IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-1509

STATE OF FLORIDA
Appellant,

v.

MICHAEL PETER FITZPATRICK,

Appellee.

POSTCONVICTION APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FLORIDA

[CORRECTED] ANSWER BRIEF OF APPELLEE, MICHAEL PETER FITZPATRICK

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STATEMENT OF THE FACTS AND OF THE CASE

Mr. Fitzpatrick agrees with the State's recitation of the record as far as it goes, but asks the Court to consider some supplemental matters. Of particular note, many of the "facts" that made it into this Court's opinion on direct appeal should not have been there.

Defense Counsel's Testimony

William K. Eble, Sr. worked at the Public Defender's Office from 1981 until 1996, and he has been in private practice since 1997. PC-R Add. Vol. I, 89. Fitzpatrick's case was the first capital murder case he was assigned to after entering private practice. *Id*. at 104. Although he had experience handling capital cases prior to representing Fitzpatrick, he could not recall exactly how many capital cases he tried up until 1997. *Id*. at 98-104. Although his activities in this case are discussed throughout this brief, a few introductory observations are posted here.

Mr. Eble first spoke with Fitzpatrick while he was still employed with the Public Defender's Office. PC-R. Add. Vol. II, 165. Fitzpatrick called Mr. Eble prior to his arrest and asked some questions about whether or not he should cooperate with his parole officer and provide a DNA sample.

> Q Do you recall what you told him?
> A He was on parole. His parole officer wanted him to cooperate and get — and they wanted a DNA sample. I

> would have told Michael that if there was any chance of there being DNA that they recovered under the girl's fingernails or from hair samples or from sperm that would be on that body, that I felt he should not volunteer to give them DNA.

PC-R. Add. Vol. II, 165.

Attorney A.J. Ivy was appointed to represent Fitzpatrick after the Public Defender's Office moved to withdraw. PC-R. Add. Vol. I, 105. Ivy asked the court to appoint Mr. Eble to handle the penalty phase. *Id*. at 106. At some point, Ivy ceased to appear, and Mr. Eble was Fitzpatrick's sole counsel for the remainder of the case. *Id.* at 107. In total, Mr. Eble represented Fitzpatrick for about four years. PC-R. Add. Vol. II, 175. He did not ask for the assistance of co-counsel because, according to him, Fitzpatrick "didn't want to do any penalty phase" and "[y]ou didn't get two attorneys to do guilt." *Id*. at 171. He did not bill for his work in this case, and there is no finalized invoice or contemporaneous record of what he did. PC-R. Add. Vol. I, 108-09. He did not hire any experts in this case, either for guilt phase or penalty phase. PC-R. Add. Vol. II, 184.

Mr. Eble said he spoke with a DNA expert on the phone, although he could not remember the expert's name. PC-R. Add. Vol. I, 125-26. He decided that this expert was not going to help him, so he did not hire him. *Id.* at 131, 135. The expert did not receive compensation for his consultation with Defense counsel, and

there is no documentation regarding Defense counsel's conversation with this expert. *Id*. at 131-32. He did not request additional testing from FDLE, of any of the forensic evidence in this case, and he did not recall whether it occurred to him to do so. *Id*. at 141.

As related by this Court on direct appeal:

> At trial, the court excluded evidence of fingernail scrapings indicating that the victim could be eliminated from the DNA mixture tested from her right hand, but neither Fitzpatrick nor Stephen Kirk could be eliminated; both Fitzpatrick and Stephen Kirk could be eliminated from the mixture tested from her left hand but the victim could not be eliminated; there was evidence of the DNA of another, unknown person in the tissue from the right hand clippings; and the DNA evidence under the victim's fingernails could have been there for a long period of time, depending on when she had last washed her hands or cleaned her nails. The trial court found that "the proffer of the evidence is of a nature that it would be irrelevant and immaterial in its composition ... for the reason that the proffered evidence is inconsequential and does not lead to any conclusion of any kind."

Fitzpatrick v. State, 900 So.2d 495, 521 (2005).

Defense counsel testified that everybody, including himself and the State, thought that the DNA results that he wanted to introduce to the jury regarding the third party contributor were obtained from the fingernail scrapings that were part of the SAVE exam. PC-R. Add. Vol. II, 160. He cannot recall when he realized that the evidence he was trying to introduce did not come from the SAVE kit. *Id*.

at 161. Mr. Eble felt that this evidence was probative because there was a person's DNA that was under the victim's fingernails that did not belong to the victim, Fitzpatrick, or Kirk. *Id.* at 161-62. He was banking on getting the DNA evidence from the fingernails in, because if he could do that he did not think the sperm mattered. *Id*. at 216-17.

In an attempt to deal with this evidence, which the State thought was going to come in, the prosecutor argued in the State's opening statement that the unidentified DNA under the victim's fingernails must have come from Dwayne Mercer, one of the people who found the victim, who the victim scratched. PC-R Add. Vol. II at 162. Defense counsel was surprised by this argument, and he did not recall learning anything about Mercer being scratched until around the time of the trial. *Id*. at 164. Defense counsel did not ask to get a DNA sample from Mercer. *Id*. at 163-64. His position was that if the State was going to argue that the DNA under the victim's fingernail belonged to Mercer, they would have to prove it. *Id*. at 164. Mercer was excluded as being a contributor in postconviction DNA testing. PC-R Vol. XVIII at 133-34.

Defense counsel said he spoke with a Dr. Feegle, a medical examiner with a law degree, about Fitzpatrick's case for thirty minutes over the phone. PC-R Add. Vol. I at 133-34. He spoke with Dr. Feegle about "the SAVE team stuff;"

specifically, "the idea of the mobility [sic] of the sperm" and "the fact that the lab report indicated that the underwear didn't really have any semen in it." *Id.* at 133. Based on what Dr. Feegle told him, he did not hire him. PC-R. Add. Vol. II, 206. As shown in the postconviction proceedings, there never was a motility evaluation, which would have required simply examining a "wet" slide under a microscope. PC-R Vol. XVI, 154-55.

Mr. Eble conducted independent research at the University of South Florida science library, and he obtained some research articles with regard to the persistence of sperm in victims of sexual offenses. PC-R. Add. Vol. I, 146-47. He tried to use a British study in the course of his cross examination of Ruth McMahan, the prosecution serology expert, but the court sustained the prosecution's objection regarding his use of the article. *Id*. at 147-48. He did not discuss the article with any expert. *Id*. at 150.

Mr. Eble did not make any objections based on the qualifications or opinions of Rita Hall, the nurse practitioner who conducted the SAVE examination, because he was under the impression that she had been previously recognized by the courts as an expert. PC-R. Add. Vol. II, 218.

> Q (By [Asst. State Attorney] Mr. Garcia) Prior to your representation of Mr. Fitzpatrick, had you dealt with Rita Hall, the advanced registered nurse practitioner?

> A I don't remember if I did, Mr. Garcia.
>
> Q Okay. You did not object during the trial as to her qualifications or some opinion testimony that she had given during the trial?
>
> A I was under the impression she had been recognized as an expert in the past and in the courts. I don't remember why I had that impression then. I still have that impression now. I think she had been recognized by the courts to be an expert in the area she was tendered in the past.
>
> If I was wrong, then I was wrong, and I should have objected to it.
>
> Q And do you recall if you ever asked Judge Swanson if you could voir dire her on her credentials or her qualifications?
>
> A I don't remember if I did that.

Id. He did not do that.

According to defense counsel, Fitzpatrick made it clear that "there wasn't going to be any penalty phase." PC-R. Add. Vol. II, 175. Fitzpatrick did not want to speak with or present a mental health expert who would suggest that he was a "deranged rapist/killer." *Id.* at 176, 180, 222. Although he had conversations with Fitzpatrick about aggravators and mitigators, Mr. Eble could not recall whether he explained to his client that mitigation is not limited to the statutory mitigators and does not have to have a nexus to the crime. *Id.* at 178-79. He felt that it was

Fitzpatrick's right to choose not to present mitigation, and when he could not change Fitzpatrick's mind about presenting mitigation, he stopped pursuing mitigation. *Id*. at 175, 209. Even after the verdict, Fitzpatrick continued to order Defense counsel not to present mitigation, so he did not pursue any investigation into mitigation. PC-R. Add. Vol. II, 177.

> A I was instructed, if we lost, there was not going to be mitigation presented.
>
> Q You're familiar with the [ABA] guideline that says an investigation into such issue should be conducted regardless?
>
> A Not familiar with that at this time, no, sir.

PC-R. Add. Vol. II, 182. He was not aware that Fitzpatrick had been diagnosed with depression by the Department of Corrections mental health expert. *Id.* at 176. He was not certain that he was aware of Fitzpatrick's military background. *Id.* at 213. He did not consult with a mental health expert in this case. PC-R. Add. Vol. I, 140. He did not request funds to do so or appointment of a confidential advisor.

> CCRC: I'd like to point out [ABA Guideline for appointment and performance of counsel in capital cases 11.5.1(b)(9) (1989) states, "Among the issues that counsel should consider addressing in a pretrial motion are, in 9, access to resources which may be denied to the client because of indigency, and which may be necessary in the case, including independent and confidential investigative resources."

Did you ever file such a pretrial motion?
A If it wasn't filed, then it wasn't.

PC-R. Add. Vol. II, 178. It wasn't.

Dr. Daniel Spitz

Daniel Spitz, M.D. is a forensic pathologist and the chief medical examiner for Macomb and St. Clair counties in Michigan. PC-R. Vol. XVII, 310. His CV was introduced as Defense Exhibit Four. *Id.* at 309. He becomes involved in an outside case as an expert consultant only a couple of times per year, and only in cases that he has reviewed and feels that there are things that he can shed light on. *Id*. at 315. CV at PC-R Vol. XIV, 2539-52. See e.g. SPITZ WU, SPITZ DJ. Medicolegal Investigation of Death, Charles C. Thomas, Springfield, 4th Ed. 2006.

He was retained by CCRC and reviewed everything that exists that might be relevant to his evaluation in this case, including trial and deposition testimony, all relevant medical records, lab reports, and photographs of the victim's injuries taken in the hospital shortly after surgery.

Dr. Spitz's expertise includes collection of evidence from both living and dead individuals. PC-R Vol. XVII, 322. He explained that, a forensic pathologist can take greater liberties in collecting evidence from a deceased individual, since there is no longer a concern about the deceased individual's underlying condition

or discomfort. *Id*. at 321-22. With regard to the tissue under the victim's fingernails recovered from the autopsy, much deeper and more invasive techniques are employed than were used during the initial SAVE examination. *Id.* at 352. Furthermore, when Romines was in the hospital, Dr. Spitz would expect that the staff was using latex gloves. *Id.* at 353. As shown below, the tissue samples were mixed with sand and dirt, suggesting that their DNA profile was contributed at the scene of the offense, not later on in the hospital.

Dr. Spitz considered the medical condition of the victim when she was questioned by law enforcement in the hospital following surgery. She was under the influence of morphine and Ativan (trade name), a benzodiazepine. PC-R Vol. XVII, 325. Ativan is a sedative which was used to keep her in a sedated state following surgical intervention while she required the assistance of an endotracheal tube and mechanical ventilation. *Id.* at 326. As Dr. Spitz explained, although the morphine and Ativan did not result in Romines being unconscious, they resulted in her being sedated and played a role in impairing her cognitive ability. *Id.* at 327. Furthermore, because she was intubated, she was unable to respond verbally to the officers' questioning. *Id.* at 328.

Dr. Spitz also reviewed the police reports regarding Romines' communications with law enforcement while she was in the hospital, and he found

that the officers' descriptions of Romines were consistent with his medical conclusions regarding her condition. PC-R Vol. XVII, 327. One of the officers stated that he was concerned that Romines was not understanding the questioning due to the fact that she was having severe breathing difficulties and slipping in and out of consciousness. *Id.* at 327. At that point, the officer stopped the questioning because in his mind Romines was fading in and out of consciousness and not understanding the questions he was asking. *Id.* at 327.

Romines' condition when she was questioned by law enforcement in the hospital can be contrasted with her condition when she was first discovered. PC-R Vol. XVII, 328. When she was first discovered, although she was intoxicated by alcohol and had suffered severe trauma, she was able to verbalize various comments. *Id.* at 328. She was able to respond verbally, and her responses indicated that she understood the questioning. *Id.* at 328.

Dr. Spitz reviewed the trial testimony and report of Dr. Miller, the medical examiner who conducted the autopsy of the victim. PC-R Vol. XVII, 328. Dr. Spitz agreed with Dr. Miller's report, and he did not have any significant disagreements regarding his conclusions. *Id.* at 329-30. The sharp force injuries that Romines suffered were smaller wounds that involved the upper airway and the esophagus, as opposed to the entire surface of the neck, and they would not have

been immediately lethal. *Id.* at 331. Dr. Spitz estimated that the injuries could have occurred between five and twenty minutes before she was found. *Id.* at 332. Although these injuries were the primary cause of death, severe liver damage in the form of hepatic cirrhosis also would have played a factor in her death. *Id.* at 330.

Dr. Spitz described Rita Hall as a forensic nurse examiner who has training in the collection of evidence, which includes the collection of sexual assault specimens, the documentation of how and where evidence is collected, the proper documentation of evidence, the proper packaging of evidence, and understanding the importance of chain of custody. PC-R Vol. XVII, 334. Mainly, the role of the forensic nurse examiner involves evidence collection, as opposed to the interpretation of evidence, which often occurs at a crime lab or by a physician who has expertise in evaluating injuries. *Id.* at 334. A nurse practitioner such as Hall does not have the training and expertise to pronounce whether or not a sexual encounter was forced, especially in light of the findings that Hall identified in this case. *Id*. at 383.

Dr. Spitz expressed concern about several instances during Fitzpatrick's trial when Hall exceeded the scope of her expertise and made misleading comments. PC-R Vol. XVII, 335. Hall had testified that Romines' breasts were a deep purple color, and she observed a penetrating wound in Romines' breast area that she

would classify as a stab wound or a bite mark. R. Vol. XV, 529. She also described round areas the public region that she characterized as cigarette burns, or where something round had burned the area. R. Vol. XV, 529-30. The defense did not object to these statements. *Id.* at 529-30. According to Dr. Spitz, Hall overstepped the bounds of her expertise when she interpreted wounds and injuries. PC-R. Vol. XVII, 335. Dr. Spitz reviewed photographs of the wounds that Hall was referring to, and he did not agree with her characterizations of these wounds. *Id.* at 335-36. Dr. Spitz testified that there was no penetrating wound on the victim's breast, and the discolorization on her breast "was a very nonspecific injury" that does not have the characteristics of a bite mark. *Id.* at 340, 365. Rather, he characterized the wound on her breast as a superficial, "nonspecific bruise that could have been caused in any number of ways." *Id.* at 365, 369-70. Regarding the wounds Hall characterized as cigarette burns, Dr. Spitz testified that one of these wounds clearly showed signs of healing, which indicates that it existed previously and was unrelated to her attack. *Id.* at 336. He further testified that the wound did not have enough characteristic to be limiting the scope of the opinion to a cigarette burn to the exclusion of all other conditions, including some natural disease processes, such as syphilis, that can cause similar wounds. *Id.* at 336-37. Consistent with Dr. Spitz's observations, Dr. Miller's autopsy report did

not mention anything at all about wounds that would be consistent with cigarette burns, bite marks, or knife wounds anywhere on the body beside the neck. *Id.* at 333.

Ms. Hall testified at trial that after examining the rest of Romines' body, she looked at her vaginal and anal area. R. Vol. XV, 531. She observed "increased color" in the anal area, which appeared very deep pink or red. *Id*. at 531. According to Hall, "this would indicate that there was a pressure on the area from something penetrating the area." *Id.* at 532. Dr. Spitz testified in postconviction that he does not agree with Hall that the conclusion can be made that there was penetration based on increased color or redness. PC-R. Vol. XVII, 342. Furthermore, when the victim was examined, she already had a urinary catheter inserted, which could have caused redness and swelling. *Id.* at 354.

Hall testified that she observed some brownish fluid in Romines' vaginal area that she assumed was fluid from the end of her period. R. Vol. XV, 534. She observed the same substance in the anal area, and she testified that she "felt it could have been is that maybe a penis went into the vagina and then into the anus, and that it was the tail end of her period where it would be menstrual flow, or it could have been trauma to the tissue, which also would have caused a brownish discharge." *Id.* at 534. However, as Dr. Spitz explained in postconviction, aside

from the possibility that this brown reddish fluid consisted of vaginal secretions, it could also have been related to an injury or small amounts of hemorrhage. PC-R Vol. XVII, 351.

Hall testified at trial that she proceeded to collect swabs internally from the victim's anus. R. Vol. XV, 551. Hall felt that the presence of seminal fluid in the anal area was of great importance "because you wouldn't expect to see that." *Id.* at 533. Dr. Spitz expressed concerns with regard to the collection of the anal swabs in this case. PC-R. Vol. XVII, 342-43. Although Hall testified that the anal swabs were collected internally, there is a very high probability that if there was semen in the vaginal cavity there was contamination of the perineum (the skin between the anus and the vagina) and the anus due to gravitational forces. *Id.* at 342-43. There is no way to know whether the three sperm heads that Hall collected were collected from the outer portion of the anus or within the anal cavity, since obviously the swab would have to pass through the outside of the anus to enter the anus itself. *Id.* at 343. Furthermore, Dr. Spitz explained that the fact that there were only three sperm heads makes it very likely that they are a result of contamination and not indicative of any type of anal sexual activity. *Id.* at 343.

When asked whether Romines was violently sexually assaulted, Hall replied, "I can say that she definitely had sex with someone, and the sex was a penis in the

vagina and a penis in the anus." R. Vol. XV, 537. She also testified on cross examination that she felt her findings were consistent with forced sexual activity, although she could not tell if the sexual activity was forced or not. *Id.* at 547-48. According to Dr. Spitz, the evidence in this case does not establish that there was forced sexual contact or anal intercourse at all. PC-R. Vol. XVII, 342.

Dr. Spitz testified that the sperm that was collected from the victim included both intact sperm (sperm that has a head with an intact tail) and sperm heads by themselves. PC-R. Vol. XVII, 345. As Dr. Spitz explained, there is a process by which sperm degenerates in the vaginal cavity. *Id.* at 345. The accepted time frame when the tails begin to separate from the heads is fifteen to eighteen hours. *Id.* at 345. In the case at hand, there are a majority of naked sperm heads with only some intact heads with tails. *Id.* at 345. This indicates a time frame for the sexual activity of approximately 24 hours, give or take a couple of hours, from the time of evidence collection, which was at approximately 8:00 a.m., with a minimum time frame of fifteen or sixteen hours prior to 8:00 a.m. *Id.* at 345-46. There was no attempt to evaluate whether or not the sperm in this case was motile. *Id.* at 347. This time frame is consistent with the defendant's account and inconsistent with the prosecution's theory of the case.

Rita Hall testified at trial that she observed white fluid in the victim's

vaginal vault and anus, which she suspected was vaginal fluid. R. Vol. XV, 533. Hall explained what this indicated to her regarding the timing of the sexual activity: "I would expect that if a person had been sexually assaulted, and they walked around for any length of time, you lose evidence right away. The anal area, within an hour you have lost all the evidence, and within a couple of hours in the vaginal area." *Id.* at 533. She later testified that she could tell that the sexual activity occurred "within an hour or two of when I saw her." *Id.* at 548. This time-of-offense testimony is inconsistent with any theory of the case, and is frankly absurd. However, as Dr. Spitz explained in postconviction, we know nothing about the composition of this white fluid, and thus one cannot even make a determination that it is in fact indicative of sexual contact. PC-R. Vol. XVII, 349. The white fluid may have been the product of the victim's normal vaginal secretions. *Id.* at 351. Using the mere fact that this unidentified white fluid was present to estimate a time frame for the sexual contact, as Hall did at trial, is in Dr. Spitz's opinion a mis-evaluation of the evidence. *Id.* at 349. Furthermore, if Hall was correct in her estimation that the sexual contact occurred within an hour or two of when Hall saw Romines at 8:00 a.m., that would mean that the sexual activity occurred during the time that Romines was in the hospital between 3:30 a.m. and 8:00 a.m., a determination that does not have any scientific basis, *Id.* at 349, and

obviously makes no sense.

Dr. Spitz testified that "[t]here's really no physical evidence to [implicate] Mr. Fitzpatrick with the injuries that Laura Romines sustained." PC-R Vol. XVIII, 353. Furthermore, Dr. Spitz testified that the evidence does not lend itself to make the determination that there was forced sexual contact at all. *Id.* at 373.

Dr. Elizabeth Johnson

Dr. Elizabeth Johnson, Ph.D. in Immunology and Microbiology, with a B.S. in chemistry, is a forensic biology consultant with a specialty in DNA. Qualifications at PC-R. Vol. XVI, 150; CV at PC-R Vol. XIV, 2525-30 (Def. Ex. 2). Dr. Johnson was contacted by CCRC-Middle in the summer of 2006 and asked to review some discovery materials in Fitzpatrick's case, including FDLE reports and bench notes, trial transcripts, reports from BODE Laboratories, and this Court's opinion from direct appeal. *Id*. at 153.

In reviewing the trial testimony of Ruth McMahan, Dr. Johnson observed that McMahan was questioned about "motile sperm," and the term "motile sperm" was being incorrectly used to describe a sperm that still has a tail. *Id.* at 153-54. Despite the fact that there was never a motile sperm examination in this case, McMahan answered questions that used the term "motile" incorrectly, and she did not correct the questioner's misstatement. *Id.* at 154-55. As Dr. Johnson

explained, there is a difference between motile sperm and sperm with tails:

A motile sperm has to have a tail. But it is a sperm that is still moving. It's capable of swimming. And the only way that you can make an evaluation whether a sperm is motile or not is to make a wet mount slide so that it has a liquid medium in which to move in and in which you can observe it's moving. And that was never done in this case. Such slides were never prepared.

> The slides that were made were actually air dry. Now, a sperm can have a tail and it may no longer be motile. You can, certainly, even find a sperm on swabs in fabric that have been - are around for years. They're certainly not moving, but they may have a tail. So, it's very inappropriate to interchange those two terms. They're very different things.

Id. at 154-55.

Because no wet mount was made in this case, it was impossible to make an evaluation for whether the sperm retained their motility. PC-R Vol. XVI, 155. By looking at the dry mount slides that were created, McMahan was able to analyze whether or not the sperm had tails, but not whether they were motile. *Id.* at 155.

Ms. McMahan testified that she saw sperm with tails in some fields, and she put the absolute timing of the intercourse at fifteen hours prior to the collection of the swabs. *Id.* at 156. Dr. Johnson disagreed with this estimate based on available literature. *Id.* at 156. An article by J.E. Allard published in 1997 analyzed the

presence of sperm with and without tails from three different areas of vaginal swabbing and found that sperm with tails were easy to find after 24 hours. *Id.* at 157-58. A 2001 article by Collins and Bennett stated that "[t]he first sign of spermatozoa degeneration is the loss of spermatozoa degeneration is the loss of tail which occurs after approximately sixteen hours in the vagina." *Id.* at 159-60. In other words, the research indicates that sperm do not even begin to lose their tails until sixteen hours after they are deposited. *Id.* at 160. On the other hand, the Collins and Bennett article estimated that the average time for the loss of motility is two to three hours after intercourse. *Id.* at 158. The SAVE examination in this case was conducted at approximately 8:00 a.m. *Id.* at 160. McMahan's testimony that some of the sperm had lost their tails is consistent with timing of intercourse having occurred twenty to 23 hours earlier, between 9:00 a.m. and noon the previous day. *Id.* at 160-61.

Dr. Johnson described the testing that the FDLE conducted on the victim's underwear prior to the trial:

> They did tests for the presence of acid phosphotase, which is a protein found in higher levels of seminal fluid and those results were negative. And they also did sperm searches in several areas of the underwear with negative results.

PC-R Vol. XVI, 161. The blood that was on the underwear should not have

interfered with the acid phosphotase testing, and it would not have prevented an analyst from detecting sperm in a microscopic examination. *Id.* at 161-62.

Tissue collected from the victim's right hand fingernail clippings from the autopsy contained a large amount of DNA. The size of the sample was significant:

> Q. Would you expect this kind of tissue to be under a person's nails?
>
> A. If it doesn't belong to the victim, and this did not, I would not expect it to be there from any kind of casual contact.
>
> Q. So, for example, touching, sitting on a couch with somebody who was previously sitting on, riding a bus with somebody, is this the kind of DNA that would be under somebody's fingernails from that kind of incidental contact?
>
> A. No. Nor holding hands or handshaking. Not from casual contact.

(Testimony of Elizabeth Johnson, PC-R Vol. XVI, 170.) It is not common for people to have foreign tissue under their nails. *Id.* at 173. However, it is possible that the tissue could have been deposited during her attack, as notations that there was blood and sand under the nails when they were examined under a microscope indicate that she was not cleaned up very well at the hospital. *Id.* at 170.

According to Dr. Johnson, the DNA analysis conducted at the time of trial revealed a mixture of at least two donors. PC-R Vol. XVI, 184, 208. The major

donor of the mixture was that of an unknown person. Based on the limited testing that was conducted on the sample, FDLE analyst Ragsdale concluded in her report that she could not exclude the victim, Fitzpatrick, or Stephen Kirk as contributors to the mixture. What Ragsdale failed to state in her report is that none of these three individuals was the major contributor. *Id.* at 184.

Dr. Robert Smith

Dr. Smith, Ph.D. is a clinical psychologist and certified addiction specialist who was retained by CCRC to investigate and present mental and background mitigation in the postconviction proceedings. His testimony appears in the record of the evidentiary hearing at PC-R Vol. XV, 63-128. Generally his qualifications include *inter alia* a Ph.D. in clinical psychology from Kent State, appointment as Assistant Clinical Professor of Psychology at Case Western in Cleveland from 1983 to present, numerous other consultancies, appointments and publications, and he has testified as an expert witness in Florida and many other jurisdictions. See CV at PC ROA Vol. XIV, 2519-24 (Defense Exhibit 1). He reviewed every relevant record about Mr. Fitzpatrick's background in existence as well as all relevant portions of the trial record. PC-R Vol. XV, 73. He interviewed Mr. Fitzpatrick three times and conducted psychological testing. He also interviewed Mr. Fitzpatrick's mother, Mary Lewis, on two occasions, and interviewed

Fitzpatrick's father, sister, ex-wife and an individual who was active in Alcoholics Anonymous during the time that Fitzpatrick was attending AA. *Id.* 73-75. The substance of his postconviction testimony and that of Ms. Lewis is presented in detail below.

Postconviction Court's Findings

In addition to the written final order granting a new trial, which is reprinted accurately in the Appellant's Initial Brief, the postconviction judge conducted a hearing in open court at which she entertained argument from counsel and pronounced her rulings along with findings of fact. The transcript of that hearing is located at PC-R Vol. XIX, 591 -- 743. The court actively participated in the hearing, questioning counsel for both sides and referring extensively to the record of the trial and the postconviction proceedings, and to the judge's own notes. *Id.* at 698-737. The written final order is of course the lower court's ultimate disposition of the case, but the judge's oral pronouncements are informative. They are addressed in detail below.

STANDARD OF REVIEW

Appellee agrees with the legal discussion offered by the Appellant regarding standard of review, but adds the following. The postconviction judge made some pointed findings regarding the credibility of trial counsel, Mr. Eble, the experts

presented by CCRC, the defendant's mother and others. This Court has recited the standard of review regarding witness credibility findings many times. E.g. "[A]s long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *McLin v. State*, 827 So.2d 948, 954 n. 4 (Fla.2002) quoting *Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997). As this Court stated in *Porter v. State*, 788 So.2d 917 (Fla.2001):

> The reason we have required postconviction evidentiary hearings on capital postconviction motions claiming ineffective assistance of counsel is to provide a defendant an opportunity to present factual and expert evidence which was not presented at the trial of the case and to have the trial court evaluate and weigh that additional evidence. Following such an evidentiary hearing, we have held that the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference. So long as [the trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Id. at 923 (citations omitted, emphasis added) cited in *Sochor v. State*, 883 So. 2d 766, 781 (Fla. 2004).

SUMMARY OF ARGUMENT

This is a whodunit case. The victim, Laura Romines, was found in the early morning hours of April 18, 1996 by the side of the road, nearly nude, bleeding profusely from a knife wound to her neck. Although dazed and in shock, she was conscious and told a number of those who found her that the perpetrator was a white man named "Steve" who was in his early thirties and lived at Water's Edge Apartments. She received emergency treatment and underwent surgery but eventually expired after languishing 18 days in the hospital. The description and other information she had given at the scene implicated a man named Steve Kirk, who for a while was the main target of the investigation. Kirk, however, proved to have an alibi that satisfied the police and eventually was dropped as a suspect.

Mr. Fitzpatrick, who had been seen with the victim on the day before the crime, initially denied anything more than casual contact with her. However semen found in the victim's vagina contained DNA which was eventually found to match his. When confronted with this evidence, he admitted having consensual sex with the victim early on the day preceding her discovery, but continued to deny having any contact with her at the time she was attacked.

Aside from defense counsel's self-serving allusions to some completely undocumented telephone calls, which were expressly found to be lacking in credibility by the postconviction judge, there is no evidence that he sought assistance of any kind, whether in the form of co-counsel, investigative services beyond the mere service of subpoenas, experts in forensic sciences such as pathology and DNA analysis, which were obviously crucial in this case, or in mental health issues. The defense preparation for the guilt phase of the trial consisted of conducting discovery, pulling some scientific literature from a college library, and securing the presence of lay witnesses who could bolster the defendant's time line of events. Defense counsel conducted no penalty phase investigation or preparation. In his view, the fact that his client had said he did not want any mitigation in the event of a conviction was a sufficient reason for inaction.

Towards the conclusion of the guilt phase trial, the prosecutor, in his rebuttal closing argument, essentially conceded that much of his case as presented by lay witnesses was problematic. Instead, he urged the jury to "forget all that," and focus on all of the scientific evidence derived from the SAVE (sexual assault victim examination) on Romines at the hospital and subsequent laboratory analyses of the evidence that had been collected. That evidence, he said, proved that

Fitzpatrick was lying and that only he could have committed the crime. After some questions the jury returned a guilty verdict.

"That evidence," the scientific evidence expressly relied on by the prosecution to obtain a conviction, was either wholly debunked or seriously called into question at the postconviction hearing. Throughout the trial, the prosecutor, his expert serologist, and the defense lawyer who had supposedly educated himself on the subject, incorrectly conflated the terminology and interpretation of "motile sperm," which means sperm cells that are alive and moving, with "intact sperm," which means sperm cells that may be dead and unmoving but which still retain tails. There was no evaluation of sperm "motility" in this case, which would have involved placing the tissue sample on a wet mount slide and looking at it through a microscope. The slides were dry mounted, which would have killed any living cells. Once the slides were accurately characterized and the appropriate literature was consulted, the timing of events reported in Fitzpatrick's statements to the police turns out to be more consistent with the relevant scientific research than what was presented to the jury by the prosecutor at trial.

As discussed below, all of the forensic evidence in this case, given the proper expert scientific analysis, is consistent with innocence or at least unsupportive of guilt. The prosecutor argued that the absence of sperm on the

victim's underwear showed that she was sexually assaulted at the time of the attack. Fitzpatrick's sperm was found on the underwear in the postconviction proceedings, consistent with his report of consensual sexual activity earlier in the day. Tissue taken from under the victim's fingernails during the autopsy indicated the presence of a single DNA marker from what was then shown only to be some unknown and otherwise undescribed person. The prosecutor said it may have come from Dwayne Mercer. The judge disallowed defense counsel efforts to introduce the evidence because it was so vague and speculative. Postconviction analysis excluded Mercer and showed that the tissue contained a full, undifferentiated DNA profile from a male whose identity remains unknown,[1] and that the tissue sample had blood and sand mixed in it showing that it was likely deposited at the time of the crime.

The SAVE nurse, Rita Hall, who was used by the prosecutor as if she were a medical examiner, was flatly unqualified to offer her characterizations, interpretations and purported causation of what she saw during her examination of the victim. Trial counsel did not challenge her qualifications to testify to these opinions and conclusions either by way of a simple objection at trial, voir dire of her qualifications, expert testimony or in any other way. Left unchecked by an effective defense, the prosecutor led Ms. Hall through a lurid description of a

[1] FDLE declined to unload the profile into the CODIS system.

victim who endured being burned in her genital area with cigarettes, bit or stabbed on her breasts and sodomized. Ms. Hall also spoke of redness in the victim's vaginal area, and of a large amount of fluid in the vaginal vault, indicative of forced sexual activity. These "facts" were trumpeted by the prosecutor and eventually made it into this Court's opinion on direct appeal.

They were all debunked in postconviction. Dr. Spitz, the medical examiner called by CCRC at the postconviction hearing, whose qualifications are impressive, testified unequivocally that there was no forensic evidence to show that a sexual assault had taken place at all – a conclusion that eliminates two aggravators. Because this Court expressly relied on a felony murder theory of the case in affirming the lower court's denial of a judgment of acquittal, it calls into question whether this is a first degree murder case at all, regardless of who did the crime. The few sperm cells on the anal swab were likely the result of contamination simply from inserting the swab. Redness in the vaginal area was attributable to being catheterized for surgery. Fluid in the vaginal vault could have been anything, including menstrual flow, normal vaginal fluids or other things. The "cigarette burn" looked like a syphilis chancre. The "bite" wound could not be characterized as such, and in any event at least one of the wounds was also healing at the time it was photographed, meaning that it had nothing to do with the

crime.

In any event, Dr. Spitz testified point blank that Ms. Hall was unqualified to give any of this testimony. The Appellant emphasizes the point that defense counsel did conduct a cross examination in which Ms. Hall walked some of her more graphic opinions back a bit. The fact is they should never have been admitted in evidence in the first place. And even if they had, defense counsel did not counter them effectively by, for example, offering expert testimony from a real expert.

As to the penalty phase ineffectiveness grant of relief, the law is well settled that any purported waiver of mitigation by a defendant who has not been informed by an adequate investigation is invalid, and defense counsel conducted no investigation. His purported reason for inaction is legally unacceptable. The existence of mitigation was demonstrated at the evidentiary hearing, and prejudice is shown by, among other things, the fact that the trial judge's assessment of the defendant's formative years was simply inaccurate.

The postconviction court conducted a thorough hearing in this case and made detailed findings of facts and conclusions of law. Her decision to grant relief should be affirmed in all respects.

ARGUMENT

CLAIM I

THE POSTCONVICTION COURT DID NOT ERR IN GRANTING A NEW GUILT PHASE TRIAL

The Trial

On direct appeal of the judgment and sentence, the State admitted that the case against Fitzpatrick was circumstantial, but argued that the evidence – particularly the scientific evidence presented by the prosecution at trial – was sufficient to warrant affirming the trial judge's denial of a motion for judgment of acquittal. The State argued:

> The most damning evidence against [Fitzpatrick] is the fact that his semen was found in the victim, and, according to the SAVE (Sexual Assault Victim Examination) nurse [Rita Hall] who examined the victim, the amount of semen found indicated that the sex had taken place only one to two hours prior. . . . This testimony directly contradicted Appellant's only hypothesis of innocence: that he had consensual sex with the victim between 9:00 a.m. and noon the day before she was found stabbed on the side of the road at approximately 3:30 a.m. . . .The DNA testing done on the victim's underpants also contradicted Appellant's claim of consensual sex, as well as the timing of that sexual encounter. Where no semen was found on the underpants which were found pushed up under the victim's breasts and covered in blood, consensual sex was ruled out. . . . If Appellant and the victim had consensual sex in the morning hours the day before she was stabbed, his semen would have been found on her underwear. Additionally, if Appellant and the victim had

> sex, as Appellant claimed, some 20 to 24 hours prior to her SAVE exam which was conducted at 8:00 a.m. on August I7, 1996 . . . the amount of fluid found would no longer have been present. . . . Further, the motility of the sperm observed by the serologist suggested that the very longest the sperm cells could have been present in the victim's vagina would have been 15 hours before the sample was removed during the SAVE exam, or since 5:00 p.m. on August 17, 1996. Again, this scientific evidence contradicts Appellant's story that he had consensual sex with the victim between 9 a.m. and noon on August 17, 1996.

Answer Brief of Appellee [on direct appeal] in pages 7-9 (record citations omitted).

Indeed, the prosecutor made the following argument in his rebuttal closing statement to the jury:

> All right. Let's go at it this way. Let's forget Steve Kirk. Let's forget A. J. Howard, Melanie Yarborough, Cindy Young, Jeff Bousquet [the lead detective], Stacey Morrison and Arnold.[1] Everybody but three folks and one piece of evidence.
>
> Let's forget the statements made by Fitzpatrick. The identifications made by the people in this courtroom. By Cindy Martin -- or Cindy Young, who could or could not identify him, by A. J. [Howard], by Melanie, by Diane Fairbanks. Forget it all.

[1]Lieutenant William Arnold was the EMS first responder who was told by the victim that the perpetrator was a "Steve" who lived at the Water's Edge Apartments.

You have the right to believe or disbelieve any witness you want to. But I would suggest to you that the testimony of Lee Miller, the medical examiner, Dr. McMahan, and Rita Hall have not been damaged. . .

Dr. McMahan says this is not an exact science. I cannot tell you specifically. I can tell you that the literature in my experience to date . . . indicates that you will find live, motile sperm up to fifteen hours after it's been deposited.

Whoever, therefore, according to Dr. McMahan, had sex with this lady, had sex with her sometime fifteen hours preceding 8:00 a.m.on the morning of the 18th. . .

Rita Hall. Based upon my examination of Laura Romines and the amount of semen that I saw, not only in the vaginal cavity, but in the anus, I'm telling you that no more than an hour. At most, two.

Okay. Lee Miller, doctor. Forensic Pathologist. The wounds that were inflicted upon Laura Romines, these incised wounds of her throat, were inflicted a very short period of time before she was discovered. Very short. Otherwise, she would have bled out.

Dr. McMahan says, notwithstanding the cross-examination, there is no semen in those panties. There was none revealed by the Woods Lamp. There was none revealed by the scientific test that I was performing. There was none.

She did not have her panties on after she was raped. If she had -- and again, underlying the amount seminal fluid that was found in her body, the fact that there was that much by itself . . . the law of gravity indicates that if she's on her feet, it's going to drip out. It's just that indelicate, but it's true.

> There is no semen in her panties. Her panties were removed. She had sex, and she never put them back on, because they were around her waist. If she had had sex before these wounds were inflicted upon her body, there would be A, less semen in her than there was. Or B, semen in her panties. And you don't have either one of them. Whoever stabbed her had sex with her right then and there, and that is him.
>
> Forget A.J., forget Melanie, forget Steve Kirk. Look at the panties. Look at the medical evidence. Look at the scientific evidence. And the only person you have is Michael Peter Fitzpatrick. It is physically, scientifically impossible for there to have been anyone else involved.

ROA Vol. 21, T1446-48.

During deliberations the jury submitted three questions about some testimony that the victim's clothing possibly had been burned in a pit on the property of a witness, Albert J. Howard, and that other people may have been seen wearing some articles of her clothing. These events, if they happened, would have occurred around August 18, 1996. The judge told the jury that he could not pick and choose what portions of the relevant witness's testimony could be read back but would have to read back their entire testimony, which would take about seven hours. The jurors, who had begun deliberations late in the day, declined that offer and returned a verdict at 11:00 pm. ROA Vol. XXI, T1478-83.

The guilt phase trial took place March 26, 2001 through March 30, 2001, resulting in a guilty verdict. The penalty phase trial took place April 5, 2001 and

resulted in a 10-2 recommendation of the death sentence. On August 10, 2001, about four months after the trial, defense counsel (unsuccessfully) filed a motion to get a forensic investigator and for "excavation" of Howard's property to look at the burn pit issue. ROA Vol. VI, 1123. That was the first and last time that defense counsel asked for expert assistance of any kind. He also asked to conduct a re-deposition of the State's serologist, Ruth McMahan. These motions were taken up at the joint motion for new trial/*Spencer* hearing on September 2001. After a number of untimeliness objections the prosecutor finally had this to say:

> The motion for the investigator and for an order authorizing the excavation of Mr. Howard's property, we object to that on two grounds. Number one, this is untimely. This is information that was readily available to -- at least thoughts which were readily available to Mr. Eble prior to the swearing of the jury and the trial of this case . . .
>
> With regard to the Motion for the costs for the confidential examination of the microscopic slides, again, this is something that should have been done pre-trial. These witnesses were available pre-trial. The deposition was taken. If it had been more in-depth or if more questions had been asked, perhaps, this information would have been revealed. The fact that it wasn't revealed does not now give Mr. Eble the opportunity to go back and start preparing to try this case all over again. This is just simply untimely. And if this is the basis for postconviction relief, should the Defendant get that far, then, albeit, there it is [sic].
>
> Finally, with regard to the Motion to Compel and authorizing the taking of the deposition of Ms.

> McMahan, number 1, again, untimely.
>
> Number 2, Judge, I'm assuming that Mr. Eble was well aware of the fact, in his preparation for this trial, that he had this study from this laboratory. And he was well aware of that at the time that Ms. McMahan was deposed or shortly after that. Had he wanted to go in and make her aware of the fact that he was going to ask her about this during the course of the trial so that he could -- instead of trying to ambush her with this at trial, I think this is the choice Mr. Eble made and now he's going to have to live with it, the fact she was not familiar with the tests that he was attempting to impeach her with, something he should have found out pre-trial. And it was a choice, I assume, that he made and it backfired on him.
>
> So, in each of these . . . these three motions, I object on the grounds they're untimely and the specific objection as previously raised.

ROA Vol. IX, 1533-36. The judge denied all the motions without comment. CCRC agrees with the prosecutor's remarks.

Forensic Evidence Regarding the Victim's Underwear

Prior to trial the FDLE tested the underwear for the presence of acid phosphatase, a protein found in high levels in seminal fluid, and those results were negative. They also did sperm searches in several areas of the underwear with negative results. Dr. Johnson said that if Fitzpatrick's trial attorney had contacted her prior to his trial in 2001 regarding the results of the FDLE's testing of the victim's underwear, she would have advised them to perform independent tests at a

different laboratory, because it is fairly common for one lab to miss sperm and a second lab to find it. PC-R Vol. XVI, 163.

BODE Laboratories was able to locate sperm on the victim's underwear. The methodology described by Dr. Angela Williamson involved dividing the underwear into eleven areas each of which was then scraped with s scalpel blade. Bode found sperm in 9 of the 11 areas. PC-R Vol. XVII, 261-62. Andrea Borchardt-Gardner performed DNA analysis on 2 of the scrapings, from the interior front upper left region near the side strap and interior back left side strap. She obtained a DNA profile from each sample and determined that Fitzpatrick was the contributor. As the postconviction court noted, "Without the expert witnesses and analysis produced at the 3.851 evidentiary hearing described above, at trial the State freely and strenuously argued at closing, 'There's not a bit of semen on those panties.'" PC-R V5, 720. Quoting from ROA Vol. XX, TT1345.

DNA from the Victim's Fingernails

Defense counsel tried but failed to introduce evidence obtained from the victim's fingernails during the autopsy. The judge ruled that it was not relevant. This is how this Court described the proffer:

> At trial, the court excluded evidence of fingernail scrapings indicating that the victim could be eliminated from the DNA mixture tested from her right hand, but neither Fitzpatrick nor Stephen Kirk could be eliminated; both Fitzpatrick and Stephen Kirk could be eliminated

> from the mixture tested from her left hand but the victim could not be eliminated; there was evidence of the DNA of another, unknown person in the tissue from the right hand clippings; and the DNA evidence under the victim's fingernails could have been there for a long period of time, depending on when she had last washed her hands or cleaned her nails. The trial court found that "the proffer of the evidence is of a nature that it would be irrelevant and immaterial in its composition ... for the reason that the proffered evidence is inconsequential and does not lead to any conclusion of any kind."

Fitzpatrick v. State, 900 So. 2d 495, 521 (Fla. 2005). That missing relevancy was provided through expert testimony at the postconviction hearing. Dr. Johnson pointed out that there was visible tissue from the fingernail clippings on the right hand and that a large quantity of DNA was collected. She said that she would not expect that to result from any kind of casual contact (i.e. holding hands, shaking hands, incidental contact). She also noted that there was blood and sand under the victim's fingernails when they were examined under a microscope, which strongly indicates that the sample was deposited at the scene of the crime. It also suggests that the victim's hands were not cleaned up very well at the hospital. PC-R Vol. XVI, 170. Dr. Johnson said it is not common that people have foreign tissue under their nails. *Id.* 173.

According to Dr. Angela Williamson, BODE obtained a full DNA profile from a male contributor. BODE used STR testing, which was available in 2001.

At trial, FDLE used DQ Alpha testing which is not as discriminating as STR testing. PC-R Vol. XVII, 52-54. Fitzpatrick, Kirk, and Romines were all excluded as contributors. Subsequent comparison with DNA obtained during the postconviction proceedings from Dwayne Mercer excluded him as a contributor as well, thus debunking the prosecutor's argument both to the jury in opening statements and during the defense proffer. It shows that there was DNA from a large amount of tissue mixed with sand and blood found under the victim's fingernails belonging to a male whose identity remains unknown to this day, but who in any event is not Mr. Fitzpatrick.

On direct appeal this Court declined to address whether the trial court's rejection of the defense proffer at trial was error and instead denied relief on harmlessness grounds. The Court observed, *inter alia:*

> The proffered testimony did not establish any material conclusion due to the expert's inability to accurately determine how long the DNA had been under the victim's fingernails. The proffered evidence also failed to eliminate Fitzpatrick. The tissue from the unknown person could have been explained through the trial testimony of Dwayne Mercer, who testified that when he was with the victim at the crime scene she squeezed his arm and her fingernails went into his flesh.

Fitzpatrick, 900 So.2d at 521. These factual circumstances have now been debunked. Dwayne Mercer has been excluded. Instead of a single, unexplained

DNA marker, postconviction testing of the tissue yielded a full DNA profile of a male, who was the major contributor to the extracted DNA. Blood and dirt were intermixed with the tissue sample, indicating both that the victim's hands were not cleaned up at the hospital and that the tissue was deposited around the time of the crime. Dr. Spitz pointed out that a medical examiner can take much deeper scrapings and be much more invasive with a deceased person than would be possible with someone who was living. That would explain why a profile was obtained from the samples collected by the medical examiner and not from the samples collected during the SAVE exam. PC-R Vol. XVII, 352-53. He also said that while Laura Romines was in the hospital he would expect the hospital staff to be wearing latex gloves, thus reducing the possibility that the tissue was deposited while she was there. *Id.*

This Court has explained the harmless error test many times.

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict

State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (citation omitted). At a minimum, the factual basis for this Court's harmless error analysis on direct appeal has been called into question.

Robyn Ragsdale, FDLE's DNA analyst, testified at the postconviction hearing that FDLE switched from using DQ Alpha Polymarker and RFLP testing to STR testing in early 1999. FDLE was not asked to do any additional testing using the new STR method, even though it was available prior to trial. If they had been asked or ordered to do additional testing, they would have. PC-R Vol. XVIII, 408-09.

The postconviction court found as follows:

> C. Claim I (F) - Ineffective assistance of Counsel (IAC)/guilt phase: failure to seek testing on fingernail scrapings from SAVE kit. BURDEN MET.
>
> 1. Dr. Angela Louise Williamson testified as to the results of the BODE examination of the right hand victim fingernail scrapings obtained by the Medical Examiner [WJ10A] [There has been significant confusion as to whether the SAVE kit scrapings needed to be tested for DNA or the Medical Examiner's scrapings and clippings.] BODE determined that it was a full DNA profile, from a single source, specifically not the Defendant, the victim, Steve Kirk (from the Water's Edge Apartments), nor was it the first responder, Mr. Mercer who found the victim (and in turn had her fingernails dug into his arm). It was from an unknown male contributor.

> 2. Robin Ragsdale, the long time FDLE Crime Lab Analyst and now Supervisor, has commendable credentials and experience in serological and DNA analysis though her breadth of experience in DNA pales compared with the Bode defense witnesses. She disputed whether the DNA from the right hand finger nail scrapings was a full DNA profile from a single contributor or mixed contributors.
>
> 3. This significantly undermines the State's closing argument and theory. Undoubtedly, a jury hearing of an unknown male, not any of the expected males or the defendant, leaving a clump of tissue [DNA] under the victim's fingernails undermines the confidence in the outcome of the verdict.

PC-R Vol. V, 721. The court's finding should be affirmed.

Motile vs. Intact Sperm

During the trial, everybody who addressed the subject, including Dr. Ruth McMahan who should have known better, used the term "motile" to describe sperm that still has a tail. In fact, there was never an evaluation in this case for sperm motility, which would simply have involved placing a sample on a wet slide and looking at it through a microscope. The postconviction court accurately termed the unobjected-to, un-clarified and even un-commented on conflation of "intact" with "motile" at trial "foundational."

Dr. Johnson described the distinction between a motile sperm and a sperm

with a tail: A motile sperm is still moving. A sperm cell can have a tail and no longer be motile. The only way to make an evaluation of whether a sperm is motile is to make a wet mount slide. In this case, the slides that were made were air dried. PC-R Vil. XVI, 154-55. She did not agree with Dr. McMahan's testimony based on her observation of sperm with tails that the outside timing of the sex was 15 hours prior to collection of the evidence. PC-R Vol. XVI, 156.

Dr. Johnson discussed the literature on the subject. One study found sperm with tails in the vagina after 20 hours, 24 hours, and 48 hours. Another asserted that in the living victim, motile spermatozoa are generally not seen after 12 hours. This may had been what led to the inaccurate trial testimony. Properly interpreted Ruth McMahan's testimony that some of the sperm had lost their tails is consistent with the sperm being deposited in the victim 20 to 23 hours before the SAVE exam, between 9 am and noon the previous day. PC-R Vol. XVI, 160-61

Dr. Spitz said that 15 to 18 hours is the generally accepted time frame when the tails begin to separate from the heads. PC-R Vol. XVII, 345. "Here we have a majority of naked sperm heads with only some intact heads and tails. So it indicates to me that we are dealing with a range of – a time frame of approximately 24 hours from the time of evidence collection, which is at approximately 8 o'clock in the morning, back 24 hour period, give or take a couple of hours, indicating

when the sexual contact occurred." PC-R Vol. XVII, 345.

Robyn Ragsdale, quoted this from the Forensic Science Handbook (1988): "It is common to recover intact nonmotile cells from the vagina up to 16 hours and less commonly as long as 144 hours postcoitus." PC-R Vol. XVIII, 421.

The timeline in this case is absolutely critical. The postconviction court found as follows:

> 7. Dr. Elizabeth Johnson, a Ph.D. in Immunology and Microbiology, with a B.S. in chemistry, is a forensic biology consultant with a specialty in DNA. Regarding the description of the sperm found in the victim, Dr. Johnson testified that Ms. Ruth McMahan incorrectly interchanged "motile" (or moving) to describe "sperm that still has a tail", a foundational flaw. See Evidentiary Hearing transcript vol. ii, p. 154, lines 6-10. This vastly changes the timeline from a couple hours to arguably up to 23-24 hours prior for the depositing of the sperm in the victim.
>
> 8. The victim's underwear, the garment initially believed to be a sports bra, and found by FDLE to be stained a brownish red with no sperm evident, underwent extensive testing, by BODE Labs by order of the undersigned, for the presence of sperm heads. Dr. Angela Louise Williamson, director of Bode Technology, a Ph.D. in molecular biochemistry, testified at the 3.851 evidentiary hearing that the "brownish red stain" was blood and, using a method available since 2001, located 11 different areas of sperm. This sperm located on the underwear was subsequently matched to the DNA of the Defendant. This match is without dispute.

> 9. At trial, Detective Bosquet, relying upon what appears to be inaccurate or at least disputed findings by FDLE, testified that he confronted the Defendant regarding the timing of sex with the victim by pointing out: "....if he had sex with her in the morning and semen was leaking out of her that evening when she was found, there would be some type of fluid in her panties; however, none mis found. He could not give me a reason." [Trial Transcript p. 1016, lines 14-22].
>
> 10. Without the expert witnesses and analysis produced at the 3.851 Evidentiary Hearing described above, at trial the State freely and strenuously, argued at closing "There's not a bit of semen on those panties". [Trial Transcript p. 1345, lines 24-25]. "She was anally raped, she was vaginally raped...burnt in the vaginal area." [Trial Transcript p. 1362, lines 13- 19]. Disputing the time line of consensual sex that the defendant made in statements to law enforcement, the State in closing says "...the sperm is still alive at eight o'clock on the morning of the 18th...but according to the testimony of Dr. McMahan, that's not possible...it didn't happen." [Trial Transcript p. 1366, line 18-p. 1367, line 6]. . . . The Supreme Court, reciting this now questionable evidence, rejected the claim of insufficiency to submit the sexual battery charge to the jury, and further, found it sufficiently strong to support the aggravating circumstance under section 921.141(5)(d) of the Florida Statutes.

PC-R Vol. V, 720 citing *State v. Fitzpatrick*. 900 So.2d 495, at 524 & 525 (Fla. 2005).

Contamination of the Anal Swab

The point here should have been fairly obvious. Dr. Johnson said that if a

few sperm cells are found on an anal swab and there was sperm in the vaginal tract, the likelihood is drainage from the vaginal area back to the rectal area, or contamination of the swab during collection. PC-R Vol. XVI, 165. She also discussed literature concerning a study of living victims who reported vaginal rape but not sodomy. In a few of the cases they even cleansed the area around the rectum. Nevertheless a few sperm cells were on the anal swabs in all cases.

Dr. Spitz said:

> Ms. Hall makes the comment and testifies that the swab she used, in fact collected, was placed into the deeper part of the anal canal cavity, and, therefore, the positive result of three sperm heads indicates that there was anal intercourse.
>
> The fact of the matter is that it is a very high, high probability, if there is semen in the vaginal cavity, that there is contamination of the perineum, which is the skin between the anus and the vagina, as well as the anus itself. And to state that you can put the swab in through the anus but then state that you recovered specimens from deep within the anal cavity indicative on anal intercourse is completely without scientific basis because, as it's glaringly obvious, once you put the swab against the outside of the anus, the anal skin itself, you are now in the process of collecting specimens. And there is a very high probability of contamination of that part of the anatomy due to gravitational forces causing fluid to seep around the perineum and the anus.
>
> So there's no way for Ms. Hall to know whether those three sperm heads were in fact collected from the outer portion of the anus or from deeper within the anal cavity. Furthermore, the fact that there are only three sperm

> heads makes it a very high likelihood that this is in fact contamination and not indicative of any type of anal sexual activity.

PC-R Vol. XVII, 342-43. The postconviction court observed "Dr. Spitz placed at issue the question of whether there was "forced sexual contact" and anal intercourse (as in a rape). Rather, he testified to a very high probability of contamination not indicative of any type of anal sexual activity."

Rita Hall Testifying Outside Her Area of Expertise

Dr. Spitz said:

> Rita Hall is a – what I would classify or who I would classify as a forensic nurse examiner, and this is an individual who has training in the collection of evidence. And that collection of sexual assault specimens, the documentation of how and where the evidence is collected from, the proper documentation of that evidence, proper packaging of that evidence, and understanding of the importance of chain of custody.
>
> Q: What is her role with regard to interpretation of the raw data?
>
> Dr. Spitz: Generally there's – there's little role that forensic nurse examiners have with the interpretation of the evidence. Mainly, it's an evidence-collection role. The evaluation of that evidence often occurs at the crime lab, the DNA section of a crime lab. The evaluation of injuries is typically done by a physician who has expertise in that area.
>
> Q: Basically, as you saw, she did quite a bit of interpretation of what she saw. Do you believe that she –

> in general terms, did she exceed the scope of her expertise?
>
> Dr. Spitz: I do think she exceeded the scope, and more than that, I think that things that she did comment on were very misleading.

PC-R Vol. XVII, 334.

With regard to Ms. Hall's testimony about a purported bite wound Dr. Spitz said that she was "overstepping her bounds and interpreting wounds and injuries." Also, he simply did not agree that the evidence reflected a bite mark. According to Dr. Spitz, there was no penetrating wound of the breast and the discoloration reflected at most only nonspecific injury. He would not characterize it as a bite mark. PC-R Vol. XVII, 340. "[T]he wound that is being characterized as a bite mark, even a potential bite mark is nothing more than a nonspecific bruise that could have been caused in any number of ways. And I think it's misleading to characterize it as a sharp-force injury, i.e. Stab wound. And it's misleading to characterize it as a bite mark, because it does not have those characteristics. And I think it's most appropriately characterized as a nonspecific bruise." PC-R Vol. XVII, 365. "I wouldn't characterize it as a stab wound or a bite mark. I'd characterize it as a more superficial wound." *Id.* 370. He pointed out that the appropriate way to analyze a suspected bite wound would be to swab it in hopes of capturing some DNA from the perpetrator's saliva.

With regard to purported cigarette burns, Dr. Spitz observed that one of them was clearly showing signs of healing, indicative that it existed previously and was unrelated to the crime. The "very rounded, punched-out type lesion in the pubic area could be a chancre associated with syphilis." PC-R V17 p. 3336-37

Regarding the testimony about fluid in the victim's vaginal cavity Dr. Spitz observed that:

> Rita Hall testified that because of the amount of fluid in the victim's vagina, the sex would have had to have occurred within an hour or two of the SAVE exam. Since she was in the hospital during that time, unless she is saying that something happened to her in the hospital that is an impossibility.
>
> The quantity of fluid doesn't tell you any anything unless you know what the fluid is and you know the component of that fluid to make a determination that is in fact indicative of sexual contact. Rita Hall did not do any tests to determine what the fluid was.

PC-R Vol. XVII. 348-50. Other sources of the fluid include normal vaginal secretions, small amounts of hemorrhage related to injury, or the body's own fluids. PC-R Vol. XVII, 351.

At trial, Rita Hall said that when she looked at the victim's anal area, "Instead of it being a light pink or pale pink, it was a deeper pink and in some places red, and this would indicate that there was pressure on the area from

something penetrating the area." Dr. Spitz disagreed with that opinion and pointed out that when the victim was examined there was already a urinary catheter inserted, which can cause redness and swelling.

Elements of the Offense and Aggravating Circumstances

On the penultimate question of whether there was evidence of forced sexual contact/anal intercourse/linking Fitzpatrick to the crime, Dr. Daniel Spitz said that the evidence in this case did not establish that there was forced sexual contact. Nor did the evidence in this case establish that there was anal intercourse. PC-R Vol. XVII, 342. And overall, "There's really no physical evidence to [implicate] Mr. Fitzpatrick with the injuries that Laura Romines sustained." PC-R Vol. XVII, 353.

The postconviction court referred to the passage in this Court's opinion on direct appeal that says, "The State presented competent, substantial evidence from which the jury could find that there was sufficient evidence that the killing occurred during a sexual battery, and therefore the trial court did not err in denying Fitzpatrick's motion for judgment of acquittal." Further, in weighing the evidence and affirming the denial of judgment of acquittal on premeditated murder, this Court wrote that if there was any error by the trial court, the error would be "harmless because the evidence clearly supported a first-degree murder conviction on a felony murder theory." *Fitzpatrick* at 509 (Fla. 2005). The postconviction

court said this:

> The reasonableness and likelihood of a different result is all the more evident upon an examination of the reliance by the Supreme Court upon the limited, virtually uncontroverted evidence during the guilt phase. Contrasted with the evidence introduced during the 3.851, it would have reasonably been expected to persuade a jury (and the Supreme Court) that the evidence did not support the murder verdict. . . .
>
> State's witness, Rita Hall, a master's level ARNP, who set up the Florida protocol for SAVE exams and the collection of evidence, made assumptions, "felt" things "could have been...maybe...", had "suspicions", "appeared to be..."-- all as to critical findings outside her area of expertise and without a scientific basis. Her testimony was successfully challenged by the testimony of Dr. Daniel Spitz, an anatomical clinical forensic pathologist, licensed in Florida and Michigan, editor of a forensic text on training people in evidence collection, instructor in rape and homicide evidence collection. . . . Dr. Spitz testified that Rita Hall exceeded her scope of expertise by interpreting and evaluating the injuries. He rejected her description of a wound as a "bite wound", "cigarette burns", and redness in the pubic area from a forced sexual event.

PC-R Vol. V, 719.

Defense counsel's failure to challenge the admissibility of Rita Hall's characterizations, classifications, speculations about causality of the victim's wounds and so on is remarkable. Essentially she was permitted to play the role in the prosecutor's case that is usually reserved for the medical examiner. A medical examiner is a critical witness in any homicide case, and is frequently either the star witness for the prosecution or one of them. Learning to deal with this type of evidence is a bedrock obligation of any lawyer who aspires to defend a homicide case, let alone a capital case with potential aggravating circumstances at issue. Defense counsel's only explanation for failing to object to Ms. Hall's testimony during trial, file a pretrial motion in limine, conduct a voir dire of her qualifications, consult an expert or do anything else was that he thought Ms. Hall had been permitted to testify the way she did in other cases. Not only is that below any imaginable standard of reasonableness – by definition there was no reasoning involved – but millions of nonlawyer fans of books and movies about this sort of thing would be perplexed by his sheer lack of curiosity.

That said, this case cried out for scrutiny. In many homicide cases the cause and time of death are all too obvious. Here, the victim languished in the hospital for 18 days before she expired. All the experts agree that if she had been in better shape she might well have survived to tell her side of the story. Many of her

wounds had healed by the time of the autopsy. As the postconviction court pointed out, Rita Hall's testimony was the basis for not only potentially two aggravators but for the finding that there had been a sexual battery at all. The State, the trial court and this Court all expressly relied on a felony murder theory of the case. Ineffective assistance of counsel on this point alone should undermine confidence not only in the death penalty, but in whether this should ever have been a first degree murder case to begin with.

The Victim's "Statements"

Kyle Lester Hughes, who worked in the Corrections Bureau of the Pasco County Sheriff's Office, was one of the first responders who discovered the victim in the early morning hours of August 18, 1996. He described her as being "real scared" and said that she "appeared to be in shock," but said that she calmed down somewhat after he showed her his identification and let her know that he worked for the sheriff's department. ROA Vol. XV, pp. 449-50. When Hughes asked her who did that to her, she gave the name "Steve." ROA Vol. XV, p. 450. When Hughes asked her where "Steve" lived, she said, "Water's Edge." ROA Vol. XV, pp. 450, 455-56. The postconviction court, referring to the trial record, noted this excerpt from the transcript: "Q & A of first responder, Kyle Lester Hughes: "Did you ask her who had done this to her?" "Yes, I did." "And what did she say?" "She had gave the name 'Steve'." "Okay. Did you ask her where Steve lived?"..

"Water's Edge." PC-R Vol. V, 719 n.2.

Lieutenant paramedic William Arnold of Pasco County Fire Rescue was dispatched to the scene. ROA Vol. XV, pp. 482-83. Arnold asked the victim who had attacked her and got the name, "Steve." ROA Vol. XV, p. 486. Lt. Arnold started off his testimony by agreeing with the prosecutor's leading questions about Ms. Romines going in and out of consciousness,[2] but he said this on cross examination:

> Q. [S]he was alert at that time, wasn't she?
>
> A. Alert enough to say the name Steve. Yes, sir.
>
> Q. Well, as a matter of fact, you asked her repeatedly if it was Steve who had cut her throat, and she shook her head yes repeatedly, correct?
>
> A. Yes, sir.
>
> Q. As a matter of fact, that's what you put in your report . . . That you wrote four years ago, right?
>
> Q. You got more information out of her, though too, didn't you? . . . Didn't you learn from her that it was a white male, approximately thirty years of age . . .
>
> A. Let me go to my report. Yes, sir. From my report it was approximately thirty years, white male. . . .
>
> Q. You also got Waters Edge Apartments from her, didn't you?

[2]The judge eventually sustained an objection.

A. Yes, sir.

Q. So she was alert enough and responsive enough and answered the questions as to who cut her throat to tell you Steve; to repeatedly reaffirm that to you; to describe him as a white male, thirty years . . .

* * *

Q. And as a matter of fact, during your questioning of her, she actually verbalized when you were questioning her that, "It hurts to talk"?

A. Yes, sir.

Q. Pretty indicative of being aware of what she's feeling and thinking at that time?

A. Yes, sir.

ROA Vol. XV, 490-92.

When Deputy William Tierney PCSO arrived on the scene, Laura Romines was in the ambulance. ROA Vol. XV, p. 476. He said that she whispered to Lt. Arnold that "Steve" did this to her, and that he lived at Water's Edge Apartments. ROA Vol. XV, pp. 476-477, 479-480. She also indicated that she was cut at the location where she was found, and that she arrived at the location in a vehicle. ROA Vol. XV, p. 480.

All in all this does not sound like someone who did not understand the questions, or what was at stake.

On direct appeal this Court said:

"Steve" was later presumed to be Stephen Kirk, who

> became a suspect. At trial, the nature of Romines' relationship with Kirk was revealed. Jeff Smedley, a corporal with the sheriff's office, testified that on August 17, 1996, he responded to a call from Water's Edge Apartments. There, he was informed that Romines had been staying with Kirk and Barbara Simler, and was no longer welcome on the premises. Smedley discovered that Kirk met Romines at the motel where he worked as a security guard, and offered Romines a place to stay after she was beaten up by her boyfriend, Joe Galbert. The police eliminated Galbert as a suspect because he was in jail at the time of Romines' stabbing.
>
> A significant amount of investigative evidence exculpated Kirk of Romines' sexual battery and murder. The DNA profile developed from Romines' vaginal swabs was not consistent with Kirk's DNA profile; numerous witnesses, including coworkers and guests at the motel where Kirk was working as a security guard, testified regarding his whereabouts that night; and Kirk's vehicle was processed for possible blood evidence but no results were procured.

Fitzpatrick v. State, 503-04 n.1.

The postconviction court granted relief, *inter alia*, on Fitzpatrick's claim that trial counsel was ineffective due to his failure to retain forensic pathologist/medical professional to testify on effect of medications given to the victim in the hospital. During the postconviction evidentiary hearing Dr. Spitz addressed the victim's medical condition when she was questioned by the lead detective after her surgery. The hospital drug screen showed that she was intoxicated by alcohol. After surgical intervention to repair some of her wounds, she was questioned again. At that point, she had tubes in her to assist her with breathing. She was suffering from

the effects of her injuries, as well as being under the influence of morphine and Ativan, which were given to her for sedative purposes and pain control**.** Although these medications did not result in her being unconscious, she was sedated. That sedation would play a role in impairing her cognitive ability. PC-R Vol. XVII, 325-37

Dr. Spitz reviewed police reports regarding the efforts to obtain statements from the victim when she was hospitalized. One of the officers stated that he was concerned due to the fact that she was fading in and out of consciousness that she was not understanding the questioning and was beginning to have severe breathing difficulties to the point where he didn't feel that she was understanding what he was asking. At that point, he stopped the questioning because he felt that she was fading in and out of consciousness and didn't understand what he was asking. PC-R Vol. XVII, 327. When she was questioned at the scene, the victim was intoxicated by alcohol and had suffered severe trauma. However, she seemed to understand the questioning and she answered the questions in an appropriate fashion. Aside from the alcohol, she was not under the influence of narcotics or in an intubated state. She was able to respond verbally, and the nature of her verbal response indicated that she understood the questioning. *Id.*, 328

The postconviction court found ineffectiveness in that the evidence presented in postconviction would have given the jury an alternative view of "the

physical condition of the victim at the hospital, including the impact of the Morphine, Ativan (pain medication) and intubation on her cognitive ability to competently respond to questions of law enforcement in her hearsay statements as to whether she maintained that "Steve" did this to her, as she had said when first discovered." PC-R Vol. V, 719. Referring to this Court's disposition on direct appeal of a claim that the victim's "statements" to the lead detective should have been excluded as hearsay, the postconviction court said: "The Court, in affirming the introduction of the hearsay statements given by the victim to law enforcement at the hospital, noted that jurors could "assess...on their own the reliability of [victim's] statements." See *State v. Fitzpatrick*. 900 So.2d 495 at 515 n.7. Had trial counsel obtained an expert such as Dr. Daniel Spitz, the jurors would have more medical testimony to consider in weighing the reliability of those statements in light of the impact of the medications." *Id.*

As part of its case in chief, the State put on what was essentially a mini-case in defense of Stephen Kirk. Kirk himself always denied any crime. The State put on five witnesses who said they saw the security guard at the Motel 6 (Kirk) at various times on the night of August 17/early morning of August 18 to show that he did not leave the premises during his shift. ROA Vol. XVI, 687-720. Kirk did acknowledge that he vacuumed out his vehicle on the morning of August 18 when his shift ended. ROA Vol. XVI, 659.

Diane Marie Fairbanks was assistant manager for Water's Edge Apartments in Land 0' Lakes in August, 1996. ROA Vol. XX, pp. 1246-47. She lived there with Michael Fitzpatrick, who was her boyfriend. ROA Vol. XX, p. 1247. She said there were four "Steves" living at Water's Edge while she was assistant manager there. Vol. XX, pp. 1265-67. She gave copies of her files pertaining to these "Steves" to Detective Bousquet in 1996. ROA Vol. XX, 1266-67) One of the "Steves" broke his lease, moved out of his apartment, and left the state before Det. Bousquet asked Fairbanks for her records. ROA Vol. XX, 1266.

In any event, Michael Peter Fitzpatrick is not and never has been known as "Steve." Defense counsel's failure to support the thesis that her statements at the scene were more reliable than her purported responses at the hospital -- when she had undergone surgery, was intubated and heavily sedated -- with available expert testimony was an instance of prejudicial ineffective assistance of counsel.

ABA Guidelines

Defense counsel exhibited a pattern either of being unaware of the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases (1989) or of ignoring them. For example, although the postconviction judge declined to grant relief on a claim predicated on Guideline 2.1 which advises appointment of two attorneys in a capital case, she did consider defense counsel's failure to seek the assistance of co-counsel as a component of her prejudice

analysis. See *supra.* It is also ironic that Mr. Ivie sought and obtained Mr. Eble's appointment as co-counsel solely on the basis of that guideline, and then left Mr. Eble on his own. In any event, the postconviction court found:

> [Defense counsel] did not seek experts to assist him in effectively examining the FDLE experts on DNA, blood, and semen. No Motions were filed or argued to seek such experts prior to trial. . . His decisions were not tactical. In response to inquiry by defense, (referencing ABA Guideline 11.5.1(b)(9): "pretrial motions ...may be necessary...including independent and confidential investigative resources"), as to whether Mr. Eble had ever filed such pretrial motion, his response was simply "If it wasn't filed, then it wasn't." [Citing PC-R Add. Vol. II, p.178, line 15] . . . His only request for experts was made after the verdict and penalty phase, during the course of arguing motions immediately preceding the *Spencer* hearing, ***53 months after his appointment to the case.***

PC-R Vol. V, 717-18 (emphasis in the original).

The Postconviction Court's Remarks

What follows are detailed excerpts from the postconviction judge's oral remarks at the conclusion of the evidentiary hearing. The judge first observed generally that trial counsel, Mr. Eble, "testified vaguely. He has scant notes. . . . Mr. Ivie, who had gotten Mr. Eble in, allegedly as second chair, ceases appearing in the record, although there isn't a formal withdraw . . . Mr. Ivie failed to be a part of this case. That left Mr. Eble, essentially, on his own." The court observed that in this postconviction capital case, Mr. Eble "hadn't even reviewed how many

capital cases he had done. . . Had virtually no notes. His recollection varied as he narrated his answers and talked himself into other answers and had vague recollections of faxes and phone calls. He couldn't even remember Dr. Feegle's last name initially or who he talked to."

The court, with a reference to cumulative effect, addressed the trial testimony of Rita Hall, the nurse practitioner who conducted the SAVE examination of the victim. CCRC's contention was that the unobjected-to testimony elicited from Ms. Hall by the prosecutor at trial grossly exceeded the scope of her expertise. The court said:

> I'd like to think that if Mr. Eble had been able to focus on the expert witnesses that were presented during the course of the guilt phase, maybe he would have stood up and objected when Rita Hall testified . . . about stuff she had no business testifying to. No objection throughout the testimony of Rita Hall.
>
> Rita Hall collects evidence and she observes individuals who have claimed that they have been the victim of sexual assault. And she may have developed protocols in our circuit and helped others learn how to collect evidence, how to handle the alleged victims. [S]he has no credentials, no training that she persuaded this Court that she has any business telling me whether that's a mark indicating syphilis or it's a cigarette burn.

* * *

> [B]y the time it made it to the Florida Supreme Court, it was all those things that Rita Hall said it was. The Supreme Court didn't kind of think maybe that's what happened, it's number one on their list under their

summary. . . they say [reading from opinion]:

> In this case, Fitzpatrick contends that he had a consensual sexual encounter with Romines between nine a.m. and noon, 15 to 18 hours before she was found naked and bleeding on the side of the road and that Romines was killed by someone else. The evidence against Fitzpatrick can be summarized generally as follows:
>
> Number one, Hall, the SAVE nurse, testified to numerous injuries and markings to Romines' body that led her to conclude that Romines had suffered forced sexual activity. Hall also concluded that the sexual activity occurred within a fairly close proximity of time, a maximum of an hour to two before Romines was found."
>
> [Quoted from *Fitzpatrick v. State*, 900 So.2d 495 at 504]. This -- Rita Hall had no business testifying as to what time it took -- it occurred. Zero basis, credentials to do that.

The court discussed the relative qualifications of Rita Hall and Dr. Spitz, a medical examiner called as an expert witness by CCRC. Suffice it to say they aren't close. The court started in on Ms. Hall's testimony about a supposed bite mark, then said:

> [L]et me point out that the Supreme Court in banking on what Rita Hall said in more detail than what I just said [reading]:
>
> Further, Fitzpatrick's contention that sexual intercourse with the victim was consensual was [contravened] by the circumstances under which the victim was found. Specifically, the victim was found naked with her bloody undergarment wrapped and her waist near her breasts. Her breasts were deep purple and there was a penetrating wound in the breast area that was either

another stab wound or a bite mark.

[quoting *Fitzpatrick*, 900 So.2d at 509.] Well, the only person who said it was a bite mark was Rita Hall and she wasn't competent to say so. So we got two problems: We've got a witness who was incompetent to give opinion testimony in this area [and that] was error. Mr. Eble failed to object to it, to insist that there be a voir dire of the witness to determine that she was competent to testify to all of these conclusionary items. And was there prejudice as a result of Rita Hall going way beyond her credentials? Yeah. Because the Supreme Court took it and ran with it and it became fact.

* * *

The Supreme Court goes on to say, after it talks about a bite mark: "Puffiness around her head, bruising on her arms, scratches covering her legs, and a cigarette burn on her leg." Not, "likely a cigarette burn," a cigarette burn.

Now, even Rita Hall on examination in this evidentiary proceeding, had to back down a little bit . . She indicated that "I've seen a lot of wounds. I couldn't determine what caused them. And I saw -- I had an observation of something round and red with a slight indentation in the middle."

Well, that's one thing to describe what you see. That's appropriate. To call it a cigarette burn and get away with it because defense counsel doesn't do anything about it is -- falls below the standard of professional reasonableness and it's prejudicial.

It's prejudicial because the jury heard it to help determine whether this was, indeed, a sex battery. And that dovetails into so many things.

Because if you find it isn't a sex battery, then we rule out the possibility of felony murder, then we rule out one of

> the aggravators -- in fact, we rule out two of the aggravators, potentially.

The court addressed the finding of the HAC aggravator: "'Fitzpatrick committed the murder in this case in an especially heinous, atrocious, or cruel fashion. Great weight.'" Quoting from *Fitzpatrick v. State*, at 526, in the section on proportionality which in turn references the trial judge's sentencing order.

> What? Because he used -- allegedly, the argument was made by Mr. Van Allen [the prosecutor], we had bite marks, we had cigarette burns, so this was very heinous, atrocious, and cruel. Because . . . in the charge conference, when they argued it, that was what Mr. Van Allen was arguing. And heinous, atrocious, and cruel does not come easily. And I suggest to you, without putting any weight on that, it would give doubt as to whether it could have, should have been given, whether or not the Supreme Court would have affirmed. Because, of course, then they also do the proportionality review. So it potentially does away with two aggravators.

The court addressed some other problems with Ms. Hall's testimony:

> "[W]e have . . . Rita Hall -- talking about the fluids. There is no evidence that she had the credentials to be talking about what these fluids were . . . there was this suggestion that if you're having anal sex, you must be sexually assaulted. And that the reason they drew the conclusion that there was anal sex was, number one, there was redness in the area. . . .her trial testimony was based upon, "Changes in the skin, the redness, same redness in the vaginal area . . .." Dr. Spitz said, "Well, we have the catheter there . . ."

The court moved on to the claim about failing to hire a forensic pathologist and to offer expert medical testimony.

> Failure to hire forensic pathologist, Claim I(J) at the guilt phase and I(K), failure to retain forensic pathologist slash medical professional to testify on the effect of medications given to the victim in the hospital . . . [A]s has now been revealed through Dr. Spitz's testimony and review of the records in this case that -- the hospital records -- revealed that the victim was under the influence of at least two different medications. . . . The Supreme Court said . . . it was okay to use the statements, pointing, holding of up fingers, whatever it was that Ms. Romines was doing when questioned by two officers in the hospital. . . The Supreme Court specifically said, "Oh, no, no. This isn't for substantive evidence when it's not being introduced to show somebody other than Steve did this. This is to impeach that she said Steve did it." Great. I can't undo what the Supreme Court did. However, as you start to chip away at the evidence linking circumstantially Mr. Fitzpatrick to [Ms. Romines] at the time when this atrocious lethal injury occurred, the question becomes ... does it persuade this Court that the outcome of jury determination of guilt would have been different. And, in this case, when we're talking about . . . Ms. Romines, it's kind of significant when you hear as soon as she's picked up, "Steve, Water's Edge Apartments." Well, a jury might have concluded, if they found it impeachment, that she was somehow signaling or indicating to these two officers shaking her head about Steve. If they knew she was under the influence of pain pills, Benzodiazepines, maybe they would have disregarded that and weight would have stayed with her excited utterance, even if she was under the influence at the time she was discovered.

The court then addressed various issues related to forensic evidence and the differing chronologies argued by the State and defense. First the court referred to an exchange between the prosecutor and the State's serologist, Ms. McMahan. The court cited ROA Vol. X, 1095, where Ms. McMahan is asked leading

questions about her findings with regard to motile vs. non-motile sperm. As it turned out, no motility examination was ever conducted. The question by the prosecutor was: "Based upon your observations of the sperm, motile and non-motile in the vaginal swabs and on the slide, can you render an opinion as to how long prior to their removal from the vagina they had been deposited?" The postconviction judge read out this part of the trial record and said:

> And, so, he's misleading her. And then throughout closing arguments, Mr. Van Allen comes back and repeatedly refers to motile sperm. Mr. Eble wasn't on his feet then, he wasn't on his feet when it was raised several other times during the course of these proceedings, and he wasn't on his feet in closing argument that it wasn't -- he was assuming facts not in evidence. And motile makes all the difference in the world in terms of timing. And we have an expert now that has been hired by the Defense to tell us all of that.

The court then discussed some of the evidence that had been presented by the prosecution at trial and termed it "circumstantial." The court said, "There's nothing, no blood that tied him. The only thing was the sperm. And the timing of the sperm was everything. Again, was there a sexual battery or not? If the sex , , , didn't coincide time-wise with the timing . . . of the cutting of the neck, was there a sex battery? Dr. Spitz says, "No. There wasn't evidence of a sex battery. There was sex."

> But the conclusion that apparently the Supreme Court made is a cigarette burn and the bite coinciding within that two-hour time period means it must have happened during this stabbing and, therefore, it was forced sex.

> Huh? These experts make all the difference in the world as to what conclusion can be drawn as to whether there was any sex battery. And, like I said, that does away with one of the aggravators at the very least and whether, indeed, Mr. Fitzpatrick was with her at the time medically they believe that this devastating stabbing injury would have occurred to her.

The court returned to the timeline evidence:

> Now, I think it's very clear from the examination that, both, was done of Ms. Ragsdale at the time of trial and the failure to object and what Ms. Ragsdale has testified to in these proceedings is that she said there was no motility testing done in this case. And, therefore, we were dealing with -- all we know is non-motile since we don't know they were motile. And she said intact -- intact which we've established is with the head and the tail -- non-motile sperm up to 16 hours. And she said, less commonly, 144 hours. But if we had the expert that was saying, yes, it goes up to 144 hours, that would have been significant assistance from removing Mr. Fitzpatrick from the timing, again, of the stabbing.
>
> The court then addressed the evidence of tissue found under the fingernails of the victim during the autopsy which was conducted around 18 days after the time of the offense. DNA from the tissue did not match that of the defendant, the victim or of the initial suspect, Steve Kirk. During the trial, the prosecutor suggested that it may have come from Dwayne Mercer, who was one of the people who first discovered the victim. Postconviction testing excluded Mr. Mercer from being the contributor, too. Referring to claim I(f) of the postconviction motion regarding newly discovered evidence regarding the fingernail exemplars, the court said:
>
> I(F), newly discovered evidence, that is the failure to seek testing on the fingernail scrapings which we now know is from the ME. It does matter. There is a

> distinction between -- well, first of all, apparently everybody was confused, even Mr. Eble was confused. And it made it all the way to he made a proffer and the Supreme Court addressed it and everything. . . . Mr. Van Allen suggested to the jury that it must have been from Mr. Mercer.
>
> But according to the experts that were hired and, therefore, could have, should have had experts assist Mr. Eble, Dr. Elizabeth Johnson . . . indicated that it was not from inconsequential contact the significant amount of tissue that was found in the finger. [T]his is the famous WJ10A item in evidence. That a complete DNA, as opposed to just knowing that there was some single man out there, which is all FDLE found, and . . . couldn't rule out Mr. Fitzpatrick or Mr. Kirk. But, instead, BODE, through Ms. [Johnson] and with the assistance of the other BODE staff, they determined they had an actual full number of loci and a full DNA sample and it was none of them. It was another person, another male.
>
> Would that have mattered to a jury, as we start to chip away at the timing of whether or not it was Mr. Fitzpatrick who had sex an hour or two earlier or 15 hours earlier? Should a jury have known that, that there was some other male who she had consequential contact with to leave tissue deep within the nail, tissue that was visible, that was not any of the first responders, was not the Defendant, was not one of the Steve's at Water Edge Apartment?
>
> Now, that is why Mr. Eble should have asked for experts.

The court then addressed the prosecutor's closing argument.

> Mr. Van Allen [the prosecutor] makes a very big deal out of there being no sperm on the underwear. We now know that FDLE did not do the tests . . . that would have been necessary to uncover the sperm. It's not like

the sperm were manufactured. The sperm was there. But because they were covered with blood, we had an explanation . . . that the blood may have obliterated it, so they couldn't see it the way they were doing it because they only used a certain method. . . . I suggest to you that there was sufficient -- with all of these experts -- evidence to show there was no sexual battery, that it wasn't Mr. Fitzpatrick who was at her at the time . . . there's all sorts of arguments, reasonable hypotheses, that could have been argued to the jury, had [it] been known that it was sperm, but only Mr. Fitzpatrick's sperm . . . [S]he, who was known as an alcoholic -- in fact, the ME said she was dying, had significant cirrhosis of the liver, that she was known as somebody who had casual sex regularly, in fact, that was why Mr. Kirk had thrown her out of his apartment close in time to when this all happened, and that she was not known for -- either because of her lack of a place to live circumstances -- for maintaining herself well. . . whether she used the underwear to wipe herself, whether she put a piece of toilet paper in there after she had sex, I don't know. But reasonable explanations could have been made as to why there was no sperm in the crotch. It's not like we had a lot of help from FDLE on this. . .

Mr. Van Allen argued . . . at closing, he said: "Was she raped? Was she sexually battered? We know that there is semen, that there is sperm in her vagina and in the area in her anus." So here we go again, stretching Rita Hall into closing argument, her inappropriate testimony. "Her panties -- and remember the panties. When they were cut off, the sides were cut. The crotch was intact. One leg of her panties surrounded her entire body around her waist. There is not a bit of semen on those panties. But -- "And he goes onto the next page -- "for them she is naked. You have photographs of the injuries to Ms. Romines. This is force. Knife puncture wounds to her breasts -- " which I suggest to you is not necessarily consistent with what Dr. Spitz says -- "scratches the length of her legs -- both legs. Burned -- "he runs with what Rita Hall says --

> "Burned in her vaginal area. Is this consensual sexual intercourse or did somebody use great force in committing a sexual battery upon this woman?" Clearly, if all of this had been permitted [countered?] through expert testimony -- or had properly been objected to by Mr. Eble and kept out, this closing argument couldn't have taken place and the Supreme Court could not have included in their findings what I read to you a little while ago about what they're using to find sexual battery.

The court concluded:

> I find cumulative error by Mr. Eble. Although, I find it the least of the concerns of the Court, that is, the failure to request appointment of second attorney for penalty phase, I find any single one of these other ones alone would have been enough and causes this Court to doubt the outcome of the case. And that the fact that I do not find the failure to investigate the witnesses or the failure to investigate the impact of ethanol on the victim [two 3.851claims that had been summarily denied], that matters not. Any of the others that I have found . . . clearly make a significant difference in the Court determining that I have — I lack confidence in the outcome of this case, both the guilt phase, as well as the penalty phase. And I grant your motion.
> PC-R Vol. XIX 698-737.

The postconviction's decision is amply supported by competent evidence and should be upheld.

CLAIM II

THE POSTCONVICTION COURT DID NOT ERR IN GRANTING A NEW PENALTY PHASE TRIAL

A. Introduction

The postconviction court vacated Fitzpatrick's sentence of death and granted relief with respect to Claim II(A) (ineffective assistance of counsel for failure to advise defendant of available mitigation prior to his decision to not present mitigation evidence) and Claim II(B) (failure to request funds for mental health evaluation of defendant) of Fitzpatrick's Rule 3.851 motion for postconviction relief. PC-R. Vol. V, 721-24. The postconviction court's factual findings are supported by competent and substantial evidence and support the postconviction court's legal conclusions.

B. Penalty Phase Proceedings

At the start of penalty phase proceedings on April 5, 2001, Mr. Eble announced to the court that his client instructed him not to present mitigation. R. Vol. XXI, 1502. Mr. Eble informed the court that he met with several of Fitzpatrick's family members and his girlfriend over the past couple of days and that they were prepared to offer non-statutory mitigation. *Id.* at 1509-10. He also claimed to have discussed with Fitzpatrick all of the mitigating factors that he thought could be presented to the jury. *Id.* at 1511. When the court asked Fitzpatrick whether it was his decision not to have his attorney present any

mitigating circumstances to the jury, Fitzpatrick simply replied, "Yes, Your Honor, it is." *Id.* at 1512-13. Shortly before the jury was brought in for the penalty phase trial, the trial court directed the State Attorney's Office to present to the jury "all mitigating circumstances available to the State Attorney's Office." ROA Vol. XXI, 1513.

The State's sole penalty phase witness was Fitzpatrick's parole officer, George Kranz, who established that Fitzpatrick had previously been convicted of aggravated battery, and he was on controlled release at the time of the instant offense. ROA Vol. XXI, 1524, 1531. Additionally, Kranz read a summary of the events that led to the defendant's previous conviction for aggravated battery. *Id.* at 1524-25. The "mitigation" presented by the State partly consisted of Mr. Kranz's testimony that Fitzpatrick had a problem with alcohol and drugs, which defense counsel objected to on the basis that the way this testimony was presented, it came across as aggravating as opposed to mitigating. *Id.* at 1532-33. The trial court denied defense counsel's objection, and Kranz was permitted to elaborate that Fitzpatrick tested positive for marijuana while he was on probation in 1997. *Id.* at 1533. Mr. Kranz also testified that Fitzpatrick attempted suicide on August 21, 1995 by slitting his wrists and taking rat poison. *Id.* at 1535. The only family history that Kranz was able to provide was that Fitzpatrick was born in Hempstead, New York, moved to Tampa when he was seven, that his parents

did not get along, and that his siblings stay in touch with him. *Id.* at 1536. Fitzpatrick worked for a pizza parlor, and Kranz verified with his employers that he went to work regularly and they were satisfied with his work. *Id*. at 1536-37. During the short time that Kranz supervised Fitzpatrick, "he seemed to be doing pretty good," and in the year Fitzpatrick was on supervision prior to Kranz supervising him, "it was an up-and-down affair", including the suicide attempt, unstableness in his employment, and not having a stable residence. *Id.* at 1537. The defense did not present any mitigation to the jury. The jury recommended death by a vote of ten to two. *Id.* at 1601.

The *Spencer* hearing was held on September 28, 2001, more than five months after the jury's death recommendation. Judge Swanson ordered a presentence investigation, R. Vol. XXI, 1500, which was made available to the court prior to the start of the *Spencer* hearing. R. Vol. IX, 1483. Neither the State nor the defense called any witnesses at the *Spencer* hearing. When the trial court invited any witnesses who wished to be heard in aggravation or mitigation to come forward to the podium, seven witnesses came forward and spoke very briefly on Fitzpatrick's behalf. *Id.* at 1578-1590. These witnesses were basically character witnesses who pleaded for Fitzpatrick's life and expressed their belief in his innocence, but provided virtually no information about his background. *Id.* One of these witnesses was Fitzpatrick's mother, whose testimony comprised less

than two pages of the transcript. *Id.* at 1579-80. It is apparent from the record that defense counsel did not prepare these witnesses to testify, and they did not seem to understand what might constitute mitigation. The trial court did not receive a sentencing memorandum from either side. ROA Vol. VII, 1162.

The trial court issued a sentencing order on November 2, 2001. ROA Vol. VII, 1160-78. The trial court found the following four aggravating factors: (1) Fitzpatrick was under sentence of imprisonment, to wit: Conditional/Control Release, when the murder in this case was committed (great weight); (2) Fitzpatrick had been previously convicted of a violent felony to some person when he committed murder in this case (moderate weight); (3) Fitzpatrick committed the murder in this case while he was committing an involuntary sexual battery on the victim (little weight); and (4) Fitzpatrick committed the murder in this case in an especially heinous, atrocious, or cruel fashion [hereinafter HAC], which was established beyond every reasonable doubt (great weight). *Id.* at 1162-66.

Although the defense presented no mitigating factors, the trial court considered all statutory mitigating factors, as well as many non-statutory mitigating factors. ROA Vol. VII, 1167-75. The trial court acknowledged that in weighing the aggravating and mitigating factors the jury's death recommendation must be tempered somewhat because they did not hear the mitigating factors that were set forth in the sentencing order. ROA Vol. VII, 1176. Ultimately,

Fitzpatrick was sentenced to death, ROA Vol. VII, 1178, and the death sentence was upheld on direct appeal. *Fitzpatrick*, 900 So. 2d 495.

C. Postconviction Proceedings

In addition to the guilt phase evidence presented during the postconviction evidentiary hearing, which significantly alters the picture that was painted to the jury and the trial court during Fitzpatrick's penalty phase, postconviction counsel presented mitigation testimony from Fitzpatrick's mother, Mary Agnes Lewis, as well as Robert Smith, Ph.D.

Excerpts from the postconviction judge's remarks at the conclusion of the evidentiary hearing regarding ineffectiveness due to failure to investigate and present mitigation are as follows. The court first observed that a capital defendant's decision to forego presentation of mitigation "has to be an informed decision and it has to be based on a reasonable investigation of available mitigation evidence . . ." PC-R. Vol. XIX, 703. The court addressed whether this was a case where there were deficiencies in the investigation of potential mitigation due to the "uncooperative nature of the Defendant." *Id.* at 704. The court noted that Mr. Eble had not asked the court for a confidential expert to interview Mr. Fitzpatrick. *Id.* at 704. The judge said "I can't find that . . . it was Mr. Fitzpatrick's uncooperativeness that caused the deficiency because I don't even know what Mr. Eble explained to Mr. Fitzpatrick as to what he could have, should have done. . .

keep in mind, Mr. Eble was apparently on this case for a significant period of time even before Mr. Ivie got off and Mr. Eble is supposed to be doing mitigation and there isn't any evidence that he did anything." *Id.* at 704.

> The testimony, this Court finds unrebutted by the Defendant's mother, is that she didn't even hear from Mr. Eble until the night before court. That's something that should have happened three years earlier, that it shouldn't have been the Department of Corrections that was looking in Mr. Fitzpatrick's jacket to see how he did at Gainesville Treatment Center . . . Mr. Eble doesn't even testify that he gave Mr. Fitzpatrick a waiver to get the information . . . Didn't even try the backdoor way to get the judge to order . . . the release of such records . . . It doesn't show that Mr. Eble sat down and said to Mr. Fitzpatrick, 'By the way, I need to know more about your childhood . . . and by the way, here's a copy of the statute' . . . it appears to me, because Mr. Eble makes it very clear that he rarely had to deal with penalty phases, that Mr. Eble was banking on winning the case. And that's not what a professional does that has a death-penalty case where death is on the table. They prepare from the onset. . . Ms. Lewis, the mother, said she's lived in Land O'Lakes for 35 years. She's been sober since the seventies. And . . . there's no evidence that Mr. Eble made any attempt, other than the night before, to try and sit down and talk to her and say, "Please talk to your son. You've got to talk him into letting me save his life." He didn't do that. . . . He could have picked up the phone and found Ms. Lewis well before the night before, well before the year before, well before two years before, three years before, four years before when he was on the case. He could have found Ms. Lewis and he could have asked her the right questions instead of the testimony that was given at *Spencer* [hearing]. . . And the Court finds it significant, significant prejudice to the Defendant that any failure of Mr. Eble to present mitigation without a proper, informed waiver in front of a jury that was going

> to tell a judge and the State of Florida, you're going to recommend this guy for death or life. . . if the jury had been given the proper mitigation and the jury returned a recommendation of life, this court would have been required to give great weight to a recommendation for life. That is prejudice.

PC-R. Vol. XIX, 705-08.

The court characterized Ms. Lewis' brief, unprepared testimony at the *Spencer* hearing this way: "[I]f that's what Bill Eble was going to present in front of a jury, that would have been meaningless, virtually, to a jury. 'Oh, please don't kill my son; he's a nice guy and hasn't done anything like this before.'" PC-R. Vol. XIX, 708.

The court then turned to the testimony of Dr. Robert Smith and Mary Lewis that had been presented at the postconviction evidentiary hearing on the issue of the defendant's family background.

> According to the mother's own testimony that she relapsed in her substance abuse. Keep in mind she was so bad she was hospitalized in a mental hospital for three months during his young life and he was sent off to live with relatives, as if that's all hunky-dory. And she didn't just sober up and stayed sober at that point. No. She testified that she relapsed and he was about 12 or 13. Keep in mind, before Mr. Fitzpatrick was 18 years of age, she had already been married to three men who were abusive to her and it was suggested that, well, she didn't think that he knew about it. Well, unless he was living in a household that had soundproof rooms, he was raised in a household that was filled with violence, that was filled with a mother who, according to her own testimony, used pills and alcohol throughout the rest of

> his childhood and that she -- let me quote her on what she said. "I drank morning, noon, and night. Mike was at home. I was not in control, not even aware of what the kids were doing." That might have made a difference to a jury. It certainly could have been a mitigator.
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> And she, by the way, specifically testified that she had no recollection of Mr. Eble ever preparing her to testify. . .
>
> Dr. Smith indicated that the family . . . there were significant numbers of -- mother, father, grandparents . . . that had substance-abuse issues. And, in fact, Dr. Smith went -- even went into the statistics as to the frequency that Mr. Fitzpatrick would be genetically predisposed to become a substance abuser . . . it's seven to ten times greater likelihood. That would be a mitigator. That would have been something had Mr. Eble -- and this goes hand-in-hand with the Claim II(A), alleged failure to advise Defendant of available mitigation prior to his decision to not present, and II (B), failure to request funds for mental health evaluation of the defendant -- because somebody such as a Dr. Smith, frankly, I suggest to you most any fairly competent psychologist might have been able to uncover this. A jury may easily have been impacted by that.
>
> And, in addition, we have the reality that Mr. Fitzpatrick was raised by a mother who not only had significant, long-term mental health and substance-abuse issues that resulted in significant neglect of this child, in reality he then became -- he was the oldest of the children. And she even indicated she had -- it was -- things were so bad she put up another kid for adoption. That's how bad things were. And that his mom was a victim of sex abuse by an adult relative.

PC-R. Vol. XIX, 709-12.

With regard to the trial court's treatment of the mitigation that had been

presented by a parole officer and gleaned from the voluntary statements of support offered at the *Spencer* hearing, the postconviction court said, "And what did Judge Swanson [the trial judge] find, according to the Supreme Court on this area, on the mitigators? He – specifically that Fitzpatrick's family background was good and he gave it great weight. That's inaccurate; it's inconsistent; and it certainly was not properly investigated by Mr. Eble." PC-R. Vol. XIX, 712.

Returning to the evidence presented at the postconviction hearing regarding the defendant's family background, the court said:

> In addition, the mother admitted that at the time Mr. Fitzpatrick was under18 she was abusing barbiturates, downers, that she was heavily medicated and she abused all of them in a daily way until she would pass out. So I'm thinking that's not a great family life.
>
> And it was bad enough she even got arrested . . . we had the DUI where the son was present. He and his two siblings were in the car with the police when the police took mom away. That's a great family life.
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> The jury might have wanted to hear that.
>
> And it was after the DUI that she finally sobered up and became the individual that she has become apparently today. That's -- the person she became is the person that stood by her son for five years, but that has nothing to do with a mitigator that could have been addressed at the penalty phase.
>
> Dr. Smith testified that all of the kids were affected by an alcoholic parent, one that lives with them and that he was even involved in demonstration projects dealing with chemically-dependent parents. That's significant to this

> Court. And it might have — somebody like that would have been -- had significant impact on a jury's understanding of why this makes that individual eligible to be considered for mitigation.
>
> He testified that there was emotional and physical neglect. There was testimony that . . . Mr. Fitzpatrick used to get hit on the back of his leg by a belt. Ms. Lewis had indicated she didn't even understand that was abuse. So, it's sort of like asking a victim of domestic violence, "So, does your husband beat you?" "No." "Well, does he spit on you?" "Yeah." "Does he strangle you?" "Yeah." "Does he hit you with a belt?" "Yeah. But he doesn't beat me."
>
> Ms. Lewis said . . . that she didn't understand this was abuse. Mr. Fitzpatrick was the one being abused. Should a jury have heard that? Yes. Could it have made a difference? Yes, in terms of mitigation.
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> Now, Dr. Smith stated that the dysthymic disorder leading to his suicide attempt . . . probably it would stay with him his entire life and he was suffering from depression at the time of the arrest . . . let me also add that Dr. Smith said, "All kids who grow up in a home with an active alcoholic are affected in some way negative."

PC-R. Vol. XIX, 712-14.

The court then summed up the legal impact of this evidence:

> Now, that leads us to the question of whether or . . . not it would undermine confidence in the outcome. Let's look at the penalty phase only for the moment . . . it's going to dovetail into some of these other issues. So, I find that . . . whether it was Mr. Eble's cockiness, confidence that he would never need to worry about a penalty phase that caused him to do nothing . . . don't find he made best efforts with Mr. Fitzpatrick to persuade

> him to [present mitigation], nor did he uncover it, as I indicated, on his own; and if he was too busy . . . doing other things, then he should have, could have asked for second chair. He could have at least asked. And I do find that within the professional standards, in a case of this nature, that it is the reasonable thing to do. He failed to do that.

PC-R. Vol. XIX, 714-15.

D. Legal Principles

1. Deficient Performance

The first prong of an ineffective assistance claim is deficient performance:

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

Strickland v. Washington, 466 U.S. 668, 688 (1984). In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688.

Prevailing professional norms require counsel to conduct a thorough investigation of the defendant's background, *Porter v. McCollum,* 130 S.Ct. 447, 452 (2009), "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available." *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)[2];

[2] Appellant's Initial Brief does not even cite *Wiggins*.

Walker v. State, 2012 WL 1345408 (Fla. April 19, 2012).

A defendant may waive the presentation of mitigation evidence only if the defendant's waiver is knowingly, voluntarily, and intelligently made. *State v. Larzelere*, 979 So. 2d 195 (Fla. 2008); *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010); *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002); *State v. Pearce*, 994 So. 2d 1094 (Fla. 2008); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993); *Walker*, 2012 WL 1345408. In *State v. Lewis*, this Court explained that "[a]lthough a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." *Lewis*, 838 So. 2d at 1113. As the Appellant recognized in its Initial Brief at page 82, this Court has held that counsel's failure to adequately prepare for mitigation renders a defendant's waiver of mitigation invalid. *Ferrell*, 29 So. 3d 959.

This Court has held that trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. *Sochor v. Florida*, 883 So. 2d 766, 772 (Fla. 2004). *See also, State v. Lewis*, 838 So. 2d at 1113 ("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated- this is an integral part of a capital case."); *Ragsdale v. State*,

798 So. 2d 713, 718-719 (Fla. 2001) (holding that inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members).

The federal courts have also stressed the importance of counsel conducting a mitigation investigation, regardless of the defendant's instructions. In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) the court found counsel to be ineffective because:

> The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

Blanco, 943 F.2d at 1503. As this Court explained in *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993):

> In *Blanco*, the court granted habeas relief on Blanco's claim that his trial counsel rendered ineffective assistance, in part, by not presenting available mitigating evidence at the penalty phase. Blanco's defense counsel conducted no investigation into possible mitigating evidence until the conclusion of the guilt phase of trial. After the jury returned a guilty verdict, Blanco told counsel that he did not wish to present witnesses in the penalty phase. The court rejected the argument that Blanco's instruction controlled the issue, noting that counsel may not blindly follow such commands. Rather,

> counsel "'first must evaluate potential avenues and advise the client of those offering potential merit.'" *Id.* at 1502 (quoting *Thompson v.* Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986), *cert.* denied, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Koon v. Dugger, 619 So. 2d at 250.

The court found deficient performance here. Although trial counsel testified that he "had conversations with [Fitzpatrick] multiple times over different aspects of mitigation" and they "went over the aggravators and mitigators", PC-R. Add. Vol. II, 179, the postconviction court noted that "[n]o attorney notes of such conversations were referenced or produced [and] [n]o specific or general time frames (such as 'before pretrial or trial') of such important client communications or of their specific content were referenced by Mr. Eble." PC-R. Vol. V, 721.

The court discussed specific areas in which trial counsel's penalty phase investigation was deficient. Trial counsel failed to order any school records, military records, county jail records, prior DOC records, or mental health records. PC-R. Vol. V, 722. Mr. Eble had admitted as much. PC-R. Add. Vol. II, 173, 176-77. He did not even know that Fitzpatrick had been diagnosed with depression by the DOC mental health expert. *Id.* at 176. He was not certain whether he knew of Fitzpatrick's military background. *Id.* at 213. He did not consult with a mental health expert in this case. PC-R. Add. Vol. I, 140. Although many of these records are contained in the PSI, the postconviction court found that

trial counsel made no argument "to further link these records to statutory and non-statutory mitigators either to the penalty phase jury, at the Spencer hearing or sentencing hearing." *Id.* at 722.[3] Counsel did not request the assistance of an investigator or mitigation expert to interview family members and the defendant, follow up with potential penalty phase witnesses, and obtain and review records. PC-R. Vol. XV, 723.

Mr. Eble said that he spoke with Fitzpatrick's girlfriend, mother (Mary Lewis), and sister[4]. PC-R. Add. Vol. II, 167, 172-73. Mary Lewis' only recollection of speaking with Eble was late in the evening the night before trial when he called and spoke with her and her husband about what was going to transpire, and she does not recall ever providing Mr. Eble with any records or family history. PC-R. Vol. XV, 36-37. Fitzpatrick never asked her not to speak with his attorney, and he did not tell her not to speak with his attorneys about family background or mitigation. *Id.* at 36. She was willing to speak with Mr. Eble and answer any questions he had. *Id.* at 59. She has lived in Land O'Lakes

[3] The PSI was mostly bulked up with routine documents relating to prison operations. The trial court's now debunked findings about Mr. Fitzpatrick's purported childhood show how uninformative the PSI was. It also contained records pertaining to another inmate, Joseph Fitapelli, who apparently had anger management issues. In any event, the postconviction judge read all of it carefully. PC-R. Add. Vol. I, 4-6, 152.

[4] Dawn Moore, the defendant's sister, was a prosecution witness who had been deposed in preparation for guilt phase.

for over 35 years, and she attended her son's trial. *Id.* at 37. She spoke a few words at the *Spencer* hearing, but she does not recall Mr. Eble speaking with her prior to the hearing or preparing her to testify. *Id.* at 43, 60. Although she was not limited in what she was going to tell the court, she did not understand the purpose of the hearing, and she does not recall anyone explaining to her what mitigation is. *Id.* at 47. She would have been willing and able to testify at trial to everything that she testified to at the evidentiary hearing. *Id.* at 37.

The postconviction court expressly found that Mrs. Lewis's testimony was credible and that trial counsel's testimony was not. PC-R. Vol. V, 715-16, 723. Competent substantial evidence supports the court's findings, and establishes that trial counsel conducted practically no mitigation investigation.

2. Prejudice

In addition to proving that there was deficient performance, *Strickland* requires a showing of prejudice to sustain a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. The defendant must show that counsel's errors were "so serious as to deprive the defendant of a fair trial, whose result is unreliable." *Id*. at 687. In the case at hand, Fitzpatrick suffered prejudice based on his lack of a knowing waiver of mitigation because, as he demonstrated in postconviction, there was substantial mitigating evidence that was available but undiscovered. *See Pearce*, 994 So. 2d at 1102-03.

The Appellant cites several cases where defendants who refused to allow counsel to present mitigation at trial were denied postconviction relief because they could not establish prejudice. These cases can be distinguished from Fitzpatrick's case. First, in each of these cases, the defendant's waiver of mitigation was knowing and intelligent. *See Schriro v. Landrigan*, 550 U.S. 465, 479 (2007); *Spann v. Florida*, 985 So. 2d 1059, 1072 (Fla. 2008); *Allen v. McNeil*, 611 F.3d 740, 764 (11th Cir. 2010); *Grim v. State*, 971 So. 2d 85, 99-101 (Fla. 2007); *Hojan v. State*, 3 So. 3d 1204, 1217 (Fla. 2009); *Gilreath v. Head*, 234 F.3d (11th Cir. 2000). These cases are distinguishable from Fitzpatrick's case in which trial counsel performed no mitigation investigation and his waiver of mitigation was clearly not knowing and intelligent, as well as other cases where this Court has granted relief on the basis that the defendant's waiver was not knowing and intelligent without requiring that the defendant testify in postconviction that he would have allowed the mitigation uncovered in postconviction to be presented at trial. *See, e.g. Ferrell*, 29 So. 3d 959; *Larzalere*, 979 So. 2d 195; *Lewis*, 838 So. 2d 1102. Additionally, the defendants in *Schriro* and *Allen* waived mitigation because they wanted to be sentenced to death. *Schriro*, 550 U.S. 465, 480-81 (postconviction relief denied where the defendant refused to allow counsel to present mitigation and stated to the sentencing court, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it."); *Allen*, 611 F.3d 740

(postconviction relief denied where the defendant, who represented himself during the penalty phase trial before the jury, urged the jury to give him the death penalty and stated that he would escape from prison if given the chance). In stark contrast to these cases, Mr. Eble informed the trial court that Fitzpatrick instructed him not to ask the jury for either a death sentence or a life sentence. ROA Vol. XXI, 1503. Obviously, Fitzpatrick does not want to spend life in prison for a crime he did not commit, and to that end he was not interested in a negotiated plea for life imprisonment. PC-R. Add. Vol. II, 180. However, he has never asked the court or anyone else to sentence him to death.

Moreover, the postconviction record reveals that Fitzpatrick's reason for not wanting mitigation to be presented during penalty phase was based not only on a lack of knowledge regarding what mitigation was available, but also on a misperception that to present mitigation would be inconsistent with a claim of innocence and would paint him in a negative light -- a misperception that trial counsel failed to correct. The testimony that was presented at the postconviction evidentiary hearing established that Fitzpatrick, who has always maintained his innocence, was concerned that any presentation of mitigation evidence would be inconsistent with his claim of innocence. He informed Eble that he did not want to speak with or present a mental health expert who would suggest that he was a "deranged rapist/killer," especially in light of his history of alcoholic blackouts and

his prior violent felony. *Id.* at 176, 180, 222. Although he had conversations with Fitzpatrick about aggravators and mitigators, Eble could not recall whether he explained to his client that mitigation is not limited to the statutory mitigators and does not have to have a nexus to the crime. *Id.* at 178-79. There is no indication that Mr. Eble explained to Fitzpatrick that mitigation could be presented that would paint him in a positive light and would help explain his history of alcoholic blackouts and his prior violent felony, both of which came out anyway without the benefit of mitigation to place these events in the proper context. As a result of counsel's deficient performance, Fitzpatrick blindly waived the presentation of mitigation evidence without understanding what evidence was available that could have been presented to the jury. As postconviction counsel demonstrated during the evidentiary hearing, counsel could have presented mitigation evidence in a way that was entirely consistent with Fitzpatrick's claim of innocence and in no way painted Fitzpatrick as a "deranged rapist/killer". There is a reasonable probability that if trial counsel had conducted a penalty phase investigation and explained to Fitzpatrick the mitigation that was available, Fitzpatrick would have agreed to allow his counsel to present mitigation on his behalf.

The postconviction court's factual findings that the following mitigation testimony that was presented during postconviction was "compelling", as well as the courts findings regarding the credibility and credentials of Fitzpatrick's

mitigation witnesses are supported by competent, substantial evidence and are entitled to deference from this Court. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004):

> Mrs. Mary Agnes Lewis, Defendant's mother, testified credibly at the 3.851 evidentiary hearing that the defendant was her oldest child of 3 siblings. She was an active alcoholic during his childhood and had been married and divorced 3 times with many boyfriends in and out of the home. By her own admission and according to the history obtained by Dr. Robert L. Smith (the psychologist who testified at the 3.851 hearing who has a stellar educational, academic and clinical background in substance abuse and psychology), the defendant's mother was drunk, morning, noon and night, abusing barbiturates and other medications on a daily basis until she would pass out. She had been a victim of child sexual abuse by a relative and struggled with depression for years, including suicide attempts, one of which resulted in a multi-month stay in a psychiatric hospital, all while the defendant was a child. When home she was often in bed for days at a time, not dressed or inappropriately dressed, oblivious to the children and their needs, which fell to the defendant. He was whipped with a belt and hit with objects. Eventually Mrs. Lewis was arrested for DUI with the 8 or 9 year old defendant and younger siblings in the car. His father and many other paternal relatives had substance abuse issues. After his parents divorced when he was 10, he had virtually no contact with his father. His mother's second husband was also an active alcoholic. By 16 the defendant left home.
>
> According to Dr. Smith both the defendant and his sister (who the Dr. also interviewed) were emotionally and physically neglected and physically abused by both their mother and father. The defendant was unsuccessful in relationships and the military due to substance abuse. He

> was imprisoned in 1993 for a violent aggravated battery, during which he maintains that he suffered an alcoholic blackout. As noted by Dr. Smith, the substance abuse he began as a 10 year old disrupted virtually every aspect of his life- living proof of the statistic that if a child has two parents who are substance abusers they are at 7 to 10 times greater risk of becoming substance abusers themselves.
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> As an adult the defendant was involved in many substances and was considered, according to Dr. Smith, to be chemically dependent. His formal diagnosis was dysthymic disorder. His depression had been severe enough to cause him to attempt suicide April 20, 1995. He entered treatment and stayed sober thereafter, becoming active in AA, as his mother and step-dad were. Up until his arrest, he was employed, had a stable home and friends.

PC-R. Vol. V, 723-24 (numbering omitted).

The court also noted that the records that trial counsel failed to obtain would have revealed that Fitzpatrick was "diagnosed in 1993 with major depression and that he was an adult child of an alcoholic and himself alcohol and marijuana dependent." *Id.* at 722-23. Furthermore, records from the Gainesville Drug Treatment Center contained a psychosocial history/assessment that revealed that growing up Fitzpatrick never had an adult around and was forced to raise his younger siblings. *Id.* at 723. Contrary to the Appellant's argument that the additional mitigation evidence presented in postconviction was "largely cumulative" to what was addressed by the trial court, the scant mitigation that was presented at to the court during the penalty phase trial and at the *Spencer* hearing

bears almost no resemblance to the "compelling" testimony that was presented in postconviction. Fitzpatrick's brother, who testified at the *Spencer* hearing, recognized the prejudice that resulted from the obvious deficiencies in Mr. Eble's mitigation investigation:

> From what I've seen during the trial, it seems that nobody actually got a personal side of my brother. Everybody tended to refer to him as the "pizza guy" . . .
>
> And there's just so much more that I don't think was brought out in a mitigating investigation. I was never contacted, but I think needs to be considered, so that this gentleman here (indicating) will be known as my brother, Michael Fitzpatrick, and not the pizza guy.

R. Vol. IX, 103.

Although the Appellant argues that presenting more evidence about Fitzpatrick's drug addiction would have been a double edged sword that could have opened up the door to damaging evidence, the Appellant is vague about what this damaging evidence could have entailed, with the exception of some testimony about his discharge from the military for "dirty urine," which the trial court found in its sentencing order, R. Vol. VII, 1171, and his prior violent felony conviction, which the State used as an aggravator and was coming in regardless. Furthermore, even if postconviction counsel uncovered some apparently adverse evidence, it would be unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." *See Sears v. Upton*, 130 S.Ct. 3259, 3264

(2010). Competent counsel would have been able to turn most, if not all, of this evidence into a positive. *Id.*; *See also, Porter v. McCollum*, 130 S.Ct. 447 (2010) (holding that evidence that defendant was AWOL was consistent with defendant's theory of mitigation and did not diminish the evidence of his military service). The testimony of Mary Lewis and Dr. Smith would have helped the jury understand how and why Fitzpatrick developed an addiction and the impressive progress that he made to overcome his addiction, as opposed to the trial court's conclusion that his past relapses suggest that he may not have been as interested in overcoming his alcoholism/drug addiction as others think. ROA Vol. VII, 1170-71. Similarly, the testimony that was presented at the evidentiary hearing established that some of the conclusions that the trial court reached in its sentencing order were inaccurate, such as the trial court's findings that Fitzpatrick's family background is good and that he was not abused by his parents. *Id.* at 1169, 1172.

In addition to the prejudice Fitzpatrick suffered as a result of his counsel's failure to conduct a penalty phase investigation, ineffective assistance during the guilt phase also prejudiced Fitzpatrick in the penalty phase. Defense counsel argued to the trial court during penalty phase that there was not sufficient evidence to instruct the jury regarding the aggravating circumstance that Romines' death occurred during the commission of a sexual battery:

> I'm anticipating Mr. Van Allen is going to get up there and talk about the scratches. Mr. Van Allen is going to

> talk about the bruising. Mr. Van Allen is going to talk about the fact that there was some vague testimony that she could have had cigarette burns on her.
>
> The amazing thing is, he never had the medical examiner confirm any of Rita Hall's description of injuries other than scratch marks and healed wounds to her neck.

ROA Vol. XXI, 1556.

As predicted, Van Allen referred to the victim's injuries during the State's penalty phase closing argument. In support of the HAC aggravating factor, Van Allen describes the injuries that resulted from the "pitiless torture through which Ms. Romines was forced to endure," including "the wounds to her breasts, what appear to be either bite marks or puncture wounds" and "the burn mark in the vaginal area." ROA Vol. XXI, 1582-83. Van Allen further emphasized that "to put a cigarette to her vaginal area shows a lack of pity on the part of . . . Fitzpatrick." *Id.* at 1584.

There is a reasonable probability that, but for counsel's deficient performance in the guilt phase, as the Appellee discusses in Claim I, *supra*, not only would Fitzpatrick not have been convicted of first degree murder, but even in the unlikely event that he was convicted, the State would not have been able to establish the aggravating factors that Romines' death occurred during the commission of a sexual battery and HAC. Furthermore, the additional guilt phase evidence that was presented in postconviction would have rebutted the trial court's

descriptions of Fitzpatrick as a "sadistic rapist and killer," a "sex-starved, sadistic killer" a "sex–starved maniac," and a "sadistic, sex-crazed rapist." ROA Vol. VII, 1166, 1173-74, 1177. The elimination of two aggravating factors, one of which the trial court assigned great weight (HAC), coupled with the addition of the mitigation that was presented during postconviction undermine confidence in the outcome of the penalty phase.

CONCLUSION

The postconviction court's finding of ineffective assistance of counsel and consequent decision to grant a new trial is amply supported by competent substantial evidence, consistent with state and federal law, and should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing [Corrected] Answer Brief of Appellee has been furnished by email and United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this 2nd day of July, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing [Corrected] Answer Brief of Appellee, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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