ORIGINAL

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-1636

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BY

PAUL GLENN EVERETT,
Appellant

versus

STATE OF FLORIDA,
Appellee

/

Appeal of: Paul Glenn Everett, Appellant, vs State of Florida, Appellee, Case No. 01-2956.

APPEAL BRIEF OF APPELLANT

Respectfully Submitted By:

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III. STATEMENT OF THE CASE

A. Course of prior proceedings.

1. Format.

In order to simplify consideration of this matter by this Honorable Court the Appellant (who may alternatively be referred to as the Appellant) will refer to testimony in the evidentiary hearing conducted in December, 2007, with the reference designation "(ET.X.)" where X. is the page number in the transcript of the evidentiary hearing. As this appeal will also encompass events from the trial and perhaps even matters from outside the trial, these matters will be attached to the record in an appellate appendix and will be referred to by "(AE.X.)" where X. is the exhibit number within the appellate appendix. If any appellate appendix exhibit is substantial in nature further references will be made to enable easy location of the referenced passage within the appellate appendix. Other references, such as to the original petition, will be specified where made.

2. Present Status of the Case.

The Appellant hereby challenges and seeks relief from the verdicts of guilt to the offenses of murder in the first-degree, burglary accompanied with battery, and sexual battery with serious physical force rendered on November 21, 2002; the recommendation by the jury to impose the death penalty rendered on November

22, 2002; and the resulting sentence of this Honorable Court on January 9, 2003, in which this Honorable Court entered a judgment of conviction and ordered that the sentence be that of the imposition of death by lethal injection with respect to murder in the first degree and consecutive life sentences to the other charges.

This matter was appealed to the Florida Supreme Court and the Florida Supreme Court denied relief and allowed the judgment, conviction, and sentence to stand on November 24, 2004.

The Appellant thereon filed a petition for a writ of certiorari to the United States Supreme Court in the United States Supreme Court, by order dated April 18, 2005, declined to take any action or to review the proceedings herein.

The present petition was filed on March 30, 2006. On September 11, 2006, the Trial Court entered an order denying portions of the petition and setting several matters for evidentiary hearing. An evidentiary hearing was conducted December 17-19, 2007, and the petition was denied on July 17, 2008.

It is from this denial that the present appeal is taken.

B. Statement of facts.

1. Background Facts.

The offenses occurred on or about November 2, 2001. (R.001-2) The body of Ms. Kelli Bailey, the victim, was discovered by her stepfather that evening when

it was reported to him that she had failed to report for work. The crime scene was processed by local law enforcement and the Medical Examiner was called in. The premises were photographed. Samples of fluids were taken from Ms. Bailey's vagina. The premises were also examined and analyzed for latent fingerprints. Proximate to the premises but outside were found a sweater with the victim's credit card in a pocket and a fishbat.

Shortly after the investigation was begun a Panama City Beach Police officer saw a fishbat which was identical to the one found near Ms. Bailey's home that evening. His investigation lead to a videotape of the purchase of one such fishbat shortly before the crimes were committed. Two weeks or more after the death of Ms. Bailey it was reported that some local high school students, who had been at some form of party at a hotel near the crime scene had heard rumors associating a person named "Paul" with the crimes. The source of this information was traced to an individual named Jared Farmer, from Alabama. At least one of these students had heard from Jared Farmer that the death of Ms. Bailey was by strangulation.

Mr. Farmer was questioned. At first he denied significant contact with the Appellant and denied being with Appellant at the purchase of the fishbat. After persuasion by his mother and confrontation with the videotape showing him

present at the purchase of the fishbat, Mr. Farmer acknowledged a closer association with the Appellant, but did not acknowledge his presence at the time of the offense.

The Appellant had been taken into custody by Alabama bounty hunters at approximately 8:30 PM the evening of November 2, 2001, on unrelated Alabama charges. He was delivered to the Baldwin County, Alabama jail and later visited there by Panama City Police for questioning. (ET.00744-764) Appellant had been afforded no opportunity to speak with counsel nor was Florida counsel even available to him in Alabama. At the initial questioning on November 14, 2001, the Appellant was questioned about his activities at the residence of Ms. Bailey during the early evening of November without even knowing that Ms. Bailey had been killed. When Det. Tilley began to challenge and question his statement, the Appellant unequivocally invoked his right to counsel. Questioning ceased. Det. Tilley admonished Appellant that the offense was punishable by "lethal injection."

Despite his invocation of the right to counsel the Appellant was approached by or at the request of Panama City police on two subsequent occasions. Appellant, incarcerated in Alabama, still had no counsel appointed or available for consultation with respect to this offense. These visits were coordinated between the Panama City Beach Police Dept. and Det. Murphy of the Baldwin County jail.

Det. Murphy would inform the Appellant of the arrival of Panama City Beach police and take him to a room for the meetings. One approach was to ask for the Appellant's consent for samples of his blood and a swab of his saliva. A later meeting was for the purpose of serving Appellant with an arrest warrant for the crimes. (R.00851-882)

Prior to the appearances of the Panama City police and regularly throughout his period of confinement in Alabama the Appellant was repeatedly approached by Det. Murphy. Frequent mention was made of the present homicide. This was the principal subject of inquiry for Appellant from Murphy. Det. Murphy on numerous occasions indicated to the Appellant that his best hope for avoiding lethal injection would be a confession to the offense. These conversations would be accompanied with representations of the crime scene such as diagrams and other comments relating to this.

On November 19, 2001, five days after the Appellant had first expressed his desire to speak with counsel, there was another interview with the Appellant by Det. Murphy. The record of the interview begins with a prolonged statement from Det. Murphy reciting that the Appellant, after having invoked his rights, had indicated a desire to speak with law enforcement concerning the offense without counsel. It does not recite how this contact was made. The Appellant is recorded,

both orally and in writing, as waiving his rights but he does not state when or how contact was initiated either. In fact, the Appellant did not initiate the contact with Det. Murphy. The contact was, in fact, initiated by Det. Murphy about the submission of the samples and the Appellant, only in response to more remarks about the possibility of lethal injection, agreed to discuss the present offense.

The Appellant substantially repeated the earlier statement regarding the events, again providing that "Bubba" Wilson had inflicted the mortal wounds but that he (Appellant) had consensual sex with Ms. Bailey prior to that. The recording was apparently of poor quality so there are inaudible portions. Additionally, there are unexplained interruptions. What is particularly significant about this interview is that the Appellant again invoked right to counsel requiring the interview to cease.

On November 27, 2001, Det. Murphy was advised that Det. Tilley desired to see the Appellant for the purpose of serving the Appellant with a warrant for his arrest for these crimes. Appellant was again approached by Deputy Murphy and the subject of the present homicide was raised by Deputy Murphy. Appellant, still incarcerated in Alabama, had never been afforded the opportunity to consult with counsel regarding this case even though he had already twice invoked his right to counsel and stated his desire to consult counsel. As a result of this contact

Appellant was convinced by Det. Murphy to speak with Panama City Beach police detectives even though he had still not received an appointment of counsel for the present offense. Panama City Beach police detective Tilley was already in route to the Alabama location for the purpose of serving an arrest warrant upon Appellant.

Upon the arrival of Det. Tilley, the Appellant was served with a warrant for his arrest for the crimes which are the subject of this action by Det. Tilley. A transcript of the portion of the interview following the arrival of Det. Tilley was made. While it shows that the Appellant acknowledged waiving his rights and refers to the Appellant having "asked" to talk to Det. Tilley, there is no description of how or when this contact was made. Again, the Appellant did not initiate the contact, but it was initiated by Det. Murphy, ostensibly in order to schedule the reading and service of the warrant. Again, it was only in response to reminders about the death penalty that Appellant discussed the matter of the present offense with Det. Murphy. Such discussion had already begun when Det. Tilley arrived from Panama City Beach.

Appellant thereon gave a third statement. He stated that he had ingested both LSD and cocaine within the day before the event and that he wanted more cocaine and needed money. He had approached Ms. Bailey's home, initially accompanied by Frederick "Bubba" Wilson. While in the residence he

acknowledged that he had struck Ms. Bailey with his fist and that he had sexual activity with Ms. Bailey while she was incapacitated. He denied ever striking her with the fishbat. He finally stated that he departed after rummaging through her purse and removing some cash. His belief of her condition when he left was that Ms. Bailey was injured but not fatally and that she was not dead and would not die as a result of this encounter. Almost immediately upon his return to the Fiesta Hotel he was taken into custody by the Alabama bounty hunters and transported to Baldwin County jail.

Excerpts of the transcripts of these interviews are attached which demonstrate the waivers purportedly obtained by law enforcement and the report of Det. Murphy. After the final incriminating statement Appellant was transported from Alabama to Bay County, Florida, where he was incarcerated in the Bay County, Florida, jail until his trial in November, 2002. He had never had been afforded the opportunity to see counsel regarding this matter while in Baldwin County, Alabama.

2. Facts Developed at the Hearing Pursuant to Fla.R.Crim.P § 3.851.

The Appellant was in February, 2002, assigned to be represented by Mr. Walter Smith, Esq., of the Office of the Public Defender For the 14th Judicial Circuit of Florida. (R.008) In preparation for his case Mr. Smith and his

investigator examined the physical evidence and the police reports and made an investigation into the background of the Appellant. This included a trip to his hometown and recovery of his public school records. The Appellant respectfully represents that he and Mr. Smith had a contentious relationship. The Appellant would respectfully submit that Mr. Smith told the Appellant that he did not believe what the Appellant told him about the offense and thought that he had made it up while waiting in jail. Mr. Smith did not request the assistance of an assistant counsel for the preparation of this death penalty case. He did not engage a mitigation specialist or a psychologist. (R.006807-6846

Mr. Smith engaged a psychologist, Jill J. Rowan, Ph.D., from Tallahassee, Florida, to make an examination of the Appellant. She met with the Appellant for 45 minutes with the investigator for Mr. Smith present. (AE.I) She was of the opinion that the Appellant understood the nature of the offense and was capable of participating in his trial. She also made the observation that the Appellant seemed to think he knew more than the appointed Defense counsel. She was not asked and did not look into his background to any significant degree and did not make any evaluation of the impact of this drug addiction and what substances he reported habitually using. That is the only investigation into psychological factors made by the defense before trial. Mr. Smith, although lacking in any formal or even

informal training in psychology, determined that no further psychological or psychiatric examination was necessary. He claimed an ability to make this determination based upon his history with criminal defendants. (R.006838)

Mr. Smith made a motion to suppress the pretrial statements of the Appellant. This matter came for hearing in October, 2002, shortly before the trial. The record does not reflect his appearance or participation in the hearing. More significantly, Det. Murphy from Alabama, who was a critical witness to the pretrial contacts between law enforcement and the Appellant, was not present. The Appellant, whose state of mind is necessarily the focus of such an analysis, was not aware of his right to testify at this hearing and would have testified had he been aware of the significance of this matter. (AE.II)

Appellant's testimony would have explained that he had been held for several weeks in Alabama and had continuously desired counsel regarding this matter but, since he could not afford counsel and since he was not in Florida, this Honorable Court could not supervise his constitutional rights and ensure counsel and no Alabama court had an interest or jurisdiction to do so. He would have further described the numerous approaches and pressure used by Det. Murphy concerning interrogation of the Appellant about this matter, despite having invoked counsel, one approach even occurring after a second request for counsel. (Petition)

The trial commenced with jury selection on November 18, 2002. A jury was selected that day. The trial began the next day. It was substantially completed in a single day of evidence. (TT.entirety) The evidence against the Appellant comprised the evidence from the crime scene, laboratory reports with DNA analysis, the medical examiner's testimony, and the Appellant's pretrial statements. During the presentation of evidence from the crime scene a crime scene analyst, Chuck Richards, gave opinions and analysis amounting to expert blood splatter analysis.

While there had been substantial efforts to analyze the DNA found in Ms. Bailey's vagina with that of the Appellant and several early potential suspects, there had never been more than "presumptive testing" of numerous suspected bloodstains throughout the crime scene. Throughout the examination by the State Mr. Richards was referred to as "Chuck". Mr. Smith had initially objected to allowing such evidence but remained silent while it was presented following a representation from the State Attorney that such testimony would be "limited".

This testimony with cross-examination, may be reviewed at the transcript of proceedings for November 19, 2002, pages 41 through 73. Such reveals that "Chuck" was allowed to testify to numerous "blood splatter" issues to an extent which should have required qualification as an expert. Appellant's defense counsel made no further objections to this and did not challenge his qualifications to render

such testimony to the jury. The exchange was allowed to appear as a simple conversation between friends with the defense counsel appearing as an outsider. This testimony formed the framework of the State's theory of the sequence of events and the facts from which they asserted that Ms. Bailey's homicide was heinous, atrocious, and cruel.

The Appellant did not testify in his defense. The Appellant respectfully submits that, had his counsel permitted him to tell the truth of the matter the would have testified contrary to his pressured final statement to the Panama City police detective Tilley. The Appellant was dissuaded from presenting this testimony by Mr. Smith who stated that he did not believe the testimony and that he should not testify in that manner. Mr. Smith did not report to this Honorable Court that he was embroiled in an ethical conflict with his client and that his client's true desire was to testify and present his version of the events to the jury.

1. Appellant, on the day of the incident, had used LSD and cocaine and had recently used methamphetamine, which he had been manufacturing with Jared Farmer, for sale in the Panama City area. That is how they, and Jared Farmer's parents, had been funding their trip to Panama City. They approached the house with three persons. Mr. Farmer and the Appellant went to the house while Bubba Wilson was to be a lookout. Mr. Farmer knocked on the door and when Ms.

Bailey approached he (Farmer) forcefully pushed his way in and struck Ms. Bailey. The Appellant looked through her belongings to try and ascertain whether she had law enforcement identification. He did not remove any credit cards or clothing of hers from the premises.

2. The Appellant, because of his fear and paranoia, did buy and carry a fish bat but never used this on Ms. Bailey.

3. After this encounter Appellant panicked and fled the scene, leaving Jared Farmer. The Appellant did not take any clothing or other items of Ms. Bailey's from the premises.

4. The Appellant would have also described the circumstances surrounding his statements to Det. Tilley and Det. Murphy, if such had still been admitted by the Court, in order to allow the jury to consider whether they were voluntary.

The only evidence presented by Appellant in defense was the recall of Det. Tilley, the lead detective who had investigated the case, delivered the warrant to the Appellant, and taken statements from the Appellant. His direct examination was focused on the potential effects of drug abuse, although Det. Tilley was never qualified as an expert to do this. On cross-examination he continued with this line of testimony and was then able to render opinions about the Appellant's state of mind and level of awareness which were damaging to the Appellant.

The Appellant would have also testified and presented evidence during his mitigation phase that he was and had been a chronic abuser of drugs, particularly methamphetamine, for several years before this incident. He had experienced this paranoia on prior occasions including at least one wherein he suspected that there were law enforcement agents present at an event in which he was using these substances with friends.

The Appellant would further, had he been afforded the opportunity, have presented expert testimony that he had a long history with these drugs, that the paranoia and lack of control are recognized occurrences with these drugs combinations, and that it was this paranoia and lack of control that caused him to embark on the event which led to the tragic death of Ms. Bailey. The Appellant would further have desired to express his extreme remorse for the loss of Ms. Bailey before the jury as well as for the loved ones of Ms. Bailey's family. Such was presented at rhe evidentiary hearing of December 17-19, 2007 (R.00714=759))

The penalty phase was also presented by Mr. Smith with no assistance from other counsel. It began the day immediately after the jury's verdicts of guilt to all charges of the indictment. No expert testimony was presented. The Appellant never was seen to have shown any remorse or sorrow for the loss of Ms. Bailey and for his role in it. There was no development of the background of the

Appellant nor no presentation, in the penalty phase, of the impact of his years of drug abuse. There was, likewise, no discussion of the Appellant's having frequently moved during his adolescence. In fact, the Appellant had rarely remained in the same location or attend the same school for more than eighteen months and did not complete high school. He did obtain a GED. Mr. Smith had effectively delegated the task of coordinating the mitigation of the offense to Appellant's alcoholic father, who passed away several months before the trial. (R.00845)

C. Points on Appeal.

Point One: **The Poor Communication Between Appellant and Trial Defense Counsel Resulted in Ineffective Assistance of Counsel.**

Point Two: **Appeallant Was Denied the Effective Assistance of Counsel in the Presentation of His Miranda Argument to the Court as Well as in the Inability to Argue the Issue of the Voluntariness of His Confession to the Jury.**

Point Three: **The Appellant Was Denied the Effective Assistance of Counsel by the Failure of His Attorney to Make an Adequate Challenge to the Forensic Serological Evidence and by Allowing an Unqualified Witness Render a Prejudicial Opinion.**

Point Four: **Appellant Was Denied Effective Assistance of Counsel by the Presentation of the Lead Police Detective as His Only Defense Witness.**

Point Five: **Appellant Was Not Effectively Represented in the Penalty Phase since the Penalty Phase Was Presented by the Same Attorney as the Guilt Phase, since the Case Was Not Prepared, and since Psychological Assistance Had Not Been Sought.**

Point Six: **The Cumulative Effect of All of the Errors and Omissions of Counsel Requires Reversal and Remand for a New Trial.**

Point Seven: **Florida's death penalty procedures deny due process within the meaning of Ring v Arizona, 122 S. Ct. 2428, 2443 (2002) and Apprendi v New Jersey, 530 U.S. 466.**

Point Eight: **Lethal Injection Is Cruel and Unusual Punishment and Violates the Eighth Amendment of the United States Constitution.**

D. Standard of Review.

All issues raised herein comprising purely legal determinations should be reviewed de novo under the harmless error standard. To the extent that factual decisions are reviewed, such should be reviewed for an abuse of discretion.

IV. SUMMARY OF THE ARGUMENT

The Appellant was convicted of murder in the first in November, 2002, following a two-day trial. The state of Florida proved their case with a statement made by the Appellant while he was in a jail in Baldwin County, Alabama, after he had twice invoked his right to counsel, after law enforcement agents in Panama City Beach, Florida, collaborated with Detective John Murphy from Baldwin County, Alabama, and before it was even possible for the Appellant to have received the appointment of counsel. Although a motion to suppress this statement was made, at the hearing regarding the statement the Alabama detective who had collaborated with the Panama City Beach police officers was not called as a witness even though we would have corroborated the elaboration. Instead, the Appellant's defense counsel represented that he was relying upon "a New York line of cases" which he was unable to specify at the evidentiary hearing. This omission should have been found to be below the standard set forth in the case of Strickland and to have been significant enough to require a new trial.

The Appellant also was convicted based upon "blood spatter" analysis testimony offered to the jury by a non-expert. Moreover, such analysis was made they upon assumed blood spatter patterns. The reality is that the substance is assumed to be the blood of the victim were actually never formally lab tested and

confirmed as the blood. No objection was made on this basis and the Appellant's trial counsel essentially withdrew a proper and timely objection to the lack of qualifications of the witness to testify regarding the blood spatter analysis. Accordingly, the Appellant's jury was given an image of the events of the death of Ms. Bailey which was based upon an analysis given by one who was not qualified to give such an analysis based upon data which was not be shown to be reliable. This omission should also have been found to be below the standard set forth in the Strickland case and to have been significant enough to require a new trial.

After a contentious attorney-client relationship the Appellant was defendant in a death penalty case by the single attorney with whom he had experienced poor communication and preparation and with whom he had spent little time and who did not give his representations about the case much creed. The result of this was that there was little cross examination with respect to these salient facts of the case and that the defense case, which by its presentation alone forfeited the advantage of opening and closing the summary arguments of the trial, consisted of the lead case agent and resulted in allowing the lead case agent to offer opinion testimony regarding the guilt of the Appellant and his credibility.

Following the conviction of the Appellant the Appellant was sentenced to death after having received a penalty phase hearing conducted by the same single

defense lawyer. Although the Appellant had reported a substantial substance abuse problem a company with paranoia and had also reported a childhood which included a poor male role model and frequent moves, though psychological expert opinion was offered to the jury about any of these issues. Instead, the preparation and coordination of the penalty phase had been delegated to the Appellant's alcoholic father who passed away several months before the trial This omission should have been found to be below the standard set forth in the Strickland v. Washington, 466 U.S. 668 (1984) case and to have been significant enough to require a new penalty phase.

The penalty phase was conducted under circumstances in which the jury was not required to find the existence of any single aggravating factor unanimously. The jury was also instructed that their verdict with respect to the penalty phase was only advisory. Although these matters have apparently met with approval of the Florida Supreme Court and, through inaction, with the United States Supreme Court, Appellant is obligated to keep these objections alive for the future.

Relating to the preparation for the mitigation phase, Appellant first would make note of the fact that the Appellant's trial defense counsel handled both the guilt and penalty phases of this trial alone and without assistance from other counsel. Additional counsel was available within the office of the Public Defender

for this circuit. This fact was never known to Appellant. As has been previously discussed in detail the relationship between Appellant and trial defense counsel was very poor and lacked any reasonable relationship based on mutual trust. Appellant's trial defense counsel basically acted alone and in disbelief of his representations and statements about his case. As this matter was raised in the Appellant's motion for postconviction relief pursuant to Fla.R.Crim.P § 3.851, it is mentioned here in order that it not be deemed to have been waived by the failure to mention it. However, the Appellant has also raised this issue in his petition for a writ of habeas corpus and would ask that this Honorable Court consider such issue fully in either this appeal or in the petition for a writ of habeas corpus. It is the Appellant's desire to have this matter heard fully and considered fully by this Honorable Court only one time but to ensure that it is fully considered in the proper context.

In addition to the individual errors described above, it must also be considered that the cumulative nature of these problems may need to compound the other and this cumulative effect should also be seen as creating sufficient error and doubt upon the integrity of the Appellant's trial to require setting aside the trial and sentence of November, 2002, and requiring a new trial.

The Appellant also presented a claim in his petition pursuant to Fla.R.Crim.P § 3.851 that the death penalty, as carried out through lethal injection, is cruel and unusual punishment. He was not granted a hearing on this issue. While the Appellant is aware that this Honorable Court as well as the United States Supreme Court have come to the conclusion that certain protocols exist pursuant to which such means of execution is not cruel and unusual, the Appellant would herein submit that it will remain the case that no licensed medical professional will assume responsibility for the administration of what can only be described as a medical procedure, albeit not want to spare a life but want to take a life. Accordingly, the Appellant would respectfully submit that lethal injection can never be considered anything other than cruel and unusual punishment because it necessarily will be carried out by those who cannot be licensed by the state to perform medical procedures.

V. ARGUMENT

A. Introduction.

The Appellant will now present arguments and authorities in support of the points on appeal designated above. Appellant would also respectfully submit that certain issues involved in this appeal may have characteristics and aspects which overlap matters which may be raised in the accompanying petition for a writ of habeas corpus. In order to achieve efficiency and to also ensure that Appellant received the benefit of each and every legal argument available to him at this point the Appellant will seek to address each issue and all related issues in the document in which it is most appropriate but will also have the practice of mentioning such issue and its potential overlapping related issues in the other document in order that no such issue will go without consideration because it was improperly referenced in the wrong document. The undersigned beg the indulgence of this Honorable Court in any case in which the issue has either been presented in the wrong document or in which it appears that the Appellant has unnecessarily overlap such issues.

1. General Principles applicable to FlaRCrimP'3.851 hearings.

When ineffective assistance of counsel claims are reviewed the courts will typically not grant relief for imperfect tactical decisions of counsel as long as there

was any valid basis for such decisions. If. however, there has been a clear error or omission of counsel, such will be evaluated for its potential effect on the integrity of the trial. Strickland v. Washington, 466 U.S. 668 (1984) has long been and remains the standard for the determination of claims of ineffective assistance of counsel. The decision always requires a determination, on a case by case basis, of whether two elements exist.

The first element of the Strickland test is whether the representation afforded the Appellant fell below a standard of minimal competency so that the representation rendered by this counsel was "effective" within the meaning of the Sixth Amendment of the United States Constitution and Article I, Section 16(a) of the Florida Constitution. The second element is whether the ineffectiveness of counsel was of sufficient substance to cast doubt on or undermine the integrity of the result of the trial. Put another way, the second element asks if there a reasonable likelihood that, but for the errors or omissions of counsel, the result of the trial would have been different.

It is often said that certain challenged decisions of counsel were "strategic" or "tactical" and that such decisions should not be subject to second guessing in a postconviction hearing. While Appellant will concede that this may be true, it should also be considered that a court should consider whether the purported

"tactical" decision was supported by minimal investigation or competent considerations. For instance, as in the recent case of Rhodes v. State, No. SC04-31 (Fla. 03/13/2008), the failure to be made aware of relevant facts bearing on a decision results in it not being a legitimate "tactical" decision because he required factors for consideration were not considered. Also, according to the case of Henry v. State, No. SC04-153 (Fla. 10/12/2006), it is also appropriate to inquire whether other courses of action were considered before the purported "tactical" decision was made.

This standard, when applied to each of the remaining claims in the case, will reveal that the Appellant should be entitled to have his verdicts set aside and that Appellant is entitled to either a new trial or to have his conviction set aside. This is because the errors and omissions of his counsel, either separately or cumulatively, resulted in a conviction and sentence which cannot be sustained in light of the evidence and circumstances established in the proceeding. This is in the interest of justice as well as the interests of all parties concerned, who deserve a result in which they may have integrity and confidence.

2. Principal Points on Appeal.

The claims which were finally submitted to the Trial Court for evidentiary hearing and resolution and which will be the focus of this appeal are as follows:

Point One: **The Poor Communication Between Appellant and Trial Defense Counsel Resulted in Ineffective Assistance of Counsel.**

Point Two: **Appeallant Was Denied the Effective Assistance of Counsel in the Presentation of His Miranda Argument to the Court as Well as in the Inability to Argue the Issue of the Voluntariness of His Confession to the Jury.**

Point Three: **The Appellant Was Denied the Effective Assistance of Counsel by the Failure of His Attorney to Make an Adequate Challenge to the Forensic Serological Evidence and by Allowing an Unqualified Witness Render a Prejudicial Opinion.**

Point Four: **Appellant Was Denied Effective Assistance of Counsel by the Presentation of the Lead Police Detective as His Only Defense Witness.**

Point Five: **Appellant Was Not Effectively Represented in the Penalty Phase since the Penalty Phase Was Presented by the Same Attorney as the Guilt Phase, since the Case Was Not Prepared, and since Psychological Assistance Had Not Been Sought.**

Point Six: **The Cumulative Effect of All of the Errors and Omissions of Counsel Requires Reversal and Remand for a New Trial.**

Point Seven: **Florida's death penalty procedures deny due process within the meaning of Ring v Arizona, 122 S. Ct. 2428, 2443 (2002) and Apprendi v New Jersey, 530 U.S. 466.**

Point Eight: **Lethal Injection Is Cruel and Unusual Punishment and Violates the Eighth Amendment of the United States Constitution.**

B. The Poor Communication Between Appellant and Trial Defense Counsel Resulted in Ineffective Assistance of Counsel.

It is crucial to realize that the Appellant was not afforded the opportunity to do discuss his case with counsel until February 26, 2002, when he was transported

to Bay County, Florida, from Baldwin County, Alabama, following his waiver of extradition. He was, upon extradition to Florida, represented by the Office of the Public Defender, Fourteenth Judicial Circuit, and his appointed counsel was Mr. Walter Smith. Mr. Smith, at the time, had in excess of 20 years of practice and most of this was in the field of criminal law. (R.125)

In this regard, brief reference is made to the next principal point on appeal, regarding Miranda rights and the three un-counseled statements, it is important to acknowledge that it was not possible for this indigent Appellant to have had counsel appointed in Alabama. Accordingly, the three trips by Det. Tilley and Lieut. Lindsey and the constant efforts of Det. Murphy to question Appellant were particularly violative of the rights of the Appellant, whose lack of access to counsel was obvious and well-known.

It may be said that Mr. Smith should have known that Appellant would be his client since he testified that he does all of the capital cases from Panama City. (ET.X) Accordingly, Mr. Smith should have at least corresponded with Appellant and advised him to refrain from making a statement until he could be represented and counseled well before Appellant was actually transported to the jurisdiction. The failure to make this contact resulted in the exposure of Appellant to numerous contacts from law enforcement before any opportunity for legal consultation.

However, a related and perhaps overlapping concern is Fla.R.Crim.P § 3.111, which requires a prompt appointment of counsel. It may also be said that Mr. Smith could not and should not be required to travel to a foreign jurisdiction to make contact and advise a client. If this be the case, the Appellant will rely upon his addressing of this issue in the writ of habeas corpus, filed contemporaneously herewith, and asked that such arguments be considered wherever appropriate.

Mr. Smith and Appellant did not get along well and Mr. Smith disbelieved much of what Mr. Everett had told him with respect to the offense. (ET.112-114) Mr. Smith offered that he was very confident of suppressing Mr. Everett's pretrial statements without calling Mr. Everett to testify based upon a "New York line of cases" of which he was aware but unable to cite at the evidentiary hearing. Mr. Smith also stated that he did not feel as though he would need an assistant counsel even though such was available and that the budget of his office would not permit a second counsel. The case was prepared for trial in approximately 9 months.[1] Mr. Smith took responsibility for both preparation and presentation for both the guilt and mitigation phases of the trial.

With respect to the psychological evaluation of the Appellant, Mr. Smith consulted with only one psychologist, a Ms. Jill Rowan, Ph. D. from Tallahassee

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[1] This assumes a first meeting with Appellant in February, 2002, as recalled by Mr. Smith.

Florida, and this evaluation occurred over a 45 minute period in which Mr. Smith's investigator was present. The evaluation was limited to the Appellant's competency to stand trial. (AE.I) Mr. Smith testified that, even though he had no formal psychological training, (ET. 135) his evaluations were always accurate and he did not need additional professional assistance even though he was aware that the Appellant was a long-standing drug abuser, that his father was an alcoholic, and that Appellant had moved back and forth during his childhood. (ET. 116).

Mr. Smith was also aware of the location of Mr. Everett's mother and the sisters, with whom he most closely was associated when growing up. These persons were not consulted. Instead Mr. Smith provided that he relied upon Mr. Everett's alcoholic father for assistance in preparing the penalty phase. (ET.142) Mr. Everett's father passed away approximately 2 months before the trial. Mr. Smith made no effort to continue the trial or to seek a replacement for preparation of the penalty phase.

It should be noted that Fla.R.Crim.P § 3.112 makes clear that the standard should be appointment of cocounsel whenever a defendant faces the death penalty. The comments to the rule note that this is an ABA standard and that the rules committee has not made it a requirement simply because it may not be feasible or economical in some areas. The standard is specifically made applicable to public

defenders as well as appointed counsel. The rule does provide that appointment of cocounsel will be automatic if requested by lead counsel.

Accordingly, Mr. Smith had two options to representing Appellant without assistance. A first option would have been to request assistance and, since these standards and requirements also apply to public defenders, it appears the elected Public Defender for the circuit would have been obligated to appoint one. A second option would have been to have pointed out the excessive caseload upon him and appointed counsel could have been made available. Instead, Mr. Smith proceeded to defend this capital case within nine months of his appointment which prohibited effective communication with the client, effective investigation of the guilt phase of the case, and effective penalty phase preparation and presentation.

The Rules of Professional Responsibility specifically provide that counsel need not "endorse" the position of the client, but is bound to represent it. Rule 4-1.2 provides as follows:

> **RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION**
>
> **(a) Lawyer to Abide by Client's Decisions.** A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's

decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client ,including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) Limitation on Lawyer's Conduct. When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or by law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

These rules are meant to ensure that counsel has both the right and duty to present the position and defense asserted by the client, even if counsel does not agree with the position. Counsel is only prohibited from presenting known false evidence or advocating a clearly illegal point of law without a good faith basis for change. That Mr. Smith breached this duty is clear throughout this proceeding and the prejudicial impact in Appellant case is also clear. It is difficult to imagine

how any attorney, regardless of skill level, could render reasonably effective assistance of counsel without conversing with the client other than to state disbelief.

The lack of communication between Appellant and his trial counsel and the automatic disbelief that Mr. Smith had for the Appellant resulted in depriving the Appellant of the effective assistance of counsel. Appellant would have certainly testified regarding the matter of his pretrial statements. Mr. Smith obviously felt that there was some merit to this issue because he made the motion and conducted a hearing regarding the issue. Accordingly, it is clear that the failure of the defense to have presented the testimony of the Appellant regarding the voluntariness of his statement in the suppression motion or to have at least allowed him the opportunity to tell his own version of the events to the jury so undermined the integrity of the trial as to require a retrial.

This prejudice continued through the trial, wherein Appellant did not have the opportunity to present his desired theory of defense and into the penalty phase, wherein the Appellant's revelations about his substance abuse and paranoia were not presented.

C. Appeallant Was Denied the Effective Assistance of Counsel in the Presentation of His Argument to the Court Pursuant to Miranda v Arizona, 386 US 1 (1966) and its Progeny as Well as in the Inability to Argue the Issue of the Voluntariness of His Confession to the Jury.

1. Facts Regarding the Pretrial Statements.

After being located in Alabama, Appellant was questioned by Detective Tilley and Lieut. Lindsey from Panama City Beach on November 14, 2001. They were assisted in making the arrangements by a Detective John Murphy, from the Baldwin County, Alabama Sheriff's Office. Detective Murphy had already questioned the Appellant about his Alabama charges, which concerned forged checks. At the time Det. Murphy did not know about the Panama City murder charges and had not discussed them. He had developed a rapport with the Appellant which Detective Tilley hoped to exploit. (ET. 74)

It is uncontroverted that, at the end of this first interview on November 14, 2001, the Appellant indicated that he desired the assistance of counsel and questioning immediately ceased. (AE.II) Portions of this interview were recorded. About a week later Detectives Tilley and Lindsey traveled to the Baldwin County, Alabama, jail again. Detective Murphy had established some rapport with the Appellant and Detectives Tilley and Lindsey asked Detective Murphy to set up a time for Detectives Tilley and Lindsey to travel to the Baldwin County Courthouse and retrieve blood and saliva samples from the Appellant. Miranda warnings were

again given and the general statement was made that the Appellant had indicated that he "wanted" to talk to the Detectives. He had allegedly indicated to Detective Murphy that he, after talking to Murphy "wanted" to speak with Tilley. Portions of this interview were also tape-recorded but there was no tape recording made of any assertions or statements by the Appellant that, despite his earlier invocation of counsel, he had made a conscious decision to speak with the Detectives without counsel. Appellant denied that he had initiated any such contact (ET.X.)

After a short time this second interview also was terminated when the Appellant invoked his right to counsel. (AE.III) His second statement was somewhat at variance with his first statement. Detective Murphy again made contact with the Appellant at the request of Detective Tilley and discussed this case. (ET.83) Following this discussion detectives Tilley and Lieut. Lindsey again traveled from Panama City to be Baldwin County jail and took yet another statement from the Appellant. It was represented that the Appellant had initiated this contact through Detective Murphy.

Detective Murphy was again asked by Detective Tilley to share certain physical evidence, such as photographs and sketches, with Mr. Everett. Accordingly, Detective Murphy approached Mr. Everett yet again after this second

invocation of his right to counsel and this produced a third statement. This third statement was offered against Mr. Everett at his trial. (ET.83)

Prior to the conduct of the trial Mr. Everett, through Mr. Smith, filed and litigated a motion to suppress these pretrial statements. What is clear from the record is that neither Mr. Everett nor Detective Murphy testified and that Detective Murphy's version of these events was presented through a police report offered by the State of Florida which made no mention of meetings between he and Mr. Everett between the times of the tape recorded interviews. (AE.III., Transcript of October 4, 2002 hearing)

At his evidentiary hearing Mr. Everett testified that he had not been made aware of the importance of his testimony at the suppression hearing and that he would have testified if he had known of the importance of demonstrating how his desire for counsel was disregarded and if he had known that it was asserted that he had "initiated contact" with Detective Tilley were with Lieut. Lindsey. (ET.53) At Mr. Everett's trial the voluntariness issue was briefly re-litigated with Mr. Murphy present. Again, Mr. Everett did not testify about these meetings between he and Detective Murphy which had occurred between the tape recorded interviews. He still was not made aware that it was his state of mind regarding his rights to counsel and to remain silent that were the focal point of this inquiry.

At the evidentiary hearing Mr. Smith testified that he had taken the proper procedures to get Detective Murphy present for the original suppression hearing but that the Judge in Alabama refused to follow through with an order. Mr. Smith did not request a continuance nor did he mention this witness problem in that manner to this Honorable Court before proceeding with the suppression hearing. (ET.X.) The third Statement made by Mr. Everett was admitted at his trial and argued by the State as evidence that Mr. Everett was trying to cover up what he had done. Accordingly, it can only be assumed that the appellee was aware that the first two statements should not be used and based its case for admissibility of the statement upon the purported initiation of contact by the Appellant.

Appellant's contention here is that proper litigation of this issue at the time of trial would have revealed, as was revealed during the evidentiary hearing, that Detective Murphy and Detective Tilley had developed a scheme for inducing Mr. Everett to "desire" to "initiate contact" with Detective Tilley in order to get around the fact that Mr. Everett had invoked his right to counsel. They succeeded in this endeavor on two occasions. It was obviously impossible for this Honorable Court to have granted the appropriate relief when the evidence regarding this matter was never presented to him until the evidentiary hearing.

2. Legal Authorities Regarding Pre-Trial Statements.

In Florida the right to remain silent comes from both the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. The right to counsel comes from both the Sixth Amendment of the United States Constitution and Article I, Section 16(a) of the Florida Constitution. How these rights combine to define the conduct of interrogations in Florida, particularly as regards this case, is best defined by the case of Traylor v State, 596 So.2d 957 (Fla, 1992). This case determined that the Florida Constitution, at Article I, Section 9, provided greater rights than the 5th and 6th Amendments to the United States Constitution and further provided as follows:

> Based on the foregoing analysis of our Florida law and the experience under Miranda and its progeny. (Quoting and citing from Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the federal Court established procedural safeguards similar to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation. In subsequent decisions, the Court expanded Miranda's scope. See, e.g., Minnick v. Mississippi, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990); Arizona v. Roberson, 486 U.S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 (1988); Edwards v. Arizona, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). In other areas, the Court limited Miranda's scope. See, e.g., Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990); Duckworth v. Eagan, 492 U.S. 195 2875, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989); Colorado v. Spring, 479 U.S. 564, 93 L. Ed. 2d 954, 107 S. Ct. 851 (1987); Colorado v. Connelly, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986); Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); Oregon v. Elstad, 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985), and others.)we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to

custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help footnote omitted) and that if they cannot pay for a lawyer one will be appointed to help them.

Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present,(footnote omitted) although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.

A waiver of a suspect's constitutional rights must be voluntary, knowing, and intelligent, and, where reasonably practical, prudence suggests it should be in writing.(footnote omitted) A prime purpose of the above safeguards is to maintain a bright-line standard for police interrogation; any statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the State.(footnote omitted)These guidelines apply only to statements obtained while in custody and through interrogation; (footnote provides "Interrogation takes place for Section 9 purposes when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response. Cf. Rhode Island v. Innis, 446 U.S. 291, 300-01, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980) ") they do not apply to volunteered statements initiated by the suspect or statements that are obtained in non-custodial settings or through means other than interrogation. While our state voluntariness test is still applicable in those cases where actual compulsion is alleged in obtaining a self-incriminating statement, adherence to the above safeguards constitutes significant proof that the resulting statement was voluntary.

And, as was recently reinforced in Rigterink v. State, No. SC05-2162 (Fla. 01/30/2009), the federal right against self-incrimination is the beginning point of the right, not the defining point. Accordingly, the right can be defined more broadly in Florida, and this is particularly true under these circumstances.

Appellant's Fla R.CrimP § 3.851 complaint here is that he was uninformed about the nature of the challenge to the admission of pretrial statements. Because of this he was unaware of the requirement of offering his own testimony about the circumstances surrounding these statements. Appellant was also unaware of the importance of the full development of the live testimony of Detective John Murphy from Baldwin County, Alabama, rather than allowing his version of the statements by police reports.

Appellee, fully aware that Appellant had invoked his right to counsel on multiple occasions, still maintained that Appellant had initiated the contact with law enforcement by, without solicitation or suggestion, informing Detective Murphy, that Appellant desired to talk to Panama City police detectives. To the contrary, Appellant has set forth that Detective Murphy made numerous contacts with him and discussed the importance of Appellant making a Statement to the Panama City Beach police department. Appellant further stated that once Murphy got him to agree, that Murphy called Panama City police department and represent

that it was the Appellant's idea to initiate contact with them.

In his evidentiary hearing testimony Detective Murphy acknowledged that he had, indeed, and as set forth in one of his police reports, initiated contact with Appellant after he had invoked his right to counsel on at least one occasion and perhaps two. (ET. 83) Because this information was never presented to the Trial Court, either through the testimony of the Appellant or the testimony of Detective Murphy, and because Appellant's trial attorney suggested that he did not think it was necessary in light of a line of cases from New York, it is clear that there has been ineffective assistance of counsel. It is also clear that there is a substantial likelihood that, if this Honorable Court had been presented with the testimony of the Appellant (further corroborated by Detective Murphy) that there was contact initiate by law enforcement following his invocation of counsel, the result would have been different.

It is not a difficult matter to secure the attendance of law enforcement officers from other States, particularly when the distance is not so great as was the case between Baldwin County, Alabama, and Bay County, Florida. This is about a three hour drive. This was also a matter of paramount importance to the Appellant's trial. But for his reported confession to the offense the State was left with less than convincing circumstantial evidence and would have likely had to

present the testimony of the demonstrably deceitful Jared Farmer, who was never required to testify and who would have presented problems for the State if he had been required to testify because of his own inconsistencies and credibility problems.

Following the decision made in the landmark case of Miranda vs. Arizona 384 US 436 (1966) has followed an entire body of law regarding Fifth and Sixth Amendment rights. Of particular concern to this case is what happens after a Defendant has invoked his right to counsel. The general rule is that when a Defendant makes a clear request to speak with counsel questioning must cease. However, if a Defendant who has invoked his right to counsel later changes his mind and initiates contact with law enforcement statements that are made following this voluntary initiation of contact may be used at trial because the Defendant can be said to have waived his right.

It was, however, made very clear in the case of Edwards v Arizona, 451 US 477 (1981) that, in order to truly be voluntary, a subsequent statement must be shown to have been initiated by the Defendant and not to have been prompted by any contact by law enforcement. The Court also mentioned that the Defendant should have also been afforded a lawyer before any such voluntary subsequent waiver be considered valid. At the evidentiary hearing Appellant's trial counsel

acknowledged that he had neither secured the appearance of Detective John Murphy, from Baldwin County, Alabama, nor had he requested a continuance for this to be done. This was crucial to the case because the initiation of contact by the Appellant was said to have come through Detective Murphy.

It is uncontroverted from the records and transcripts of the statements of the Appellant that both of the first two statements were terminated by invocation of counsel. Accordingly, in order to satisfy the Edwards standard, the State would have been required to show that the Appellant had, on his own, made the decision to waive his right to counsel and initiate contact with law enforcement.

A recent case decided within the Florida First District, Hunter vs. State, 973 So 2d 1174 (1st DCA, 2007) underscores the importance of all of this. In the Hunter case the Defendant had invoked his right to counsel but later was said to have told correctional officers that he desired to waive his right to counsel and go ahead and make a statement. Following this law enforcement visited Hunter and obtained a waiver of Miranda rights. It was also said that the investigating officer "confirmed that it was Appellant's (Hunter's) decision to speak with him before he started the interrogation".

The First District Court of Appeal determined that the statement should not have been admitted because Hunter could not be shown to be the one that initiated

contact with law enforcement. It was the correctional officers who initiated contact with Hunter, suggested he talk, and then passed along to the Detective that it was Hunter's idea. This was not adequate to overcome the requirements of Edwards. The court held "the waiver of the right to counsel cannot be established by showing that Appellant responded to police initiated contact".

Appellant's trial counsel represented that he anticipated winning the suppression motion based upon some unspecified "New York line of cases". He was unable to say how it was that these New York cases would have made a difference or would have caused the court to have decided the case differently. More importantly, however, he was unable to say how the New York cases would have made it possible to litigate this issue without calling both Detective Murphy and the Appellant to testify.

The Appellant clearly stated that, had he known the importance of his own testimony, that he would have wanted to provide such testimony for the court. Unfortunately, there is no colloquy or other way of saying from the record that the Appellant was aware of these rights and made a voluntary waiver anyway.

It should also be mentioned that Appellant does not here seek to "re-litigate" the suppression issue. The point here is that the failure to litigate it correctly the first time was ineffective assistance of counsel. It is inconceivable that this issue

could have been properly resolved, knowing that Detective Murphy did indeed mention the murder case to Appellant post - invocation of counsel with the testimony of Murphy and Appellant.

D. The Appellant Was Denied the Effective Assistance of Counsel by the Failure of His Attorney to Make an Adequate Challenge to the Forensic Serological Evidence and by Allowing an Unqualified Witness Render a Prejudicial Opinion.

By any evaluation or standard the crime scene was horrific. The victim had been beaten, apparently both with and without a blunt instrument, to either unconsciousness or paralysis or both and then raped and left to die. There were multiple bloodstains about the house which could have been effectively used to establish where certain events occurred and perhaps even who was present at the time.

Unfortunately, the bloodstains were photographed and subjected to presumptive testing but were never analyzed with sufficient detail to ascertain even that they were stains made from human blood, much less whose blood it might have been. When this is done properly an appropriate expert in serology can normally state with reasonable certainty how many different persons left blood samples at the scene and who they were. This is important because the existence of a perpetrator who may have received a defensive wound can be established if such exists.

Beyond the information available from serological analysis, a trained and qualified blood spatter expert can make measurements regarding the size and shapes of blood droplets and offer qualified opinions about what sort of impact or cut produced the wound and the approximate location at which the relevant event of impact or cutting occurred. This science has been developed over the last 20 or 30 years and has achieved sufficient acceptance in the scientific community to pass the Frye test. There have also been occasions of charlatans who practice in this area and who have managed to be put in front of juries by virtue of falsely Stated qualifications and experiences.

Accordingly, with knowledge of the identity of specific blood donors and with qualified expert analysis of the blood stain and droplet patterns, it is possible for a crime re-enactment or reconstruction to be performed. However, without the proper data (identification of blood) and without an expert who is trained to identify patterns and interpret patterns, the reference to such an art is prejudicial and should be excluded.

Add Appellant's trial the State presented Mr. Charles "Chuck" Richards from Pensacola. (TT.41-75) Without even being able to establish that the stains in the decedent's home were human blood, (ET.38) and without being able to establish himself as a blood spatter expert, (ET.37) Mr. Richards was allowed to

testify as though he were a blood spatter expert. Mr. Smith did object but, upon the State's promise to limit the amount of testimony in this regard, effectively waived the objection and permitted the unqualified expert (Mr. Richards) to offer blood spatter opinions about stains which were not even known with certainty to be human blood. (TT. 60)

Appellant's allegations in his Petition were corroborated by the testimony of Mr. Chuck Richards at the evidentiary hearing. Mr. Richards acknowledged that he was not a blood spatter expert at the time of the trial and has had only nominal training in this manner since then. Mr. Richards also acknowledged that the bloodstains he was describing and applying to his limited blood spatter testimony were never confirmed to even be human blood, much less the blood of any particular person as would be necessary to establish the validity of blood spatter analysis.

Mr. Smith's explanation to permitting this testimony to be presented to the jury was that he did not consider that Mr. Richards was testifying "beyond" his recognized expertise. (ET.122) This explanation is unsatisfactory in light of the fact that it was acknowledged by Mr. Richards and by the appellee that he was not qualified to offer such opinions. It is also unsatisfactory in light of the fact that the

alleged bloodstains were never more than presumptively tested and they became a feature of the trial.

Florida still observes the test established in Frye v. United States, 293 F. 1013 (D.C.Cir. 1923), hereinafter the Frye rule, and this challenge is to be used to question or challenge the use of expert testimony and scientific evidence. (Also see Zack v. State, No. SC03-1374 (Fla. 07/07/2005) After making an objection to the opinions offered by "Chuck" Richards regarding "blood splatter" patterns, Appellant's defense counsel allowed the State to present it and made no further objection.

Moreover, there are specific requirements for scientific evidence in opinion testimony in the Florida Rules of Evidence. Each of them are clear and together they demonstrate that proper preparation and challenge of this opinion testimony would have been successful in either completely excluding the evidence from the trial or in requiring that its lack of support the presented fairly to the jury. In either of these instances it can be easily seen that the result is more than a reasonable likelihood that the trial outcome would have been more favorable to the Appellant. Either the jury would have not heard it or they would have realized it was not conclusive of anything.

With respect to the testimony by one who was not qualify as an expert, FS 90.701 provides that his testimony cannot be presented unless the witness cannot readily and with equal accuracy and adequacy communicate his or her perception without including the questioned inferences and opinions. This would not have applied in this case because Mr. Richards would have only required to testify about his physical observations of the crime scene. No inference or opinion was required to do that. Instead, the inferences or opinions were offered by the State to persuade the jury of its theory of the case.

The second requirement for allowing an unqualified person to render an opinion also could not be satisfied. This is that the opinions were inferences and not such as to require a special knowledge, skill, experience, or training. This did not apply because blood splatter analysis is indeed a recognized expertise.

The field of blood splatter analysis assumes the ability to identify and define a substance as blood rather than some other similar fluid and, when reconstruction is attempted, to actually identify the person who is the source of the blood. This can only be done with proper testing and can never be done either by mere visual recognition or by presumptive testing. This is because not only is confirmation that it is blood important, but also confirmation of whose blood it is, since the patterns will be analyzed to offer opinions about how and where participants were

involved in combat. It requires the ability to understand fluid dynamics (the science of how liquids behave under a variety of conditions) because the opinions will be based upon knowledge of how blood is transferred from one material to another. Also, as a minimum, it requires an understanding of the physics and laws of motion. This is because presumptions about the impact or cut causing blood loss or the flight of the droplets of blood are to be made from the size and shapes of the droplet or other stains.

Even if Mr. Richards could have been qualified by the court as an expert the defense counsel, pursuant to FS § 90.702, should have taken the opportunity to challenge his qualifications before the jury. Had this been done the jury, the ultimate judges of the facts, would have understood that Richards had no unique or special training in this field other than the basic familiarization with the existence of the technique and that Mr. Richards expertise was only sufficient to permit him to effectively document and preserve a crime scene for later analysis by a true expert. If the jury had been made aware of this it clearly would have impeached the validity and integrity of these prejudicial opinions to the jury regarding the sequence of events hypothecated by the State to have been involved in the crime.

Finally, an appropriate challenge existed, but was not attempted, under FS § 90.705 relating to the underlying facts or data upon which the opinions and

inferences were based. Had this been done, the jury would have known that the suspected bloodstains had never been tested beyond presumptive testing and that no reliable expert could even say with any degree of certainty that they were either human blood or the blood of a particular person. Also, the jury would have known that the kinds of measurements of the sizes and shapes of the bloodstains necessary to support a given theory of activity within the room had not been made and that such inferences are opinions could not be supported by reliable data.

None of the challenge techniques should have been considered to be beyond the skill and knowledge of a reasonably effective attorney. None of them were effectively applied. This significant evidence was presented to the jury without substantial contradiction or question. There was no strategic or tactical reason offered for this omission of counsel nor can any be hypothecated. The Trial Court's determination that this does not require relief was in error.

E. Appellant Was Denied Effective Assistance of Counsel by the Presentation of the Lead Police Detective as His Only Defense Witness.

Appellant's trial was conducted in November, 2002. At that time the practice in Florida was that if a criminal defendant either presented no evidence or presented only the bare testimony of the Defendant, without corroboration or supporting physical evidence, the defense counsel would be permitted to both open and close the summation arguments to the jury. It cannot seriously be contended

that this does not offer significant advantage. Having the first and last word in any argument is of great value.

Rather than to either offer the testimony of Appellant or to present no evidence at all, Appellant's trial counsel called, as the only defense witness, Detective Tilley, the case agent. At the time of this trial the defense of voluntary intoxication had been abolished. Yet Appellant's counsel focused on this issue. (ET.135) It would appear that the purpose of offering Detective Tilley at the time would have been to establish that, because of his drug use, Mr. Everett may not have been capable of offering an accurate description of the events of the crime. As Detective Tilley could not have conceivably been qualified as an expert in this field this was a futile effort from the start. As it played out, however, it got much worse. This enabled Detective Tilley to offer opinions about Mr. Everett and about whether or not he was the perpetrator of the offense. Obviously Mr. Everett's case suffered from this testimony. It should also be noted that even this effort would have been unnecessary if the pre-trial statements would have been suppressed.

Moreover, in addition to the damage done by the evidence offered by Detective Tilley, Mr. Everett lost the summation argument advantage described above. Since Detective Tilley was a witness other than the Defendant and was

presented by the Defendant one of the best advantages available to the defense was now gone as well.

Mr. Smith could offer no viable strategic reason for this maneuver. At the evidentiary hearing his memory of this was poor, although he hypothecated that he was either seeking to elicit information about the statement (which should have been done when the statement was offered by the Appellee) or about Appellant's drug use (which itself was prejudicial during the guilt phase and was ignored during the penalty phase, when it might have been of benefit.)

Indeed, it is difficult to imagine any strategy or tactic of the defense which would have been supported by the testimony of Detective Tilley. Such can only be seen as below the standard of reasonably effective counsel. It is also clear that the loss of this advantage which was so significant as to have been taken away by the legislation, would have had a substantial likelihood of producing a new result of the trial.

As was previously described, while tactical or strategic decisions of counsel are not normally subjected to hindsight analysis, this presents a case which is within the exception to that rule. In particular, this was not a decision upon which there could be any reasonable debate about both the error of the decision or the prejudice which it engendered. Additionally, this was not some decision which

had to be made in an environment of surprise and, drama. Detective Tilley was a planned witness and arrangements for his appearance had to be made by Mr. Smith. There was nothing spontaneous about it.

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 09/30/1991) and Cronic v United States, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) demonstrate situations wherein prejudice may be assumed. Blanco was a case wherein the defense counsel had disregarded the defendant's theory of defense and had not called certain witnesses. The judge intervened to bring the witnesses in for the sentencing phase. In reversing the Blanco court quoted from the Cronic decision.

> In Cronic, the Court carved out a narrow exception to Washington's general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Circumstances which would warrant a presumption of prejudice from counsel's ineffectiveness are those where "the adversary process itself is [rendered] presumptively unreliable [by the circumstances]."

Appellant would respectfully submit that the circumstances of this decision of counsel for such as to make appropriate the observation that "the adversary process itself is [rendered] presumptively unreliable [by the circumstances]." When counsel calls the chief witness of the adversary, thereby surrendering perhaps the biggest procedural advantage available to the case, for a purpose which is counterproductive and, to emphasize the point, such was the only affirmative

gesture taken in defense, no other observation is possible and prejudice must be assumed.

Accordingly, with respect to this issue alone, since there was no potential for practical advantage to this maneuver, since it rendered the adversary process available for the Appellant "unreliable", and since prejudice is so inherent in the activity of prejudice need not be separately shown, relief was appropriate and now reversal of the cause is warranted and Appellant should receive a new trial during which a thoughtful defense strategy is considered poor implementation.

In the Henry case, cited above in the INTRODUCTION an experienced defense counsel made a tactical decision to disclose a prior offense to the jury in the hopes that they would appreciate the candor of the accused. This Honorable Court had little difficulty in granting relief based upon this ill-fated tactical decision. It lacked any conceivable merit. Likewise, calling the case agent to effectively enhance his earlier testimony with negative observations about the Appellant and also forfeit his only remaining advantage in the case (opening and closing in the summation) should not be seen to be excusable. Its prejudice was clear.

Appellant should be allowed a new trial conducted according to the rules in effect in November, 2002.

F. Appellant Was Not Effectively Represented in the Penalty Phase since the Penalty Phase Was Presented by the Same Attorney as the Guilt Phase, since the Case Was Not Prepared, and since Psychological Assistance Had Not Been Sought.

As was mentioned before, Mr. Smith had delegated the task of locating mitigation and character evidence to support Mr. Everett's appeal to spare his life to Mr. Everett's alcoholic father. When Appellant's father passed away several months before the trial no one was left to assist Mr. Smith and apparently Mr. Smith did nothing to resolve the dilemma. He did not even ask for additional time to prepare. (ET.142)

Moreover, Mr. Smith had not consulted a psychological or psychiatric professional for the purpose of discovering and developing mitigating factors which may have been available from Mr. Everett's background and physical and mental health. (ET.135) That Mr. Everett had suffered from a long-standing abuse of a variety of chemicals was well known to Mr. Smith. Even though such evidence was no longer available as a defense to the crime, it is well known that this evidence can be presented during a penalty phase to support a contention that a Defendant was suffering from emotional distress, such as fear or anxiety.

Whereas Mr. Smith did present evidence of drug use during the guilt phase, when it could not possibly have helped and only served to hurt the Appellant, he did not present such evidence during the penalty phase when it may have well

made a difference. At the evidentiary hearing was presented the testimony of Dr. Umesh Mhatre`. (ET.88-103) Dr. Mhatre` established that the Appellant would have experienced both fear and anxiety from the combination of drugs that he was taking and that the Appellant had a documented history of ingesting these drugs. He was able to testify to these facts based upon not only his meeting with the Appellant but also his interviews of the family members and his review of the Appellant's history.

Accordingly, rather than the mere plea of Appellant's mother and sister to the jury, the jury should and could have been presented with a reason to consider that the Appellant was something other than the evil monster who participated in this horrible crime. Appellant had compelling mitigating mental and psychological factors. Appellant lacked a male role model other than his alcoholic father. Appellant himself and adopted a life of substance abuse and this caused him fear, anxiety, and paranoia. Appellant was denied a stable upbringing as he was moved from place to place even more often than those with transient careers, such as the military.

These were all factors of the life of the Appellant which were not adequately investigated, documented and presented for the jury and which may have been a

reason for six or more of the jurors to have considered that he could or should receive something other than execution by lethal injection.

The failure to have adequately probed into these factors and to have presented them to the jury balls below any reasonably effective standard of legal representation. Again, there was no strategic or tactical reason for this to have not been done and again, it is clear that the presentation of such evidence to the jury would have had a substantial likelihood of producing a different result.

Only this Honorable Trial Court knows for sure and is not obligated to say at this point, but it could be that a vote of 7 to 5, 8 to 4, or 9 to 3 for the death penalty may have been one which would have produced a different result in the ultimate sentence rendered by this Honorable Court, who could have overridden such a recommendation.

G. The Cumulative Effect of All of the Errors and Omissions of Counsel Requires Reversal and Remand for a New Trial.

Appellant has also asked this Honorable Court to consider the cumulative effect of all of the errors. This is particularly significant in this case because the matters are all so overlapping. For instance, the failure to adequately mount a challenge to the pre-trial statement was shown to have required the feeble attempt to explain away the statement by calling Detective Tilley to the stand as Appellant's only witness.

Also the improper blood spatter evidence made it harder to overcome the aggravating factors in the penalty phase. There are numerous examples of where one of these errors either compounded or complemented another error for the benefit of the State.

The purpose of considering the cumulative effect is to allow the Court to consider how these matters, together, may result in prejudice if any individual error does not result in prejudice. Appellant would respectfully submit that each of the above claims demonstrates an error or oversight which falls below the standard of reasonable competence. The Courts have provided for this as set forth below.

> Finally, in Harvey v Dugger, 656 So. 2d 1253 (Fla., 1995), it was held:
> A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel. Therefore, in view of the fact that we have already determined to remand for an evidentiary hearing Harvey's penalty claims 2(a) and 3, we also remand his penalty claims 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), and 16 for consideration at the same time.

This holding was affirmed and further explained in Cherry v State, 659 So2d 1069 (Fla., 1995).

Based upon the foregoing, relief is appropriate in this case. At least one

claim with respect to both the guilt and penalty phases of the trial is meritorious under the Strickland case. With respect to the guilt phase, it is clear that when the confession issue was to be determined upon the totality of the circumstances and the Appellant's defense lawyer presents no evidence of the circumstances relief is warranted. This claim, standing alone, should be enough to warrant a new trial because the only direct evidence of the offense resulted from the denial of the suppression motion. When this is considered along with the ineffective challenging of renting evidence, the counterproductive and only defense witness, and the four State of communication between attorney and client, it is clear that the cumulative effect of these errors and instances of ineffectiveness of counsel require relief.

In the same manner relief is appropriate in the penalty phase of the case. The failure of the Defense counsel to present an appropriate version of the Appellant's problems with drugs both misled the Court and jury with respect to the impact of the drugs and also was not even attempted during the proper phase of the trial. Such an error clearly satisfies the Strickland standard. This should be coupled with the meager mitigation planning, the failure to properly and adequately describe the Appellant's background, and the failure to even allow the

jury and opportunity to consider that another person was present who could have at least participated in the crimes.

When this is done it is respectfully submitted that relief is warranted with respect to the penalty phase as well.

H. Florida's death penalty procedures deny due process within the meaning of Ring v Arizona, 122 S. Ct. 2428, 2443 (2002) and Apprendi v New Jersey, 530 U.S. 466.

The Appellant maintains that the present state of the law does not accord him certain rights and procedures which, with all due respect to the appeals courts, seem obvious and appropriate with respect to death penalty cases. These inadequate rights and procedures are described as follows.

First, the Appellant's jury was not instructed that they would be required to find the existence of at least one aggravating factor unanimously and beyond reasonable doubt. They were instructed simply that a majority of the members of the jury would have to determine that the aggravating factors would have to outweigh the mitigating factors. Because of this instruction there is no record of which aggravating factor was relied upon by the jury and there is no way of saying whether any one aggravating factor was found to exist by the jury both unanimously and beyond reasonable doubt.

Second, the jury was instructed that their penalty phase verdict was only advisory and such fails to adequately apprise them of the importance of their decision. The Appellant's jury was not instructed that their decision was binding on this Honorable Court with respect to the issue of the factual findings of aggravating circumstances. In fact, they were advised that their decision was merely advisory and that this Honorable Court would have the final word in this decision. Because of this it is far more likely that a jury would not take as seriously as they should the import of this determination.

Third, the Appellant's jury was not instructed that Florida law provides that the life sentence resulting from conviction to a capital offense does not allow release on parole and that the Appellant, upon conviction, would have no opportunity for release other than a pardon.

In light of the Apprendi v New Jersey, 530 U.S. 466. and Ring v Arizona, 122 S. Ct. 2428, 2443 (2002) the Appellant respectfully submits that he was not accorded and could not possibly be accorded the due process rights envisioned by the Six Amendment to the United States Constitution as well as Article 1, section 21, of the Florida Constitution u8nder the present framework..

Apprendi sets forth that enhancements of sentences beyond the statutory maximum must be based upon proof to a jury beyond reasonable doubt.

Accordingly, in the absence of a single aggravating factor, Appellant's maximum permissible sentence would be life without parole. Accordingly, a unanimous jury verdict of at least one aggravating factor must be required.

Although Appellant is aware that, to date, no Florida court has granted this relief on this basis, Appellant maintains that his argument and position are well-founded and outh to be adopted as the law governing these matters. Indeed, Bottoson v. Moore, 833 So.2d 693 (Fla., 2002) reveals the difficulty in rectifying these principles and it is almost as though the status of the law has been maintained by default. Appellant herein asks this Honorable Court to bring certainty to these issues by requiring the minimal due process of a unanimous jury verdict rendered by a jury fully informed of the law and their importance in the process of sentencing.

I. Lethal Injection Is Cruel and Unusual Punishment and Violates the Eighth Amendment of the United States Constitution.

Evidence has surfaced that the use of lethal injection as a manner of carrying out the death penalty is cruel and unusual. The basis of this argument is that such execution is normally accomplished in three stages. In a first stage the condemned is given an anesthetic, which is intended to alleviate his pain as though he were undergoing a medical procedure such as surgery. In a second phase the condemned his then given a muscle relaxant. The purpose of this is to prevent

involuntary movement by the condemned person as the third chemical, which stops the heart and kills the condemned is administered. There is a distinct possibility, as has been known to happen in regular surgical procedures, that the anesthetic is not properly applied but the muscle relaxant is so that when the killing chemical is applied the condemned feels excruciating pain but is unable to answer anyway communicate this. Such was believed to have happened to Angel Diaz.

Numerous cases regarding this issue have been decided since the Appellant was sentenced to death by lethal injection. In Florida, after a thorough and comprehensive theory had been conducted in the trial court in the case of light burned the MacCallum, this Honorable Court determined that the death penalty, as carried out in Florida, did not amount to cruel and unusual punishment. Then, in 2008, the United States Supreme Court decided the case of Baze v Kentucky, in which the protocol used for the death penalty in the state of Kentucky was found to have had sufficient safeguards to avoid characterization as cruel and unusual punishment. In the Baze decision the Appellants have sought to require an alternative means of execution by lethal injection in which a single "super anesthetic" would be used to cause death as is the case with animals when they are euthanized.

The United States Supreme Court sidestepped the issue of comparison with animals and stated that they would not direct any state to accomplish execution and any particular manner but that they would pass upon the constitutionality of the Kentucky procedure and then, finding it not to be cruel and unusual punishment, they further said for that states adopting this protocol would be in compliance with the Eighth Amendment of the United States Constitution.

Despite these decisions, Appellant would still offer the challenge to the procedure in Florida because, particularly when the single "super anesthetic" method is rejected requiring the coordinated application of three separate chemicals, it is clear that what is required is medical expertise because a medical procedure (albeit not one design to alleviate illness and pain) is what is being undertaken. Since the state would not permit the administration of drugs or the application of medical procedures to a patient by unqualified and unlicensed persons, it should follow that only adequately qualified and licensed persons with respect to the performance of medical procedures should be allowed to carry out the death penalty by means of lethal injection.

This was the concern of the article "Execution by Injection Far from Painless" * 15:49 14 April 2005 by Alison Motluk, Journal reference: The Lancet

(vol 365, p 1412) , (AE.V) also a matter addressed in the The Report of the Governor's Commission on the Administration of Lethal

Injection in Florida, rendered in March, 2007. (AE.VI). In the governor's report there was an addendum from the medical community in which they clearly and unequivocally provided that the ethics of their profession prohibited their cooperation and participation in this process.

Accordingly, since the procedure cannot be applied in a professional manner and because it is clearly one which requires more than a slight amount of medical expertise, Appellant would respectfully submit that this Honorable Court should retreat from its earlier decisions finding that the preent lethal injection protocol is not and unusual punishment and render a judgment that lethal injection which is not administered by a qualified medical professional runs the risk of accomplishing execution in a manner which is, indeed, cruel and unusual punishment as was suspected in the matter of Angel Diaz.

VI. CONCLUSION

Appellant would respectfully submit that the facts and law presented above make it clear that the Trial Court was wrong in its assessment that the Appellant had not been materially prejudiced by the ineffective assistance of counsel. The reasons for this begin with the fact that the Appellant had been subjected to repeated encounters with law enforcement before council was ever made available to him. Panama City Beach law enforcement was keenly aware that the Appellant was without counsel in Baldwin County, Alabama, and exploited this by cooperation with Detective John Murphy, of the Baldwin County Sheriff's Department.

By the time that the Appellant finally was afforded legal representation it was as though it were already too late for meaningful legal consultation. The Appellant had been induced to make statements which were contradictory and Appellant and his counsel never achieve a relationship of trust. Both Appellant and his counsel have acknowledged this fact. It is clear that this prejudiced his defense and deprived him of the assistance of counsel as envisioned by the ABA standards.

As a result of this, Appellant was not properly evaluated from a standpoint of psychological factors. It was not for five months before the Appellant was even a value weighted for competency to stand trial. This alone indicates a serious

problem because Appellant's counsel apparently was willing to work with him for five months before he was even sure that the Appellant was capable of participating in his own defense.

This also resulted in a suppression motion directed at the pretrial statements made in Alabama which did not even rise to the level of halfhearted. The Appellant, state of mind was the critical issue, was never called to testify and relayed this to the court and the Alabama detective who had collaborated with Panama City Beach police detectives was never called to testify. Instead his self-serving police report was offered as his testimony.

Appellant's trial was closed by his counsel inviting the lead case agent to reinforce his theories of the guilt of the Appellant and to even offer additional opinions about the Appellant's credibility and complicity. This maneuver, in addition to factually hurting the Appellant, deprived him of his last remaining procedural advantage, that of opening and closing the summary arguments of the case.

Once convicted, Appellant then was subjected to an unprepared penalty phase. It was unprepared because Appellant's counsel had delegated the preparation to the Appellant's alcoholic father, who passed away several months before the trial. There was very little use of his family members and the most

helpful facts about the Appellant's background were not discussed. Also not discussed was the Appellant's recognized substance abuse which resulted in his paranoia on numerous occasions before. Since this was not presented to the jury it is not hard to imagine how the jury, whose last recollections of the trial were the lead case agents revelations about the investigation, and who did not hear anything other than a couple of family members say they cared about the Appellant, would have had a hard time sentencing the Appellant to death.

The circumstances described above each warrant the relief requested. However, if this Honorable Court should not find that any one of the demonstrated errors warrants relief, it is requested that each established error be considered in para materia with each other error and that their cumulative effect be considered.

Finally, Appellant continues to maintain both that the Florida death penalty procedures and that the manner of carrying out executions in Florida failed to pass constitutional muster for the reasons described above.

VII. PRAYER FOR RELIEF.

WHEREFORE, the Appellant prays this Honorable Court enter an order reversing the decision rendered by the Trial Court on July 17, 2008, denying the Appellant relief pursuant to Fla.R.Crim.P § 3.851 and three men being the case to the Trial Court with instructions to set aside the conviction and require a new trial in which the rules applicable to trials and 2002 are applied. Alternatively, the Appellant prays this Honorable Court enter and order setting aside the imposition of the death penalty in this matter and remanded the case to the Trial Court for the purpose of conducting a new penalty phase.

Respectfully Submitted,

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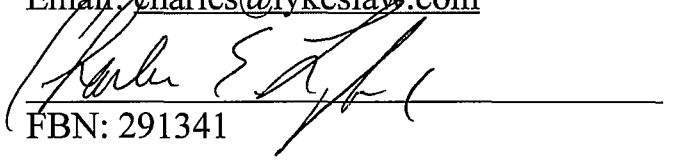

FBN: 291341

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served upon:

Steve White, AAG
Assistant Attorney General
The Capitol- PL-01
Tallahassee, Florida 32399

by (×) regular United States mail; or ( ) by hand delivery; and/or

by _____ this 6th day of April, 2009.

Charles E. Lykes, Jr., Esq.

Clinical Summary

Name: Paul Everett
Date of Evaluation: July 23, 2002

Paul Everett was seen at the Bay County Jail for about 45 minutes. Present at the interview was Earnest Jordan.

Background: Mr. Everett, who is 23 years old, explained that he has alternated living with his mother and father depending upon his mood. He has seven older sisters. He left school during the 10th grade and obtained a GED. He has spent time in prison in Alabama. Mr. Everett reported a history of drug abuse that began at age 15 and has included LSD, methamphetamine, marijuana, and pills.

Mental Status: Mr. Everett was cooperative with the assessment. His attention span and concentration were good. His thinking was clear and coherent and it was easy to follow his presentation. Mr. Everett demonstrated some grandiose thinking: he calls his public defender by his first name, thinks he ought to be in charge of his case, and stated he used to "party" with an attorney in Alabama. He also said that, if found not guilty, he would become an attorney. Given the severity of the case, Mr. Everett's affect- which was very cheerful- indicated that he has not fully arrived at a realistic understanding of his situation. The grandiosity and over-confidence could be a combination of immaturity, denial, and personality.

The majority of the time was spent discussing his legal situation and he listened to information which Mr. Jordan provided. He has been spending his time in jail reading novels and law books from

the jail library. He said that he has also been reading over the paperwork in his case.

Competence to Stand Trial: Mr. Everett spoke very conversantly about his charges and gave an overall account of his actions on the day in question. It was clear in listening to Mr. Everett discuss the legal process and the specifics of his case that he has an accurate grasp of courtroom procedures. He understands the charge, understands the possible penalties, and is cognitively able to follow proceedings. Mr. Everett is considering hiring a private attorney or representing himself in Court. There was nothing in his presentation that indicated a full Competence evaluation ought to be done.

Conclusion: Mr. Everett demonstrated no signs of mental retardation or of a major mental illness. His grandiosity is not of psychotic proportions. His over-confident style may interfere with the establishment of a good collaborative relationship with his attorney but there was some evidence that he would listen and that he is willing to reconsider some of his strong opinions- in other words he showed that he can consider new information and re-think his ideas.

Jill Rowan, PhD

Jill J. Rowan, Ph.D.
License # PY 000 4429

MR. SMITH: We need to get Everett out here.

THE BAILIFF: Everett refused to come over.

MR. SMITH: Oh, he did?

MR. MEADOWS: 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 COURT: Yeah. He does, he, he hasn't got a right to refuse to come, not in a court hearing. So he needs to, to be brought over for the hearing.

THE BAILIFF: If you want him, we'll get him.

THE COURT: Yeah. Unless he waives his presence or he gets here and then acts up, and then we can—

MR. SMITH: Yeah, that's fine, Judge. Yeah, I assumed he was back there. I didn't, nobody told me he wasn't here.

THE COURT: So...

MR. SMITH: Okay.

THE COURT: If you can make arrangements to bring him over.

THE BAILIFF: I'll take care of it, Judge.

THE COURT: Okay.

OFF THE RECORD

THE COURT: For the record, we're here in the State of Florida versus Paul G. Everett, and I believe, Mr. Smith, we're here on your motions; is that correct?

MR. SMITH: That's correct, Judge. I've filed a, a Motion to Suppress certain statements in one, in one motion. I filed a Motion to Suppress admissions illegally obtained. And the other is a Motion to Suppress physical evidence.

We delayed the, the hearing in order for me to obtain some witnesses from Alabama, and, unfortunately, I haven't had much assistance from Alabama in doing that, but I talked with Mr. Meadows yesterday, and I think that we're kind of of the mind that we may be able to stipulate, basically, to what happened in Alabama that led up to some biological samples being taken from Mr. Everett, as well as two statements that were given; two recorded statements that were given to them.

MR. MEADOWS: I'd suggest, let me make a proffer and—

MR. SMITH: Okay.

MR. MEADOWS: —see if you can accept that.

MR. SMITH: All right.

MR. MEADOWS: Judge, I have prepared for you an identical packet that I have given to Defense Counsel this morning. Within that packet, Your Honor, we have, to begin with, a statement report done by John D. Murphy. John D. Murphy is with the Baldwin County Sheriff's Office, Baldwin County, Alabama. And his

involvement with Mr. Everett preceded knowledge of the Panama City Beach case and involved a case that arose in Alabama where he had questioned Mr. Everett.

As a result of that, once Panama City Beach learned of the presence of Mr. Everett in Alabama, they contacted Mr. Murphy to assist them in obtaining a, some DNA samples. Buccal swabs and blood. They had, Panama City Beach Police Department, as you can tell from the series of statements that I've provided to you, first conducted an interview on November 14th in the Baldwin County Jail. During the course of that interview, on page 8, Mr. Everett invoked his right to an attorney. He said, "I wish to have a lawyer present." "I can tell you I can see where this is going; I mean I want a lawyer." At that time the interview was terminated.

THE COURT: Can I ask you something? Okay, I'm sorry. I, you said November 14th, and I—

MR. SMITH: And, actually, it says November 15th at the top.

THE COURT: 15th.

MR. MEADOWS: That's the date of the transcription.

THE COURT: That's, that's, exactly. I, I apologize. I saw that and I was, I wanted to make that was... Go ahead.

MR. MEADOWS: Does everybody have a copy of that? Judge, you do have a copy of that statement?

THE COURT: Yes. Uh huh, (yes).

MR. MEADOWS: Okay. Now, after that statement was

taken the officers left the Baldwin County Sheriff's Office and returned back to Panama City.

Then on November 19th, five days later, Murphy is contacted by Sergeant Tilley of the Panama City Beach Police Department and requested to go to Mr. Everett and request that he provide buccal and blood swabs. Blood standards. The encounter that occurred between Murphy and the defendant on November 19th, I have provided Counsel a copy of Murphy's narrative; the relevant portions for this issue are, are within your packet, and in which Murphy details his involvement. And were he called to testify, we can get him on the phone, if necessary today, would provide this testimony as reflected in his report of... The report's dated November 21st, detailing the events that occurred on November 19th.

After John Murphy is in there with Mr. Everett and as those facts are laid out within that narrative, an interview begins because of... The State would rely upon the, the conversation that occurred between Murphy and Everett. During that interview Sergeant Tilley arrives at the Baldwin County Sheriff's Office or Baldwin County Correctional Facility and is there during a portion of the interview that had already began, as you can tell from the, the second interview, which you have transcribed for you.

MR. SMITH: It says November 20th at the top.

THE COURT: The top.

MR. MEADOWS: Right.

MR. SMITH: And it's actually November 19th.

MR. MEADOWS: Transcribed November 20th, detailing the interview that occurred on November 19th. That is the second interview that occurred after the request for DNA standards was made, and you have the narrative, Number 2, done by Murphy detailing what occurred prior to the tape-recording beginning on the transcript here, dated November 20th transcription.

The officers take that statement and then come back to Bay County. And then on... We have a third statement taken. The third statement that was taken is dated November 27th. In the course of that, of the events leading up to that statement are that the officers had obtained at that point a warrant for Mr. Everett's arrest, and they presented that warrant to him and their conversation that occurred after the presentment of that warrant to him is outlined within the statement dated November 27th. And those facts I, I believe speak for themselves.

THE COURT: I do not have—

MR. MEADOWS: You don't have the November 27th—

MR. SMITH: Yeah, I, I have two of the 15th.

THE COURT: I've got, I, what I have is a November 26th interview on November 21st, of a phone interview between Lindsey and Investigator John Murphy.

MR. MEADOWS: Okay. Let me give you the, the statement from November 19th and the statement from November 27th. And I'll, I'll take back that other thing, Judge.

THE COURT: This one? I've got this one.

MR. MEADOWS: No, the – yeah, Murphy, right. Okay. Walter, you have those statements with you, don't you?

MR. SMITH: (Nod, yes).

MR. MEADOWS: Okay.

THE COURT: Okay, I have the 19th and 20th. What I did not have was the 27th. So let me give you – otherwise I have two of those.

MR. MEADOWS: Okay.

THE COURT: In the, in the packet I have the 15th. As a matter of fact, I've got two of those. Let me give you one of those back, too. I've got the November 14th, 4:23 hours interview; the November 19th interview; and the November 27th at 10:55 a.m.

MR. MEADOWS: Okay. Everybody's got all three.

THE COURT: Right. And I also have your narrative of November 21st, November 19th of, of Murphy.

MR. MEADOWS: Right. Judge, I believe for purposes of this motion those are the facts that the State would offer as a proffer for stipulation.

MR. SMITH: Judge, we'll, we'll accept that. In addition, I would like to go ahead and file the deposition transcripts of Chad Lindsey and, and Tilley, where they, where they discuss this. And I don't have—

MR. MEADOWS: Without objection.

MR. SMITH: —an objection to you reading through it, and I, I can certainly point out the relevant parts.

THE COURT: So, for the record, I have, then, the deposition testimony of Chad Lindsey and Rodney Tilley. Those depositions were taken August the 6th on Tilley and also on Lindsey. All right.

MR. SMITH: And I think with that we, we have a, a record on which to, to argue the, the legal points that are relevant.

THE COURT: All right. Let's see, I believe it's Defense's motion; is that correct?

MR. SMITH: Judge, I'll go ahead and proceed. It's pretty much stated in, in the motions. I, I think we can pretty much condense all this down to, to a, a, a simple issue. If... In the depositions that you have, particularly that of Investigator Tilley, I think you can just read a couple of pages and, and get the sense of what's going on here. Okay. Really, on about page 33 of, of Tilley's deposition – this is, this is what happened. They went and they interviewed Mr. Everett over in Baldwin County and that, the essence of that interview is contained in that first statement that's dated November 15th, that's really the, the 14th. There's no rights being violated, everything's voluntary, and he's, he's answering the questions. And then at the end, I think it was page 8, Mr. Meadows referred to, he makes a statement and, and it's contained in the motion, "I see where this is going; I want a lawyer". At that point they terminate the conversation. Although, you, you read the deposition, they did make some more comments about, well, we think this was just a burglary that went awry and, but we're not gonna talk to you about it anymore.

Well, Tilley makes it clear at that point they had their suspect. They, the investigation focused on Paul Everett.

On the way back they, they kind of decided what they were going to do. They called the investigator out in Alabama, and his, his report basically condenses what, what he says in his statement and I think reflects accurately what happened. They, they knew that the investigator up there had a rapport with Mr. Everett. He had talked to him before. So they contact him and, and said, basically, you know, we didn't get very far in our interview; how about you going to contact Mr. Everett and see if you can get these biological samples.

Now, it's clear that Paul Everett's in custody. He's in jail out there on Alabama charges and that, that all, all the panoply of Miranda rights and protections apply. The investigator does just that. Morris (sic) is his name. And he, he goes to the jail and pulls him down, you know, goes – the, the jail is run by the Sheriff's Office in Baldwin County – and asks that Paul Everett be brought down from his pod to the medical area for these samples. And, in fact, he, that happens. The investigator talks to, has, has a form, a consent form, asks for consent to obtain these biological samples, and Mr. Everett signs the form and, in fact, gives these biological samples. And then during that process a conversation occurs. And that's reflected, I think, in, in the very brief report that, that you have before you where there is mention made about, well, you know, you wanted an attorney, have you talked to an attorney, and Mr. Everett says, no, he says, but, you know, here's, here's the name of somebody over in Panama City I want

to contact. He says, well, I'll give it to Investigator Tilley. And then at that point is when this second statement is taken. And the second statement reflects, now, you've asked for an attorney and you haven't been able to get in touch with an attorney, but you want to go ahead and, and give me this statement, and Mr. Everett says he does. And then we have the second statement. That's the one where Tilley walks in to the statement during the middle of it. And if you read his deposition, what happened was they were headed to Pensacola and they decided, well, we'll see if, if we can get these samples that we've requested – I mean Murphy. I called him Morris I think the other, a minute ago. But Investigator Murphy in Baldwin County, if you'll look at page 33 of... This is Tilley's deposition. He says it was decided by Captain Moring to attempt to see if Paul Everett would voluntarily give DNA, and we asked Murphy because Murphy had said he was going back to talk to him. And then they, they, once they contacted Murphy they decide, well, we're gonna go over to Pensacola anyway, we'll just go over to Baldwin County, which is Bay Minette and Orange Beach; it's just over the, it's just really over the line from, from Florida. It's not very far away from Pensacola. And they decide, and the Captain said, well, you all are going over to Pensacola but just don't stop in Pensacola, go on over to Bay Minette, and if we get these samples, then you can run those back to Pensacola. So the whole idea, obviously, was an investigative stratagem to contact Everett to get the, the samples at the, at the request of the investigators here. Now, this is after he had invoked his right to counsel several days before.

I think the legal issue in this case is, is this. Once he invokes his right to counsel it's clear under the case law that it is a violation of his Fifth Amendment rights, under Miranda and also under the Florida Constitution, for the, for the officers to contact him again for purposes of questioning. What we submit to the Court and what we think the law should be is that once that right to counsel is invoked, the only way it can be waived or, or uninvoked is if Mr. Everett, himself, had contacted the police, contacted Investigator Murphy or somebody else and said, look, I want to talk to you; I want to participate in this investigation; I want to give you some information. That didn't happen here. What, what reinitiated the contact was Murphy's actions at the request of the investigators here to see if he would submit to biological samples.

Now, I believe the cases draw a pretty bright line that once that right to counsel is invoked the police are basically forbidden from recontacting him to ask him anything about any issues at all. One of the cases that I, I think I cite in the motion and also Mr. Meadows has provided to the Court is the Minnick case. It's a US Supreme Court case. An accused who requests an attorney, having expressed his desire to deal with the police only through counsel, which is important, he has made a decision; I don't want to talk to you anymore; I don't want anymore contact with you. I want you to deal with my lawyer. And, in fact, he's trying to contact a lawyer. He's made an indication he wants to talk to a lawyer. He gives the investigator a piece of paper and says, hey, you know, I need to contact somebody in Panama City.

But, in fact, he has not talked to a lawyer. No lawyer has been provided to him. Certainly no lawyer in Florida's been provided to him. He's in custody in Alabama. So he's not had that opportunity. But yet he has invoked this right, he has indicated on his own that he's not capable. What that invocation of that right says is I'm not capable of dealing with you anymore; I have to have a lawyer. Well, there has to be a bright line, I, I contend, and there certainly is a bright line in, in some lines of cases, particularly in New York, which, which say emphatically once he invokes his right to counsel, you've got to get him a lawyer or leave him alone. He has to have that lawyer there or he has to consult with a lawyer before anything else can happen. Searches, seizures, statements, anything. Now, Florida doesn't have a case directly on point in this, in this particular situation, but I contend that under, under the prevailing Florida law, as well as under the US Supreme Court and the cases that are cited in the motion, that it puts an obligation on law enforcement to ensure that, in fact, not only is he just told that he has a lawyer but he's actually talked to a lawyer; they've, they've made arrangements for him to see a lawyer. And they are forbidden from asking for biological samples or statements or anything else, from initiating any contact with him once he invokes that right. And that, that certainly happened in this case. Just the mere fact that they requested that, that biological samples be taken, contact with Mr. Everett was initiated on the part of law enforcement, and they knew or should've known that in the process of asking for biological samples, obviously, there's a conversation going on. Will you consent,

will you sign this, do you understand why you're here, we want these biological samples. All that is going to provoke verbal responses. They knew or should have known that. Now, once, once that contact is made, anything that flows from that is a direct violation of his right to counsel under Miranda. They can't reinitiate that contact. So that even the consent that was given is vitiated. He cannot give consent unless he's talked to an attorney or has an attorney present to advise him. Neither can he consent to give a statement. Because if you read the Supreme Court cases, what, what, the, the evil that they're trying to remedy is that once somebody invokes his rights, the, the investigators can just sort of ignore it by repeated badgering, repeated attempts to get him to talk or to, or to cooperate with the investigation. And what they point out, this sends exactly the wrong message. This, this sends a message to an incarcerated person, look, invoking these rights doesn't do you any good. You can say you want a lawyer, but we're not gonna see that you get one. We're not gonna contact one for you. We're just gonna come back and keep talking to you and eventually that will impart to the, to the accused that these rights don't really mean anything, that, that even though you invoke them, nothing is going to flow from that. And that's an evil that, that these Edwards and these lines of cases try to remedy. And they say clearly you just can't keep coming back and keep reading Miranda rights and eventually get a statement and call that statement, you know, lawfully obtained.

So we, you know, it's our position that there should be a bright line, that if Florida, implicit in the decisions that, that we have

in our, from our Florida Supreme Court, as well as from the US Supreme Court, indicates there should and there is a bright line. Once that right to counsel is invoked, all dealings should be through counsel unless the defendant, himself, initiates the contact and says, look, I've changed my mind, I want to talk to you, I want to give biological samples or whatever it is. That's where the bright line ought to be. That line was crossed here in this case. So we're arguing that the, the obtaining of the biological samples, even though it was done with consent, is vitiated by the violation of his right to counsel, which was invoked, which was basically ignored by the investigators. And, obviously, any statements that were taken also were taken through this reinitiation and are a violation of, of Mr. Everett's right to counsel. So that's our position.

And we, and I would just point out that the biological samples could've been obtained through a search warrant, and to reasonably have the exclusionary rule is to impress upon law enforcement that they have to follow the rules. There is a, there is a definite preference (phonetic) under our constitutional system for police officers to obtain warrants. Search warrants, arrest warrants, whatever. And the exclusionary rule is supposed to reinforce that and say, well, if you violate these rules, then you can't benefit from the evidence that you obtained. And this is a clear violation of that. They knew they could get a warrant. They even, it's even mentioned in Tilley's deposition that they discussed it with their superior at, at the, at the police department, and there was an attempt to circumvent that

requirement. Just as there was an attempt to circumvent the requirement that Mr. Everett be provided with an attorney and have an attorney present when he dealt face-to-face with law enforcement officers. So I think there should be a bright line rule and there should be a bright line remedy once the line is crossed. And that remedy is the exclusionary rule, and, and once the, the rules are violated, then the, the State cannot benefit from the evidence that's obtained from, from that violation.

THE COURT: There's two things that we're talking about. Actually, you've got two separate motions. The one motion, as I read it, has to do with the actual statements made during the interviews on the 19th and the 20th. And then, as you pointed out in your next argument, the other motion has to do with whether or not there, the biological specimens were, should be suppressed, which in a sense is a sub-issue or a different issue having to do with consent. But the biological specimens we're talking about are what?

MR. SMITH: Swabs, blood—

THE COURT: Swabs.

MR. SMITH: I think there was blood drawn as well.

THE COURT: Blood draw and swabbing for DNA?

MR. SMITH: Right. And then the results of that is that those biological samples were compared to biological evidence at the scene, which linked Mr. Everett to the homicide.

THE COURT: And the other, since I haven't, the only record I have at this point in time is the, are the transcripts of the

interviews, and in light of what you've argued, I just need to clarify something because by looking at face value on the, the interview sheet for November the 19th, the first question, and this is what I'm concerned with. I'm not sure if there's a factual dispute or, or if I'm misreading it, but it says... If you've got that, Walter.

MR. SMITH: Okay. Yeah, I've got it.

THE COURT: Okay.

(Brief pause).

MR. SMITH: Right.

THE COURT: Yeah. The November 20th but November 19th interview. Question: Mr. Everett had previously talked about speaking with an attorney but has since made contact – but has since made contact with me and said that he's been unable to make contact with his attorney and did want to talk to me. I don't know if that's gonna be clarified somewhere else. And then the other, on the November 27th interview, down, it said... The third question: I have presented you with a form and you have asked to talk to me again; is that correct? Is, is that a, a factual dispute about what took place in terms of, of – because you had indicated that it has to do with initiation of the contact.

MR. SMITH: Right.

THE COURT: And I'm not sure in reading what's, how those start off—

MR. SMITH: Right.

THE COURT: —if that's a, a, a conflict that is

somewhere else that, that I need to be aware of or...

MR. SMITH: I, I think we can agree that the initiation of the contact is the investigator going to the jail and bringing him down and then asking him for the biological samples. And then it is after that point there's this discussion about, well, you asked for a lawyer. Yeah, I asked for one. I haven't been able to get in touch with one. Here's a note that you can give Tilley. Presumably, with a lawyer's name or somebody to contact. And then at that point the conversation ensues.

MR. MEADOWS: Judge, I don't, I don't think we are, the State is in agreement that the name that he wanted to give was a lawyer's name, but rather the, the State's position is, is that the defendant wanted to give the police some direction in their investigation. I believe that's, that's just a point of clarification on, on that.

And, Judge, one other point before I get to the, to the body of my argument. In response to your question of why he, there, he was back in contact with him again. There were those other Alabama cases that they were dealing with that he was, that Detective Murphy was handling for another jurisdiction in Alabama. On page 33 you see, of Tilley's statement, you see that, that Murphy was going to talk to him about another unrelated case to the case that, that involved the homicide here in Bay County. And that in the course of that they asked him to request the, the standards. That is the, the factual basis that, that I understand to have occurred prior to obtaining the samples.

And when the Court's ready, I'll, I'm prepared to go forward with my argument.

THE COURT: You may.

MR. MEADOWS: Judge, I, I've provided the Court and Counsel a number of cases. The first case I want to address is the Federal case. There's some Federal cases on this point. The first one coming from the Fifth Circuit. United States versus Dougall, found at, for the record, 919 Fed. Second, 932. Judge, in that case we had an instance where we had a Mexican American who had been raped by the defendant, and the defendant was questioned. He invoked his right to counsel, his Fifth Amendment right. In that questioning, after that point, the federal agents requested hair samples. And the Fifth Circuit held that there was no evidence that the agents designed request to elicit damaging statements, and request did not draw damaging response, other than submission of the hair samples. So if you go to page two of that opinion it says: Before questioning him, the agents read Dougall his rights; and he signed a waiver. After he requested an attorney, the agents requested minimal personal data from Dougall–name, social security number, birth date, birth place, height, weight, and address. As well as they requested a hair sample, informing Dougall that they would obtain a court order if he failed to comply voluntarily: Dougall agreed to permit the agents to take a hair sample at the V.A. Hospital. Dougall then began to talk about the charges and signed a second waiver. When he again requested an attorney and fell silent, the officers sat in the room in silence for a

short time. Dougall resumed talking and confessed. And, Judge, the Fifth Circuit declined to suppress or uphold any suppression, affirmed the trial court's denial of the suppression of the hair samples that were taken after he had invoked his right to counsel.

Another case, this one's from the Ninth Circuit, Judge, found at 140 Fed. Second, 1289. United States versus Del EDMO. Decided April 9th, 1998. And requiring an arrestee to comply with officers' request for a urine sample did not violate his Fifth Amendment privilege against self-incrimination inasmuch as the sample was not evidence of testimonial or communicative in nature, and requiring the arrestee to submit to a urine sample without the presence of counsel did not violate the Sixth Amendment right to counsel inasmuch as arrestee had no right to seek the advice of counsel prior to furnishing it. And I've highlighted all copies for the, for the parties, as well as the Court, on the relevant portions of that opinion.

But, clearly, Judge, what we're, we're seeing here is that obtaining biological samples is not a violation of the Fifth Amendment or prophylactic provisions of Miranda because it is not testimonial in nature. Simply requesting one to comply in that regard obtains physical evidence, non-testimonial.

Judge, the Fifth District Court of Appeal in the State of Florida, in Buggs versus State, an order permitting state to **seize hairs** and **blood** did not involve "testimonial compulsion" or "enforced communication," as required to implicate defendant's Fifth Amendment rights.

Gilbert versus California, a Supreme Court of the United States opinion, Judge, found at 388 U.S., 263. Taking of exemplars of defendant's handwriting, containing no testimonial or communicative nature (sic); a mere handwriting exemplar, in contrast to the content of what is written, like voice or body itself, is an identifying physical characteristics outside constitutional protection. Preindictment taking of handwriting exemplars from the defendant was not a crucial (sic) stage of criminal proceedings at which the defendant was entitled to the assistance of counsel, since there was minimal risk that the absence of counsel might derogate from his right to a fair trial.

United States versus Wade, another United States Supreme Court opinion, Judge, again, standing for the proposition that preparatory steps, such as systemized or scientific analyzing of accused fingerprints, blood sample, clothing, hair, and the like are not a crucial stage of proceedings in which an accused has a right to the presence of counsel, and, thus, denial of a right to have counsel present at such analysis does not violate the Sixth Amendment.

Finally, Judge, a seminal case from the United States Supreme Court, in Schmerber versus California, found at 384 U.S., 757. Words "testimonial" or "communicative" within the rule that privilege against self-incrimination protects an accused only from being compelled to testify against himself or from otherwise providing state with evidence of a testimonial or communicative nature does not apply to evidence of acts noncommunicative in nature as to person asserting privilege, even though acts are compelled in order to obtain testimony.

Evidence consisting of analysis of blood withdrawn at a hospital by a physician from accused, over his objection, after arrest for driving while under the influence of intoxicating liquor, although an incriminating product of compulsion, was neither his "testimony" nor "evidence relating to some communicative act or writing" by him.

Finally, Judge, in Minnick versus Mississippi, I've provided for a different reason than what Counsel provided it for, found at 498 U.S., 146. An accused may waive his Fifth Amendment protections after counsel has been requested provided accused has initiated the conversation or discussion with authorities.

The only evidence before the Court at this point is, is that the officer, Murphy, Detective Murphy was present with this defendant for two purposes. One, to question him about a non-related case occurring in the State of Alabama, and, secondly, simply to request his consent to obtain the saliva and blood standards. Neither of those calculated to elicit a statement from him regarding the acts in Florida. If you read the narrative provided within page one of John Murphy's synopsis of the interview, you, you see here that the defendant expanded that contact from simply the obtaining of samples to rather attempting to give information which he purported at that time to be helpful in directing the Panama City Beach Police Department to find the individual responsible for this murder. And the taped statement that occurred immediately after he began making those representations to the detective also supports the proposition, that is the defendant, again, who was aware of his rights and sought to continue to discuss the Bay

County case and not the officer who has brought the discussion to that direction.

Hayes versus State, Judge. There was neither – a, a Second District case from, out of Florida. 488 Southern Second, 77. There was neither a Fourth Amendment, Fifth Amendment, nor Sixth Amendment violation from compelled submission to **fingerprinting** when individual was otherwise **properly** in **custody** or **fingerprinting** was otherwise carried out with dispatch.

Wyche versus State, a Third District opinion from the State of Florida. **Compelled display** of **identifiable physical characteristics** does not infringe upon privilege against compulsory self-incrimination – Fifth Amendment right against self-incrimination.

Wilson versus State, Judge. The fact that the defendants were given blood tests for the purposes of determining their blood types without being afforded counsel and the results of tests were admitted at trial did not deny defendants of the right to counsel, the right to due process of law, the rights against reasonable searches and seizures, or their privilege against self-incrimination. That opinion is found in the Supreme Court of Florida, Judge. In Wilson versus State, 225 Southern Second, 321.

The last case I have for you, Judge, is Gilbert versus California, a United States Supreme Court case. Taking exemplars of the defendant's handwriting contained no testimonial or communicative nature and did not violate the Fifth Amendment and – standing for the proposition that the request of Detective Murphy of this defendant to

submit to the obtaining of DNA standards was not calculated to elicit him to provide additional statements. Clearly you can see on the basis of these opinions that an officer, after the invocation of counsel has occurred under the Fifth Amendment, is free to come back and ask for non-testimonial or non-communicative evidence from an individual. There has been no showing of, from any case in Florida or from any federal case contrary to that position. And I'm not familiar with the, where the lines are drawn in New York, but I am at a loss of finding any case that supports the proposition that, advanced by Defense Counsel a moment ago, on where the bright line test should be drawn. These are non-testimonial, non-communicative evidence that was obtained regarding the standards and the subsequent statements that were obtained. The second statement was obtained after the defendant indicated to Detective Murphy he wanted to provide additional evidence even though he hadn't, or testimony, even though he hadn't had an opportunity to speak with counsel. The third statement was obtained after the defendant was presented with a warrant and indicated to the officers at that time, as you can tell from the transcript of that third statement, that he wished to provide additional statements to the officer regarding his knowledge of the events which we are here on today.

For all those reasons, Your Honor, we would ask the Court to deny both the Defense Motion to Suppress the Physical Evidence, as well as the Defense Motion to Suppress the Testimony in this case.

MR. SMITH: Judge, just to, I'll just respond briefly. I, you know, I'm not arguing that, that biological samples are

testimonial in nature and that, that somehow that answers the question that, that we're here about today. What we're here about today, with respect to the biological samples, is that Mr. Everett invoked his right to counsel on November the 14th. Now, five days later, and he's not being booked like some of these cases talk about, he's not DUI, where they're trying to force a sample from him, he's not giving fingerprints at the booking station; they're going back with the expressed purpose of obtaining evidence to link him to a homicide. That's the reason that, that Murphy is asked to contact him again. That's at the, that's at the request of the investigators here. They know that he's already invoked his right to counsel. They know under the law that they are not permitted to reinitiate contact with him. Now, how do, how do they get the samples? They obtain consent. They pull him down and they ask him, can we take blood and swabs from you. So not only have they reinitiated contact, but they are asking him questions. They are interrogating him. Do you still want a lawyer? What, what's the status of your request for a lawyer? Will you give these samples to us? These are all questions that they have initiated. He hasn't called them to come to the jail. The samples are obtained with his consent. That's how they are obtained. They didn't have any right to pull him down and stick a needle in his arm without his consent. The only way they could have done that is to go to you or some other judge and obtain a search warrant, which they did not do, but they could have done. But they chose this route. And if you read the depositions of Tilley and Lindsey, they talk about the difficulty in interviewing him over there.

They had to interview him through the glass. It was not very, they, they didn't have that hand-to-hand contact, that eye-to-eye contact that is so important in interrogating somebody. And so they, and so they, they, they are trying to, to use a different vehicle to get to him to obtain evidence. Either, either the biological samples or statements. Because they have to ask him questions. They have to ask him for his consent. So what, what we are arguing is that consent is vitiated through the contact that they made, that they are forbidden to do. There's one thing that...

There's, there's a case that I cite that's called Traylor, that's a Florida Supreme Court case, and it is, they go into great lengths about the difference between the right to counsel under the Sixth Amendment and the right to counsel under the Fifth Amendment. Now, under the Sixth Amendment, you know, once you're charged, once the adversary proceedings are initiated, you're entitled to a lawyer. That's the Sixth Amendment right to counsel. But in Miranda and Edwards and these other cases they notice that you also have a right not to incriminate yourself. Now, how do you protect that right? Well, Miranda says you protect that right by giving somebody a lawyer. That is your Fifth Amendment right to counsel. So you have to discriminate between Sixth Amendment right to counsel cases and Fifth Amendment right to counsel cases.

If Murphy had gone back to the, if, if he were being prosecuted and his Sixth Amendment right attached to this murder charge, Murphy could go back to that jail and talk to him about

anything he wanted to other than the murder charge. However, under the Fifth Amendment, once, once you are in custody and you are advised of your rights and you say I want a lawyer, that invokes that Fifth Amendment right. And what does Traylor say about that? It says: If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present, or if it's already begun, must immediately stop. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense, anything, throughout the period of his custody unless a lawyer is present. And what I'm suggesting is that Traylor is almost up to this New York rule that says, okay, he's in custody, he knows his rights, he asked for a lawyer, that's it. Until you get him a lawyer or he has a lawyer present or he has consulted with a lawyer, you can't talk to him about anything. Not even an unrelated case. And what I'm saying is in, in applying that rule in this case, what's important is that they reinitiated contact; even though it was for this consent to obtain this non-testimonial evidence, it is still incriminating evidence. It is still the type of evidence they could put him in the electric chair or through lethal injection if he's convicted. And before he can even consent to that, shouldn't he have the right to talk to a lawyer? Isn't that what Miranda is all about? That he is able to consult with a lawyer and a lawyer is able to say, look, man, you shouldn't give these samples. You should make them get a warrant. They may not have probable cause to get a warrant. All of these, all of these protections that we afford any accused are

violated when the police ignore that request for an attorney and decide to investigate the case some other way. And I, I contend that the issue here is that once he invokes that right, what do the cops have to do? I contend that they have to leave him alone. They can't talk to him about anything. If they want the biological samples, they've got to get a warrant, a court order. They can't go to him and ask for consent. They can't talk to him about anything; even an unrelated case they can't talk to him about because once he's invoked that right, as Minnick and these other cases say, he is, he is telling the police, look, I can't deal with this alone. I need a lawyer to help me. Anything I do may tend to incriminate me. And if I'm invoking this Miranda, Fifth Amendment right to counsel, the only way that you can address that is to actually have him a lawyer. Have a lawyer there or have, at least allow him to consult with a lawyer. If that doesn't happen, you've got to leave him alone. You can't go back and talk to him about anything. And I think that's the bright line. I think Traylor gets to that point. In New York they've already said that. And once he is in custody and says I want a lawyer, that's it. You get him a lawyer. You can't talk to him about anything else. You can't ask for blood samples or hair samples or anything else. You cannot initiate. And this is a reinitiation case. They initiated contact, he invokes his right, and five days later comes back. This is not a booking room situation where he wants a lawyer, but they're entitled to fingerprint him, they're entitled to get a breath sample or blood sample. This is a calculated ploy. This was something that was designed; you know, how are we

gonna investigate this case? I know. We'll get Murphy to talk to him; he's got a rapport with Murphy, we'll get Murphy, we know Murphy can get this consent from him cause Murphy's over there, he can pull him down to the medical. He doesn't have to talk to him through the glass like we do, and we'll get further along in this investigation. So I think that bright line should exist. I can't point to any case other than Traylor, which doesn't, you know, doesn't go as far as what I'm expounding here, but I think that ought to be the rule, and I think implicit in these cases is that notion. And the only way you protect somebody from incriminating themselves is through a lawyer. It's to provide them a lawyer. And that's why Miranda says you're entitled to have a lawyer present there when you're being questioned. And they did nothing to, to provide that right to him, and they should not benefit from the gains of their investigation once they, they ignored that right.

MR. MEADOWS: Judge, I just wanted to point one thing out to you. Judge, the first paragraph of United States versus Dougall, the United States Court of Appeals, Fifth Circuit, it says: We are asked to hold that hair samples voluntarily provided and a confession given must both be suppressed because in the course of obtaining them investigating agents asked routine booking questions and requested the samples after the defendant had invoked his Fifth Amendment and requested counsel. The Fifth Circuit Court of Appeals found nothing improper, Judge, of the officer doing just that.

It's the State's position that Detective, we didn't have to have Detective Murphy. After he had invoked his right to counsel, the

Panama City Beach Police officer could have, if he wanted to, requested the samples right, sitting right there at the table. That's because we are requesting non-testimonial. All the cases Defense cites to deal with reinitiation of interrogation designed to elicit verbal communicative evidence. That's not the purpose of the, the contact as before the Court on Murphy. That's all.

THE COURT: Excuse me. As Counsel indicated, I need to review the, also the depositions of Tilley and, and the other officer before I can rule in this matter. So I'll do that and have an answer for you shortly.

MR. SMITH: Thank you.

THE COURT: Do we have this matter rescheduled?

MR. MEADOWS: Yes, Judge. It's set for trial, I believe, November 18th, isn't it?

MR. SMITH: That's correct. You know, I, I don't foresee any delays on that date.

THE COURT: All right. We'll be in recess, then.

NOTHING FURTHER

CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF BAY

I, Rebecca Ann Akins, a Court Reporter and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing proceedings were taken before me at the time and place therein designated; that the proceedings were taken in shorthand and tape-recorded and thereafter reduced to typewriting by me; and the foregoing pages numbered three (3) through thirty-two (32) are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the foregoing action.

THIS, THE 21st DAY OF APRIL, 2003, A.D., IN THE CITY OF PANAMA CITY, COUNTY OF BAY, STATE OF FLORIDA.

Rebecca Ann Akins

The Governor's Commission on Administration of Lethal Injection

March 1, 2007

The Honorable Charlie Crist
Office of the Governor
The Capitol
Tallahassee, FL 32999-0001

Dear Governor Crist:

Please find enclosed the final report of the Governor's Commission on Administration of Lethal Injection. A copy of this report was electronically mailed to you on March 1, 2007. I want to thank you for the opportunity to be of service to you and the citizens of the State of Florida. Every member of your staff that I interacted with on this project has demonstrated a positive attitude and a dedication to helping the Commission.

I will personally deliver a copy of the transcripts and all the other documents received or generated by the Commission to your legal office early next week. If I can be of further assistance to you on this or any other matter, please do not hesitate to contact me.

Respectfully,

Bill Jennings
Chairman

The Governor's Commission on Administration of Lethal Injection

John W. "Bill" Jennings
Senator Victor Crist
Rodney Doss
Harley Lappin
Honorable Stan Morris
Dr. Steve Morris

Representative Dennis Ross
Harry K. Singletary
Dr. Peter Springer
Carolyn Snurkowski
Dr. David Varlotta

Final Report
With
Findings and Recommendations

Presented to the
Honorable Charlie Crist
Governor of Florida
March 1, 2007

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The Governor's Commission on Administration of Lethal Injection

March 1, 2007

INTRODUCTION

On December 13, 2006, the execution of Angel Diaz created concerns whether Florida's lethal injection protocols were being adequately implemented by the Florida Department of Corrections. The amount of time required to effectuate death, eyewitness accounts of the execution and the preliminary autopsy findings prepared by William Hamilton, M.D., the Chief Medical Examiner for the Eighth Circuit, called into question the adequacy of the lethal injection protocols and the Department of Corrections' ability to implement them in a manner consistent with the Eighth Amendment to the United States Constitution.

As a result, then Governor Jeb Bush issued Executive Order 06-260 on December 15, 2006, which created the Governor's Commission on Administration of Lethal Injection to "review the method in which the lethal injection protocols are administered by the Department of Corrections and to make findings and recommendations as to how administration of the procedures and protocols can be revised". The Commission's purpose and mission was limited to evaluating these protocols and not the "policy decisions of the Legislature in enacting a death penalty or the means chosen by the Legislature for implementing the state's death penalty." While limited to evaluating Florida's lethal injection procedures and protocols, the Commission was given broad authority to re-evaluate the lethal injection process including "enforcement of those procedures and protocols."

Chapter 922 is the only legislative expression of Florida's method of execution which, under section 922.105, Florida Statutes (2006), calls for executions to be by either electrocution or lethal injection. Chapter 922 does not delineate with any detail how Florida's death penalty by lethal injection is to be implemented. The promulgation of procedures and protocols for implementing the death penalty by lethal injection was left to the discretion of the Department of Corrections.

Once this Commission was fully comprised by the current Governor, the commissioners set out to fully investigate Florida's method of execution consistent with the mandate of the Executive Order.

THE COMMISSION'S MEETINGS

The Commission met eight times in a manner that was open, transparent and conducive to citizen input on this vital issue consistent with Article I, Section 24(b) of the Florida Constitution and Florida's "Sunshine Act" under Chapter 286 of the Florida Statutes. The Commission first convened on January 29, 2007, and met subsequently on February 5th, 9th, 12th, 19th 24th, 25th, and 28th. During these meetings, numerous witnesses testified before the Commission, pages of documentary evidence were received and public comments, both oral and written, were given. An account of the evidence received by the Commission follows.

January 29th, 2007
The Commission heard testimony from the Following witnesses:
Neal Dupree: The Capital Collateral Regional Counsel for the Southern Region of Florida and attorney for Angel Diaz.
Randall Bryant: Warden of the Florida State Prison.
Randall Polk: Assistant Warden of the Florida State Prison.
William F. Mathews, P.A.: A physician's assistant employed by the Florida Department of Corrections.

February 5th, 2007
The Commission heard testimony from the following witness:
Denise Clark, D.O.: an osteopathic physician trained in vein therapy.

February 9th, 2007
The Commission heard testimony from the following witnesses:
Timothy J. Westveer: Inspector with the Office of Executive Investigations, Internal Affairs Unit, for the Florida Department of Law Enforcement.
Nikolaus Gravenstein, M.D.: An anesthesiologist and professor at the University of Florida.
Primary Executioner: Anonymous testimony from the primary executioner employed by the Florida Department of Corrections.
A Medically Qualified Member of the Execution Team: Anonymous testimony from a medically qualified member of the execution team.
The Commission also received comments from the public:
Carol Weihrer
Gavin Lee
Mark Elliot
Sol Otero

February 12th, 2007
The Commission heard testimony from the following witnesses:
Brenda Whitehead: A correctional specialist employed by the Florida Department of Corrections who witnessed the execution of Angel Diaz.
Bruce A. Goldberger, Ph.D, D.A.B.F.T.: A forensic toxicologist employed at the University of Florida who conducted a blood analysis on samples taken from Angel Diaz.
Mark Heath, M.D.: An anesthesiologist employed by Columbia University.
William F. Hamilton ,M.D.: The Medical Examiner for the Eighth District of Florida who performed the autopsy on Angel Diaz.

February 19th, 2007
The Commission heard testimony from the following witnesses:
Mark Dershwitz, M.D., Ph.D.: An anesthesiologist with a Ph.D. in Pharmacology with the Department of Anesthesiology at the University of Massachusetts.
George B. Sapp: Assistant Secretary for Institutions for the Florida Department of Corrections.
James R. McDonough: Secretary of the Florida Department of Corrections.
A Medically Qualified Member of the Execution Team: Anonymous testimony from a medically qualified member of the execution team.
Bonita Sorenson, M.D.: An employee of the Florida Department of Health and a member of the December 15, 2006, Department of Corrections' Task Force.
Maximillian J. Changus: Attorney supervisor in the Office of General Counsel for the Florida Department of Corrections and member of the December 15, 2006, Department of Corrections' Task Force.
The Commission also received comments from the public:
Mary Berglund

February 24th, 2007
The Commission conducted a workshop session concerning this report.

February 25th, 2007
The Commission conducted a workshop session concerning this report.

February 28th, 2007
The Commission met telephonically by means of a conference call and conducted a workshop session concerning this report. As a result of this meeting, the final draft of this report was written and approved.

AREAS OF INQUIRY

Much of the Commission's work focused on the execution of Angel Diaz on December 13, 2006. This was aided by the *Summary of Findings of the Department of Corrections' Task Force Regarding the December 13, 2006, Execution of Angel Diaz* which was submitted on December 20, 2006, to James R. McDonough, Secretary of the Florida Department of Corrections. In summary, the task force report offered adequate details surrounding the execution of Angel Diaz, finding that several protocols were not followed that day.

The Commission built on this foundation by calling several individuals of the execution team from the Department of Corrections responsible for carrying out the lethal injection protocols during the execution of Angel Diaz. This proved to be a difficult task, complicated by the executioners' desire for anonymity under Florida Statues and a number of medical personnel requests to maintain their anonymity. The task was also complicated because the Commission lacked the ability to subpoena witnesses.

Further restraints were placed on the Commission by the very nature of the lethal injection procedure itself. The use of medical personnel in capital punishment presents a profound dilemma. Every medical organization that has commented has taken a similar position. Medical personnel are prohibited from participating in executions and rendering technical advice. This prohibition hindered the Commission's ability to gather information. Many members of the medical profession were reluctant to appear in front of the Commission and were likewise reluctant to testify in the context of lethal injection. The Commission was also concerned that this prohibition may limit the best advice, the latest technology and the most capable individuals to enact lethal injection. This issue also limited the medical members of the Commission from offering advice or recommending suggestions during this process. Although the execution by lethal injection process is not a medical procedure; the process does require some qualified medical personnel to successfully accomplish a humane and lawful execution.

Both medical and legal ethics regulating each profession limited inquiry of those commissioners affiliated with either profession. These Commission members appreciate the other Commissioners' understanding of these ethical issues.

Despite the above issues, the Commission was able to convene in a manner that was collegial, deliberate and dedicated to the mandate bestowed upon it by the Governor. As a result, the Commission is proposing several findings and recommendations to be considered by those who create policy and those charged with its implementation.

LEGAL OVERVIEW

Lethal injection is currently the method of execution used by 37 of the 38 capital punishment states. The Florida Supreme Court, like other State and federal courts, has regularly rejected arguments that lethal injection as a method of execution is cruel and unusual. *Sims v. State*, 754 So. 2d 657 (Fla. 2000); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla. 2006); *Hill v. State*, 921 So. 2d 579, 582-83 (Fla. 2006); *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006). No court thus far has held that lethal injection is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The courts and legal articles acknowledge that humane concerns formed a large part of the motivation in adopting lethal injection as the presumptive method of execution in most states, and it has been observed that "with lethal injection, we know exactly what the person is going through because it's exactly what someone undergoing surgery experiences." Jonathan S. Abernethy, *The Methodology of Death: Re-examining the Deterrence Rationale*, 27 Colum. Hum. Rts. L. Rev. 379, 414 (1996).
The lethal injection procedure used by most states, originated in Oklahoma when Senator Bill Dawson asked Dr. Stanley Deutsch, then chair of the Anesthesiology Department at Oklahoma University Medical School, to recommend a method for executing prisoners through the administration of intravenous drugs. In a responsive letter, Dr. Deutsch recommended the administration of an "ultra short acting barbiturate" to induce unconsciousness, followed by the administration of a neuromuscular blocking drug to induce paralysis and death. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 95-97 (2002). Shortly thereafter, in 1977, Oklahoma became the first state to adopt lethal injection as an execution method, employing the protocol described in Dr. Deutsch's letter. See Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection,* 17 Ga. St. U. L. Rev. 116, 121 (2000). The first lethal injection execution occurred in Texas in 1982. Christina Michalos, *Medical Ethics and the Execution Process in the United States of America*, 16 Med. & L. 125, 126 (1997).

The Eighth Amendment prohibits punishments that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.' " *Estelle v. Gamble*, 429 U.S. 97, 102, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958)(*plurality opinion*)). In the context of executions, the Eighth Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 34 L. Ed. 519, 10 S. Ct. 930 (1890), or do not accord with "the dignity of man, which is the basic concept underlying the Eighth Amendment," *Gregg*, 428 U.S. at 173 (internal quotation marks and citation omitted). The Ninth Circuit, for example, has held that execution by hanging under the State of Washington's protocols did not constitute cruel and unusual punishment based on the district court's findings that the "mechanisms involved in bringing about unconsciousness and death in judicial hanging occur extremely rapidly, that unconsciousness was likely to be immediate or within a matter of

seconds, and that death would follow rapidly thereafter." *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (*en banc*); Note: *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1946).

The Eighth Amendment prohibits punishments that involve the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); *Furman v. Georgia*, 408 U.S. 238, 269-70 (1972); *Gregg v. Georgia*, 428 U.S. at 173 (opinion of Stewart, Powell, Stevens, JJ.). Punishments are cruel when they involve torture or a lingering death. *In re Kemmler*, 136 U.S. 436, 447 (1890). A method of execution is considered to be cruel and unusual punishment under the Federal Constitution when the procedure for execution creates "a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death". *Gregg v. Georgia, supra.* In reviewing whether the method of execution is a constitutional violation, courts must consider whether it is contrary to evolving standards of decency that mark the progress of a maturing society. See *Baze v. Rees*, 2006 Ky. LEXIS 301 (Ky. 2006); *Trop v. Dulles*, 356 U.S. 86 (1958); *Roper v. Simmons*, 543 U.S. 551 (2005); *Solem v. Helm*, 463 U.S. 277, 292 (1983).

The United States Supreme Court has analyzed challenges to a method for carrying out the punishment, as to: (1) whether a method of execution comports with the contemporary norms and standards of society, ("the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)); (2) whether a method of execution offends the dignity of the prisoner and society; (3) whether a method of execution inflicts unnecessary physical pain; and (4) whether a method of execution inflicts unnecessary psychological suffering. *Weems v. United States*, 217 U.S. 349, 373 (19–20). In considering objections to a particular execution method, the "methodology review focuses more heavily on objective evidence of the pain involved in the challenged method." *Campbell*, 18 F.3d at 682. To that end, "the objective evidence, though of great importance, [does] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' " *Atkins v. Virginia*, 536 U.S. 304, 312, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002) (quoting *Coker*, 433 U.S. at 597). See *Beardslee v. Woodford,* 395 F.3d 1064, 1070-71 (9th Cir. 2005).

These factors dictate that punishments may not include "torture, lingering death, wanton infliction of pain, or like methods." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *In re Kemmler*, 136 U.S. 436, 447 (1890), but the Court has likewise held that the afore-noted does not contemplate a totally painless execution.

FINDINGS AND RECOMMENDTIONS

As a result of the review of testimony, written reports, Commission transcripts, articles and documents submitted to the Commission, it is the conclusion of the Commission that there are conflicts that the Commission believes that it has resolved that lead to our findings and recommendations. Examples of these resolved conflicts are as follows:

1. The execution team failed to ensure that a successful IV access was maintained throughout the execution of Angel Diaz.
2. Failure of the execution team to follow the existing protocols in the delivery of the chemicals.
3. The protocols as written are insufficient to properly carry out an execution when complications arise.
4. Failure of the training of the execution team members.
5. Failure of the training to provide adequate guidelines when complications occur.
6. There was a failure of leadership as to how to proceed when a complication arose in the execution process.
7. There was inadequate communication between the execution team members and the warden who was not informed of the problem and the changes implemented.

However, the Commission discovered during its investigation that there are other conflicts which remain unresolved. Examples of these unresolved conflicts are as follows:

1. Observations of the inmate during the execution process, including movement of the body, facial movements and verbal comments
2. Conflicting testimony of the expert medical witnesses regarding the impact of drugs, absorption of drugs, etc.

FINDINGS

1. Execution of inmate Diaz took 34 minutes, which was substantially longer than in any previous lethal injection execution in Florida. This was reflected in the testimony of all witnesses or participants in the Diaz execution, who had also witnessed prior executions by lethal injection.

2. The preponderance of physical evidence demonstrates that venous access at the time of execution was improperly maintained and administered. This was derived from the testimony of William F. Mathews P.A., Dr. William F. Hamilton, M.D. and FDLE Inspector Timothy J. Westveer.

3. The Department of Corrections failed to follow their August 16, 2006 Protocols, which resulted in the administration of the lethal chemicals to inmate Diaz at least in part subcutaneously. This was derived from the December 20, 2006, Department of Corrections report and testimony of William F. Mathews, P.A., Dr. William F. Hamilton, M.D. and FDLE Inspector Timothy J. Westveer.

4. There was inadequate training as to the August 16, 2006 Protocols. This was derived from testimony of the Primary Executioner, FDLE Inspector Westveer, and a Medically Qualified Member of the Execution Team.

5. Failure to adhere to Department of Corrections Protocol 14 (e) and the fact that this protocol inadequately provides direction when changing to the secondary site (B), that the lethal chemicals are to commence from the second rack (B) in the order described in protocol 14 (d). In this instance, the sequence in which the drugs were actually administered and the rack from which they were taken, created the opportunity, with or without the venous access failure, to allow the second chemical, pancuronium bromide, and the third chemical, potassium chloride, to take affect before the first drug, sodium pentothal, was able to fully take effect.

6. Because of the findings above, it is impossible for the Commission to reach a conclusion as to whether inmate Angel Diaz was in pain.

RECOMMENDATIONS: (see attachment (A) for The Physicians' Statement)

The Commission recommends that the Florida Department of Corrections, in consultation with other entities in the State of Florida, consider modifications to its written policies and procedures:

a. Related to the implementation of lethal injections carried out by officers and agents of the State of Florida;

b. Implement written policies, practices, and procedures related to ensuring optimal supervision and management of every lethal injection procedure by the appropriate officials, including the selection of personnel involved in each part of the lethal injection procedure;

c. Implement a comprehensive, systematic procedure for ensuring that persons selected to perform these official duties related to carrying out lethal injections are suitably qualified and trained to perform the assigned duties.

A. PROTOCOLS, PROCEDURES, CHECKLISTS AND DOCUMENTATION:

1. EXECUTION PROTOCOL

a. Develop and implement written procedures that clearly establish the chain of command in the lethal injection process, to include that the Warden (or other such person designated by the Secretary, Florida Department of Corrections) has final and ultimate decision making authority in each and every aspect of the lethal injection process.

b. Develop and implement procedures to insure that there is effective two-way audio communication between the execution team members in the Chemical Room and the execution team members in the Death Chamber (for example, a dedicated frequency should be considered).

2. **DOCUMENTATION OF ACTIONS AND PROCEDURES:**

a. Develop and implement procedures which require that any step or function which is required to be documented on a checklist or other document(s) be verified by utilization of the execution team member's initials or other identifier.

b. Develop and implement procedures to monitor and document all stages of the lethal injection process, including the administration of the lethal chemicals.

c. Change the designation of the lines used for the IVs and racks holding the lethal chemicals so that one has a number designation and the other has a letter designation.

d. Implement a change so that the primary FDLE agent will be located in the Chemical Room, and the agent's responsibilities are to include documenting and keeping a detailed log as to what occurs in the Chemical Room at a minimum of 30 second intervals. The log should be available at the post execution debriefing.

e. A second FDLE agent should be added to the procedures. This agent will be located in the Witness Room, and will be responsible for keeping a detailed log of what is occurring in the Death Chamber at a minimum of 30 seconds intervals. The log should be available for the post execution debriefing.

f. The duties of both the primary and secondary FDLE Agent should be defined in detail by the Department of Corrections and the Florida Department of Law Enforcement.

g. The debriefing process following an execution should be a formal process that details who should participate and what should be covered. A written record of the debriefing should be produced.

3. **LETHAL INJECTION CHEMICAL PREPARATION**

Develop and implement a procedure to ensure that each syringe used in the lethal injection process is appropriately labeled, including the name of the chemical contained therein.

4. **ESTABLISHING INTRAVENOUS (IV) ACCESS:**

a. Develop and implement a procedure which requires that the condemned inmate be individually assessed by appropriately trained and qualified persons at a minimum of one

week prior to the scheduled execution. The results of this examination shall be documented in the appropriate record.

b. Develop and implement a process to determine the most suitable method of venous access (peripheral or femoral) for the lethal injection process, considering the technical skills of available personnel and the individual circumstances of the condemned inmate.

c. Develop and implement procedures for gaining venous access to the condemned inmate which do not require movement of the condemned person after venous access is obtained. These procedures should optimize the length of tubing, so that it is as short as possible.

d. Develop and implement procedures to ensure that unexpected event(s) are identified, including inability to access a venous site, problems with tubing, apparent consciousness of the inmate, etc. In the event that an above describe event(s) occurs, the execution process should be interrupted, appropriate persons advised, and corrective steps discussed and implemented before resuming the execution process.

e. Develop and implement procedures to allow for the monitoring of the condemned inmate's restraints and the adhesive tape to eliminate the risk of restricting the flow of lethal chemicals through the IV line.

f. Develop and implement procedures to insure that a closed circuit monitoring of the inmate in the Death Chamber by the execution team members in the Chemical Room. This should include at a minimum the condemned inmate's face and IV access points. No recordings by the closed circuit monitor should be made.

5. ADMINISTRATION OF LETHAL CHEMICALS:

a. Develop and implement procedures to ensure that the condemned inmate is unconscious after the administration of the first lethal chemical, sodium pentothal, before initiating administration of the second and third lethal chemicals. Under no circumstances should the execution continue with the second and third lethal chemical without the Warden's authorization.

b. Develop and implement procedures to ensure that if at any stage of the administration of the lethal chemicals a decision is made to change IV sites or utilize a secondary site, that the entire lethal chemical administration process is re-initiated from the beginning (syringe # 1{sodium pentothal}), unless the Warden, in consultation with available medical staff, determines that the process may be re-initiated at a different stage.

B. DEVELOPMENT OF COMMAND STRUCTURE AND INFLUENCE AND SELECTION OF PERSONNEL INVOLVED IN THE LETHAL INJECTION PROCESS:

1. Develop and implement written procedures that clearly establish and define the role of each person in the lethal injection process, including the duties required of the position, the expected outcome of each duty or function to be observed or performed, the necessity for compliance with established procedures, that person's responsibility to perform duties as set forth in the protocol or procedure, and to provide necessary information to supervisory level personnel as is needed or required.

2. Consider limiting appointment of persons as members of the execution team, who are otherwise responsible for the routine care and custody of condemned inmates.

3. Consider assigning as few individuals to the Death Chamber as possible to enhance an unobstructed view of the condemned inmate.

4. Develop and implement clearly defined duties for the two FDLE agents who should document what occurs during the execution.

5. Establish that the Warden is responsible for each and every decision during the execution, after receiving input from other members of the execution team.

C. DEVELOPMENT AND IMPLEMENTATION OF TRAINING PROCEDURES FOR PERSONS INVOLVED IN THE LETHAL INJECTION PROCESS:

1. Develop and implement a training program for all persons involved in the lethal injection process. This training program should consider including a requirement for periodic exercises involving all team members and the representative(s) from FDLE. If not feasible for persons to be involved in the periodic training, a procedure should be established to ensure that the person performing a given function is proficient to perform that task. The training program should be documented as to the participants (by name or other identifier) and the function rehearsed. A procedure should be developed and implemented in which each training exercise is critiqued at all levels to address contingencies and the response to those contingencies.

2. Develop and implement procedures which review foreseeable lethal injection contingencies and formulate responses to the contingencies which are rehearsed in the periodic training.

3. Develop and implement written policies, practices, and procedures requiring all team members who participate in an actual execution to have completed, to the satisfaction of the Warden or designee, any and all training necessary to ensure the team member is qualified to perform the specific function or task in a lethal injection.

D. MISCELLANEOUS RECOMMENDATIONS RELATED TO THE FLORIDA LETHAL INJECTION PROCESS:

1. Develop and implement procedures to ensure that a member of the execution team is able to communicate in the primary language of the inmate being executed.

2. Install additional clocks and any additional necessary lighting in the Death Chamber.

3. It is the Commission's opinion that an agency following the procedures framed in our recommendations can carry out an execution utilizing the three proscribed chemicals identified in the Florida Department of Corrections' August 16, 2006, protocol within the existing parameters of the Constitution. However, the Commission suggest, that the Governor have the Florida Department of Corrections on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic.

Respectfully Submitted,

The Commission

CHAIRMAN'S CLOSING COMMENTS

I feel it is important to recognize several individuals for their contribution to the Commission's effort in fulfilling the task assigned to it by the Governor. I wish to thank Governor Crist for giving me the opportunity to serve the citizens of the State of Florida. Next, I wish to recognize the enormous sacrifice of time and energy by each and every commissioner. Without their dedication to this task, it would have been impossible for the Commission to have accomplished its work in a timely manner. Additionally, Gerald Curington, Deputy Chief of the Governor's Legal Staff, was instrumental in assisting the Commission in navigating the early fiscal and structural requirements. Kathy Torian, Governor's Deputy Press Secretary, cheerfully provided all the meeting notifications to the news media on what always seemed like short notice. A special thanks to Max Changus, Deputy Council for the Department of Corrections, who was constantly required to produce Department of Corrections' personnel to testify before the Commission with only minimum notice. The Florida Bar's willingness in providing a meeting room, and daily assistance with the little details was of significant assistance to the Commission in its work. I wish to voice my appreciation to Pat Gleason of the Governor's staff, who was continually providing much appreciated advice on the Florida Sunshine Law requirements. Finally, I would like express my appreciation to the members of my office, who were constantly required to assist me on this project, while continuing to perform their normal duties. In particular, I wish to mention the efforts of Peter Cannon of my staff, who worked tirelessly behind the scenes, so that the Commissioners had all of the materials, as well as coordinating the witnesses and producing the meeting agendas. I hope that by acknowledging these individuals that it is apparent to everyone that this was a group effort, which was made possible by the dedication, congeniality and perseverance of everyone, but especially the Commission members.

APPENDIX A

The Physicians' Statement

The American Medical Association has maintained a Code of Ethics for Physicians since 1847. This Code is regularly updated and revised and is currently relevant, it is also extremely specific when addressing physician participation in legal executions, including lethal injection. According to the Code a physician is prohibited from participating in an execution, observing an execution, and assisting in an execution including providing technical advice. Indeed, countless organizations representing medical and clinical professions have adopted a similar position.

When asked to participate in the Lethal Injection Commission for the State of Florida we physicians were faced with a dilemma. Should we decline the request of the State and let others decide the direction of the Commission's actions, or should we involve ourselves at the risk of being labeled unethical physicians? Ultimately we agreed to serve as we trust that the State neither wants to create unethical physicians, nor would it be interested in consulting physicians willing to operate outside of their ethical boundaries.

It is our contention from testimony of witnesses and interacting with the other Commission members that authoritative bodies in this country are tending to require more sophisticated medical techniques and personnel to administer the lethal injection. This is a legal and societal problem, not a medical one. A physician must always act in the best interest of the individual as they apply their knowledge and skill; otherwise they risk damage to the trust that patients place in their physician. Maintaining a patient's trust is paramount. A physician must always place the individual's interest above all else. Physician participation in lethal injection places this trust in jeopardy.

We physicians are aware that the Commission rendered specific recommendations in its report. We have refrained from rendering our medical expertise or consent to these specific recommendations. After hearing the testimony of the witnesses and through our deliberations, it is of great concern to us that this task may require the use of medical personnel. The participation of these individuals requires them to operate outside the ethical boundaries of their profession. This is a unique situation. We know of no other occasion where the State employs the services of individuals operating outside of the ethical boundaries of their profession. This is not a desirable situation. It is also our conclusion that because of the above noted points, the inherent risks, and therefore the potential unreliability of lethal injection cannot be fully mitigated.

Respectfully,
Steve Morris, M.D.
Peter Springer, M.D., F.A.C.E.P.
Dave Varlotta, D.O.

APPENDIX B

February 28, 2007

Mr. John W. "Bill" Jennings
Chairman
Governor's Commission on
Administration of Lethal Injection
3801 Corporex Drive, Suite 210
Tampa, Florida 33619

RE: Objection to Commission Statement

Dear Chairman:

I must first observe that it has been a great pleasure to work with you and the other esteemed members of the Governor's Commission on Administration of Lethal Injection. While the task assigned the Commission was serious and challenging, getting to know and work with the Commission members was rewarding and educational.

I write this letter however, to register my concerns that, in questioning whether the lethal drugs utilized in Florida's method of execution should be evaluated, the Commission has moved beyond the mission and purpose assigned by Governor Bush in Executive Order 06-260. That Order set forth that the Commission's "purpose and mission shall be limited to evaluating Florida's lethal injection procedures and protocols, including enforcement of those procedures and protocols, and shall not extend to re-evaluating the policy decisions of the Legislature in enacting a death penalty or the means chosen by the Legislature for implementing the state's death penalty."

While the Commission clearly addressed a number of very important issues regarding needed enhancements of the existing protocols and shoring up identified lapses in the adherence to the existing protocols, the issues identified by the Commission dealt with personnel matters, the failure to properly deliver the lethal drugs and the failure to follow current protocols once a problem was detected, not the use of particular drugs set forth in the Department of Corrections' protocols.

Because I believe the Commission was not authorized to expand its charge beyond the Governor's Executive Order, I must respectfully voice my dissent regarding the overreaching of the Commission's remarks on this point.

Sincerely yours,

Carolyn M. Snurkowski

Execution by Injection Far from Painless

* 15:49 14 April 2005 by Alison Motluk
* For similar stories, visit the Death Topic Guide

Execution by lethal injection may not be the painless procedure most Americans assume, say researchers from Florida and Virginia.

They examined post-mortem blood levels of anaesthetic and believe that prisoners may have been capable of feeling pain in almost 90% of cases and may have actually been conscious when they were put to death in over 40% of cases.

Since 1976, when the death penalty was reinstated in the US, 788 people have been killed by lethal injection. The procedure typically involves the injection of three substances: first, sodium thiopental to induce anaesthesia, followed by pancuronium bromide to relax muscles, and finally potassium chloride to stop the heart.

But doctors and nurses are prohibited by healthcare professionals' ethical guidelines from participating in or assisting with executions, and the technicians involved have no specific training in administering anaesthetics.

"My impression is that lethal injection as practiced in the US now is no more humane than the gas chamber or electrocution, which have both been deemed inhumane," says Leonidas Koniaris, a surgeon in Miami and one of the authors on the paper. He is not, he told New Scientist, against the death penalty per se.

But Kyle Janek, a Texas senator and anaesthesiologist, and a vocal advocate of the death penalty, insists that levels of anaesthetic are more than adequate. He says that an inmate will typically receive up to 3 grams - about 10 times the amount given before surgery. "I can attest with all medical certainty that anyone receiving that massive dose will be under anaesthesia," he said in a recent editorial.

Extremely anxious

The authors of the new study argue that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially when the people administering it are unskilled and the execution could last up to 10 minutes. They also point out that people on death row are extremely anxious and their bodies are flooded with adrenaline - so would be expected to need more of the drug to render them unconscious.

Without adequate anaesthesia, the authors say, the person being executed would experience asphyxiation, a severe burning sensation, massive muscle cramping and cardiac arrest - which would constitute the "cruel and unusual" punishment expressly forbidden by the US constitution's Eighth Amendment.

Koniaris's team collected post-mortem data on blood levels of sodium thiopental in 49 executed

inmates. Even where the same execution protocol and the same blood sampling procedure was used, they found that levels varied dramatically - from 8.2 to 370 milligrams per litre. In other inmates, mere trace levels were recorded.

"Perverted medical practice"

If these post-mortem concentrations reflect levels during execution, the authors say, 43 of the 49 inmates studied were probably sentient, and 21 may have been "fully aware". Because a muscle relaxant was used to paralyse them, however, inmates would have been unable to indicate any pain.

Ironically, US veterinarians are advised not to use neuromuscular blocking agents while euthanising animals precisely so they can recognise when the anaesthesia is not working.

People in the US assume that lethal injection is highly medicalised, and therefore humane, says Koniaris. "But when you look at it critically, it's anything but medical," he says. "It's a perverted medical practice."

He says the people carrying it out are unskilled, the procedure is not monitored - the executioners step behind a curtain when delivering the lethal drugs - and there is no follow-up to ensure that everything worked as intended.

Journal reference: The Lancet (vol 365, p 1412)

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-1636

FILED
THOMAS D. HALL
2009 APR -8 A 10:51
CLERK, SUPREME COURT
BY_____

PAUL GLENN EVERETT,
Appellant

versus

STATE OF FLORIDA,
Appellee

_____/

Appeal of: Paul Glenn Everett, Appellant, vs State of Florida, Appellee, Case No. 01-2956.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing brief and the accompanyingPETITION FOR WRIT OF HABEAS CORPUS have each been printed in proportional Times New Roman, 14 point type and that, except for quotations, both document are double spaced.

Respectfully Submitted By:

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served upon:

Bill McCollum, Esq.
Office of the Attorney General
Concourse Center # 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607

by (X) regular United States mail or ( ) by hand delivery or ( ) by facsimile and/or by _____ this 6 day of Apr, 2009.

Charles E. Lykes, Jr., Esquire

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THOMAS D. HALL

2009 APR -8 A 10:51

CLERK, SUPREME COURT

BY_____

April 6, 2009

Hon. Thomas D. Hall
Clerk, Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Everett, Appellant/Petitioner v State, Appellant/Respondent, SC08-1636

Dear Mr. Hall:

Enclosed please find one original and seven copies of amended APPEAL BRIEF OF APPELLANT with a TABLE OF CITATIONS immediately following the TABLE OF CONTENTS. Also please find the original and 7 copies of a Habeas Corpus Petition for Mr. Everett. I have also enclosed a CERTIFICATE OF COMPLIANCEwhich addresses both documents..

Thank you for your attention to this matter and for the helpfulness and courtesy of your staff. Please let me know if there is any way I can assist in the resolution of this matter.

Very truly yours,

Charles E. Lykes, Jr., Esq.

CEL/jt