he was at the convenience store. Duckett denied any involvement with the three women.

The jury found Duckett guilty of sexual battery and first-degree murder. In the penalty phase, the state presented no additional testimony and Duckett presented the testimony of four witnesses. By an eight-to-four vote, the jury recommended a death sentence. The trial judge found two aggravating circumstances, specifically, that the murder was committed during the commission of or immediately after a sexual battery and that the murder was especially heinous, atrocious, or cruel. The trial judge found the existence of one statutory mitigating circumstance, namely, that Duckett had no significant history of prior criminal activity. The trial judge also determined that Duckett's family background and education gave rise to nonstatutory mitigating evidence. After making these findings, the trial judge imposed the death sentence, concluding that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Duckett to life imprisonment for the mandatory minimum of twenty-five

years for the sexual battery conviction.

Duckett v. State, 568 So. 2d 891, 892-94 (Fla. 1990).

THE RULE 3.850 PROCEEDINGS

Duckett filed an initial 3.850 Motion to Vacate on May 1, 1992. (R1-12, R1859-70). He filed an Amended 3.850 Motion to Vacate on June 12, 1992. (R41-170, R1890). A consolidated 3.850 Motion to Vacate was filed on November 14, 1994. (R337-470). Several evidentiary hearings were held before the Honorable Jerry T. Lockett, Circuit Court Judge for the Fifth Judicial Circuit of Florida, in and for Lake County, on September 20-21, 1995, (R156-657), January 7-8, 1997, (R677-961), October 29-30, 1997, (R962-1526), December 17, 1997, (R1527-1653), and October 26-27, 1998. (R1654-1807).[1] An Order denying Duckett's Consolidated First and Second Amended Motions to Vacate was issued on August 10, 2001. An Amended Order was issued on August 16, 2001. Duckett filed a Notice of Appeal on September 19, 2001.

On September 20-21, 1995, an evidentiary hearing was held regarding Claim I of Duckett's 3.850 motion. This hearing pertained to the public records issue. (R160).

<u>The Evidentiary Hearing Facts</u>

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[1]The February 19, 1999, deposition of Randall Aleno was entered in lieu of live testimony. (SR1-48).

Richard Ridgway was Duckett's first witness. (R162). Mr. Ridgway is an Assistant State Attorney with the Fifth Judicial Circuit in Florida. (R163). In June 1989, Ridgway investigated a complaint made by Ron Hill and took a taped statement from Gwen Gurley, an inmate at Marion Correctional Institute. (R163-164). He testified that Ron Hill alleged that "a script had been prepared" for Gwen Gurley's use in assisting her to fabricate her testimony at Duckett's trial. (R168). Ridgway did not recall any specific type of preparation with Gurley prior to tape recording her interview nor did he prepare any notes, reports, diagrams or evaluations as a result of the investigation. (R169). He did not recall what happened to the files after his investigation. (R170).

Kenneth Raym is an investigator with the State Attorney's Office in Ocala, Florida. (R176). In August 1989, Ric Ridgway contacted him regarding this case. (R176-177). Subsequently, he interviewed Gwen Gurley and the interview was audio taped. (R177). He believes the tape was given either to Mr. Ridgway or to Miss Geeraerts, the secretary, to transcribe. (R182). He reviewed notes that Mr. Ridgway had prepared as a result of the interview with Gwen Gurley. (R179). He did not remember talking to Linda Long, but if he did, it was just "a casual interview." (R180). He has not maintained any notes, correspondence, memos

or files in this case. (R181).

Albert Vidal was an attorney with the State Attorney's Office in Ocala, Florida, from 1991-1994. (R184-185). He was involved with the collateral attack proceedings in this case. (R185). He did not have any specific recollection of meeting with investigators in Duckett's case. (R186-187). He provided access to the Duckett files in the State Attorney's office but did not remove any documents prior to showing them to the investigators. (R187). He was not aware of any destruction of public records relating to Duckett's case. (R196). He would remove handwritten notes from files if they were exempt from disclosure but did not recall removing any handwritten notes from Duckett's files. (R205-206).

Ida Marion Press was a nurse employed by the Lake County Sheriff's Department from 1984-1995. (R208). In approximately 1986, (R210) she was called from her job at the jail to go to the "old courthouse." (R208). Upon arrival, she took hair samples from Duckett and placed them in plastic bags in the presence of a law enforcement officer. (R209). She did not recall if she wrote a report concerning the taking of hair samples from Duckett. (R210).

She has not maintained any notes, correspondence, or memoranda regarding Duckett's case. (R212).

Suz Geeraerts is Brad King's secretary at the State Attorney's Office in Ocala, Florida, and has worked for him since 1989. (R213-214). From July 1987 to July 1988, she worked for Ric Ridgeway. (R214). From July 1988 to July 1989, she worked for Diana Simpson and Jerry Burford. (R214-215). In 1989, she transcribed a tape relating to Duckett's case. She did not maintain or control any records relating to the Duckett case - - records went into the case file. (R217). Any documents or correspondence relating to Duckett's case would have been placed in the operating case file maintained by Brad King, as custodian of records. (R220).

Gerard King is currently a supervisor with Child Protection Investigations under HRS. (R223). He was the Chief Investigator with the State Attorney's Office from 1985-1991. (R223). The Sheriff of Lake County requested his assistance regarding Duckett's case. (R223). In 1987, he had approximately twenty-three years experience in homicide investigations. (R225). He, along with Jimmy Horner, Captain of the Criminal Division of the Lake County Sheriff's Department, interviewed James Duckett regarding this case. (R226). He kept the State Attorney, (Ray Gill) apprised of developments in the case. (R228). It was not his practice to make notes or recordings of conversations with the State Attorney regarding the case. (R229). There was a video

tape made at the Jiffy Store, where Duckett explained what he did on the night of the murder. (R230). King testified he maintained a copy of the tape and the original went into the evidence room. (R230). He did not prepare a report after the taped interview was made. (R230). He did not recall having any involvement with the hair evidence in this case. (R234). He did not currently have any notes, memoranda, or reports on the Duckett case in his possession. (R246). He was not involved in the destruction of any evidence regarding this case. (R246).

Ralph Earl Lamb was a mechanic with the Lake County Sheriff's maintenance garage in May 1987. (R252). Deputy Jimmy Mock called Lamb and requested that he open the maintenance shop. Subsequently, a police car was impounded, parked in the garage, and processed. (R253). He did not maintain any notes or records regarding the Duckett case. (R255).

Wanda Tatum was an evidence technician with the Lake County Sheriff's Department in May 1987. (R257). She received evidence from police officers, signed a document listing what the evidence was, and put the evidence in containers in the evidence room. (R258). The only document she would generate was the property receipt. (R258).

Steven Hurm was an attorney with the State Attorney's Office in May 1987. (R267). The day Duckett was indicted, his office

requested his assistance in presenting evidence to the grand jury. (R268). Mr. Hogan was lead counsel on the case and he was second chair. (R269). He was never contacted directly regarding a public records request. (R276). He did not destroy any records in any case. (R294).

Bradley King has been the elected State Attorney of the Fifth Judicial Circuit in the State of Florida since January 1989. (R296). He became custodian of the records regarding the Duckett case when he took office. (R297). He did not have any involvement in Duckett's case during the trial. (R297). He did not recall being directly contacted regarding allegations of Gwen Gurley's recantation in this case. (R297). He recalled Ric Ridgway being involved with the complaint. (R298). He was aware of a public records request made by Duckett's attorney, Capital Collateral Regional Counsel. (R299). He did not recall taking any handwritten notes out of Duckett's file. (R307).

James Hope was an attorney with the State Attorney's Office in 1991. (R322). He did not have any personal connection to Duckett's case and never participated in any phase of the case. (R324). He does not recall taking any documents out of the files in the possession of the State' Attorney's office pursuant to an exemption. (R329). He did not remove any documents from Duckett's files nor, did he have any knowledge of anyone else

removing any documents from those files. (R331). He did not maintain any personal files regarding Duckett nor was he aware of any Assistant State Attorney maintaining personal files regarding Duckett's case. (R331).

Charles Johnson was a Sergeant in the Investigation Unit with the Lake County Sheriff's Office in May 1987. (R335). After receiving a radio call, he responded to the murder scene and took charge of the initial investigation of the murder. (R335-336). He did not recall having a personal file on Duckett's case. (R338). He did not recall taking possession of any evidence or property in this case. (R355). Any documents generated with the case number assigned to Duckett would have been placed in the Lake County Sheriff's master file with the same case number. (R370).

Maureen Eastwood is a Corrections Officer at the Lake County jail. In May 1987, she was in the booking and I.D. processing position. (R374). After the Grand Jury indicted Duckett, she was responsible for fingerprinting him. (R375). She did not generate a report or write any notes after taking Duckett's fingerprints. (R376).

Stanley Ray Gill was the State Attorney for the Fifth Judicial Circuit from 1984 to 1989. (R380). Prior to the indictment of Duckett, his office was contacted by the Lake

County Sheriff's Department to discuss the investigation into the homicide. (R381).

He recalls an investigator from the State Attorney's office went to the murder scene but was instructed "not to become part of the evidentiary process." (R383). He was the custodian of the records regarding Duckett's case. (R388). No files would have been destroyed that would have been requested pursuant to a Chapter 119 request. (R397).

William Hampton was an investigator with the Lake County Sheriff's Department in May 1987. (R398). He did some of the investigative work on the Duckett case. (R399). It was his practice to take notes while interviewing a potential witness. (R404).

Mark Sharp was an investigator with the Lake County Sheriff's Office in May 1987. (R409). He rode with Investigator Bill Hampton, who spoke with employees at Ekiert Tire Center regarding the purchase of tires for the Mascotte Police Department. (R411). He did not remember taking any notes or writing any reports regarding the Duckett case. (R412).

Lynn Allen Wagner was a Sergeant in the Detective Bureau of the Lake County Sheriff's Department in 1987. (R420). He responded to the scene of the murder after receiving a call in the Criminal Investigations office. (R421). He did not recall

taking any notes that day. (R423). He did not maintain a personal file regarding the Duckett case. (R428). In addition, he did not handle any of the evidence that was found or taken at the scene. (R436).

Bruce Pahaly was a Deputy Sheriff with the Lake County Sheriff's Department in May 1987. (R437). He recalled being at the Groveland Police Department the night the victim's mother reported her daughter missing. (R438). He did not recall interviewing any witnesses regarding this case. (R439). After speaking with the victim's mother the night she disappeared, he did not write any notes or a report. (R440). He did not maintain any personal files regarding any cases. (R442).

Jimmy Horner was a Captain with the Lake County Sheriff's Department in May 1987, and at that time, was Commander of the Criminal Investigations Bureau. (R443). He did not personally take any notes or write a report after going to the murder scene in this case but would have reviewed the reports of the investigators. (R446). He did not recall personally giving any notes or reports to the State Attorney's Office in this case. (R454). It is the policy of the Lake County Sheriff's Department to turn over all documents in a case to the State Attorney's Office to comply with all *Brady* requirements. (R466).

Wanda Chatman worked with the Economic Crimes Unit with the

State Attorney's Office in Ocala, Florida, in November 1991. (R468). She did not maintain any personal files (R470)and did not process any public records requests. (R471).

Pauline Albon has been a paralegal with the State Attorney's Office for the Fifth Judicial Circuit for approximately twenty-three years. (R480). She became involved in Duckett's case approximately one month before the start of the trial. (R485). She did not recall a discovery request but would have sent the defense everything pursuant to the attorney working on the case. (R485). It was her practice that all notes would remain with the case file. (R493). To her knowledge, all documents in the possession of the State Attorney's Office regarding Duckett's case were given to Duckett's attorney. (R509).

John North has been a deputy with the Lake County Sheriff's Department for eleven and one-half years and was the responding deputy to the murder scene where Teresa McCabe's body was found. (R520). He did not interview any witnesses or collect any evidence. (R520). In addition, he did not take any notes or generate any reports after responding to the scene. (R521).

Patty Wiley was an assistant latent fingerprint examiner with the Lake County Sheriff's Department in 1987. (R537). One of her duties was to issue property receipts after receiving evidence. (R538).

Grace Villazon was employed as an investigator with Capital Collateral Regional Counsel in 1991 and worked on Duckett's case. (R545). Initially, she and another investigator, Teresa Farley, went to the State Attorney's Office to copy documents from the Duckett files. (R546). Shortly thereafter, they ceased copying the files pursuant to the request of Brad King, State Attorney. (R546).

Rocky Harris was an investigator with the Lake County Sheriff's Department from 1981 to 1988. (R548). As lead investigator, he had reported to the murder scene and subsequently took notes. (R550, 563). He did not collect any of the evidence in this case. (R567).

Gary Nelson was a deputy sheriff with the Lake County Sheriff's department from 1984 through 1988. (R572). He was the supervisor of the Technical Services department. (R573). After receiving a call, he went to the murder scene. (R573). It was not his practice to carry a notebook to take notes when he arrived at a crime scene but he did carry a hand-held tape recorder. (R574). While at the crime scene in this case, he helped Deputy Aleno make casts of tire impressions but not recall collecting any other evidence. (R575). It was his practice to generate a report from every crime scene as soon as possible. (R576). He would write his report and give it to his

supervisor, Captain Horner. (R577). He did not maintain a personal file regarding this case. (R586).

Randy Aleno was a Crime Scene Investigator with the Lake County Sheriff's Department from 1985 through 1987. (R619). He was dispatched to the crime scene in this case and secured the area and started processing the crime scene. (R621). It was his practice to take notes at every crime scene and generate a report thereafter. (R622). After evidence was collected, it was brought back to the office, marked, and usually put in a sealed container and locked up in a secured area. (R631). He maintained a personal file with his notes but the file was combined with the main file for this case. (R640). He was not involved, post-trial, with the destruction of any evidence in this case. (R646).

On January 7-8, 1997, another evidentiary hearing was held. Duckett's first witness was Jack Edmund, his trial counsel. (R691). Edmund had been an attorney for forty years. (R692). Edmund testified that he thought the "fingerprint evidence was damaging evidence" and it was investigated through a retired FBI agent from the Panhandle. (R693). In addition, the pubic hair that had been recovered was additional evidence that was investigated, and he felt the defense had established a conflict in the opinion of the FDLE expert and the FBI expert in this

case. (R693). It was later determined by appellate courts in Florida that the FBI expert was a "charlatan" and was no longer accepted as an expert in Florida.[2] (R693). He felt that the time preceding the murder and Duckett's whereabouts during that same time was crucial. (R694). However, he learned after the trial that Duckett had maintained a notebook of his activities the night of the murder, noting that he had made "two stops" and had also made a notation as to the color of the child victim's shirt the night she was murdered. (R694). Edmund knew that the hood of Duckett's police car got very hot. (R695, 976). While he did present some witnesses in the penalty phase, he felt it was a "cursory-type" thing - - there was no mitigation that could result in a life sentence for him. (R700). However, he presented the trial judge with numerous letters urging the judge to override the jury's recommendation of death. (R703). He did not request funds for a mental health expert as he "saw no evidence or indication of a malady, any mental malady, and so I just didn't do it ... never gave much thought to it." (R704). He admitted that he "probably should have looked into it." (R704). He told Duckett, "if he was convicted, the penalty phase would be just walking through." (R706). He did present four witnesses

[2]This statement, which is unsupported, is evidence of Edmund's bias in favor of Duckett against the State.

(including Duckett) on Duckett's behalf at the penalty phase. (R710-711). Based on his history of over "seventy trials, murder cases" he believed that a jury would "get bored" if numerous witnesses were presented to "regurgitate the same material that he's (the defendant) a good person, a good son." (R714). He felt the statutory mitigators that dealt with mental health would have been difficult to prove since his client "was steadfastly maintaining his innocence." (R715-716). In addition, he did supplement the record with the "packet of letters" from family, friends and neighbors for the judge to consider prior to sentencing. (R718).

Sheila Holloway is James Duckett's older sister. (R722). She testified that James Hunter, Duckett's biological father, was an alcoholic. (R724-725). After divorcing James Hunter, Duckett's mother remarried James Duckett, who raised all four children. (R727). Holloway stated, "he was a wonderful man, an excellent father ... gentle." "Jimmy was always right on his heels. He grew up just like Daddy." (R727). James Duckett (Senior) eventually adopted her brother, Jimmy. (R728). Duckett met his future wife, Carla, in high school. They married young, and had two sons. (R732). Holloway testified that Duckett was "an excellent father." (R733). In addition, Duckett is her daughters' "favorite uncle." (R734). They all had a "very, very

close family." (R736). She never saw any type of behavior from her brother that was inappropriate toward her two daughters or with her daughters' friends. (R737). She did tell Jack Edmund, Duckett's trial attorney, that she was willing to testify at the trial, but she was never called as a witness. (R739).

Dianne Nseravil is James Duckett's niece. (R740). She testified that Duckett is approximately seven years older than she and that she spent a lot of time with him when they were growing up. (R741). He treated her and her sister like he was their father. (R744). She stated that Duckett and his father (James Duckett) were "very close, very close" (R744) and his relationship with his mother was "the same ... they were very close." (R745). After Duckett's sons were born, the relationship between Duckett, his wife, and their sons was "very close. They did everything with him." (R748). She described Duckett as "a very kind person. He'll do anything for anybody. He's there to help. If you need him he's there. He'll listen to you, try to help with your problems." (R750-751). She would have been willing to testify at her uncle's trial but was not asked to be a witness. (R751).

Donald Jordan is Duckett's older brother. (R753). He remembered Duckett's biological father, Jim Hunter, as "a good man, always good to him." (R753). After his mother divorced

Hunter, she married James Duckett (Senior) and he was "a very special man, very special to all of us." (R754). He stated that Duckett and his stepfather (who ultimately adopted him) "were very, very close all through their lives." (R754). He stated his brother was a good student (R757) and never knew him to drink or do drugs. (R760). He testified that Duckett and his wife Carla were "very close, very loving." (R762). In addition, Duckett's relationship with their mother was "very special." (R762). After James Duckett, Sr. died, their mother relied on her son, James, and he made sure "that things were done for her." (R763). Jordan's twin sons "have a real good relationship with their uncle, and even since he's been in trouble they visit him on a regular basis." (R765). He saw Duckett around his two nieces and "he was a good uncle to them." (R765-766). Jordan testified that it was very important to Duckett to be a police officer, "he was looking forward to it." (R768). Jordan stated that Duckett was "not the flare-up kind. He's not the kind that spontaneously jumps all over everybody ... just very easygoing, very caring." (R769). Jordan testified at the trial to "advise the judge of what Jim's life was like." (R770).

Debra Prescott is Duckett's niece and saw him very frequently while growing up. "He was always a part of our lives, you know, very close to us." (R772). She stated that Duckett had

a very close relationship with his parents. (R774). She testified that Duckett was "an all-American father." (R780). She never spoke with Jack Edmund, Duckett's trial attorney, nor did she recall ever speaking with an investigator. (R782-783). She would have been willing to testify on Duckett's behalf if she had been asked. (R783).

Janice Jordan is Duckett's sister-in-law. (R787). She first met Duckett when he was between 14 and 15 years old. (R788). She stated that Duckett was very close with James Duckett, Sr., even though he was "not his biological father." (R789). He was "very, very close" with his mother and never raised his voice to his parents. (R790). She never saw him get angry with anybody. (R791). "He was like an older brother" to his nieces and a "real good father, very patient." (R793). He was very excited to become a police officer, "a goal he wanted to achieve." (R794). She attended the trial but never talked with Jack Edmund, Duckett's trial attorney. (R795). She would have been willing to testify on Duckett's behalf if she had been asked. (R796).

Mary Frances Terrell was a former neighbor of Duckett's and her oldest son became a friend of his. (R798). He was "quite a gentleman around the house ... always in the neighborhood wanting to help people." (R799). She stated that she always saw Duckett, his wife, and their two sons together, "never saw one

without the other three." (R802). She testified as a character witness at the trial after being contacted by an investigator. (R803). She did not testify at the penalty phase but would have been willing to do so. (R804).

Micki Rees first met Duckett when he was nine years old and she had sold his parents land. Subsequently, he became good friends with her son. (R806-807). She knew Duckett's wife Carla, and often saw Duckett and Carla together. (R814). She testified that Duckett was "a very good father." (R816). She never observed any "real strong temper" and never saw him doing drugs or caught him drinking. (R817). She would have been willing to testify on Duckett's behalf had she been called at the penalty phase. (R821).

Mary Jean Melissa had known Duckett all of her life, since he was "seven to nine." (R823). She and Duckett attended school together and Duckett "didn't have much of a reputation. Just you know, kind of a middle-of-the-road student." (R827). He never behaved inappropriately toward her. (R833). He was very well-mannered and came from a "proper and polite family." (R837). She never saw a temper and he was "a good caretaker for the younger children." (R837). She never saw him drink, "it was–it was–this was really a Happy Days kind of existence, you know, Beaver Cleaver." (R838). She was never contacted by Duckett's trial

attorney, but did testify at the penalty phase of Duckett's trial. (R841).

John Mason has been a friend of Duckett's for approximately thirty years. (R846). He testified that Duckett and his wife, Carla, had a good marriage and that Duckett was a good father. (R848). After Duckett became a police officer, he told Mason that he really liked his job, "he would be all straight ... like everything was perfect." (R851). While they were growing up together, he never saw Duckett angry, he was "peaceful" and "quiet." (R851). He did not recall whether Jack Edmund, Duckett's trial attorney, asked him to testify or not, but he would have done so. (R852).

Kenneth Jones owed a store in the town where Duckett was raised. (R855). Jones saw Duckett on a regular basis and knew his family well. He stated that Duckett was, "very well-thought-of" in the community. (R855). Duckett and his wife Carla were "very family oriented. Seemed like the Cleavers." (R856). Duckett was always "neat, clean." (R857). He would have been willing to testify on Duckett's behalf at his trial. (R858).

Frances Jones was a co-owner of a grocery store in the town where Duckett was raised. (R860). Duckett and his family would frequent her store and he was always "very, very polite ... very well-mannered." (R862). While growing up, he never came in her

store and bought alcohol nor cigarettes. (R862). "He was very well-thought-of by the adults and the ones his own age." "So much so that after all this started we put a gallon jar on the counter there at the store to help defray some of the expenses ... " (R864). She knew Duckett and his wife while they were married. She stated, "they seemed to always do things together." (R865). She gave Duckett a letter of recommendation for the police academy. (R867). She never spoke with Duckett's trial attorney prior to trial and would have been willing to testify on his behalf. (R868-869).

Harry Doremus was a lead instructor at the Lake County School of Public Safety Law Enforcement Academy when Duckett attended. (R897). He was currently a Sergeant in the Eustis Police department. (R896). He had considered Duckett, "an average student that had a high desire to succeed and gave that extra effort to succeed . . . he was always prepared, the notebook was always together and ready." (R900). He never saw Duckett behave in an inappropriate manner and did not have concerns about Duckett becoming a police officer. (R902). He was never called to testify at Duckett's trial but would have been willing to do so. (R904).

Ray Melton is a Deputy with the Lake County Sheriff's Department. (R907). He was an instructor at the Police Academy

during the time that Duckett had attended. (R908). He recalled Duckett, "was a very good student." (R908). He had not been asked to testify at Duckett's trial but would have been willing to do so. (R910).

Dr. Patricia Fleming is a licensed clinical psychologist in Wyoming. (R913-914). She evaluated James Duckett three times at the request of Duckett's current attorney. (R920, 923). During the mental status exam, she did not identify any unusual characteristics that signified any behavior or intellectual problems in Duckett. (R927). In addition, there were no indications of "major depressive disorders." (R928). After interviewing Duckett's family members, she had the impression that "he has a history of being a caring man, a very stable person ... he's laid back ... a source of support." (R930-931). She gave Duckett the "standard tests" used by the profession. "They are reliable and valid and they fit this case." (R933). The standard IQ test indicated the Duckett was "in the strong average range of intelligence." (R933). The MMPI-II test that she administered to Duckett did not indicate any significant mental problems. (R937). She testified that there was no indication of a thought disorder, major depression, delusional disorder or a mental health illness. (R940). In sum, she concluded that the test results showed that Duckett was, "an

intellectually sound man who is able to organize information, to think rationally and act purposefully and deal effectively within the environment. He has the intellectual strengths and capacities to do that. He comes across as a man who is a caring, wants to please people ... " (R943).

On October 28, 1997, the evidentiary hearing continued in this case. Jack Edmund, Duckett's trial attorney, was called as the first witness. He believed that the testimony of Gwen Gurley, the State's eyewitness, "was the most critical testimony in the trial." (R975). Time records indicated that Duckett was not on duty the day Linda Upshaw testified at trial that Duckett picked her up in his police car.[3] Edmund stated that he did not present this evidence to the trial court because it was, "just incompetence on my part."[4] (R978). After the trial, investigator Ron Hill contacted Edmund and told him that Gwen Gurley had recanted the testimony she had given at the trial. (R981). Subsequently, he, along with Mr. Hill, spoke with Ms. Gurley and taped the interview. (R983). During the "recantation interview," Gurley indicated that she had been taken out of her cell quite a few times. (R994). As a consequence, the matter was forwarded

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[3]Linda Upshaw, who testified at trial,(TR1431-1436) is referred to as "Gwen Upshaw" at the evidentiary hearing. (R978).

[4]Duckett testified at trial that he was not on duty on the day Linda Upshaw testified she encountered him. (TR1677, 1678).

to the Florida Department of Law Enforcement - - agents subsequently interviewed Gwen Gurley. Edmund stated that, "They prepared a report indicating that she had recanted her recantation." (R994). With respect to Gurley's testimony at the trial, Edmund did not want to put on any testimony that might corroborate Gurley's, and he had no recollection of any testimony that would have put her some place else. (R1002-1003). However, there was testimony that would have corroborated Gurley's presence and observations that Edmund did not want to present. (R1003, 1005, 1040). He thought that, "there wasn't anything to impeach her with, except, I think Miss Williams, who came up as the car drove away." (R1005). He stated, "In retrospect, I did a terrible job of not calling a pathologist to refute the State's contention that the child drowned. At this point in time there is a pathologist's report that would indicate to the contrary."[5] (R1007). In addition, he felt that the child victim "had bled enough so that whatever vehicle transported her ... to the scene ... would have left some indication of blood. There was none in that car. Duckett's car, immediately after the homicide, had not been washed, had not

[5]This statement makes no sense - - to rebut the drowning testimony would necessarily require the defendant to prove that strangulation, which is per se heinous, atrocious or cruel, was the sole cause of death. *See, Hitchcock v. State,* 578 So.2d 685 (Fla. 1990).

been cleaned, still had the fingerprints on it."[6] (R1007). In addition, there was no mud on the police car, and tire tracks had been left at the scene of the crime. (R1007). His trial strategy was, "she was never in his car. He didn't do it. There was no indication that he did it." (R1007-1008). He testified that, "The one person that put her with him or put a small child with him, was Gwen Gurley." (R1008). He stated that he learned through current defense counsel that after the murder, a BOLO had come into the police departments from Louisiana asking if there had been a homicide within the prior few days involving a blue or a green/blue automobile and a child in the vicinity of a beach or a lake. (R1008).[7] He felt that this would have been a critical piece of evidence. (R1008). In addition, the victim and her siblings had been the subjects of a HRS report and he felt this would have been important to his trial strategy. (R1015). There was testimony at trial that put the victim in a "blue car." (R1016). Edmund also testified that his daughter had given him an internal office memo concerning a report from Louise Braswell that she had seen the child victim associating

[6]Counsel pointed out that he argued that the soil on the police car did not match the crime scene, and that there was no mud on the vehicle.(R1011-12). Obviously, the jury resolved the issue against Duckett.

[7] Nothing was presented that tended to connect the BOLO to the crime that Duckett committed.

with "boys that were considerable older than she was." (R1017). In addition, she saw Teresa McAbee "receiving money from a White man, with some phase about here you are honey ... " "I simply should have called her ... I just blew this." (R1018).[8] He recalled arguing to the jury that the shirt Duckett saw the victim wearing the night she was murdered, but prior to her murder, was different from the shirt she was wearing when she was found. (R1023).[9] Edmund testified that he had never "seen a judge who was more concerned about seeing that a trial went properly ... things that needed to be discussed with Duckett, the Judge would see that he was present." (R1047). He would have voiced his objections to the jury instructions at the time of the Charge conference, "if, in fact, there were any." He did not believe he offered any special jury instructions in this case. (R1049). He believes that he challenged the State's time line of events through the testimony of Duckett. (R1054). He was not

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[8]Florida law is well-settled that such "confessions" of ineffectiveness mean very little. *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985); *Francis v. State*, 529 So. 2d 670, 672 n.4 (Fla. 1988); *see also Grayson v. Thompson*, 257 F. 3d 1194, 1222 (11th Cir. 2001); *Atkins v. Singletary*, 965 F. 2d 952, 960 (11th Cir. 1992). At the very least, this great willingness to admit to ineffectiveness is evidence of Mr. Edmund's bias against the State in favor of Duckett.

[9]Duckett never mentioned his notebook to counsel. (R1041). In any event, Duckett testified at trial about the clothing the victim had on. (TR1694-95, TR1739-40).

sure when he gave all of his files to Capital Collateral Regional, Duckett's current attorneys. (R1055).

Mervin Smith was a fingerprint examiner with the FBI for thirty-three years and had forty-five years in the field of fingerprints. (R1058). Duckett's trial attorney first contacted Smith in 1988 and sent him fingerprint specimens, lifts of latent prints regarding this case. (R1062). Edmund asked him to determine "which fingerprint was there first if two prints were superimposed." Since he was not able to determine this, the examination ceased and he was instructed to return the fingerprint specimens. (R1065). He testified that a palm print that tells you the position of the hand does not tell you whether the person who left the palm print was sitting or leaning or standing. It could be any of those three positions. (R1071). He disagreed with the State's witness as to her conclusion and opinion as to the position of the victim's body when she placed her palm print and fingerprints on the hood of Duckett's patrol car. He would have been willing to testify on Duckett's behalf at trial had he been asked to do so. (R1078).

Dr. Jonathan Arden is the First Deputy Chief Medical Examiner for the City of New York. (R1082-1083). He has testified in the field of forensic pathology many times. (R1084-1085). He reviewed the autopsy report, documents, diagrams and

laboratory reports prepared by the medical examiner in this case. (R1087). He testified that the victim in this case died of manual strangulation and that the autopsy report was "half correct." He disagreed with the portion that said the victim also died of drowning. (R1099). He would have been available to testify in this case at the time of trial. (R1130).

William Burks was employed by the Mascotte Police Department from 1987-1988. (R1114). He was assigned to the same patrol car that Duckett had used during his time as a Mascotte police officer. (R1115). He testified that the car was not in "good working order" when he drove it because, "You couldn't put your hands on the hood after you've driven it for a while because it got too hot." (R1115). After he had put his hands on the hood of the car, he "had to get off real quick or I would have had second degree burns." (R1116). He told Jack Edmunds this information at the end of the first day of trial. (R1116).

Kim Vargas lived across the street from the Circle K in Mascotte in May 1987. (R1118). After the murder, she gave a taped statement that the victim in this case got out of the vehicle (Duckett's patrol car), "walked toward the left side of the building, towards where the dumpster was, and that's the last time I seen him." (R1120). Although she was subpoenaed by the State to testify at trial, she was told that, "they weren't

going to use me ... because what I knew couldn't hurt Duckett or couldn't help him, either one." (R1121). She spoke with the investigator Rocky Harris, who was working with Duckett's defense attorney, Jack Edmund, but did not ever speak with Edmund. (R1121).

Shirley Williams was Duckett's next witness. In May 1987, she was employed by the Circle K in Mascotte. (R1123). At approximately 10:45 p.m. on May 11, 1987, she arrived at work and saw Duckett exiting the parking lot in his police car. (R1123-1124). He briefly spoke to her, and she was approximately one arm's length away from him. (R1124-1125). She did not see anyone in the car with him at that time. (R1125). At approximately 11:05 p.m., he came into the store, "picked something up and went right back out." (R1125). He returned to the store at approximately 1:00 a.m., spoke with her, "and by that time we already knew the girl was missing," and he told her, "he was going to see one of the people that was involved with her earlier, to see his uncle." (R1126). He returned again between 3:00 a.m. and 4:00 a.m., and she observed that "there was no mud or dirt" on him; she had "already mopped my floor and had he tracked my floors, I would have handed him the mop." (R1126). She testified that "a Spanish boy" had come into the store at approximately 1:00 a.m. and asked her for change, "he

wanted to use the phone." (R1126-1127). While using the phone, "he looked worried, upset." She later learned from another Mascotte police officer that his name was "Salvador." (R1127). When she had arrived at work earlier in the evening, she did not see anyone in the "overgrown area next to the laundry mat." (R1127). She recalled speaking to an investigator working with Jack Edmund, Duckett's trial attorney, and Edmund's daughter. (R1128). She stated that she was "a nosy person" and "had heard rumors that Duckett had scratches all over him." The next time he came into the store, "I asked him and he undid his shirt, pulled up his tee shirt and showed us. He turned around where we could see his whole upper body, there were no scratches." (R1128-1129). She spoke quite often with the Lake County investigators as well as Duckett's investigators regarding the murder. "Every time I turned around they were there." "They would come to where I worked and aggravate me." (R1129-1130).

Richard Reynolds was the next witness. Regarding the Duckett case, he stated, "To tell you the truth, I haven't really heard a whole lot about it." (R1131). However, he testified that he was familiar with the disappearance of Teresa McAbee. (R1131). At the time of the murder, he was living in Mascotte, "about a block and a half away from Circle K." (R1132). At approximately 9:30 p.m., on the night of the murder, he went to the Circle K

to do his laundry. (R1132). He recalled seeing the child victim, Teresa McAbee, sometime that night speaking with a Mascotte Police Officer. (R1132-1133). At approximately 10:00 p.m., or shortly thereafter, he recalled seeing Teresa leave the Circle K in "a blue car." (R1133, 1135).

Chevus Wayne Butler was Teresa McAbee's uncle through marriage. Teresa lived with Butler and his wife for a period of time, including the Thanksgiving prior to her murder. (R1157). He testified that Teresa told him she was unhappy when she was living with her mother. (R1158). He stated she told him, "there was a Spanish guy by the name of Peoples or something like People, every time that she passed by if he was on the couch he would try to grab her and pull her down on the couch and fondle her ... She was scared of him." (R1159).

Gale Waters owned the Mascotte General Store in May 1987. (R1168). Teresa McAbee used to frequent her store "from early morning to ten o'clock at night." "Normally ... it would be with some Mexican boys." (R1169). She did not speak with Duckett's trial attorney or an investigator but would have been willing to testify at the trial if she had been asked. (R1171-1172).

Greg Waters is the son of Gale Waters, the owner of the Mascotte General Store, and he was working the night of May 11, 1987. (R1173). He testified that Teresa came into the store and

bought ice cream early in the evening and then he saw her at the Circle K at approximately 9:30 p.m., when she was on the phone. (R1774). Teresa would frequent his store "all the time, you know, two or three times a day and late at night before we closed." (R1176). He never spoke with Duckett's trial attorney but would have been available to testify at trial if he had been asked. (R1177).

Joseph Mane Davis lived in Groveland, Florida, in May 1987, but would stay with his grandmother in the evenings in Mascotte. (R1179). The morning after the murder, he and his wife drove by the McAbee home and saw the "Partain brothers" standing outside the residence. (R1179). He stated that they were, "regular people, just mean and rough, like the kind that just plain party all the time." (R1180). Their house was approximately a mile and a half from the lake where Teresa McAbee's body was found. (R1181). He stated that they drove, "an old bluish-green or, it was either a Buick or a Pontiac, one." (R1181). He testified that they stopped driving that car "right after the little girl had – - was dead." (R1181). Subsequently, he testified that Louis Partain left town, "that same day that I seen him standing up there." (R1182). He stated that he spoke with Jack Edmund but did not testify at trial, but would have been willing to do so. (R1183).

Savona Brady is married to Michael Brady, who was the police chief in May 1987. (R1184). On the night of Teresa's murder, she overheard a telephone conversation between her husband and James Duckett. Duckett called their residence at approximately 12:30 a.m., to relate the girl's disappearance. (R1185). It was not unusual for these phone calls to occur nor was it unusual for a young girl to disappear as, "we figured she was just with some friends or, you know, at someone's house, and she would turn up." (R1186). The next morning, after her husband had been at the murder scene, he came home to change his pants because, "they had mud on them, and to clean his shoes, because they had mud all over them." In addition, "his arms had scratches on them from the brush or briars." (R1186).

Michael Brady was the Mascotte Police Chief in May 1987. (R1188). He testified that Duckett had called him the night of May 11, 1987, or the early morning hours of May 12, to report Teresa McAbee's disappearance. (R1188). In addition, he had spoken with Duckett around 10:30 p.m., and requested that he do a security check at City Hall. (R1189). He stated that he talked to investigators "numerous times" before the trial and did not recall if he mentioned the "security check" to them. (R1190). He did not recall if he offered to help Duckett look for the missing girl. (R1191). While working the crossing guard duty at

the elementary school, he was notified that a body was seen at the lake, and he subsequently reported to the scene. (R1192). The area near the body was "wet and muddy, slippery." (R1193). He returned home, changed his clothes and returned to the murder scene later in the evening. (R1194). He saw the remains of "plaster paris" along the dirt trail in the vicinity of the murder scene, the area where police cars had been parked during that day. (R1194). Later that day, Captain Horner with the Lake County Sheriff's Department told him the plaster tire cast matched Duckett's car, after initially comparing it to the other Mascotte police cars. (R1196-1198). He stated that he informed Jack Edmund of this information, and did in fact testify at Duckett's trial. (R1198). He would have testified to this "additional stuff" if he had been asked. (R1199).

Troy Smith was a Mascotte Police Officer in May 1987. (R1202). He was called in to work on May 12 and participated in the "grid search" conducted at the crime scene. (R1203). He testified that he had taken many missing person reports as a police officer and that was a frequent occurrence. (R1205). He stated that he spoke with an investigator for Duckett prior to trial and would have been available to testify if he had been asked. (R1206).

H. Dale Nute is a forensic science consultant. (R1208). He

reviewed the evidence in this case and testified, "If the pencil (discovered 10 days after the murder) is alleged to have involvement in this case, I would want to know whether or not it was out there at the time of the crime ten days before." (R1217). It was his opinion that, "if you leave a pencil out it will change color ... " (R1218). He also testified that a trial attorney should "check anybody who lived in the house as a potential suspect, particularly anyone that had that previous contact with her ... in most death investigations and sexual assaults, the person who commits the assault is known to the individual as either family or friend." (R1219). Dr. Nute reviewed a statement made by Armando Morales Villareal that Teresa McAbee, according to Villareal, "leaned on the front, left side of the car, that would be the driver's side ... put her foot on the bumper. She also did the same thing on the right-hand side, passenger side." Nute stated that the defense, "should investigate an alternative source for the fingerprints (McAbee's) being on the car." (R1224). He advised that the defense should review the evidence of the plaster casts made from the tire impressions at the murder scene as Mascotte police cars were parked in that vicinity, which was outside the perimeter established by the Lake County Sheriff's Office. (R1224-1225). In his opinion, Duckett did not have the time

needed to commit this crime. (R1225, 1235).

Upon cross examination, Dr. Nute testified that there was no actual evidence that the tire casting was outside the crime scene. (R1252). In addition, if the perpetrator did not walk down the embankment to the lake where the body was found, he would not have had any mud or debris on his shoes or clothing. (R1253-1254). He stated, "If the car did not drive through the mud hole, then it would not have mud on it." (R1254).

Nathaniel White was Duckett's next witness. He worked with Jack Edmund, Duckett's trial attorney, in May 1988. (R1258). While Edmund was working on Duckett's trial, Mr. White took the deposition of a witness for the State (Gwen Gurley), "to perpetuate testimony because the lady was going to have a baby, and the fear was she might be unavailable for trial ... " (R1259). Edmund briefed him on what was "important to extract from Miss Gurley" and he followed his directions. (R1281). Had he been provided with statements made by Vicky Davis and Jesse Gaiton, he would have used their statements to question the truthfulness of Ms. Gurley statements to him. (R1264). However, he would have used several statements made by other witnesses that would have been useful in questioning Gurley. (R1280). He believed that Gwen Gurley received "some sort of preferential treatment for her testimony." (R1266, 1268). He stated that he

had "limited involvement in this case" but learned that Gwen Gurley had recanted her testimony after the trial. (R1277). Regarding his interview with Gwen Gurley, he stated that, "He did the best job with what he had to work with." (R1281).

Grace Gwendolyn Gurley was Duckett's next witness. (R1299). Ms. Gurley invoked her fifth amendment rights regarding any questions that pertained to the night of May 11, 1987. (R1299). Upon cross examination, Ms. Gurley testified that representatives of Capital Collateral Counsel had contacted her numerous times and she felt like she was badgered or harassed by them. In addition, she contacted the State Attorney's Office to inquire how to make a police report about an event that occurred at her home regarding CCR. (R1300). Upon redirect, Gurley stated that she was informed by the State Attorney's Office that if she testified inconsistently with her trial testimony, than she would be at risk of a perjury charge. (R1303, 1309). She told CCR representatives that she was
afraid she would be charged with perjury. (R1304).

Cheryl Nuss is an investigator with CCR, and worked on Duckett's case. (R1313). She testified that Gurley told her in January 1997 that, "she had lied during her trial testimony and that she was going to tell the truth." "She definitely did not ever see the little girl get into Duckett's car." (R1314). Upon

meeting with her in August 1997, she stated that Gurley told her, "she wouldn't go to jail for doing the right thing. " (R1316).

Diane Nicoll is an investigator with CCR, and worked on Duckett's case. (R1321). She met with Gwen Gurley in August 1997 along with Investigator Nuss. (R1322). She stated that Gurley told her that, "we had lied to her and she could be prosecuted for perjury ... " (R1322). Gurley told her she "had spent most of her life in jail and she was not going back to jail about doing the right thing." (R1323).

Vicky Davis lived approximately one mile from the Circle K store in Mascotte, Florida. (R1325). In October 1987, Gwen Gurley and Investigator Rocky Harris came to her house to speak with her. (R1325). She stated Gurley asked her to, "agree with what I say, it'll help get me out of prison ... " (R1326). She was not sure if she had seen Duckett that night but said she did because, "Gwen said it was that night, so I feel like, well, maybe it could have been, I was just going along with what she said." (R1326-1327). She was not sure if she had even gone to the Circle K the night of the murder. (R1327). She did not recall talking with defense attorney Jack Edmund prior to the trial. (R1330).

Mary Gurley is Gwen Gurley's sister. (R1336). When Gwen got

out of prison, she came to stay with Mary and they had several visits from employees of the State Attorney's Office. (R1337). They instructed Gwen Gurley to memorize several documents and asked Mary Gurley to, "drill her on it to see what she remembered and what she didn't." (R1337). Several times Gwen told her that she was removed from prison to, "visit her boyfriend, that's how she ended up being pregnant." (R1338-1339).

Rane Payne lived with Gwen Gurley from July 1988 to July 1990. (R1340). According to Payne, Gurley told her that "she was given a script on what to say ... she lied, because she wanted to get out of jail, from prison." (R1341). Approximately a month before this hearing, Gurley told her that, "she was going to get up there and tell them the truth ... she would go to jail for lying ... she was not going to go to jail for lying." (R1342-1343).

Grace Villazon was formally employed with Capital Collateral Regional and worked on Duckett's case. (R1345). She interviewed Gurley in October 1991. (R1346). Gurley told her that she was in jail at the time of the murder, and saw the disappearance of the victim on the news. Subsequently, she told a C.O. she was "from that area" and she "got a visit from either the State Attorney or the Lake County Sheriff's Office." (R1347). Gurley told

Villazon that she "was taken to the area of the convenience store and shown or coached where she needed to be ... when in fact he never saw anything or heard anything." (R1347). Gurley told her that her testimony at trial was false and that she had not seen the victim at that location that night. (R1347). Gurley told her she was juvenile at the time and "was scared or they had threatened her with charging her over as an adult ... she did what she was told to do ... if she didn't say what they told her to say, then she was going to go to prison." (R1348). During her testimony by deposition,[10] Gurley told her she was extremely scared and asked for a bathroom break where, she was subsequently coached and, "told her what to say." (R1351). Gurley signed an affidavit in Villazon's presence stating her recanted testimony. (R1355).

Troy Merck, currently incarcerated on death row, met Gwen Gurley in October 1988. (R1357, 1360). He testified that Gurley told him, "she had been in prison" and "the prosecutor ... told her that if she would say what he wanted her to say, that he would let her out so that she could have her baby. And she agreed to this. He told her what to say and she said it." (R1359).

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[10]Gwen Gurley testified by video on April 21, 1988, in lieu of live testimony in front of the jury. (R2162, 2221).

Dr. Richard Ofshe is a professor at the University of California in the Sociology Department and his specialty is in the field of social psychology. (R1373-1374). He has testified as an expert on the subject of interrogation numerous times in Florida. (R1383). He reviewed several statements made by Gwen Gurley as well as transcripts and interviews with several witnesses involved in this case both pre-trial and post-trial. (R1386-1387, 1413). After reviewing this information, he opined that, "there are a lot of things that are not clear that should have been suggested that something inappropriate was happening, suggested that these statements may have been purchases or coerced, witness testimony deliberately manipulated, and the recantation ... simply confirms what was already in the record in a very powerful way." (R1413-1414). When asked how Gwen Gurley's refusal to testify at this hearing affected his analysis, he stated that it depended on, "whether or not there's an attempt on the part of the State to get the truth or whether there's an attempt on the part of the State to use this line of evidence that's been coming into court for a decade now." (R1446).

Jaenier Newcombe was an investigator with the Lake County Sheriff's Department in June 1984. (R1473). During that time period, she took a statement from Gwen Gurley regarding her

allegations of being molested by Mascotte Police Officer Gary Berman. (R1478).

The State called Donald Scaglione as its first witness. (R1487). He has been employed an Assistant State Attorney with the Fifth Judicial Circuit in Hernando County, Florida, since 1990, and has been involved in this case since 1995. (R1488-1489, 1500). He met with Gwen Gurley in January 1997 and spoke with her on two separate occasions. (R1490). Gurley told him that, "she felt she was being harassed ... she was being pestered at home." (R1494, 1496). She told him that, "she would come forward and tell the truth and advised me that he truth was going to be consistent to her 1988 trial testimony." He did not recall any discussions regarding "perjury statutes" at that time. (R1495, 1497). She indicated to him that she would not be recanting her trial testimony. (R1497).

At the December 17, 1997, evidentiary hearing, Jim McCune was the first witness for the State. (R1532). At that time, he was employed as an assistant State Attorney for the Fifth Judicial Circuit in Florida. (R1533). He, along with Assistant State Attorney Don Scaglione, met with Gwen Gurley at the Groveland Police Department in January 1997. (R1534-1535). He stated that she was not threatened with perjury charges and she told them she was being "harassed" by Capital Collateral

Counsel. (R1536-1537, 1540). She asked if she could review her videotaped interview of her previous testimony in this case. (R1537).

Richard Ridgway is the Chief Assistant State Attorney for the Fifth Judicial Circuit in Florida and became involved in this case in 1989. (R1542). After an allegation was made that a witness had been coerced, he was directed by Brad King (State Attorney) to investigate the allegation as to "whether there was any truth to it." (R1542-1543). He met with Gwen Gurley, who was incarcerated at the Lowell Correctional Institute. (R1547). Subsequently, he concluded that there was no truth to the allegations that Gurley's testimony had been "coerced or improperly coached" and it was consistent with other witnesses.(R1547, 1548).

Kenneth Rhame has been an investigator with the Office of the State Attorney for the Fifth Judicial Circuit for over thirteen years. (R1553). He accompanied Ric Ridgway to Lowell Correctional in order to interview Gwen Gurley. (R1554). They advised her to "tell us the truth ... she would not be in any trouble whatsoever for it." (R1554).

Steven Hurm was an Assistant State Attorney for the Fifth Judicial Circuit from May 1986 through August 1990 and was "second chair" in the prosecution of this case. (R1563-1564).

Before Duckett's trial, he learned that Gwen Gurley had information regarding this case, and he interviewed her at Lowell Correctional, along with sheriff's detectives. (R1565). He testified that "the indictment was already in (against Duckett) before Ms. Gurley's name even came to the attention of the office or law enforcement ... " (R1566, 1578). Due to her pregnancy, he arranged for a deposition to perpetuate her testimony which was videotaped and presented at the trial. (R1566). He never made any arrangements "for her to leave the stand and to meet other individuals in a bathroom or anywhere else in the courthouse to - – to discuss her testimony" nor "were there any arrangements made ... for there to be signals ... if she did not understand an answer ... " (R1567). There were never any threats made against her that he "would take away her children if she failed to cooperate and testify against Mr. Duckett." (R1567). In addition, there were never any promises made to Gurley regarding her testimony and cooperation. (R1567-1568). He did not think her testimony was critical in obtaining a conviction against Duckett as the physical evidence "was so overwhelming." (R1568). He was not involved in the investigation of Gurley's recantation (after the conviction) to Investigator Hill. (R1568).

Thomas Hogan was an Assistant State Attorney for the Fifth

Judicial Circuit in Florida from February 1985 through January 1989 and was the prosecutor in charge of Duckett's case. (R1582-1583). During Gurley's testimony, he did not make any arrangements for "secret signals" if she did not understand the questions, nor did he arrange for any meetings for her to get the answers from investigators or other individuals. He stated that there were never any threats made to Gurley regarding her children or promises made regarding her cooperation in testifying against Duckett. (R1584-1585).

James Key was employed by the Lake County Sheriff's Department from July 1990 through January 1993 and was not involved in the investigation and prosecution of this case. (R1593). He spoke with Gwen Gurley's mother in 1992 regarding an unrelated complaint and she referenced her daughter being a witness that saw Duckett with the victim the night she disappeared. She, as well as Gwen Gurley, did not indicate that her daughter was coerced or threatened, or that she lied in any way regarding her testimony. (R1594-1595, 1597-1598).

Lynn Allen Wagner has been an investigator for twenty-five years and employed by the Lake County Sheriff's Department for sixteen years. (R1611, 1600). He, along with a prosecutor, interviewed Gwen Gurley at Lowell Correctional. (R1601). He testified that there were no threats made toward Ms. Gurley nor

were any promises made to her regarding her cooperation. (R1601-1602). In his opinion, Gurley's testimony was not crucial to obtaining a conviction of Duckett. (R1603). Investigator Wagner testified that it was established that there had been very minimal rain in the area of the crime scene on the evening of the murder. (R1607). No tire casts were made outside of the marked-off crime scene. (R1608). He testified that the evidence in this case pointed to Duckett as the one responsible. (R1610).

Rocky Harris was an investigator with the Lake County Sheriff's Department from 1981 through 1989 and was the lead investigator on Duckett's case. (R1620-1621). He never threatened Gwen Gurley, never made any promises in any way in order to obtain statements from her regarding this case, and never coached her about how to answer questions. (R1622-1623, 1626, 1628). In evaluating all of the evidence in this case, it did not point to anyone else other than James Duckett. (R1634).[11]

Dorothy Ballou was formerly an investigator with Capital Collateral from April 1995 to March 1997. (R1649). She spoke with Gwen Gurley in January 1997, and Gurley told her that she had lied during Duckett's trial and "felt bad about it." (R1649-1650).

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[11]Duckett denied ever having been at the crime scene, and, during the on-scene investigation, did not take a patrol car into the secure area of the crime scene. (R1633).

At the October 26-27, 1998, evidentiary hearing, Patricia Garcia was Duckett's first witness. In May 1987, she lived in Center Hill, Florida, and knew the victim Teresa McAbee as she also had lived there, or had family in Center Hill. (R1662-1663). At approximately four or five o'clock in the afternoon on the day of McAbee's murder, she witnessed an argument between the victim and a boy approximately sixteen years old with brown hair at the Circle K in Mascotte, Florida. (R1663). After learning that Duckett was a suspect, she and her ex-husband (Joe Diaz) went to the Mascotte Police Department to inform them of the incident she had witnessed. They were told "they would look into it and that was it. We never heard anything else about it." (R1665).

James Horner was the Captain in charge of the Criminal Investigations Bureau for the Lake County Sheriff's Department in May 1987. (R1667). He was involved in the decision to have the "unknown pubic hair" tested in this case which was originally tested by FDLE. (R1668). The State Attorney's Office subsequently had the hair re-tested by the FBI. (R1670, 1672).

Grace Villazon was again called as a witness. (R1681). She tried, unsuccessfully, to locate a witness named Joe Diaz, the ex-husband of Patricia Garcia prior to her departure from CCR. (R1682).

Rocky Harris had previously testified that he was the main investigator on Duckett's case for the Lake County Sheriff's Department. (R1685). He was present at the autopsy of the victim and was aware that a hair was found on the victim's thigh but he was not involved with the procedure of logging in the evidence. (R1685-1686). He does not recall if he was present when the "unknown pubic hair" was found. (R1687). Subsequently, hair samples were removed from Duckett. (R1689). He did not recall why the hair found on the victim's thigh was not tested. (R1692). He recalls accompanying the hair evidence to the FBI lab and personally returning with it. (R1694).

Gary Nelson was the supervisor of the Technical Services Unit in 1987 and attended the autopsy of Teresa McAbee, the victim in this case. (R1696-1697). He was not present during the laser exam of the victim's body when the hair evidence was discovered nor was he involved with the transportation of the hair evidence. (R1699). He does not recall ever misplacing or losing any evidence at the Lake County Technical Services Unit. (R1707). It was common for items that left his custody would not be returned in the same condition in which they were sent. (R1710-1711).

Dr. Michael Baird testified telephonically.[12] (R1725). In reviewing a letter he had written on August 17, 1989, regarding this case, he stated that two hair samples had been misplaced and recovered while cleaning and organizing the LifeCodes evidence storage room and were subsequently returned. (R1726).[13] He stated that LifeCodes was asked to do a DNA analysis on the "unknown hair" but there was an insufficient amount of DNA to do the test. (R1728). In addition, he stated that the pubic hair from the underwear was not analyzed for DNA as it may not have contained a "hair root" which is needed for RFLP testing. (R1729).

Jack Edmund, Duckett's trial attorney, was Duckett's last witness. (R1732). He was not aware that the victim had been seen arguing with a young boy on the day of her murder and was never told this information by the Mascotte Police. (R1733). He was not aware at the time of Duckett's trial that Agent Malone with the FBI, had given misleading testimony in another case in 1985. (R1735). He was not aware that the hair samples used in this case were inadvertently misplaced by LifeCodes during the trial. (R1737). He would have moved *in limine* during the trial to

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[12]Dr. Baird is an employee of LifeCodes, an independent laboratory that performs forensic DNA typing. (R1671-1672).

[13]The misplaced hair samples were "knowns" that had been collected from Duckett. (R1730).

preclude Agent Malone's testimony had he known of the misleading/false testimony even though that testimony had nothing to do with hair examination. (R1740-49). Edmund had a hair expert available, but did not call him. (R1742-43).[14]

Randall Murch is a Special Agent and Deputy Assistant Director of th FBI laboratory in Washington, D.C. Pursuant to a review of personnel files regarding Agent Mike Malone, Murch testified that Malone received proficiency tests in the examination of hair and fiber and had never failed those tests. (R1756). He was aware that the Office of the Inspector General filed a report that Agent Malone had testified falsely in the Alcee Hastings case. (R1758-1759). However, there was nothing in Agent's Malone's career that challenged his ability to correctly make a hair analysis. (R1759).

Agent Michael Malone is currently a Special Agent with the FBI assigned to the Richmond, Virginia office. He was previously assigned to the hair and fibers unit with the FBI from 1974 through 1994. (R1761). He has testified as an expert in the field of hair and fiber and courts have never refused to recognize him as an expert. (R1762-1763).[15] He testified that he

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[14]For reasons that are not apparent, the Court allowed former counsel to invoke the attorney/client privilege and decline to answer certain questions. (R1742).

[15]This contradicts Edmund's testimony.

has taken proficiency tests in hair and fiber and never failed any of them. (R1763-1764). In addition to Duckett, he took several hair samples from other individuals and he could not match the hair sample from the victim's underwear to anyone other than Duckett. (R1765). Regarding a conclusion on the hair analysis, he stated that, " ... it's FBI policy. Anytime we have a hair match, we always put what's called a qualifying statement in the report ... a hair is not a means of absolute personal identification." (R1766). In a comparison of the suspect hair that was removed from the victim's underwear to the known hairs from Duckett, as well as the other seven alternative suspects, he concluded that, "the hair from the panties microscopically matched the hairs from Mr. Duckett and therefore this hair was consistent with originating from Mr. Duckett." (R1766). In addition, he tested the hair for race, and he determined, "it was caucasian." (R1767). The hairs from most of the other suspects were "predominately mongoloid." (R1768). He is not aware of any challenge as to a mistake in his evaluation of hair comparisons in nineteen years with the agency. (R1769). He stated that if an agency has not reached a conclusion as to evidence that has been tested, the FBI lab will examine the

evidence.[16] (R1771). He was not aware that the hair evidence had been misplaced by LifeCodes but felt that information would have been helpful. (R1793). He testified that he was not disciplined in any way regarding his testimony in the Alcee Hastings case and he disputed several of the findings contained within the report from the Inspector General's Office. (R1795-1796).

On February 19, 1999, Randall Aleno was deposed and testified in this case. (SR3). In 1987, he worked as an Evidence Technician for the Lake County, Florida, Sheriff's Office until he transferred to the State Attorney's Office in 1988. (SR3). He collected and maintained evidence from crime scenes until it was transported to the laboratory. Aleno said that Gary Nelson was his supervisor and Captain Horner was the "overseer." He recalled attending the autopsy of Teresa McAbee, the victim in this case, but arrived after it had started. With regard to any evidence collected at the autopsy, he stated, " ... I would imagine any evidence that was collected would eventually be turned back over to me." (SR4). He said that Pauline Albon, an employee of the State Attorney's Office, prepared an evidence

[16]The "re-test" decision is made by a supervisor, not by Special Agent Malone. (R1772). In this case, FDLE had not reached an opinion, so it was not the "re-test" that is outside FBI policy. (R1795).

tracking form after going through notes prepared by evidence technicians including himself. (SR6-7). When evidence is collected, an evidence tag is filled out and the information off of the tags is "transposed" on to a master evidence sheet so that the evidence tags remain with the entry of the evidence itself. (SR8). He was primarily responsible for entering evidence in this case into the Lake county Sheriff's Office. (SR9). In addition to attending the autopsy, Aleno said he took the body to the Florida Department of Law Enforcement "where we lasered the body for fingerprints." (SR11). When asked if any evidence had been recovered then, he stated, " ... there may have been some fibers ... I'm not absolutely positive ... There seems like there might have been some foreign hairs." (SR11-12). He recalled that there were "three or four Mexican males" that had hair samples taken shortly after the murder. In addition, he was involved when hair samples were taken from Duckett by Dr. Shutz and he "placed them in a sealed envelope, and then turned them over to me." (SR12-13). The samples were subsequently logged in like the other evidence. (SR13). It was Captain Horner's decision that he eventually transported the hair evidence to LifeCodes in New York as well as to Dr. DeForrest in White Plains, New York, approximately one month after the

murder. (SR16, 18, 21).[17] Aleno said that the evidence at LifeCodes "appeared to be under lock and key or some type of security system." (SR23). He recalled that there was a mix-up with the numbering system that LifeCodes used regarding this hair evidence and that they may have re-submitted a letter in this regard. (SR24). Aleno testified that he returned to LifeCodes in New York and personally retrieved the hair samples. (SR26). Had any evidence not been returned, it would have been noted in the files. SR28, 29). Initially, LifeCodes informed his office that other hair evidence had been "disposed of or used up" during their testing. Aleno stated that destroyed evidence is noted on forms used by the Lake County Sheriff's Office. He later learned that some of the individual hair samples had not been returned to him so LifeCodes sent them back to the Lake County Sheriff's Office in 1989. (SR28). To his knowledge, the hair samples that were later returned from LifeCodes did not belong to Duckett. (SR30). However, a letter sent by LifeCodes to the State Attorney's Office on August 17, 1989, referenced evidence numbers that corresponded to hair samples that were taken from Duckett. (SR31). After he received the evidence back from LifeCodes, Aleno transported it to the Federal Bureau of

[17]Aleno stated that it was normal procedure that the evidence would have first gone to the Florida Department of Law Enforcement. (SR16).

Investigation per Captain Horner's instructions. (SR32). Although it was not "normal procedure" to have evidence tested by the FBI after it had already been tested, Aleno said that it had been done before. He stated, " ... the FBI had a reputation of having people with a little more expertise in such things as hair and firearms." (SR33). He recalled that Duckett submitted to a "second hair pull" but was not sure why. (SR34). Tests conducted by the FBI later revealed that the hair samples from Duckett matched those found on the victim. FDLE's testing results had been inconclusive. (SR36). Aleno testified that the evidence at the Lake County Sheriff's evidence room was "kept under lock and key, and you had to sign in the key and sign out the key." There were only two or three people that could go into the evidence room. (SR36-37). Aleno said, "We had a folder or clipboard in the evidence room. You'd log in and log out when you're in and when you're out and which case you're in there in reference to." (SR37). He did not recall ever losing any evidence and he personally did not recall misplacing any. (SR38). He did not recall if "two question hairs" were found on the body of Teresa McAbee but it would have been normal procedure to test both of the hairs. (SR40-41).

The Circuit Court entered its order denying the consolidated

motion to vacate on August 10, 2001.[18] A Notice of Appeal was timely filed on September 19, 2001.

SUMMARY OF THE ARGUMENT

The "denial of an adversarial testing" claim consists of several component parts. To the extent that an alleged "recantation" is at issue, that claim presented a credibility choice for the collateral proceeding trial court, which was resolved against Duckett. To the extent that this claim includes claims of ineffective assistance of counsel, Duckett has not met his burden of proving not only deficient performance by counsel, but also prejudice as a result.

The ineffective assistance of penalty phase counsel claim is not a basis for relief because Duckett failed to demonstrate deficient performance or prejudice, as the collateral proceeding trial court found.

The "prohibition on juror interviews" claim is not only procedurally barred, but also meritless, as the collateral proceeding trial court held.

The prosecutorial argument claim is procedurally barred because it could have been raised at trial or on direct appeal from Duckett's conviction, as the collateral proceeding trial

[18]The Order denying relief was not mailed until August 23, 2001.

court found.

The *Ake v. Oklahoma* claim is not a basis for relief becasue there has been no showing that Duckett could have benefitted from the presentation of mental state testimony. The record form the evidentiary hearing demonstrates that Duckett has no significant mental problems, as the lower court found in denying relief on this claim. To the extent that Duckett has included an ineffective assistance of counsel component to this claim, that issue fails because Duckett cannot demonstrate deficient performance or prejudice.

The aggravating circumstance jury instruction claim is procedurally barred, as the collateral proceeding trial court found.

The *Caldwell v. Mississippi* claim is procedurally barred, as the collateral proceeding trial court found.

The burden shifting jury instruction claim is procedurally barred, and the derivative ineffective assistance of counsel claim is meritless, as the collateral proceeding trial court found.

The "absence from critical stages" claim is not only procedurally barred, but also meritless, as the collateral proceeding trial court found.

The challenge to the constitutionally of the death penalty

claim is procedurally barred.

ARGUMENT

I. THE "DENIAL OF AN ADVERSARIAL TESTING" CLAIM

On pages 22-75 of his brief, Duckett raises a multi-part claim that is best described as alleging various violations of *Brady v. Maryland* and *United States v. Bagley*. Despite the histrionics of this claim, it has no factual basis, and is not a basis for relief.[19]

A. An alleged recantation creates a credibility choice for the trial court which is reviewed for an abuse of discretion -- in this case, there has been no such showing.

On pages 23-34 of his brief, Duckett alleges that the "state's key witness lied" at trial, and that he is entitled to reversal because that witness has now recanted that trial testimony. Florida law is well-settled that recanted testimony is viewed with great suspicion -- this Court has described such testimony as being exceedingly unreliable. *Sweet v. State,* 810 So. 2d 854, 867 (Fla. 2002); *Keen v. State,* 775 So. 2d 263, 281

[19]Duckett also pleads this claim as one of ineffective assistance of counsel, apparently in an effort to avoid choosing which claim he truly wishes to pursue. Of course, a *Brady* claim is mutually exclusive of a claim of ineffective assistance of counsel, and Duckett should have chosen which legal theory supports his claim for relief, rather than leaving this Court to speculate. Or, perhaps the presentation of mutually exclusive claims for relief indicates a lack of confidence in any of them. *Jones v. Barnes,* 463 U.S. 745 (1983).

(Fla. 2000); *Robinson v. State*, 707 So.2d 688, 691 (Fla. 1998); *Armstrong v. State,* 642 So. 2d 730 (Fla. 1994). The trial court's decision, which is based upon that court's superior vantage point in the assessment of the credibility of witnesses, is reviewed for an abuse of discretion. *State v. Spaziano,* 692 So. 2d 174, 178 (Fla. 1997). This claim wholly ignores the unchallenged evidence of guilt set out at pp.
1-5, above, and fails to recognize that the testimony of the "recanting" witness is not even mentioned in this Court's direct appeal opinion.

In denying relief on this claim, the Circuit Court stated:

> Defendant alleges a due process violation because a State witness allegedly lied. Said witness, Grace Gurley, **has not recanted her testimony in court, but the issue of recantation has been presented to the court through hearsay testimony.** The record is clear that Ms. Gurley testified at Defendant's trial, she later recanted to a private investigator representing Defendant, Ms. Gurley then recanted her statement to Mr. Hill (private investigator), and to Ric Ridgway, Chief Assistant of the State Attorney's Office. We then have a litany of witnesses that related through hearing a version of events that supports their individual claims. The court has uncontradicted testimony of Tom Hogan, Steve Hurm and Rocky Harris as to their involvement with Ms. Gurley prior to trial and the fact that they did not threaten or pressure Ms. Gurley to testify. Ms. Gurley testified that she felt badgered and harassed by representatives of CCR, although she took the 5th as to the ultimate issue (October 30, 1997 338-399). Specifically, Ms. Gurley relayed to the court that representatives of CCR called her a liar. And although Ms. Gurley stated that Mr. Scaglione informed her of perjury, he did not

threaten her, or harass her, in any way.

(R1801). The Court assessed Ms. Gurley's credibility:

> Ms. Gurley's testimony at this time lacks trustworthiness, and her alleged recantation made, excluding that to Mr. Hill and Mr. Ridgway, are inadmissable hearsay.

(R1802). The Court concluded that no relief was warranted, stating:

> The court finds, under the circumstances as we know through today, that Grace Gurley's recantation is inconsistent, incredible, and unreliable in its entirety, and does not constitute a sufficient basis for the Defendant to have a new trial. The court specifically finds that had Grace Gurley not testified at the original trial, the results would have been the same, a guilty verdict for Defendant.

(R1804).[20]

Those findings of fact and conclusions of law are supported by the evidence from the evidentiary hearing, apply well-settled Florida law to the facts of this case, and do not amount to an abuse of discretion. There is no basis for relief, and the Circuit Court should be affirmed in all respects.

B. The "forensic evidence" issues do not create a due process claim.

On direct appeal from his conviction and sentence, Duckett argued that his conviction could not stand because it was based

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[20]The Circuit Court's determination is squarely within this Court's holding in ***Sims v. State,*** which affirmed the denial of relief of facts that were, if anything, more favorable to the defendant that those present here. ***Sims v. State,*** 754 So. 2d 657, 660 (Fla. 2000).

on circumstantial evidence which did not exclude any reasonable hypothesis of innocence. This Court rejected that claim, stating:

> The following facts satisfy the test in *Davis* [*v. State,* 90 So. 2d 629, 631 (Fla. 1956)]: (1) the victim was last seen in Duckett's patrol car; (2) the tire tracks at the murder scene were consistent with those from Duckett's car; (3) no one saw Duckett, the only policeman on duty in Mascotte, from the time he was last seen with the victim until the time he met the victim's mother at the police station; (4) numerous prints of the victim were found on the hood of Duckett's patrol car, although he denied seeing her on the hood; (5) a pubic hair found in the victim's underpants was consistent with Duckett's pubic hair and inconsistent with the others in contact with the victim that evening; and, (6) during a five-month period, Duckett, contrary to department policy, had picked up three young women in his patrol car while on duty and engaged in sexual activity with one and made sexual advances toward the other two.
>
> Duckett argues that: (1) while the vehicle which left the tire tracks had driven through a mudhole, no debris was found on his car; (2) although considerable bleeding resulted from the sexual battery, no traces of blood were found in his car; and (3) those who observed him after midnight found him to be neat and clean as though he had just come on duty. We conclude that neither these facts nor Duckett's blanket denial of involvement with the victim or the three young women is sufficient to raise any hypothesis of innocence, given the total circumstances in this case.

Duckett v. State, 568 So.2d at 894-95.

1. The “hair evidence” issue was fully litigated at trial and, in any event, is a red herring.

On pages 35-53 of his brief, Duckett complains about the trial testimony concerning a hair recovered from the victim’s

person that was matched to known hair samples collected from Duckett. This issue turns on a credibility determination of the witnesses, and is reviewed under the abuse of discretion standard. When the testimony is reviewed, there is no basis for relief.

The initial sub-claim in Duckett's brief is the assertion that the State engaged in "expert shopping." *Initial Brief*, at 35.[21] Assuming for the sake of argument that this is a valid claim of some sort (though it does not appear to have any legal basis), this claim was not contained in Duckett's Rule 3.850 motion, and cannot be raised for the first time on appeal from the denial of Rule 3.850 relief. *Doyle v. State* 526 So. 2d 909 (Fla. 1988). In any event, the most that Duckett has done is allege that an internal policy of the Federal Bureau of Investigation might not have been followed. Regardless of how good an idea Duckett may think that policy is, FBI policy is not enshrined in the Constitution, and any perceived departure from that policy does not give rise to a due process violation. The

[21]Duckett's histrionics about LifeCodes Corporation and their inability to conduct DNA typing on the unknown hair sample are frivolous. It is absurd to suggest that a charge of "expert shopping" can be leveled when a scientific test cannot be performed for technical reasons, as Duckett admits was the case here. Likewise, to the extent that LifeCodes may have mislaid **known** hair standards does not compromise the questioned sample.

fact that FBI personnel were able to conduct an examination that FDLE could not does not generate a basis for relief.[22] In any event, the testimony of the FBI personnel shows that Duckett's claim of a policy violation is false - - FDLE reached no conclusion, and there is no FBI policy against testing such a sample because it is not a "re-test." (R1795).

Duckett also personally attacks the credibility of the FBI hair examiner by reliance on unrelated matters set out in the April 1997, Department of Justice report about the FBI laboratory. The Circuit Court decided this issue in the following way:

> The attack upon Agent Malone of the FBI is unfounded and without merit. *Davis v. State*, 24 Fla. L. Weekly S260 (June 1999); *United States v. McDonald,* USCA 4th Circuit No.97-7297 (September 8, 1998). The court also notes that nothing in the FBI "Report" connects Agent Malone to any hair or fiber analysis conducted by him. Thus it is not relevant in this case.

(R1805). The Circuit Court correctly denied relief, and that decision should not be disturbed.

To the extent that further discussion of the matter is necessary, the Circuit Court noted that trial counsel **and** post-conviction counsel both retained Dr. Peter DeForest as a hair

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[22]Since this claim was not raised in the Rule 3.850 motion, it obviously was not before the trial court, and, just as obviously, the trial court did not have the opportunity to rule on it.

expert for the defendant. (R1850). Dr. DeForest was not called in either proceeding, and the only possible conclusion is that he would not have been helpful to Duckett. Despite the hyperbole of Duckett's brief, he has presented no evidence at all that calls the trial testimony into question.

Finally, this Court decided at least a component part of this claim on direct appeal, when it held:

> ...Duckett contends that the trial court erred in qualifying Malone as an expert in hair comparisons. We find no error. We note that, when asked if there were any objections to Malone as an expert, defense counsel replied, "Yes, Your Honor, but none that I will voice for the record." Duckett's counsel extensively challenged Malone's credibility during the cross-examination of Malone and during the testimony of a Florida Department of Law Enforcement expert on hair analysis. It is not our responsibility to reweigh that evidence. The expert's credibility was resolved by the jury.

Duckett v. State, 568 So.2d at 895.

2. The Tire Tracks

On pages 53-4 of his brief, Duckett alleges ineffective assistance of counsel in connection with the evidence concerning tire tracks found at the location where the victim's body was found. Duckett has not carried his burden of proof with respect to this claim, because he has not demonstrated either deficient performance or prejudice on the part of trial counsel. That is what he must show under *Strickland v. Washington*, 466 U.S. 668

(1984), and he has not done it. Despite the speculative assertions contained in his brief, he has done nothing other than criticize trial counsel for not presenting evidence that was not presented at the evidentiary hearing, either. The Circuit Court properly rejected this claim. (R1805).

To the extent that further discussion of this claim is necessary, Duckett has presented no evidence to call the tire track testimony into question. (R1252). He has not carried his burden of proof.

3. The Fingerprints on the Hood of the Patrol Car

On pages 55-57 of his brief, Duckett alleges that trial counsel was ineffective with regard to the victim's fingerprints that were found on the hood of Duckett's patrol car. Duckett has not demonstrated that counsel's performance was deficient, nor has he demonstrated prejudice in the way that counsel handled the fingerprint evidence at trial. Once again, the most that Duckett has done is demonstrate that, with the benefit of time and a made record, claims can be generated years after the fact. *Waters v. Thomas*, 46 F. 3d 1506 (11th Cir. 1995). That is not the standard by which ineffective assistance of counsel claims are judged, and is nothing more than an example of the second-guessing of counsel's performance that *Strickland* and the cases following it have condemned. The Circuit Court rejected this

claim, and that disposition should not be disturbed.

To the extent that further discussion of this claim is necessary, Duckett has presented nothing that was not known at the time of this trial. See pp. 16-18, 25-29, above.

4. The Pencil

On pages 57-59 of his brief, Duckett alleges that counsel was ineffective with respect to the pencil that was recovered at the crime scene. This claim presents nothing more than second-guessing of trial counsel's performance, and is insufficient to establish the two-prong deficient performance/prejudice standard of *Strickland.* The trial court properly (if implicitly) rejected this claim because neither prong of *Strickland* has been satisfied.

To the extent that further discussion of this claim is necessary, Duckett has, once again, presented nothing that was not known and argued at trial. See pp. 16-18, 25-29.

C. THE *WILLIAMS* RULE CLAIM

On pages 59-61 of his brief, Duckett claims that he is entitled to relief based upon improperly-admitted *Williams* Rule evidence. This claim is procedurally barred, as the Circuit Court found:

> Claim 2B [of the Rule 3.850 motion] is procedurally barred because the record clearly demonstrates the issues/allegations were raised on direct appeal, as

> evidenced by Defendant/Appellant's Supplemental Brief and the Supreme Court ruling in *Duckett v. State,* 568 So. 2d 891 (Fla. 1990). See also *Cave v. State,* 529 So. 2d 293 (Fla. 1983); *McCrae v. State,* 437 So. 2d 1388 (Fla. 1983). The Court also noted that it is improper to raise procedurally barred claims under a guise of ineffective assistance of counsel. *Bates v. State,* 604 So. 2d 457 (Fla. 1992); *King v. State,* 597 So. 2d 780 (Fla. 1992).

(R2804).

On direct appeal, this Court considered the *Williams* Rule claim and rejected it, stating:

> In Duckett's second point, he contends that the trial court erred in admitting the testimony of the three young females as *Williams* rule similar fact evidence. The rule allows evidence to be admitted when it tends to prove or disprove a determinative fact in the cause. *See* C. Ehrhardt, *Florida Evidence* § 404.9-.10 (2d ed. 1984). In *Drake v. State*, 400 So. 2d 1217, 1219 (Fla.1981), we explained:
>
> > The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.
>
> The evidence in this record established Duckett's tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in his uniform. All of these incidents occurred within six months of the victim's death. We note that Duckett denies involvement in each

> of these incidents and, in the alternative, argues that the incidents involved no force or violence and involved women who were older than the victim. However, the evidence indicated that the victim appeared to be older than her actual age and that the women in these incidents were petite, like the victim. We find the evidence of the first two incidents to be relevant to establish Duckett's mode of operation, his identity, and a common plan, and we find sufficient points of similarity to conclude that no *Williams* rule violation occurred as to these two incidents. We also find that evidence of the third sexual encounter should not have been admitted because it was not sufficiently similar to the facts in the instant case, particularly since that encounter was admittedly consensual. However, we conclude that, given all the other evidence, the error in admitting this evidence was harmless under the principles set forth in *State v. DiGuilio,* 491 So. 2d 1129 (Fla.1986).

Duckett v. State, 568 So.2d at 895.

To the extent that further discussion of this claim is necessary, the evidence from trial was that only one of the three women was able to identify a specific date on which she encountered Duckett (R1431-32; 1408 et seq.; 1465 et seq.). Duckett denied any improper contact with the three women and testified that he was not on duty on Fridays, when he came in contact with one of the women. (TR1678).

D. THE “UNHEARD CRITICAL EVIDENCE”

On pages 61-65 of his brief, Duckett argues that “critical evidence which would have raised a reasonable doubt was not heard by the jury.” That "evidence" is unidentified. Despite the due process pretensions of this claim, Duckett has done no more

than plead yet another specification of ineffective assistance of counsel, which is subject to, and cannot meet, the *Strickland* standard applied to such claims. The Circuit Court rejected this claim (albeit implicitly), and Duckett has not alleged any matter that calls that denial of relief into question. He cannot demonstrate deficient performance or prejudice, and has failed to carry his burden of proof.

E. THE "CORROBORATING EVIDENCE" CLAIM

On pages 66-72 of his brief, Duckett again pleads an ineffective assistance of counsel claim as a denial of due process. When the histrionics of this claim are ignored, it is clear that Duckett has failed to establish the two-part test of *Strickland v. Washington*, and is entitled to no relief.

The Circuit Court found that this claim lacked factual support, pointing out that what Duckett describes as "withheld evidence" was, in fact, evidence that he either had or knew about (and could have told his lawyer about). (R1805). Likewise, the claim related to the pathologist fails because, as the Circuit Court found, the testimony of Duckett's hand-picked expert does not dispute the testimony of the pathologist who testified at trial. (R1805). Duckett has not established that counsel's performance was deficient, nor has he established that he was prejudiced in any fashion by the way his attorney

defended this case. There is no reasonable probability of a different result, and the Circuit Court should be affirmed in all respects.

II. THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

On pages 75-80 of his brief, Duckett argues that trial counsel was constitutionally ineffective at the penalty phase of his capital trial. A claim of ineffective assistance of counsel is reviewed *de novo,* and deference is given to the trial court's findings of fact. *Stephens v. State,* 748 So. 2d 1028, 1033 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both the deficient performance and prejudice prongs of *Strickland v. Washington* 466 U.S. 668, (1984) must be established in order for the defendant to be entitled to relief, and both components present mixed questions of law and fact which are subject to *de novo* review on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (although the ultimate conclusion as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are reviewed only for clear error under *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland, supra,* at 698. The standard is not how present counsel would have proceeded. *Occhicone v. State*,

768 So. 2d 1037, 1048 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995).

The Circuit Court denied relief on this claim, stating:

> Defendant claims that his attorney's actions in the penalty phase of the case were ineffective, and that this prejudiced him because the jury recommended a sentence of death. The testimony of Jack Edmund on June 7, 1997 (page 21-31, 34-38) as to his handling of the penalty phase; *i.e.* his presentation of witnesses and material before the court and jury, and the record itself support tactful [sic] decisions on the part of Mr. Edmund. The numerous witnesses and affidavits presented by post-conviction counsel were cumulative as to the testimony presented before the sentencing jury. There is no merit to a claim that counsel failed to present mitigation. And the record does not support the "*Strickland*" standard of ineffectiveness by showing prejudice. *Haliburton v. State,* 22 Fla. L. Weekly 536.

(R1806). To the extent that Duckett alleges that trial counsel was ineffective for not presenting mental state testimony in mitigation, the Circuit Court found that this claim was not only meritless but also lacking in factual support, stating:

> The Court can address this issue by examining the testimony of two individuals. First, the testimony of Jack Edmund on June 7, 1997 (page 39, 40, 41) shows that it was a tactful [sic] decision on the part of defense counsel not to employ a mental health expert. Second, Patricia Fleming testified on January 8, 1997 that she did not identify any unusual characteristics that signified any behavior or intellectual problems (page 56), nor was there any indication of major depressive disorders (page 57). Dr. Fleming acknowledged (page 66) no significant mental problems with Defendant. The court finds that had Mr. Edmund employed a mental health expert, the only testimony that this expert could have presented would have been

> lingering doubt, which is not permissible argument before the jury.

(R1807). Those findings are supported by the record, and should not be disturbed.[23]

III. THE PROHIBITION ON JUROR INTERVIEWS

On pages 81-86 of his brief, Duckett argues that the rule prohibiting interviews of jurors is "unconstitutional." This claim is not only procedurally barred, but also meritless, as the Circuit Court found. Those rulings are each supported by competent, substantial evidence, and should not be disturbed. *See, Guzman v. State,* 721 So. 2d 1155, 1159 (Fla. 1998).

Duckett did not seek to conduct juror interviews following the conclusion of his capital trial, and his failure to timely raise the issue is a procedural bar to further litigation. *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999) (concluding that postconviction claim regarding the constitutionality of rule which limits an attorney's right to interview jurors after the conclusion of trial was procedurally barred because not raised on direct appeal). Alternatively and secondarily, this claim

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[23]To the extent that Duckett complains that page limitations prevent him from discussing the testimony of various witnesses, he is not entitled to compel this Court, and the State, to guess what he relies upon as a basis for relief. *See, e.g.*, *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990); *see also, Anderson v. State*, 822 So.2d 1261, 1268 (Fla. 2002).

lacks merit, as the Circuit Court found. *Spencer v. State,* 27 Fla. L. Weekly S323 (Fla. 2002); *Johnson v. State,* 804 So. 2d 1218, 1225 (Fla. 2001)*; Arbelaez v. State,* 775 So. 2d 909 (Fla.2000). (R1817).

IV. THE PROSECUTORIAL ARGUMENT CLAIM

On pages 86-88 of his brief, Duckett asserts that various arguments, questions, and statements made by the prosecutors were somehow improper. The Circuit Court found this claim procedurally barred because Duckett did not object to the complained-of matters at the time of trial, nor did he raise these matters as issues on direct appeal to this Court. That failure to timely raise the prosecutorial argument claim creates a double layer of procedural bar to further consideration of the issue. *Moore v. State,* 820 So. 2d 199 (Fla. 2002); *Knight v. State,* 746 So. 2d 423, 431 (Fla. 1998); *San Martin v. State,* 705 So. 2d 1337, 1345 (Fla.1997); *Chandler v. State,* 702 So. 2d 186, 191 (Fla. 1997); *Sims v. State*, 681 So. 2d 1112, 1116-17 (Fla.1996); *Kilgore v. State,* 688 So. 2d 895, 898 (Fla.1996) (when allegedly improper prosecutorial comments are not preserved for appellate review, entire claim is procedurally barred in absence of fundamental error). *Allen v. State*, 662 So. 2d 323, 328 (Fla.1995)(contemporaneous objection and accompanying motion for mistrial required to preserve allegedly

improper prosecutorial comments for appellate review). The Circuit Court's denial of relief on procedural bar grounds is supported by competent, substantial evidence, and should not be disturbed.[24]

V. THE *AKE V. OKLAHOMA* ISSUE

On pages 88-89 of his brief, Duckett asserts that trial counsel should have obtained the services of a mental health expert, and that his constitutional rights were thereby violated. To the extent that this claim is an ineffective assistance of counsel claim, the Circuit Court's denial of relief is reviewed *de novo.* See pp.67-68, above. To the extent that this issue attempts to set out some other constitutional claim, that unspecified claim is not properly before this Court because it was not raised below. Florida law is well-settled that issues cannot be raised for the first time on appeal. *Doyle, supra.*

In denying relief on this claim, the Circuit Court stated:

> This Court can address this issue by examining the testimony of two individuals. First, the testimony of Jack Edmund on June 7, 1997 (page 39, 40, 41) shows that it was a tactful [sic] decision on the part of

[24]In footnote 65 on page 87 of his brief, Duckett asserts that trial counsel was ineffective with respect to the prosecutorial argument issue. That claim does not appear to have been presented to the Circuit Court, and, in any event, is not sufficiently briefed herein. If this is truly intended to be a claim of constitutional error, it should not have been relegated to a footnote in the back of the Defendant's brief.

> defense counsel not to employ a mental health expert. Second, Patricia Fleming testified on January 8, 1997 that she did not identify any unusual characteristics that signified any behavior or intellectual problems (page56), nor was there any indication of major depressive disorders (page 57). Dr. Fleming acknowledged (page 66) no significant mental problems with Defendant. The Court finds that had Mr. Edmund employed a mental health expert, the only testimony that this expert could have provided would have been lingering doubt, which is not permissible argument before the jury.

(R1807). The facts upon which the Circuit Court based its denial of relief are not clearly erroneous, do not support either the deficient performance or the prejudice prongs of *Strickland,* and establish why Duckett has failed to carry his burden of proof as to this claim. This claim is not a basis for relief, and the Circuit Court should be affirmed in all respects.

VI. THE AGGRAVATING CIRCUMSTANCE CLAIM

On pages 89-91 of his brief, Duckett argues various errors which, according to him, are associated with the heinous, atrocious, or cruel aggravator, and the during the course of a felony aggravator, both of which were applied in this case. The Circuit Court imposed a procedural bar as to this claim, and that disposition is in accord with settled Florida law. (R1807).

To the extent that further discussion of this claim is necessary, the law is clear that claims involving the adequacy of jury instructions cannot be raised for the first time on

collateral attack. *Freeman v. State,* 761 So. 2d 1055, 1066 (Fla. 2000) (“The issue of the heinous, atrocious and cruel instruction is not properly raised in a postconviction motion because the claim either was or could have been raised on direct appeal. *See Hardwick*, 648 So. 2d at 103; *Lambrix*, 641 So. 2d at 848; *Bryan*, 641 So. 2d at 63.”); *Johnston v. State,* 708 So. 2d 590, 591 (Fla. 1998); *Johnston v. Singletary*, 640 So. 2d 1102, 1104 (Fla. 1994); *Henderson v. Singletary*, 617 So. 2d 313, 315 (Fla. 1993) ("The instruction given on the heinous, atrocious, or cruel aggravator was the standard jury instruction found lacking in *Espinosa.* ... Although defense counsel requested expanded instructions on both aggravating factors and objected when the standard instructions were given, this claim is procedurally barred because a specific challenge to the instructions was not raised on direct appeal."); *Glock v. Moore,* 776 So. 2d 243, 255 (Fla. 2001). The Circuit Court properly found Duckett’s jury instruction claims to be procedurally barred -- that disposition should not be disturbed.

Alternatively and secondarily, without waiving the procedural bar defense, the facts of this case establish the heinousness aggravator beyond any doubt regardless of the definition applied thereto. *Johnston, supra.* Likewise, there can be no colorable argument that the during the course of an

enumerated felony aggravator is inapplicable to this case, and the subsidiary jury instruction claim is frivolous. Finally, to the extent that Duckett argues that *Apprendi v. New Jersey,* 530 U.S. 466 (2000) is of some help to him, that assertion makes no sense. *Apprendi* has nothing to do with jury instructions, and Florida does not make the "eligibility for death" determination at the penalty phase of a capital trial. *Mills v. Moore,* 786 So. 2d 532, 536-537 (Fla. 2001). Duckett's argument is based upon a faulty premise, and would not be a basis for relief even if it were not procedurally barred. The Circuit Court's denial of relief should not be disturbed.

VII. THE *CALDWELL V. MISSISSIPPI* CLAIM

On pages 91-93 of his brief, Duckett argues that the jury's sense of responsibility for its sentence was "unconstitutionally diluted" by "improper" jury instructions. The Circuit Court held this claim procedurally barred because it could have been but was not raised at trial or on direct appeal. That is a correct application of Florida law to the facts of this case, and it should not be disturbed.

Florida law is well-settled, as the Circuit Court held, that *Caldwell* claims are subject to a procedural bar on collateral attack, and properly imposed that bar in this case. (R1810). *Dugger v. Adams,* 489 U.S. 401, 410 n. 6 (1989); *Arbelaez v.*

State, 775 So. 2d 909, 915 (Fla. 2000); *Teffeteller v. Dugger,* 734 So.2d 1009, 1026 (Fla. 1999); *Sochor v. State,* 619 So. 2d 285, 291 (Fla.1993) ("Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*."). This procedurally barred claim deserves no further discussion, and the Circuit Court should be affirmed in all respects.

VIII. THE BURDEN-SHIFTING JURY INSTRUCTION CLAIM

On pages 93-94 of his brief, Duckett argues that the penalty phase jury instructions "improperly shifted the burden" to him to prove that death was not the appropriate penalty, and that he received ineffective assistance of counsel with respect to the jury instruction issue. The ineffective assistance of counsel component is reviewed *de novo* by this Court, and the substantive claim is reviewed for clear error. See pages 67-68, above. The substantive claim is procedurally barred, as the Circuit Court found (R1813), and the ineffective assistance of counsel claim is meritless because the underlying claim is also meritless. *Carroll v. State,* 815 So. 2d 601, 623 (Fla. 2002) ("Appellate counsel's failure to raise nonmeritorious issues does not constitute ineffective assistance. *See Groover v. State*, 656 So. 2d 424, 425 [(Fla. 1995])."). Neither is a basis for relief under long-settled Florida law. *Moore v. State,* 820 So. 2d 199

(Fla. 2002); *Gorby v. State,* 819 So. 2d 664 (Fla. 2002); *Freeman v. State,* 761 So. 2d 1055, 1067 (Fla. 2000); *Rutherford v. Moore*, 774 So. 2d 637, 644 n. 8 (Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365 (Fla.1998); *Shellito v. State,* 701 So. 2d 837, 842-43 (Fla.1997). *See also, Blystone v. Pennsylvania,* 494 U.S. 299 (1990); *Boyde v. California,* 494 U.S. 370 (1990). This claim is not a basis for relief, and the Circuit Court's denial of relief should not be disturbed.

IX. THE ABSENCE FROM CRITICAL STAGES CLAIM

On pages 95-97 of his brief, Duckett asserts that he was "absent from critical stages" in his trial. This claim is wholly based upon factual matters, and the Circuit Court's factual determinations are reviewed under the competent, substantial evidence standard. See pp. 69-70, above. This claim is procedurally barred, as the Circuit Court found, because it could have been but was not raised at trial or on direct appeal. (R1816). Despite the histrionics of his argument, none of the proceedings identified in his brief are "critical stages" of a trial, hence, the defendant's absence cannot be a basis for objection, much less for reversal.

To the extent that further discussion of this frivolous claim is necessary, *Florida Rule of Criminal Procedure* 3.180 enumerates the stages of a criminal proceeding at which the

defendant's presence is required. None of the identified "absences" set out in Duckett's brief fall within the enumerated critical stages, and this claim collapses because it has no facts to support it. The Circuit Court properly denied relief on this claim. (R1815-16).

X. THE CONSTITUTIONALITY OF THE DEATH PENALTY CLAIM

On pages 97-98 of his brief, Duckett argues that the death penalty violates the Eighth Amendment to the Constitution. This claim is procedurally barred, as the Circuit Court found, because it could have been but was not raised at trial or on direct appeal. (R1817). In addition to being procedurally barred, this claim has no merit because the United States Supreme Court has repeatedly upheld the constitutionality of Florida's death penalty act. *Proffitt, Spaziano, Barclay, Hildwin*. Likewise, this Court has repeatedly rejected such challenges to the constitutionality of the death penalty. *Farina v. State,* 801 So. 2d 44, 55 (Fla. 2001); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999); *Pooler v. State,* 704 So. 2d 1375, 1381 (Fla. 1997); *Jones v. State*, 701 So.2d 76, 79 (Fla. 1997); *Hunter v. State*, 660 So. 2d 244, 252-53 (Fla. 1995); *Medina v. State*, 690 So. 2d 1241, 1244 (Fla.1997); *Fotopoulos v. State*, 608 So. 2d 784, 794 n. 7 (Fla. 1992). This claim is not a basis for relief.

CONCLUSION

Based upon the foregoing, the State requests that this Court affirm the denial of post-conviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **M. Elizabeth Wells**, 376 Milledge Ave., Atlanta, Georgia 30313-3240, on this _____ day of October, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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