IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

MICHAEL PETER FITZPATRICK,

Appellee.
_____/

CASE NO. SC11-1509
L.T. No. 97-482 CFAES
Death Penalty Case

POST-CONVICTION APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal Proceedings

The criminal charges against Michael Fitzpatrick resulted from the stabbing and sexual battery of Laura Romines, who was found nude and bleeding on the side of a road, and later died from her injuries. On February 7, 1997, Fitzpatrick was indicted for first-degree murder and sexual battery. (DA V1/1-2). This case originally went to trial on November 27-28, 2000, but ended in a mistrial. (DA SR V1/2069-SR V3/2468; V19/1203). Retrial was had before a different jury beginning on March 26, 2001, with the Honorable Maynard F. Swanson, Jr. presiding. (DA V13/1-V21/1619).

On March 30, 2001, the jury returned its guilty verdict, finding Fitzpatrick guilty, as charged, of first-degree murder and sexual battery with great force. (DA V6/1035-1036; V21/1484). The penalty phase was held on April 5, 2001. During the penalty phase, the State presented one witness and one exhibit, but Fitzpatrick declined to present evidence in mitigation. (DA V21/1498-1607). The jury returned a death recommendation by a vote of ten to two. (DA V6/1034; V21/1601). The trial court ordered that a comprehensive presentence investigation be prepared. (DA V6/1030, 1109-1110; V21/1500-1501). A *Spencer* hearing was held on September 7, 2001 and

several people spoke on Fitzpatrick's behalf. (DA V9/1567-1592).[1]

The trial court found four aggravating factors: (1) Fitzpatrick was under sentence of imprisonment, conditional/control release, (great weight), *see* § 921.141(5)(a), Fla. Stat. (2001); (2) Fitzpatrick had previously been convicted of a violent felony (moderate weight), *see* § 921.141(5)(b), Fla. Stat. (2001); (3) Fitzpatrick committed the murder while he was committing an involuntary sexual battery on the victim (little weight), *see* § 921.141(5)(d), Fla. Stat. (2001); and (4) Fitzpatrick committed the murder in an

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[1]The post-conviction court's final order set forth the following summary of the timeline from the original encounter with the victim through to the sentencing of the defendant:

> •8/18/96: Victim found walking on side of road and hospitalized.
> •9/05/96: Victim dies in the hospital.
> •2/07/97: Defendant is arrested.
> •3/18/97: Attorney A.J. Ivie was initially appointed when the Public Defender withdrew.
> •4/08/97: "Additional Attorney" William Eble appointed.
> •2/24/98: Attorney Ivie ceased appearing; no formal order of withdrawal exists.
> •3/26/01: Jury sworn and trial commenced.
> •3/30/01: Guilty Verdict of First Degree Murder.
> •4/05/01: Penalty Phase begins and recommendation of death returned.
> •6/15/01: Spencer Hearing set but continued.
> •6/29/01: Spencer Hearing reset again.
> •9/07/01: Spencer Hearing held.
> •11/02/01: Sentencing on Count 1 (First degree Murder).
> •12/21/01: Sentencing on Count 2 (Sexual Battery).
> (PCR V5/714-715).

especially heinous, atrocious, or cruel fashion (great weight), *see* § 921.141(5)(h), Fla. Stat. (2001). (DA V7/1162-1166; V12/2012-2016).

The trial court also considered a number of factors in mitigation. (DA V7/1167-1175; V12/2017-2025). The trial court gave "great weight" to the following mitigating circumstances: (1) Fitzpatrick's good family background (DA V7/1169; V12/2018-2019); (2) Fitzpatrick's role as a surrogate father to his girlfriend's children (DA V7/1172-1173; V12/2021-2022); (3) Fitzpatrick's long-term relationships with three women showed that he was not a "sex-starved maniac[,]" and this crime seems more of an aberration than as a common course of conduct (DA V7/1174; V12/2022-2023); and (4) the loyalty of Fitzpatrick's family and friends showed him to be "generally a friendly, warm, considerate person." (DA V7/1174-1175; V12/2023).

The trial court gave "moderate weight" to the following mitigation: (1) Fitzpatrick was doing well at his job (DA V7/1170; V12/2019); (2) Fitzpatrick "had a long history of alcoholism and drug addiction and was apparently making strides to combat it" (DA V7/1170-1171; V12/2019-2020); (3) Fitzpatrick's mental problems, including a suicide attempt in 1995, and "in 1995 a diagnosis of adjustment disorder with depressed mood and situational depression and alcohol and

marijuana dependency" (DA V7/1171-1172; V12/2020-2021); and (4) Fitzpatrick's remorse. (DA V7/1173-1174; V12/2022).

On direct appeal, *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005), this Court set forth the following summary of the facts adduced at trial:

> The evidence presented at trial indicated that on August 18, 1996, at approximately 3 a.m., several individuals found Romines walking on the side of the road, nude and bloody with her throat slit. When questioned at the scene, and then again at the hospital, Romines gave conflicting responses with regard to who attacked her. At the scene, she separately advised an individual who found her, a paramedic, and the first deputy to arrive that "Steve" had attacked her and that he lived at Water's Edge Apartments. [FN1] Romines also told the paramedic that "Steve" was a 30–year–old male. The paramedic testified that Romines was in and out of consciousness and possibly did not understand the question when she stated "Steve." Romines also stated that she was stabbed at the location where she was found and that she arrived there in a vehicle. Romines was airlifted to the hospital. At the hospital, detectives Jeff Bousquet and Peter Weekes asked Romines if "Steve" had attacked her and she shook her head no.
>
> [FN1] "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.

Rita Hall, an advanced registered nurse, who was accepted by the trial court as an expert in the field of the examination of sexual assault victims, conducted the SAVE (sexual assault victim examination) on Romines at the hospital. Hall testified that she found a bloody undergarment wrapped around Romines' waist near her breasts, Romines' breasts were deep purple, there was a penetrating wound in the breast area that was either another stab wound or a bite mark, there was puffiness around her head, there was bruising on her arms, her legs were covered in scratches, and there was a cigarette burn on her leg.

Hall also examined and swabbed Romines' vaginal and anal areas. Hall concluded that sexual activity occurred within a fairly close proximity of time, a maximum of an hour or two, from when Romines was found. Hall also concluded that Romines never had the undergarment on after the sexual activity, due to the absence of semen on the undergarment. Hall detected several areas in the vagina and anus that were either a very deep pink or red, indicating there was pressure from something penetrating the areas. In addition, Hall testified that her findings were consistent with forced sexual activity; however, she could not determine conclusively if the sexual activity was forced. Further, the evidence established that the DNA profile developed from Romines' vaginal swabs was consistent with the DNA profile that was developed from Fitzpatrick's blood sample. According to the medical examiner, the cause of death was hemorrhage and aspiration of blood due to incised wounds of the neck, penetrating the larynx and esophagus. The medical examiner could not indicate with any degree of precision the original length of the wound; however,

the deepest penetration appeared to be one to one and a half inches.

With regard to Fitzpatrick's involvement with Romines, the evidence established that on August 17, 1996, Romines was dropped off at a 7–Eleven between 7:30 and 8 p.m. Fitzpatrick, who was delivering pizzas for Pro Pizza, saw Romines at the 7–Eleven. In his police statement, Fitzpatrick stated that when he stopped at the 7–Eleven to get gas and cigarettes he saw Romines crying and asked her if she needed a ride to the Sunny Palms Motel. Fitzpatrick stated that he then dropped off Romines at the motel, and later returned to the motel to check on her, but never saw her again. The 7–Eleven surveillance tape from that night revealed that Romines entered the store. The tape also revealed Fitzpatrick at the store.

Two State witnesses, Cindy Young and Jessica Kortepeter, testified that they witnessed a Pro Pizza delivery man arrive at the Sunny Palms Motel with Romines on the night of August 17 between 8:30 and 9 p.m. After Romines informed Kortepeter she was looking for a place to stay, Kortepeter recommended her friend Albert J. Howard. Kortepeter testified that Howard arrived at the Sunny Palms Motel, talked to Romines for about ten to fifteen minutes, and drove off with her at approximately 9 p.m. [FN2] Young and Kortepeter's testimony was consistent with Howard's, who admitted that he went to the Sunny Palms Motel between 8:30 and 9 p.m. to talk to Romines, and talked to her for fifteen to twenty minutes before she decided to go with him to his house.

> [FN2] This testimony was corroborated by Fitzpatrick's Pro Pizza employers, Deborah Bradford and Eugene Degele, who testified that Fitzpatrick informed them that he had gone that night to a convenience store, picked up a young lady, and taken her to the Sunny Palms Motel. Degele testified that he personally saw Fitzpatrick's Pro Pizza truck in the motel parking lot. At trial, evidence was presented that after the stabbing Degele questioned Fitzpatrick regarding whether the girl who was stabbed was the same girl Fitzpatrick had picked

> up at the 7–Eleven, and Fitzpatrick denied it was she. However, the next day Fitzpatrick admitted to Degele that the girl he picked up was the one who was found stabbed later that night.

The evidence at trial established that Fitzpatrick clocked out with his time card at 11:45 p.m. on August 17, and took a pizza with him. Sally Goodwin, Kortepeter's mother who was visiting Kortepeter at the Sunny Palms Motel, testified that she saw a Pro Pizza truck at the motel that night, but could not remember what time she observed the truck at the motel. Goodwin also testified that she left the motel and drove to Howard's house, where she recalled seeing the same Pro Pizza truck that left the motel. Howard confirmed that a pizza delivery man, whom he identified in court as Fitzpatrick, arrived at his house with a pizza, informed him the pizza was free, and asked him if Romines was there. Howard testified that it was approximately midnight when Romines left with the pizza delivery man "arm in arm."

Howard's testimony was consistent with that of Melanie Yarborough, who was at Howard's house on August 17, 1996. At some point that night, Yarborough observed a Pro Pizza delivery man arrive at Howard's house. Yarborough recalled either helping place Romines' bags in the pizza delivery man's truck or handing the bags to Romines, who then placed the bags in the truck. Yarborough testified that she saw Romines leave Howard's house with the pizza delivery man.

At trial, evidence was presented that Fitzpatrick was seen carrying a knife before the stabbing occurred, but not afterward. Specifically, Fitzpatrick's Pro Pizza employers, Bradford and Degele, testified that during the time frame that Fitzpatrick worked for Pro Pizza he carried a knife on his person, but that after the stabbing they never saw that knife again. Degele, however, did not remember the last time he saw Fitzpatrick with the knife before the stabbing. According to Degele, he confronted Fitzpatrick regarding not carrying the knife after the stabbing, and Fitzpatrick indicated it would not be very smart to carry a knife around because the police were

conducting a murder investigation.

> During the investigation, Fitzpatrick made several statements to Detective Jeffrey Bousquet denying involvement in the crime. Fitzpatrick admitted that he picked Romines up at the 7–Eleven and dropped her off at the Sunny Palms Motel. Fitzpatrick denied ever seeing Romines again. Diane Fairbanks, who resided with Fitzpatrick at the time of the murder, and was still Fitzpatrick's girlfriend at the time of trial, testified that Fitzpatrick was home between 12:30 and 1 a.m. on August 18, 1996, roughly the same time other witnesses testified to seeing Fitzpatrick with Romines leaving Howard's house. [FN3] Fitzpatrick also denied having sexual intercourse with Romines, until the detective confronted him with the DNA results. At that point, Fitzpatrick admitted that he had sexual contact with Romines on August 17, 1996, between 9:30 a.m. and noon at the Water's Edge Apartments. Fitzpatrick stated that he saw Romines at the dumpster at Water's Edge and then they went to his house, had sexual intercourse on the couch, and he paid her twenty-five dollars. Bousquet also inquired whether Fitzpatrick would submit a blood sample to the police, which Fitzpatrick ultimately did. Evidence presented revealed that Fitzpatrick asked Dawn Moore, his sister who was a nurse, for a couple of vials of blood. Moore informed Fitzpatrick that she could not obtain blood samples for him.

Fitzpatrick, 900 So. 2d at 503-506.

Fitzpatrick raised eleven claims on direct appeal[2] and this

[2]Fitzpatrick's claims on direct appeal were: (1) the trial court erred in denying Fitzpatrick's motion for judgment of acquittal on the issue of identity; (2) the trial court erred in denying Fitzpatrick's motion for judgment of acquittal on the issue of sufficiency of the evidence to prove premeditation or that the killing occurred during a sexual battery; (3) the trial court erred in denying Fitzpatrick's motions to suppress statements he made to detectives; (4) the trial court erred in denying Fitzpatrick's motion to suppress DNA results obtained from his blood sample; (5) the trial court erred in permitting the State to introduce the detective's testimony regarding Romines'

Court affirmed Fitzpatrick's convictions and death sentence on January 27, 2005.

Post-Conviction Proceedings

Fitzpatrick's initial Motion to Vacate was filed on June 30, 2006. The State's Response was filed August 29, 2006. The post-conviction court's final order set forth the following procedural history of the post-conviction proceedings:

> This matter came on to be heard before the undersigned who was appointed on May 25, 2005 due to the retirement of the trial judge. The Defendant filed the initial Motion for Post-Conviction Relief on June 30, 2006. Thereafter the following pivotal procedural events took place:
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> •At the November 9, 2006 Case Management Conference the court announced which claims were barred, denied, denied without prejudice with leave to amend, and which would be resolved either by the outcome of a DNA motion or an evidentiary hearing.
> •An Order reflecting those rulings was entered January 4, 2007.
> •An Amended Motion to Vacate Judgment of Conviction and Sentence was filed March 7, 2007.

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statements made at the hospital; (6) the trial court erred in not granting a mistrial when Bousquet testified that during the initial interview Fitzpatrick mentioned that he thought he needed an attorney; (7) the trial court erred in denying Fitzpatrick's motions to suppress Howard and Yarborough's identifications of Fitzpatrick; (8) the trial court excluded critical evidence, thereby depriving Fitzpatrick of a fair trial; (9) the trial court committed errors that could have rendered Fitzpatrick's sentence of death unreliable; (10) Florida's death penalty statute is unconstitutional; and (11) the trial court erred in sentencing Fitzpatrick on the noncapital count of sexual battery without the benefit of a sentencing guidelines scoresheet. *Fitzpatrick,* 900 So. 2d 506.

> The State responded to this and subsequent amendments.
> •A Motion for Post-Conviction DNA Testing pursuant to Fl. R. Cr. P. 3.853 was filed March 7, 2007.
> •Notices of further DNA testing continued until June of 2010.
> •Several hearings were held, Orders entered and lab test results filed.
> •Ultimately the Court entered an Order on July 12, 2010 outlining the remaining claims.
> •The court conducted 33 hearings on the DNA related motions and the 3.851 Motion including testimony on October 20, 21, 22, November 19, & December 9, 2010.

(PCR V5/714).

The multi-day evidentiary hearing proceedings were held before the Honorable Lynn Tepper, Circuit Judge, on October 20-22, 2010, November 19, 2010 and December 9, 2010. (PCR V15/3-V19/743; PCR Add. V1/1 - Add. V2/247). The following witnesses testified in post-conviction: Mary Lewis (Fitzpatrick's mother); Margaret Angel (Private Investigator); William Eble (trial counsel), Dr. Daniel Spitz, M.D.; Robert Smith, Ph.D.; Elizabeth Johnson, Ph.D.; Angela Williamson, Ph.D.; Andrea Gardner, Ph.D.; Rita Hall, Advanced Registered Nurse Practitioner; and Robyn Ragsdale, Ph.D.

Mary Lewis is the mother of the defendant, Michael Fitzpatrick. (PCR V15/15). She married her first husband, also named Michael Fitzpatrick, when she was almost 19 and he was 24. She had three children with Fitzpatrick – Michael, who was born

on May 10, 1962, about a year after her marriage, Dawn Marie (born July 18, 1965), and John Phillip Fitzpatrick (born June 20, 1966). At first, her marriage was very good. However, when her son, Michael, was about a year old, her husband got an offer to work on the Long Island Railroad; his hours became very strange and he did not have much interaction with the children. (PCR V15/16). Her husband was unfaithful, and was mentally and sexually abusive to her. (PCR V15/17-18). She did not believe that she or her husband were physically abusive toward Fitzpatrick, although he was chastised, spanked and hit with a belt. (PCR V15/18).

Mary Lewis drank quite heavily socially and, during the sexual abuse, she drank alcohol as an escape. She attended Alcoholics Anonymous when she was married to Fitzpatrick, but he did not like her becoming independent and tried to make a deal that she could go to her AA meetings if she went out to a bar with him afterwards. (PCR V15/19-20). He also checked the mileage on her car to see if she was lying. (PCR V15/20). She had a history of depression while an active alcoholic and attempted suicide, by overdosing on valium and alcohol, in 1970 or 1971, when the defendant was 8 or 9 years old. (PCR V15/20). Mrs. Lewis was taken to a psychiatric unit at a hospital, where she remained for about 2½ weeks until she was transferred to a

private sanitarium, where she remained for over three months. (PCR V15/21). During that time, Mrs. Lewis did not see her children - they were with her aunt and uncle in Merritt Island, Florida. After her release from the hospital, Mrs. Lewis did not remain sober. She divorced Fitzpatrick in 1972, when the defendant was about ten years old. (PCR V15/21). According to Mrs. Lewis, the children were traumatized by the divorce, they had no idea that anything was wrong between their parents. (PCR V15/22). After her divorce was final, Mrs. Lewis got married in New York to Joseph Bower, a man she'd met at AA meetings. She and Bower and her children moved to Florida; at that point, her children did not have any further contact with their biological father. (PCR V15/22). She also had a daughter with Bower, but she put that daughter up for adoption because her parents, who lived in New York, were already helping to support the three older children and "strongly suggested" or forced her into that decision. (PCR V15/22). Bower did not remain sober during their marriage; he started drinking about three months after they moved to Florida and paid for his alcohol by stealing jewelry and money from her and her mother. (PCR V15/23).

Mrs. Lewis' mother was a caregiver to both Mrs. Lewis and her children; she was "very dominant." When Mary Lewis lived in New York with Fitzpatrick, they lived with her mother "at all

times;" and, when she moved to Florida, her mother would visit "mostly on a weekly basis, as her work schedule permitted." (PCR V15/23). Mrs. Lewis' mother worked at a hospital in New York as a registered nurse anesthetist. (PCR V15/24). In Mrs. Lewis' family, "everything was kind of swept under the table. It was just the old Irish way. You didn't talk about problems or situations." (PCR V15/24). When she was a child, Mrs. Lewis was sexually abused by an uncle; when she finally told her mother, she was told that she didn't have to stay there anymore. (PCR V15/24-25).

After Mrs. Lewis divorced Bower, she started drinking again when her mother gave her "permission" to drink at a lunch celebrating their purchase of property adjacent to their home; the defendant was around 12 or 13. (PCR V15/25). That one drink led to an "incomprehensible feeling of demoralization" and "started the cycle of not being able to control" anything - her drinking, herself or her children. (PCR V15/26). Mrs. Lewis also used prescription sedatives and painkillers on a daily basis. (PCR V15/26-27). Mrs. Lewis experienced blackouts, had difficulty remembering things, and was unable to take care of herself and the children; her mother came to Florida as often as possible and took weeks at a time off work in order to help. (PCR V15/27-28).

One morning, Mrs. Lewis was driving the children to parochial school in Tampa when she was stopped for driving too slowly. She was arrested for DUI. (PCR V15/28). She was sentenced to an alcohol treatment recovery program, including AA meetings four times a week, and six months probation. (PCR V15/28). Alcoholics Anonymous changed her life and Mrs. Lewis' attitude, appearance, interaction with her mother and children all started to change; she has been involved with AA since that time and has remained sober since March 9, 1973. (PCR V15/29, 42).

Mrs. Lewis has had four husbands. (PCR V15/29). After she established her sobriety, she remarried her third husband, Andrew Peterson, but that marriage only lasted for six to eight months. (PCR V15/29-30). She was married to her last husband, Howard Lewis, for almost 30 years; Howard Lewis had an excellent relationship with the defendant and was a good step-father to him. (PCR V15/31).

The defendant joined the military when he was 17 years old. He obtained his GED and was discharged from the military because he had a "dirty urine." (PCR V15/31). Before this, Mrs. Lewis did not suspect him of using drugs or alcohol. (PCR V15/31-32). Her daughter [Dawn] uses drugs and alcohol to this day. (PCR V15/32). After he was discharged from the military, Fitzpatrick

went to live with his grandmother. (PCR V15/32).

Mrs. Lewis knew that the defendant was arrested for aggravated battery in 1993. (PCR V15/35). Mrs. Lewis also knew that the defendant attempted to commit suicide in 1995; he slit his wrist and drank rat poison. (PCR V15/32-33). Howard Lewis took the defendant to the hospital and made arrangements for the defendant to be transported to Harbor, a detox rehabilitation center for alcoholics and drug addicts. The defendant stayed at Harbor for about a week. (PCR V15/33). After he left Harbor, the defendant moved in with his mother and Howard Lewis at their home. ((PCR V15/34). According to Mrs. Lewis, the defendant "jumped in Alcoholics Anonymous with both feet;" he did everything that was asked of him and more. (PCR V15/34). In addition, Howard Lewis, who had his own lawn maintenance company, gave the defendant a job during this time period. (PCR V15/35). Mrs. Lewis saw a between "night and day" difference between the defendant in 1993 and in 1996. (PCR V15/35). There was "no more anger, no more fear, no more argumentative;" the defendant accepted the fact that he needed to be on the road to recovery. (PCR V15/36).

The defendant never asked Mrs. Lewis to either speak with or not to speak with his attorney, William Eble, about mitigation. Mrs. Lewis' recalled speaking with Eble the night

before trial started, although she might have spoken to him once or twice over the phone. (PCR V15/36-37). During that phone call, Eble spoke with both Mrs. Lewis and her husband, Howard. (PCR V15/37). Mrs. Lewis did not recall ever providing Eble with any records or family history and she did not recall speaking with any investigator. (PCR V15/37).

William Eble, Sr., represented Fitzpatrick at trial. Eble graduated from the University of Notre Dame in 1976, the University of Miami School of Law in 1979, and he was admitted to the Florida Bar in 1980. (PCR Add. V1/89). Eble was board-certified in criminal trial law from 1995–2000. Eble started at the Public Defender's Office in September of 1981; he left there in December of 1996 and started private practice on January 1, 1997. (PCR Add. V1/90). Eble attended a variety of CLE seminars, including Life Over Death, and he spoke at several death penalty seminars. (PCR Add. V1/90). His private practice initially was 95% criminal law. (PCR Add. V1/94).

Eble was appointed Chief Assistant P. D. in 1987 or 1987. (PCR Add. V1/97). Beginning with the Puiatti case in 1984 (PCR Add. V2/220), Eble was involved in every first-degree murder case represented by the Public Defender, either as lead counsel or penalty phase counsel, until he left the office in December of 1996. (PCR Add. V1/98-99). By the time of his appointment on

this case (April of 1997), Eble had done around fifteen capital trials, which included between five and ten penalty phases. (PCR Add. V1/99, 102). The Fitzpatrick case was Eble's first court-appointed capital case in private practice; he'd been privately retained on another capital case during the same time period. (PCR Add. V1/104). At the time of this trial, Eble was familiar with the 1989 ABA guidelines. (PCR Add. V1/145-146, 175).

After the Public Defender's Office moved to withdraw in this case, attorney A. J. Ivie was appointed to represent Fitzpatrick. (PCR Add. V1/105). Eble was appointed as co-counsel. (PCR Add. V1/106-107). When attorney Ivie withdrew from the case, Eble became the sole counsel. (PCR Add. V1/107). Eble had substantial contact with Fitzpatrick – they talked on the phone and met in person at the jail. (PCR Add. V2/212).

During his sixteen years at the Public Defender's Office, Eble never had to keep track of his time. Other court-appointed cases were a flat rate; Eble didn't keep good records of his time, and he never submitted a finalized bill in this case because he wasn't interested in getting paid for losing a trial and having somebody get a death sentence. (PCR Add. V1/108, 113). Eble has "opposed the death penalty" with everything he's "got" for years. (PCR Add. V2/211). Eble did not keep any trial journals or diaries. (PCR Add. V1/107). However, Eble did have

some handwritten notes, phone messages, and a proposed bill, which was reconstructed after the trial by his secretary based on a compilation of notes from the folders, phone slips, calendar notations, deposition invoices and court reporters' bills. (PCR Add. V1/110-112, 114, 121, 124).

One of the entries was for August 13, 1997 regarding a phone conversation with John Carballo about who the Public Defender was using as their DNA expert. (PCR Add. V1/125). Eble could not remember the expert's name, but he recalled speaking with the DNA expert, who was a male. (PCR Add. V1/125). Eble knew that Dr. Litman's paperwork was in the file, Eble specifically recalled speaking with the DNA expert about what he would be able to do in this case, including preparing for the *Frye* hearing; and, on cross-examination, Eble reviewed his handwritten notes which indicated that Dr. Litman was the expert he'd contacted. (PCR Add. V1/126-128, 131; Add. V2/191-193, 194, 196-197, 207).

Eble explained that in Pasco County if the defense obtained the court-appointment of an expert to do physical testing on evidence, such as DNA testing, then the DNA results would not be confidential. (PCR Add. V1/129, 135-136, 138; Add. V2/222). Eble did not challenge this policy. (PCR Add. V1/139-140). The only confidential expert would be a psychiatrist or psychologist.

(PCR Add. V1/129). Therefore, if Eble was going to have physical testing done and the results implicated his client, he couldn't "bury" it. (PCR Add. V1/129). When Eble asked the DNA expert about retesting evidence that had matched the defendant's DNA, the expert informed Eble, "[i]f you have it retested, it's just going to match again." (PCR Add. V1/129, 131). The State called Dr. Martin Tracey to testify at the *Frye* hearing; that is not the same expert that Eble talked to for confidential purposes. (PCR Add. V1/129-130). Eble would have asked the DNA expert about retesting the sperm retrieved from the SAVE kit and the underwear. After being informed that the DNA match would not be any different, Eble decided, "he's not going to help me. The last thing I want to give the State is my own DNA expert to say, yes, that's Michael Fitzpatrick's DNA." (PCR Add. V1/131). Eble was not giving the State "somebody else who is backing up what they say." (PCR Add. V2/158). Eble did not seek any additional testing by FDLE. (PCR Add. V1/140, 151). Attorney Eble did not agree that there would have been "no harm" in having the undergarment retested. As Eble explained, "[i]f the results come out positive for you guys now, that's great, but if they had just reinforced the State's expert, then there was harm." (PCR Add. V2/159).

Eble could not recall when he realized that the fingernail

testing results [indicating a third party contributor] were not from the SAVE exam, but were from the medical examiner. (PCR Add. V2/160-161). Eble expected (and believed that the prosecutor likewise expected) that the unidentified DNA from the victim's fingernails would come in at trial; it was their "big hook." (PCR Add. V2/161-162, 216-217). At trial, the prosecutor explained that the victim had scratched one of the first responders [Dwayne Mercer]; Eble was surprised by this, he did not recall any report that alerted him about this scratch, and he thought the State should prove it. (PCR Add. V2/162-164).

Attorney Eble's handwritten notes also included the name of Dr. Feegle. Although Eble initially had forgotten Dr. Feegle's name, when Eble spoke with former assistant CCRC counsel Mina Morgan years earlier in this post-conviction case, Eble described Dr. Feegle and Morgan knew him and had worked for him. (PCR Add. V1/132). Eble "absolutely spoke to Dr. Feegle on this case" and eventually remembered Dr. Feegle's name. (PCR Add. V1/133; Add. V2/207). Dr. Feegle was a well-respected medical examiner and he also had a law degree. (PCR Add. V1/133). Dr. Feegle was "the guy to try to get." (PCR Add. V2/199-200). Eble spoke with Dr. Feegle about issues involving the SAVE team, testimony expected from McMahan, the time delay, the testing of the victim's underwear, and the facts from the police reports.

(PCR Add. V2/202-204). When Eble gave Dr. Feegle the time periods that Fitzpatrick said that he'd had sex with the victim, Dr. Feegle made it clear that the problem was "gravity." (PCR Add. V1/148-149). Eble explained that if Fitzpatrick "had had sex with her when he said he did, and she had walked around all day long and into the evening, until she was found on the side of the road, where, at that point, she's be prone," Dr. Feegle told Eble that if he put Feegle on the witness stand, that Dr. Feegle "would end up agreeing with the analysis that it was likely that the intercourse had happened a short period of time before she was found." Dr. Feegle made it clear to Eble. (PCR Add. V1/148-149). Eble spoke to Dr. Feegle about the SAVE kit evidence and the fact that the lab report indicated the underwear didn't really have any semen on it. (PCR Add. V1/133). Eble spoke with Dr. Feegle for about 30 minutes on the phone. (PCR Add. V1/134). Eble decided not to hire Dr. Feegle because it would not be helpful to Fitzpatrick's defense. (PCR Add. V2/206).

Eble personally researched the issue of the persistence of sperm in the victim of a sexual offense. Eble located some research articles and used them during his cross-examination of FDLE analyst McMahan. Eble obtained the articles from the science library at the U.S.F. (PCR Add. V1/146-147).

Although the victim initially named “Steve,” which pointed toward Steve Kirk, nothing else pointed to him. (PCR Add. V2/216). Eble recalled that the information, about four guys named “Steve” who lived at Water’s Edge Apartments, came from Diane Fairbanks, Fitzpatrick’s girlfriend, who was the manager at the apartment. (PCR Add. V2/167). Eble recalled that she had turned the records over to somebody else and did not have them anymore; Eble did not investigate the other “Steves.” (PCR Add. V2/167).

Fitzpatrick admitted having sex with the victim and his DNA matched, so the defense had to concede sex. (PCR Add. V2/215). The defense theory at trial was that the sex was consensual, Fitzpatrick didn’t kill the victim, and to try and point the finger at other people. (PCR Add. V2/216). Eble cross-examined Rita Hall and tried to disarm her as much as possible and get her to concede that she couldn’t make certain conclusions. (PCR Add. V2/168, 218-219). Eble would rely on the transcript to see whether he addressed Hall’s mistake -- that the offense occurred within an hour or two of when Hall saw her. (PCR Add. V2/170).

Eble did not ask for the assistance of co-counsel because Fitzpatrick did not want to do any penalty phase; Eble tried to get Fitzpatrick to agree to present penalty phase [mitigation], but, “It wasn’t going to be done. I could not file a motion in

good faith to say that I needed a penalty phase lawyer when he wasn't going to let one be presented." (PCR Add. V2/171-172). Eble began investigating for the penalty phase, but Fitzpatrick "made it clear there wasn't going to be any penalty phase. I can't make a client talk to a psychiatrist. I can't make one talk to a psychologist. . . . my client had the right to make that choice on that matter. He made the choice. No matter how many times I asked him to change his mind, there wasn't going to be no mind changing, even after guilt." (PCR Add. V2/175; Add. V2/209).

Eble knew about Fitzpatrick's background, including that he had a rough childhood and his mother was an alcoholic; his sister was prepared to testify to those things. Eble also knew about the prior conviction. Fitzpatrick did not want any type of testimony from a psychiatrist or psychologist that was going to prove, in Fitzaptrick's view, that he was a deranged rapist/killer. There was not going to be mitigation presented. (PCR Add. V2/176, 209, 213). Eble did not obtain records from the Department of Corrections; even after Fitzpatrick was found guilty, he was still ordering Eble not to present any mitigation. (PCR Add. V2/177).

Fitzpatrick did not exhibit any mental health problems; he did not have mood swings, he was always direct, he always spoke

clearly and there was nothing about Fitzpatrick that indicated that he didn't understand or had any mental illness. (PCR Add. V2/214-215). If Eble had any concerns about Fitzpatrick's competency, he would have asked for the appointment of a mental health expert. (PCR Add. V2/215). Eble was not aware of Fitzpatrick being diagnosed with depression by the Department of Corrections mental health expert; but that information would have been included in the PSI ordered by the trial judge (which the post-conviction court noted was included in the five volumes that contain the PSI). (PCR Add. V2/177).

In investigating for the penalty phase early on (which Eble believed began while A. J. Ivie was still on the case), Eble spoke with Fitzpatrick's mother, sister, girlfriend (Diane Fairbanks) and he also spoke with Fitzpatrick, about submitting to a psychiatric or psychological evaluation. (PCR Add. V2/173-174, 208). Fitzpatrick did not want his mother put on the witness stand. (PCR Add. V2/174). Eble was sure that he informed Fitzpatrick that an interview with a mental health expert would be confidential, but Fitzpatrick "wasn't going to see a shrink, period" and Eble could not talk him into seeing a psychologist or psychiatrist over the three and half years that Eble represented him. (PCR Add. V2/177, 222). Eble did not consult with a mental health expert in this case. (PCR Add. V1/140).

Eble knew that [non-statutory] mitigation did not require a nexus to the crime, but could it come from "anywhere." (PCR Add. V2/178-179). Although Eble stated that he went over the aggravators and mitigators with Fitzpatrick and had multiple conversations with Fitzpatrick over different aspects of mitigation, Eble then added, ". . . I don't recall. I think I would have." (PCR Add. V2/179). According to Eble, Fitzpatrick "didn't want a life sentence . . . It was all or nothing. It didn't matter what I said to him about that. It wasn't going to make a difference. It doesn't matter how many times I talked to him about it, he was not going to have a sentencing mitigation presented. He didn't want life." (PCR Add. V2/180, 209). The family wanted to speak [in mitigation], even though Fitzpatrick didn't want anything, and the trial court heard testimony from them at the *Spencer* hearing; Eble did not recall if Fitzpatrick had him object to it. (PCR Add. V2/210). Eble agreed that the trial transcript would reflect the trial court's inquiry of Fitzpatrick about the fact that he did not wish to present any mitigation, and this would be consistent with what Eble and Fitzpatrick discussed. (PCR Add. V2/210).

On July 22, 2011 the circuit court entered its final order finding ineffective assistance of counsel at both the guilt phase and the penalty phase. (PCR V5/724-725). The post-

conviction court's final order summarized the testimony of the additional post-conviction witnesses, recognized *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) as the controlling case law and, thereafter, set forth the following findings of fact and conclusions of law:

> II. BACKGROUND AND PRELIMINARY FINDINGS
>
> A. In making its findings, the Court does not rely upon trial counsel, Mr. William Eble's recollection as it is embarrassingly scant. The court considered the record as the best evidence of what Mr. Eble did or did not do on behalf of the defendant in preparation of the guilt and the penalty phase as well as the testimony of the defendant's mother at the Evidentiary Hearing.
>
> 1. Mr. Eble came to testify in a post-conviction capital case and had not even reviewed how many capital cases he had done. He could not testify definitively as to how many capital cases he tried to a first-degree murder conviction where death was on the table. He had virtually no notes for this case, a case in which he was attorney of record for more than four years. Clearly, an attorney who had practiced law for 30 years, involved for three years as the Chief of the Dade City, Pasco County Public Defender's Office and involved in every first degree murder case for approximately three years (estimated at 15 as trial counsel) had to know such cases result in post-conviction relief proceedings and he would undoubtedly be called as a witness in the future. His recollection varied as he narrated his answers and literally talked himself into answers. His recollections of faxes and phone calls are vague and hazy.
>
> B. The record of the trial, which this court,

read several times, has been relied upon extensively in the determination that but for the deficiencies of counsel's performance, there is a reasonable probability that the outcome of this case would have been different. These deficiencies are dealt with herein. Further, there is a reasonable probability the trial Judge's consideration and weight given to mitigators may have changed in favor of the Defendant had counsel done any of the mitigation preparation set forth in this Order resulting in the more extensive testimony of the Defendant's Mother, as presented at the 3.851 Evidentiary Hearing and the presentation of experts.

C. The expert witnesses presented by the defense at the 3.851 evidentiary hearing over a course of five days, were given great weight by this court in making its findings. The credentials of the 3.851 Defense expert witnesses were impeccable. Each of the experts was either an M.D. or Ph.D. They were well qualified by education, and extensive experience in the field in which they testified. Their credentials included being college and law school faculty, recipients of grants in their fields of expertise, lecturers and published authors. Dr. Daniel Spitz, the Chief Medical Examiner [M.E.] for Macomb and St. Clair Counties had done between 3500 to 4000 medical exams, as well as supervising and training forensic nurses in evidence collection. The findings of the M.E. at trial, Dr. Lee Robert Miller, were not placed at issue. The finger scrapings obtained by him, post-mortem, were never previously tested. The DNA recovered from this sample impacts the theory argued by the State during closing. Rather the conclusions, assumptions and "suspicions" of state witnesses during the guilt phase by persons of significantly lesser credentials, degrees and experience within specific fields of science are at issue.

1. The testimony of the State's witnesses was often inconsistent with their own trial testimony or inconsistent with other trial

witnesses for the State. To the extent that their testimony was inconsistent with the experts presented by defense during the 3.851 evidentiary hearing, the court relied upon the defense witnesses for the reasons stated above and reflected in the extensive examination of the witnesses in the record.

III. FINDINGS ON 3.851 CLAIMS (INCLUDING AMENDMENTS TO THE CLAIMS)

A. Claim I (A)-Ineffective assistance of Counsel (IAC)/penalty phase: trial counsel failed to request the appointment of a second attorney to assist him in his representation in the penalty phase. NO PREJUDICE.

1. It was not the lack of a second chair itself that lead to prejudice but the lack of virtually all preparation to adequately advise the defendant of available mitigation for the defendant to make an informed decision as to the presentation of penalty phase evidence [*See* claims 2(A) & (B) *infra*.]

2. Mr. Eble, originally court-appointed as penalty counsel, did not request a second chair after the original guilt-phase attorney was no longer on the case. Instead, in Mr. Eble's eyes, he became the guilt-phase attorney. He maintained that since he couldn't get the defendant to agree to a penalty phase he couldn't in "good faith" ask for a penalty-phase attorney.

B. Ineffective assistance of Counsel (IAC)/guilt phase: The court has considered several of the claims in conjunction with one another, as they all relate to the guilt phase. The failure to take any or all of the below actions lead to error by trial counsel. Further the impacts of each are inter-twined in weighing the impact upon the possible outcome of the case.

•**Claim I(E): failure to consult expert in**

serology/DNA to refute timing of sexual relations with victim;

•Claim I(J): failure to hire forensic pathologist on (a)apparent absence of semen on victim's blood soaked underwear, (b)quantity of discharge found in victim's vagina and anus during SAVE exam and (c) number of "motile" sperm from .SAVE examination;

•Claim I(K): failure to retain forensic pathologist/medical professional to testify on effect of medications given to the victim in the hospital.

1. This was Mr. Eble's first capital case in private practice without the resources of the Public Defender's office, where he enjoyed a respectable reputation. Nonetheless, he admits:

a) He did not request funding, though the defendant was indigent, for additional testing, such as, further DNA testing of critical pieces of evidence (as described herein).

b) He did not seek any experts to do independent testing as he felt it was "policy" that such testing would not be confidential or necessarily authorized.

c) He 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.

d) 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."

[Evidentiary Hearing transcript vol. vi, p.178, line 15] All transcripts referenced are attached for ease of review.

e) 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.*

2. Mr. Eble's cross-examination of the critical state's witnesses was without any evident preparation, without objection to inadmissible and inaccurate assertions by the assistant State attorney and apparently without concern as to the impact these errors would have upon the jury in reaching a just verdict. When asked if he had mixed up the terms used to determine "sperm motility, as opposed to an examination of dry slides, regarding whether or not sperm cells are intact" he simply said, "If I mixed the two up, then I mixed them up...". *[Evidentiary Hearing transcript vol. vi, p. 184, lines 23-p. 185, line 18)*. Ms. Robin Ragsdale of the FDLE, now a supervisor, testified at the evidentiary hearing that there was no motility testing done in this case. The errors by Mr. Eble on this critical issue permitted the development by the State of an inaccurate timeline of when the defendant may have had sex with the victim and when she was stabbed and found wandering the streets. Ms. Romines was found sometime around 3:30 a.m. on August 18, 1996, hospitalized and did not die until September 5, 1996, 18 days later. This was a critical piece that the State continued to press inaccurately, throughout the trial with witnesses and in closing argument.

3. The court considered the testimony of guilt phase expert witnesses' trial testimony, as well as the live testimony of several of the same witnesses presented during the 3.851 evidentiary hearing to determine if, within a reasonable probability, the defense experts' testimony and the expanded, more competent defense examination of the State's original witnesses, rather than

the deficient performance of trial counsel, would have lead the guilt phase jury (and Supreme Court which reviewed the evidence) to reach conclusions other than:

a) The defendant was the person who in the early morning hours of August 18, 1996, had sex with the victim, close in proximity to her receiving stab wounds to her neck.

b) The sex was forced based upon bruising of the victim's breast, a bite or stab to her torso, cigarette burns in the pubic area, and anal sex.

c) The defendant was the person who inflicted the wounds to the victim's neck.

d) The garment initially believed to be a sports bra, determined by FDLE serologist Mary Ruth McMahan to be underwear, stained a brownish red, had *no* semen present on it.

e) There was no identifiable physical evidence of tissue belonging to a 3rd person under the fingernails of the victim.

4. Without any hesitancy, this court determines that Counsel's performance was deficient, particularly in this area, and that but for the deficient performance, there is a reasonable probability of a different result. A jury would have been given alternative time lines as to the sexual contact with the defendant, 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 [FN1] as to whether she maintained that "Steve" did this to her, as she had said when first discovered. [FN2] 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.

[FN3] 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.

5. 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. (His credentials are further described in "C." above). 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. *See Evidentiary Hearing transcript vol iii, p. 334, line 4-p.337, line 20.*

[FN1] 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, Footnote 7 (Fla. 2005). 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.

[FN2] 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?" "Waters Edge." *See Trial Transcript, p.450, lines 5-12.*
>
> [FN3] The Court noted "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, the 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." *See Fitzpatrick*, at 509 (Fla. 2005).

6. Additionally, 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. *See Evidentiary Hearing transcript vol. iii, p. 342, line 6-p. 343, line 21*.

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 was 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 State even enhanced Ruth McMahan's credentials by referring to her, without objection or correction, as "Dr." 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. *See State v. Fitzpatrick*, 900 So.2d 495, at 524 & 525 (Fla. 2005).

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.

D. **Claim I(G)**-Ineffective assistance of Counsel

(IAC)/guilt phase: ***failure to conduct reasonable investigation of potential witnesses.*** NO PREJUDICE.

E. **Claim 2(A)**-Ineffective assistance of Counsel (IAC)/penalty phase: ***alleged failure to advise defendant of available mitigation prior to his decision to not present mitigation evidence***. BURDEN MET.

1. Mr. Eble maintained during the 3.851 evidentiary hearing that "I had conversations with Michael multiple times over different aspects of mitigation. I know we went over the aggravators and mitigators. Can I say at this time that I specifically told him that? I can't say that now. I don't recall. I think I would have." *[See Evidentiary Hearing Transcript, p. 179, line 4]* No attorney notes of such conversations were referenced or produced. No 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.

2. Mr. Eble prepared little mitigation evidence or testimony, because he was "...instructed, if we lost, there was not going to be mitigation presented." *[See Evidentiary Hearing transcript, p. 182, line 6]*. This was despite his knowledge that the ABA guidelines indicate that investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. Mr. Eble testified that there was not "an initial", as he had represented Michael for over about a three or four year time period and no matter how many times he asked him to change his mind, there "wasn't going to be no mind changing, even after guilt..." *[See Evidentiary Hearing Transcript, p. 175, line 24]*.

3. At the start of the penalty-phase, outside the presence of the jury, Mr. Eble announced his client's instructions to the Court (Judge Maynard F. Swanson Jr.). He announced that

"...based upon my investigation and ***my meeting with family members over this past couple days*** [emphasis added]...a brother, a mother, a stepfather and...girlfriend...are prepared to offer non-statutory mitigating circumstances regarding childhood...family history...his upbringing.., his relationship to them...his work history..." *[See Jury Trial transcript, p. 1509, line 14]*. The court made a brief inquiry *[See Jury Trial transcript, p. 1511, line 4]* of Mr. Eble as to his discussions with his client and then inquired very briefly of the defendant himself *[See Jury Trial transcript, p. 1512, line 13-p. 1513, line 12]*, to which the defendant answered merely with "No, your Honor" and "Yes, your Honor."

4. Neither the record of the Penalty phase outside the presence of the jury, [see Record references infra) nor the *Spencer* hearing reflect that Mr. Eble put on the record in detail all the mitigators he investigated, the extent of the "investigations", records he obtained that he could and would put on but for his client's adamant position that there would be "no mitigators." Rather, he simply states "Judge, Mr. Fitzpatrick maintains the position that he had before the jury-the penalty phase which is that I am not to present any affirmative evidence of mitigation on his behalf." *[See Spencer Hearing, p. 87, lines 2-6]*

5. Trial counsel failed to order any school records, military records, county jail records [for the 4 years the defendant was held], his prior Department of Corrections records, or known mental health records. Although many of these are part of the extensive PSI that the Department of Corrections, Parole and Probation Officer compiled and served May 3, 2001, no argument was made by trial counsel to further link these records to statutory and nonstatutory mitigators either to the penalty phase jury, at the *Spencer* Hearing or sentencing hearing.

6. These records reveal that a mitigator could

be that the defendant had been diagnosed in 1993 with major depression and that he was an adult child of an alcoholic and himself alcohol and marijuana dependent. Further, he had been successfully discharged May 13, 1994 from the Gainesville Drug Treatment Center. There he had a psychosocial history/assessment performed and it revealed that growing up he never had an adult around and was forced to raise younger siblings.

7. Mr. Eble did not request an investigator to assist in following up with potential penalty phase witnesses. He did not ask for a mitigation expert to interview family, the defendant or obtain and review his various records. During the 3.851 evidentiary hearing, however, Capital Collateral counsel established, on behalf of Mr. Fitzpatrick, quite clearly, the existence of available mitigation witnesses. The compelling testimony is set forth herein.

8. 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.

9. 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.

10. 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 a 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.

11. Witnesses to speak on behalf of the defendant were not presented to the Jury at the penalty phase (which occurred on April 5, 2001) but at the *Spencer* hearing which took place five months after the verdict and the recommendation of death. Indeed Mr. Eble called no witnesses in mitigation but rather the Court asked if any witnesses wished to be heard in mitigation or aggravation to come forward to the podium. *[See Spencer Hearing, p. 97, lines 17-21]* Seven

witnesses, none of whom were prepared by Mr. Eble, came forward and spoke very briefly on the defendant's behalf. The Mother testified at the 3.851 hearing that she had lived in the same town in Pasco County, Fl for 35 years but Mr. Eble did not speak to her until the *night before the trial*.

H. **Claim 2(B)**-Ineffective assistance of Counsel (IAC)/guilt penalty: ***failure to request funds for mental health evaluation of defendant***. BURDEN MET. Mr. Eble did not request a confidential mental health expert of any kind to attempt to meet and speak with the defendant; observe the defendant should the defendant refuse to cooperate; or even to review records. Neither was a request made for same during the five months between the guilty verdict and the *Spencer* hearing. While Mr. Eble had claimed he didn't make certain requests for experts and funding because of "policy" he believed existed, he failed to even make a record of such a denial by filing a motion or arguing it.

1. As described in E.5. *infra* the mental health past of the defendant was readily available and should have made clear that an evaluation would in all likelihood have resulted in potential mitigators.

2. The court notes that the Sentencing Order touched upon some mitigators, as the Supreme Court has mandated that such evidence be considered and weighed even if a defendant refused to present it. *See State v. Fitzpatrick,* 900 So.2d 495 at 523 (Fla. 2005). If the guilt phase is permitted to stand, the non-existent Penalty phase preparation and presentation becomes that much more significant.

I. **Claim 2(D)**-Ineffective assistance of Counsel (IAC)/penalty phase: ***failure to retain forensic pathologist to testify about effect of ethanol in the victim's system on her awareness of assault and ability to experience fear, danger or pain.*** NO PREJUDICE. Defendant not met his burden of proof.

> Accordingly, the Court finds ample basis to establish that at the guilt phase and penalty phase, defense counsel, William Eble's performance in this case was deficient, and this deficient performance "prejudiced" the defense. There is a reasonable probability of a different result had his performance not been deficient. Individually and cumulatively the deficient performance would have undermined the confidence in the outcome. Therefore . . .
>
> (PCR V5/715-725).

The State timely filed its Notice of Appeal on July 26, 2011. This appeal follows.

SUMMARY OF THE ARGUMENT

The post-conviction court erred in granting a new trial -– both a new guilt phase and a new penalty phase -- on the basis of ineffective assistance of trial counsel.

The post-conviction court erred in finding defense counsel rendered ineffective assistance at the guilt phase in allegedly failing to (1) consult an expert in serology/DNA to refute the timing of the sexual relations with the victim; (2) hire a forensic pathologist on the (a) apparent absence of semen on the victim's blood-soaked underwear, (b) quantity of discharge found in the victim's vagina and anus during the "SAVE" exam, and (c) number of "motile" sperm from the "SAVE" exam; (3) retain a forensic pathologist/medical professional on the effect of medications given to the victim in the hospital; and (4) seek testing on fingernail scrapings from the "SAVE" kit. None of the foregoing IAC sub-claims, individually or cumulatively, established deficiency and resulting prejudice under *Strickland*.

As to the IAC/penalty phase, Fitzpatrick refused to allow defense counsel to present mitigation. The trial court ordered a comprehensive PSI and directed the State to present mitigation. The additional evidence presented in post-conviction was largely cumulative and unremarkable. There is no reasonable probability of a different result.

ARGUMENT

ISSUE I

THE POST-CONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT PHASE.

This is a State appeal from the post-conviction court's final order in a death penalty case, finding ineffective assistance of counsel at the guilt phase and penalty phase. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In this case, the post-conviction court erred in finding defense counsel rendered ineffective assistance at the guilt phase in allegedly failing to (1) consult an expert in serology/DNA to refute the timing of the sexual relations with the victim; (2) hire a forensic pathologist on the (a) apparent absence of semen on the victim's blood-soaked underwear, (b) quantity of discharge found in the victim's vagina and anus during the "SAVE" exam, and (c) number of "motile" sperm from the "SAVE" exam; (3) retain a forensic pathologist/medical professional on the effect of medications given to the victim in the hospital; and (4) seek testing on fingernail scrapings from

the "SAVE" kit. For the following reasons, none of the foregoing IAC claims, individually or cumulatively, established both deficient performance and resulting prejudice under *Strickland*.

Standards of Review

It is well-settled that claims of ineffective assistance of counsel are governed by the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense.... Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. at 2064.

As to the performance prong, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 558 U.S. ----, 130 S. Ct. 13, 17 (2009) (quotation marks omitted). To establish the deficient performance prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. 668, 687, 104 S. Ct. 2052. In assessing the reasonableness of counsel's performance, courts must "indulge a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (quotation marks omitted). The defendant carries the burden to overcome that presumption. See, *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

As to the "prejudice" prong, the appropriate test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. That requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. ----, 131 S. Ct. 770, 791 (2011). Once again, "*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, ––– U.S. ––––, 130 S. Ct. 383, 390–91 (2009) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052).

Because both prongs of the *Strickland* test present mixed questions of law and fact, in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of

counsel claim, this Court employs a mixed standard of review, deferring to the post-conviction court's factual findings that are supported by competent, substantial evidence, but reviewing the post-conviction court's application of the law to the facts de novo. *Mungin v. State*, 932 So. 2d 986, 998 (Fla. 2006). With the foregoing principles in mind, the State submits that the post-conviction court's order -- finding trial counsel ineffective during the guilt phase –- should be reversed.

(1) IAC/failure to consult an expert in serology/DNA to refute the timing of the sexual relations with the victim.

For the following reasons, the post-conviction court erred in finding trial counsel rendered ineffective assistance for failing to consult an expert in serology/DNA to allegedly refute the timing of the sexual relations with the victim.

The post-conviction court's final order states that "the Court does not rely upon trial counsel, Mr. William Eble's recollection as it is embarrassingly scant." (PCR V5/715) (e.s.). However, according to the post-conviction order, the lower court did rely, in part, on attorney Eble's recollection, but only when Eble's post-conviction testimony arguably supported Fitzpatrick's IAC complaint (See, PCR V5/717), and not when Eble's post-conviction testimony refuted Fitzpatrick's IAC complaint.

This Court has repeated that "[t]he discretionary power

that is exercised by a trial judge is not, however, without limitation. . . . The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge *nor in an inconsistent manner*." *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990) (e.s.) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

The trial court's selective reliance on attorney Eble's post-conviction testimony is inconsistent, arbitrary and capricious. It is certainly permissible for the trial court to make a credibility determination. However, the post-conviction court did not find that attorney Eble was not a credible witness. Instead, the post-conviction court, under the guise of Eble's "embarrassingly scant" recollection, abused its discretion in relying on attorney Eble's post-conviction testimony only when it arguably supported the IAC complaints, yet declining to rely on, or even mention, attorney Eble's testimony and recollection that, at the time of trial, Eble (1) conducted independent research on the range of timing on the sexual contact and (2) consulted expert witnesses on the DNA and timing of the sexual contact (including Dr. Litman, a DNA

expert, and Dr. Feegle, an M.D. who was a former medical examiner and also an attorney). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052). Eble testified that at the time of trial he conducted independent research at the USF library and contacted DNA expert, Dr. Litman, and attorney/M.D. John Feegle, who emphasized that "gravity" was the main problem for the defense. Fitzpatrick cannot establish deficient performance in light of trial counsel's independent investigation and contemporaneous strategic decisions, which are virtually unassailable under *Strickland*. Furthermore, even if attorney Eble had no recollection, at all, for any strategic basis for his actions, his performance was presumed reasonable and must be judged objectively. See, *Richter*, at 1427, 131 S. Ct., at 791 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.")

Assuming, *arguendo*, that the post-conviction court did not abuse its discretion in selectively discounting attorney Eble's post-conviction testimony, which the State emphatically disputes, the trial record confirms that attorney Eble also cross-examined FDLE analyst McMahan and ARNP Rita Hall at trial

and also elicited an extended time period for the presence of sperm.

The final post-conviction order also states that the lower court "considered the record as the best evidence of what Mr. Eble did or did not do . . ." (PCR V5/715). Notably, the trial record confirms that attorney Eble acted as a zealous advocate who continually challenged the State's case. In fact, on direct appeal, Fitzpatrick raised eleven claims, eight of which were important guilt phase claims that were previously raised by attorney Eble at trial. Those guilt phase claims included: (1) the denial of Fitzpatrick's motion for judgment of acquittal on the issue of identity; (2) the denial of Fitzpatrick's motion for judgment of acquittal on the issue of sufficiency of the evidence to prove premeditation or that the killing occurred during a sexual battery; (3) the denial of Fitzpatrick's motions to suppress statements he made to detectives; (4) the denial of Fitzpatrick's motion to suppress DNA results obtained from his blood sample; (5) the objected-to admission of the detective's testimony regarding Romines' statements made at the hospital; (6) the denial of the defense motion for mistrial when Detective Bousquet testified that during the initial interview Fitzpatrick mentioned that he thought he needed an attorney; (7) the denial of defense motions to suppress Howard and Yarborough's

identifications of Fitzpatrick; and (8) the exclusion of critical defense evidence. See, *Fitzpatrick*, 900 So. 2d at 506, fn. 4. Although the post-conviction order states that the lower court considered the trial record, the final order makes no mention, at all, of any of these significant claims raised by trial counsel.

Strickland itself explained that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S. Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as *having produced a just result*." *Id*., at 686, 104 S. Ct. 2052 (emphasis added). The trial record confirms that attorney Eble acted as a fervent advocate, but he could not change the decisive facts of this case, nor his client's actions and vacillating statements. Laura Romines was stabbed in the neck and left to die in an isolated area at approximately 3:00 a.m. Among other things, Fitzpatrick claimed that he was not with the victim in the hours leading up to her stabbing, despite numerous witnesses to the contrary. Fitzpatrick also repeatedly denied having sex with the victim,

until he was confronted with the DNA proving that it was his semen found in the victim. At that point, Fitzpatrick then claimed that it was consensual sex, sometime between 9:00 a.m. and noon on the day before the victim was found. At trial, Fitzpatrick's former employers testified that Fitzpatrick regularly carried a knife which they never saw again after the stabbing. And, Fitzpatrick tried to get his sister, a nurse, to help him obtain two blood samples other than his own to provide to the police. None of the foregoing factors have been undermined in post-conviction and the trial can be relied on as having produced a just result. The trial court erred in finding a deficiency of counsel and resulting prejudice under *Strickland.*

(2) IAC/failure to hire a forensic pathologist on the (a) apparent absence of semen on the victim's blood-soaked underwear, (b) quantity of discharge found in the victim's vagina and anus during the "SAVE" exam and (c) number of "motile" sperm from the "SAVE" exam.

For the following reasons, the post-conviction court also erred in finding defense counsel rendered ineffective assistance in failing to hire a forensic pathologist on the (a) apparent absence of semen on the victim's blood-soaked underwear, (b) quantity of discharge found in the victim's vagina and anus during the "SAVE" exam, and (c) number of "motile" sperm from the "SAVE" exam.

At the time of trial, FDLE tested the victim's underwear for the presence of acid phosphatase, a protein found in higher levels of seminal fluid, and also conducted sperm searches on several areas of the underwear, with PCR testing on cuttings from the underwear. Both testing procedures provided negative results. In post-conviction, BODE developed a specialized grid search plan, did micro-sample "cuttings" which consisted of individual thread-by-thread extractions and used an invasive scraping technique not utilized by FDLE.

Dr. Williamson supervised the testing conducted by BODE analyst Shannon Weitz and also assisted in developing a strategy for testing the underwear in this case because "it's not what [they] usually do for cases." (PCR V17/259). As Dr. Williamson recalled, when analyst Weitz took the underwear out of the evidence bag, the underwear was folded on itself; the underwear appeared to have been cut open so that the waistband was no longer intact and it appeared to be completely covered in blood. (PCR V17/276). If the underwear had been folded when the stain was wet, the sperm heads could have transferred onto different areas of the garment. (PCR V17/281).

BODE devised a plan to divide the underpants into a grid-like pattern, which eventually consisted of eleven areas, to try and sample every surface of the underpants, particularly

concentrating on the inside areas. (PCR V17/258; 278). The inside area of the underwear was divided into ten separate areas and the outside of the crotch was also tested. (PCR V17/259). BODE conducted a microscopic sperm search of every sample from the eleven gridded areas that the underpants were divided into; although microscopic sperm search has been widely used for years, it is usually done on areas that either glow underneath an alternate light source or that test positive for acid phosphatase. (PCR V17/258; 277). According to Dr. Williamson, normally, “you would focus on the crotch area or those areas that were positive for the other two tests.” (PCR V17/277). The BODE analyst used a separate sterile scalpel blade for each area sampled and scraped the surface area of the fabric to try and obtain any sperm, if embedded. (PCR V17/259). The underwear was covered in blood and BODE went straight to the microscopic sperm search out of concern that it might interfere with the acid phosphatase test or the prostate-specific antigen test. (PCR V17/260). FDLE had previously conducted an acid phosphatase test with negative results and that was another reason why BODE decided not to repeat the same testing. (PCR V17/260-261).

Dr. Williamson explained that the sperm heads are smaller than the size of a pinhead and can’t be seen with the naked eye, but are easy to identify under a microscope. (PCR V17/278-279).

Most ejaculate contains up to “millions of sperm.” (PCR V17/279). Dr. Williamson reported the following results on the testing of the underwear: On area 9, the interior back left side strap, BODE found 50 sperm heads. On area 1, the interior front, upper left, near the side strap, BODE found 25 sperm heads. On area 8, the interior back, upper left region, BODE found 14 sperm heads. On area 6, the interior back, lower left region, BODE found 6 sperm heads. On area 10, the interior back right side strap, BODE found 3 sperm heads. On area 3, the interior front center region, above the crotch, 1 sperm head was located. On area 4, the interior crotch, 1 sperm head was located. On area 7, the interior back upper right region, 1 sperm head was located. On area 11, the exterior crotch, 1 sperm head was located. There were no sperm located on area 2 or area 5 (the interior front, upper right region and interior back, lower right region). (PCR V17/261-262; 279). Dr. Williamson could not tell when the sperm was deposited on the underwear or how long it was there. (PCR V17/279-280).

The DNA obtained from the sperm samples was a single profile which matched Fitzpatrick. (PCR V10/561-562). BODE analyst Gardner could not tell when the semen was deposited, under what circumstances, or how long it had been on the underwear. (PCR V19/565-566). BODE’s post-conviction detection

of Fitzpatrick's sperm on the victim's underwear admittedly diminishes the prosecutor's claim at trial that "[t]here's not a bit of semen on those panties." (DA V20/1345). However, even with BODE's post-conviction detection of the miniscule sperm samples, located primarily on the side straps area of the victim's underwear, the prosecutor could still argue the fair inference that the victim likely was not wearing the underwear covering her pubic area *after* the sexual assault because: if the victim had sex with Fitzpatrick only on the morning of August 17th (between 9:00 a.m. and noon, as Fitzpatrick claimed), the victim still would have walked around – and she was seen walking around – on both that afternoon and the evening of August 17th and she presumably would have used the restroom at some point between noon on August 17th (the last point at which Fitzpatrick claimed that he had consensual sex with her) and when she was found staggering on the side of the road on the following morning around 3:00 a.m., naked (except for the underwear pulled up under her breasts), bleeding, shaking and afraid. Because of gravity -- an issue trial counsel addressed with Dr. Feegle -- Fitzpatrick's semen would be expected to be prevalent on the crotch of her underwear, rather than still pooled in the large quantity of fluid observed in her vaginal cavity. The prosecutor's argument – that the victim's underwear likely were

not worn by her *after* the sexual assault – would still remain a fair inference from the evidence in light of the discovery of the victim's underwear found bunched up beneath her breasts, the location of only miniscule amounts of sperm, and the likelihood for contamination (both because of the condition of the crumpled fabric and because only small amounts were recovered, akin to the likelihood of contamination described by Dr. Johnson and Dr. Spitz on anal swabbings if only small amounts of sperm are recovered). See also, *Dist. Atty's Ofc., Third Jud. Dist. v. Osborne*, 557 U.S. 52, 70, 129 S. Ct. 2308, 2327-28 (2009) (Alito, J., concurring) (noting the difficulty, even with the most advanced STR technology, of extracting meaningful results from "messy" crime scene samples that have been exposed to the elements and handled by investigators).

At trial, Rita Hall, an advanced registered nurse practitioner, examined Laura Romines at the hospital around 8:00 a.m. on August 18, 1996. (DA V15/522; 524). Romines had just come from surgery and was in the recovery room. (DA V15/525). Romines was unconscious. There was a blood-covered garment near Romines' breasts, which Hall thought might be a sports bra, but turned out to be underwear. (DA V15/525-526). Hall cut off this garment put it into evidence. Hall also took fingernail scrapings. (DA V15/532-533, 551). There was puffiness around

Romines' head and, because of the surgery, Hall was unable to see Romines' neck. Romines' breasts were a deep purple color, and there was a penetrating wound in the breast area that Hall could not identify if it was a stab wound or a bite mark. (DA V15/529). There were some red areas and bruises on Romines' arms, dried blood in numerous places, and a round area below the knee that appeared to be a cigarette burn. (DA V15/529-530, 552-553). Romines' legs were covered with scratches, but there were no injuries to the bottoms of her feet, although she did have a fungus infection. (DA V15/530). It appeared to Hall that Romines had had a case of "crabs," a sexually transmitted disease which showed up as "[l]ittle, brown, grayish, circular things," and her pubic hair had been shaved off, probably by Romines herself. (DA V15/529, 539-540, 553). Hall used swabs to collect fluid from Romines' vaginal vault and anus, both of which exhibited increased color indicative of pressure from something penetrating. (DA V15/531-532). The redness Hall saw did not match what she usually saw in a forced entry. (DA V15/350). Hall found no vaginal lacerations and admitted she could not tell if the sex was forced or not. (DA V15/547-548). In about 50% of cases of forcible intercourse, Hall did not find any redness or signs of penetration. (DA V15/556). Hall opined that the sex had occurred "within a fairly close proximity of time, like an hour

or two at the max," because of the amount of fluid still present in Romines. (DA V15/535, 546). Hall had known sperm to be found as much as five days after intercourse, although that was "the far extreme." (DA V15/544). In the 24 to 72-hour range, one would usually find sperm heads and very few tails, because the tails disappear first. (DA V15/545).

As to the fluid discharge in the victim's vagina and anus, defense counsel Eble cross-examined her about the fluid she observed and the possibility for drainage from the vaginal area. (DA V15/538) On cross-examination, SAVE examiner Hall admitted that the whitish fluid could have been seminal fluid and it could be vaginal fluid; she could not tell whether it was seminal fluid or vaginal fluid. (DA V15/538; 540). Hall admitted that she could not tell that the fluid found in the vaginal vault was seminal fluid. (DA V15/540). Hall agreed that the wetness in the anal area could have been drainage from her vaginal area. (DA V15/551-552). Hall described what she saw and she described the puncture wound [on the victim's breast] as either a stab wound or a bite mark, but she did not see any teeth marks and did not say it was absolutely a bite mark. (DA V15/552). Hall also testified that "I cannot say it was a cigarette burn. I'm just saying that compared to cigarette burns that I've seen, this is what it appeared. It was round, it was

very raw on the edges, more like a cigarette burn would leave." (DA V15/552-553). As evidenced by the foregoing, during attorney Eble's cross-examination at trial, ARNP Rita Hall narrowed the scope of her testimony. Thus, the majority of the post-conviction criticisms leveled by Dr. Spitz -- regarding ARNP Rita Hall allegedly testifying beyond the scope of her expertise -- were already explored on cross-examination by attorney Eble at trial. Accordingly, Fitzpatrick cannot establish both deficient performance and resulting prejudice under *Strickland*.

Finally, as to the reference to "motile" sperm from the "SAVE" exam, there was no test for motility conducted. Instead, the term "motility" was used by the prosecutor as an interchangeable term for those sperm with heads and tails intact. (DA V15/555). ARNP Rita Hall admitted that she was not an expert on "motile" sperm, but believed that the term referred to sperm that was fresh and still alive. (DA V15/555).

At trial, Mary Ruth McMahan, Ph.D., testified that she was a senior crime lab analyst with the Florida Department of Law Enforcement, working in the serology, DNA section of the Tampa Regional Crime Laboratory. (DA V19/1080-1081). McMahan testified that the entire undergarment cut from Laura Romines was stained with blood, but tested negative for semen. (DA V19/1086-1089). The vaginal swabs from Romines were presumptively positive for

semen using the acid phosphatase test, while the anal swabs were negative. (DA V19/1087, 1090, 1094-1095).

McMahan explained that sperm is a small organism or cell, and the DNA is contained within the head of the sperm. McMahan also stated that sperm also has a tail, which makes it motile (meaning that it can move), and the tail is much more fragile than the head is. (DA V19/1091). Thereafter, the prosecutor referred to the sperm as motile and nonmotile sperm, with nonmotile being the head itself, that no longer possesses the capability of moving. (DA V19/1091). McMahan testified that because the sperm tail is much more fragile than the head, it breaks off very easily. (DA V19/1092). According to McMahan, the longest the sperm cells could have been present in the vagina before they were removed was 15 hours. (DA V19/1096). However, McMahan admitted that there are numerous factors involved in the breakdown of sperm, and calculating a time period is not an exact science. (DA V19/1126, 1131). Although McMahan was "familiar with" the time for the breakdown of sperm, she had "not made a study of it[.]" (DA V19/1127).

Using the RFLP method, McMahan found that the DNA on the vaginal swabs from Laura Romines was consistent with the DNA profile of Fitzpatrick. (DA V19/1100, 1105). McMahan also compared the DNA profile of Stephen Kirk with the profile from

the vaginal swabs and found that the two were not consistent; it was not Kirk's sperm. (DA V19/1106-1107). According to McMahan, the more active the female was after the sperm was deposited, the more likely the sperm would be drained from her body, making for less sperm being there and less with tails. (DA V19/1133).

On cross-examination of FDLE analyst McMahan, attorney Eble established, among other things, that the anal swabs were negative for semen and although the presumptive tests and testing on cuttings from the underwear did not get anything reacting for semen, McMahan testified "that doesn't necessarily mean there's no sperm there." (DA V19/1118). In addition, McMahan agreed that the underpants were filled with moderate debris, including epithelial debris, cellular debris and possible vaginal discharge. (DA V19/1124). McCahan agreed that when it comes to time, in talking about sperm, it was not an exact science, not precise at all. She also agreed that three or four hours' difference in the time would be within the parameters of her opinion. (DA V19/1126). McMahan found some-to-many heads in most fields, with intact or tail-bearing sperm. (DA V19/1127). McMahan testified that she found "intact sperm in most of the fields. That means with tails." (DA V19/1128). McCahon agreed that the longest time recorded for spermatozoa may be 120 hours and for those with tails the record is 26

hours, but “once you pass 12 hours, the number of sperm with tails drops off very rapidly.” (DA V19/1129). McCahan agreed that the breakdown of sperm depends upon a lot of factors, including the environment, whether it’s acidic or neutral, the presence of white blood cells, bacteria, temperature, deterioration, and whether the male produces deformed sperm. (DA V19/1131). McMahan agreed that the time frame was only an estimate. (DA V19/1133).

On cross-examination at trial, ARNP Rita Hall also agreed that, from her own personal experience, she’s known sperm to be found as much as five days after intercourse, although that was the far extreme. (DA V15/544). In addition, Hall had multiple examinations where sperm was found in a woman 72 hours after the sexual contact, and she accepted defense counsel’s representation of statistical data that, at the 72-hour range, you would usually find sperm heads and very few tails, if any, because the tails disappear first. (DA V15/545).

Although the prosecutor should have referred to the sperm as sperm *with tails*, rather than “motile” sperm, the jury was not misled by the incorrect use of the term “motility” since the jury was informed that that term was used to represent “sperm with tails” and attorney Eble also established an extended timeline on cross-examination.

On cross-examination, ARNP Hall also admitted that she could not tell if the sex was forced or not; and, according to Hall, in 50 percent of the cases there is redness, but "the redness [she] saw did not match what [she] usually see[s] in a forced entry." (DA V15/548; 550). The State maintains that ARNP Rita Hall was qualified to testify as an expert. See, § 90.704, Fla. Stat.; *Smith v. State*, 28 So. 3d 838 (Fla. 2009). In this case, even with a severe limitation on the testimony of ARNP Rita Hall, as urged by Dr. Spitz in post-conviction, ARNP Hall's eyewitness observations and descriptions of the fluid in the victim's vagina and the victim's multiple injuries would remain. And, as this Court pointed out on direct appeal, "Fitzpatrick was the last person seen with Romines alive three hours before she was discovered on the side of the road, there was DNA evidence matching Fitzpatrick to the source of the semen recovered from Romines, and evidence revealed that Romines had what was likely a forced sexual encounter two hours before her death. Moreover, Fitzpatrick denied his involvement with Romines only to change his story when confronted with DNA evidence. In addition, Fitzpatrick attempted to secure false blood samples. Finally, Fitzpatrick was never again seen in possession of a knife he was known to carry after the murder." *Fitzpatrick v. State*, 900 So. 2d 495, at 507-508 (Fla. 2005). Trial counsel's

alleged errors in this case did not constitute deficient performance and there was no resulting prejudice under *Strickland.*

(3) IAC/failure to retain a forensic pathologist/medical professional on the effect of medications given to the victim in the hospital.

The post-conviction court erred in finding trial counsel ineffective on this sub-claim because trial counsel did seek to exclude the victim's responses at the hospital (DA V15/567-568) and this evidentiary issue was litigated on direct appeal. See, *Fitzpatrick,* 900 So. 2d at 515. At the time of trial, the trial court ruled that Romines' statements to the people who came to her aid (naming "Steve" as her assailant) were admissible as "excited utterances," and Romines' statements at the hospital were admissible for impeachment purposes. *Fitzpatrick,* 900 So. 2d at 515. On direct appeal, this Court ruled that the trial court did not abuse its discretion in admitting the testimony regarding Romines' statements to the police at the hospital for the limited purpose of impeachment. In addition, this Court rejected Fitzpatrick's claim that Romines' statements when she was in the hospital, even if hearsay, were subject to exclusion as unreliable and inadmissible. *Fitzpatrick*, 900 So. 2d at 515, fn. 7. Furthermore, as this Court previously noted, "the jury was presented with evidence that during the interview with

detectives at the hospital Romines was medicated and was in and out of consciousness. The jurors could have assessed on their own the reliability of Romines' statements." *Fitzpatrick*, 900 So. 2d at 515, fn. 7.

At trial, the jury knew that when the detectives attempted to briefly interview Laura Romines at the hospital on August 18th, Romines was in the ICU, under sedation, intubated and unable to speak, in and out of consciousness, and that her responses were in the form of nods or shaking of her head. (DA V25/566-567; 594). The addition of the post-conviction testimony from Dr. Spitz on the severe trauma to the victim, her intoxication by alcohol at the scene (PCR V17/328; 325), the post-operative intubation and the administration of pain and sedative medications (morphine and Ativan) (PCR V17/325) would not have resulted in *carte blanche* exclusion of her responses at the hospital, but would have related only to their weight, not admissibility.[3] Trial counsel's performance was not deficient

[3]As this Court explained on direct appeal, "Fitzpatrick contends that Romines' hearsay statements when she was in the hospital are unreliable and inadmissible. Even assuming that Romines' statements at the hospital were hearsay, Fitzpatrick overlooks that hearsay statements admitted as impeachment, as opposed to being admitted as substantive evidence, do not need to satisfy the demands of reliability necessary to prove an essential element of a crime or defense. See, *State v. Smith*, 573 So. 2d 306, 313 (Fla. 1990) ("[E]vidence of a prior inconsistent statement offered as impeachment is admissible only for that purpose unless it is independently admissible on other grounds.

because trial counsel did object and seek to exclude the victim's responses at the hospital. (DA V15/567-567). The addition of Dr. Spitz' post-conviction testimony would not compel exclusion of the victim's responses at the hospital. Even the addition of a flotilla of impressively-credentialed expert witnesses in post-conviction does not mean that trial counsel was ineffective. As the Supreme Court underscored in *Harrington v. Richter,* 131 S. Ct. 770, 788-792 (2011), "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Moreover, the victim's head-nodding responses did not incriminate Fitzpatrick. If Fitzpatrick suggests that, but for the victim's contradictory responses at the hospital, the victim's initial statements concerning Steve would have been undisputed and dispositive at trial, any such suggestion is incorrect. Although the victim initially stated that she was attacked by someone named "Steve," the direct

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Such evidence generally is hearsay and usually does not satisfy the demands of reliability necessary to prove an essential element of a crime or defense. The purpose of admitting evidence of prior inconsistent statements is to test the credibility of a witness whose testimony was harmful to the interest of the impeaching party.") (internal quotation marks and citations omitted). Moreover, the jury was presented with evidence that during the interview with detectives at the hospital, Romines was medicated and was in and out of consciousness. The jurors could have assessed on their own the reliability of Romines' statements. *Fitzpatrick*, 900 So. 2d at 515, fn. 7.

evidence presented at trial exonerated Steve Kirk and identified Fitzpatrick as the assailant; the DNA evidence on the semen taken from the victim excluded Steve Kirk and identified Fitzpatrick's DNA as a match.

Trial counsel cannot be deemed deficient under *Strickland* in light of the fact that he did seek to exclude Romines' responses at the hospital and this Court reviewed this evidentiary claim on appeal and denied relief. Fitzpatrick failed to establish both a deficiency of counsel and resulting prejudice under *Strickland*.

(4) IAC/failure to seek testing on fingernail scrapings from the "SAVE" kit.

The trial court also erred in finding trial counsel ineffective during the guilt phase for failing to seek testing on fingernail scrapings from the "SAVE" kit. In post-conviction, Fitzpatrick abandoned any claim predicated on the SAVE kit fingernail scrapings. The fingernail scrapings from the SAVE kit (nail samples obtained by examiner Rita Hall on the morning of August 18th) were tested by BODE in post-conviction. The post-conviction testing did not produce a "Y" chromosome marker and, therefore, no further testing was done. (PCR V16/202-203). As a result, the SAVE kit fingernail scrapings were not relied upon on by CCRC in support of any fingernail analysis claim. Instead, Fitzpatrick's Amendment to Claim I.F., focused on the DNA

testing of the victim's fingernail clippings taken at the Medical Examiner's office at the time of the autopsy. (PCR V4/545-556).

The victim's fingernail clippings obtained by the M.E. at the victim's autopsy on September 5, 1996, were tested by FDLE at the time of trial. At trial, defense counsel sought to present the testimony of FDLE analyst Robin Ragsdale on the results of the testing on the fingernail clippings taken at the autopsy, specifically that there was evidence of the DNA of another, unknown person in the tissue from the right hand clippings. (DA V19/1235-1236). The trial court denied attorney Eble's request to introduce the testimony of FDLE analyst Ragsdale and attorney Eble proffered her testimony outside the presence of the jury. (DA V19/1230-1240).

In this case, the non-match from the fingernail sample may simply indicate that the victim, at some unknown time and place and under unknown circumstances, had contact, sexual or otherwise, with someone else. The DNA results on the fingernail clippings taken at the Medical Examiner's Office were not introduced against Fitzpatrick at trial and the unidentified DNA did not then -- and does not now -- exonerate the defendant from commission of the sexual battery and murder. Defense counsel explored this issue before, during and after trial.

Before trial, during the pre-trial *Frye* hearing, defense counsel cross-examined the State's expert, Dr. Martin Tracey, about the unidentified DNA located under the victim's right-hand fingernail [clippings]. (DA V12/1962-1965). Defense counsel sought to link the DNA to the victim scratching someone:

> Q So, would it be fair to say that underneath--that's if that's the fingernail scraping of Laura Romines, your testimony would be that her fingernail scraping contains DNA that belongs–under her fingernail scrapings, that belongs to somebody different than Michael Fitzpartick (sic), different from Steven Kirk, and different from herself, right?
>
> A That's correct.
>
> **Q So she scratched somebody with a B, right?**
>
> **A I can't say that she scratched somebody with a B. All I can say is that underneath her right-hand fingernail there is a B. It doesn't necessarily have to come from scratching, but it's under the nail.**
>
> Q So, there's human DNA that doesn't belong to the other three people tested?
>
> A It doesn't belong to her. And it doesn't show any indication of coming from the other two, Mr. Kirk and Mr. Fitzpatrick.
>
> Q So there's a B?
>
> A There's no B present in either one of those three--any of those three individuals.
>
> Q So, therefore, we can exclude them as being the contributors of the B, right?
>
> A Yes.
>
> (DA V12/1964-1965) (e.s.).

During trial, on March 27, 2001, shortly before the jury was sworn (DA V15/409-410), defense counsel notified the trial court of the DNA test results obtained by FDLE analyst Robyn Ragsdale. Defense counsel explained that even though the State did not intend to call Ms. Ragsdale at trial, the defense intended to call her because:

> [Ragsdale] tested fingernail scrapings, and her testimony would be that the fingernail scrapings--there is on the one hand a tissue that she found that she tested, under the PCR DNA analysis, and that it does not match Fitzpatrick. It does not match Steve Kirk. It does not match Laura Romines.
>
> **Therefore, the suggestion is that the young lady scratched her assailant, and it's somebody whose DNA or blood was never sent for testing . . .**

(DA V15/409) (e.s.).

During the defense case, in the presence of the jury, trial counsel elicited from both FDLE analysts, McMahan and Ragsdale, that the victim's fingernail scrapings placed in the SAVE kit were *not* tested by FDLE. (DA V19/1152-1153; 1157). When defense counsel attempted to ask FDLE analyst Ragsdale about other fingernail testing results, specifically, those obtained at the victim's autopsy, the trial court sustained the State's objection. (DA V19/1154-1158).

The trial court allowed the defense to proffer FDLE analyst Ragsdale's testimony on the DNA results of the fingernail clippings from the Medical Examiner's office. (V19/1230-1240).

Ragsdale admitted that she had "*no way of knowing how old the tissue is that's under the nail*." (DA V19/1240). The trial court found the proffered testimony "irrelevant and immaterial" and that it was "inconsequential and does not lead to any conclusion of any kind" (DA V19/1241).

After trial, defense counsel filed a renewed motion for judgment of acquittal (DA V6/1041-1045) and motion for new trial (DA V6/1038-1040). In responding to defense counsel's reliance on the unidentified DNA from the victim's fingernails, prosecutor Van Allen underscored this speculative nature and reiterated:

> **What we had and what Mr. Eble has indicated is exactly what Ms. McMahan would have testified--or Ms. Ragsdale would have testified to, rather. And I submitted to the Court then, and I submit, again, that it is nothing more than product for speculation.**
>
> **It does not identify any other individual as a person who could have committed this offense and it does not exclude Mr. Fitzpatrick as the person who did the offense.**
>
> **As a matter of fact, there are a number of places or number of ways in which the defendant--or the victim could have come in contact with people who could have deposited different substances under her nails. It could have left enough to do a PCR examination. So, it was nothing more than a product for speculation.**
>
> (DA V9/1542-1543) (e.s.).

On direct appeal, this Court noted, **". . . 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*, 900 So. 2d at 521 (e.s.). This Court further explained that any error in its exclusion was harmless:

> **. . . The proferred [sic] 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. *Moreover, the DNA obtained from the victim's vaginal swabs was consistent with Fitzpatrick's. Finally, the defense stressed to the jury the possibility that the perpetrator was someone other than Fitzpatrick The defense argued that four individuals named Steve lived at Water's Edge Apartments, some of whom were never accounted for; that the victim held up two fingers when questioned whether the victim knew the people that attacked her; and that Howard was a possible suspect based on Cindy Young's testimony.* [FN9] **Therefore, the testimony was minimal at best, inconclusive, and would have been inconsequential. After an examination of the entire record, this Court concludes that any error resulting from exclusion of the evidence was harmless.** See id.
>
> *Fitzpatrick*, 900 So. 2d at 521 (e.s.).

The criminal charges against Fitzpatrick resulted from the stabbing and sexual battery of Laura Romines, who was found naked and bleeding on the side of the road during the early morning of August 18, 1996. (DA V15/449; 460). Although Ms. Romines was transported to the hospital and underwent emergency surgery, she died on September 5, 1996. CCRC alleged below that trial counsel was deficient for failing to authenticate the fingernail clippings [taken at the Medical Examiner's office] and concluded that if they had been authenticated, the defense *"would have been able to present Ms. Ragsdale's findings to the jury."* (PCR V4/548). This assertion is squarely refuted by the record. The trial court found that *even if* the chain of custody were established,

> . . . there's no materiality to this particular case. It does not narrow the search. What it merely says is the defendant could have been, may not, could have been scratched, or this other man's nail that could have scratched, **and there might be a third person, but the third person was never identified. There's no identification when it was on there.**
>
> The originality of the testimony of Ragsdale is so far removed from any material part of this case as to--for recessing that trial for the testimony to come in. On that basis I will deny it.
>
> (DA V20/1273) (e.s.).

The DNA results on the victim's fingernail clippings were not presented by the State at trial. The unidentified DNA from the autopsy fingernail clippings was of no forensic significance

because it could not be linked to the sexual assault/murder of Laura Romines. The evidence presented at trial included:

> 1. 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 or two, before Romines was found.
>
> 2. The DNA profile that was developed from Romines' vaginal swabs was consistent with the DNA profile that was developed from the known blood standard of Fitzpatrick.
>
> 3. Fitzpatrick repeatedly denied having sexual intercourse with Romines until he was confronted with the DNA evidence. At that point, Fitzpatrick admitted that he had sexual intercourse with Romines between 9 a.m. and noon on August 17, 1996.
>
> 4. Fitzpatrick admitted picking up Romines at the 7-Eleven and dropping her off at the Sunny Palms Motel, but denied any further contact. Two eyewitnesses testified that they last saw Romines alive with Fitzpatrick leaving Howard's house at midnight on August 17. Another eyewitness testified that she saw the same Pro Pizza truck at the Sunny Palms Motel and later at Howard's house.
>
> 5. Fitzpatrick's Pro Pizza employers, Degele and Bradford, testified that Fitzpatrick regularly carried a knife, but that they never saw him with it again after the stabbing.
>
> 6. After detectives asked Fitzpatrick for a blood sample, Fitzpatrick attempted to have his sister, a nurse, assist him in obtaining two blood samples other than his own.
>
> * * *
>
> . . . Fitzpatrick was the last person seen with Romines alive three hours before she was discovered on the side of the road, there was DNA evidence matching

> Fitzpatrick to the source of the semen recovered from Romines, and evidence revealed that Romines had what was likely a forced sexual encounter two hours before her death. Moreover, Fitzpatrick denied his involvement with Romines only to change his story when confronted with DNA evidence. In addition, Fitzpatrick attempted to secure false blood samples. Finally, Fitzpatrick was never again seen in possession of a knife he was known to carry after the murder. Based on the foregoing, we conclude that the State presented competent, substantial evidence to support the conviction. Therefore, the trial court did not err in denying Fitzpatrick's motion for judgment of acquittal.
>
> *Fitzpatrick*, 900 So. 2d at 507-508.

And, in rejecting the challenge to the sufficiency of evidence to sustain Fitzpatrick's conviction for felony murder, based on sexual battery, this Court found,

> . . . record evidence contradicts the timing of events outlined by Fitzpatrick. Evidence presented at trial indicated that the amount of seminal fluid containing Fitzpatrick's DNA found in the victim confirmed that sexual intercourse took place only one to two hours before she was found. See *Lightbourne v. State*, 438 So.2d 380, 391 (Fla. 1983)(determining that the fact that the defendant's sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death supported the finding of sexual battery). The evidence established that Fitzpatrick's sexual encounter with the victim occurred between 1 a.m. and 3 a.m. on August 18.
>
> 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 around 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,

> puffiness around her head, bruising on her arms, scratches covering her legs, and a cigarette burn on her leg. See *Carpenter v. State*, 785 So.2d 1182, 1196 (Fla. 2001)(determining that the evidence that demonstrated that the victim's own bra was placed across her mouth as a gag "was inconsistent with consensual behavior"); *Zack v. State*, 753 So.2d 9, 18 (Fla. 2000)(determining that although "there is evidence from which a jury could conclude that [the victim] originally intended to engage in consensual intercourse with [the defendant], such evidence does not negate" a finding to the contrary). 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.
>
> *Fitzpatrick*, 900 So. 2d at 508-509.

In post-conviction, Dr. Johnson readily admitted that she could not tell when the tissue was deposited and "neither can the other analyst." (PCR V16/182-183). Dr. Williamson likewise could not tell when the debris was deposited or how long it had been there. (PCR V17/272). In short, it still cannot be shown *when - where – why - or how* - the unidentified DNA was transferred to the victim's fingernails. The tenuous defense speculation was addressed by the trial court at the time of trial (DA V20/1272-1273) and by this Court on direct appeal, *Fitzpatrick,* 900 So. 2d at 521. The unidentified DNA still remains irrelevant, inconsequential and immaterial. See, *Overton v. State*, 976 So. 2d 536, 568-569 (Fla. 2007) ("[t]he conclusory assertion that if the hair does not belong to Overton or the

victims, *it must belong to a person who committed or participated in the crime, is far too tenuous because there is no way to determine when, why, where, or how* the hairs attached to the tape. . .”).

In his motion for new trial, defense counsel specifically included the trial court’s exclusion of FDLE Analyst Ragsdale’s proffered DNA testimony. (DA V6/1039). On direct appeal, this Court found error, if any, to be harmless and concluded that “*the testimony was minimal at best, inconclusive, and would have been inconsequential.*” *Fitzpatrick*, 900 So. 2d at 521. Because this Court has already held that the exclusion of the DNA testimony was harmless error, Fitzpatrick cannot establish prejudice in his claim of ineffective assistance of counsel. See, *Conde v. State*, 35 So. 3d 660, 664 (Fla. 2010), citing *Cox v. State*, 966 So. 2d 337, 347-48 (Fla. 2007). The unidentified DNA remains an unidentified profile transferred at some unknown time, unknown place, and under unknown circumstances.

Furthermore, the post-conviction elimination of Mr. Mercer as a possible contributor does not weaken the State’s case against Fitzpatrick nor bolster any speculative third party phantom theory. Again, the State did not introduce any DNA test results on the victim’s fingernails to inculpate Fitzpatrick at trial. The autopsy fingernail testing results remain of no

forensic significance. The unidentified DNA did not then, and does not now, exculpate Fitzpatrick nor implicate anyone else in her murder. This Court held that the exclusion of the defense-proffered testimony regarding the fingernail clippings was harmless inasmuch as *"[t]he 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." Fitzpatrick*, 900 So. 2d at 521.

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See, *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

Even if Fitzpatrick arguably could meet the first requirement of *Jones*, he cannot meet the second prong.

Regardless of the availability of "newer" DNA testing, Fitzpatrick still has not shown that the unidentified DNA was transferred *during* the sexual assault/stabbing of Laura Romines on August 18, 1996. The unidentified DNA does not weaken "the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Accordingly, any claim of alleged "newly discovered" evidence fails to establish any basis for post-conviction relief. See, *Gore v. State*, 32 So. 3d 614 (Fla. 2010) (affirming denial of DNA testing on, among other things, strands of hair found in the victim's right hand and a shoe string found knotted around the victim's left wrist that could have been related to the murder, "but were never used to inculpate Gore and Gore has not shown how the DNA testing of these items could be used to exonerate him of the murder."); See also*, Wright v. State*, 995 So. 2d 324, 328 (Fla. 2008) ("Wright cannot show that the DNA testing result is of such nature that it would probably produce an acquittal on retrial.").

The fact that a DNA profile of an unidentified third person was obtained from the victim's fingernail samples which were taken during the victim's autopsy by the M.E. eighteen days after the victim was found still alive -- (1) was undisputed in 1997 (the date of the FDLE Analyst's report) and remains undisputed today, (2) was addressed at the time of trial and

rejected as a basis for relief on direct appeal and (3) fails to "give rise to a reasonable probability of acquittal or a lesser sentence." *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004); See also, *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008) (DNA analysis of the pubic hairs found on the victim would not exonerate Hitchcock because he admitted having sexual intercourse with victim, and DNA analysis of non-pubic hairs on the victim would not likely exonerate Hitchcock); *Sireci v. State*, 773 So. 2d 34, 43-44 (Fla. 2000) (even if DNA on hairs found in motel room belonged to codefendant, Sireci is not exculpated); *Tompkins v. State*, 872 So. 2d 230, 243 (Fla. 2003) (even if DNA analysis indicated a source other than victim or defendant, there is no reasonable probability of a different result); *King v. State*, 808 So. 2d 1237, 1247-49 (Fla. 2002) (same). The post-conviction court erred in finding trial counsel ineffective during the guilt phase and, even if viewed as a newly discovered evidence claim, there is no reasonable probability of a different result under *Jones*.

ISSUE II

THE POST-CONVICTION COURT ERRED IN GRANTING A NEW PENALTY PHASE ON THE BASIS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The post-conviction court granted a new penalty phase on the ground that trial counsel was ineffective for failing to investigate and present mitigation during the penalty phase of Fitzpatrick's capital trial. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Chavez v. State*, 12 So. 3d 199, 208 (Fla. 2009). Although the State submits that trial counsel was not deficient by following Fitzpatrick's instructions,[4] because this case can be decided on lack of prejudice ground, it is unnecessary to decide whether counsel performed deficiently by following Fitzpatrick's instructions. See, *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

In evaluating the prejudice prong of an IAC/penalty phase claim, the test remains whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. To assess that probability,

[4]The State recognizes that this Court, in *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010), held that counsel's failure to adequately prepare for mitigation rendered the defendant's waiver of mitigating evidence invalid.

the reviewing court must consider "the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding - and reweigh it against the evidence in aggravation." See, *Porter v. McCollum*, 558 U.S. ----, 130 S. Ct. 447, 453-54 (2009) (quotation marks and brackets omitted) Again, under *Strickland*, the State does not have any burden to prove that Fitzpatrick was not prejudiced by his counsel's performance. *Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different." *Wong v. Belmontes*, --- U.S. ----, 130 S. Ct. 383 (2009) (quoting *Strickland*, 466 U.S. at 694).

The scope of the duty to investigate mitigation evidence is substantially affected by the defendant's actions, statements, and instructions. As the Supreme Court explained in *Strickland*, the issue of what investigation decisions are reasonable "depends critically" on the defendant's instructions. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Attorney Eble testified that Fitzpatrick "made it clear there wasn't going to be any penalty phase [mitigation presented] . . . and "[no] matter how many times [Eble] asked him to change his mind, there wasn't going to be no mind changing, even after guilt." (PCR

Add. V2/175). In short, Fitzpatrick did "not want any mitigation presented" (PCR Add. V2/176), ordered Eble "not to present mitigation" (PCR Add. V2/177), and Fitzpatrick never wavered from that position. Fitzpatrick wouldn't talk to a psychologist or a psychiatrist. (PCR Add. V1/140).

Fitzpatrick did not testify in post-conviction. Even though he had the opportunity at his Rule 3.851 evidentiary hearing, he did not rebut the sworn testimony of trial counsel Eble who testified that Fitzpatrick was adamant that counsel not present any mitigation at the penalty phase. The only logical conclusion is that Fitzpatrick told the truth when he acknowledged at his penalty phase hearing that he did not want any mitigation presented. The record is devoid of any evidence establishing that further investigation of mitigation by trial counsel would have caused Fitzpatrick to reconsider his decision to reject the presentation of mitigation. See, *Schriro v. Landrigan*, 550 U.S. 465, 478, 127 S. Ct. 1933, 1942 (2007) ("[I]t was not objectively unreasonable for [the state postconviction] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence."). The conclusion that prejudice was established here can only result from an unwarranted

presumption of prejudice. [5] In this case, the trial court found four aggravating factors: (1) Fitzpatrick was under sentence of imprisonment, conditional/control release, when the murder in this case was committed (great weight), see § 921.141(5)(a), Fla. Stat. (2001); (2) Fitzpatrick had previously been convicted of a violent felony to some person when he committed the murder in this case (moderate weight), see § 921.141(5)(b), Fla. Stat. (2001); (3) Fitzpatrick committed the murder in this case while he was committing an involuntary sexual battery on the victim (little weight), see § 921.141(5)(d), Fla. Stat. (2001); and (4) Fitzpatrick committed the murder in this case in an especially heinous, atrocious, or cruel fashion (great weight), see § 921.141(5)(h), Fla. Stat. (2001). *Fitzpatrick v. State*, 900 So. 2d 495, 526 (Fla. 2005).

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[5]In an analogous setting, in addressing an IAC claim arising from a guilty plea, Justice Ginsburg reiterated that "[t]o prevail under the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner for federal habeas corpus relief must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985). . . . *Moore never declared that, better informed, he would have resisted the plea bargain and opted for trial. For that reason, I concur in the Court's judgment*. *Premo v. Moore,* ---U.S. ----, 131 S. Ct. 733, 746, (2011) Ginsburg, J., concurring. See also, *Winkles v. State*, 21 So. 3d 19, 23 (Fla. 2009) (declining to find prejudice where defendant did not testify during the evidentiary hearing that he would not have pleaded guilty but for counsel's advice.)

On direct appeal, this Court summarized the mitigation considered, and the weight assigned, as follows:

> The trial court gave little weight to the statutory mitigator involving the victim's participation in Fitzpatrick's conduct, *see* §921.141(6)(c), Fla. Stat. (2001), and gave no weight to Fitzpatrick's adult age, *see* §921.141(6)(g), Fla. Stat. (2001). The trial court did accept and weigh mitigation under the statutory catchall provision, *see* §921.141(6)(h), Fla. Stat. (2001), specifically that Fitzpatrick's family background was good (great weight); Fitzpatrick was doing well at his job when the murder in this case was committed (moderate weight); Fitzpatrick had a long history of alcoholism and drug addiction and was apparently making strides to combat it (moderate weight); Fitzpatrick served in the military but was given a general discharge under honorable conditions (no weight because of reason for his discharge); other mental problems, which included an attempted suicide in 1995 and a 1995 diagnosis of an adjustment disorder with depressed mood and situational depression and alcohol and marijuana dependency (moderate weight); and Fitzpatrick has had no relationship with his natural child but established a caring, parental relationship with the children of his girlfriend (great weight).
>
> The trial court also found the following nonstatutory mitigating factors: Fitzpatrick had shown considerate remorse for the death of the victim and appeared genuinely sorry for her death (moderate weight); Fitzpatrick had long-term relationships with at least three women (great weight); the loyalty of Fitzpatrick's friends and family was commendable and showed him as generally a friendly, warm, considerate person (great weight); and the victim was a troubled young woman but there was no evidence that she enticed Fitzpatrick into the acts he committed (given no weight).[FN 11]
>
> > [FN 11] The trial court considered and rejected as not established the following mitigating factors: Fitzpatrick had no significant criminal history, *see* §921.141(6)(a), Fla. Stat. (2001);

> Fitzpatrick was under the influence of extreme mental or emotional disturbance, *see* §921.141(6)(b), Fla. Stat. (2001); Fitzpatrick's role was minor, *see* §921.141(6)(d), Fla. Stat. (2001); Fitzpatrick acted under extreme duress or under the substantial domination of another person, *see* §921.141(6)(e), Fla. Stat. (2001); Fitzpatrick's capacity to appreciate the criminality of his act was impaired, *see* §921.141(6)(f), Fla. Stat. (2001); evidence that Fitzpatrick was abused, *see* §921.141(6)(h), Fla. Stat. (2001); evidence that Fitzpatrick made any charitable or humanitarian contributions, *see id.;* and Fitzpatrick's religious practices, *see id.*

The overwhelming aggravation and relative lack of mitigation in the instant case are similar to other cases in which this Court has upheld the death penalty. See *Grim v. State*, 841 So.2d 455, 464 (Fla.) (holding the death sentence proportional for the first-degree murder and sexual battery conviction where the aggravators included the murder was committed by a person under sentence of imprisonment, the defendant had prior convictions for violent felonies, and the murder was committed while the defendant was engaged in the commission of a sexual battery), *cert. denied*, 540 U.S. 892, 124 S.Ct. 230, 157 L.Ed.2d 166 (2003); *Darling v. State*, 808 So.2d 145, 164 (Fla. 2002)(holding death sentence proportional where murder was committed while defendant was engaged in the commission of the crime of armed sexual battery and defendant had been previously convicted of felony involving the use or threat of violence to the person); *Mansfield v. State*, 758 So.2d 636, 647 (Fla. 2000)(holding death penalty proportional where HAC and crime committed during the commission of a sexual battery aggravators were found, and five nonstatutory mitigating circumstances were found); *Branch v. State*, 685 So.2d 1250, 1253 (Fla. 1996)(holding death sentence proportional in a case where the aggravators were murder committed during the course of a sexual battery, prior violent felony, and HAC, and the following nonstatutory mitigating factors were found: remorse, unstable childhood, positive personality traits, and acceptable conduct at trial.)

> Comparing the circumstances in this action to the cases cited above and other capital cases, we conclude that Fitzpatrick's death sentence is proportionate.

Fitzpatrick, 900 So. 2d at 527.

Fitzpatrick has failed to establish in the record the requirement of "prejudice," in that he failed to establish that there is a reasonable probability that he would not have waived mitigation but for the alleged ineffective assistance of counsel. Moreover, Fitzpatrick's willingness to present mitigation in post-conviction does nothing to alter his steadfast refusal at the time of his trial. As the Eleventh Circuit Court painstakingly explained in another Florida death penalty case, *Allen v. Sec'y, Fla. Dept. of Corr.,* 611 F.3d 740, 762-765 (11th Cir. 2010):

> **The United States Supreme Court has told us in no uncertain terms that if a competent defendant did instruct his counsel not to offer any mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under Strickland."** [FN12] *Schriro*, 550 U.S. at 475, 127 S.Ct. at 1941 (emphasis added); cf. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)("In the context of guilty pleas,...in order to satisfy [*Strickland*'s] 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").
>
> As we recently explained, the *Schriro* rule "follows naturally from *Strickland*'s formulation of the prejudice prong, for there cannot be a reasonable probability of a different result if the defendant would have refused to permit the introduction of

mitigation evidence in any event." *Cummings v. Sec'y, Dep't of Corr.*, 588 F.3d 1331, 1360 (11th Cir. 2009) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). Allen therefore must show "that-but for his counsel's supposedly unreasonable conduct-helpful [mitigation] evidence actually would have been heard by the jury" or the sentencing court. *Gilreath v. Head*, 234 F.3d 547, 552 n. 12 (11th Cir. 2000). If Allen "would have precluded its admission in any event, [he] was not prejudiced by anything that trial counsel did." *Id.*; *see also id*. at 551-52.

The Florida courts reasonably determined that Allen had waived the presentation of any and all mitigating circumstances, that he "was entitled to control the overall objectives of his defense, including the decision to disavow mitigation," and that he had in fact "decided not to present mitigating evidence." *Allen I*, 662 So.2d at 329-30. That determination of the facts was entirely reasonable. See 28 U.S.C. § 2254(d)(2); *Schriro*, 550 U.S. at 477, 127 S.Ct. at 1942. Allen's pre-trial waiver made clear that he did not want to present mitigation evidence, and the trial court was repeatedly informed of that. Allen himself stood before the jury and argued in favor of a death sentence, telling the jury that it would be "torture" if he had to sit in jail-in a cage, as he put it-for 25 years. Allen also repeatedly instructed his counsel not to plead for his life in the hearing before the sentencing judge, *Allen I*, 662 So.2d at 329, making that position clear "over and over again."

Not once has Allen even alleged that he would have allowed trial counsel to present (or that he himself would have presented) mitigation evidence if only he had known about the evidence that his collateral proceedings counsel have since collected. Allen pleaded in his post-conviction motion that today he would be willing to present a mental health expert at an evidentiary hearing to testify that he suffers from severe depression, and we take that allegation as true. See App. Br. at 58; Post-conviction Record at 827. [FN13] Allen's willingness to present mitigation evidence today, however, does nothing to alter his steadfast desire at the time of his trial to seek the death penalty instead of life in prison. Having

alleged no specific facts that, if true, would entitle him to federal habeas relief, Allen is not entitled to an evidentiary hearing. See *Schriro*, 550 U.S. at 474, 477, 127 S.Ct. at 1940, 1942; *Boyd*, 592 F.3d at 1305.

* * *

Allen argues that his waiver should be deemed invalid because counsel, having conducted no pre-waiver investigation, failed to inform Allen of the mitigating evidence that he was giving up. The United States Supreme Court's *Schriro* decision forecloses that argument. The Court held that "it was not objectively unreasonable for that [state] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Schriro*, 550 U.S. at 478, 127 S.Ct. at 1942. The Court also stated that it was not clearly established federal law that a defendant's refusal to allow the presentation of mitigating evidence must be informed and knowing. *Id*. ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence.").[FN14]

* * *

. . . As the Supreme Court concluded in *Schriro*, "it was not objectively unreasonable for that [state post-conviction court] to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." [FN16] 550 U.S. at 478, 127 S.Ct. at 1942.

Allen, a mentally competent, intelligent defendant, having been convicted of a brutal murder, faced life imprisonment or death. Insisting on doing things his way, he chose death and prevented his counsel from attempting to secure a life sentence through the development and presentation of mitigating circumstances evidence. That is not a choice that most people would have made, but it is one that he had the right to make, and he made it voluntarily and with

> full awareness of the consequences. Cf. *Sanchez-Velasco v. Sec'y, Dep't of Corr.*, 287 F.3d 1015, 1033 (11th Cir. 2002)("As a death row inmate, Sanchez-Velasco does not have many choices left. One choice the law does give him is whether to fight the death sentence he is under or accede to it. Sanchez-Velasco, who is mentally competent to make that choice, has decided not to contest his death sentence any further. He has the right to make that choice."). What Allen does not have is the right to escape the consequences of his own decision not to present any mitigating circumstances evidence by shifting the blame for it to someone else.
>
> *Allen,* 611 F.3d at 762-765 (e.s.) [footnotes omitted]

In this case, as in *Spann v. State,* 985 So. 2d 1059 (Fla. 2008), trial counsel cannot be deemed ineffective when Fitzpatrick refused to be examined by a mental health expert and, thus, thwarted trial counsel's efforts to secure mental health mitigation. *Id*. at 1070, citing, *Gore v. State*, 784 So. 2d 418, 438 (Fla. 2001) (finding that counsel was not deemed ineffective when the defendant himself "thwarted defense counsel's efforts to secure mitigating evidence by refusing to cooperate with or be examined by several mental health experts"). See also, *Grim v. State,* 971 So. 2d 85, 102 (Fla. 2007), citing *Muhammad v. State*, 782 So. 2d 343, 364 n. 15 (Fla. 2001) (recognizing that a defendant who "knowingly and intelligent[ly] waived the presentation of mitigating evidence . . . [is] barred from subsequently claiming that [special] counsel's performance was ineffective in the presentation of

mitigating evidence"); *Johnston v. Singletary*, 162 F.3d 630, 642 (11th Cir. 1998) (concluding trial counsel's failure to present expert mental health testimony at penalty phase was not unreasonable where counsel tried to have defendant evaluated but defendant "was steadfast in his resistance to meeting with [the] expert"); *Hojan v. State,* 3 So. 3d 1204, 1211 (Fla. 2009) (noting that "[C]ompetent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel. See, e.g., *Boyd v. State*, 910 So. 2d 167, 189–90 (Fla. 2005) ("Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase.").

Fitzpatrick has not shown that he would have consented to presenting the mitigating evidence adduced at the post-conviction evidentiary hearing even if Eble had investigated and discovered it. As previously noted, a defendant cannot show prejudice under *Strickland* if the defendant would not have permitted his counsel to present mitigating evidence at trial. *Schriro*, 550 U.S. at 476-78, 127 S. Ct. at 1941-42; see also, *Gilreath*, 234 F.3d at 551 ("Petitioner must show a reasonable

probability that - if Petitioner had been advised more fully about character evidence or if trial counsel had requested a continuance - Petitioner would have authorized trial counsel to permit such evidence at sentencing."). Fitzpatrick has never testified that he would have allowed his counsel to present the post-conviction information at his trial. Fitzpatrick consistently opposed the presentation of mitigating evidence at his trial. Fitzpatrick repeatedly informed attorney Eble that he didn't want a life sentence. (PCR Add. V2/180). Fitzpatrick's unwavering insistence -- that he didn't want life imprisonment (PCR Add. V2/180) -- further indicate that he would not have consented to the presentation of mitigating evidence whose only purpose was to convince the jury to recommend life instead of death.

Fitzpatrick also cannot satisfy *Strickland's* prejudice prong because even if the mitigating evidence adduced in post-conviction had been presented, he has not shown "that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Porter*, at 453. The trial court found four aggravating circumstances, and gave "great weight" to two of the aggravating factors, which included the HAC aggravator. Given the strength of the aggravating circumstances, the proposed mitigation evidence must be strong

enough to outweigh them, and therefore to raise a reasonable probability that the balance of aggravating and mitigating circumstances did not warrant death.

The trial court previously considered a number of factors in mitigation. (DA V7/1167-1175; V12/2017-2025). The trial court gave "great weight" to the following mitigating circumstances: (1) Fitzpatrick's good family background (DA V7/1169; V12/2018-2019); (2) Fitzpatrick's role as a surrogate father to his girlfriend's children (DA V7/1172-1173; V12/2021-2022); (3) Fitzpatrick's long-term relationships with three women showed that he was not a "sex-starved maniac[,]" and this crime seems more of an aberration than as a common course of conduct (DA V7/1174; V12/2022-2023); and (4) the loyalty of Fitzpatrick's family and friends showed him to be "generally a friendly, warm, considerate person." (DA V7/1174-1175; V12/2023). The trial court gave "moderate weight" to the following mitigation: (1) Fitzpatrick was doing well at his job (DA V7/1170; V12/2019); (2) Fitzpatrick "had a long history of alcoholism and drug addiction and was apparently making strides to combat it" (DA V7/1170-1171; V12/2019-2020); (3) Fitzpatrick's mental problems, including a suicide attempt in 1995, and "in 1995 a diagnosis of adjustment disorder with depressed mood and situational depression and alcohol and marijuana dependency"

(DA V7/1171-1172; V12/2020-2021); and (4) Fitzpatrick's remorse. (DA V7/1173-1174; V12/2022).

The additional mitigation evidence presented in post-conviction was largely cumulative to that previously addressed by the trial court. *Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008) (prejudice cannot be demonstrated by testimony that was cumulative to that presented at the penalty phase; counsel is not ineffective for failing to present cumulative evidence.) The post-conviction mitigation is either cumulative or inconsequential in light of the aggravating circumstances or could open the door to potentially damaging rebuttal. As to more drug or alcohol abuse and mental health evidence, the information provided by Mary Lewis and Dr. Smith was somewhat cumulative. In addition, presenting more evidence of a defendant's drug or alcohol addiction to a jury is often a two-edged sword or could have opened the door to damaging evidence. See, *Wong*, 130 S. Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

Although more detailed family background information was presented from Fitzpatrick's mother, Mary Lewis, the additional information essentially portrayed a mother who loved her

children,[6] but, because of her own struggles with alcoholism, was often unable to care for them and, therefore, family members frequently stepped in to help. Moreover, the mitigating nature of this proposed penalty-phase evidence would have been wholly offset by the double-edged nature of some of her additional testimony, including her admission of knowledge about Fitzpatrick's discharge from the military for "dirty urine" and his prior violent felony conviction. Additionally, any attempt to present Fitzpatrick in a "more positive" light also could have opened the door to a rebuttal by the State that would have included the possibility of more emphasis on his prior violent felony conviction. See, *Wong*, 130 S. Ct. at 389 (recognizing "more-evidence-is-better" attempt to portray defendant in positive light can invite strong negative evidence in rebuttal). As the Supreme Court pointed out in *Pinholster*,

> If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. See, e.g., *Wong v. Belmontes*, 558 U.S. ––––, 130 S.Ct. 383, 389–90, 175 L.Ed.2d 328 (2009)(per curiam)(taking into account that certain mitigating

[6]In *Cullen v. Pinholster*, ---U.S.----, 131 S. Ct. 1388, 1398 (2011), the Court noted that a family sympathy defense is how the State understood defense counsel's strategy. The prosecutor carefully opened her cross-examination of Pinholster's mother with, "I hope you understand I don't enjoy cross-examining a mother of anybody." 52 Tr. 7407. And in her closing argument, the prosecutor attempted to undercut defense counsel's strategy by pointing out, "Even the most heinous person born, even Adolph Hitler[,] probably had a mother who loved him." 53 *id*., at 7452.

> evidence would have exposed the petitioner to further aggravating evidence). **The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, see post, at 1424—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.** Cf. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness).
>
> *Pinholster*, 131 S. Ct. 1388, 1410. (e.s.)

Furthermore, any reliance the fact that Mary Lewis struggled with her own alcoholism and did not attain sobriety until Fitzpatrick was eleven years old could be met by the fact that Fitzpatrick was 34 years old when he murdered Laura Romines. Thus, the State certainly could have stressed that his childhood was many years behind him. Even had this additional post-conviction evidence been presented, there is no reasonable probability of a different result under *Strickland*. The post-conviction court erred in finding trial counsel ineffective at the penalty phase. The State respectfully submits that the post-conviction court's order should be reversed and this case remanded for reinstatement of the judgment and sentence of death.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant requests this Court reverse the post-conviction court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to Mark S. Gruber, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3301 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 9th day of March, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR THE STATE OF FLORIDA