IN THE SUPREME COURT OF FLORIDA

PAUL G. EVERETT,

Appellant,

vs. **Case No. SC 03-73**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

CONSTITUTIONAL PROVISIONS, ACTS, STATUTES AND RULES

PRELIMINARY STATEMENT

Appellant, Paul G. Everett, appeals from the judgment of conviction and sentence of death imposed by the Circuit Court of the Fourteenth Judicial Circuit, Bay County, Florida, following a jury verdict finding him guilty of one count each of murder in the first degree, burglary with a battery, and sexual battery involving serious physical force. The jury unanimously recommended a death sentence. In addition to the death penalty upon the murder conviction, the trial court imposed consecutive life sentences upon the other two convictions. References to appellant will be to "Everett" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal consists of eight volumes[1] and the supplemental record on appeal includes three volumes. For the convenience of the Court, the State will cite to the record in a manner similar to that used by the Appellant, i.e., to the clerk's record on appeal as "R." or supplemental record as "S.R.," with the appropriate volume number and page citations as required by Fla. R. App. P. 9.210(b)(3).[2]

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[1]Only Volumes I-VI are consecutively paginated, and Volumes VII and VIII of the trial transcript, as designated, are out of order.

[2]Because Volumes VII and VIII of the trial transcript, as designated, are not in order, neither is contiguously paginated with the previous volumes; accordingly, references thereto will be to the actual page numbers for those two volumes.

STATEMENT OF THE CASE AND OF THE FACTS

Trial Proceedings

Paul G. Everett was charged by indictment in the Circuit Court of Bay County, Florida, on January 28, 2002, with one count each of murder in the first degree, burglary of a dwelling with a battery, and sexual battery involving serious physical force, having occurred on November 2, 2001 (R. I-5). The jury found Everett guilty as charged on November 21, 2002 (R. I-113). The case then proceeded to the penalty phase, where, the following day, an unanimous jury recommended that Everett be sentenced to death (R. I-131).

Guilt phase:

Evidence adduced at the guilt phase of trial established the following:

Sometime during the late afternoon or early evening of Friday, November 2, 2001 but no later than 7:30 p.m., the victim, thirty-one-year-old Kelli M. Bailey, was accosted, brutally beaten, raped, and murdered by Appellant in her own home. Everett apparently entered through an unlocked door and did not know the victim (R. VII-47, 153, 158).

Ms. Bailey worked the third shift on Fridays, Saturdays, and Sundays at Bay

Medical Center as a medical technologist (R. VII-23-24; R. VII-32).[3] At the time she confronted Appellant in her home, Ms. Bailey would have been preparing to take a bath to get ready for work or to go to the grocery store (R. VII-37). She had not yet showered or bathed (R. VII-72), but the lights in the house were on, the television located in the livingroom was on, and her car was parked in the driveway (R. VII-34; VII-236; VII-154). Anyone entering the house would have known that someone was there. Ms. Bailey first confronted Everett in her livingroom, where she was beaten (R. VII-155). Appellant had brought a wooden club with him (R. VII-159). The victim attempted to get away, only to be knocked to the floor just inside her bedroom (R. VII-156). At some point Appellant violently yanked Ms. Bailey's head and twisted her neck, breaking the C-5 vertebra (R. VII-158, 160; VIII-214). Everett sexually assaulted Ms. Bailey while she was conscious (R. VII-156). Although Appellant later would claim that he "ate some acid and started tripping" and did not remember the majority of his attack upon Ms. Bailey (R. VII-153, 155, 156, 157, 158, 160, 161, 163, 164-165), his ability to accurately describe the layout of the victim's house, how he entered, where he found the purse, as well as details of the attack such as where in the

[3]The record reflects that the third shift was either from 7 p.m. to 7 a.m. or 7:30 p.m. to 7:30 a.m. (compare R. VII-23 with R. VII-32). Because Ms. Bailey's co-worker would not have called until she was about thirty minutes late (R. VII-24) and he called at 7:38 p.m. (R. VII-25, 26), the former period is more likely.

house he struck and sexually assaulted the victim, which was consistent with the physical evidence, demonstrates that Appellant was quite aware of and did remember what occurred upon entering Ms. Bailey's house (see R. VII-153; VIII-240-243).

Similarly, while Everett denied beating the victim with the wooden club or repeatedly hitting her (R. VII-156, 157, 159-160), the physical evidence is to the contrary. Specifically, injuries to Ms. Bailey resulting from the attack included a fractured nose, somewhat swollen eyelids, abrasions to the bottom of her chin, lacerations and bruising to various areas of her lip, a laceration to the top of the lip from which her front teeth protruded, bruising to the tongue, a knocked out tooth, abrasions and carpet burns to her thumb, elbows, and middle of her back, abrasions to her vagina, and a broken neck (R. VIII-207-215). Ms. Bailey died of suffocation – paralysis from the broken vertebrae causing her diaphragm muscles not to function thus preventing her from breathing (R. VIII-215-217, 218). Ms. Bailey would not have lost consciousness for several minutes (R. VIII-219), and during that time the most she could have done was to slightly shrug her shoulder and move her head from side to side (R. VIII-217).

Appellant took approximately $70.00 and Ms. Bailey's Visa card from her wallet that was in her purse, a change purse, as well as a sweater jacket before leaving the victim's house (R. VII-155, 161). He left behind his Nike t-shirt (R. VII-160-161, 166-

167). Besides discarding the jacket with the credit card in a pocket (R. VII-78, 161, 167), Everett also dropped the wooden club (R. VII-86). He threw his bloody tennis shoes in a trash bin as he returned to the nearby Fiesta Motel (R. VII-161-162, 167). Jared Farmer, Everett's friend that had accompanied him from Alabama to Panama City Beach, was not in the hotel room when Appellant returned (R. VII-162; see VIII-237-238). Later that same night, on November 2, 2001, after Jared Farmer had returned to the motel room, Everett was taken by an Alabama bail bondsman and ultimately turned over to Baldwin County, Alabama authorities (R. VII-147; R. VIII-237).

After Ms. Bailey did not show up for work by around 7:30 p.m., a co-worker, Charles Dehart, called the victim's house a number of times (R. VII-24-26). With each call he only reached the victim's answering machine thereby leaving recorded messages (R. VII-25-26). Finally, Mr. Dehart contacted Ms. Bailey's stepfather, John Greathouse, between 8:15 and 8:45 p.m. (R. VII-34), who said he would check on his stepdaughter (R. VII-27).

Ms. Bailey lived .6 of a mile from her parents (R. VII-31). When Mr. Greathouse arrived at his stepdaughter's house, the lights inside were on, which was not unusual because Ms. Bailey slept with all the lights on (R. VII-34). Mr. Greathouse proceeded to the back door, which he always used to enter the house

because Ms. Bailey's bedroom was right next to the front door and he did not want to scare her (R. 34-35). Although he used his key on the doorknob lock, Mr. Greathouse did not know whether that lock was actually engaged (see R. VII-35). The deadbolt, however, was not locked (R. VII-35). After entering the house, Mr. Greathouse found his stepdaughter's semi-nude and battered body (R. VII-35-36). Feeling her ice cold heel, Mr. Greathouse knew that his stepdaughter was dead (R. VII-36). He called 911 and then went outside through the back door to wait for the police and ambulance (R. VII-36).

Law enforcement determined that there were no signs of forced entry into Ms. Bailey's house (R. VII-47). The house was very neat (R. VII-48), and Ms. Bailey's purse was found sitting on the diningroom table (R. VII-71). Blood was located in several areas on the livingroom floor, between the coffee table and entertainment center (R. VII-47; R. VII-66). The victim was found laying in the doorway to the master bedroom (R. VII-49). The bed had not been made (R. VII-49). Blood was also found in the master bedroom, around the closet door, to the right of that door, on the ceiling, on a mirror, and on the bedpost near the foot of the bed (R. VII-50; VII-65). There was blood in the master bathroom on the sink (R. VII-50). The sweater jacket with Ms. Bailey's Visa card was found a block directly behind her house (R. VII-78-79), and a wooden club or fish bat was located approximately 133 feet from the

victim's back door (R. VII-86). The bat tested positive for the presumptive presence of blood (R. VII-170-171). No latent prints, however, were recovered from either the bat or the Visa card (R. VII-112).

Latent fingerprints were recovered at the house (R. VII-79). Accordingly, police obtained the known fingerprints of specific persons in order to compare those prints to the unidentified ones recovered from the house (R. VII-82). Prints were obtained from Ms. Bailey, her parents, Appellant, Jared Farmer (Appellant's traveling companion), the Camps (who found the jacket), and William Minor (who had previously dated the victim) (R. VII-80-82). All fingerprint evidence was forwarded to Florida Department of Law Enforcement (hereinafter "FDLE") (R. VII-94). Of the latent prints recovered, however, only two were identified, and they belonged to the victim (R. VII-108, 112). In addition, a sexual assault kit and other physical evidence was collected from Ms. Bailey (R. VII-82-83). Physical evidence was also collected from Jared Farmer, William Minor, Freddie (Bubba) Wilson (someone who interacted with the teenage boys in the neighborhood), and Steve Colson (a neighbor and former boyfriend) (R. VII-85).

Investigator Jeff Haire of the Panama City Beach Police Department discovered that the Super Wal-Mart at the beach carried the exact type of wooden bat found close to Ms. Bailey's house (R. VII-97). By scanning the bat, a Wal-Mart employee was

able to advise Investigator Haire that that same model of bat had been last purchased by check on October 27, 2001, at approximately 5:17 p.m. (R. VII-98-99). The videotape of that transaction was played for the jury (R. VII-99-101), depicting Appellant and Jared Farmer (R. VII-100, 104; R. VIII-234). Ultimately the police traced the check used to purchase the wooden club from Wal-Mart to Appellant, who was supposed to be at the Fiesta Motel in Panama City Beach (R. VII-104). By November 13, 2001, however, when police identified Appellant, he had already been picked up and was in Baldwin County, Alabama (R. VII-105). Officers with the Panama City Beach Police Department subsequently obtained statements from Appellant on November 14, November 19, and November 27, 2001 while he was in Alabama's custody. Only the latter statement was admitted at trial, wherein Everett admitted involvement in the murder (R. VII-151-166). In addition, Appellant had consented to providing blood and saliva samples, in which testing established that it was Everett's DNA recovered from the vaginal swabbing of the victim (R. VII-140; VIII-186, 190).[4]

After the State rested its case-in-chief, Appellant moved for a judgment of

[4]Facts pertaining to the manner in which police obtained physical evidence from Appellant and his statements will be discussed under Issue I, wherein Everett raises on appeal the issue as to the admissibility of some of that evidence. See infra, at 23-27.

acquittal, which the trial judge denied (R. VIII-227).

Appellant waived his right to testify (R. VIII-227-228). The defense case consisted of the testimony of Panama City Beach Police Detective Rodney Tilley, who testified that Appellant cried while giving his statement to police, and that it was very usual for a suspect to tell part of the truth when talking to police (R. VIII-236, 239).

At the close of the evidence, instructions, and argument by counsel, the jury found Appellant guilty as charged (R. I-113; R. VIII-329).

Penalty phase:

During the penalty phase of the trial, the State relied principally upon the evidence adduced during the guilt phase. In addition, the State established that Everett had previously been convicted on September 8, 1999 in Alabama of one count of second degree possession of a forged instrument, a felony, and was under a sentence of imprisonment at the time of the instant murder (State's Exhibit 26; R. IV-464).[5]

[5]While Appellant states that he "was on bond pending resolution of an appeal he had filed with an appellate court in Alabama," Initial Brief Of Appellant (hereinafter "I.B."), at 5, the record establishes that the Alabama appellate court affirmed the judgment of conviction and sentence on October 5, 2001 and that Everett's sentence began fifteen days later, or October 20, 2001, pursuant to Alabama law (State's Exhibit 25, at pp. 3, 5). Appellant was not, therefore, on bond pending appeal when he murdered Kelli Bailey on November 2, 2001.

Everett presented testimony from two witnesses -- his mother, Glenda Everett, and his sister, Cindy Everett Grider:

Regarding his childhood, Appellant's mother testified that he had seven sisters[6], that he was her only son and the youngest of her children, he was raised in a small community in Alabama where everyone knew one another, and was a fun loving child not known to always be in trouble (R. IV-469-472). Appellant's mother further testified that while she divorced Everett's father, they remarried, but then separated a second time and she again took the children (R. IV-472). Everett moved in with his father at some point (R. IV-472), and in 2001, Appellant lived with friends or with his father (R. IV-473). Appellant's mother was aware that Everett was involved with drugs, having first become aware of that fact when he was eighteen or nineteen years old, and she had encouraged him to get treatment for his drug use (R. IV- 473-474). In late September and through most of October, prior to the murder, Appellant stayed at his mother's house, and at that time "he was not completely himself." (R. IV-473). She was not aware that Appellant planned on traveling to Panama City (R. IV-474). Appellant's mother also testified that Appellant had never been violent, that it was hard

[6]At one point in her testimony, Appellant's mother testified that she had "seven other children" and that "[t]hey are all daughters" (R. IV-469), but later testified that Everett "has six sisters" (R. IV-476).

for him to accept having come from a broken home, and that "[h]is father was an alcoholic and at times he would say things to Paul that no child needed to know, and some of the things he told him, I am sure, has affected Paul and probably affected the fact that he had to rely on drugs to try to maybe block out some of those memories." (R. IV-475). Appellant's mother did not, however, elaborate on what Everett's father had said or what memories she was referring.

Everett's sister Cindy testified about the tight knit community that the family grew up in (R. IV-477-478), and that she and Appellant were very close (R. IV-479). She further testified that before he went to Panama City Beach, she saw Appellant daily when he was in north Alabama or would otherwise hear from him, and that Appellant was a large part of her family (R. IV-479). She had never heard about him being violent (R. IV-479-480). Appellant's sister further testified that she knew Jared Farmer and his family, knew that they were involved in drugs, and that she had tried to get Appellant to go for counseling or get other help for his drug use (R. IV-479, 480). Appellant's sister had heard that Everett had been with Jared Farmer when he traveled to Panama City Beach (R. IV-478-479), but had no prior knowledge that Appellant was going to go there (R. IV-480). Everett's sister concluded her testimony by telling the jury that "[o]ur dad was a very caring man" (R. IV-481), that Appellant was like that, and "[w]ithout some outside influence, other involvement, there's no way

this could have happened." (R. IV-481).

The jury was instructed on the following aggravating circumstances: that Appellant had been previously convicted of a felony and was under a sentence of imprisonment; that the murder was committed while Appellant was engaged in the commission of a sexual battery or a burglary; and that the murder was especially heinous, atrocious, or cruel (R. I-118-120; R. IV-510-511). The trial court instructed the jury on the following statutory mitigating circumstances: any aspect of the defendant's character, record, or background, and any other circumstance of the offense (R. IV-511-512). After the close of the evidence, instructions, and arguments by counsel, on November 22, 2002, the jury unanimously recommended the death penalty (R. I-131; R. IV -516-517).

A Spencer[7] hearing was held on December 30, 2002, wherein Appellant presented the testimony of his mother, Glenda Everett (R. V-528-530), and Ernest Jordan, Chief Investigator with the Public Defender's Office in the Fourteenth Judicial Circuit (R. V-530-531):

Unlike her testimony at the penalty phase, Appellant's mother testified solely in respect to her opinion of Appellant's level of maturity (R. V-528-529). Although

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

Everett was age twenty-two when he committed the murder, sexual battery, and burglary, his mother testified that he "has always acted kind of young . . . . He definitely does not act like a 22 year old." (R. V-529). Appellant's mother further testified that her son had primarily worked at fast food restaurants, never had his own place to live and had lived either with her, his father, or his sisters (R. V-529).

Mr. Jordan then testified that as an investigator for the Public Defender's Office, he contacted the jail in Panama City. Neither the records themselves nor Shirley Brown, the custodian of records, indicated any disciplinary action taken against Appellant (R. VI-530-531). Though he made contact with the officials in Baldwin County, Alabama, Mr. Jordan was unable to get any information regarding Everett from them (R. VI-531).

On January 9, 2003, the trial court ultimately followed the jury's 12-0 recommendation and sentenced Appellant to death (R. I-165; R. VI-558).

The trial court considered the following factors as possible mitigating evidence: "A. The age of the defendant at the time of the crime. . . .," given very little weight (R. I-158; R. VI-549); "B. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . . The Court will find this mitigating factor has not been reasonably established. However, ... [t]he court concludes the mitigating factor that the defendant committed this murder while

under the influence of some type of substance has been reasonably established. . . .," given little weight (R. I-159-160; R. VI-549-551); "C. The defendant has no significant history of prior criminal activity. . . .," given little weight (R. I-160-161; R. VI-551-552); "D. The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty" including "1. The defendant's family background. . . .," given very little weight (R. I-161; R. VI-553); "2. The defendant's employment background. . . .," rejected as a mitigating factor (R. 1-161-162; R. VI-553-554); "3. The defendant's drug use," given little weight (R. I-162; R. VI-554). The court also considered the following nonstatutory mitigating evidence: "A. The defendant's remorse. . . .," given very little weight (R. I-162-163; R. VI-555-557); "B. The defendant's good conduct in custody. . . .," given very little weight (R. I-164; R. VI-557); "C. The alternative punishment is life imprisonment without parole. . . .," given very little weight (R. I-164; R. VI-557); and "D. The defendant confessed to his crime. . . .," given very little weight (R. I-164; R. VI-557-558).

As was submitted to the jury, the trial court found each of the three statutory aggravating circumstances: (1) that Everett was previously convicted of a felony and was under a sentence of imprisonment (R. I-154; R. VI-541-542); (2) that Everett committed the murder while engaged in the commission of a sexual battery or a burglary (R. I-154-155; R. VI-542-543); and (3) that the murder was especially

heinous, atrocious, and cruel (R. I-155-158; R. VI-543-548).

The trial court found that each statutory aggravating circumstance, standing alone, was sufficient to outweigh any and all mitigating evidence (R. I-164; R. VI-558).

Direct Appeal

Everett filed his notice of appeal on January 9, 2003 (R. I-167), and now raises the following five issues on direct appeal:

(1) "THE COURT ERRED IN DENYING EVERETT'S MOTIONS TO SUPPRESS BLOOD, HAIR, AND OTHER BODY SAMPLES TAKEN FROM HIM AS WELL AS A CONFESSION HE GAVE TO POLICE OFFICERS, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS." I.B. at 9;

(2) "THE COURT ERRED IN ALLOWING JACQUELINE BENEFIELD, AN EXPERT IN DNA ANALYSIS, TO ALSO TESTIFY ABOUT THE LIKELIHOOD OF OTHERS HAVING THE SAME DNA RESULTS AS THOSE SHE TESTED, A VIOLATION OF EVERETT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL." I.B. at 23;

(3) "THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002) AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002)."

I.B. at 29;

(4) "THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF EVERETT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS." I.B. at 40; and

(5) "THE COURT ERRED IN FINDING EVERETT COMMITTED THE MURDER WHILE UNDER SENTENCE OF IMPRISONMENT BECAUSE THERE WAS NO NEXUS OR CONNECTION LINKING THAT AGGRAVATOR WITH ANY ASPECT OF THE HOMICIDE, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS." I.B. at 43.

In addition to the issues raised by Appellant, this Court has an independent duty to review the sufficiency of the evidence of the first degree murder conviction and the proportionality of the sentence. See Knight v. State, 746 So. 2d 423, 437 (Fla. 1998), cert. denied, 528 U.S. 990 (1999); Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999). The State addresses these matters under Issues VI and VII, respectfully, in its answer brief.

SUMMARY OF THE ARGUMENT

I.

Edwards v. Arizona, 451 U.S. 477 (1981) neither precludes admission of physical evidence obtained from Appellant upon his consent nor his statement given on November 27, 2001 which he initiated. A request for consent to search or to obtain physical evidence is not interrogation and seeks a non-testimonial response. Similarly, advising Appellant that there was a warrant for his arrest and that it would be served upon him that day did not constitute interrogation. And because Appellant's statement followed his request to speak to law enforcement, Everett's Fifth Amendment right to counsel was not violated.

II.

The trial court did not commit reversible error in permitting a State's witness to testify as to the population frequency for the DNA profile obtained. As an expert witness, the FDLE DNA analyst testified that she had attended courses and conferences on population genetics and statistics, as well as being familiar with the National Research Council, that there are particular protocols to the establishment of calculating population frequencies, and that she had employed the product rule, which is generally accepted in the scientific community. And even if the testimony should

have been excluded, in light of the overwhelming evidence of Appellant's guilt, any such error was harmless beyond a reasonable doubt.

III.

Appellant failed to preserve his Sixth Amendment penalty phase jury sentencing claims raised for the first time on appeal. And even if Everett's claims are reviewable, the United States Supreme Court did not overrule the extensive line of cases upholding Florida's death penalty scheme. Moreover, Ring v. Arizona, 536 U.S. 584 (2002) is inapplicable as Appellant was convicted of contemporaneous felonies that further qualify to establish the aggravating circumstance under § 921.141(5)(d), Florida Statutes. In addition, the jury's recommendation was unanimous, and Ring did not hold that special verdict forms are required or that the aggravating factor(s) must be charged in an indictment.

IV.

The Florida Standard Jury Instructions do not contravene Caldwell v. Mississippi, 472 U.S. 320 (1985) and thus Appellant's jury was properly instructed. The instructions accurately informed the jury of its role under Florida law, and at no time was the jury's sense of responsibility diminished in respect to its role concerning

its consideration of the aggravating and mitigating circumstances. Here, the jury unanimously recommended that Everett receive a death sentence, and had previously been instructed that the judge would give great weight to its recommendation. Nor does Ring v. Arizona create a constitutional right beyond that enumerated therein.

V.

Appellant's challenge to the trial court instructing upon and finding the aggravating circumstance that Appellant committed the murder while under a sentence of imprisonment is procedurally barred, as Appellant failed to object to the instruction below on the same basis as now raised on appeal. Moreover, that Everett had failed to turn himself in as required by Alabama law, to begin service of his sentence does not negate the applicability of the aggravator. Further, the Eighth Amendment does not mandate that the aggravating circumstance have a nexus or connection to the facts of the murder, as in this case it bears on the character of the defendant. And because the status of being under a sentence of imprisonment does not apply to every murderer, it is a proper aggravator. Finally, because of the strong remaining aggravating circumstances and the minimal mitigating circumstances, any error would be harmless beyond a reasonable doubt.

VI.

The evidence overwhelmingly supports Everett's conviction for first degree murder upon a premeditated design, where Everett beat and sexually battered the victim before he twisted her neck resulting in paralysis and suffocation. The evidence also overwhelmingly supports Appellant's conviction as first degree felony murder, in that the murder was committed while Everett engaged in burglary and sexual battery, where Everett admitted that he was not authorized to be in the victim's house and had entered to steal money, and had sexual intercourse with the victim and her injuries were inconsistent with consensual contact.

VII.

The sentence of death imposed in this case is proportionate to others approved by this Court. The record supports the finding of the three aggravating factors submitted and the trial court appropriately considered and weighed the minimal mitigating factors presented.

ARGUMENTS

I.

ADMISSION OF PHYSICAL EVIDENCE OBTAINED FROM EVERETT AND HIS STATEMENT MADE ON NOVEMBER 27, 2001, DID NOT VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Everett appeals from the admission of physical evidence obtained from him and from the admission of his statement made on November 27, 2001. Everett filed motions to suppress that evidence as well as a statement given on November 19, 2001 (R. I-31-32; R. I-33-37), which were denied following a suppression hearing (R. I-46-51).

At trial, the November 27, 2001 statement and DNA evidence were admitted (R. VII-134-137; R. VIII-186, respectively). Appellant objected to the admission of the November 27, 2001 statement on the ground that law enforcement failed to re-administer Miranda warnings: "So I feel that the prophylactic measures that Miranda sets out have been ignored in this case and based on that failure to re-mirandize him to obtain a waiver, particularly a waiver of counsel in writing, the statement taken on November 27th should be held inadmissible by the Court." (R. VII-129). This objection is distinct from that raised pretrial seeking suppression of any statements based upon Appellant's invocation of his right to counsel, and thus does not preserve

the issue for appeal. Sedney v. State, 817 So. 2d 1074, 1075 (Fla. 5th DCA 2002); see Correll v. State, 523 So. 2d 562, 566 (Fla.) (failure to renew objection to the admissibility of evidence that was the subject of a motion in limine precludes appellate consideration), cert. denied, 488 U.S. 871 (1988).[8] Similarly, Appellant did not object at trial to the admission of DNA evidence as raised in his pretrial motion -- i.e., that the police violate Everett's Fifth Amendment rights when seeking consent to obtain physical evidence because he had previously invoked his right to counsel. Instead, at trial Appellant contended that the population frequency evidence was inadmissible based upon the expert's lack of expertise in the area (R. VIII-181).[9] Because that objection is distinct from what was raised pretrial, that issue also is not preserved for appeal. Id.

Even if the Court were to conclude that Everett's claim under Edwards v. Arizona, 451 U.S. 477 (1981) is reviewable on the merits, he is not entitled to relief.

> This Court has recently explained the standard of review for orders on motions to suppress:
>
> > Appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to

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[8]The law has subsequently changed so that a defendant need not renew an objection previously raised and ruled on pretrial. Compare § 90.104(1), Florida Statutes (effective July 1, 2003).

[9]That claim is addressed under Issue II, infra, at 40-45.

> suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.
>
> *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). At the trial court level it is proper to apply a "totality of the circumstances" analysis when determining if a confession was obtained voluntarily. See *Frazier v. Cupp*, 394 U.S. 731, 739, 22 L. Ed. 2d 684, 89 S. Ct. 1420 (1969); *Thompson v. State*, 548 So. 2d 198, 203-04 (Fla. 1989).

Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003).

A. Factual Background

After being picked up in Panama City Beach, Florida by a bail bondsmen on the night of the murder, November 2, 2001, Everett was transferred to the custody of the Baldwin County, Alabama Sheriff's Office (R. VII-147). On November 14, 2001, Sergeant Tilley and Chad Lindsey of the Panama City Beach Police Department (hereinafter "PCBPD") traveled to Baldwin County, Alabama, to interview Appellant (S.R. I-1; S.R. II-63-64). During that first interview, Everett was questioned at the jail through a plexiglass divider (S.R. II-64-65). At first Everett "was very open" and gave a statement, but then said that he wanted to talk to an attorney (S.R. II-65). Questioning then ceased, and Sgt. Tilley told Appellant that if he should want to talk

to him, to let the Baldwin officials know (S.R. II-66).

Sgt. Tilley subsequently contacted Deputy John Murphy of the Baldwin County Sheriff's Office (R. VII-147-148). Deputy Murphy had interviewed Appellant on unrelated Alabama bad check cases prior to being contacted by Sgt. Tilley (S.R. I-22). Because Deputy Murphy was planning on reinterviewing Appellant relative to the Alabama cases, Sgt. Tilley requested that Deputy Murphy see if Appellant would consent to providing a DNA sample (S.R. II-67). In permitting Alabama officials to obtain blood and saliva samples from him, Everett executed a "Consent To Search" form (State's Exhibit 22). On that same date, Sgt. Tilley, who was taking evidence to the Pensacola office of the Florida Department of Law Enforcement, was directed to first go to Baldwin County and see if Appellant had consented to giving physical evidence from his person (R. II-205; S.R. II-69).

At the hearing on the motion to suppress, the State presented a packet of information pertaining to the facts underlying the consent to obtain physical evidence and Everett's statements -- including a statement from Deputy Murphy, as well as transcripts of Appellant's statements made on November 14, November 19, and November 27 -- of which the defense stipulated presented the relevant facts (R. II-202). In his statement, Deputy Murphy set forth what occurred on November 19, 2001:

> On 19 Nov 01, Murphy made contact with Paul Everett at the request of Panama City [Beach] Police Department Sgt Tilly. Everett was incarcerated at the Baldwin County Correction's Facility for fraudulent check charges. Murphy has previously interviewed Everett in reference to the Ft Payne[, Alabama] charges. Tilly requested Murphy to confront Everett for consent of blood and saliva samples. The samples were for a DNA comparison in a homicide investigation their office was conducting (Panama City [Beach] Police Case # 01-31016 - Keli Bailey). Everett agreed verbally, in writing, and gave the samples.
>
> After giving the samples, Everett told Murphy that he had been attempting to contact his Attorney in reference to the Panama City investigation but had been unsuccessful. *He told Murphy he wanted to write a name on a piece of paper and get him to deliver it to PCPD Sgt Tilly. He further advised that he wanted to "Point them in the right direction."* Murphy told Everett he would make the delivery but that he would first read Everett his Miranda Rights. *Everett was read and signed a copy of his Miranda Rights. Everett also told Murphy he wanted to give further information but he wanted it "Off the Record". Murphy told Everett that any information he gave would be on the record and recorded. Everett advised that he would make a statement to Murphy and or Sgt Tilly. Sgt Tilly was enroute from Panama City so Murphy started the interview and Tilly would join the interview when he arrived.*
>
> * * * * *

(S.R. I-22) (emphasis added).

In its "Order Denying Defendant's Motion To Suppress Admissions Illegally Obtained And Defendant's Motion To Suppress Physical Evidence," the trial court made the following relevant findings:

> As to the issue of the voluntariness of the consent given by the defendant for the taking of blood and DNA swab samples, there is no 5th Amendment privilege against self incrimination in seeking these types of

samples from a defendant in custody. See: *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The taking of these samples was not the result of any act which was "testimonial or communicative in nature." Id[.,] 384 U.S. at 761, 86 S.Ct. at 1830. *The fact that the defendant had earlier invoked his right to an attorney would only be applicable if the officers had attempted to interrogate the defendant. It is clear that the officers did not attempt to interrogate the defendant prior to seeking his consent for the taking of the samples on November 19, 2001.* Because the defendant had no 5th Amendment right to counsel for the taking of these samples, and the defendant was not subjected to any interrogation to elicit any incriminating statement in violation of *Miranda* at the time he gave his consent, the defendant had no right to seek advice of counsel under the 6th Amendment prior to furnishing the blood and DNA samples. *There has been no showing that his consent to the taking of the blood and DNA swabs on November 19, 2001 was involuntarily given or was the result of any coercion or wrong doing on the part of any law enforcement official.* See: *U.S. v. Del EDMO*, 140 F.3d 1289 (9th Cir. 1998). The defendant's Motion to Suppress these samples and the results of the tests of these samples must be denied.

As to the contents of the interviews of November 19th and November 27th, the defendant is correct that once counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney. See: *Traylor v. State*, 596 So.2d 957 (Fla. 1992); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146[,] 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). However, an accused can initiate further contact with law enforcement and then waive his right to an attorney prior to being questioned. This is an exception to the above rule concerning reinitiating interrogation by law enforcement officers after a defendant has requested counsel. See: *Edwards v. Arizona*, 451 U.S. 477 (1981); *Jones v. State*, 748 So.2d 1012 (Fla. 1999); *Davis v. State*, 698 So.2d 1182 (Fla. 1997); *Sapp v. State*, 690 So.2d 581 (Fla. 1997); *Addison v. State*, 653 So.2d 482 (5 DCA 1995). *Here, the deposition of Officer Tilley and the statement of John Murphy reflect that the November 19, 2001 interview was the result of the defendant, himself,*

initiating contact with law enforcement after (emphasis supplied) *he had given his consent for the taking of his blood and DNA swab samples.* Specifically, at pages 35 and 36 of Detective Tilley's deposition, Detective Tilley had asked Officer Murphy to see if the defendant would voluntarily agree to a DNA test. Officer Murphy's statement indicates that the sole reason for contacting the defendant on November 19, 2001 for the Panama City Beach case was to get consent for the taking of the blood and DNA swab samples. *There was no attempt to question or interrogate the defendant prior to getting his consent for the taking of the DNA samples.* Officer Murphy had also contacted the defendant about an entirely separate case in Alabama that had nothing to do with the Panama City Beach case. There was nothing improper about Officer Murphy's contact with the defendant about the other case that would adversely impact on the Panama City Beach case.[10] . . . .

* * * * *

The Court notes that *the defendant was being served with an arrest warrant at the time he gave his statement. The defendant was not being brought in for the purpose of any additional questioning. The above colloquy establishes it was the defendant, and not the officers, who initiated the request for the interview of November 27th after being served with the arrest warrant* (emphasis supplied).

Because the defendant initiated the request to be interviewed by the officers on both November 19 and November 27, 2002 [sic] and there is nothing to establish that the officers coerced, forced or misled the defendant into giving either the November 19th or November 27, 2001 interviews the Court will find the defendant's interviews of November 19 and November 27, 2001 were freely and voluntarily

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[10]As discussed infra, at 33, because Deputy Murphy did not subject Appellant to interrogation prior to Appellant volunteering statements and requesting to talk to law enforcement, the fact that Deputy Murphy intended on interviewing Appellant regarding the unrelated cases is irrelevant.

made and are not subject to being suppressed. . . .

(R. I-47-50) (italicized emphasis added; underlined emphasis in original).

B. Admissibility of Physical Evidence

Everett first contends that the trial court erred in failing to suppress physical evidence obtained from him upon a request to consent. According to Appellant, once he invoked his Fifth Amendment right to counsel, law enforcement could only "talk with him on purely administrative matters such as are necessary when booking him into jail, which may require him to give his name, address, birth date, and other such biographical information." I.B. at 13 n.2. That is, based upon Appellant's belief that "dealing with the defendant involves more than interrogation and properly encompasses any communication with the defendant,[]" I.B. at 13-14 (internal footnote omitted), Everett urges this Court to hold that law enforcement could "do nothing" once Appellant invoked his right to counsel. I.B. at 14.

In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further *interrogation* by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id. at 484-485

(emphasis added). The Edwards rule is "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.'" Davis v. United States, 512 U.S. 452, 458 (1994) (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)). Edwards thus made clear that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to *reinterrogate* an accused in custody if he has clearly asserted his right to counsel." Id. at 485 (emphasis added).

"Interrogation" is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to *elicit an incriminating response* from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (internal footnotes omitted; emphasis added). That the physical evidence itself might later be determined to incriminate Appellant is not the issue. A Fourth Amendment search, on the other hand, is not testimonial in nature. Schmerber v. California, 384 U.S. 757, 763-764 (1966); Macias v. State, 515 So. 2d 206, 208 (Fla. 1987). Moreover, the accused does not have a Fifth Amendment right to counsel in connection with a request to search, Smith v. Wainwright, 581 F.2d 1149, 1151-1152 (5th Cir. 1978); see also United States v. Hidalgo, 7 F.3d 1566, 1568-1570 (11th Cir. 1993) (seeking consent to search is not a critical stage to the criminal proceedings and thus Sixth Amendment right to counsel did not attach) (citing cases), and an accused need not be warned that he can refuse to give consent. United

States v. Drayton, 536 U.S. 194, 206-207 (2002); Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973). Thus because a consent to search is not testimonial in nature, the standards governing it and waiver of the Fifth Amendment are not the same: "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Id. at 241.

Accordingly, to implicate the privilege against self-incrimination under Edwards, the request for consent to search or to obtain a blood sample or other physical evidence from an accused must be "sufficiently testimonial." See Fisher v. United States, 425 U.S. 391, 409 (1976) ("[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incrimination."). While this Court has not directly addressed the issue, nearly every court that has, has agreed that a defendant's consent to search is not an incriminating response and therefore a request for consent, following an invocation of the Fifth Amendment right to counsel, is not "interrogation" subject to limitation by Edwards. See, e.g., United States v. McClellan, 165 F.3d 535, 544-545 (7th Cir.), cert. denied, 526 U.S. 1125 (1999); Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir.), cert. denied, 474 U.S. 833 (1985); United States v. Rodriguez-Garcia, 983 F.2d 1563, 1568 (10th Cir. 1993); Hidalgo, 7 F.3d at 1568 (11th Cir. 1993) (Sixth Amendment right to counsel

not violated by request for consent to search); Scott v. State, 317 S.E.2d 282, 284 (Ga. App. 1984); People v. Wegman, 428 N.E.2d 637, 639-641 (Ill. App. 5th 1981); State v. Little, 421 N.W.2d 172, 174 (Iowa Ct. App. 1988); State v. Ealy, 530 So. 2d 1309, 1313-1315 (La. App. 1988); State v. Houser, 490 N.W.2d 168, 176-177 (Neb. 1992); State v. Childress, 448 N.E.2d 155, 157 (Ohio), cert. denied, 464 U.S. 853 (1983); State v. Baumeister, 723 P.2d 1049, 1050-1051 (Or. App. 1986); State v. Morato, 619 N.W.2d 655, 662 (S.D. 2000); Jones v. State, 7 S.W.3d 172, 173-175 (Tex. Ct. App. 1999); State v. Crannell, 750 A.2d 1002, 1007-1009 (Vt. 2000); State v. Turner, 401 N.W.2d 827, 835-837 (Wis. 1987) (applying invocation of Fifth Amendment right to remain silent); contra State v. Britain, 752 P.2d 37, 39 (Ariz. Ct. App. 1988); Pirtle v. State, 323 N.E.2d 634, 639-640 (Ind. 1975); People v. Esposito, 503 N.E.2d 98, 98-99 (N.Y. App. 1986); Kreijanovsky v. State, 706 P.2d 541, 545-546 (Okla. Crim. App. 1985).

While acknowledging that there is authority to the contrary, Appellant urges this Court to hold that requesting a defendant to consent to a Fourth Amendment search is interrogation covered by Edwards, citing United States v. Yan, 704 F. Supp. 1207, 1211-1212 (S.D. N.Y. 1989). I.B. at 15-16. Appellant's reliance upon Yan is misguided, however, as the court there expanded the meaning of interrogation to encompass any communication, irrespective of whether it seeks an incriminating

response or not. See Yan, 704 F. Supp. at 1212 ("Once a suspect expresses a desire for counsel, explicit or equivocal, all questioning should cease, including questions about a consent search."). This proposition has subsequently been rejected by the United States Supreme Court in respect to when an accused equivocally invokes his right to counsel. Davis v. United States, 512 U.S. 452 (1994). In Davis, the Supreme Court made it abundantly clear that upon an equivocal invocation of the right to counsel, Edwards does not mandate that law enforcement need cease questioning the suspect. Davis, 512 U.S. at 459-462. Further, while the court in Yan believed that a request to conduct a search "is an area where an accused would be well advised 'to deal with the police only through counsel,'" Id., 704 F. Supp. at 1211, the United States Supreme Court in Schneckloth rejected such a proposition in concluding that consent to search need not be the result of a waiver consistent with the more exacting standard set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Schneckloth, 412 U.S. at 246-247. And finally, one of the two cases relied upon in Yan, 704 F. Supp. at 1210-1212, no longer is controlling authority on the issue. Compare McClellan, 165 F.3d at 544-545 with United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988).

In considering the scope of the privilege against self-incrimination, this Court has recognized that

> [t]he constitutional privilege against self-incrimination in history and

> principle seems to relate to protecting the accused from the process of extracting from his own lips against his will an admission of guilt. In the better-reasoned cases it does not extend to the exclusion of evidence of his body or of his mental condition as evidence when such evidence is relevant and material, even when such evidence is obtained by compulsion.

Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970), cert. denied, 401 U.S. 974 (1971). Thus Yan conflicts not only with the majority of courts holding that a request for consent does not seek an incriminating response, but also contravenes this Court's interpretation of what would constitute interrogation under the Fifth Amendment. On the other hand, the majority view is consistent with this Court's recognition that prophylactic rules protecting the privilege against self-incrimination are limited to the prohibition of such conduct that would reasonably lead to an incriminating response upon invocation of the Fifth Amendment right to counsel.

Nor does the fact that Deputy Murphy planned on speaking with Appellant in regard to the Alabama cases after he had invoked his right to counsel require suppression of the physical evidence. As the trial court found and as amply supported by the record, Deputy Murphy did not subject Everett to interrogation prior to seeking his consent to obtain blood and saliva samples. Thus Arizona v. Roberson, 486 U.S. 675 (1988), applying Edwards to police-initiated interrogation of crimes other than that for which the accused had originally invoked his right to counsel, is inapposite.

In addition, Appellant contends that "Edwards requires the police to do more than give a defendant an opportunity to talk to a lawyer. They must make one available to him." I.B. at 20. To the contrary,

> the "right" to counsel to protect the Fifth Amendment right against self-incrimination is not absolute; that is, "if authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Roberson, 486 U.S. at 686 n.6.

Based upon the foregoing, the real issue that Everett raises is whether his consent to search was voluntary (a Fourth Amendment issue), Ohio v. Robinette, 519 U.S. 33, 39-40 (1996), rather than one of self-incrimination (a Fifth Amendment issue). Appellant has never suggested that his consent to giving a blood sample and other physical evidence was involuntary under the Fourth Amendment (compare R. I:31-32), and the issue is not raised on appeal.[11]

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[11]Nor does the record support any such conclusion. That is, while Everett was in custody, he was neither coerced nor compelled in any way to give consent, and did not do so in submission to a claim of lawful authority. Schneckloth, 412 U.S. at 233-234. An individual lawfully in custody may validly consent to a search. Compare Florida v. Royer, 460 U.S. 491, 507 (1983) (because there did not exist probable cause to arrest, the subject was illegally detained, thereby rendering his consent to search involuntary); but see State v. McClamrock, 295 So. 2d 715, 718 (Fla. 3rd DCA 1974) (holding that upon invocation of right to counsel, defendant cannot voluntarily

Appellant's invocation of his right to counsel did not prohibit the police from seeking his consent to obtain physical evidence from his person. To uphold Everett's position that "[i]t does not matter why [law enforcement] wanted to talk with the defendant," I.B. at 19, and that the police could not, following an invocation of the right to counsel, "talk with him on purely administrative matters such as are necessary when booking him into jail, which may require him to give his name, address, birth date, and other such biographical information," is contrary to a proposition that Appellant himself rejects. I.B. at 13 n.2. Thus Appellant's position is internally inconsistent and does not withstand scrutiny. Applying the proper analysis, Everett's consent was voluntary under the totality of the circumstances. The trial court did not error in denying the motion to suppress.

C. Admissibility of the November 27, 2001 Statement

In seeking to suppress each of Everett's statements made to law enforcement, the defense filed a "Motion To Suppress Admissions Illegally Obtained." (R. I-33-37). Relying upon Edwards, Everett had argued that

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consent to a search); Smith v. State, 344 So. 2d 867, 868 (Fla. 4th DCA 1977) (Anstead, J., dissenting) (same, citing McClamrock). Because McClamrock was decided prior to the Supreme Court's decision in Innis specifically defining "interrogation," McClamrock is not persuasive.

> the Panama City Beach investigators subverted the Defendant's request for counsel by requesting Investigator Murphy, who had a 'rapport' with the Defendant, to approach him with a request for biological samples. By doing so, the investigators purposely reinitiated contact with the Defendant with the expectation that they would obtain incriminating evidence against him.

(R. I-36). At trial, only Appellant's statement given on November 27, 2001 was admitted into evidence, as State's Exhibit 18 (R. VII-151).

Contrary to Appellant's belief, Edwards does not preclude all contact with an accused that has invoked his right to counsel. Rather, Edwards prohibits police-initiated interrogation following an unequivocal invocation of the right to counsel. Id., 451 U.S. at 485-486; Davis, 512 U.S. at 462. Here, as found by the trial court and well-supported in the record, Everett requested further communications with law enforcement regarding the Panama City Beach case.

First, the admissibility of the November 19, 2001 statement is not at issue, as the statement was not offered and admitted into evidence (Compare R.VII-3 and R. I-Index, at 10). In any event, the trial court properly denied the suppression motion in relation thereto. On November 19, after being asked to consent to providing blood and saliva samples -- which was not testimonial, did not seek an incriminating response requiring the presence of counsel as a matter of law, supra, at 28-35, and for which Everett made no showing that the request for consent was in fact designed to obtain

an incriminating response -- Appellant asked Deputy Murphy if he would deliver a piece of paper with a name written on it to Sgt. Tilley of the PCBPD (S.R. I-22). At that time Deputy Murphy told Appellant he would do so but that "he would first read Everett his Miranda Rights." (S.R. I-22). After Deputy Murphy responded to Everett's request to make a statement off the record by advising him "that any information he gave would be on the record and recorded," Appellant said he would make a statement to Deputy Murphy or to Sgt. Tilley (S.R. I-22). Similarly, on November 27, 2001, Sgt. Tilley contacted Deputy Murphy to let him know he had a warrant to present to Appellant and asked if he could use the interview room. When Deputy Murphy told Appellant that Sgt. Tilley was coming to Baldwin County, Everett asked to speak with Sgt. Tilley (S.R. I-23; S.R. II-77-78). Deputy Murphy advised Sgt. Tilley of Appellant's desire to talk to him, which Sgt. Tilley asked Everett about (S.R. I-23; S.R. II-77-78). After answering affirmatively, Sgt. Tilley reminded him of his Miranda rights (S.R. I-23).

Because Everett initiated the interrogations, the proper inquiry is whether he was advised of and validly waived his Miranda rights and voluntarily made the statements to law enforcement. Appellant, however, does not challenge the voluntariness of his

confession and the validity of his waiver of Miranda rights on appeal. See I.B. at 22.[12]

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[12]Even if the Court were to consider the issues of the voluntariness of the Everett's November 27, 2001 confession and whether he knowingly and intelligently waived his Miranda rights, Appellant is not entitled to relief. In considering these issues, the Court looks at the totality of the circumstances. Lukehart v. State, 776 So. 2d 906, 917 (Fla. 2000), cert. denied, 533 U.S. 934 (2001) (citing Jennings v. State, 718 So. 2d 144, 150 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999)).

> Whether the rights were validly waived must be ascertained from two separate inquiries:
>
> > First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.
>
> Id.

Here, Everett had been advised fully of his Miranda rights on November 14, 2001 and waived same (State's Exhibit 22), made a statement that made no mention of the murder and then invoked his right to counsel when confronted by police with the improbability of his statement (S.R. I-1-8), was again fully advised of his Miranda rights on November 19, 2001 after he requested to speak with either Deputy Murphy or Sgt. Tilley (S.R. II-9), but then invoked his right to counsel after giving a statement that he had consensual sex with the victim and that a guy named Bubba came in the house and beat the victim (S.R. II-14-21).

Accordingly, the record reflects that Appellant's decision to speak to Sgt. Tilley on November 27, 2001 was a deliberate, voluntary choice with knowledge of the rights

C. Harmless Error

Lastly, even if the Court were to determine that admission of the November 27th statement violated Appellant's Fifth Amendment right to counsel, he nonetheless would not be entitled to relief. "The erroneous admission of statements obtained in violation of *Miranda* rights is subject to harmless error analysis. . . . Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict." Mansfield v. State, 758 So.2d 636, 644 (Fla. 2000), cert. denied, 532 U.S. 998 (2001) (internal citation and quotation marks omitted).

Here, a wooden club that Appellant was videotaped purchasing was found near the victim's residence, the club tested positive for the presumptive presence of blood, and DNA and other physical evidence established that Appellant raped the victim. Accordingly, there is no reasonable possibility that admission of the statement affected the verdict. Almeida v. State, 748 So.2d 922, 932 (Fla. 1999) (citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)), cert. denied, 528 U.S. 1181 (2000).

For the foregoing reasons, Issue I should be denied.

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being given up and the consequences thereof. The trial court did not err in admitting the statement.

II.

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE STATE EXPERT'S DNA PROFILE POPULATION FREQUENCY TESTIMONY.

Everett contends that the trial court erred in permitting a State witness to testify regarding the population frequency for the resulting DNA profile obtained. Specifically, Appellant argues on appeal that "[t]he State never presented any evidence that she [the expert] was qualified in using the statistical analysis necessary to estimate the frequency of the profile in the population." I.B. at 24-25.

At trial, Jacqueline Benefield, a DNA analyst with FDLE testified that she had "approximately seven years of analytical chemistry experience" (R. VIII-179), had "attended short courses and conferences in the teaching of population genetics and statistics" (R. VIII-180), and had testified in four prior trials as an expert in the area of forensic serology and DNA analysis (R. VIII-179-180). Regarding Benefield's testimony on the frequency issue, the following colloquy occurred:

> Q (Mr. Meadows [prosecutor] continuing) Now, in determining the frequency of occurrence that you have a genetic profile found within the population, what methods do you use to do that?
>
> A [by Jacqueline Benefield] I use what is called the products rule. And that's how I calculated those numbers.
>
> Q Is there an established procedure that you go through in determining frequency of occurrence?

A Yes.

Q And is there a governing body here in the United States that determines what those standard procedures are?

A Yes.

Q What is that?

A NRC. National Research Council.

Q Who are they?

A It's a governing body that's made up of people in academics as well as people in the private industry. It's a way for them to determine procedures and practices that should be used by the people performing DNA analysis.

Q Is the FBI involved in this?

A Yes, they are.

Q What is their -- FBI data base, is that what your --

A The FBI data base is the data base that I use in order to calculate the frequencies. They follow the same rules that FDLE does in calculating these frequencies.

Q And this is the method that's generally accepted throughout the world in determining the frequencies of the genetic profile?

A Yes.

Q Now, what were your conclusions based upon the genetic profile that you found of Paul Glen Everett, of using the product rule and following the appropriate procedures, of the frequency of that occurrence?

MR. SMITH: Same objections, Judge.

THE COURT: And I'll overrule that objection. You may proceed.

A (By the witness) The frequency occurrence of this profile for unrelated individuals in the following population is one in 15.1 quadrillion of the Caucasian population.

Q (Mr. Meadows continuing) Let's go slow here. All right. In white, one in -- it would be how many zeros following this 15?

A There's going to be five sets of -- 15.

Q (Marking on large sheet of paper) Okay. What about in the black population?

A In the African-American population it would be one in 1.01 quintillion.

Q (Marking on large sheet) Okay. How many sets of zeros we going to have here?

A Six sets.

Q And Hispanic?

A One in 11.2 quadrillion of the Hispanic population.

Q Now, what is the protocol within the Florida Department of Law Enforcement Crime Laboratory regarding confirming your findings?

A Once a report is written a case file is put together, my entire case file is reviewed by a second analyst, this is called a technical review. They'll go through the entire case to determine whether they come up with the same conclusions and data that I have come up with. And then a third analyst will review the case file for administrative review.

Q Has that been done in this case?

A Yes.

Q Is that done in every case for every analyst before those results are reported out by Florida Department of Law Enforcement?

A Yes.

Q Now, when you talked about those individuals whose genetic profile did not match, does that completely, when you said excludes, that says beyond any question in scientific analysis, they could not have left the DNA that you found on those items that you tested?

A Correct.

* * * * *

(R. VIII-188-191). The defense previously stipulated that Benefield was an expert "in the area of doing DNA analysis, but not in terms of giving a population profile." (R. VIII-180).

Thus contrary to Appellant's assertion that the State's expert had "only a pedestrian knowledge of how to use that knowledge to determine how rare or frequent it would likely show up in some population," I.B. at 26, Benefield did not lack the requisite knowledge to testify as to the meaning of the DNA results. Benefield testified that she used the product rule to calculate the resulting frequencies, that there was an established procedure governed by the National Research Council which is generally accepted, and that she used the FBI database, which follows the same rules that FDLE

does in calculating population frequencies. The expert need not be a statistician herself to testify as to the statistical results. Darling v. State, 808 So. 2d 145, 158 (Fla.) (citing Murray v. State, 692 So. 2d 157, 164 (Fla. 1997)), cert. denied, 537 U.S. 848 (2002). Rather, as this Court has previously recognized, "[s]everal Florida cases, as well as cases from other jurisdictions, have accepted use of the product rule." Butler v. State, 842 So. 2d 817, 829 (Fla. 2003). Accordingly, witness Benefield was qualified to testify as an expert on the frequency issue "because her testimony was based on proven scientific principles." Id.

Even if the trial court should not have admitted Benefield's testimony as to the frequency in which the DNA profile was found in the population, any such error was harmless beyond a reasonable doubt. While Appellant argues that the testimony was "a crucial part of the State's case," I.B. at 27, he ignores the overwhelming evidence of guilt -- including the existence of the properly admitted statement to law enforcement, see supra, at 35-37, wherein Everett specifically admitted to having sexual intercourse with the victim (R. VII-156-157), in addition to the wooden club found near the victim's house that was traced back to Appellant, which tested positive for the presumptive presence of blood. "Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict." Mansfield, 758 So. 2d at 644 (internal citation and quotation marks omitted). Thus in light of the

overwhelming evidence of Appellant's guilt, any error in the admission of the population frequency testimony was harmless. Nelson v. State, 748 So. 2d 237, 242 (Fla. 1999) (admission of DNA population frequency testimony, without establishing source for calculation was generally accepted, deemed harmless error), cert. denied, 528 U.S. 1123 (2000).

III.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER RING v. ARIZONA, 536 U.S. 584 (2002).

Appellant contends that "this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme." I.B. at 29. Specifically, Everett argues that Ring is "an 'intervening development in the law' that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision." I.B. at 31.

Before the trial court, Appellant argued that Florida's death penalty scheme was unconstitutional under Ring on the basis that it was "functionally identical to Arizona's"; that aggravating circumstances "must be plead and proven to the jury"; and that "each aggravating factor [is] to be proven separately." (R. I-54-55) (underlined emphasis in original). To the extent that Appellant invites this Court to consider additional bases not raised in the trial court to hold Florida's death penalty scheme unconstitutional under Ring -- e.g., the effect of the existence of a prior violent felony, the lack of unanimous jury recommendations, and the lack of specific verdicts -- such arguments are procedurally barred. Cf. Turner v. Crosby, 339 F.3d 1247, 1280 (11th Cir. 2003) (Ring claim must properly be raised in state court).

As to his preserved arguments, Everett ignores the fact that the United States Supreme Court did not, in Ring or otherwise, overrule its extensive precedent upholding the validity of Florida's death penalty statutory scheme. That court has specifically directed lower courts to "'leav[e] to this Court the prerogative of overruling its own decisions.'" Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). Accordingly, Everett's reliance upon Ring must be considered in respect to the following: Ring's narrow holding -- i.e., that a judge cannot, sitting alone, find the aggravating circumstance necessary for imposition of the death penalty, id. 122 S.Ct. at 2443 -- that death is the maximum penalty under Florida's capital murder statute, Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 536 U.S. 962 (2002), and those cases upholding Florida's death penalty.

While Appellant invites the Court to reconsider Bottoson and King, he fails to acknowledge that the Court has subsequently, on numerous occasions, upheld the rejection of Ring to invalidate Florida's death penalty scheme. See, e.g., Owen v. State, ___ So. 2d ___, 28 Fla. L. Weekly S790, S795 (Fla. Oct. 23, 2003); Anderson v. State, ___ So. 2d ___, 28 Fla. L. Weekly S731, S736 (Fla. Sept. 25, 2003); Jones v. State, 2003 Fla. LEXIS 1532 *15 (Fla. Sept. 11, 2003); Rivera v. State, ___ So. 2d

___, 28 Fla. L. Weekly S704, S707-708 (Fla. Sept. 11, 2003) (citing cases); McCoy v. State, 853 So. 2d 396, 409 (Fla. 2003).

And even if Appellant's newly raised arguments were reviewable, neither Ring nor Apprendi v. New Jersey, 530 U.S. 466 (2000) -- which established the rule that the Supreme Court extended to capital sentencing in Ring -- provide a basis for relief.

First, Appellant was convicted of the contemporaneous felonies of Burglary with a Battery and Sexual Battery Involving Serious Physical Force (R. I-152; R. VIII-329), which qualify as aggravating circumstances under § 921.141(5)(d). Relief is therefore not warranted. Grim v. State, 841 So. 2d 455, 465 (Fla.), cert. denied, ___ S.Ct. ___ (Oct. 6, 2003); Lugo v. State, 845 So. 2d 74, 119 (Fla.) (Pariente, J., concurring), cert. denied, ___ S.Ct. ___ (Oct. 6, 2003). Secondly, the jury unanimously recommended death (R. IV-516-517). As to Appellant's claim that "we can have no confidence they unanimously found the same ones [aggravating factors] as the trial court," I.B. at 39 (emphasis in original), that simply is not the case with the contemporaneous felony convictions. Moreover, specific verdict forms are not constitutionally required. As the United States Supreme Court stated in Jones v. United States, 526 U.S. 227 (1999), "[i]n *Hildwin [v. Florida*, 490 U.S. 638 (1989)], a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that

at least one aggravating factor has been proved." Jones, 526 U.S. at 250-251. In Ring, the United States Supreme Court did not overrule Jones or Hildwin v. Florida, 490 U.S. 638 (1989). In addition, the presentment issue was expressly not addressed in Ring, 122 S.Ct. at 2437, and this Court has previously rejected such a contention. Banks v. State, 842 So. 2d 788, 793 (Fla. 2003) (rejecting argument that Apprendi, in light of Ring, requires that aggravating circumstances be charged in the indictment). Appellant fails to present any new basis for reconsideration of those decisions applying Ring.

Based upon the foregoing, Issue III is without merit and should be denied.

IV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE OF TRIAL.

Under Issue IV, while acknowledging that this Court has repeatedly upheld the standard jury instruction pertaining to the jury's role in sentencing under Caldwell v. Mississippi, 472 U.S. 320 (1985), I.B. at 40-41, Appellant "asks this Court to reconsider its rulings in those cases in light of Justices Lewis's and Pariente's concurring opinions in Bottoson v. Moore, 833 So. 2d 693, 731-34 (Fla. 2003)." I.B. at 41.

This Court has previously addressed the applicable standard upon a claim that the trial court improperly instructed the jury: "[A] trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. *Kearse v. State*, 662 So. 2d 677, 682 (Fla.1995)." Carpenter v. State, 785 So. 2d 1182, 1199-1200 (Fla. 2001).

Following closing arguments by the parties, the trial court instructed the jury (R. IV-509-513) as mandated by the Florida Standard Jury Instructions. Repeatedly this Court has held that the Florida Standard Jury Instructions comply with Caldwell. See, e.g., Floyd v. State, 850 So. 2d 383, 404 (Fla. 2002) (citing cases); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) (citing cases), cert. denied, 526 U.S. 1102 (1999);

Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) (citing cases), cert. denied, 522 U.S. 1121 (1998). "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury under local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). Appellant fails to make any such showing here. Instead, the instructions properly informed the jury of its role under Florida law, and thus Everett's claim of a Caldwell violation is without merit. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("The infirmity identified in Caldwell is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process.").

Appellant's attempt to create a constitutional right beyond that enumerated in Ring v. Arizona is unavailing, as the only issue before the United States Supreme Court in Ring was "whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,[ ] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.[ ]" Ring, 122 S.Ct. at 2437 (internal footnotes omitted). Ring did not overrule United States Supreme Court precedent holding that jury sentencing is not constitutionally required. See Proffitt v. Florida, 428 U.S. 242, 252 (1976). Rather, Ring simply held that "capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an

increase in their maximum punishment," id., 122 S.Ct. at 2432; see also id. at 2437 n.4 ("Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.").

Moreover, Everett misstates the record, asserting that the judge "never told them that it had to give 'great weight' to their decision . . . ." I.B. at 42. To the contrary, consistent with the trial court's statement to the attorneys during the penalty phase charge conference, the judge added the following language to the preliminary instruction: "Your advisory sentence will be given great weight by this Court in determining what sentence should be imposed in this case. It is only under rare circumstances that this Court could impose a sentence other than what you recommend." (R. IV-462; see R. IV-452). The preliminary penalty phase instruction including that language was read to the jury at the beginning of the penalty phase (R. IV-452). At the conclusion of the penalty phase, prior to reading the remaining instructions, the court provided the jury with a written copy of all the penalty phase instructions that included the "great weight" language, and specifically told the jury that the preliminary instructions were in the written copy (R. IV-509).

Finally, because the jury returned an unanimous verdict, any concerns regarding the language that the advisory sentence need not be unanimous, cited by Appellant, I.B. at 42, is a red-herring.

Based upon the foregoing, Appellant has failed to establish that he is entitled to relief under Issue IV and thus it should be denied accordingly.

V.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY UPON, AND FOUND THE AGGRAVATING CIRCUMSTANCE THAT EVERETT COMMITTED THE MURDER WHILE HE HAD BEEN PREVIOUSLY CONVICTED OF A FELONY AND WAS UNDER SENTENCE OF IMPRISONMENT.

Acknowledging that he is making a "novel argument," I.B. at 44, Appellant contends that it was error for the trial court to instruct the jury upon and find the aggravating circumstance that he was under a sentence of imprisonment, on the basis that "the State presented no evidence beyond Everett's status of being under sentence of imprisonment to link that aggravator to the facts of this case, and without more evidence to show his increased moral culpability, it is insufficient to establish that aggravator." I.B. at 44.

Appellant's claim, as now raised, is not subject to appellate review. "For an issue to be preserved for appeal . . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). Further, Rule 3.390(d) of the Florida Rules of Criminal Procedure provides in pertinent part that "[n]o party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, *stating distinctly*

the matter to which the party objects and the grounds of the objection. . . ." (emphasis added).

Here, Everett failed to object to the instruction on the same basis as is now presented on appeal. At trial, Appellant initially opposed the instruction on the basis that he was not "under a sentence of imprisonment" because he had not yet been incarcerated on the conviction (R. VIII-345-347), but subsequently conceded that "I think you can make an argument he was under sentence of imprisonment . . . .", limiting his objection to the instruction to the extent it alternatively stated that Everett was on probation (R. IV-454-455). At no time before the trial court did Appellant object to the instruction because the State had failed to link the sentence of imprisonment to the instant offense. Everett now acknowledges his procedural default, I.B. at 44 n.9, but simply encourages the Court to ignore it. That is, he makes no showing that he could not have raised the claim before the trial court. Compare Carpenter, 785 So. 2d at 1199 ("It is clear that defense counsel satisfied the requirements of Florida Rule of Criminal Procedure 3.390(d) . . . by objecting during the charge conference and *specifically advising the trial court of the basis for the objection*.") (emphasis added; internal footnote omitted); Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla. 1983) (objection to principal instruction preserved for appellate review where "trial counsel specifically requested that the instruction which

the trial court intended to give include 'requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word or do an act toward the commission or toward the incitement ... [of the crime].'"), cert. denied, 464 U.S. 956 (1983). Appellant's newly developed "novel" argument should, accordingly, be summarily rejected.

Even if the issue is reviewable, Appellant is not entitled to relief.

This Court has previously addressed the applicable standard of review regarding a claim that the trial court improperly instructed the jury: "[A] trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. *Kearse v. State,* 662 So. 2d 677, 682 (Fla.1995)." Carpenter, 785 So. 2d at 1199-1200. Concerning the trial court's order finding the aggravating circumstance, this Court limits its "review to ensuring that the trial court applied the correct rule of law and, if so, that there is competent, substantial evidence to support its findings." Caballero v. State, 851 So. 2d 655, 661 (Fla. 2003).

"The 'under sentence of imprisonment' aggravating circumstance exists when 'the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.' § 921.141(5)(a), Fla. Stat. (1999)." Taylor v. State, 855 So. 2d 1, __,

2003 Fla. LEXIS 926 *61 (Fla. 2003).

Here, the evidence established the following: At the time of the murder on November 2, 2001, Appellant had previously been convicted on September 8, 1999 of one count of second degree possession of a forged instrument in Alabama, a felony, and had been sentenced to a suspended term of ten years imprisonment and placed on probation. State's Exhibit 26. Everett was subsequently convicted on February 8, 2001 on a DUI charge and his probation was revoked. State's Exhibit 25, at p.5 (Appeal Bond). While Appellant remained at large on an appeal bond as to both charges, id., his judgment of conviction was affirmed on October 5, 2001. State's Exhibit 25, at p.3 (Conviction Report, prepared 11/16/01). Pursuant to Alabama law, Appellant's sentence began fifteen days later, or on October 20, 2001. See State's Exhibit 25, at p.5 (Appeal Bond); see also § 12-22-244, Ala. Code. Thus at the time of the murder, Everett was "under a sentence of imprisonment." Taylor, 855 So. 2d at __, 2003 Fla. LEXIS 926 *61-62 (the "under a sentence of imprisonment" aggravator applies to a defendant "who should have been incarcerated at the time he committed murder.") (citing Gunsby v. State, 574 So. 2d 1085, 1090 (Fla.), cert. denied, 502 U.S. 843 (1991)). Accordingly, because the trial court applied the correct rule of law and that there was substantial, competent evidence to support the aggravating circumstance, no error occurred.

Appellant's reliance upon and analogy to the age mitigating factor is misplaced. Unlike his "everyone has an age" argument, I.B. at 45, not every defendant convicted of capital murder is "under a sentence of imprisonment" at the time the murder occurs. To the contrary, only those murderers that kill while in prison, or following an escape or improper release, would be subject to application of the aggravating circumstance. Thus the aggravator is not analogous to the age mitigator.

Nor is Everett's reliance upon the avoid lawful arrest aggravator persuasive. Because any killing could arguably be to avoid lawful arrest, this Court has held that

> [t]he aggravator of killing with the intent to avoid lawful arrest applies to witness elimination. . . . In such cases, the mere fact of a death is not enough to invoke this factor . . . . Proof of the requisite intent to avoid arrest and detection must be very strong . . . . The evidence must prove that the *sole or dominant motive* for the killing was to eliminate a witness.

Trease v. State, 768 So. 2d 1050, 1055-1056 (Fla. 2000) (internal citations; quotation marks omitted; emphasis added). As previously discussed, the aggravator of under a sentence of imprisonment does not, theoretically or factually, apply to every murderer. Thus, again, Appellant's argument is without merit.

Finally, even if the Court were to determine that the "under sentence of imprisonment" aggravator was somehow improper under the circumstances, Appellant is not automatically entitled to relief. Rather, "[w]here an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is no

reasonable possibility that the error affected the sentence." Anderson v. State, 841 So. 2d 390, 407 (Fla.), cert. denied, ___ S.Ct. ___ (Oct. 14, 2003). In light of the remaining two aggravators, HAC and that the murder was committed while Everett was engaged in the commission of a sexual battery or burglary, and the minimal mitigating evidence, any such error would be harmless and the death sentence would stand. Accord, e.g., Jennings v. State, 782 So. 2d 853, 863 n.9 (Fla. 2001), cert. denied, 534 U.S. 1096 (2002); Zakrzewski v. State, 717 So. 2d 488, 492-493 (Fla. 1998), cert. denied, 525 U.S. 1126 (1999); Geralds v. State, 674 So. 2d 96, 104 (Fla.), cert. denied, 519 U.S. 891 (1996); Reaves v. State, 639 So. 2d 1, 6 (Fla.), cert. denied, 513 U.S. 990 (1994).

Based upon the foregoing, Issue V should be denied.

VI.

THE EVIDENCE SUPPORTS EVERETT'S CONVICTION FOR FIRST DEGREE MURDER.

"This Court has the obligation to independently review the record for sufficiency of the evidence." Taylor, 855 So. 2d at __, 2003 Fla. LEXIS 926 *15. Here, Everett was charged with the first degree premeditated murder, or the felony murder, of Kelli M. Bailey (R. I:5).

The jury was instructed on premeditated first degree murder as follows:

> Before you can find the defendant guilty of First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. Kelli M. Bailey is dead.
>
> 2. The death was caused by the criminal act of Paul Glen Everett.
>
> 3. There was a premeditated killing of Kelli M. Bailey.
>
> An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.
>
> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be

> determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(R. I-81).

The trial court instructed the jury on first degree felony murder as follows:

> Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. Kelli M. Bailey is dead.
>
> 2. The death occurred as a consequence of and while Paul Glen Everett was engaged in the commission of burglary and/or sexual battery.
>
> 3. Paul Glen Everett was the person who actually killed Kelli M. Bailey.
>
> In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.
>
> I will define burglary and sexual battery for you in a few moments.

(R. I-82).

The jury returned a general verdict, indicating that it found "[t]he Defendant is guilty as charged of Murder in the First Degree." (R. I-113). The jury also found Everett guilty of Burglary With A Battery and Sexual Battery Involving Serious Physical Force (R. I-113-114).

"In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla.), cert. denied, 534 U.S. 1048 (2001).

Here, there is sufficient evidence to support the murder conviction as a felony murder, as Everett sexually battered the victim, as well as having committed the felony of burglary. Regarding the sexual assault, Appellant's DNA matched that recovered from the vaginal swaps from victim "at all 13 genetic markers tested" (R. VIII-186) and the frequency of occurrence in the population with that profile "is one in 15.1 quadrillion of the Caucasian population," "one in 1.01 quintillion" in the African-American population, and "[o]ne in 11.2 quadrillion of the Hispanic population." (R. VIII-190). In addition to stating that he left his shirt at the victim's house (R. VII-160-161), Appellant admitted that he entered the victim's house without consent, that he hit the victim, chased her and knocked her down, and had sex with her (R. VII-154, 156). In addition, the medical examiner testified that the vaginal bruising was consistent with nonconsensual intercourse (R.VIII-217). In the course of committing that sexual battery, Appellant broke the victim's neck and she suffocated to death. As for the burglary, Everett admitted that he was not authorized to enter the victim's

house, and that he had done so to steal money (R. VII-153, 154). In the course of committing that burglary, Appellant brutally beat the victim and broke her neck and she suffocated to death. Accordingly, the evidence is sufficient to support the murder conviction. Accord Owen, 28 Fla. L. Weekly at S794 (DNA evidence and defendant's confession established sufficiency of the evidence); Belcher v. State, 851 So. 2d 678, 682 (Fla. 2003) (incriminating physical evidence, as well as eyewitness testimony, placed defendant in the home where the victim's body was found); Crook v. State, 813 So. 2d 68, 69-70, 70 n.1 (Fla. 2002) (while defendant did not admit committing murder, he admitted being present at bar and seeing victim counting money and that the victim's blood was found on defendant's shirt).

Turning to the sufficiency to sustain the conviction as a premeditated murder, the Court has reviewed the issue as follows:

> This Court has recently reiterated the definition of premeditation in *Woods v. State*, 733 So. 2d 980, 985 (Fla. 1999):
>
> > Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.
>
> *Id.*; see also *Buckner v. State*, 714 So. 2d 384, 387 (Fla. 1998) ("Premeditation need only exist for such time as will allow the accused to be conscious of the nature of the act the accused is about to commit

> and the probable result of the act."). Importantly, however, premeditation may be established by circumstantial evidence. See *Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997). A trier of fact may therefore infer premeditation from factors such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." *Id*.

Bradley, 787 So. 2d at 738.

Here, there is sufficient evidence to support the murder as being committed with premeditated design. Appellant entered the victim's house with a wooden club, which tested positive for the presumptive presence of blood. According to Appellant, he chased the victim down after he hit her in the front room (R. VII-155, 156, 160). He brutally beat and sexually assaulted the victim, and identity is not at issue as Appellant's DNA matched the DNA recovered from the vaginal swabbing of the victim (R. VIII-186, 190) and Everett admitted that he left his shirt at the victim's house (R. VII-160-161). And in breaking the victim's neck, Everett would have had to forcefully twist her head, rather than just grab her hair as she was falling (R. VIII-219). Based upon the foregoing,

> [t]he circumstances of the crime, including the physical evidence, the nature of the victim's injuries, and the manner of death, provide a sufficient basis for a jury to conclude that [A]ppellant acted with a purpose to inflict death. That there was no evidence that [A]ppellant had formed a criminal intent in the days or weeks prior to the murder does not preclude the conclusion that the [defendant] formed the necessary

> intent while inside the victim's house on the day of and at the time of the murder.

Blackwood v. State , 777 So. 2d 399, 404 (Fla. 2000), cert. denied, 534 U.S. 884 (2001).

Accordingly, there is sufficient evidence supporting Appellant's conviction for first degree capital murder as either a felony murder or committed with premeditated design.

VII.

EVERETT'S DEATH SENTENCE IS PROPORTIONATE TO THAT IN OTHER CAPITAL CASES.

In performing its proportionality review function, this Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Robinson v. State, 761 So. 2d 269, 276 (Fla. 1999), cert. denied, 529 U.S. 1057 (2000); Nelson, 748 So. 2d at 246. "Proportionality review 'requires a discrete analysis of the facts' . . . entailing a *qualitative* review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998) (emphasis in original; internal citation omitted); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, and the proportionality review function is "not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge." Holland v. State, 773 So. 2d 1065, 1078 (Fla. 2000), cert. denied, 534 U.S. 834 (2001); see also Lawrence v. State, ___ So. 2d ___, 28 Fla. L. Weekly S241, S244 (Fla. Mar. 20, 2003).

Here, as discussed previously, supra, at 56-59, the "under sentence of imprisonment" aggravator was properly found. The trial court also found that

Appellant committed the murder "while he was engaged in the commission of a sexual batter or a burglary." (R. I-154). In addition to the murder conviction, the jury convicted Everett of one count of Burglary With Battery and one count of Sexual Battery Involving Serious Physical Force (R. VIII-329). In finding the aggravating circumstance, the trial court summarized the supporting evidence as follows:

> The evidence establishes the victim was found face down in the bedroom of her home. She was nude from the waist down. The medical examiner testified that there was an abrasion to the victim's vagina consistent with force being used in that area. The defendant's statement confirms he committed a sexual battery upon the victim and that she was conscious when the sexual battery occurred. The nature of the bruises, carpet burns, abrasions on the victim's body and the severe damage to her face establish that force was by the defendant immediately prior to and during the commission of the sexual battery. The evidence also establishes that the defendant entered or remained in the home of the victim with the intent to commit either a theft or a sexual battery. There was no evidence of any forced entry into the victim's home. However, the evidence establishes the victim was getting ready to go to work immediately prior to the defendant entering her home. The lights were on and her car was in the driveway. The defendant was carrying a small wooden club when he entered the victim's home. In the defendant's statement of November 27, 2001 he stated he was going into the victim's home to look for money. He stated the front door was unlocked when he opened it and went in. The defendant did not say he knocked and was invited in by the victim. As noted above, the evidence also establishes that the defendant committed a sexual battery on the victim after he had entered her home without her permission. As noted previously the defendant admitted in his statement of November 27, 2001 to having sexual intercourse with the victim prior to her death and that the victim did not consent to the sexual intercourse.

(R. I-154-155). Lastly, the trial court found that the murder was especially heinous,

atrocious or cruel:

> The evidence establishes that the victim was initially attacked by the defendant while the victim was in the living room of her house. The location of the victim's blood in front of the coffee table in the living room, together with the facts given by the defendant in his statement, establish the first blow to the victim occurred at that location. The victim suffered severe damage to her face including a fractured nose, swollen eyelids and abrasions to her forehead. There were lacerations in the victim's mouth including a tear to the right side of her lip that went through her lip. These injuries to the victim occurred prior to her death. The victim's body was found face down near the doorway to her bedroom. She was nude from the waist down. Although her head was face down facing to her right side, one of her teeth was lying to the left side of her face. This appears consistent with the tooth coming out before the victim's face hit the floor. There were abrasions and scrapings on the victim's arm, right elbow, left elbow and middle of her back consistent with being carpet burns. These occurred prior to the victim's death. The floor in the livingroom and bedroom was carpeted. There was no physical evidence at the scene to indicate the victim was dragged by the defendant from the point of the initial blow to the point where her body was found. Indeed, the physical evidence, including the blood splatters at various locations in the bedroom, supports the finding that the victim was trying to flee from the defendant after the initial blow was delivered and the victim was caught by the defendant at, or very near, the point her body was found. The medical examiner's testimony establishes that the victim's neck was broken in the C-5 area and the victim died of strangulation because her diaphragm muscles were paralyzed and she could not breathe. The testimony establishes that this damage to the victim's neck was consistent with someone pulling back on the victim's hair and severely twisting the victim's neck in the process. The medical examiner opined that there needed to be more force used to accomplish the damage done to the victim's neck than someone merely reaching out and catching the victim as she was falling to the ground. The presence of blood splatters at locations away from the location of the victim's body indicate there were blows inflicted upon the victim by the defendant at the doorway prior to her body ending up

on the floor. From this physical evidence it is logical to assume that the defendant delivered blows to the victim in the doorway to her bedroom sufficient to knock her to the floor. The presence of the carpet burns and the abrasions to the elbows and the victim's back are consistent with finding that this sexual battery occurred prior to the victim's death. According to the defendant's statement of November 27, 2001, the sexual battery occurred in the bedroom area. The defendant also stated the victim was not unconscious during the sexual battery. In light of the medical examiner's testimony that the victim would not lose consciousness for several minutes prior to death, these facts make it clear that the sexual battery did occur prior to the victim's death. At this point, after the sexual battery had occurred, and the victim was then either lying face down or had gotten up and was again trying to flee, the defendant could then pull back on the victim's neck with sufficient force to break the victim's neck and cause the fatal injury. The medical examiner testified it could take up to a minute for this twisting process to take place. During this period of time the victim was conscious and aware of what was happening to her.

This was not an instantaneous death. The medical examiner's testimony establishes that the victim would not lose consciousness for several minutes after her neck was broken. During this period of time, the victim's ability to move parts of her body was limited to possibly a partial movement of her shoulder and a partial movement of her head. The remaining portions of her body and her muscle structure were paralyzed. The medical examiner further testified that because there was no bleeding or bruising on the victim's brain, it was <u>not</u> (emphasis supplied) likely the victim was unconscious from any blows to her face or body prior to her neck being broken. Because of her paralysis and her diaphragm muscles not functioning, she could not breathe and she could only lay there, knowing she had been severely beaten and sexually battered, and unable to call for help as she suffocated to death.

The facts also do not support a finding that the defendant killed the victim because she surprised him in her home when he walked in to take money from her purse. Indeed, the facts establish the defendant armed himself with a wooden club prior to going to the victim's home.

> Contrary to the defendant's statement that the lights were off, the evidence also establishes the victim's lights were on in her house and her car was in her driveway at the front entrance to her house. This would mean the defendant knew or should have known that the victim was still inside her home at the time he entered with the wooden club. The evidence also establishes there was no sign of forced entry into the victim's home and, from the positioning of the victim's purse and its contents, it does not appear the defendant was rummaging through the purse prior to the defendant encountering the victim and delivering the first blow. In addition, the details given by the defendant in his statement of November 27, 2001 as to the layout of the victim's home, furniture, purse, etcetera, do not support the defendant's claim he was acting under the influence of a hallucinogenic type of drug at the time he assaulted the victim and was not aware of what he was doing.
>
> All of these factors support a finding that this killing indicates a consciousless and pitiless regard for the victim's life by this defendant and his homicide was especially heinous, atrocious or cruel.

(R. I-155-158) (underlined emphasis in original).

Of the mitigating circumstances, the trial court gave little or very little weight to them, including the age of the defendant, that defendant was under the influence of a substance, no significant history of prior criminal activity, family background, drug use, defendant's remorse, defendant's good conduct while in custody, the alternative punishment is life imprisonment without parole, and that defendant confessed (R. I-158-164).

The death sentence is proportionate. Accord Johnston v. State, 841 So. 2d 349, 361 (Fla. 2002) (aggravators included that the defendant was previously convicted

of violent felonies, the crime was committed while defendant was engaged in the commission of sexual battery and a kidnapping, it was committed for pecuniary gain, and it was especially heinous, atrocious, or cruel; moderate weight was given to one statutory mitigator and slight weight accorded nonstatutory mitigation); Barnhill v. State, 834 So. 2d 836, 854 (Fla. 2002) (aggravators included murder committed while defendant was under a sentence of imprisonment, murder committed in the commission of a robbery or burglary, CCP, and HAC; little weight was given to the statutory mitigator of defendant's age and little weight given to nonstatutory mitigation), cert. denied, 123 S.Ct. 2281 (2003); Mansfield, 758 So. 2d at 647 (aggravators included HAC and murder committed during the commission of or an attempt to commit a sexual battery; no statutory mitigation was found and little or very little weight given to nonstatutory mitigators).

Based upon the foregoing, Everett's sentence of death should be affirmed as death is the proper sentence in this case.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of November, 2003, to:

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

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