IN THE SUPREME COURT OF FLORIDA

PAUL GLENN EVERETT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. SC09-646

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, pursuant to this Honorable Court's Order dated April 13, 2009, submits the following in opposition to the Petition for Writ of Habeas Corpus dated as served April 6, 2009 ("Petition").

STATEMENT OF THE CASE AND FACTS

Respondent rejects the Petition's Background of the Case (Pet ¶1-12) and, instead, relies on the facts stated in the State's STATEMENT OF THE CASE AND FACTS of the Answer Brief in Case #SC08-1636. When applicable, record references and citations are inserted within the following arguments.[1]

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[1] Respondent supplies emphasis, abbreviates common terms, and refers to records using the same symbols employed in the State's Answer Brief served July 10, 2009, in Case # SC08-1636. "Pet" refers to Everett's Petition for Writ of Habeas Corpus that was filed in this case and to which this pleading responds; since the copy of the Petition served on the Respondent-State contains no page numbers, paragraph number(s) ("¶") of the Petition follow "Pet" when applicable.

ARGUMENT IN OPPOSITION TO HABEAS GROUNDS

OVERVIEW AND ASSERTION OF PROCEDURAL BARS OF ALL OF THE HABEAS CLAIMS.

Everett's habeas petition raises five claims.[2] Most of them are procedurally barred by the direct appeal of this case, which resulted in this Court's opinion reported at Everett v. State, 893 So.2d 1278 (Fla. 2004). Each such habeas claim was raised, or could have been raised, in the direct appeal. See, e.g., Topps v. State, 865 So.2d 1253, 1255 (Fla. 2004)(discussing two types of procedural bar; "doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised"; "doctrine of collateral estoppel (or issue preclusion) … bars relitigation of the same issues between the same parties in connection with a different cause of action"); Denson v. State, 775 So.2d 288 (Fla. 2000)(applying procedural bar to habeas petition) ; Lawton v. State, SC09-255, 2009 Fla. LEXIS 947 (Fla. June 8, 2009)(" A petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings"); Betty v. McNeil, 4 So.3d 1220 (Fla. February 12, 2009)(unpublished; "petition for writ of habeas corpus is hereby denied as procedurally barred. A petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues that were or

[2] CLAIM VI is a so-called "accumulation" claim, and CLAIM VII is not a claim at all.

could have been raised on direct appeal or in prior postconviction proceedings"); Diaz v. McNeil, 4 So.3d 676 (Fla. February 10, 2009)(unpublished; "petition for writ of habeas corpus is hereby denied as procedurally barred. A petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings"); Mills v. Dugger, 574 So.2d 63, 65 (Fla. 1990), citing White v. Dugger, 511 So.2d 554, 555 (Fla. 1987).

Accordingly, Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992), applied the procedural bar principle to a number of habeas claims, reasoning as follows:

> Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal. *E.g.*, *Porter v. Dugger*, 559 So.2d 201 (Fla. 1990); *Clark v. Dugger*, 559 So.2d 192 (Fla. 1990).
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> Using different grounds [from the appeal] to reargue the same issue is also improper. *E.g.*, *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 111 S.Ct. 2879 (1991).
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> Allegations of counsel's ineffectiveness cannot circumvent the rule that habeas corpus proceedings are not a second appeal. *E.g.*, *Medina v. Dugger*, 586 So.2d 317 (Fla. 1991). The allegations of ineffectiveness in issues 1 and 4, therefore, do not preclude a procedural bar of those issues. *E.g.*, *Johnston v. Dugger*, 583 So.2d 657 (Fla. 1991).

The foregoing procedural bar principles apply here, where habeas grounds were, or could have been, raised in the direct appeal. See also Breedlove ("Claims of trial counsel's ineffectiveness should be brought in rule 3.850

motions and are not cognizable in habeas corpus proceedings. Claims 5 and 7, therefore, should not be included in this petition").

The habeas claims that were not barred-by-the-direct-appeal were or could have been raised in the previous postconviction proceedings, thereby barring them here. Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995), succinctly stated the principle: "Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised in a 3.850 motion." See also Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987)("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material"); White v. Dugger, 511 So.2d 554, 555 (Fla. 1987)(death warrant; "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings").

Therefore, Mills v. Dugger, 559 So.2d 578, 579 (Fla. 1990), rejected an override issue and other issues presented in a habeas and reasoned:

> Mills raised most of these issues on direct appeal or in his 3.850 motion; others should have been raised, if at all, on appeal. Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions.

Moreover, even incorrectly ignoring the clearly applicable foregoing procedural bars and principles, here, the habeas claims fail to allege any prima facie basis for relief. The sum-total of legal authorities cited in

purported support of the habeas claims are Argesinger v. Hamlin, 407 U.S. 25 (1972)(Pet ¶15), Fla.R.Crim.P. 3.111 (Pet ¶16, 18), and Ring v. Arizona, 536 U.S. 584 (2002)(Pet ¶31). None of these authorities support the claims fo which they are cited, and, other than Fla.R.Crim.P. 3.111, none of the discussion of them descends to any particularity that could be construed as applicable to this case.

CLAIM I – SHOULD EVERETT'S CONFESSION HAVE BEEN SUPPRESSED BECAUSE, WHILE HE WAS HELD IN ALABAMA ON ALABAMA CHARGES, HE WAS AN UNREPRESENTED SUSPECT IN A FLORIDA MURDER? (PET ¶13-22, RESTATED)

The trial court's denial of the Motion to Suppress Everett's confession was not only raised in the direct appeal, thereby procedurally barring this claim, See, e.g., Breedlove, 595 So.2d at 10; Denson, 775 So.2d 288, it was a major focus of this Court's opinion affirming the trial court.

CLAIM I[3] attempts to re-appeal the denial of the suppression motion by re-packaging the claim under other grounds, the Sixth Amendment and Fla.R.Crim.P. 3.111, which remains procedurally barred, See Breedlove ("Using different grounds [from the appeal] to reargue the same issue is also improper"; arguing different grounds to contest the "propriety of the

[3] "For the record," Respondent denies that that there was any "affirmative[] exploit[ation]" (Pet ¶19), intentional or otherwise; or any "technique" that "worked" (Pet ¶22); or "purposely prolonged … isolation" (Pet ¶21). Respondent also denies any "belated" (Pet ¶18) accusation that might have any consequence here. Accordingly, the Petition fails to cite any record support for such groundless accusations. Instead the facts that the record supports are discussed in the Answer Brief of #SC08-1636: Case History & Event Timeline section and discussions in ISSUES "B" and "C" of that Answer Brief.

prosecutor's argument and comments … does not save issues 1, 2, and 4 from being barred procedurally").

Furthermore, trial defense counsel had brought Fla.R.Crim.P. 3.111 to the trial court's attention at the proffer of Everett's confession (R/VII 132-34) and the trial court expressly rejected its application (R/VII 134), yet the direct appeal did not raise Rule 3.111 as a purported basis for relief. As such, the assertion of Fla.R.Crim.P. 3.111 here is procedurally barred. Furthermore, to the degree that Everett's trial counsel did not assert the specific 3.111-related argument that he now claims applies, this is still not properly a habeas claim but rather, at most, an IAC trial counsel claim, which the State addressed in its Answer Brief in ISSUE "B" of Case #SC08-1636, see also ISSUE "C" of Case #SC08-1636, and which is not properly brought in a habeas petition, See, e.g., Breedlove ("Claims of trial counsel's ineffectiveness should be brought in rule 3.850 motions and are not cognizable in habeas corpus proceedings. Claims 5 and 7, therefore, should not be included in this petition").

Moreover, if somehow Everett were allowed to circumvent the clearly applicable procedural bars to CLAIM I, the Sixth Amendment does not apply. The application of the Sixth Amendment is triggered only when "adversary judicial proceedings" have begun:

> The Sixth Amendment right … is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, '"at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."' *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct.

> 2292, 2297, 81 L.Ed.2d 146 (1984) (*quoting Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion)).

McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Here, until November 26, 2001, (R/I 3-4) an arrest warrant had not even been issued for this murder, and an arrest warrant in Florida does not formally charge murder, which requires an information or indictment, See, e.g., Fla.R.Crim.P. 3.140 (indictment if maximum penalty is death or felony carrying a penalty less than death; information authorized for felony carrying a penalty less than death). Indeed, the service of a Florida arrest warrant in an Alabama jail does not remotely resemble a "judicial proceeding" for the Florida murder contemplated by the Sixth Amendment.

Here, the indictment did not issue until January 28, 2002, (R/I 5) long after Everett's November 27, 2001, confession. Further, here, Everett appeared for first appearance February 26, 2002, (R/I 7-9) months after his November 27, 2001 confession. In sum, concerning this murder, Everett had no Sixth Amendment right to counsel until well-after his November 27, 2001, confession.

Further, arguendo assuming that this claim is not procedurally barred and arguendo assuming that Sixth Amendment right to counsel applied on November 27, 2001, the police contacting Everett for the purpose of serving the arrest warrant was still not an interrogation under any Amendment, as this Court reasoned in rejecting the direct-appeals' Fifth Amendment claim:

> Service of an arrest warrant is a routine police procedure. It does not require any response from a suspect; nor can it be reasonably expected to elicit an incriminating response. Thus, this action does

> not constitute interrogation, and we affirm the trial court's denial of the motion to suppress on this claim.

Everett, 893 So.2d at 1286. Similarly, approaching a suspect to obtain biological samples is not an interrogation under the Sixth as well as the Fifth Amendment:

> The officer's request for appellant's consent to provide DNA biological samples was the same search request the officers made of several other individuals whom they had not otherwise been able to eliminate from a list of potential suspects in this sexual battery/murder case. Such a request for the consent to search is not reasonably likely to elicit an incriminating response.

Id. Thus, this Court concluded:

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

Id., citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Recognizing that "interrogation" for purposes of the Sixth Amendment is not necessarily identically co-extensive with "interrogation" for purposes of the Fifth Amendment, there still is no sound policy rationale for expanding the meaning of "interrogation" to include simply procuring biological samples and serving an arrest warrant. In this regard, Brewer v. Williams, 430 U.S. 387, 392-93 (1977), is informative as a case holding a "Christian Burial" speech as Sixth Amendment "interrogation":

> The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the 'Christian burial speech.' Addressing Williams as 'Reverend,' the detective said:

> 'I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'
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> Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville a town they would be passing on the way to Des Moines. [FN1] Leaming then stated: 'I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.'
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> FN1. The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.
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> As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

In stark contrast to the "Christian Burial" speech in Brewer, which was clearly and predictably designed to elicit incriminating testimonial evidence from that suspect, here the police were performing functions of attempting to obtain non-testimonial biological samples and subsequently

performing the ministerial and non-judicial task of serving the arrest warrant when Everett initiated the desire to speak about this case.

Moreover, here unlike Brewer, 430 U.S. at 405, the police **DID** "preface" their discussions of this case each time "by telling [Everett] that he had a right to the presence of a lawyer," and unlike Brewer, the police **DID** make the "effort … to ascertain whether [Everett] wished to relinquish that right."

While Everett's habeas petition is claiming a Sixth Amendment right under the United States Constitution, not a right to counsel under the Florida Constitution, the discussion of Chavez v. State, 832 So.2d 730 (Fla. 2002), concerning the Florida provision is instructive because Florida's right-to-counsel cannot be more limited than the federal constitution. There, "Chavez … argue[d] that the delay in providing him a first appearance within twenty-four hours of arrest interfered with his **right to counsel, which would have attached at first appearance**, resulting in a deprivation of this right." Id. at 758. Thus, because there had been no first appearance here, nor, unlike Chavez, has there even been a claim in the trial court about a dilatory first appearance (See R/VII 127-29, 132-34; R/I 33-37; R/II 203-24), Everett's right to counsel had not attached under the Sixth Amendment. As here, "Chavez was properly, timely and repeatedly informed of his right to counsel. He knowingly and voluntarily waived that right, and the record does not support a conclusion

that the delay in his first appearance induced that waiver." Indeed, here, as previously stated, there was no such delay.

Harvey v. State, 529 So.2d 1083, 1085 (Fla. 1988), upheld the admissibility of a confession in spite of the police refusing a public defender access to the defendant when the lawyer had not yet been appointed to represent the defendant:

> Since the public defender was not Harvey's lawyer, the police had no duty to let the public defender talk to Harvey while he was making his statement to the police. Additionally, Harvey acknowledged his right to counsel prior to making his statement, and after being advised of these rights, he indicated that he would continue making his statement in the absence of counsel.

Here, neither Walter Smith nor any other public defender nor any other attorney represented Everett on this murder at the time he confessed, and here, as in Harvey, the defendant "acknowledged his right to counsel prior to making his statement" but still confessed, here after re-initiating contact with the police. A fortiori, here, the police refused no public defender's request to speak with Everett.

The foregoing Sixth Amendment discussion reinforces the significance of preservation at the trial court level. To the degree that Everett contends that his current Sixth Amendment claim is analyzed differently from the Fifth Amendment claim his counsels raised with the trial court and this Court, Everett necessarily proves the point that such a claim was not presented to the trial court, procedurally barring the Sixth Amendment claim in any appellate-level review, including habeas review here. See, e.g., Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for

"proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); White v. State, 753 So.2d 548, 549 (Fla. 1999)(state Constitutional due process "not raised to the trial court or to the district court of appeal during the direct appeal from his conviction"; "not preserved"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging"). Further, this principle of preservation is especially crucial in situations that depend upon any factual development in the trial court.

To the degree that Everett argues that the foundation for appellate-level review of a Sixth Amendment claim was laid in pre-trial and trial proceedings, the claim is clearly barred here by the direct appeal.

Similarly, any claim based upon any aspect of Fla.R.Crim.P. 3.111 was barred by the direct appeal or by a failure to preserve.

For the forgoing reasons, as well as those in ISSUES "B" and "C" of the State's Answer Brief in #SC08-1636, this claim should be rejected.

CLAIM II – WAS THE TESTIMONY OF FDLE ANALYST CHUCK RICHARDS CONCERNING BLOOD ADMISSIBILE? (PET ¶23-24, RESTATED)

This claim vaguely references "serology and blood pattern analysis" (Pet ¶24) as its target. Such as vague reference should not be the basis of any relief.

Respondent assumes that this claim is not referencing the DNA analysis, which produced evidence that Everett's DNA was in the victim's vagina at 15.1 quadrillion to 1 odds. However, if the DNA evidence is the subject of this claim, this Court addressed this matter in the direct appeal:

> In his second claim, appellant argues that the trial court erred in admitting the testimony of the State's DNA expert regarding population frequency. In *Butler v. State*, 842 So.2d 817 (Fla.2003), this Court stated that DNA analysis is a two-step process. First a biochemical analysis determines that two samples are alike, and then statistics are employed to determine the frequency in the population of that profile. *Id*. at 827. Both require use of scientific methods that meet the Frye test for validity. *See Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). As to the first step, the expert testified, without objection, that appellant's DNA matched the DNA from the rape kit on each of the thirteen markers tested and that all other individuals tested were completely excluded as matches. Regarding the statistical analysis, a qualified expert must demonstrate a "sufficient knowledge of the database grounded in the study of authoritative sources." 842 So.2d at 828 (*quoting Murray v. State*, 692 So.2d 157, 164 (Fla. 1997)). Here, the expert testified to seven years' experience in analytical chemistry, attendance at several courses and conferences on population genetics and statistics, and previous experience testifying as an expert in this area. Further, she employed the product rule in her analysis, and she testified that the National Research Council developed the standards and procedures for the analysis, which was accepted internationally as the methodology for such analysis. In addition, she used the FBI database used by the Florida Department of Law Enforcement (FDLE) for all such analysis. *See Butler*, 842 So.2d at 828 (stating that Butler's claim of invalidity of product rule "is inaccurate in light of the case law that continues to uphold the validity of the product rule"). Finally, her testimony was specific to segments of the population (e.g., 1 in 15.1 quadrillion of the Caucasian population), and she testified that her results were reviewed twice under FDLE's

> procedures. Accordingly, the court did not err in finding the expert qualified to testify on population frequency because her testimony was based on established scientific principles in which she was trained and had experience.

Everett, 893 So.2d at 1281-82. Therefore, the direct appeal clearly bars any such claim here. See, e.g., Breedlove, 595 So.2d at 10; Denson, 775 So.2d 288.

Respondent's best guess is that this claim is referring to the blood-related testimony of Chuck Richards, which was the target of the IAC claim (ISSUE "D") in the appeal from the denial of postconviction relief (Case # SC08-1636). If this guess is correct, then the claim remains procedurally barred for any appellate-level review because, according to Everett (in his postconviction appeal), the point was not preserved below during the trial, and if defense counsel's discussion with the trial court (See R/VII 59-60) did preserve the claim, it should have been raised in the direct appeal, which also procedurally bars the claim here.

Furthermore, postconviction claims should not be inserted into habeas petitions. See Blanco, 507 So.2d at 1384 ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material"); White, 511 So.2dat 555 (death warrant; "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings"); Mills ("Habeas corpus is not to

be used for additional appeals of issues that could have been, should have been, or were raised … in other postconviction motions").

The bottom-line is that the admissibility of evidence admitted at trial is not, and should be, cognizable here as a free-standing habeas claim.

Arguendo, if somehow this claim is entertained in the habeas proceeding, Respondent will not belabor the point because it was extensively rebutted within the Answer Brief's ISSUE "D" treatment of IAC (Case # SC08-1636): The evidence was inconsequential for the three reasons discussed in the Answer Brief and therefore not a valid basis for any relief, and the witness was qualified to testify as he did, as also discussed in the Answer Brief.

CLAIM III – IS A POSTOCNVICTION CLAIM CONCERNING THE ADMISSIBILITY OF EVERETT'S CONFESSION COGNIZABLE IN A HABEAS PETITION? (PET ¶25-28, RESTATED)

This claim contends that evidence of police coercion or intimidation was newly discovered and renders Everett's confession inadmissible.

A habeas proceeding is not the proper vehicle for considering whether this claim was timely and worthy of any relief. Postconviction-type claims should be presented in postconviction motions to the trial court, which can assess whether the Petitioner has presented adequate facts and rule for this Court's subsequent review. See White (death warrant; "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial **or which could have, should have, … been, raised in rule 3.850**

proceedings"); Mills ("Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised … **in other postconviction motions**").

Thus, Fla.R.Crim.P. 3.851 provides for successive postconviction motions limited to specific conditions, which the Petitioner must allege and otherwise meet: for example, "reasons" for the delay and witness list requirements, Fla.R.Crim.P. 3.851(e)(2); "due diligence" for a claim filed beyond the one-year limit, Fla.R.Crim.P. 3.851(d).

Accordingly, Jimenez v. State, 997 So. 2d 1056 (Fla. 2008), concerned a successive postconviction motion, that is a motion filed under Rule 3.851 where "a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." 997 So.2d at 1063. There, the motion was filed "well beyond the one-year time period limitation after the judgment and sentence were finalized--on October 30, 1997, when this [Florida Supreme] Court affirmed the convictions and sentence on direct appeal." 997 So.2d at 1064. Applying the overarching language of Rule 3.851(d), Jiminez reasoned:

> Thus, to be reviewed on the merits, each of Jimenez's subclaims must either be based on (A) new evidence that would have been unknowable through the exercise of due diligence or (B) a fundamental constitutional right that should receive retroactive application and that was not established before October 30, 1998. *See* Fla. R. Crim. P. 3.851(d)(2)(A)-(B). To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence. *Cf. Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996) (establishing such an interpretation for rule 3.850(b)(1), which has language identical to rule 3.851(d)(2)(A)).

997 So.2d at 1064.

Here, to allow Everett to circumvent all of the foregoing requirements by petitioning this Court now would gut the Rules' interest in an orderly process and open the floodgates for abusive filings in this Court.

Indeed, arguendo, improperly entertaining this claim on its face here, Respondent contests whether CLAIM III has even made out a prima facie claim that might justify its tardiness. The claim merely states (Pet ¶26) that "it was not discovered" by Everett's current attorney in previously available materials. This allegation palpably fails to allege any facts constituting due diligence for delaying raising this claim over three years after the United States Supreme Court denied certiorari from the direct appeal in Everett v. Florida, 544 U.S. 987 (2005), and about one year after the trial court conducted the evidentiary hearing on Everett's postconviction motion December 17 to 19, 2007, (Compare PCR/IV 568-76; PCR/V-PCR/XVII with December 4, 2008, date on p. "x" of the handwritten motion attached as Appendix to the habeas petition), and after the appeal was taken to this Court from the trial court denial of postconviction relief.

In addition to Petitioner failing to make any prima facie showing of due diligence, which alone is fatal to this claim, the record affirmatively shows a lack of due diligence. The alleged basis of this claim is the deposition of Investigator Chad Lindsey. However that deposition has been part of the official proceedings and of the record for several years: At

the suppression hearing, reports from John D. Murphy and the deposition transcripts of Detective Rodney Tilley (R-Supp/II) and **Investigator Chad Lindsey (R-Supp/III)** were considered (See R/II 202-224) and therefore part of the record in the direct appeal (R-Supp/II,III). Thus, the trial judge's Order denying Defendant's Motion to Suppress explicitly referenced Chad Lindsey's deposition. (See R/I 46)

If the merits of the claim are ever reached, their resolution illustrates why this claim does not belong in a habeas petition filed in this appellate-level court. Assuming that the statement Everett attributes to Lindsey could vitiate the prior findings that Everett re-initiated contact with the police, an evidentiary hearing would be required to determine whether Lindsey, in fact, made the statement regarding lethal injection. On the face of Lindsey deposition testimony, Lindsey introduced the topic of lethal injection by indicating: "I don't remember exactly what happened. I probably said something to the effect of – I don't remember exactly what I said, something to the effect of …." (R-Supp/III 87) Subsequently in the deposition, trial defense counsel asked a series of leading questions. (See R-Supp/III 88 et seq.) An evidentiary hearing would be required to determine if, in fact, Lindsey made the statement, and an evidentiary hearing would be required to determine whether Everett actually heard the statement. Given Everett's capacity to adapt his stories to what he perceives to be his needs at the time (See a list of Everett's statements bulleted towards the end of ISSUE "B" in the State's Answer

Brief, pp. 45-47, in case # SC08-1636), one might expect that he would testify that he took Lindsey's statement as a threat that changed his outlook towards talking to the police, but the trial court would need to evaluate the credibility of any such testimony given all of the circumstances of this case, such as Everett's failure to mention the supposed threat in these proceedings until relatively recently. For example, when Walter Smith interviewed Everett in April 2002, Everett did not claim that he renewed contact with the police; to the contrary, he "flatly denie[d] contacting the Alabama investigator …," (PCR/VII 1070)

Moreover, if this claim survives procedural bars and time-bars and if Lindsey made the statement and if Everett testifies that he heard it and was subjectively impacted by it, Respondent does not conceded that, as a matter of law, it vitiated what has been held in this case to be re-initiated contact. Factors that would still support the re-initiated contact ruling and holding would include, for example, the multiple times that the police Mirandized Everett, Everett's palpable demonstration that he understood the importance of the warnings by his exercise of his right to remain silent to the point of calmly timing that exercise, and the lapse in days between Lindsey's statement and Everett's statements.

CLAIM IV – IS FLORIDA'S CAPITAL SETENCING PROCEDURE UNCONSTITUIONAL UNDER RING? (PET ¶29-32, RESTATED)

CLAIM V – IS FLORIDA'S LETHAL INJECTION PROCEDURE UNCONSTITUIONAL? (PET ¶33-36, RESTATED)

The State addressed these claims in its Answer Brief in #SC08-1636. As explained in that Answer Brief, most of these claims were addressed in the direct appeal, which procedurally bars those claims here. See, e.g., Breedlove, 595 So.2d at 10; Denson, 775 So.2d 288; Blanco, 507 So.2d at 1384 ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material"); White, 511 So.2dat 555 ("habeas corpus is not a vehicle for obtaining additional appeals of issues which … **have been, raised in rule 3.850 proceedings**").

One aspect of ISSUE "H" of the postconviction appeal is barred for multiple reasons, which also bar the claim here. See State's Answer Brief. Further, the lethal-injection claim is unpreserved here, as it was in the postconviction appeal.

In any event, as explained in the State's Answer Brief, none of these claims has any merit.

CLAIM VI – IS PETITIONER ENTITLED TO RELIEF IN A HABEAS PROCEEDING BY ACCUMULATING CLAIMS? (PET ¶37, RESTATED)

There are no claims in the habeas petition that justify any relief individually or combined with anything. Procedurally barred and meritless claims cannot accumulate. Five habeas claims times zero is still zero.

Further, habeas claims don't accumulate with postconviction claims, especially ones that also present no ground for relief, as in #SC08-1636.

CLAIM VII – DOES PETITIONER HAVE AUTHORIZATION TO RAISE ANY CLAIM HE WISHES ANY TIME THAT HE WISHES? (PET ¶37-39, RESTATED)

This claim should be denied as patently absurd: It requests that all rules of procedure and case law be disregarded and that, instead of requiring adherence to that law, Everett be given a blank check to raise whatever he wants whenever he wants.

If and when Everett presents a claim in a successive motion filed in a court with arguable jurisdiction, the State will address it appropriately, given the rules and case law that apply to that motion at that time.

CONCLUSION

Based on the foregoing discussions, Respondent-State respectfully requests this Honorable Court deny each aspect of the Petition and deny all relief.

CERTIFICATE OF SERVICE

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

CHARLES E. LYKES, JR., ESQ.
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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
BILL McCOLLUM, ATTORNEY GENERAL

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