IN THE SUPREME COURT OF FLORIDA

PAUL GLENN EVERETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC08-1636

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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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Everett." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

"IAC" indicates "ineffective assistance of counsel."

The following references will be used:

"IB"	In this appeal, the Initial Brief that was dated as served by mail April 6, 2009;
"R"	The eight-volume record of the direct appeal;
"R-Supp"	The three-volume supplemental record of the direct appeal;
"PCR"	The 17-volume postconviction record;
"SE";"DE"	State's Exhibit and Defense Exhibit, respectively; preceded with "PC-" for postconviction exhibits.

When applicable, volume numbers as designated by the Circuit Court, and page numbers follow the foregoing symbols.

The State defers to Appellant's designation of the issues, although rather unconventional, as "B" through "I."

Unless the contrary is indicated, **bold-typeface** emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case History & Event Timeline.

On **November 2, 2001**, 31-year-old Kelli Bailey (R/VII 29) was sexually battered and murdered in her home (See, e.g., R/VII 31, 34-36; R/VIII 186-90, 207-218).

November 14, 2001, at the Baldwin County Jail, Alabama, Sergeant Rodney Tilley interviewed Everett. (R-Suppl/I 1-8) The officer Mirandized Everett, who agreed to talk to the officer. (R-Suppl/I 1) Everett discussed drugs, his appeal bond for forgery, (R-Suppl/I 1-3) a billy club he purchased (R-Supp/ I 3-5) and discarding his only pair of shoes because they had blood on them (R-Supp/I 5-7). When the officer indicated disbelief in Everett's story, Everett requested an attorney. (R-Supp/I 8)

November 19, 2001, investigator Murphy made contact with Everett to request Everett's consent for blood and saliva samples for DNA analysis. Everett said he wanted to "point [the Panama City Police Dept.] in the right direction." Everett started talking about this case and wanted to speak with Alabama Detective Murphy "off the record." Murphy said that he couldn't speak with Everett "off the record" and Mirandized Everett. Everett's demeanor was very calm. (R/VII 117-20); R-Supp/I 9, 22[1]; PCR/XVII 3580-82) At the beginning of the taped interview, Murphy also indicated that Everett initiated the contact with him (Murphy). (R-Supp/I 9) Sergeant Tilley arrived towards the beginning of the interview. (R-Supp/I 10)

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[1] The direct appeal record at R-Suppl/I 22 contains only page 1 of Murphy's report of the November 19, 2001, interview, but the postconviction record at PCR/XVII 3580-82) appears to contain that entire report.

Everett talked about drugs and said that "Bubba" was beating up "Angel," "Bubba's" girlfriend, after Everett had sex with her while Bubba was gone for a little while. Everett said he left the house. (R-Supp 14-17) Everett said that while he was running away from the victim's house, he "lost grip of" a "little fish billy" club, which he said he got because he had been robbed. (R-Supp/I 20) Everett said he had not been able to sleep and wanted to get this "off my chest." (R-Supp/I 18) After discussing the sex and billy club again, Everett again asked for an attorney and mentioned something about pointing the police in the "right direction." (R-Supp/I 20-21)

November 26, 2001, a warrant was issued for Everett's arrest on this murder. (R/I 3-4)[2]

November 27, 2001, Sergeant Tilley served the arrest warrant on Everett at the Baldwin County Correctional Facility. Everett indicated that he wanted to talk without an attorney present. Everett tried to speak before Sergeant Tilley could "get the recorder on" and Tilley "had to stop him." The officer indicated to Everett that he could stop at any time, that Everett still has his rights, but confirmed with Everett that he wants to talk about the case. (R-Supp/I 23; R/VII 120-21, 124-25, 149-50[3]) Everett said that he "ate some acid" and "went looking for pretty much basically

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[2] Volume I of the postconviction record appears to contain the same documents and pagination as Volume I of the direct-appeal record.

[3] An audiotape of Everett's statement was played for the jury (at R/VII 151 et seq), and the trial transcript also reflects the content of Everett's statement to Tilley.

some money." He said he went in the house, took some money, a lady came out of the bedroom, and the "tussle[d]", and he hit her with his fist. (R-Supp/I 24, 28) Everett described additional details concerning the money he took, the house, the furniture, the car in the driveway, the victim's reaction to Everett, and his clothing. He said he had vaginal and anal sex with the victim while she was conscious. He said he grabbed her by the hair as she ran towards her bedroom, and it was "possib[le]" that he twisted her head too much. (R-Supp/I 24-28) Bubba went to the house, but he did not go inside; Bubba was the look-out. (R-Supp/I 27, 29-30) Everett said that he had the club with him because he "carr[ied] it pretty much everywhere," but he denied striking the victim with it. (R-Supp/I 28) He grabbed something like a jacket or sweater "and ran out the door," he had it on but "took it off and threw it." He discarded his shoes in a trashcan. (R-Supp/I 29) Everett said he is sorry and swore to his statement. (R-Supp/I 31)

January 28, 2002, Paul G. Everett was charged by indictment in the Circuit Court of Bay County, Florida, with one count each of Murder in the First Degree, Burglary of a Dwelling with a Battery, and Sexual Battery Involving Serious Physical Force. (R/I 5)

February 26, 2002, Everett went to First Appearance, and the Public Defender was appointed to represent him in this case. (R/I 7-9)

March 5, 2002, Everett's attorney, Assistant Public defender Walter B. Smith, entered a written plea of not guilty to the indictment. (R/I 17)

August 20, 2002, Everett's attorney, Mr. Smith, filed a written Motion to Suppress Admissions Illegally Obtained. (R/I 33)

September 4, 2002, Mr. Smith filed on Everett's behalf a Motion for Continuance, which requested a delayed trial date due to the pending motion to suppress and difficulties procuring out-of-state witnesses for the motion hearing. Smith also filed a Motion for Certificate Pursuant to the Uniform Law to Secure the Attendance of Witnesses (R/I 40-41), which the trial judge granted on September 23, 2002 (R/I 42-43).

October 4, 2002, Everett "refused to come over" to court for the motion to suppress hearing; the circuit judge ordered that arrangements be made "to bring him over." (R/I 45; R/II 197) At the hearing, the attorneys agreed (R/II 198-203) to use reports from John D. Murphy and the deposition transcripts of Detective Rodney Tilley (R-Supp/II) and Investigator Chad Lindsey (R-Supp/III). Mr. Smith and the prosecutor argued their respective positions on the motion. (R/II 203-24)

October 8, 2002, the trial judge entered a written order denying the motion to suppress Everett's confession. (R/I 46-51)

November 18, 2002, at jury selection, Everett tendered comments and substantially deferred to defense counsel. (See R/III 401-405, 428)

November 19, 2002, in the trial, the State proffered Everett's confession, and at the proffer Detective Murphy and Sergeant Tilley testified, counsel argued concerning whether the confession should be suppressed, and the trial court announced its ruling and findings. (R/VII 115-38) Subsequent to the proffer, a tape of Everett's confession was played for the jury. (R/VII 150-68)

November 20, 2002, after the State rested its case, defense counsel informed the trial judge that he "need[ed] to talk to my client and see what his wishes are," and the court recessed, (R/VIII 223-26), the trial judge conducted a colloquy with Everett in which Everett confirmed that he did not wish to testify (R/VIII 226-28). The defense called as its only witness, Sergeant Tilley. (R/VIII 231-48)

November 21, 2002, the jury found Everett guilty as charged on each of the three counts of the indictment. (PCR/I 113; R/VIII 329-30)

November 22, 2002, the trial court conducted the jury penalty phase. Everett's mother (R/IV 469-76) and Everett's sister (R/IV 477-81) testified on Everett's behalf. The State relied upon the evidence adduced during the guilt phase. (See R/IV 483-85) In addition, the State established that Everett had previously been convicted in Alabama of possession of a forged instrument, a felony, for which in 2000 his suspended sentence was revoked and Everett was sentenced to ten years in prison. (See R/IV 449-55, 464, 482-83; SE #25, #26).

The jury unanimously recommended that Everett be sentenced to death. (PCR/I 131; R/I 131; R/IV 516-19)

December 30, 2002, the trial court conducted a Spencer[4] hearing, at which Everett's mother again testified for him (R/V 528-30). An investigator also testified for Everett. (R/V 530-31)

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

The parties submitted sentencing memoranda. (See PC/I 132-37; PC/I 138-42)

January 9, 2003, the trial court sentenced Everett to death. (PCR/I 152-65; R/VI) Everett v. State, 893 So.2d 1278, 1280-81 (Fla. 2004), summarized the aggravating and mitigating circumstances that the trial court found and weighed.

Everett's appeal to this Court raised five issues:

> (1) that the trial court's admission at trial of physical evidence obtained from him and his confession violated his Fifth Amendment right to silence; (2) that the trial court erred in admitting the testimony of the State's DNA expert regarding population frequency; (3) that appellant's death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (4) that the standard penalty phase jury instructions violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); and (5) that use of the 'under sentence of imprisonment' aggravator is unconstitutional because there is no evidentiary nexus between the factor and the homicide.

Everett, 893 So.2d at 1281.

In an opinion dated **November 24, 2004**, this Court affirmed the murder conviction and death sentence, rejecting issues 1, 2, 3, and 4 on the merits and rejecting issue 5 on preservation. Everett, 893 So.2d at 1281-87. The opinion also held the evidence sufficient and the death sentence proportionate. Id. at 1287-88.

January 24, 2005, this Court denied rehearing on its affirmance of the conviction and death sentence (PCR/II 195), and on February 9, 2005, this Court's mandate issued (PCR/II 196).

April 18, 2005, the United States Supreme Court denied certiorari, Everett v. Florida, 544 U.S. 987 (2005).

March 30, 2006, Everett, though counsel, filed his postconviction motion claiming 12 numbered claims for relief. (PCR/II 294-361 & PCR/III 362-421) The State responded. (PCR/III 423-86)

After a **September 1, 2006**, Huff[5] hearing (See PCR/III 497-99), on **September 12, 2006**, the trial court entered an Order granting an evidentiary hearing on several ineffective-assistance-of-counsel (IAC) allegations regarding: parts of Claim One, ineffective communication, failure to present Defendant's or Detective Murphy's testimony, opinion testimony, juror misconduct, failure to obtain co-counsel, defense strategy, and penalty phase mitigation. The trial court reserved ruling on Claim Twelve's cumulative effect allegation. (PCR/III 501-505)

Defendant Everett pro se wrote to Circuit Judge Sirmons (PCR/III 506-508, 525), who granted a number of defense requests to continue the evidentiary hearing (PCR/III 516-21, 526-28, 546, 548-49), and the State was also granted a continuance due to the timing of its receipt of the defense expert's report (PCR/IV 558-64).

December 17 to 19, 2007, the trial court conducted the evidentiary hearing. (PCR/IV 568-76; PCR/V-PCR/XVII) During the hearing proceedings, on December 19, 2007, the defense filed a "Supplemental Motion Regarding Extra-Jurisdictional Investigation and Penalty" asserting that officials in Alabama were "receiving the blood and the saliva" and concluding that it "request(s) reconsideration of each claim which was denied without a

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[5] Huff v. State, 569 So.2d 1247 (Fla. 1990).

hearing" (PCR/IV 576-80; PCR/V 804-806); the trial court granted the State's objection (PCR/V 806-807).

After the parties submitted written memoranda (PCR/IV 586-613, 614-37, 638-52), the trial court entered a written order denying the postconviction motion (PCR/IV 653-67), which is the subject of this appeal.[6]

The State now highhlights aspects of the proceedings that it submits as especially pertinent to aspects of this appeal. Of course, aspects of each of the following sections also pertain to other issues.

Suppression-Hearing/Proffer Facts.

ISSUE "C" (IB 33-44) claims IAC regarding the hearing on Walter Smith's motion to suppress evidence of Everett's confession.

As indicated in the "Case History & Event Timeline" section supra, the trial court conducted the suppression hearing on October 4, 2002, for which Everett "refused to come over" to court. The circuit judge ordered that arrangements be made "to bring him over." (R/I 45; R/II 197) At the hearing, the attorneys agreed (R/II 198-203) to use reports from John D. Murphy and the deposition transcripts of Detective Rodney Tilley (R-Supp/II) and Investigator Chad Lindsey (R-Supp/III). Mr. Smith and the prosecutor argued their respective positions on the motion. (R/II 203-24) Subsequently, the trial judge entered a written order. (R/I 46-51)

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[6] The Notice of Appeal (PCR/IV 668-69) may have been late. Opposing counsel has indicated that it was mailed to the Circuit Clerk in a timely manner.

Also, prior to the introduction into evidence of Everett's confession, a proffer was conducted during the trial in which Detective Murphy (R/VII 115-22) and Sergeant Tilley (R/VII 123-26) testified and at which counsel continued to argue concerning the suppression of the confession (R/VII 127-34) and at which the trial judge made detailed findings from the bench (R/VII 134-37).

A summary of Everett's statements in the context of other events can be found in the "Case History & Event Timeline" section supra, and they also are discussed in ISSUE "C" infra, which also discusses some of the details of the proffer.

This Court's direct-appeal opinion summarized pertinent facts as follows:

> Within hours of the murder, an Alabama bail bondsman, unaware of the murder but searching for Everett because he was a fugitive, found him in Panama City, Florida, and transferred him to Alabama authorities. On November 14, 2001, roughly two weeks after the murder, two Panama City Beach police officers investigating the case, having traced the wooden fish bat found near the crime scene to Everett, traveled to Alabama. They read Everett his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Everett agreed to talk. During the questioning, however, he abruptly stated, 'I wish to have a lawyer present.... I mean I want a lawyer.' The officers immediately stopped their questioning.
>
> Several days later, on November 19, the Panama City Beach Police requested an Alabama deputy to ask Everett to provide DNA samples for the Florida murder investigation. Everett consented both verbally and in writing. After the DNA swabs were taken, however, Everett advised the Alabama deputy that he had information for Florida authorities. The officer read Everett his *Miranda* rights, and Everett began his statement. At that point Sergeant Tilley of the Panama City Beach Police Department arrived to retrieve the DNA samples. On the record, Tilley noted that Everett had previously invoked his right to counsel, but had now contacted him desiring to provide information. Sergeant Tilley also read Everett his *Miranda* rights before Everett continued. At the conclusion of his statement, Everett said, 'I do want to talk to a lawyer, but I did want to let you know to get you

> in the right direction.' Sergeant Tilley immediately stopped the interview. Appellant's November 19 statement was not offered at trial.
>
> Finally, on November 27, Alabama authorities informed Everett that Sergeant Tilley was en route to serve an arrest warrant for the Florida murder. After Sergeant Tilley served the warrant, Everett asked to speak to him. At the outset of the interview, Everett acknowledged that he had previously invoked his right to have counsel present but had now asked to speak to Sergeant Tilley without an attorney present. In the ensuing statement, Everett confessed to the crimes.

Everett, 893 So.2d at 1283.

Trial Guilt-Phase Facts.

ISSUE "C" contests the handling of Everett's confession for the guilt-phase of the trial; ISSUE "D" claims IAC concerning challenging "forensic" evidence and a witness's opinion in the guilt-phase; and, ISSUE "E" claims IAC concerning calling Sergeant Tilley as a defense witness in the guilt-phase. The Case History & Event Timeline supra provides some of the context and background for these claims, and pertinent facts are highlighted under the respective issues infra. However, pertinent background also includes guilt-phase facts, which this Court's opinion affirming Everett's conviction and death sentence substantially summarized:

> The evidence at trial showed that during the late afternoon or early evening of November 2, 2001, appellant approached Kelly M. Bailey's home, looking for money and carrying a wooden fish bat or billy club. A stranger to the victim, appellant entered her home uninvited. When Ms. Bailey confronted him, appellant beat her, and as she tried to escape, knocked her down and raped her. He also forcefully twisted her neck, breaking a vertebra, which paralyzed her and caused her to suffocate to death. Before leaving, appellant removed his t-shirt, but he took with him some money from the victim's purse, his fish bat, her credit card, and her sweater. Outside the house, he discarded all but the cash. The victim suffered multiple injuries: a knocked-out tooth; a fractured nose; swollen eyelids; lacerations and bruising of her lips; a lacerated lip through which her teeth protruded; abrasions and carpet burns; a broken neck; and vaginal

abrasion evidencing the use of force and consistent with nonconsensual sexual intercourse.

*** Among other evidence at trial, the fish bat was traced to the appellant and his DNA matched the vaginal swabs from the victim on all thirteen genetic markers tested.[FN1] The jury found appellant guilty as charged.

[FN1]. The DNA expert also testified that the frequency occurrence of appellant's genetic profile is one in 15.1 quadrillion of the Caucasian population, 1.01 quintillion of the African-American population, and 11.2 quadrillion of the Hispanic population.

***

[O]n November 27, Alabama authorities informed Everett that Sergeant Tilley was en route to serve an arrest warrant for the Florida murder. After Sergeant Tilley served the warrant, Everett asked to speak to him. At the outset of the interview, Everett acknowledged that he had previously invoked his right to have counsel present but had now asked to speak to Sergeant Tilley without an attorney present. In the ensuing statement, Everett confessed to the crimes.

Everett, 893 So.2d at 1280-83. In reviewing the sufficiency of evidence, this Court added:

As to felony murder with a sexual battery or burglary, the evidence showed that Everett's DNA matched the DNA found on the vaginal swabs taken from the victim at all thirteen genetic markers tested and that appellant's DNA profile occurred once in every 15.1 quadrillion Caucasians, once in 1.01 quintillion African-Americans, and once in 11.2 quadrillion Hispanics. Everett admitted that he entered the house without the victim's consent and with the intent to steal. He hit the victim, chased her and knocked her down, and then had nonconsensual, forceful intercourse with her. He admitted that he left his shirt in her home. In the course of committing these crimes, he broke the victim's neck, and she suffocated to death. With regard to the premeditated murder charge, Everett was armed with a wooden club (which later tested positive for blood) when he entered the victim's home. He hit her, chased her down, and brutally beat and sexually assaulted her. He forcefully twisted the victim's neck, breaking it; this could not have occurred from her falling as he grabbed her hair. Everett's DNA matched the vaginal swabs from the victim, and Everett admitted leaving his shirt in the victim's home.

893 So.2d at 1287.

It is also noteworthy that a wooden club or fish bat was located approximately 133 feet from the victim's back door. (R/VII 86, 94) The bat tested positive for the presumptive presence of blood. (R/VII 170-71) 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), and the investigator identified Everett as the person passing the check, which was stolen and passed using a false identity. (R/VII 104, 105-107). By November 13, 2001, however, when police attempted to locate Everett at the Fiesta Motel, he had already been picked up and located in Baldwin County, Alabama (R/VII 104-105).

Trial Penalty-Phase Facts.

ISSUE "F" claims IAC at the penalty phase, for which this section and the next one provide background.

For the penalty phase of the jury trial, the State relied upon the guilt-phase evidence and also 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 he was under a sentence of imprisonment at the time of this murder (See R/IV 446-55, 464; State's Exhibits 25 & 26). Regarding Everett's forgery-related charges, the prosecutor observed:

> [O]n February 8th of 2000 these documents reflect that … [Everett's] probation was revoked, sentenced to ten years in prison. *** He was supposed to be sitting in a jail cell in the State of Alabama, a prison cell. on October 20th of 2001, but he fled on that bond and

> came down here, jumping the bond after it's been revoked, his sentence has beg[u]n, he came down here [and committed this murder]***

(R/IV 482-83; see also R/I 154)

Everett's trial defense counsel, Walter Smith, presented testimony from his mother, Glenda Everett, (R/IV 469-76) and his sister, Cindy Everett Grider (R/IV 477-81).

Regarding his childhood, Everett's mother testified at the jury penalty phase that he had six or seven sisters (R/IV 469, 476); he was her only son and the youngest of her children (R/IV 469-70, 476). He was raised in a small community in Alabama where everyone knew one another (R/IV 471).

Her son "Paul" Everett was "always the fun loving child." (R/IV 471) She continued:

> As he grew we began to have grandchildren. The grandchildren were always very happy when Uncle Paul was around because he loved to play and cuddle up and play chase and things like that.
>
> (R/IV 471)

Everett's mother testified that she divorced Everett's father, then they remarried, but then separated a second time, and she again took the children (R/IV 472). "After that[,] Paul missed his father so much that he wanted to go and live with him, and I allowed him to go and live with his father." (R/IV 472)

By 2001, Everett was "more or less" living on his own, living with his father "some" and with friends "some"; his mother testified that she stayed in contact with him. (R/IV 473) In September 2001 until the latter part of October 2001, Everett stayed with his mother. (Id.) Everett had a drug problem for several years, so by the time he moved back to his mother's,

Everett was involved with drugs. He "was not completely himself" and "he just couldn't seem to get control of everything." (R/IV 473-74) She "probably" first became aware that Everett was abusing drugs when he was eighteen or nineteen years old, and she had encouraged him to get treatment for his drug use (R/IV 474). Everett's mother was not aware that Everett planned to travel to Panama City. (R/IV 474)

Trial defense counsel Smith also elicited from Everett's mother that Everett had never been violent and that he is a "very loving and caring person." (R/IV 475) Everett "was a very fun-loving kid" and "just loved people in general." (R/IV 476) She testified:

> Q [by Walter Smith]: And to what would you attribute violence on his part, is there a source from that?
>
> A. Well, for my Paul to do something as horrendous as this is, there would have to be drugs involved. ***."
>
> (R/IV 475)

Everett's mother testified that it was hard for Everett to accept coming from a broken home. "His 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 475-76)

Everett's mother indicated she loves Everett, and all of Everett's sisters love him. (R/IV 476)

Trial defense counsel Smith also called Everett's sister, Cindy Everett Grider, to testify on his behalf. She testified about the small tight knit community in which the family grew up. (R/IV 477-78) She and Everett were

very close, and she was "very maternal about Paul." (R/IV 479) When she heard about Everett's arrest in this case, she was "[s]hock[ed]." (R/IV 478). She continued:

> Everyone consoled me and told me they knew something has to come out eventually, it could not possibly be, there was no way, not the Paul they knew. Who was he with, that was the question asked of me over and over; who was he with, because there's no way.
>
> (R/IV 478)

Everett's sister testified that before he went to Panama City Beach, she saw Everett almost daily when he was in north Alabama or would otherwise hear from him, and that Appellant was a large part of her family. She has three kids. (R/IV 479) She had never heard about him being violent. Even when "something was wrong," he had "never been violent." (R/IV 479-80, 481)

Everett's sister testified that she knew Jared Farmer and his family, knew that they were involved in drugs, and she had tried to get Everett to go for counseling or get other help for his drug use. (R/IV 479-80)

She had heard that Everett went with other people when he traveled to Panama City Beach. (R/IV 478-79), but she had no prior knowledge that Everett was going to go there this time (R/IV 480).

Everett's sister concluded her testimony by reiterating that Everett is not violent and by telling the jury that "[o]ur dad was a very caring man" and that Everett "was always just like that, give somebody the shirt off of his back." (R/IV 481) She said that "[w]ithout some outside influence, other involvement, there's no way this could have happened." (R/IV 481)

On November 22, 2002, the jury unanimously recommended the death penalty (R/I 131; R/IV 516-17).

Post-Jury Trial Sentencing Proceedings.

At the Spencer hearing on December 30, 2002, Everett's trial counsel presented more testimony from his mother, Glenda Everett. (R/V 528-30) Defense counsel Smith also called as a witness Ernest Jordan, Chief Investigator with the Public Defender's Office in the Fourteenth Judicial Circuit. (R/V 530-31)

Everett's mother testified that although Everett was 22 years old when he committed "this offense," he "always acted kind of young," "definitely" not "like a 22 year old." Everett had worked at fast food restaurants, never had his own place to live; instead, he continued to live with her, his father, or his sisters. (R/V 529)

Everett's defense counsel, Walter Smith, then called Mr. Jordan to testify for Everett. As an investigator for the Public Defender's Office, Jordan contacted the jail in Panama City. Neither the jail records nor Shirley Brown, the custodian of records, indicated any disciplinary action taken against Everett. (R/V 530-531)

A pre-sentence investigation was done. (PCR/XVI 3147-56); see R/V 526, 529) It indicated that Everett told the psi-writer that the victim "came to their [motel] room by mistake and saw the meth lab." Everett and his accomplice then followed the victim to her house and returned a few more times. After a couple of weeks, they broke into the victim's house. The victim confronted them, and Everett punched her in the face, and Everett

and his accomplice tied her up and raped her. While raping the victim, a drug buyer knocked on victim's door because he recognized the truck outside and knew that Everett and his accomplice sold drugs. Everett then returned to the motel where he sold some marijuana. "When the buyer left, bounty hunters from Alabama [] came in and took the defendant into custody. He found out 3 weeks later that the victim was deceased." (PCR/XVI 3149)

The PSI also indicated that Everett "reported being in good health, with no mental defect or disorder. Ms. Grider [Everett's sister] stated that she knew him to be in good health with no mental health diagnosis." (PCR/XVI 3154) Everett indicated that he made $4,000 to $6,000 per month selling marijuana and crystal meth. (PCR/XVI 3152) The report also relayed what Everett said about his drug use. (XVI 3154)

The parties had submitted sentencing memoranda. (R/I 132-37; R/I 138-42; see also R/V 526) Defense counsel's memorandum attacked aggravating factors (R/I 133-35) and stressed the mitigation evidence, including the influence of drugs (R/I 135-37).

On January 9, 2003, the trial court followed the jury's 12-to-0 recommendation and sentenced Everett to death. (PCR/I 152-65; R/VI) Everett, 893 So.2d at 1280-81, summarized the trial court's findings:

> It found three aggravating factors: (1) appellant was a convicted felon under a sentence of imprisonment at the time of the murder; (2) he committed the murder while engaged in the commission of a sexual battery or a burglary; and (3) the murder was especially heinous, atrocious, or cruel. The court found the following statutory mitigating factors and accorded them the weight indicated: (1) appellant's age (very little weight); (2) the crime "was committed while under the influence of some type of substance" (little weight); [FN2] (3) lack of significant history of prior criminal activity (little weight); (4) family background (very little weight); and (5)

> drug use (little weight). The court also found nonstatutory mitigating factors, with each given very little weight: (1) appellant's remorse; (2) good conduct in custody; (3) the alternative punishment of life imprisonment without parole; and (4) appellant's confession. After weighing the mitigating and aggravating factors, the court found that each of the aggravators individually outweighed the mitigation and imposed a sentence of death.
>
> [FN2]. Based on the clarity and detail of appellant's confession, the court rejected the factor that appellant was under the influence of extreme mental or emotional disturbance; instead, the court found only that appellant was under the influence of a substance.

Post-Conviction Evidentiary Hearing.

On December 17, 18, and 19, 2007, the Circuit Court afforded Everett an evidentiary hearing on several postconviction claims.

Everett called as witnesses Everett's mother, Glenda Everett, (PCR/V 714-25) and Everett's sister, Cindy Everett Crider (PCR/V 726-33). These two witnesses had also testified at the jury penalty phase of the trial, as detailed supra.

At the postconviction hearing, Everett's mother testified again about her relationship with Everett's father and moving around. (PCR/V 716-19) She reiterated that Everett lived with his father for awhile. (PCR/V 719) Everett dropped out of school. (PCR/V 719-20) Other boys got Everett into trouble. (PCR/V 720) She did not go over "all of" this testimony with Mr. Smith. She said he did not "ask a lot of questions about it." (PCR/V 720) She said that defense counsel Smith interviewed her and "several of the girls" in his office. (PCR/V 720-21) On cross-examination, the mother acknowledged that Everett "had excessive absenteeism in school." Everett

"wasn't very interested in school but … he wasn't a bad kid either." (PCR/V 722-23) Cross examination continued:

> Q Now, you said that he was never violent when he was young. Was there a time when he put a bear hug on you really tightly and wouldn't let go of you?
>
> A Yes.
>
> Q Was there a time where he set some trash on fire and some kind of problem he had with a friend of his?
>
> A I don't know anything about a problem of his but he did set some trash on fire.
>
> Q And would you say that he had a little bit of a temper when he was on drugs?
>
> A I couldn't tell when he was on drugs and when he wasn't.
>
> Q Could you tell when he had a little bit of a temper?
>
> A I guess we all have a little bit of a temper at one time or another.

(PCR/V 723)

On re-direct examination, Everett's mother repeated that she "couldn't tell when he was on drugs and when he wasn't." (PCR/V 724) She later testified that Everett left her and went back to his father around age 14 and that she became aware that Everett was heavily involved with drugs about a year "before all this stuff started," and she reiterated that she did not know when he was using drugs. (PCR/V 725)

Cindy Everett Crider testified about the family moving around and, like she said at the trial's penalty phase, about not recalling Everett committing any violent acts when he was young. (PCR/V 726-27, 730-31) She testified that she became aware that Everett was involved with drugs "probably awhile before" he left home. (PCR/V 727-28) She had frank

discussions with Everett about going the wrong way "on many occasions." (PCR/V 729) She moved in with her father when she was 15 years old and Everett was age eight or nine. (PCR/V 730-31) Everett lived with her and their father for awhile. (PCR/V 731) She said that when she was not in the home, she was close. (PCR/V 732)

She said that Everett's father "was around," he drank, and she did not "think that he was a good influence necessarily." Their father passed away on August 21, 2002. (PCR/V 732)

She said that, prior to trial, she had a "brief conversation," she believed, in Mr. Smith's office. (PCR/V 728) A psychiatrist or psychologist did not speak with her "about any of these issues." (PCR/V 729)

Ashley Malone, another one of Everett's sisters, testified that she was not interviewed prior to Everett's trial. (PCR/V 733) She said that Everett "was loving, we cut up, played," and Everett "was never violent." (PCR/V 734; see also PCR/V 735) At one point, she testified that she did not know that Everett was getting involved in drugs (PCR/V 734), and a little later testified that "I know that he was doing drugs" around 2000, 2001 (PCR/V 735, 736). She did not see Everett violent when she knew he was involved with, or under the influence of, drugs. (PCR/V 736) She said that the family moving around was "hard on all of us" but that she and Everett were still able to maintain friendships. (PCR/V 734-35)

Defendant Everett testified[7] that he was 22 years old in 2001. (PCR/V 767) He claimed that his defense counsel Smith "virtually talked nothing about a defense," including "hardly ever" getting "to that point" regarding Miranda. (PCR/V 746) He said that his attorney never asked about his problems with drugs and that he spoke with "Ms. Jill Rowan for maybe 30, 45 minutes tops" with Mr. Smith's investigator present. (PCR/V 746) Everett said that she focused on competency to stand trial and did not go into any great length about Everett's background. (PCR/V 747) He said that she did not discuss with him the effects of his drug use. (PCR/V 760) Everett claimed that "there was never really an attempt to establish mitigating factors other than briefly speaking with my family. (PCR/V 747) Everett said he wanted Mr. Smith to look into the effects of drugs on his brain and his father giving him alcohol by the time he was eight and its effects. (PCR/V 747-48) Everett said that somehow he kept his marijuana use "hid from the family" and by age 16 he "was eating LSD every day" and "injecting methamphetamine every day and still somehow for the next couple of years I still kept that secret to just myself and the people I hung out with." (PCR/V 758) He said he manufactured methamphetamine and sold some of it and "did" the majority of it. (PCR/V 759) He described in detail how to make methamphetamine. (PCR/V 761-62) He said that taking cocaine and

[7] Everett's testimony also swore that he overheard Earl Ogden speak with juror Mary Kay Ogden regarding the trial. (PCR/V 757-58) Rosemary Ogden testified that she was a juror in Everett's trial and she is certain that Earl Ogden did not call her during the trial. (PCR/V 769-70)

methamphetamine would make him intensely paranoid, "thinking I was being watched by the police," thinking the "police were following me." (PCR/V 760) He testified that he "really can't say" whether this made him violent. (PCR/V 760) He acknowledged that he used both of these within hours before "this incident." (PCR/V 760-61) He said he wanted to speak with Smith about the effects of drugs on the brain, but he never told Smith about the effects of certain drugs on him. (PCR/V 762-63) He said, when growing up, he was not violent when he was on drugs. (PCR/V 763)

On cross-examination, when asked whether the time he went to the victim's house was the first time that he was violent as a result of using drugs, he replied, "I'll plead the Fifth on that," then after the Judge told Everett to answer the question, Everett said that this was the only time he had ever been violent because of his drug use. (PCR/V 766-67)

Dr. Umesh Mhatre, psychiatrist, testified that he met with Everett for about an hour and spoke with several family members, including his mother, sister Cindy, and Sherry Forehand. (PCR/V 792-93) He said that Everett's mother told him that when Everett is on drugs "he was like a different person" and became "difficult" and "not a violent person except when he got on drugs," having a "bit of a temper." (PCR/V 795) Once he held his mother and "firmly told her not to go anywhere." (PCR/V 795-96) On cross-examination, the doctor said that the mother said that Everett "has never been violent but does describe him as having a bit of a tempter when he was on drugs." (PCR/V 802)

Dr. Mhatre relayed what Everett told him about his drug use. Everett said that he "actually became pretty good at cooking [crystal meth] himself," and he was preparing it "virtually every day" prior to this murder. (PCR/V 796-97) Everett claimed to be "pretty high on drugs all throughout the time." (PCR/V 797) Mhatre discussed crystal meth being "well known to cause significant paranoia." (PCR/V 798) He said Everett said that he thought that the victim was the police so he stalked her. (PCR/V 798) On cross-examination, the doctor reiterated that his "information is strictly from" Everett (PCR/V 799) and that no other witness corroborated that Everett was in a drug-induced psychosis at the time of the murder (PCR/V 802), and the doctor indicated that he "usually do[esn]'t use that book [the DSM] at all" (PCR/V 799-800). Mhatre did not test Everett at all. (PCR/V 801)

At the postconviction evidentiary hearing, Everett also testified about his interviews while in custody in Alabama. (PCR/V 748-57, 772; see ISSUE "C" infra) Everett said that he recalls "a pretrial argument" about suppressing his statements, and "that's pretty much all I remember specifically." (PCR/V 756) He did not recall Mr. Murphy testifying outside of the presence of the jury. (PCR/V 756) He said that Mr. Smith told him that the "best thing" would be to "just let him take care of the legal aspects of the case." (PCR/v 756) He acknowledged that transcripts of three interviews were the best evidence of what he said to them, and they were introduced as State's Exhibit 1. (PCR/V 764) He indicated that in the third interview, he discussed his LSD use. (PCR/V 765)

John Murphy, in 2001 a detective in Baldwin County, Alabama, testified by telephone. He indicated a number of times that his memory of interactions with Everett and with Panama City was not clear and so his reports were Fax'd to him (See PCR/V 773-78). After he had reviewed at least the first half of his reports, his testimony resumed and he discussed his involvement and recollections (PCR/V 782-89; see ISSUE "C" infra), including, for example, Everett wanting to "point Panama City Police department in the right direction" (PCR/V 783).

Charles Richards, a senior crime lab analyst at FDLE, testified about the scope of his qualifications. (See PCR/V 737-44; ISSUE "D" infra)

The State called as a witness Walter Smith, Everett's trial lawyer. He was the deputy public defender for the 14th Judicial Circuit. He discussed his extensive experience, including 41 first-degree murder trials, and out of 20 cases in which the State sought the death penalty, four resulted in jury death recommendations, two of which this Court has upheld. (PCR/V 807-808) He indicated that in 2005 he tried nine murder trials, in 2006 one murder trial, and in so far five in 2007. (PCR/V 829)

Smith testified that he has never had a co-counsel. Instead, he and his investigator work-up the murder cases. (PCR/V 824)

Smith first had an indication that Everett would be his defendant "[p]robably maybe the day before his first appearance," when Everett's mother called him at home after someone, he thought Detective Tilley, gave her his number. (PCR/V 830)

Mr. Smith testified about the depositions he did in the case. (PCR/V 836-37)

Smith said he "routinely" asks the State if it will agree to life on a plea, and he was sure he did it here. (PCR/V 840)

Smith saw Everett at the jail, and Everett corresponded with him "quite often." Smith said he does not do "a lot of hand-holding." (PCR/V 811) Smith responded that he did not know of anything in his relationship with Everett that interfered with the transfer of information between Everett and himself. (PCR/V 842)

Everett told Smith several different versions of what happened during the murder. (PCR/V 814-15) The second version involved "Bubba," 18-year-old Jared Farmer, and a tattoo place where Everett said he was involved in buying or selling drugs. Smith located Farmer, but Farmer "denied any knowledge of drug use" and said that on the day of the murder, he and Everett had an argument and they split up prior to the murder. (PCR/V 820-21) Smith felt that, between Everett and Farmer, Everett was the leader. He described Farmer as "just a baby-face kid from northern Alabama." Smith thought that Everett and Farmer did engage in "recreational drug use" that "really" did not "amount[] to anything" regarding having a beneficial impact for the defense. (PCR/V 821) Smith said that the defense's follow-up on this version was a "dead end" in terms of attempting to corroborate Everett. (PCR/V 821)

There was no way that Smith could corroborate that Everett was "tripping on acid" during the murder, and Smith explained that he thought

that Everett bringing the weapon, the bat, to the victim's residence was inconsistent with Everett's being high on LSD. (PCR/V 822; see also PCR/V 823-24) Smith also pointed out that Everett was arrested about an hour and a half after the murder, and there was no notation that Everett was "tripping on acid." (PCR/V 823; see also defense counsel's memo at PCR/VII 1069-70 indicating only purchasing LSD and seeking additional drugs)

Mr. Smith testified about the suppression motion and hearing and his strategy concerning Everett testifying. Everett's various versions of events made it more difficult to put Everett on the witness stand. (PCR/V 814-15, 830-31) However, if Everett had presented Smith with "an important revelation," "there is no reason not to put him on the stand at the suppression hearing because that is not going to be admissible against him at trial." (PCR/V 826)

Smith explained that he viewed the police approaching Everett for a biological sample as re-initiating contact with Everett and that there were not "any Florida cases on point." (PCR/V 833-34; 841-42) He discussed his efforts to secure Murphy's presence for the suppression hearing and eventually using Murphy's report. (PCR/V 834-35, 837-38) He assumed that Murphy would testify from his report, and if Murphy testified at trial differently from his report, he could have renewed the suppression motion then. (PCR/V 841)

Although Mr. Smith testified that he had no independent recollection of discussions with Everett concerning Everett taking the witness stand for the suppression motion hearing, (PCR/V 813) Smith indicated that he thought

that Everett told him that his mother advised him "to talk with the police and tell them what happened." (PCR/V 832-33)

Smith explained that as the case progressed, Everett's "stories got bigger and bigger" and Smith "probably told him "I don't believe that's what happened." (PCR/V 815) Smith said that he does not "remember [Everett] being anxious to testify." (PCR/V 817) Smith continued:

> Q Would you have told him that it is his final decision?
>
> A Well, that's what I always tell them, you know, and it is so, you know, I would probably tell him, look, you can testify, I don't think it is a good idea, I think you're going to hurt yourself if you do testify, but if you want to, you have that opportunity, but, you know, I probably would have to have him testify in some kind of narrative form because of the problems we had with the inconsistencies and the versions of what happened.

(PCR/V 817)

By the time of trial, Everett's version of events included the victim being "some sort of double agent and … involved in drugs … and she was in Alabama …." (PCR/V 815) Smith and his investigator attempted to corroborate aspects of Everett's stories. (PCR/V 815-16) For instance, their attempts to track down "Bubba," whom Everett had mentioned, were unsuccessful. (PCR/V 815-16)

Smith always tells his clients that they can testify at trial, but he probably told Everett that he would not do himself "any good" by testifying "given the statements that he had already provided." (PCR/V 817)

On the other hand, "most of what happened in terms of what had happened with the police" was "contained in the record and the statements themselves," providing what Smith believed to be a "cogent argument" to suppress Everett's statements to the police. (PCR/V 818-19)

Everett told Smith that he and "cohort" were cooking meth and that "he was high on LSD," but, as far as he could recall, he had no corroboration for "that." (PCR/V 811)

Mr. Smith testified that he "had sufficient contact with [Everett] to ferret out whatever mitigation we had." (PCR/V 811)

Mr. Smith's trial preparation was predicated on his assumption that this could be a death penalty case. (PCR/V 807-810) Early-on, he tried to get records. Everett had no mental history. (PCR/V 810) Smith did not see "any evidence of mental illness" or retardation. (PCR/V 818) As a "CYA," Smith asked Dr. Rowan to make sure Everett was competent, and Rowan concurred that Everett may "even be above average intelligence." (PCR/V 818) To Smith, Everett appeared to be "pretty classic" antisocial personality disorder. (PCR/V 819) Smith saw nothing to indicate that Everett was paranoid. (PCR/V 819) Smith has a track record of being "pretty dead on" in predicting the result when he calls in a psychologist. (PCR/V 820; see also PCR/V 838) Smith felt that any "greater psychological work up" on Everett would "probably be detrimental to" Everett. (PCR/V 818)

Smith met with Everett's father, who "had a lot of contacts up in northern Alabama," where Everett had lived much of his life. The father pledged to obtain witnesses to say good things about Everett, but the father died, so that angle "sort of fell apart." (PCR/V 810-11)

Smith summarized his mitigation efforts for Everett:

> Q Did it ["not really getting along with defendant] in anyway lessen the attempts that you made on behalf of Paul Everett in this case?

A No, I did everything I thought I could do. You know, even, we went up to Alabama, my investigator and I, trying to find witnesses once his father died. We just, we went to his school, we talked to his principal, his guidance counselor, talked to a couple of his friends that we ran down up there. We, it just wasn't much redeeming about him. He wasn't a Boy Scout, he wasn't an athlete, he wasn't a scholar, you know, he didn't go to church. It was hardly anything that we could cull out of that and present to a jury. He never had a job. You know, it was tough. I mean, this is the first case I've ever had where I wasn't able to come up with something. So it was, it was sort of frustrating but, you know, like I said, we did everything we could, we just, we just ran into dead ends every time we investigated a certain avenue. So it wasn't much more I could do. Once that statement was presented to the jury, I mean, it was lights out after that.

(PCR/V 842-43) Later, on a recross-examination, Mr. Smith explained:

Q And are you saying you basically made your whole mitigation case dependent upon his alcoholic father finding people?

A Well, yeah, in large measure his father had a realistic appraisal of what was going on. His mother really didn't come to terms with it, I mean, she wanted to deny that her son had done this and she lived in Savannah and his father was, he kind of was living with his father up there.

Q What about his sisters?

A Well, some of them didn't want anything to do with him. There was one sister, like I said, we went to Alabama, she was supposed to take that day off and help us round up people and she went to work that day. So we were up there and had to do a lot of running around on our own until she got off of work. We went to the school and I think she got us in touch with a guidance counselor and a principal but, I mean, I talked to his sisters but there wasn't a whole lot they could say other than, you know, we love our brother and we have been close to him and he's, we have never seen him doing anything violent and that sort of thing.

Q When his father passed away and you were left without a mitigation case did you try to get a continuance so that you could work on mitigation issues?

A Well, it didn't look like there was any mitigation forthcoming. That's why we went up there trying to track it down on our own. We even called some people, it was one guy up there ran a mill or something, I talked to him. He said, well, I can't help you, I don't know anything about the kid. The principal said, I know him, but he

never came to school. You know, we just ran into a dead end. I mean, you can't just fabricate it.

Q If you had had co counsel, co counsel might have been able to spend a little more time with that?

A Well, I think we spent time on it, there just wasn't anything there.

(PCR/V 845-46)

Smith also testified about Chuck Richards of FDLE. He said that Richards testified at trial about what he (Richards) saw, and any trial testimony concerning blood spatter or cast-off blood is a gray area concerning a crime scene expert. (PCR/V 825) He deferred to the trial transcript for what happened during Richards' trial testimony. (PCR/V 836)

Smith's entire file was admitted into evidence. (PCR/V 827-28; see SE #2, PCR/VI-XVII)

SUMMARY OF ARGUMENT

The Initial Brief raises eight issues. None of them justify reversing the convictions, sentences, or trial court order denying post conviction relief.

The first six issues attack the effectiveness of Everett's defense counsel, Walter Smith. A theme running through all of these IAC issues is the attempted hindsighted evaluation of counsel that Strickland condemns as inappropriate.

There are defendants whose crimes have created overwhelming evidence of guilt, which virtually no competent attorney could defend to a not-guilty verdict. The case against Everett was such a case. Among the evidence, DNA, at 15.1 quadrillion-to-1 odds, showed that Everett raped the victim. Each

and all of Everett's IAC claims pale in contrast to the evidence against him as well as in contrast to his defense attorney's very competent representation of him.

ISSUE "B": There is no free-standing right to communicate at any harmonious level with defense counsel. Instead, IAC is determined by the reasonableness of counsel's representation, given all of the circumstances and, here, determined by whether Everett has met his Strickland burdens to prove the claims in ISSUES "C" through "F." He has failed to prove either of Strickland's prongs on each of these issues.

ISSUE "C": Trial counsel was not responsible for representing, indeed, not even authorized by law to represent, Everett while Everett was incarcerated in Alabama; there is no deficient performance. In any event, Everett repeatedly demonstrated his determination to "try out" his various stories on the police and no additional advice to remain silent would have made any difference; moreover, Everett ignores his sexual battery upon the victim, proved at 15.1 quadrillion-to-1 odds, amidst his severe beating of her to the extent that her teeth protruded through her lip and to the extent that he knocked out her tooth; there is no prejudice.

ISSUE "D": Everett seeks a reversal of his conviction because he claims that his attorney should have more vigorously contested a witness (FDLE analyst Chuck Richards) calling some reddish spots at the murder scene "blood." However, Everett has not contested other witnesses' characterization of these spots as "blood," especially the observations of the medical examiner. Indeed, the medical examiner, as well as Richards,

were qualified to call the spots "blood" and Richards' repeated qualifications of his observation as "suspected blood" was unnecessary and a gratuity for Everett. Further, Richards' testimony concerning a characteristic of the blood spots, limited to directionality, was within the scope of his extensive crime-scene experience. In any event, the direction of the "blood" spots was totally inconsequential in the trial.

ISSUE "E": The Initial Brief hindsights his experienced counsel's judgment to call Sergeant Tilley as a defense witness. Tilley's defense testimony made some points for the defense, and this issue improperly questions whether it was "worth it." One might be tempted to say that, given the DNA and other evidence amassed against Everett, "desperate times call for…," but such an adage is not necessary to sustain counsel's judgment-call here.

ISSUE "F": Everett argues that the mitigation-evidence he produced at postconviction was so much better than what his counsel produced during the penalty phase that he is entitled to a new penalty phase. However, the "new evidence" was not really new at all, but rather a re-packaging of what defense counsel presented. Indeed, the "new" evidence would have been harmful to the case for mitigation. In any event, Everett failed to prove the availability of anything "new" for the trial, and the re-packaged evidence paled in comparison with the aggravation. Further, although Everett bore the burden to prove Strickland's prongs, the record affirmatively shows the extensive efforts undertaken by Everett's trial counsel to save his life, as counsel and his investigator pulled school

records, jail records, interviewed family, interviewed school personnel, traveled to Alabama, and had Dr. Rowan examine Everett. There was no deficiency and there was no prejudice.

ISSUE "G": There was no harm to accumulate.

ISSUES "H" (Ring) AND "I" (lethal injection): As this Court has held many times, these issues have no merit.

For these reasons, as well as the reasons in the trial court's extensive order and in the following discussion of the issues, each and all of the issues on appeal should be rejected.

ARGUMENT

PRINCIPLES OF REVIEW APPLICABLE TO MULTIPLE ISSUES: EVERETT'S HEAVY IAC BURDENS PURSUANT TO STRICKLAND AND, AS TO FACTUAL FINDINGS, THE TEST OF COMPETENT, SUBSTANTIAL EVIDENCE.

To demonstrate an ineffective-assistance-of-counsel (IAC) claim, Everett must meet the rigorous tests of Strickland v. Washington, 466 U.S. 668 (1984). "[B]ecause the *Strickland* standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the deficiency prong, the standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008), quoting Strickland, 466 U.S. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

"The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313, quoting Burger v. Kemp, 483 U.S. 776 (1987). The standard is not whether counsel would have had "nothing to lose" in pursuing a defense. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411; 173 L.Ed. 2d 251, 2009 U.S. LEXIS 2329 (2009).

Everett must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)("trial counsel's decision to forgo Watson's testimony"). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

Extensive experience of trial defense counsel can inform the evaluation whether a defendant has met Strickland's deficiency prong. See, e.g., Henry v. State, 948 So.2d 609, 619-20 (Fla. 2006)(citing to defense counsel's extensive experience); Jones v. State, 732 So.2d 313, 319-20 n.5 (Fla. 1999)("We give the conclusion of Davis in this respect substantial deference in light of his experience in representing capital defendants at the time he represented appellant"), citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel"); Chandler v. United States, 218 F.3d

1305, 1316 (11th Cir. 2000)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger"). Here, trial defense counsel detailed his extensive experience. (See PCR/V 807-808)

"For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Valle v. State*, 705 So.2d 1331, 1333 (Fla.1997)." Evans v. State, 975 So.2d 1035, 1043 (Fla. 2007)

On appeal, the trial court's factual findings are presumed correct and merit affirmance if supported by competent, substantial evidence. See, e.g., Ford v. State, 955 So. 2d 550, 553 (Fla. 2007)("Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo"), citing Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004).

ISSUE "B" (IAC COMMUNICATION): DID POOR COMMUNICATION BETWEEN THE DEFENDANT AND TRIAL DEFENSE COUNSEL RESULT IN IAC? (IB 26-32) RESTATED)

The Initial Brief's statement of this issue is couched solely in terms of IAC: "**B. The poor communication Between Appellant and Trial Defense Counsel Resulted in Ineffective Assistance of Counsel.**" (IB i, 26, 26) Therefore, this issue, as well as the other IAC issues ("C" through ""G") must meet Strickland's heavy burden to overcome the presumptions of competency and "exercise of reasonable professional judgment," especially

here where Everett's defense counsel was very experienced (See PCR/V 807-808). Everett's appellate claims fail to meet either of Strickland's prongs.

Juxtaposing the issue statement of "B" with the text following it, it appears that this issue asserts an overarching premise for two claims that follow it: Due to trial defense counsel Walter Smith's poor, or lack of, communication with Everett, experienced defense counsel Smith ineffectively represented Everett's interests in attacking the admissibility of Everett's statements to law enforcement (ISSUE "C" infra) and in presenting mitigation evidence (ISSUE "F" infra). This claim contends that if there had been better communication, then Everett "would have certainly testified regarding the matter of his pretrial statements" and evidence of Everett's "substance abuse and paranoia" would have been presented at the penalty phase. (IB 32)

The State addresses ISSUES "C" (alleged IAC regarding the suppression motion) and "F" (alleged IAC regarding penalty phase mitigation) as such under those issues infra. However, to the degree that ISSUE "B" suggests a communication claim per se, that is, a claim that Everett had a right to a certain frequency or quality of communication, it is meritless. Mere allegations of inadequate communication would have been insufficient to trigger an inquiry under Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). A fortiori, in postconviction such allegations are insufficient to meet Strickland's heavy burdens. See, e.g., Sweet v. State, 810 So.2d 854, 869 (Fla. 2002)(affirmed trial court rejection of IAC "allegation that

there was a break down in communications"; defendant trying to push case to trial undermining trial preparation; "this claim is, at best, facially insufficient"); Stephens v. State, 787 So.2d 747, 758 (Fla. 2001)("lack of contact between Stephens and his attorneys" and "dissatisfaction with counsel" not by themselves "question[ing] counsel's competency"); Kenney v. State, 611 So.2d 575 (Fla. 1st DCA 1992) (expression of dissatisfaction because of frequency of visits to jail, not a complaint of ineffectiveness); Wilson v. State, 753 So.2d 683, 687 n.2 (Fla. 3d DCA 2000)("a complaint based on inadequate conferences with counsel, without a more specific claim of incompetence, does not require a full *Nelson* inquiry"); Soto v. State, 751 So. 2d 633, 636 (Fla. 4th DCA 1999)("Mere failure to make what a defendant considers adequate visits to him in jail is not an issue of competency").

Analogously, an allegation that a trial defense counsel was under the influence of a substance does not constitute, and is irrelevant to proving, IAC unless and until there is a predicate of proof of ineffectiveness. See Bryan v. State, 753 So.2d 1244, 1247-50 (Fla. 2000)("because Stokes' representation of Bryan was not deficient, and given that Bryan has not suffered any prejudice pursuant to Stokes' representation, the issue of whether Stokes was an alcoholic at the time of trial is irrelevant under *Strickland*").

Thus, concerning the effects of any deficient communication, the trial court correctly concluded:

> [T]he defendant has failed to establish that any problems in communication between he and Mr. Smith resulted in any specific

> action or inaction on the part of Mr. Smith that were 'ineffective' in Mr. Smith's representation. ***See Stephens v. State***, 787 So.2d 747, 758 (Fla. 2001); ***Sweet v. State***, 810 So.2d 854, 869 (Fla. 2002).

(PCR/IV 657) As such, there was no "action or inaction" that could constitute Strickland prejudice.

ISSUE "B" mentions in passing that "Mr. Smith and Appellant did not get along well" (IB 28) and then later picks up with this theme by contending that it resulted in Appellant not having the opportunity to present his theory of defense, not testifying at the suppression hearing, not presenting Everett's "revelations about his substance abuse and paranoia" (IB 32, alleged IAC penalty phase also addressed in ISSUE "F"). Concerning the "theory of defense" and Everett testifying at the suppression hearing, the initial Brief fails to cite any specificity whatsoever, making any such claim in ISSUE "B" undeveloped and thereby unpreserved at the appellate level. See Jones v. State, 966 So.2d 319, 330 (Fla. 2007)("In his reply brief, Jones raises for the first time a claim that ... the trial court abused its discretion by ... "; "we need not address it"); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Hall v. State, 823 So.2d 757, 763 (Fla.2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved).

Concerning any general negative impact of the relationship between Smith and Everett and concerning supposed IAC penalty phase, the trial court correctly reasoned:

> The defendant also claims Mr. Smith was 'hostile' to him in their communications with each other. In response to questions at the evidentiary hearing concerning the relationship between the defendant and his trial attorney, Mr. Smith gave the following answers:
>
> > Q. Did your, I think it was described as not really getting along with the defendant, did that interfere in any [] way in the transfer of information between the two of you?
> >
> > A. No, I don't get along with a lot of my clients, you know, and I understand why. They're in — I'm over there telling them, look, the best you're going to get is a life sentence, there is not much I can do for you, you know, your confession is coming in, all this evidence is coming in. They don't want to hear that. They want somebody to go tell them, look, we got an out here, I found a loophole to get you off. And, you know, at that point sometimes the relationship goes sour.
> >
> > Q. Did it in anyway lessen the attempts that you made on behalf of Paul Everett in this case? (Evidentiary hearing transcript page 139, lines 11-25)
> >
> > A. No, I did everything I thought I could do. You know, even, we went up to Alabama, my investigator and I, trying to find witnesses once his father died. We just, we went to his school, we talked to his principal, his guidance counselor, talked to a couple of his friends that we ran down up there. We, it just wasn't much redeeming about him. He wasn't a Boy Scout, he wasn't an athlete, he wasn't a scholar, you know, he didn't go to church. It was hardly anything that we could cull out of that and present to a jury. He never had a job. You know, it was tough. I mean, this is the first case I've ever had where I wasn't able to come up with something. So it was, it was sort of frustrating but, you know, like I said, we did everything we could, we just, we just ran into dead ends every time we investigated a certain avenue. So it wasn't much more I could do. Once that statement was presented to the jury, I mean, it was lights out after that. (Evidentiary hearing transcript, page 140, lines 1 — 17).
>
> *** The defendant is not entitled to relief as to this first ground.

(PCR/IV 657) See also ISSUE "F" infra. Further, as will be argued in ISSUE "F" infra, Everett's postconviction mitigation evidence falls far-short of demonstrating Strickland prejudice.

Beyond the forgoing arguments, the balance of ISSUE "B" appears to be an attempt to re-litigate the admissibility of Everett's incriminating November 27, 2001, statement, which this Court resolved through a lengthy analysis on direct appeal. See Everett v. State, 893 So.2d 1278, 1282-87 (Fla. 2004). As such, the balance of ISSUE "B" is procedurally barred. See Johnson v. State, 921 So.2d 490, 505 (Fla. 2005)("Issues regarding whether a confession should have been suppressed as involuntary are issues that could have been raised on direct appeal"; "procedurally barred"), citing Christopher v. State, 489 So.2d 22, 24 (Fla. 1986); see also Muehleman v. State, 3 So.3d 1149, 1164 (Fla. 2009)("law of the case doctrine bars consideration of those issues actually considered and decided in a former appeal in the same case"). However, in an abundance of caution, the State addresses the other aspects of ISSUE "B."

ISSUE "B" argues (IB 27) that "Mr. Smith should have known that Appellant would be his client" and corresponded with Everett to tell him not to make any statements to law enforcement. The answer to this argument is found within the Initial Brief: "It is important to acknowledge that it was **not possible** for this indigent Appellant to have had counsel appointed in Alabama." (IB 27) While the State does not concede that anyone in Florida should have known of any indigency (See discussion of Everett's $4,000 to $6,000 income infra), Assistant Public Defender Smith should not be held responsible for a task that would "not [be] possible" (IB 27) for him to do.

Beyond the Initial Brief's concession, the trial court's order correctly analyzed this allegation as follows:

> The defendant complains that his attorney, Walter Smith, should have corresponded with the defendant while the defendant was incarcerated in Alabama and law enforcement officers were investigating and interviewing him as to the instant case. The defendant argues Mr. Smith should have advised him to refrain from making statements until he could be represented and counseled.
>
> However, the evidence reflects Mr. Smith was with the Public Defender's Office and his office was appointed to represent the defendant **after the defendant was returned to Bay County** and charged with the current offenses. Upon undertaking the representation of the defendant, Mr. Smith filed a Motion to Suppress the statements made by the defendant on November 14, 2001 at 4:23 p.m. at the Baldwin County Jail, on November 19, 2001 at the Baldwin County Jail and on November 27, 2001 at 10:55 a.m. at the Baldwin County Jail. The record reflects law enforcement stopped their interview of the defendant during the November 14th statement **when the defendant stated he wished to talk to an attorney**. The defendant, through his attorney, based his Motion to Suppress on his allegations that he had exercised his right to an attorney while he was being questioned during his first interview on November 14, 2001 and that any further interrogation was improperly conducted by law enforcement on November 19th and 27th because they initiated the further contact. The defendant's attorney argued law enforcement initiated the contact when they asked for the biological sample from the defendant.
>
> The Court held a hearing on that motion and denied the defendant's motion. At that hearing the Court found it was the defendant who initiated the renewed contact with law enforcement officers on November 19, 2001 and not the other way around. The Court also found the defendant initiated the November 27th[] interview after being served with the arrest warrant for these charges. Because the defendant initiated both contacts with law enforcement, the Court found the defendant's case fell within the exception to the rule concerning re[]instating contact by law enforcement officer after a defendant has requested counsel. *See Edwards v. Arizona*, 451 U.S. 477 (1981), *Jones v. State*, 748 So.2d 1012 (Fla. 1999) and *Davis v. State*, 698 So.2d 1182 (Fla. 1997). This order was affirmed as part of the appeal of the defendant's judgment and sentence in this case. The defendant cannot now, in hindsight, claim his lawyer, who was not representing him at the time he made the statements, should have advised him not to make any statements.

(PCR/IV 655-57, paragraph breaks supplied)

Everett's Initial Brief fails to meet its appellate burden by failing to cite to authority requiring publicly-funded counsel to anticipate being appointed and to act as counsel for an out-of-state person prior to that appointment. Indeed, any such action would exceed the statutory authorization of the public defender's duties, which require the person to be "indigent," §27.51(1), Fla. Stat.; **AND** the indigent status to be determined pursuant to Section 27.52, §27.51(1), Fla. Stat., **AND** the person to be "under arrest for, or charged with, a felony," §27.51(1), Fla. Stat. (pertinent part). In terms of the facts of this case, Fla.R.Crim.P. 3.111 does not conflict with Chapter 27: When a defendant is held out-of-state, Florida has no control over the foreign "Booking Officer," Fla.R.Crim.P. 3.111(c), and there is no Florida "public defender of the circuit in which the arrest was made," Fla.R.Crim.P. 3.111(c)(2). Even someone who has been arrested out-of-state on a Governor's warrant can only "test the legality of the arrest" and cannot contest guilt. See §§941.10, 941.20, Fla. Stat.; here, the proceedings appear to have not reached even that limited stage.

Further, here, Everett was in Alabama custody pursuant to Alabama charges and therefore not in Florida "custodial restraint," as well as not yet formally charged with this murder and not yet at "first appearance" on this murder for purposes of Fla.R.Crim.P. 3.111(a). Accepting Everett's argument would lead to the absurd result of requiring the public defender to appear for, or otherwise advise, every person who is a suspect on a Florida felony and who is held out of state.

Indeed, adopting Everett's argument could have absurd implications for every police investigation in which the public defender could surmise police might have a suspect, the police might interview that suspect, the police might arrest the suspect, and in which the suspect might be indigent. Here, Everett wishes to somehow impose the absurd burden on Assistant Public Defender Walter Smith to know of his (Everett's) suspect status and location, but in weighing Smith's supposed responsibility, Everett withholds indigency-relevant information of Everett's assertion of $4,000 to $6,000 per month income selling marijuana and crystal meth (PSI at PCR/XVI 3152).

Everett has not even demonstrated that Walter Smith, or anyone else in the 14th Judicial Circuit's Public Defender's Office, knew of Everett's situation until after Everett had made his statements to law enforcement while he was in jail in Alabama. Contrary to Everett's current argument, Smith had no indication that Everett would be his defendant until "[p]robably maybe the day before his first appearance," when Everett's mother called him at home after someone, he thought Detective Tilley, gave her his number (PCR/V 829-30); Everett made his last pertinent statement to law enforcement on November 27, 2001 (R-Supp/I 23-31), and his first appearance was months later, on February 26, 2002, when the Public Defender was first appointed to represent Everett (R/I 7-9). Therefore, there was no factual predicate even for Fla.R.Crim.P. 3.111(c)(4)("public defender of each judicial circuit may interview a defendant when contacted by, or on

behalf of, a defendant who is, or claims to be, indigent as defined by law *** shall tender such advice ***").

Moreover, in this case, it is abundantly clear that Everett was well-aware of the right to remain silent that Everett now says Smith should have been required to tell him while he was in Alabama. The police repeatedly Mirandized Everett when he was in Alabama, telling him of this right (See R-Supp/I 1, 9, 23), and Everett actually invoked his right to remain silent twice (R-Supp/I 8, 21). Therefore, the best evidence of what Everett would have done with additional advice is what he actually did with that same advice, that is discard it and talk to the police, essentially trying to game them. As such, there is no Strickland, or any other, prejudice.

For each of the foregoing reasons, any suggestions that Fla.R.Crim.P. 3.111 could be the basis for an IAC claim would be incorrect. Trial counsel was not unreasonable by not injecting himself into the police investigation in Alabama that defense counsel did not have any reason to even know about. Trial counsel was not unreasonable for staying within the authority limited by law.

ISSUE "B" (IB 30-31) also quotes from the Rules of Professional Responsibility for the proposition that "counsel need not 'endorse' the position of a client, but is bound to represent it." While these rules can inform the analysis, they, for postconviction litigation, establish no rights per se. Further, here, Mr. Smith diligently implemented this principle, as he reasonably questioned the multiple versions of Everett's stories (See PCR/V 814-15, 830-31), ranging from --

- telling the police that he never saw the billy club while he was in Panama City (R/Supp/I 5) and threw his shoes away because he "got in a fight on the beach and they got blood on them" and no longer looked "nice" (R/Supp/I 6); **TO**

- telling the police that the victim was "Bubba's" girlfriend, he (Everett) had the billy club at the victim's house but after he (Everett) had consensual sex with the victim and after "Bubba" began beating-up the victim (R-Supp/I 14-20) the club slipped from his hands as he (Everett) ran away and then he discarded his bloody shoes (R-Supp/I 20); **TO**

- telling the police that he (Everett) had never previously met or seen the victim (R/Supp/I 30), he (Everett) burglarized victim's home while "Bubba" waited outside (R/Supp/I 24, 27) and while Everett had the billy club (R/Supp/I 27-28), she confronted Everett (R/Supp/I 24, 30), he hit her (R/Supp/I 28) and knocked her down (R/Supp/I 26), he had anal and vaginal sex with her (R/Supp/I 26), he "possib[ly]" twisted her head too much (R/Supp/I 27), and he discarded his bloody shoes in a trashcan (R/Supp/I 28-29);[8] **TO**

- months later, in March 2002, purportedly reporting to a Public Defender investigator what he had told Sergeant Tilley in Alabama, telling the Public Defender investigator that he was on LSD when the crime was committed, "they" were burglarizing the victim's house, he (Everett) was going through her purse when she confronted him, and he punched her and she fell down, he passed out, and when he awakened his accomplice was choking the victim, and at some point he (Everett) had sex with the victim because "he was naked except for his shirt" (PCR/VI 912-13; PCR/VII 1172-73); **TO**

- months later, in May 2002, telling the Public Defender investigator that he (Everett) thought the victim was a "federal agent" when the victim came to his and Jared Farmer's motel room asked about someone else and saw them making drugs in the room, by happenstance later he (Everett) saw the victim's car in a Panama City Beach

[8] This was the version that the State introduced into evidence at the trial. (See R/VII 151-66)

> neighborhood while he jogged, and he (Everett) then refused to provide the investigator more detail (PCR/VI 903-904);

but, even saddled with Everett's multiple stories,[9] Everett's counsel, Walter Smith, still vigorously advocated for Everett as, for example, he litigated the motion to suppress (See R/I 33-44; R/II); as he argued against admitting the evidence at trial (R/VII 127-29, 132-34) and contemporaneously objected to its admission then (R/VII 150-51); as he advocated for Everett in the guilt-phase of the trial (See, e.g., R/VIII 294-303); as he submitted mitigation evidence to the jury (R/IV 469-81) and argued to the jury for Everett's life (R/IV 489-509); and as he advocated for a life sentence through a sentencing memorandum (PC/I 132-37)[10]. Mr. Smith's advocacy far-exceeded Strickland's requirements for constitutional representation and highlight the failure of Everett to demonstrate any judicially cognizable prejudice under Strickland or otherwise. Indeed, aspects of Mr. Smith's advocacy are the subjects of additional issues, addressed infra.

In sum, ISSUE "B," as stated, fails to present a claim, and, to the degree its text does present any claim, it is meritless. Everett has failed to demonstrate either of Strickland's prongs. The trial court's rejections of Everett's arguments are sound and supported by the law and competent

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[9] For yet-another variation of Everett's stories, see his letter in the Public Defender's file (PCR/VI 891-93)

[10] The memorandum is written in terms like a draft of a sentencing order.

substantial evidence, thereby meriting affirmance. See also ISSUES "C" and "F" infra.

ISSUE "C" (IAC DEFENNDANT'S STATEMENTS): WHETHER APPELLANT EVERETT PROVED, PURSUANT TO STRICKLAND, THAT HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN LITIGATING THE SUPPRESSION OF APPELLANT'S ALABAMA STATEMENTS. (IB 33-44, RESTATED)

ISSUE "C" contends (See IB 39) that Everett's defense counsel, Walter Smith, ineffectively failed to inform him of the importance of his own testimony at the pre-trial suppression hearing and ineffectively failed to obtain Alabama Detective Murphy's attendance at that suppression hearing.

Everett has failed to meet his heavy Strickland burdens to prove deficiency and failed to demonstrate that the result of the suppression hearing would have been any different, thereby also failing to prove Strickland prejudice.

The trial court's rejection of this claim is grounded on findings supported by competent substantial evidence and merits affirmance:

> As to his second claim, the defendant states he was not aware of the issues of contention with respect to his pretrial statement being suppressed. He further claims he was unaware of the importance of offering his own testimony as well as the importance of ensuring Detective John Murphy from Baldwin County, Alabama, was present at the suppression hearing. He argues his attorney was ineffective in not having him testify at the suppression hearing.
>
> The record of the October 4, 2002 hearing on the Motion to Suppress reflects the defendant initially refused to come over for the hearing and the Court ordered him brought over.
>
> The **transcripts of the three statements were the best evidence of what was going on at the time** the defendant was giving his statements to law enforcement and were given to the Court for its consideration.
>
> At the evidentiary hearing, the defendant's attorney testified concerning what he knew about the defendant's possible testimony at the suppression hearing:

Q. Do you recall any facts that you received from the defendant that would support his motion to suppress that you did not present to the court?

A. No, you know, I think everyone pretty much agreed as to what happened, you know, in terms of when they came (Evidentiary hearing transcript, page 122, lines 1 - 25) into contact with him and he invoked his right to a lawyer. They left. And then I think Rodney Tilley called back over there and said, hey, how about see if you can get a biological sample from him. So, I mean that, that really, those are the salient facts. I don't know if there is anything else that could be added to that.

Q. You don't recall anything that he specifically told you that was not presented to the court?

A. I don't. I mean, there may have been but I certainly don't remember it at this point. I mean, if I had, there is no reason not to put him on the stand at the suppression hearing because that is not going to be admissible against him at trial. So if there were some important revelation that I thought would have bearing on that motion to suppress I would have put him on. So the fact that I didn't, you know, I'm inferring from that that I didn't have any other additional information to put before the court. (Evidentiary hearing transcript, page 123, lines 1-18).

It is obvious the defendant's testimony at the evidentiary hearing as to his version of what transpired during the taking of his statement is extremely questionable. The defendant has failed to establish his attorney was ineffective in not calling him to testify at the suppression hearing.

Furthermore, the trial record reflects there was a proffer made by the State as to the admissibility of defendant's statements prior to being admitted as evidence. During that proffer, the State offered the testimony of Detective John Murphy, Baldwin County, Alabama, and Sergeant Tilley with the Panama City Beach Police Department. At that proffer, the Court made specific findings regarding what was said and done. See trial transcript, pages 134 through 137.

The Court also notes that during the evidentiary hearing on this motion, Detective Murphy denied having additional or hidden interviews with the defendant that were not covered in the report used at the suppression hearing. The Court finds the testimony of Detective Murphy to be credible on this point.

The Court further finds that the defendant has failed to present any credible evidence to show that his trial counsel's performance in the handling of the attack on the admissibility of defendant's statements was ineffective. There is nothing to establish that the testimony of the defendant at the suppression hearing would have changed the result reached by the Court. The only additional points that were

> raised by the defendant's testimony at the evidentiary hearing was that he was not read his *Miranda* rights by Sergeant Tilley and when he asked for an attorney the officers would turn off the tape recorder and tell him the only way to avoid lethal injection was to confess to it. Under the totality of the circumstances, the defendant's claim that this additional testimony, if presented to the Court, would have changed the result is without merit. The State is correct in pointing out that the Court is the finder of fact and judge of the credibility of a witness in a Motion to Suppress hearing. In light of the contents of the recorded and transcribed statements, made by the defendant, **the Court finds the defendant's version of what took place not credible**. Furthermore, as noted during the evidentiary hearing, **defendant's attorney testified concerning his recollection of what the defendant told him and the defendant's attorney did not see the need to call the defendant because he had nothing to add.**
>
> The defendant is not entitled to relief under claim two.

(PCR/IV 658-60, paragraph breaks supplied)

Thus, in addition to Mr. Smith's testimony block-quoted in the trial court's order and excerpted above, the trial court, as fact-finder, disregarded Everett's testimony that Everett claims he would have tendered at the suppression hearing.[11] Accordingly, Detective Murphy testified at the postconviction hearing that he did not make any threats or anything of that nature. (PCR/V 787) As such, Everett has failed to establish that this rejected testimony demonstrated either Strickland deficiency or Strickland prejudice.

The following sub-sections document competent substantial evidence supporting other aspects of the trial court's order and its findings.

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[11] Accordingly, it appears that every time Everett opens his mouth, he concocts another story. See Everett's versions of the murder bulleted at the end of ISSUE "B" supra.

TRIAL COURT ORDER: "defendant initially refused to come over for the hearing and the Court ordered him brought over." (PCR/IV 658)

Accordingly, the transcript for the October 4, 2002, suppression hearing reflects the following:

> MR. SMITH [defense counsel]: We need to get Everett out here.
>
> THE BAILIFF: Everett refused to come over.
>
> MR. SMITH: Oh, he did?
>
> MR. MEADOWS [prosecutor]: He refused to come over?
>
> THE BAILIFF: He refused to come over. Would not come.
>
> MR. MEADOWS: Do you want to transport him?
>
> MR. SMITH: Well, I think we need him here, Judge.

The trial judge directed that Everett be brought to court, and the bailiff responded, "I'll take care of it, Judge." (R/II 197) Everett should not be heard to complain that he was not called as a witness at a hearing that he had refused to attend.[12]

TRIAL COURT ORDER: "the trial record reflects there was a proffer made by the State as to the admissibility of defendant's statements prior to being admitted as evidence. During that proffer, the State offered the testimony of Detective John Murphy, Baldwin County, Alabama, and Sergeant Tilley with the Panama City Beach Police Department." (PCR/IV 659)

Thus, during the trial, when the jury was excused for a recess, the prosecutor interjected:

> MR. MEADOWS: This might be a good place to do a proffer on the admissibility of the Defendant's statement.

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[12] It is also noteworthy that Everett interjected nothing during the proffer of his confession and the announcement of the proffer without the jury's presence (See R/VII 114-38) and later confirmed that he did not wish to testify at the jury trial even though it was made clear to Everett that the decision not to testify was entirely his (See R VIII 227-28).

THE COURT: All right.

MR. MEADOWS: I will be glad to put them on and get some testimony in that regard.

THE COURT: All right.

MR. MEADOWS: **John Murphy**.

(R/VII 114) At this point, the very same witness (Murphy) that Everett now claims at postconviction should have testified regarding the admissibility-determination, did, in fact, testify for that purpose (at R/VII 115-22).

At the proffer, Murphy testified that, on **November 19, 2001**, (R/VII 120) when he asked Everett about giving law enforcement a DNA sample, Everett started talking about this case. Everett, not Murphy, wanted to talk "off the record" but Murphy responded that he could not speak with Everett off the record, "it would have to be on the record." Murphy then Mirandized Everett **again**, reading the Miranda form to Everett and checking the items on it as "we read each one." Everett signed the Miranda form. (R/VII 118-19) Subsequently that day, Everett then gave a statement to Investigator Tilley. (R/VII 120; accord Tilley's testimony at R/VII 123-24)

At the proffer, Murphy testified that, on **November 27, 2001**, Everett was told that Sergeant Tilley was bringing the arrest warrant for this murder, and Everett responded that he wanted to speak again. (R/VII 120-21) At the proffer, Sergeant Tilley testified that Detective Murphy advised him that Everett "wanted to talk to me again, so I started the interview." The Sergeant's proffer then went line by line of the part of Everett's taped statement in which he confirmed with Everett that he "wished to talk … without an attorney present," that Everett "underst[ood]d that [he] can

still stop at any time," that he "still has [his] rights," that he "can still stop talking … at any time that [he] likes," and that he still wants to talk. (Compare R-Supp/I 23 with R/VII 125) On cross-examination, Tilley confirmed, "[n]othing else happened that you haven't told us about." (R/VII 126)

At the proffer, Everett's trial counsel then very competently argued that Everett's statement should be suppressed (R/VII 127-29, 132-34), and the trial court accredited Murphy's and Tilley's testimony at the proffer (R/VII 134-37).

Therefore, contrary to ISSUE "C" but as the trial court found in its postconviction order, prior to the introduction into evidence at trial of Everett's November 27, 2001, confession, Everett was not deprived of the testimony of Detective Murphy.

Indeed, although unnecessary to resolve this claim, Everett's counsel had expended substantial competent effort in attempting to procure Murphy's presence at the pre-trial suppression hearing. (See R/I 40-43)

TRIAL COURT ORDER: "during the evidentiary hearing on this motion, Detective Murphy denied having additional or hidden interviews with the defendant that were not covered in the report used at the suppression hearing. The Court finds the testimony of Detective Murphy to be credible on this point." (PCR/IV 659)

Accordingly, Detective Murphy testified at the postconviction evidentiary hearing:

> Q ... Is there any other contact or any other conversation that you had with ... Paul Everett that you have not previously testified about?
>
> A No.

(PCR/V 787) Murphy also confirmed that the only interviews he conducted were covered in the report (PCR/V 789) that was used at the motion to suppress and, directly conflicting with Everett's testimony about hidden threats, Murphy expressly denied that he ever threatened Everett (PCR/V 787). Accordingly, Sergeant Tilley acknowledged at the proffer during trial that "[n]othing else happened that you haven't told us about." (R/VII 126)

Therefore, based on the tapes of Everett's statements themselves, as supported by evidence at the proffer and at the postconviction evidentiary hearing,

"[t]he transcripts of the three statements were the best evidence of what was going on at the time" (PCR/IV 658),

which the trial court's order found.

In sum, in spite of years of hindsighted postconviction preparation, Everett failed to present any credible evidence that undermines the admissibility of his confession beyond what was already presented to the trial court, rejected by the trial court, and on direct appeal rejected by this Court. As such, Everett's postconviction effort fell woefully short of demonstrating that Mr. Smith was Strickland deficient to the degree that undermined the confidence in the outcome of the jury trial. Everett's burden was to prove both Strickland prongs. He proved neither. The trial court's findings and ruling denying this claim merit affirmance.

Additional Rebuttal.

Although unnecessary for rejecting this claim, the State rebuts additional aspects of Everett's Initial Brief.

Everett concludes (IB 36) that, because the State introduced only Everett's third statement in which he fully confessed, "it can only be assumed that the Appellee was aware that the first two statements should not be used" at trial. This, dehors record assumption, is incorrect. The first two statements were admissible, and Everett should not be heard to "complain" that the State did not use them. They were admissible to show that Everett was attempting to game the police by concocting various stories, thereby showing his consciousness of guilt. Prior to making his first statement, Everett waived his Miranda rights. (R-Supp/I 1) Prior to making his second statement, Everett initiated discussion of this murder, the police confirmed that he wanted to talk, and Everett waived his Miranda rights. (R/VII 117-20; R-Supp/I 9) Therefore, these two statements were admissible.

The consciousness-of-guilt inconsistencies among Everett's stories are palpable. As bulleted towards the end of ISSUE "B" supra,[13] in Everett's first statement, he said that he never saw the billy club while he was in Panama City (R/Supp/I 5) and threw his shoes away because he "got in a fight on the beach and they got blood on them" and no longer looked "nice" (R/Supp/I 6). In his second statement, Everett, probably concluding that the police recovered the billy club near the murder scene, admitted that he had the billy club at the victim's house (R-Supp/I 20), but instead of him

[13] Given all those stories documented in those bullets, one must wonder whether any testimony from Everett at the suppression hearing would have adopted one of those or whether it would have concocted yet another story.

being involved in a fight at the beach, he got blood on his shoes (R-Supp/I 20) when "Bubba" beat the victim up because she had consensual sex with Everett (R-Supp/I 14-20). And, of course, in his third statement, which was introduced into evidence, Everett admits to having the billy club with him (R-Supp/I 27), burglarizing the victim's home (R-Supp/I 24), beating her (R-Supp/I 28), raping her anally and vaginally (R-Supp/I 25-26), "possib[ly]" yanking her head too much (R-Supp/I 27), and trashing the shoes that he (Everett) bloodied during these events (See R-Supp/I 29).

Everett erroneously concludes (IB 36) that Murphy and Tilley "developed a scheme for inducing Mr. Everett to 'desire' to 'initiate contact.'" This self-serving conclusion is contradicted by competent substantial evidence. In contrast to Everett's conclusion, his second statement was initiated by Everett when law enforcement was performing a lawful function of obtaining DNA samples. And, the third statement was initiated by Everett when law enforcement lawfully served the arrest warrant on him. As such, this Court announced the law of this case:

> Accordingly, neither the service of the arrest warrant nor the request that Everett consent to providing physical evidence constitutes a word or action 'that the police should know is reasonably likely to elicit an incriminating response from the suspect.'

Everett, 893 So.2d at 1286.

Everett pretends (See IB 39) that he was innocent to the practical impact of his statements. However, Everett's extensive efforts to mislead the police in his first and second statements, his counsel's motion to suppress, his presence at the suppression hearing (although initially refusing to attend), and his presence at the proffer and attendant

argument, all belie such a conclusion. Everett's gaming continued through those two statements and even into the judicial proceedings as he "refused" to come to court for the suppression hearing. In any event, a more-motivated Everett would have produced nothing that would have changed anything concerning the admissibility of his confession.

Everett claims (IB 40) that Murphy initiated contact beyond what was presented to the trial court. In addition to Murphy's proffer testimony and postconviction testimony eliminating any relevant improper initiated contact (See discussion supra), it is noteworthy that Everett's sole support for his conclusion is a citation to the evidentiary hearing at "ET. 83" (PCR/V 786). However, the testimony there does not state that Murphy initiated any improper contact with Everett relevant to the admissibility of Everett's third statement to the police. Instead, Murphy was asked whether he "ever" showed Everett any photographs or charts of the crime scene, and Murphy said that after Everett had confessed, that is, **after Everett had initiated contact and after Everett's third statement to the police**, he (Murphy) showed Everett some pictures and Everett "refused to look at them." This contact, after Everett initiated contact, was not improper, and it is irrelevant to the third statement that he made earlier and that was introduced into evidence.

Everett states (IB 40) that it "is not a difficult matter to secure the attendance of law enforcement officer from other states …." As suggested by no citation to the record, this is beyond the record on appeal. If Everett thought this to be a significant fact, he should have introduced evidence

of it. In any event, as discussed supra, Murphy did testify prior to the introduction of Everett's statement in front of the jury. Murphy did "attend[]" and, as the postconviction hearing confirmed, his testimony years later does not change anything significant.

Everett speculates (IB 40-41) regarding Farmer's veracity and how the State might have reacted if Everett's confession had been excluded. This speculation is not supported by the record, and Everett ignores the other evidence, such as his non-consensual sex with the victim, as confirmed through Everett's DNA and the severe beating he inflicted upon her, culminating in Everett breaking her neck. He also ignores, for example, his purchase of the billy club at Wal-Mart and then discarding it near the murder scene. See "Trial Guilt-Phase Facts" section supra.

Everett discusses (IB 42-43) Hunter v. State, 973 So.2d 1174 (Fla. 1st DCA 2007). The State has four responses: (1) trial defense counsel is not responsible for case law that did not exist in 2002, see, e.g., Owen v. Crosby, 854 So.2d 182, 191 (Fla. 2003)(counsel not responsible for case law decided three years later), discussing Nelms v. State, 596 So. 2d 441 (Fla. 1992); Cherry v. State, 781 So.2d 1040, 1053 (Fla. 2000)(regarding "a limiting instruction on the aggravating factors"; "We have consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law"); (2) because no new facts have been adduced that show IAC, Everett v. State, 893 So.2d 1278 (Fla. 2004), procedurally bars this claim because it was raised on direct appeal; (3) Hunter, as a first DCA case, is not binding on this Court, and (4) Hunter, with

operative facts differing from those here, is not applicable here; Everett, in contrast to Hunter, re-initiated contact with law enforcement, as is now the law of this case based upon the trial court's evidence-grounded factual finding. In sum, even if Everett's trial were today, Hunter would not apply here.

Everett's criticism (e.g., IB 43) of his defense counsel's invocation of some New York case law (See R/I 35) ignores the other extensive argument and authorities that defense counsel presented on Everett's behalf that went well-above the threshold for effectiveness. Further, Florida Courts do sometimes adopt New York case law. Indeed, the motion to suppress was filed about two years after this Court decided Delgado v. State, 776 So.2d 233 (Fla. 2000)(subsequently statutorily overruled), which relied upon New York law, Id. at 237. Further, relying upon another state's law does not constitute IAC if, as here, that law is competently presented or if, as here, it does not negate counsel's otherwise competent representation.

In sum, contrary to Everett's protest (IB 43-44), ISSUE "C" is an attempt to re-litigate the suppression issue, and even armed with years of hindsight, Everett has failed to demonstrate that the result of the suppression hearing would be any different. Mr. Smith afforded Everett an effort that was more than Strickland competent, and nothing presented at the postconviction evidentiary hearing would have undermined confidence in the outcome.

ISSUE "D" (IAC OPINIONS): WHETHER APPELLANT EVERETT PROVED, PURSUANT TO STRICKLAND, THAT HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE CONCERNING OPINION TESTIMONY. (IB 44-50, RESTATED)

ISSUE "D" claims that Everett's trial counsel was Strickland prejudicially ineffective by allowing Chuck Richards, an FDLE "senior crime analyst" (R/VII), to "offer blood spatter opinions about stains which were not even known with certainty to be human blood." (IB 46) Everett contends that Richards was not qualified to render the opinions and defense counsel should have excluded the opinions (See IB 45-47) or showed the jury that they were rendered by a witness with "no unique or special training" (IB 49) and without supportive scientific testing (IB 49-50).

This issue's protest over Chuck Richards' blood-related testimony is, to put it bluntly, a "red herring." Everett claims (IB 47) that the testimony was "a feature of the trial," but the trial record demonstrates that the testimony was actually inconsequential to the result of the trial because: (1) Other evidence was far more weighty and probative than the evidence this issue contests as an alleged basis for IAC; (2) other witnesses testified concerning the blood, and Everett has not raised IAC concerning their testimony; (3) the prosecutor did not highlight Chuck Richards testimony in his arguments to the jury; and (4) Everett has failed to prove that Chuck Richards' limited testimony concerning the blood was unqualified or that it was wrong.

Because of the inconsequential nature of the evidence, Everett failed to demonstrate that no competent counsel would have acted or omitted to act as Mr. Smith did, thereby failing to prove the Strickland deficiency prong,

and failed to prove that the confidence in the outcome is undermined, thereby failing to prove the Strickland prejudice prong.

The trial court's order denying this claim (PCR/IV 660) merits affirmance. The State elaborates.

1. The testimony was inconsequential to the result of the trial because other evidence was far more weighty and probative than the evidence this issue contests as an alleged basis for IAC.

Citing to testimony in the trial transcript at "TT.60" (R/VII 60), this issue contests some testimony concerning what appeared to be blood at the crime scene.

As a preliminary matter, the witness at issue here, Chuck Richards, admitted on cross-examination that no tests were done to determine who was the source of the blood (R/VII 68-69), thus limiting any impact of his blood-testimony in the trial. He also repeatedly qualified his testimony by indicating that the reddish substances were "suspected" blood. (See R/VII 47 L23-24, 50 L8, 50 L9, 50 L24, 51 L4, 55 L2, 55 L21, 62 L10, 64 L1, 64 L15, 65 L14-15, 66 L3, 66 L7)

Other evidence introduced at trial, on which the State now elaborates, dwarfs the Chuck-Richards' evidence that Everett claims that his defense counsel should have more vigorously contested.

The Medical Examiner's Testimony.

The medical examiner, Dr. Marie Hansen, went to the crime scene. There she saw the victim face down on the floor. A "bloody" pillow was near her. "There was … blood spatter on the ceiling and some blood droplets on the

furniture in that area." (R/VIII 205-206) Blood was found on the victim's hand and forearm (R/VIII 210) and on the bottom of her feet (R/VIII 217).

There were "lacerations of various areas in the lip," and there was a tear in her lip that extended all the way through to the inside of her cheek. (R/VIII 209)

The victim's teeth protruded through the top of her lip. (R/VIII 209)

The victim's tooth had been knocked out of her head (See R/VIII 209-210), and the tooth was located "between her shoulder and her head" (R/VIII 205) on the rug (R/VIII 210).

There was other evidence of blunt impacts to the victim's mouth, (R/VIII 210) and there was "bruising in the tongue where the teeth are impacting the tongue" (R/VIII 210).

The doctor found several small abrasions on the victim's hand. (R/VIII 211) The victim had an abrasion on the bottom of her chin (R/VIII 207), on her back (R/VIII 205), and "on the upper outer aspect of the right arm" (R/VIII 210). The abrasion on her back was consistent with a carpet burn. (See R/VIII 213) The victim's "traumatic abrasions" were consistent with carpet burns. (R/VIII 210-11) She also had "traumatic abrasions" on the "back of the other elbow," which also could be a carpet burn, that is, from scraping against carpet. (R/VIII 211)

There was a fresh (R/VIII 221) abrasion at the base of the victim's vagina (R/VIII 213), which was consistent with forceful impact (R/VIII 217-18).

The victim died from a fractured C-5 vertebra, which injured her spinal cord and eventually fatally impaired her breathing. (R/VIII 214-17) In other words, she died from a broken neck (R/VIII 218), which was caused by a "twisting motion, rather than a single blow to that area" (R/VIII 218). It may have taken the victim several minutes to lose consciousness. (R/VIII 219; see also R/VIII 219-20, 221, 222))

Everett's DNA from the Rape.

As discussed above, the medical examiner testified that the victim sustained a vaginal injury consistent with being raped. Everett's DNA (R/VII 140-41, 147-49) was identified on vaginal swabs taken from the victim (R/VII 82-84; R/VIII 184-86). The odds that this was someone else's DNA, among caucasions, were 1 in 15.1 quadrillion. (R/VIII 190)

The Billy Club.

A billy club was recovered about 133 feet from the victim's back door. (R/VII 86, 94) The bat tested positive for the presumptive presence of blood. (R/VII 170-71) Everett was identified in a Wal-Mart surveillance video purchasing such a club on October 27, 2001 (R/VII 98-99, 104-107), less than a week prior to the victim's November 2, 2001, murder. The videotape of that transaction was played for the jury. (R/VII 99-101)

Confession to the Burglary, Rape, Beating, and Possessing the Club.

A discussed in ISSUE "B" and ISSUE "C" supra, Everett confessed, and several details in the confession matched other evidence amassed against Everett. Everett admitted to burglarizing victim's home (R/VII 153-55, 158-

59, 163-64, 165), raping her anally and vaginally (R/VII 156-57), hitting her (R/VII 153, 155, 160) and knocking her down (R/VII 156), "possib[ly]" twisted her head too much (R/VII 158), and having the billy club with him at the beginning of the burglary (R/VII 159). See also Trial Guilt-Phase Facts section supra; Everett, 893 So.2d 1278.

Compared with the foregoing evidence, Chuck Richards' testimony concerning blood is inconsequential.

2. The testimony was inconsequential to the result of the trial because other witnesses testified concerning the blood, and Everett has not raised IAC concerning their testimony.

This issue complains about Chuck Richards characterizing what he saw as "blood" and as having some other features. However, other witnesses, whom Everett has not contested, testified to similar evidence.

As discussed above, the medical examiner, Dr. Marie Hansen, observed the murder scene and the victim. She saw a "bloody" pillow near the victim. "There was … blood spatter on the ceiling and some blood droplets on the furniture in that area." (R/VIII 205-206) Blood was found on the victim's hand and forearm (R/VIII 210) and on the bottom of her feet (R/VIII 217). Sergeant Tilley testified that "blood evidence [was found] in various areas of the house." (R/VII 144) Michelle Broschart (FDLE) testified that the bat presumptively tested positive for blood. (R/VII 171)

Everett himself not only admitted to beating the victim but also admitted that she was bleeding (R/VII 155), that he got blood on his shorts (R/VII 160), and he "guess[ed]" that his hands could have had blood on them (Id at 161). Thus, he discarded his shoes (R/VII 161-62).

Further, the jury was able to view the bloody crime scene for itself through a videotape (R/VII 44-51) and photographs (R/VII 52-66).

3. The testimony was inconsequential to the result of the trial because the prosecutor did not highlight Chuck Richards testimony in his arguments to the jury.

Contrary to Everett's assertion that Chuck Richards' blood-related testimony was a "feature of the trial" (IB 47), the prosecutor did not highlight it in his opening statement (R/VII 10-19) or his closing arguments in the guilt-phase (R/VIII 277-94, 304-307) or in the penalty phase (R/IV 481-89).

4. Fatal to his postconviction claim, Everett has failed to prove that Chuck Richards was unqualified for the limited testimony concerning the blood and that his testimony was wrong.

Applying Everett's postconviction Strickland burden to this claim, he was required to show that any competent lawyer would have known that Richards was unqualified[14] to testify concerning the blood he observed. He fails to cite any case that makes the point so clearly that his trial attorney was incompetent. He had, and has, that burden and failed to meet it. Moreover, although unnecessary to reject this claim, the record affirmatively shows Richards' competency to testify concerning the blood and thereby affirmatively shows Smith's competency in not challenging

[14] Contrary to Everett's suggestion, Appellee does not concede that Richards was "not qualified to offer such opinions." (See also, e.g., state's memorandum at PCR/IV 629: "the reasonableness of the scope of Richards' limited testimony is established by his extensive training and experience")

Richards any further. A layman could testify that the substances appeared to be blood, especially under the facts of this case, See §90.701, Fla. Stat. (lay opinion testimony), and Chuck Richards was also qualified to discuss directionality of blood, See §90.702, Fla. Stat. (experts with specialized knowledge).

As a preliminary but important point, the victim maintained a clean and neat home. (R/VII 32-33) As discussed supra, she was severely beaten, with a tooth knocked out and teeth protruding through her lip, as well as raped. Especially under these facts, any laymen could have concluded that the "reddish" (E.g., R/VII 55) substance found at the crime scene was blood. See Floyd v. State, 569 So.2d 1225, 1231 (Fla. 1990)(officer could testify that an object had blood on it and …).

Indeed, at one point, the Initial Brief (IB 44) concedes that there were "multiple bloodstains about the house." Thus, Richards' repeated qualification of his testimony with "suspected" blood (R/VII 47 L23-24, 50 L8, 50 L9, 50 L24, 51 L4, 55 L2, 55 L21, 62 L10, 64 L1, 64 L15, 65 L14-15, 66 L3, 66 L7) was unnecessary, which also supports the inconsequential nature of this claim.

Richards' expertise not only more-than-qualified him to testify that he observed blood at the murder scene, it also qualified him to testify concerning some physical characteristics indicative of directionality of the blood. He was employed by the Fort Walton Beach Police department for over 12 years, and in the last six of those years, he was a crime scene investigator. When Richards testified at trial, he was a senior crime scene

analyst for FDLE and had completed FDLE's "training program in crime scene analysis. He was "certified as a crime scene analyst." (R/VII 42-43) After the prosecutor assured defense counsel that Richards would be limited to the "direction in which blood was deposited" (R/VII 59), Richards asserted that, based on his training and experience, he "can kind of get an idea of determination in which direction the blood was traveling from when it hit the surface." (R/VII 60) Because Everett made his background an issue in postconviction, Richards provided additional details of his qualifications and the limits of it to which Richards adhered at trial:

> Q *** Let me ask you a few questions. Blood spatter pattern analysis is actually the science we're talking about, isn't it?
>
> A Pattern analysis, it is more interpretation, I guess.
>
> Q Right. So the person who is a blood spatter pattern analyst could give opinions as to the speed with which the blood made impact, correct?
>
> A That's correct.
>
> Q Could give opinions as to the distance from which the blood was delivered to the place at which it made impact?
>
> A That is correct.
>
> Q Could make, give opinions as to whether that was applied directly, was cast off blood or had been applied in some other way, correct?
>
> A That's correct.
>
> Q When you were testifying in this trial, and I'm going to have you look at Page 60, Line 15 through 19, you were asked this question, the question proposed to you is 'can you tell us based on your training and experience with the Florida Department of Law Enforcement regarding blood spatter and the shape and what it tells you as far as direction from which it was, from where it was deposited,' correct?
>
> A That's correct.

> Q And it was based upon that question and based on your training and experience that you testified in the trial as Mr. Lykes has directed, correct?
>
> A That's correct.
>
> Q And you didn't go -- did you go beyond your level of expertise and knowledge in your testimony?
>
> A I don't think so, Mr. Grammer, because based on my crime scene training we can, I have trained to look at blood spatter and kind of get an idea of which direction it came from based on the shape of the blood spatter. But I don't give any testimony as to the angle or the velocity or anything like that.

(PCR/V 742-43)

Thus, Richards' role in this case properly "assist[ed] … in investigating a scene involving a death," (R/VII 43) and Richards was qualified to opine concerning directionality.

Accordingly, in Floyd, 569 So.2d at 1231, the officer could lawfully not only testify that something was blood, he could lawfully also opine:

> *** Officer Olsen stated that a Kleenex box lying on the bedroom floor where Anderson's body was found 'appeared to have been knocked off the dresser,' that a tablecloth found lying on the bed 'appeared like someone had taken some type of object that had blood on it and wiped it on there and left it on the bed,' ***

Chuck Richards' testimony concerning the direction of blood-travel required no more expertise than Officer Olsen's testimony, and Richards was particularly qualified to give his opinions here.

Holland v. State, 916 So.2d 750, 758 (Fla. 2005), cited to Floyd in rejecting an IAC claim that alleged "trial counsel was ineffective for failing to object to the admission of Officer McDonald's opinion testimony that Officer Winters' service weapon had been intentionally hidden in the place where it was found." Everett's IAC claim should be rejected here. See also Grossman v. State, 525 So.2d 833, 837 (Fla. 1988)("blood splatter

expert … was qualified and performed sufficient analysis to opine that the splatters were from a high velocity weapon, and that the victim's mortal wound was inflicted inside the vehicle"), overruled on other ground Franqui v. State, 699 So.2d 1312, 1318-19 (Fla. 1997).

A fortiori, here Richards' opinion concerned only direction and did not extend to velocity. Compare Taylor v. State, 937 So.2d 590, 595 (Fla. 2006)("blood spatter expert opined that the blood smears on the outside wall of the Sikes home were likely caused by Kushmer's bloody hair. Further, high-velocity blood spatter located to the left of the smears indicated that the spatter was caused by a gunshot wound"); Anderson v. State, 863 So.2d 169, 179 (Fla. 2003)("Caudill testified that some of the blood stains found in the vault were made by blood traveling at 'medium velocity,' which was consistent with the victims having been struck with blunt force. On cross-examination, Caudill admitted that the medium velocity spatters could have been created in a number of other ways as well, such as the activities of the emergency personnel or from arterial spurting. Caudill also testified that he could not associate the blood spatters he tested with a specific victim"; discusses qualifications for this level of expertise; abuse of discretion standard); Lewek v. State, 702 So.2d 527, 532 (Fla. 4th DCA 1997)("'An estimate of the speed at which a conveyance or other object was moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify to the rate

of speed of such a moving object'"); Martinez v. State, 692 So.2d 199 (Fla. 3d DCA 1997)(occupants of car that defendant passed could estimate "defendant's speed at about 70 miles per hour as he passed them").

Finally, ISSUE "D" seems to forget that a postconviction petitioner bears the burden of proof, which is heavy when evaluating a defense counsel's performance. Thus, the Initial Brief mentions the test of Frye v. United States, 293 F. 1013 (D.C.Cir.1923), but Everett ignores the principle that Frye is applicable only to new or novel scientific techniques. See, e.g., U.S. Sugar Corp. v. Henson, 823 So.2d 104, 109 (Fla. 2002)("the *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques"). Everett failed to prove the applicability of that test here as a first-step towards demonstrating that his trial counsel should have asserted it during the trial.

Similarly, to demonstrate IAC for this issue, Everett bore the burden of proving that Richards' opinions were wrong. Everett had the burden to prove that the substance was not, in fact blood, and that the directions to which Richards testified were incorrect. He met none of these burdens, thereby failing to prove his claim. See Reed v. State, 875 So.2d 415, 422, 425, 427 (Fla. 2004)(affirmed; "the circuit court found Reed had 'failed to offer anything to indicate that there was anything incorrect about the state's hair evidence at the trial or that there was anything detrimental about the manner in which it was presented"; "Reed failed to present evidence indicating that Scott's identification of the print was in

error"); Evans v. State, 975 So.2d 1035, 1046 (Fla. 2007)("the [trial] court concluded, 'the testimony of an expert such as Mr. Zercie would not have discounted the impact of Shana Wright's testimony that Mr. Evans admitted getting rid of his suit because he got brains all over it.' Thus, we agree with the trial court that even if counsel's performance was deficient in this regard, no prejudice can be shown from the failure"); Knight v. State, 923 So. 2d 387, 399 (Fla. 2005)("Defendant however fails to allege what evidence counsel could have presented to show that the defendant was aware of the Police pursuit"; "we find that the circuit court did not err in concluding that trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way").

In conclusion, the trial court's ruling rejecting this claim merits affirmance:

> As to claim three, the defendant claims trial counsel was ineffective because he did not contest the evidence from Charles Richards about blood spatter at the crime scene. To prove his claim, the defendant must produce some evidence that the substance at the crime scene was not blood and that the directionality of the blood spatter was unfounded or incorrect. **At the evidentiary hearing the defendant failed to show that the samples recovered from the crime scene were not the victim's blood and that the limited scope of Richards' testimony was beyond his training and experience in analyzing crime scenes.** *See Taylor v. State*, 937 So.2d 590, 595 (Fla. 2006); *Anderson v. State*, 863 So.2d 169, 179 (Fla. 2003). The trial record also reflects that defendant's attorney did question the use of Richard's testimony at sidebar and the State stated it was using Richards solely to say the blood came from a particular direction by direction of the trail. The Court ruled this was within the expertise of a crime scene analyst. This purpose was confirmed by the testimony of Mr. Richards at the evidentiary hearing on this motion. See Evidentiary hearing transcript, page 40, lines 2 — 22. The defendant is not entitled to relief on this claim.

(PCR/IV 660) The trial court's order correctly ruled that Everett at the postconviction evidentiary hearing failed to "produce some evidence that the substance at the crime scene was not blood and that the directionality of the blood spatter was unfounded or incorrect." This was fatal to Everett's IAC claim. Further, as discussed above and as the trial court found, Everett failed to prove that Richards' testimony exceeded his competence, which was also fatal to Everett's claim. Moreover, as also discussed above, this matter is so inconsequential that Mr. Smith was reasonable in not pursuing it any further and that it does not rise to Strickland prejudice.

For each and all of the forgoing reasons, the trial court's rejection of this claim merits affirmance.

ISSUE "E" (IAC CALLING DETECTIVE AS WITNESS): WHETHER APPELLANT EVERETT PROVED, PURSUANT TO STRICKLAND, THAT HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY CALLING DETECTIVE TILLEY AS THE ONLY DEFENSE GUILT-PHASE WITNESS. (IB 50-54, RESTATED)

The Initial Brief's bravado and hyperbole in presenting this claim should not be mistaken for merit because this claim has none. Instead, one need look no further than the **1 in 15.1 quadrillion** odds that someone other than Everett committed this burglary/sexual-battery/murder to determine that nothing could have been done by any defense counsel that would have changed the verdict, ending the Strickland analysis with a failure of Everett to prove prejudice. Compounding the futility of any defense to these charges and this claim, Everett confessed. See also discussion of guilt-phase evidence supra, especially in the Trial Guilt-Phase Facts section and ISSUE "D." If Mr. Smith's decision to call Sergeant Tilley was

high risk, that risk was justified and Strickland-reasonable by the evidence amassed against Everett and, in any event, that risk cannot be hindsightedly held against Mr. Smith. Thus, Everett failed to demonstrate either Strickland prong, and the trial court's rejection of this claim merits affirmance.

The trial court found and ruled as follows:

> The fourth claim raised by the defendant is that his trial counsel surrendered his right to open and close in final arguments by calling Sergeant Tilley, the lead detective in the case. The defendant argues there was no sound tactical or strategic reason to do so. This claim has no merit.
>
> First, the fact that there could have been more that trial counsel could have done or that new counsel, in reviewing the record with hindsight, would have done something differently, does not mean that counsel's performance was ineffective. *See State v. Coney*, 845 So.2d 120, 136 (Fla. 2003); *Jones v. State*, 732 So.2d 313, 319-320 (Fla. 1999).
>
> Second, Mr. Smith is an experienced criminal defense attorney. At the time of the defendant's trial, he was the Chief Deputy Public Defender in the Fourteenth Circuit and was assigned to handle all capital cases within the circuit involving the Public Defender's office. He had practiced law for almost 28 years and has tried 41 first degree murder trials with 39 separate defendants. He averages approximately five or six murder trials a year. In the cases he has handled, the State sought the death penalty in 20 of those 41 trials. Out of those 20 cases, the jury recommended death in four cases.
>
> At the evidentiary hearing, Mr. Smith testified he believed he called Sergeant Tilley to talk about the defendant's drug use involving LSD or acid. He also questioned Tilley concerning discrepancies in the defendant's statement and what was found at the scene of the crime and whether there may have been someone else present during the crime. Mr. Smith argued these points in his closing argument and used them to argue the murder was not a premeditated one. See trial transcript, page 296, lines 1 — 25; page 298, lines 1 — 25; page 295, lines 1 — 14; page 301, lines 20 — 25; page 303, lines 1 — 18. This was consistent with his strategy to focus on the jury considering and being able to return a verdict on a lesser charge than first degree murder and to avoid a death recommendation.

> There is nothing unreasonable in this strategy used by Mr. Smith under the facts of this case. Mr. Smith contemplated alternative courses but decided it was better to focus on the admissibility of the defendant's statements because that was the key to the State's case. His decision was reasonable under the norms of professional conduct.

(PCR/IV 660-61, paragraph breaks supplied)

As the trial court reasoned, postconviction counsel's hindsighted criticism is not the test for IAC. See, e.g., Coney, 845 So.2dat 136 ("That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient."); Mills v. Moore, 786 So.2d 532, 535 (Fla. 2001) ("That current counsel, through hindsight, would now do things differently than original counsel did is not the test for ineffectiveness") (internal quotation marks and citation omitted), cert. denied, 532 U.S. 1015 (2001).

Further, as the trial court found, the reasonableness of Mr. Smith's judgment is informed by his extensive experience. See Henry, 948 So.2d at 619-20; Jones, 732 So.2d at 319-20 n.5; Provenzano, 148 F.3d at 1332; Chandler, 218 F.3d at 1316.

Even if one were to attempt to second-guess trial defense counsel, this claim would still have no merit. It is clear from the face of defense counsel's examination of Tilley at trial that his intent was to plant seeds of doubt in the jury's mind through the last witness the jury would hear in the guilt-phase: Smith used Tilley to highlight that Everett said he had been using some acid (LSD) and had been "tripping out." (R/VIII 233-35)

Thus, Everett's statement was not consistent with some of the other evidence, including no semen found in the victim's anal area (R/VIII 235) and the lights on at the house in contrast to Everett's statement that the lights were off (R/VIII 235-36). Consistent with a theme attempting to show Everett's statement as unreliable, Smith elicited from Tilley that Everett cried during his statement. (R/VIII 236) Further, Everett's LSD tripping was consistent with this being an impromptu crime of opportunity, where Everett left his shirt but grabbed the victim's sweater and did not use the victim's credit card (R/VIII 236-37) and where Everett had not been in town very long when this happened (R/VIII 238). Accordingly, Smith argued to the jury that Everett's statement to the police was "truthful" but "not totally accurate" and then argued the details (R/VIII 296-98). Also following up on his use of Tilley as a witness, Smith hammered that this murder was not "goal-directed" and Everett's actions made no sense (R/VIII 298). Instead, Smith argued, this was a bungled burglary by someone high on drugs. (R/VIII 299-303)[15] While Everett may debate the legal technicalities of this defense tactic, a jury verdict of a lesser offense would preclude a future inquiry into the reasons for the verdict, as the State can file no Fla.R.Crim.P. 3.851 motion.

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[15] Smith's use of Tilley also planted the "seeds" that there were other possible suspects, such as the victim's "ex-boyfriends" (R/VIII 231), one of whom lived next door (R/VIII 233), and with whom the outgoing victim (R/VIII 232) may have become entangled. Smith elicited additional names, such as "Freddie or Bubba Wilson" and "Jared Farmer," who was Everett's roommate at the Fiesta motel and who was in the Wal-Mart video. (R/VIII 233-34)

Everett's suggestion that the prosecution took advantage of cross-examination (IB 51)) is hindsight and therefore not a proper Strickland test, and Everett's assertion (IB 51-52) that defense counsel would have garnered more advantage by preserving first and last closing argument is speculative and also improperly second-guessing defense counsel's decision to call Tilley; it is also insufficient for the prejudice prong, as Everett failed to demonstrate what specifically his counsel could have argued in a final closing that would have made a difference in this case. Indeed, the odds that anything in a final closing would have made any difference are less than **1 in 15.1 quadrillion**, given the DNA and other evidence, odds which falls quite short of Strickland prejudice. And, indeed, for the sake of argument, on any re-trial today, the prosecution would still get first and last closing to argue the overwhelming evidence against Everett.

ISSUE "F" (IAC PENALTY PHASE MENTAL MITIGATION): WHETHER APPELLANT EVERETT PROVED, PURSUANT TO STRICKLAND, THAT HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE DUE TO A FAILURE TO PURSUE "PSYCHOLOGICAL ASSISTANCE." (IB 55-57, RESTATED)

ISSUE "F" contends that Everett proved Strickland deficiency and Strickland prejudice by his defense counsel "delegat[ing] the task of locating mitigation" to Everett's father and doing "nothing" when Everett's father passed away. (IB 55) This issue also argues that Strickland's prongs are satisfied by Everett proving that his counsel failed to adduce the following penalty-phase mitigation evidence: Everett had no viable male role model other than his alcoholic father; Everett was denied "a stable upbringing as he was moved from place to place …"; Everett adopted a life of substance abuse, which caused him "fear, anxiety, and paranoia"; (IB 56)

He claims that the presentation of these factors "may have" convinced six or more jurors to vote for life. (IB 56-57) The State respectfully submits that ISSUE "F" is wrong on all points.

As a preliminary factual matter, this was not a close case for the death sentence. The jury unanimously recommended 12 to 0 that Everett be sentenced to death (PCR/I 131; R/I 131; R/IV 516-19). Everett, 893 So.2d at 1280-81,[16] summarized the trial court's findings of aggravating and mitigating factors:

> It found three aggravating factors: (1) appellant was a convicted felon under a sentence of imprisonment at the time of the murder; (2) he committed the murder while engaged in the commission of a sexual battery or a burglary; and (3) the murder was especially heinous, atrocious, or cruel. The court found the following statutory mitigating factors and accorded them the weight indicated: (1) appellant's age (very little weight); (2) the crime 'was committed while under the influence of some type of substance' (little weight); [FN2] (3) lack of significant history of prior criminal activity (little weight); (4) family background (very little weight); and (5) drug use (little weight). The court also found nonstatutory mitigating factors, with each given very little weight: (1) appellant's remorse; (2) good conduct in custody; (3) the alternative punishment of life imprisonment without parole; and (4) appellant's confession. After weighing the mitigating and aggravating factors, the court found that each of the aggravators individually outweighed the mitigation and imposed a sentence of death.
>
> [FN2]. Based on the clarity and detail of appellant's confession, the court rejected the factor that appellant was under the influence of extreme mental or emotional disturbance; instead, the

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[16] Although the direct appeal did not attack the aggravation-mitigation findings, this Court conducted a proportionality analysis and held: "In light of the substantial aggravating circumstances and the lack of substantial mitigation, the sentence in this case is proportional." Everett, 893 So.2d at 1288.

> court found only that appellant was under the influence of a substance.

In light of these penalty-phase findings and comparing the evidence that Everett's defense counsel presented with Everett's postconviction evidence, ISSUE "F" falls short of meeting its Strickland burdens.

Applying Strickland's principles to the penalty phase, defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696-98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

> Although no absolute duty exists to investigate particular facts or a certain line of defense, this Circuit has held that, in preparing for a death penalty case, '[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.' ***Porter v. Singletary***, 14 F.3d 554, 557 (11th Cir.1994) (citations omitted). 'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history.' ***Housel v. Head***, 238 F.3d 1289, 1294 (11th Cir.2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. See ***Tarver v. Hopper***, 169 F.3d 710, 715 (11th Cir.1999). For that reason, even when trial counsel's investigation and presentation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided, under the circumstances, not to investigate or present particular evidence. ***See Housel***, 238 F.3d at 1294.

For the prejudice prong, the reviewing court analyzes IAC-penalty-phase claims to determine whether the allegedly "'missing' testimony is significant enough to 'undermine [[its]] confidence in the outcome' of" the defendant's sentencing, "***Strickland***, 466 U.S. at 694, not to ask whether it

would have had 'some conceivable effect on the outcome of the proceeding,' *id.* at 693." Cade v. Haley, 222 F.3d 1298, 1305 (11th Cir. 2000). Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006), indicated that the analysis includes "reweigh[ing] the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined."

As in other Strickland claims, the trial court's findings of fact are entitled to appellate deference if competent substantial evidence supports them. See, e.g., Ford, 955 So.2d at 553.

The trial court's findings and rulings on this claim are extensive, grounded on competent substantial evidence, legally correct, and merit affirmance:

> In his fifth claim, the defendant argues his trial counsel did not adequately investigate mitigating circumstances and should not have relied upon the defendant's alcoholic father to find and develop mitigating circumstances. The defendant is not entitled to relief as to this claim.
>
> First, as stated earlier, Mr. Smith is an extremely experienced defense attorney in death penalty cases. Mr. Smith had never had co-counsel in any of his prior death cases but he did have the services of an investigator who he utilized to work up the case.
>
> Mr. Smith had met with the defendant's mother and the defendant just after the defendant arrived here from Alabama. Based upon his gathering of basic information he had drawn an initial impression that this would probably be a felony murder case. He therefore began preparing for both a penalty and guilt phase of a jury trial,
>
> On page 107, lines 1 - 25 and page 108, lines 1-22, Mr. Smith gave the following account [of] some of the efforts he made to get information concerning the case.

Q. And in your, you said you did the usual in your preparation for what you think might be a death penalty case. Do you prepare for the penalty phase and the guilt phase at the same time?

A. Right.

Q. And what did you do in this case generally to prepare for, let's say, for the penalty phase?

A. Well, you know, early on we try to get records on our clients. Whatever is in the box is the sum total of whatever records I obtained. You know, my interaction with Mr. Everett, I could tell he wasn't mentally retarded, he didn't appeared to be mentally ill, he didn't have any mental history. As far as I knew he didn't have any history regarding psychological problems, drug abuse problems, that sort of thing. So we didn't acquire a whole lot of information, I don't recall in terms of records but I would defer to whatever is in my files because I don't have any specific recollection of what we collected on him. But in his case the source of mitigation information really I anticipated coming from his father, 'cause I met with his father and his father had a lot of contacts up in northern Alabama where he was living at the time and where he more or less grew up and his father had pledged to obtain witnesses and, you know, twist arms, whatever he had to do to et witnesses down here to testify and say good things about Mr. (Evidentiary hearing transcript, page 107, lines 1 - 25) Everett. Unfortunately, his father died before this case went to trial. So that sort of fell apart.

Q. Did you meet with Mr. Everett on a regular basis at the jail?

A. I don't know how many times. Sure, I went to the jail and saw him. He corresponded, as I recall, quite often. You know, I don't do a lot of hand-holding, I don't go to the jail just to see him and hold their hands and that sort of thing. So I may not go as often as maybe some other attorneys do but, you know, I had sufficient contact with him to try to ferret out whatever mitigation we had.

Q. Did he tell you anything about extensive drug use in his past or at the time of the murder?

A. He mentioned that he and his cohort, Mr. Farmer, for instance, were cooking meth or somebody was cooking meth at the hotel that they were staying. Yeah, I mean, he said he used drugs in the past. I knew from his statement I think he said he was high on LSD or something when this occurred. So that was something that we were attuned to but again we didn't, as far as I know, have any real corroboration of that, just his account of being high on drugs or using drugs in the past. (Evidentiary hearing transcript, page 108, lines 1-22)

Contrary to the defendant's claim that Mr. Smith did not consult with any psychological or psychiatric professional, Mr. Smith did have Dr. Jill Rowan examine the defendant who corroborated Mr. Smith's opinion concerning the defendant's competency and level of intelligence.

Mr. Smith also faced a problem in getting information from the defendant's family. As to why he had to rely on using the defendant's father, Mr. Smith stated:

> A. Well, yeah, in large measure his father had a realistic appraisal of what was going on. His mother really didn't come to terms with it, I mean, she wanted to deny that her son had done this and she lived in Savannah and his father was, he kind of living with his father up there.
>
> Q. What about his sisters?
>
> A. Well, some of them didn't want anything to do with him. There was one sister, like I said, we went to Alabama, she was supposed to take that day off and help us round up people and she went to work that day. So we were up there and had to do a lot of running around on our own until she got off of work. We went to the school and I think she got us in touch with a guidance counselor and a principal but, I mean, I talked to his sisters but there wasn't a whole lot they could say other than, you know, we love our brother and we have been close to him and he's, we have never seen him doing anything violent and that sort of thing.

After the defendant's father died, Mr. Smith and his investigator went up to Alabama to try to track down additional mitigating evidence. They talked to several people but they ran into a dead end. See Evidentiary hearing transcript, page 142, line 25 and page 143, lines 1-11.

At the [Spencer] hearing held on December 30, 2002, Investigator Jordan talked about his efforts to obtain any disciplinary records involving the defendant at the CCA jail in Bay County, Florida and while the defendant was incarcerated in Baldwin County, Alabama. At that hearing, the defendant was given the opportunity to make any statement he wished to make in mitigation and the defendant chose not to make a statement. See [Spencer] hearing transcript, page 13, lines 5 - 25 and page 14, lines 1 - 4.

Mr. Smith did, in fact, investigate to find mitigating evidence and presented that evidence to the jury. In ***Wiggins v. Smith***, 539 U.S. 510, 533 (2003) the U.S. Supreme Court observed that ***Strickland*** does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. In deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, the Court must

consider not only the quantum of evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.* @ 527.

This is not a case where counsel conducted no investigation or presented no mitigation. *See also Jimenez v. State*, 33 Fla.L.Weekly 5417, 420 (Fla. 2008); *Spann v. State*, 33 Fla.L.Weekly 5458 (Fla. 2008). During the penalty phase, the defendant's trial attorney presented the testimony of the defendant's mother, Glena Everett, and one of his sisters, Cindy Everett Gride[r]. Both individuals gave an account of the defendant's background and drug usage based upon their recollections. It is clear that Mr. Smith did the best he could with the type of information he had available to him. The Court notes that the defendant testified at the evidentiary hearing that he never told his attorney about the effects of certain drugs on him and that he was never violent when he was on drugs growing up. According to the defendant, Mr. Smith never asked him about any problems with drugs and Mr. Smith never told the defendant about drugs. However, Mr. Smith testified the defendant told him about cooking meth and using drugs in the past. Furthermore, the defendant indicated in his statements he was high on LSD or something at the time this occurred. See Evidentiary hearing transcript, page 108, lines 12-22. In light of the trial record indicating the constant references to drug use by the defendant, the Court finds the defendant's claim that Mr. Smith did not adequately investigate his drug usage not credible. As noted previously, Mr. Smith utilized the defendant's purported drug use in an effort to avoid not only conviction of premeditated murder but also to avoid the death penalty. The Court also notes the testimony of the three family members at the evidentiary hearing was essentially the same evidence that was presented by Mr. Smith to the jury at the penalty phase. The defendant has therefore failed to establish that there was any 'undiscovered' evidence as to drug use that would have changed the outcome of this proceeding.

At the evidentiary hearing the defendant presented the testimony of Dr. Umegh Mhatre, a psychiatrist, to explain the effects of the defendant's use of drugs on the way he behaved on November 2, 2002. Dr. Mahtre opined that the defendant was getting increasingly paranoid and when the victim accidentally got in the room looking for somebody, the paranoia just went off the roof and he started thinking she was law enforcement, trying to get her, trying to track her down and, when he ran into her later on, he followed her, stalked her to find out if she was in law enforcement. Dr. Mhatre based his opinion solely on the information provided to him by Mr. Everett. On cross examination, Dr. Mhatre acknowledged he didn't find anything in the officer's reports or other witnesses to corroborate that the defendant was in a drug induced psychosis at the time of the murder.

> Mr. Smith was aware that by the time they went to trial the defendant had come up with a story similar to what he told Dr. Mhatre. On page 112, lines 4-13 Mr. Smith stated:
>
> > A. Sure, I mean, if he testified he would have been crucified on cross examination. And, like I said, by the time this case went to trial I didn't really know what he would say if he were called to testify because he had come up with all sorts of versions, you know, during the interim from the arrest to the trial, which is typical. I mean, they will sit over there and read the discovery and say, well, no, that's not the way it happened, it happened this way. And he had, by the time we went to trial, he had a fairly outlandish version where the victim was some sort of ...
>
> The defendant failed to show how Dr. Mhatre's testimony would have changed the outcome of the proceeding. Despite Mr. Smith's concerns about the defendant's credibility, he still pursued his investigation to corroborate things that were in the defendant's statement. He found out that 'Bubba' was an actual person who apparently had been trampled by a horse and was in a cast at the time of this incident. Once again, Mr. Smith utilized, to the best of his ability, all the evidence he had available to him in both the penalty and guilt phases of the trial. The defendant is not entitled to relief under his fifth claim.

(PCR/IV 661-page breaks supplied)

As the trial court documented with competent substantial evidence, Mr. Smith did not simply delegate the mitigation phase to Everett's father and then give up when the father died. Instead, Mr. Smith (and his investigator) conducted a reasonable investigation that exceeded Strickland's requirements.

Mr. Smith and his investigator gathered jail (See PCR/VII 1164-65) and school records (See PCR/VII 1083 et seq). The school records show Everett's grades including A's, B's, and C's (See PCR/VII 1088, 1094, 1103), as well as F's (See PCR/VII 1095, 1103). The records indicate that excessive absenteeism hurt Everett's grades. (See, e.g., PCR/VII 1100, 1103)

In an April 10, 2002, typed "Memo," Mr. Smith documented a meeting with Everett at the jail. Except for drug use, Everett's childhood was "unremarkable," and except for Everett providing one name as a potential character witness, Everett "could not come up with any other names of teachers or community leaders who might be helpful." (PCR/VII 1068)

On May 10, 2002, Mr. Smith authored a typed "Memo" indicating that, on May 6, 2002, Everett's sister, Vick Godby called Smith to find out whether she should travel to one of Everett's court appearances. She told Smith that she "did not know if she would help or hurt" Everett and that she "had some anger about the way he [Everett] had acted in the past"; she stated that if Everett is guilty, "then the death penalty might be appropriate for him." (PCR/VI 923; PCR/VII 1067)

Mr. Smith and his investigator traveled to Alabama. They went to Everett's school and "talked to his principal, his guidance counselor, talked to a couple of his friends that we ran down up there." In spite of Smith and his investigator "spen[ding] time on it," mitigation evidence was difficult to find because Everett "wasn't a Boy Scout, he wasn't an athlete, he wasn't a scholar, ... he didn't go to church."(PCR/V 842-43, 845-46) "The principal said, I know him, but he never came to school." Accordingly, Walter Smith's October 29, 2002, memorandum indicated that on October 24, 2002, he traveled to Fort Payne, Alabama, to interview witnesses for Everett, with the following results:

> Ms. Bailey, guidance counselor at the high school: Did not recall Everett;
>
> Mr. Tally, the principal at the high school: Everett was a "truant who did not like to attend school";

> Joe Garrett, at the Triangle grocery store: Everett not violent, but had "quite a few girlfriends," who Everett "tended to use … and throw away," borrowing their money and cars and not returning them;[17]
>
> Cindy Grider, Everett's sister [who testified for him at trial, R/IV 477-81]: She said "she would try to come up with some additional names of people to whom we could talk";
>
> Joe Scott, who runs a textile mill in the area: He "did not have any kind words to say about" Everett.

(PCR/VI 916-17; PCR/VII 1144-45)

One of Everett's sisters was "supposed to take that day off and help … round up people and she went to work that day," which resulted in Smith and his investigator "do[ing] a lot of running around on [their] own until she got off of work." They spoke with additional sisters, but they could only say, "we love our brother and we have been close to him and he's, we have never seen him doing anything violent and that sort of thing." (PCR/V 845-46)

Smith and his investigator found no records showing that Everett was ever treated for mental illness (See PCR/V 810; PCR/V 818), but as a "cya," Smith had Everett examined by Dr. Jill Rowan for competency (PCR/V 818). In her examination she not only found Everett competent but also indicated that Everett "demonstrated no signs of mental retardation or of a major mental illness." (PCR/VII 1084-85; PCR/XII 2469)

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[17] Also, see an apparent note from Everett to "JoJo" (at PCR/VI 898-99) in which Everett listed and commented on females he claims to have had sex with. (See also letter to "Joe" at PCR/VI 890-97 in which Everett appears blame "Jared" for killing the victim, at PCR/VI 892-93).

As a result of the efforts of Mr. Smith and his investigator, Mr. Smith presented as witnesses in the jury penalty phase Everett's mother, Glenda Everett, (R/IV 469-76) and Everett's sister, Cindy Everett Grider (R/IV 477-81). (Their testimony is more fully summarized in the Trial Penalty-Phase Facts section supra.) As the trial court "note[d]" (PCR/IV 665), their trial testimony substantially established the same family-related facts that Everett now poses in this issue as the purported basis for his counsel's Strickland deficiency; their trial testimony therefore belies this claim.

ISSUE "F" claims that Everett's trial attorney failed to present evidence that Everett had **no viable male role model other than his alcoholic father**. This claim has no merit because, on this point, the evidence presented in purported support of the postconviction motion was substantially the same as the evidence that Mr. Smith presented in the penalty phase. At the penalty phase, Everett's mother testified that Everett's father was an alcoholic who Everett loved in spite of some verbal mistreatment by the father:

> It was never easy on Paul coming from a broken home. *** He loved his father, and his father did have problems. **His 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 block out some of those memories.

(R/IV 476) Everett's mother essentially testified that, when Everett was growing up, he either stayed with her or his alcoholic father. (See R/IV 472). At one point, "Paul missed his father so much that he wanted to go and live with him, and I allowed him to go and live with his father." (R/IV

472) In sum, Mr. Smith cannot be held to be deficient when he, in fact, presented to the trial jury and trial judge this evidence on which ISSUE "F" complains was missing, and also for this reason, no Strickland prejudice has been proved

ISSUE "F" claims that Everett's trial attorney failed to present evidence that Everett was **denied "a stable upbringing as he was moved from place to place** …." To the contrary, Mr. Smith presented this evidence to the jury and sentencing judge through Everett's mother's penalty-phase testimony that Everett came from a "broken home" (R/IV 475) and Everett rotated staying with her or her ex-husband: When she divorced Everett's father she moved the children, including Everett, from Fort Payne to Savannah, Georgia; subsequently, she re-married Everett's father, but when "things just did not work out," she "left and went back home and took the children with" her "again"; subsequently, she allowed Everett to "go and live with his father." (R/IV 472-73) Thus, Mr. Smith presented at the penalty phase substantially the same evidence on which ISSUE "F" claims a deficiency. Indeed, the postconviction evidence, through Ms. Malone, attenuated any mitigation-impact of the moves due to the friendships she and Everett were able to maintain in spite of the moves. (See PCR/V 734-35) There was no deficiency and no prejudice.

Finally, ISSUE "F" claims that Mr. Smith neglected to present evidence that Everett adopted a life of **substance abuse, which caused him "fear, anxiety, and paranoia."** Mr. Smith elicited from Everett's sister at the penalty phase that Everett had been using drugs to the extent that she

thought he needed to go to counseling. (R/IV 479-80) Everett's mother at the penalty phase testified not only to Everett's drug use, but she blamed the murder on drugs: "Well, for my Paul to do something as horrendous as this is, there would have to be drugs involved. ***." (R/IV 475) Everett "was not completely himself" due to his involvement with drugs." (PCR/IV 473) This murder according to the mother was in contrast to Everett's personality as a "loving caring person." (R/IV 475) Likewise, Everett's sister told the trial jury and judge that she was "[s]hock[ed] when she heard about this murder and wanted to know "who was he with, because there's no way." (R/IV 478) Further, Everett's mother attributed Everett's "broken home" and verbal abuse from Everett's father as causing Everett's drug use, stating that "coming from a broken home was … hard for Paul to accept," the alcoholic father "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 475-76)

Moreover, the postconviction evidence concerning Everett's drug use is actually weaker than what was adduced by Everett's defense counsel in 2002. At the postconviction hearing, Everett's mother testified that she could not tell when Everett was on drugs (PCR/V 723) and did not know about his heavy drug use until about a year prior to this murder (PCR/V 725), but, Everett's sister Cindy knew about his drug use when Everett was about 14 years old (PCR/V 731-32). The mother's postconviction testimony would have conflicted with her penalty phase testimony that Everett had a drug problem

for several years, so by the time he moved back to her residence, Everett was involved with drugs; he "was not completely himself" and "he just couldn't seem to get control of everything." (R/IV 473-74)

Also, at the postconviction hearing, Everett testified that, prior to the incident here, he was never violent as a result of using drugs (PCR/V 763, 766-67), whereas Dr. Mhatre testified at the evidentiary hearing that Everett's mother told him (Mhatre) about Everett having a "bit of a temper" when he was on drugs, including once when "he held her and ... firmly told her not to go anywhere and she felt a little bit intimidated" (PCR/V 795-96; see also PCR/V 802).

Further, postconviction emphasis on Everett as a drug dealer (PCR/V 796, 802-803) does not render as unreasonable or prejudicial defense counsel's effort to paint Everett as a sympathetic figure; quite the contrary.

Everett in the postconviction hearing added the opinion of a psychiatrist of "paranoia," but, as the trial court's order noted (PCR/IV 665, block-quoted supra), the psychiatrist properly qualified this opinion as based entirely on what Everett told him. (See PCR/V 798, 799) In contrast to Everett's version that he told to Dr. Mhatre, see Everett's multiple other stories bulleted towards the end of ISSUE "B" supra. Postconviction mental testing was not even done. (PCR/V 801)

Therefore, the postconviction evidence, to the degree that it does not actually undermine mitigation, is substantially cumulative to what Everett's trial counsel adduced at the penalty phase, requiring the

rejection of this claim. In Jones v. State, 998 So.2d 573, 586 (Fla. 2008), defense counsel, like here, interviewed a number of lay witnesses but pared down who to call in the penalty phase, there reducing the witnesses to one and here to two. Regarding this decision, trial counsel was not deficient in Jones, and neither was Mr. Smith here. Further, as in Jones, the substantially cumulative nature of the postconviction evidence also negates Strickland prejudice:

> At the evidentiary hearing, Jones presented several witnesses, including family members and his youth football coach, to support his claim that counsel was ineffective in failing to present sufficient background mitigation. The testimony, however, was cumulative to that presented at the penalty phase. We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence. ***See, e.g., Darling v. State***, 966 So.2d 366, 377-78 (Fla. 2007); ***Whitfield v. State***, 923 So.2d 375, 386 (Fla. 2005).

Jones, 998 So.2d at 586. See also Davis v. State, 928 So.2d 1089, 1110 (Fla. 2005)("We conclude that trial counsel's performance was not deficient for failing to secure this additional witness to provide testimony that would have been cumulative to that which he anticipated eliciting from Davis's mother").

In Rutherford v. State, 727 So.2d 216, 222 (Fla. 1998), like here, counsel had the benefit of competency evaluation but decided to use only lay witnesses for his jury penalty-phase presentation. There, as here, the defendant's background included substance abuse. There, two psychologists testified at postconviction proceedings regarding mental health conditions substantially at least as weighty as here: "post-traumatic stress disorder (PTSD) and ... alcohol dependen[cy]," Id. As here, in Rutherford defense counsel, made a reasonable determination to use only lay witnesses at the

jury penalty phase. Rutherford affirmed the trial court's determination that defense counsel was not ineffective. Here, this case merits such an affirmation. Furthermore, Rutherford also addressed cumulative lay testimony:

> At the 3.850 hearing, Rutherford presented additional lay testimony that he increased his consumption of alcohol and had headaches upon returning from Vietnam; that his father had a drinking problem and was physically abusive; and that Rutherford had a troubled relationship with his wife. In many other respects, the 3.850 testimony was essentially cumulative to the lay character testimony presented by trial counsel in the original penalty phase. ***See Woods v. State***, 531 So.2d 79, 82 (Fla.1988) ("[T]he testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better.")

Rutherford, 727 So.2d 224-25. Here, Everett's postconviction evidence was "essentially cumulative to the lay character testimony presented by trial counsel in the original penalty phase."

Rutherford also held that the prejudice prong had not been met given the postconviction evidence compared to the weighty aggravation. See Id. at 225-26. Here, Everett's postconviction evidence is weaker than in Rutherford, but like Rutherford, the aggravation is weighty. Moreover, in Rutherford, the jury recommendation of death was 7-5, whereas here it was 12-0.

In addition, here, neither Ashley Moore (See PCR/V 733-37) nor Dr. Mhatre (See PCR/V 792-804) testified at the postconviction evidentiary hearing as to their respective availability and willingness to testify at the trial the same way they testified at the postconviction hearing. See Nelson v. State, 875 So.2d 579, 583-84 (Fla. 2004)("If a witness would not have been available to testify at trial, then the defendant will not be

able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness"; "a facially sufficient postconviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion that those witnesses would in fact have been available to testify at trial"); Melton v. State, 949 So.2d 994, 1004 (Fla. 2006)(applying Nelson; "presented no evidence suggesting how counsel would have been aware of these witnesses or their testimony. Further,…"); Davis v. State, 928 So.2d 1089, 1110 (Fla. 2005)(affirmed "trial court determin[ation] that Tracy would not have been available to testify at Davis's penalty phase" where evidence was ambiguous).

For each and all of the foregoing reasons, Everett did not demonstrate either of the Strickland prongs. Everett had the burden to prove each. The trial court's denial of this claim merits affirmance.

ISSUE "G" (CUMULATIVE IAC): WHETHER APPELLANT EVERETT MET HIS STRICKLAND BURDENS THROUGH THE CUMULATIVE EFFECT OF DEFICICIENCIES HIS TRIAL COUNSEL. (IB 57-60, RESTATED)

ISSUE "G" contends that the accumulation of trial defense counsel's errors should be considered in determining Strickland prejudice. However, here no prejudicial ineffectiveness has been proved, as argued in each of the issues supra. Therefore, there is no harm to accumulate and this claim should be rejected. See, e.g., Owen v. State, 986 So.2d 534, 556-57 (Fla. 2008)(denying cumulative error claim where defendant did not show that any harmful error occurred), citing Johnson v. Singletary, 695 So.2d 263, 267

(Fla.1996) ("[B]ecause all issues which were not barred were meritless, we can find no cumulative error.").

Moreover, as detailed in the Trial Guilt-Phase Facts section and in ISSUE "D" supra, evidence of guilt was compelling, for example, at 15.1 quadrillion to 1 odds, and as discussed towards the beginning of ISSUE "F," the aggravation and the 12-0 jury recommendation were compelling support for the death penalty. When compared against the weighty facts supporting guilt and supporting the death penalty, any purported harm pales. In any event, no relief is merited.

ISSUE "H" (RING AND PENALTY-PHASE JURY INSTRUCTIONS): WHETHER PENALTY PHASE JURY INSTRUCTIONS WERE CONSTITUTIONALLY DEFICIENT AND WHETHER RING PROHIBITS THE IMPOSITION OF THE DEATH PENLATY (IB 60-62, RESTATED)

ISSUE "H" claims to raise claims based upon Ring v. Arizona, 536 U.S. 584 (2002). There are many alternative reasons to reject this issue.

As a preliminary but dispositive matter, the State accepts the Initial Brief's concession that "to date," its claims have been rejected. (IB 62) Therefore, ISSUE "H" should be rejected. (See also jury finding of guilt beyond a reasonable doubt of burglary and sexual battery, each which made Everett death-eligible, at R/VIII 328-29; PCR/I 113-14); penalty-phase jury instructions, which this Court has upheld, administered here at R/IV 509-514), and 12-to-0 jury vote at R/IV 516-17; PCR/I 131)

Moreover, each of the claims raised in ISSUE "H" were raised on direct appeal or should have been raised on direct appeal, thereby barring each due to the law of this case due to procedural bar. See, e.g., Johnson, 921 So.2d at 505 ("Issues regarding whether a confession should have been

suppressed as involuntary are issues that could have been raised on direct appeal"; "procedurally barred"), citing Christopher, 489 So.2d at 24; Muehleman, 3 So.3d at 1164 (Fla. 2009)("law of the case doctrine bars consideration of those issues actually considered and decided in a former appeal in the same case").

In the direct appeal of this case, Everett, 893 So.2d at 1282, reasoned and held:

> In his third claim, Everett challenges his sentence as unconstitutional under *Ring v. Arizona*, 536 U.S. at 584, 122 S.Ct. 2428, which requires that, other than the fact of a prior conviction, the jury must find the facts supporting the aggravating factors used to impose the death penalty. In this case, the jury unanimously recommended death, and one of the aggravating factors found was that the murder was committed during the course of a sexual battery or burglary, two crimes of which the jury also found Everett guilty. Accordingly, we reject his claim as we have rejected similar ones. *See, e.g., Caballero v. State*, 851 So.2d 655, 663-64 (Fla.2003) (denying relief under *Ring* where one aggravating factor was that the murder was committed during the commission of a burglary and kidnapping, charges on which defendant also was convicted, and the court determined that any one aggravator outweighed all the mitigation). We also have rejected the claim that the jury must unanimously specify each aggravator found. *See Owen v. Crosby*, 854 So.2d 182, 193 (Fla.2003); *Duest v. State*, 855 So.2d 33, 48-49 (Fla.2003), *cert. denied*, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004).
>
> > FN3. Further, another aggravating factor was that appellant was under a sentence of imprisonment at the time he committed the murder. This Court has held that this aggravating factor may be found by the judge alone. Allen v. State, 854 So.2d 1255, 1261 (Fla.2003).

Therefore, ISSUE "H's" claims concerning a jury finding and jury unanimity (IB 60, 61-62; R/I 54-55) have already been resolved against Everett. The law of the case, as well as the precedents supporting that holding, require the denial of these claims.

Concerning the jury instructions' informing the jury of its advisory role (IB 61; R/I 52-53), Everett, 893 So.2d at 1282, also rejected this claim establishing the law of the case against Everett's position as well as presenting precedents demonstrating its meritless nature:

> Appellant's fourth claim is that the jury instructions violated *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which held that it is 'constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.' This claim also fails. We have repeatedly upheld the jury instructions against such claims. *Floyd v. State*, 808 So.2d 175 (Fla. 2002); *Sochor v. State*, 619 So.2d 285, 291 (Fla.1993) ('Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell.').

(See also argument and ruling concerning Ring at R/III 227-30)

ISSUE "H" also contends that (IB 61) that the jury instructions should inform the jury that a life sentence precludes release-on-parole, but, for three alternative reasons, this claim should be rejected here: (1) the Initial Brief poses no supportive argument whatsoever, thereby failing to preserve such a claim at the appellate level, See Jones; Whitfield; Hall; Lawrence; (2) such a claim should have been raised on direct appeal, thereby procedurally barring it here, or, if it was not preserved in the trial court (apparently the case here, See R/I 52-55), the claim should have been presented as a postconviction IAC claim in the trial court and then here, again procedurally barring the claim; and (3) here the jury was, in fact, informed that a life recommendation means that it is "without the possibility of parole" (R/I 511), thereby lawfully instructing the jury, See Perry v. State, 801 So.2d 78, 83 (Fla. 2001)("trial court properly instructed the jury regarding the life without parole sentencing option by

providing the standard instruction, i.e., regarding 'life imprisonment without the possibility of parole"), and already essentially providing Everett the relief he requests. See also, e.g., Hoskins v. State, 965 So.2d 1, 14-15 (Fla. 2007)(rejected claim attacking previous jury instruction concerning parole).

ISSUE "I" (LETHAL INJECTION): IS FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION CRUEL AND UNUSUAL PUNISHMENT? (IB 62-65, RESTATED)

The Initial Brief fails to show where this claim was timely preserved prior to trial, thereby barring it here. Instead, this claim should have been raised in the trial court prior to sentencing and then on direct appeal. If Everett wished to present this claim at the postconviction phase under a newly-discovered-evidence theory, he should have claimed the predicates for such a theory. See, e.g., Wright v. State, 857 So.2d 861, 870-871 (Fla. 2003)(previously unknown, due diligence, consequential at a judicially cognizable level), citing Jones v. State, 591 So.2d 911, 916 (Fla. 1991).

Further, This claim, if the merits are reached, has none, requiring its rejection here. This Court has rejected attacks against Florida's lethal injection procedure, like this attack, many times, as this Court recently summarized:

> To the extent that Chavez disputes the constitutionality of Florida's current lethal-injection protocol, we have repeatedly rejected such Eighth Amendment challenges. *See Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008), *cert. denied*, --- U.S. ----, 129 S.Ct. 1305, --- L.Ed.2d ---- (2009); *Power v. State*, 992 So.2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla. 2008); *Schwab v. State*, 995 So.2d 922, 933 (Fla.2008), *petition for cert. filed*, No. 08-5020 (U.S. June 30, 2008); *Woodel v. State*, 985 So.2d 524, 533-34 (Fla.), *cert. denied*, --- U.S. ----, 129 S.Ct. 607, 172 L.Ed.2d 465

(2008); ***Lebron v. State***, 982 So.2d 649, 666 (Fla.2008); ***Schwab v. State***, 982 So.2d 1158, 1159-60 (Fla. 2008); ***Lightbourne v. McCollum***, 969 So.2d 326, 350-53 (Fla.2007). Finally, with regard to reliance upon Baze, this Court recently reaffirmed that 'Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the ***Baze*** Court.' ***Ventura v. State***, 2 So.3d 194, 200 (Fla. 2009), ***petition for cert. filed***, No. 08-10098 (U.S. Apr. 16, 2009). Thus, we deny this habeas claim.

Chavez v. State, Nos. SC07-952, SC08-970, 2009 WL 1792963, *12 (Fla. June 25, 2009).

CONCLUSION

Based on the foregoing discussions,[18] the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on July 10, 2009:

CHARLES E. LYKES, JR., ESQ.
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[18] The Initial Brief's Conclusion (IB 66-68) re-summarizes and restates arguments presented in previous issues. Therefore, the State, in rebutting each of the Initial Briefs' issues ("B" through "I") answered each such claim supra.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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