

IN THE SUPREME COURT OF FLORIDA

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RAY JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1159

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 998818

Office of the Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
ken.nunnelley@myfloridalegal.com
Secondary E-Mail:
CapApp@MyFloridaLegal.com
(386)238-4990
(386)226-0457 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This case is an appeal from the denial, after an evidentiary hearing, of Jackson's *Florida Rule of Criminal Procedure* 3.851 motion. Jackson was convicted of first degree murder and sentenced to death for the November 2004 murder of Pallis Paulk. This Court affirmed the conviction and death sentence on direct appeal. *Jackson v. State*, 25 So. 3d 518 (Fla. 2009).

STATEMENT OF THE CASE AND FACTS

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

THE FACTS OF THE OFFENSE AND SENTENCING

On direct appeal, this Court summarized the facts of the crime and sentencing as follows:

Ray Jackson and his codefendant, Michael Wooten, were indicted and tried together for the kidnapping and first-degree murder of Pallis Paulk. The victim was murdered after she was kidnapped in retribution for having stolen drugs and money from Jackson. Both Jackson and his codefendant were convicted of kidnapping and first-degree murder.

Guilt Phase Evidence

When Pallis Paulk was last seen alive by an acquaintance on November 9, 2004, she was being forced into the trunk of a car by Jackson. Her body was found in a shallow grave several months later. The facts at trial concerning her murder came in through a series of witnesses by which the following factual scenario was presented. [FN1]

[FN1] The State presented numerous eyewitnesses. Curtis Vreen was Paulk's

friend who supplied her with drugs and testified that Jackson took Paulk from Vreen's house. Calvin Morris was her cousin who was with Paulk when she stole from Jackson; he also saw Jackson kidnap Paulk. Latisha Allen was Jackson's close friend; she saw the victim bound and testified that Jackson affirmed he intended to kill Paulk after she stole from him. Frederick Hunt was another one of Jackson's friends; he also saw Paulk bound and under Jackson's control and assisted Jackson in forcing Paulk into the trunk of the car.

Around 3 a.m. on the morning of November 9th, Paulk arrived at a friend's house, looking for ecstasy pills. Her friend, Curtis Vreen, testified that Paulk arrived in a red hatchback. [FN2] He noticed that there was someone else in the car, but he could not see the person's face. Vreen gave her half of an ecstasy pill and told her that was all he had.

[FN2] According to evidence presented at trial, codefendant Wooten drove a red hatchback.

Later that day, Paulk called her sixteen-year-old cousin, Calvin Morris, and told Morris, "I have a lick for you, Cuz," which meant that she found a person to rob. Morris met Paulk at an apartment in Daytona Beach, and when Morris arrived, he saw Ray Jackson sleeping in bed. Concerned that Jackson might wake up, Morris walked back to the car and waited for his cousin. Paulk arrived at the car, carrying a Sponge Bob bag, which contained about two ounces of cocaine, some marijuana, and approximately \$800. She also had men's jewelry and a cell phone that did not belong to her. Together, they drove to pick up Morris's girlfriend in Sanford, Florida, and smoked some of the marijuana. While they were driving, Paulk called Vreen, looking for more ecstasy.

At some point after Paulk left Jackson's apartment, Jackson woke up and realized the theft. Jackson and codefendant Wooten went to Latisha Allen's apartment and asked to speak to Frederick Hunt, who was Vreen's cousin. [FN3] Based on Jackson's request, Hunt called Vreen to see if he had heard from Paulk. Vreen

responded that Paulk had called him and provided the phone number from which Paulk had called Vreen. After Hunt relayed this information to Jackson, Jackson left.

[FN3] At the time, Hunt, Allen, Dewayne Thomas (Allen's boyfriend), and Charles Bush all lived in Allen's apartment, along with Allen's child.

Later in the day, Morris took Paulk to Vreen's house, even though Morris was afraid that Jackson would be there looking for Paulk. Paulk went inside, telling Morris that she would be right back. While Morris was waiting in the car, Wooten came outside and told Morris that Paulk was using the restroom. Jackson and Paulk eventually came out of the house and walked up to Morris's car. Morris saw that Jackson had a gun. Jackson asked, "Where is my stuff at?" Morris immediately gave Jackson his marijuana back. Paulk retrieved some additional items from Morris's car and then left with Jackson.

Morris noticed that Paulk looked upset, like she wanted to cry. According to Morris, Jackson shoved Paulk into the back of a red hatchback, and Jackson, Wooten, and Paulk drove away. Morris initially followed them, but stopped after Jackson held a gun out of the window. Morris immediately went to his grandmother's house and told her what had happened, but did not go to the police at that time because he had outstanding warrants against him.

Jackson took Paulk to Allen's apartment. Although Hunt, Thomas, and Allen were not there when he first arrived, Jackson had keys to Allen's apartment. [FN4] Allen and Hunt returned to Allen's apartment and saw a red hatchback parked in front. Jackson was inside, sitting by the hallway that led to the bedrooms. Jackson told Allen that he had been robbed and asked her to go look. Allen went into the bathroom where she saw a woman in her bathtub, dressed but with her hands tied behind her back. The woman told Allen that she was fine and that it was her fault. After Allen left the bathroom, Wooten told her not to be "dumb" like the victim or she could end up the same way. Allen asked if Jackson was going to kill the woman, and he nodded yes. [FN5] Allen left to bail her boyfriend out

of jail, but Hunt remained.

[FN4] Shortly before Jackson arrived, Thomas and Hunt left the apartment and were stopped by police. The police arrested Thomas for driving without a license. Allen learned about the arrest and arrived at the scene to retrieve the car and Hunt. Based on this arrest, which occurred on the same day as the kidnapping, the evidence established that Paulk was kidnapped on November 9, 2004.

[FN5] Allen also testified that Jackson asked Allen for a douche, so she gave him one. At trial, the State argued that Jackson needed the douche to remove any potential DNA evidence because Paulk and Jackson spent the prior night together and presumably had sex before Paulk stole Jackson's drugs and money.

Although a number of people were in Allen's apartment, Wooten and Jackson were the only people who entered the bathroom after Allen left. Jackson asked if anybody wanted to "have fun" with Paulk, but no one responded. Jackson obtained duct tape and, after putting on some gloves, went into the bathroom with the duct tape.

Once night fell, Jackson had several people serve as lookouts. Jackson then retrieved Paulk and carried her over his shoulder to one of his cars, a blue Oldsmobile Delta 88. As they neared the car, Paulk pleaded with Jackson not to put her in the trunk. Despite her pleas, Jackson forced Paulk into the trunk. Paulk resisted, straightening her legs so the trunk lid would not close. Jackson punched her in the face, Hunt hit Paulk in the back of her legs, and they were finally able to close the trunk. After retrieving his keys, Jackson left. Paulk's friends and family never saw her alive again.

After Hunt helped in Paulk's kidnapping, Hunt and Jackson became much closer. Hunt moved in with Jackson, selling drugs for Jackson, answering his phones, and running different errands for him. At some point, Hunt heard that a body had been found and told

Jackson. Jackson called somebody and asked that person to go to the spot, but to "step lightly" and then call him back. On a different occasion, when Hunt had Jackson's phone, a person from Paulk's family called, accusing Jackson of doing something with Paulk. When Hunt informed Jackson about the call, Jackson replied that he was not "worried about it because they ain't got no body, they ain't got no case." [FN6] After Paulk's family posted flyers about Paulk in an attempt to find her, Jackson asked Hunt to find one of the flyers and tried to hang it up on his wall. Before Paulk's body was found, Hunt and Jackson's relationship soured after Jackson borrowed \$800 from Hunt to buy cocaine and never repaid the money.

[FN6]. Jackson made a similar statement to another acquaintance.

On April 17, 2005, Paulk's body was discovered in a shallow grave. There were no visible signs of injury, but her body was severely decomposed. Using dental comparisons, a forensic dentist affirmatively identified the body as Pallis Paulk. The medical examiner opined that the cause of death was homicidal violence of undetermined etiology. Although he was unable to determine the precise method of death, he ruled out a drug overdose after reviewing the toxicology report. Shortly after Paulk's body was discovered, Hunt and Allen approached the police together, providing information regarding Paulk's disappearance.

At trial, in his defense, Jackson presented Captain Brian Skipper, an officer with the Daytona Beach Police Department, who testified about an alleged serial killer who murdered three women between December 26, 2005, and February 24, 2006. However, on cross-examination, the State demonstrated substantial differences between those crimes and the murder of Paulk.

During codefendant Wooten's defense, Wooten called Quentin Wallace, a fellow inmate who testified that while Hunt was in prison, Hunt talked to him about his own case and said that he had lied about both Wooten and Jackson and that Wooten was not even there. Wooten also testified, alleging that he lived in Jacksonville at the time of the crime and was at work on the day

that the kidnapping occurred. He further denied owning a red hatchback at the time of the crime.

Based on the above evidence, by special verdict forms, the jury found that Jackson was guilty of first-degree murder under the theories of premeditated murder and felony murder. The jury found that Wooten was guilty of only first-degree felony murder. The jury found that both Jackson and Wooten were guilty of kidnapping.

Penalty Phase

During the penalty phase, the State presented several victim impact statements and announced that Jackson had stipulated to the facts that he had prior convictions for robbery, battery on a law enforcement officer, and resisting arrest with violence.

Jackson called numerous witnesses who testified about the poor conditions in which he grew up. According to these witnesses, both Jackson and his younger brother, Thayer, lived with their mother, who abused drugs and disappeared for weeks at a time. Jackson became a father figure and made sure that they had enough food to eat. After Jackson's younger sister died, Jackson tried to hang himself. Both of the boys entered the foster care system. Thayer's aunt raised Thayer, but was unable to take Jackson. Jackson went to a mental health facility, where he stayed for a considerable period of time. Jackson's wife also testified, asserting that Jackson was a good worker, a good neighbor, a good provider, good to children, generous to others, and had two children who needed him.

Finally, Dr. Jeffery Danziger, a psychiatrist, reviewed Jackson's prior mental health history records, as well as other aspects of the case. Dr. Danziger opined that Jackson suffers from "bipolar disorder type II," a mood disorder in which a person swings from depressive episodes to manic episodes. Dr. Danziger thought it was very unusual that Jackson attempted to hang himself at the age of eight and was in a mental hospital at Macclenny from the age of eight until he was almost ten.

By a vote of nine to three, the jury recommended that Jackson be sentenced to death. After holding a *Spencer*

[FN7] hearing, the court agreed with the jury's recommendation and sentenced Jackson to death, concluding that the aggravators outweighed the mitigators. In making this determination, the court found three aggravating circumstances applied: (1) Jackson was previously convicted of a felony involving the use or threat of violence to a person based on Jackson's prior convictions for robbery, battery on a law enforcement officer, and resisting arrest with violence; (2) the capital felony was committed while Jackson was engaged in the commission of a kidnapping; and (3) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The court did not find any statutory mitigation, but did find twelve nonstatutory mitigating factors. [FN8] The trial court specifically analyzed the relative culpability of codefendant Wooten, who received a life sentence, and found that the evidence indicated that the codefendant was an "underling of the defendant and was operating at the defendant's direction."

[FN7] *Spencer v. State*, 615 So. 2d 688 (Fla.1993).

[FN8] The court found the following mitigators: (1) Jackson was severely neglected and abandoned during childhood and suffered extreme loss of family and self-image at an early age (given some weight); (2) Jackson suffered from a very abusive childhood, both from his family and while in foster care (given little weight); (3) Jackson suffered from serious mental health issues (bipolar disorder) and was involuntarily hospitalized in mental health hospitals for several years (given great weight); (4) Jackson has a special bond and is good with children (given little weight); (5) Jackson is capable of forming loving relationships with family members and friends and has the support of his family (given little weight); (6) Jackson has been a good and supportive son, brother, father, and husband (given little weight); (7) Jackson has biological children and a stepchild with whom he has bonded and who need his support and love (given little

weight); (8) Jackson has worked and contributed to his family and society in his various jobs (given little weight); (9) Jackson had a good and close relationship with his neighbors (given little weight); (10) Jackson was a caring child and adult and tried to help people (given little weight); (11) Jackson demonstrated appropriate courtroom behavior throughout the course of the trial (given very little weight); and (12) Jackson can receive a life sentence and will die in prison (given little weight).

Jackson v. State, 25 So. 3d 518, 522-526 (Fla. 2009).

THE EVIDENTIARY HEARING FACTS

The evidentiary hearing was held December 6-8, 2011. (V2-8, R137-1083).¹

Curtis Lewis, the victim's older half-brother, said he and Pallis Paulk were raised together and had a good relationship. (V2, R153-54). Lewis lived in Daytona Beach in 2004. (V2, R155). Paulk worked as an "exotic dancer" and lived in Orlando but "was back and forth." One of the clubs Paulk worked at was Cleo's. (V2, R172). Prior to Paulk's disappearance, Lewis spoke to her every other week and saw Paulk about once a month. Paulk brought her daughter to Thanksgiving and Christmas dinners. (V2, R155).

At the end of 2004, Lewis and his family became concerned

¹ Cites to the 3.851 appeal record will be V_, R _ for volume number followed by page number. Cites to the direct appeal record will be DAR, V_, R_.

about Paulk's whereabouts because Paulk did not contact their grandmother on her birthday, December 18. Paulk always called their grandmother and attended a birthday dinner. (V2, R158-59). Although it was not unusual for Paulk to be missing for several days or months, Lewis's cousin Fayonna Paulk filed a missing persons report. (V2, R158, 159, 160, 175). Police indicated that Paulk could be "on the lam" as she had an outstanding warrant for her arrest. (V2, R159).

Paulk's body was found in 2005. (V2, R160). Lewis gave police a written statement after Paulk's body was discovered. (V2, R160, Def. Exh. 1). He stated that he had last seen Paulk on November 14 at a local park the week after his November 6, 2004, birthday. (V2, R163, 164, 167). Lewis said Paulk "was happy. She wasn't under ... stress or duress." (V2, R172). Paulk was with a tall, black male, in his mid-20's, that wore dreadlocks but Lewis said that man was not Jackson. (V2, R174, 175).

Lewis could not specifically recall talking to defense investigators in October 2005. He did not recall telling them that he had last seen Paulk **two or three days** after his November 6 birthday. (V2, R176). He talked to "numerous people" and could not recall everyone he talked to. He was "almost certain" the last time he saw Paulk was November 14. (V2, R179).

Lewis was not deposed and did not testify at Jackson's trial. (V2, R168-69, 170). He has continued to live in the Daytona

Beach area and maintain contact with family members. (V2, R173).

William Hinton was a staff writer for the *Orlando Weekly* newspaper from 2000-2003. (V2, R182, 183).² Hinton authored several articles on the Metropolitan Bureau of Investigation ("MBI"), which was an Orlando-based organization comprised of several policing agencies including Federal agencies, the Orlando Police Department, and Orange and Osceola Counties. (V2, R185, 186). The MBI's mission was to stamp out organized prostitution rings and drug rings. Hinton wrote several articles in the early 2000's about the MBI after gathering information through interviews, public record requests, and depositions. Hinton said the articles were fact-checked by two editors and a proofreader. (V2, R186, 187-88, 197, 198, 200, 206).

Hinton said he obtained information that Paulk was an exotic dancer at Cleo's, an Orlando-based adult entertainment club, who had allegedly sold cocaine to undercover agents with the MBI. Paulk subsequently became a confidential informant for the MBI. (V2, R192, 193, 221). One of Hinton's articles contained information that the MBI had attempted to shut down Cleo's based upon information provided by Paulk. (V2, R194). Hinton never

² The paper was published in print form as well as on the Internet. Articles are archived on the paper's website. (V2, R184, 185).

spoke to Paulk. (V2, R210). Hinton said Cleo's remained open through a negotiated settlement. (V2, R207-08, 209). Hinton said Paulk retracted her allegations against the manager of Cleo's. (V2, R209).

One of Hinton's articles included information about Joseph Cocchiarella, "sort of the backbone" of the MBI. He was a former director as well as a legal advisor. Hinton said Cocchiarella wrote several of the MBI's manuals involving tactics and techniques. (V2, R194-95). Hinton's articles were obtainable by conducting an Internet search. (V2, R196).

Joseph Cocchiarella is an assistant state attorney for the Ninth Judicial Circuit, currently assigned as the general counsel and acting director for the MBI. (V2, R234). The MBI is a multi-jurisdictional police task force that was created to target mid-level vice, narcotics, and organized crime offenses, that have a continuing existence across jurisdictional lines. (V2, R234, 235). Cocchiarella said the MBI used confidential informants in various cases but primarily in narcotics cases. (V2, R237).

Cocchiarella responded to a public records request on behalf of the MBI and submitted records consisting of about 1500 pages to the Florida records repository. (V2, R238-41). Several documents consisted of a 2001 arrest warrant for Pallis Paulk, as well as an affidavit for the arrest warrant, for offenses

that occurred at Cleo's. (V2, R244, 245, 246, 265). Cocchiarella was familiar with Cleo's, an adult entertainment establishment - a "strip bar." (V2, R236). Several documents contained 2001-2003 investigative reports conducted by MBI agents with Pallis Paulk. (V2, R248-49, 250, 257-59). Cocchiarella said Paulk agreed to be a cooperating witness so the one charge against her, for sale or delivery of cocaine, was dropped in 2002. (V2, R251, 264, 267). Paulk was not a confidential informant. (V2, R264). The investigation involving Cleo's and Paulk concluded in 2003. (V2, R253).

Philip Bonamo has been practicing law for 16 years. (V3, R274, 275). Bonamo was brought into Jackson's case by lead attorney Gerard Keating. Jackson's case was the only death penalty case he defended. Although Bonamo participated in many aspects of Jackson's case, he was primarily focused on the penalty phase. (V3, R275, 276-77).

Bonamo did not have an independent recollection of the ABA guidelines for death penalty cases. (V3, R278). However, when he came into a case, he reviewed many documents and outlines related to death penalty cases, including the ABA guidelines. He attends the FACDL seminar/Life Over Death Seminar which he

attended in September 2005.³ (V3, R279, 338). Bonamo is familiar with statutory and non-statutory mitigators. (V3, R281-82). At the time Bonamo joined the defense team, Keating and Investigator O'Malley had already been looking into mitigation, including conversations with Dr. Jeffrey Danziger, a psychiatrist. (V3, R285, 286). Bonamo did not direct Danziger on mitigation - - direction was given by lead counsel Keating. (V3, R286). Danziger was provided with Jackson's records, which included DCF and DOC records, medical records and school records. Danziger was also provided with supplemental records several times in order for him to conduct a complete evaluation. (V3, R289-90).

Bonamo said that if a March 2002 psychosocial evaluation administered to Jackson by ACT (a behavioral healthcare company) was in his files, he "most likely" reviewed it. (V3, R292, 301, Def. Exh. 14). The evaluation was conducted by Olney McLarty, a social worker. McLarty diagnosed Jackson with cannabis dependence. Keating would have provided the report to Danziger. (V3, R293). In addition, Keating or O'Malley would have provided Danziger with Jackson's disciplinary reports "DR's" from DOC. (V3, R294-95, 302, Def. Exhs. 15, 16). One of the DR's involved an incident involving Jackson's wife's attempt to smuggle

³ Jackson's trial was held in April/May 2007.

Marijuana to Jackson at Baker Correctional Institution. (V3, R295-96). Bonamo said Danziger was also provided with a "post sentence investigation report" which stated that Jackson was court-ordered to receive in-patient care at Stewart Marchman/ACT for substance abuse. The "post sentence investigation report" also indicted Jackson was using "hard drugs." (V3, R305-06, 307, Def. Exh. 17).

Bonamo said Danziger did not write a report in Jackson's case, but Bonamo was provided with Danziger's handwritten notes of his April 2006 evaluation. (V3, R308, 309). Bonamo and Keating "probably" held a joint conference with Danziger to discuss his findings. (V3, R309). Bonamo did not recall if Danziger spoke to Jackson's wife, Tonya, Jackson's mother, Evelyn Thayer, or Jackson's business partner, Jameel McLaury. Keating would have directed Danziger to speak to witnesses. (V3, R310, 311-12).

Bonamo said Danziger's notes indicated Jackson abused Marijuana "all day," occasionally took Ecstasy, and sold drugs. The notes also reflected pre-natal exposure to PCP and cocaine. (V3, R317, 321-22, 323). All records were turned over to Danziger. (V3, R324). Bonamo also talked to Jackson several times about his drug use and history of selling drugs. (V3, R327, 328). Danziger's notes questioned whether or not Jackson had a problem with alcohol abuse. (V3, R328-29). Bonamo did not

argue substance abuse history in his closing argument or in the sentencing memorandum because the defense focused on the strongest mitigation as it related to Jackson -- i.e., mental health issues, and foster care. Any mention of drug use would only have been as it related to Jackson's mother. (V3, R331, 333). In Bonamo's opinion, the drug use was not going to be a strong mitigator due to Jackson's history of selling drugs. (V3, R330, 365-66).

Bonamo said Jackson's drug use and dealing in drugs permeated the entire trial. (V3, R336). The scenario presented to the jury was that Jackson and Paulk had been using drugs together before she robbed him. (V3, R336). Bonamo said everything was about drugs and the drug community. (V3, R337).

Bonamo was brought into the trial as second chair on the theory that it was better to have a different person present mitigation if a jury rejected the argument of the guilt phase attorney. (V3, R337). Bonamo said lead counsel Keating had defended numerous capital cases leading up to Jackson's trial. (V3, R340).

Bonamo's files contained about 500 pages of Jackson's records from DCF, DOC, and birth records. Either Keating or O'Malley obtained all possible records on Jackson's life which they reviewed in preparation for trial. (V3, R341-44, 351-52, 360). The jury heard from Jackson's mother and grandmother, and the

"horrific" life that Jackson had, including a two-year stay at ages 8-10 at Northeast Florida State Hospital, subsequent to a suicide attempt.⁴ (V3, R345, 346). It was the defense's strategy to show the life Jackson had compared to his brother Roderick Jackson, whose life "was forever different" because a family member took him in. (V3, R348, 357-58). The defense team worked on mitigation for two years leading up to Jackson's trial. They interviewed several family members a few times including Jackson's wife, his mother, his brother, and a maternal aunt. (V3, R349, 353).

Bonamo said Jackson had a prior criminal history that included drug possessions, sale and delivery of drugs, armed robbery, resisting arrest, and assault on a LEO. Only the prior violent felonies were admitted as aggravating factors. (V3, R350, 352-53).

Bonamo said the O'Malley investigation firm conducted a lot of leg work, "a tremendous amount," and attended team strategy meetings. (V3, R354). The team discussed mitigation several times. (V3, R356). Bonamo said Danziger diagnosed Jackson with bipolar disorder. (V3, R361). In addition, Bonamo said Danziger thought it was "rare" to see an 8-year-old institutionalized as

⁴ Jackson blamed himself for his baby sister's death from crib death because, as her big brother, "he didn't protect her." (V3, R347).

in Jackson's case. (V3, R363-64). Bonamo said Danziger also diagnosed Jackson with a history of cannabis dependence, the same diagnosis as McLarty from ACT Corporation, as well as a possible history of alcohol abuse. (V3, R365). Bonamo did not want to open the door to a diagnosis of antisocial personality disorder because it would "dilute and diffuse" what the defense had presented in mitigation. (V3, R366).

Bonamo said Jackson never admitted involvement in the disappearance or murder of Paulk. (V3, R369). However, witness testimony at trial indicated Jackson calmly abducted Paulk, kept her in a bathtub, showed her off to witnesses and told them, "Do not do this or you'll end up like her." (V3, R369). Bonamo said witnesses also testified that Jackson got his friends to help move Paulk into the trunk of a car and that she was gone from that point on. (V3, R369). There was no evidence Jackson used drugs on the day of the murder or the during events preceding the murder. (V3, R370).

Brent Turvey is a self-employed forensic scientist, forensic criminologist, and an adjunct professor at Oklahoma City University. He has also been a forensic profiler since 1995. (V4, R393, 394). He consults with law enforcement agencies as well as prosecutors and defense attorneys but he primarily works for the defense. (V4, R395, 426). The majority of his work is "death penalty work" -- at least "80%." (V4, R406-07). Although

Turvey has "collected evidence" during secondary reviews of crime scenes, he has never worked as a crime scene technician. (V4, R441-42, 443). In addition, Turvey was not allowed to testify in some courts, *i.e.*, Oregon, because his "evidence" was not admissible. (V4, R444). Further, Turvey's testimony was found incredible in the Ohio case, *Thorne v. Moore*.⁵ (V4, R447). Thorne recalled the judge in the *Thorne* case "was very critical." (V4, R447). Nonetheless, based on his education, and work experience, the trial court accepted Turvey as an expert in "forensic science type evidence, profiling, specifically with ... serial killers, and ... crime scene reconstruction investigation."

Turvey performed a crime scene reconstruction as well as a linkage analysis to the serial killer theory of defense. (V4, R456). Turvey reviewed numerous documents that included police reports, notes and photos; depositions; police interviews and videos; search warrant affidavits and probably cause statements; FDLE crime lab reports; FBI crime lab reports; Volusia County medical examiner's notes, report, and photos; osteological report from the C.A. Pound Human Identification Laboratory; Paulk's medical and background information; trial transcripts,

⁵ See *Thorne v. Moore*, 2009 WL 2421741, 48 (N.D. Ohio July 31, 2009) (unreported decision).

and newspaper articles regarding a potential serial killer murderer. (V4, R453-54, 458, 476).

Turvey reviewed the trial testimony of Captain Brian Skipper, Daytona Beach Police Department. Turvey said Skipper testified at trial that Paulk's murder was not linked to the murders of several prostitutes murdered in the Daytona Beach area. (V458, 462, 463-64). After reviewing the crime scene tech reports and the medical examiner's report on Paulk, Turvey learned that Paulk was recovered from a shallow grave, that an attempt had been made to burn her body, and there was very little physical evidence collected from the outdoor location where her body was found off the side of a road. (V4, R465). In Turvey's opinion, Paulk was a similar victim to the murdered, drug-addicted prostitutes because she was engaged in a similar occupation and was also involved with drugs. However, the murdered prostitutes were found nude and were shot in the head - - Paulk was not. There was no determined method of killing for Paulk. (V4, R466, 467). In addition, Paulk's case did not involve evidence of a sexual component whereas the three murdered prostitutes "had a heavy sexual component." (V4, R467, 468-69). In Turvey's opinion, Paulk's death was not consistent with the pattern of a serial killer. (V4, R470). Turvey said the defense team should not have used a "serial killer defense." Had he been retained, Turvey said that theory "would be too reckless for me to

pursue." (V4, R472, 473).

In Turvey's opinion, the investigative and forensic evidence were not sufficient to render a competent crime scene analysis. (V4, R481). He said, "there's so much that wasn't done and so much that was overlooked. And what was done was of such low quality that it doesn't allow you to make really reliable inferences about what actually happened." (V4, R481). For example, Turvey said the "offender of the crime scene cannot be assumed." (V4, R481). Turvey said "there was no physical evidence associating Paulk with the Oldsmobile."⁶ (V4, R487). In Turvey's opinion, there should have been some physical evidence left behind. (V4, R487). Turvey would have re-processed each crime scene where Paulk had been leading up to her murder. (V4, R488).

In Turvey's opinion, this case failed the "integrity test." (V4, R456). Turvey said every person at the crime scene/grave site should have written a report. In his opinion, "there seemed to be a lack of cohesion and integrity because of the lack of leadership." (V4, R492). Turvey would have recommended hiring the following: 1) an expert in police practices and probable cause; 2) an expert, "someone like myself," in forensic science

⁶ Prior to her murder, Paulk was forced into the trunk of a blue Oldsmobile Delta 88. See, *Jackson v. State*, 25 So. 3d 518, 524 (Fla. 2009).

and crime scene investigation; 3) an expert in forensic pathology; and 4) an expert in serial homicide investigation linkage analysis. (V4, R494, 496-98). Further, in his opinion, Turvey said a DNA expert could have been hired to perform STR DNA analysis on the "unidentified hair" found at the crime scene/grave site. (V4, R500, 501).

Turvey said the medical examiner testified at trial that no clothes were found in the area where Paulk's body was recovered. (V4, R506). Turvey admitted "there's a lot of unknowns in this case," including whether or not Paulk could have had a gunshot wound to a part of her body that had decomposed. (V4, R506). However, in Turvey's opinion, the medical examiner "didn't use his medical expertise to determine the cause of death in this case." (V4, R507).

Turvey did not talk to any law enforcement personnel involved in this case. He did not talk to Jackson's attorneys. He did not examine any of the physical evidence gathered by law enforcement crime scene technicians who processed the crime scenes because "that wouldn't be necessary for my analysis." In addition, he was unsure whether or not he had reviewed all available records "because the reality is you can't ever know if you've got them all." (V4, R507). In Turvey's opinion, even though there was a time delay between the victim's abduction and discovery of her remains, Turvey said all the crime scenes where Paulk had been

prior to her murder should have been processed because "it can be done, it's often done, even by law enforcement ...(and) not just by the defense." (V4, R509-10).

Dr. Daniel Buffington, clinical pharmacologist, is employed by the University of South Florida and also maintains a private practice. (V4, R514). Clinical pharmacology is the study of medications and substances and the effects they have on the body. Toxicology is a subset of pharmacology which studies the negative attributes of medications. (V4, R516). Buffington said a pharmacist is automatically a pharmacologist and a toxicologist. (V4, R532). Over the State's objection, Buffington was qualified as a pharmacologist and a toxicologist. (V4, R533).

Buffington reviewed Jackson's medical records, DOC records, trial and deposition testimony, school records, attorney correspondence regarding depositions, and Dr. Danziger's notes and deposition. (V4, R534-35, 580). Buffington said he and Danziger are different as Buffington focuses on "medications of the therapeutic agencies" and provides recommendations, but Danziger focuses on "managing patients that are undergoing psychiatric care, either diagnosis and/or management." (V4, R535).

Buffington interviewed several of Jackson's family members and friends. As a result, Buffington said Jackson's substance

abuse "goes as far back as his childhood." (V4, R536). Jackson was exposed to PCP and cocaine during his mother's pregnancy. (V4, R537). In addition, Jackson's siblings and other family members have abused substances - - whether it was "alcohol or other substance abuse problems." (V4, R539). Jackson abused cocaine when he was a teenager. (V4, R541, 560, 566). Jackson abused Ecstasy in his late 20's. (V4, R541, 571). In addition, Buffington said Jackson was physically abused by his step-father and that his mother abandoned him when he was a child. (V4, R542, 556). As a result, Jackson "self-medicated" every day with alcohol and Marijuana.⁷ (V4, R543, 554, 556, 561).

Buffington said when Jackson spent time in the State hospital between ages 8 to 10, he was administered medication which created adverse side effects including "anxieties to paranoias, hallucinations." (V4, R551-52). However, Jackson stopped taking medications during his teenage years. (V4, R552, 560). Buffington said alcohol and Marijuana are both depressants, which would have had a "compound effect" on Jackson. (V4, R564). DOC records indicated Jackson attempted to have Marijuana smuggled in to him in prison. (V4, R566, 583). In Buffington's opinion, this gives credence that Jackson suffered from

⁷ Buffington said he agreed with Danziger's diagnosis of bipolar/depression. (V4, R546, 574).

Marijuana addiction. (V4, R567).

Buffington said Jackson claimed to have taken over 1,000 Ecstasy pills during the time he abused drugs. In Buffington's opinion, high-dose use of Ecstasy can cause neurological complications. (V4, R572). Buffington opined that Jackson's substance abuse was continuous throughout his life, "continuous but progressive." His substance abuse "consumed his life." (V4, R577, 578).

Buffington was aware that Danziger diagnosed Jackson with bipolar disorder, antisocial personality disorder, and sickle cell traits. (V4, R581). Jackson was incarcerated several times. He self-reported his drug use in prison. His family went long periods of time without seeing him due to his erratic behavior and prison time. (V4, R582, 583). Jackson's record indicated he stopped taking psychotherapy drugs because he gained weight - - "a very common side effect." (V4, R583).

Gerard Keating was appointed as conflict counsel for Jackson on June 1, 2005. He has been a sole practitioner for 26 of his 30 years of practicing law, and defended 27 murder trials, with about 8 or 9 being death penalty cases. (V5, R592-93, 594, 655). Bonamo joined him as second chair on July 29, 2005. (V5, R595, 656). The O'Malley Investigative firm was appointed on June 16, 2005. (V5, R595, 656). In addition, Keating hired mental health expert Dr. Danziger on January 3, 2006. (V5, R596, 656).

Keating was lead counsel and Bonamo was primarily responsible for the penalty phase. Keating guided Bonamo through the penalty phase. Keating deposed Jackson's mother, whose testimony was perpetuated at trial due to her frail health. (V5, R597, 702-03). Keating held team meetings at least once per month and circulated memoranda. (V4, R598, 661-62).

Keating recalled reviewing Curtis Lewis' statement to police that he had last seen his sister "the week after my birthday of November 6th in the park." Paulk was last seen on November 9. (V5, R598-99). Keating said if Lewis' statement was taken "literally," then Paulk would have been seen subsequent to November 9. (V5, R599). Keating initially thought he might have talked to Lewis but could not recall whether or not he deposed him. (V5, R600). Keating assigned Investigator O'Malley to talk to Lewis. (V5, R719). Subsequent to O'Malley's interview with Lewis, and Lewis having reconciled the date when he had last seen Paulk, the defense team determined that Lewis' time frame was inaccurate. (V5, R601, 657-58, 662-63, 666, 720).

Keating assigned O'Malley to talk to Paulk's uncle, Larry Paulk. Keating had a "vague recollection" of calling Larry Paulk. (V5, R603, 657-58). After speaking to Paulk, Keating reconciled the dates in Paulk's statement regarding his memory of when he had last seen Pallis Paulk. (V5, R604, 663, 666). Keating did not depose Paulk's family members Curtis Lewis or

Larry Paulk. Keating said, "In my opinion, you need to tread very carefully with family members for several reasons. Number one, they suffered a terrible loss. Number two, family members can sit in the courtroom and there's no rule of sequestration. Therefore, if I'm going to rough up a family member and that family member is going to be in the courtroom with the jury the entire trial, I think that's a bad tactical decision." (V5, R718). Keating avoids talking to victims' family members because he represents the person purported to have killed their family member. There's no benefit in talking to them because "surely they resent me as the attorney for the killer." (V5, R718).

Keating made a strategic decision to call Captain Skipper as a witness in order to establish that there was a serial killer at large in Volusia County, at or near the time of the disappearance or murder of Pallis Paulk. Keating said the serial killer theory created "a reasonable hypothesis of innocence that Ray Jackson was not the killer." (V5, R604). Based on limited information police gave him,⁸ Keating tried to establish "general parameters or similarities between Pallis Paulk - - being a

⁸ Keating was given very limited information by police because the serial killer cases were on-going investigations at the time of Jackson's trial. As a result, Skipper was an unwilling witness. (V5, R606, 611). Keating was not aware of dissimilarities with Paulk's murder and the serial killer murders until Skipper testified. (V5, R721).

prostitute and her body being found in a location where other victims of the serial killer had been found." (V5, R606, 683). In addition, all the murdered victims were drug users and were all placed in shallow graves. (V5, R612, 615). The jury was aware of Paulk's risky lifestyle and that "third party persons" could have been a threat to Paulk. (V5, R684, 685, 686).

Keating said Skipper testified at trial that police had concluded Paulk was not a victim of the serial killer because "there were strong evidentiary connections between the ... three serial cases and there was no connection whatsoever to Pallis Paulk." (V5, R609, 610). Nonetheless, it was Keating's strategy to "put on a witness who is not a favorable witness, you take your hits sometimes ... but you try to gain something." Skipper was the only witness Keating could call who could discuss the serial killer theory. Therefore, Keating was "satisfied - - I got the issue before the jury and could argue that in closing argument." (V5, R611). Keating said the serial killer defense was a viable defense because he was not aware of dissimilarities until Jackson's trial. (V5, R611, 613). Keating said newspaper articles on the serial killings were helpful to Jackson's case, as well. (V5, R614).

Keating did not seek court approval to hire or consult with any experts besides Danziger. (V5, R617-19, 650). The crime scene was "a good crime scene for the defense ... It's an old

crime scene. It's a five-month old crime scene." In Keating's opinion, he did not need an expert to evaluate this type of crime scene. (V5, R699). In addition, because five months had elapsed before discovering Paulk's body, Keating said the apartment where she was held prior to her murder could have changed in some manner. Keating said, "So many things ... could change." (V5, R701-02, 722). Although Keating did not go to the apartment, O'Malley did. (V5, R726). Keating said, "It just shows what a good job O'Malley did." (V5, R726).

Keating did not conduct an internet search on Paulk because O'Malley looked into Paulk's background. (V5, R622). He was not aware of the newspapers articles regarding the MBI and Paulk; however, if he had them, "it would have expanded the potential third party possible suspects who had a motive or opportunity to want to hurt or harm Pallis Paulk." (V5, R626, 694, 723-24).

Keating knew Jackson "smoked pot daily." He did not recall asking Jackson's wife or mother about Jackson's drug use. However, Keating spoke to Jackson's mother about her own drug abuse. Keating said it was not necessary to hire an expert to discuss Jackson's Marijuana use - - Jackson himself "established that fact conclusively." (V5, R634, 636, 638). Keating said it is not "good trial tactic" to tell a jury to focus on a non-statutory mitigator of pot smoking. "It wasn't going to help him, it was going to hurt him." (V5, R639, 724). Nonetheless,

the jury knew Jackson abused Marijuana from the guilt phase testimony. Further, "arguing to the judge in a *Spencer* hearing that Ray smoked pot to be a mitigating factor would have been a waste of time and - - not a good theory." (V5, R640). In addition, Keating said Jackson's alcohol abuse was "secondary to pot." As a result, Keating did not develop drinking alcohol as a mitigator. (V5, R641).

Keating frequently spoke to Jackson's wife Tonya and kept her apprised of the status of Jackson's case. Tonya was a "primary person" who could potentially provide guilt phase evidence to negate the State's charges against Jackson. Keating also relied on Tonya to provide any potential mitigation evidence. (V6, R838). However, the information Jackson provided to Keating was the same information Tonya provided. (V6, R839).

Keating hired Danziger early on in the process but did not ask Danziger to write a report. (V5, R644, 645). Danziger is "a pro" who would conduct a good psychiatric evaluation. (V5, R646). Keating had Danziger determine whether or not the statutory mitigators of under extreme duress or emotional disturbance applied to Jackson. (V5, R646-47). Keating worked with Danziger on several cases and knew Danziger "would do a thorough and competent evaluation and would be able to identify - - any potential mitigating factors." (V5, R, 643, 647). He did not ask Danziger to specifically look into substance abuse. (V5,

R647). Both Keating and Danziger agreed that Marijuana use "would not be an effective mitigator." (V5, R647). Keating did not ask Danziger to interview either Jackson's mother or wife regarding Jackson's substance abuse. (V5, R648). Keating said, "Once Dr. Danziger talks to Ray, he gets the information straight from the horse's mouth, and that's the primary source." (V5, R648). There was plenty of evidence during the guilt phase about the drug culture that surrounded Jackson's life, including information that Jackson sold drugs. (V5, R649).

Keating conducted an investigation for both the guilt and penalty phases as soon as he was appointed. (V5, R678). He directed the O'Malleys to obtain public records regarding Jackson, which included family history records, medical records and prison records. (V5, R669-71, 677). Any records Keating received were given to Danziger. (V5, R682). Keating said, "I would have used every opportunity and every reasonable scintilla of evidence to try to prove that Ray was not guilty." (V5, R692). Keating presented various possibilities of alternative theories that Jackson was not Paulk's killer. (V5, R700).

Keating said the O'Malley investigative team interviewed family and friends for the penalty phase. (V5, R704). Keating also talked to Jackson about his family and friends, and asked Jackson about parts of his life in order to tell Jackson's story. (V5, R704). Keating spoke with family members and friends

that could give a complete story of Jackson's life. He estimated he spoke to about 18 potential witnesses but not all were able or willing to testify on Jackson's behalf. (V5, R706, 707). Keating presented a timeline of Jackson's life which indicated a lot of childhood distress. (v5, R709).

Keating said Jackson made it very clear that "he was not a drug abuser." Although he smoked Marijuana, Jackson did not take pills or abuse cocaine. (V5, R711). After a thorough investigation, Keating and Bonamo made strategic decisions on what to present as statutory and non-statutory mitigation. (V5, R713).

Jameel Mclaury knew Jackson through his aunt, who is married to Jackson's cousin. (V5, R732). Mclaury and Jackson were neighbors from 1998-2000. Mclaury said Jackson "frequently" smoked Marijuana "on a daily basis." Jackson also drank alcohol. Mclaury lost contact with Jackson from 2000 to 2003 when Jackson was incarcerated. (V5, R734).

Mclaury said that subsequent to Jackson's release from prison, he and Jackson drank "all the time." Jackson also smoked Marijuana at the rate of "at least a quarter of an ounce to a half ounce every day." The two drank whiskey and beer together, and, on numerous occasions, "split a gallon of alcohol" between them. (V5, R735). Mclaury and Jackson started a pressure washing/auto detail business together in 2004. (V5, R736, 739).

When times were "stressful," Jackson took Ecstasy, eventually taking 6 pills at a time. Sometimes Jackson ingested Marijuana, alcohol, and Ecstasy at the same time. (V5, R737).

Mclaury testified at trial that he only spent one or two days a week with Jackson. (V5, R732, 740, 742). When Paulk went missing in November 2004, they were not spending much time together. (V5, R742).

Tonya Jackson has been married to Jackson since 2001. (V6, R764, 766). They met in 1997 and married in 2001 during Jackson's incarceration at Baker Correctional Institution. (V5, R765, 768). Jackson was incarcerated on drug possession charges. (V6, R773). Tonya knew Jackson used drugs. (V6, R774). Jackson told her that drug use calmed his nerves -- that drugs were "important ... to him." (V6, R766-67). Tonya saw Jackson abuse Marijuana and take Ecstasy. He also drank alcohol. (V6, R767).

During Jackson's incarceration, Tonya observed some times when Jackson was agitated. (V6, R768). Jackson came to live with her when he was released in 2003. (V6, R769). He resumed smoking Marijuana, taking Ecstasy and drinking Hennessy "every day." (V6, R769). There were times when Jackson blacked out after taking Ecstasy or did not remember what he said or did. (V6, R770).

Tonya and Jackson separated in October 2004 and Jackson moved out. Tonya initially said she still saw him every other day.

(V6, R770). However, she testified during her pre-trial deposition that she did not see Jackson for about 6 weeks after he moved out. (V6, R774). Subsequent to their separation, Tonya observed Jackson abusing a larger quantity of Marijuana and Ecstasy. (V6, R770, 771). However, Tonya did not know what Jackson was doing at all times during every day. (V6, R775). Tonya told Jackson's attorneys about his drug use but did not recall whether or not she mentioned consumption quantity. (V6, R772).

Dr. Jeffrey Danziger, psychiatrist, has evaluated approximately 15 death row inmates for either the State or the defense during his 24 year career. (V6, R778, 782). Danziger evaluated Jackson on April 14, 2006, prior to trial, and met with Jackson's attorneys. (V6, R786, 789, 810). He also reviewed numerous records that included Evelyn Thayer's deposition (Jackson's mother); Jackson's State hospital records; and Jackson's DOC records. (V6, R790, 792).

Danziger said Thayer's deposition indicated she was sick "all the time" during her pregnancy with Jackson, smoked Marijuana, and, at one time, smoked Marijuana which also contained PCP. (V6, R793). As a result of her statements, Danziger testified at the penalty phase that Jackson "may have been exposed to substances in utero" among other potential mitigating factors. (V6, R793). In addition, Danziger prepared a summary (V2, R198,

Def. Exh. 18) of Jackson's history which included the following:

"Issues, mother, prenatal drug exposure, doubt much prenatal care, voodoo ritual. Born - - referring to Jackson - - with jaundice in incubator. Witnessed domestic violence, age 1 to 7, by stepfather, Reynard Thayer, also locked out of house, beaten by stepfather. Death of infant sister. Depression began age 6. Suicide attempt age 8, to Wuesthoff Hospital, then McClenny, then foster homes, and Rivendell Hospital. Issue of abandonment by mother, drugs, homelessness, mental illness on the part of the mother." Further, "Biological father in prison. Mother, history, bipolar disorder, crack cocaine use, HIV-positive, other relatives with a psychiatric history." (V6, R793-794).

Danziger said this summary of Thayer's deposition contained "key factors relevant to the penalty phase." (V6, R794). Danziger's summary also noted Jackson's DOC records revealed polysubstance abuse with Marijuana and alcohol, as well as antisocial personality disorder. (V6, R795-96). Danziger did not interview Jackson's family, friends or business partners. Thayer's lengthy deposition provided a "great deal of dated information." (V6, R826, 827).

Danziger said the State hospital records indicated Jackson was administered antipsychotic drugs when he was 9 years old, "somewhat unusual ... though not rare." (V6, R798-99).⁹

Danziger said that when he met with Jackson "it was clear

⁹ The sentencing order indicates the trial judge gave "great weight" to Danziger's opinion that Jackson did have a mental illness and a history of involuntary hospitalization. (V6, R801, 830, State Exh. 16)

that he was intellectually intact." Further, Jackson was "someone of better intelligence." (V6, R797). Danziger said Jackson denied drinking daily, denied morning drinking, and denied any alcohol withdrawal symptoms. (V6, R806-07). Based on what Jackson told him, Danziger could not make an alcohol abuse diagnosis. (V6, R825). Jackson said he smoked Marijuana "all day," having started at age 6 and become a regular user at age 13. Jackson admitted he had been in a drug treatment center. Jackson also said he used Ecstasy but "it was not a big thing, occasional use." (V6, R809, 810). Jackson denied using hard drugs and denied abusing prescription sedatives. (V6, R813). However, Jackson admitted he sold drugs. (V6, R814).

Danziger said he testified at the penalty phase that Jackson suffered from bipolar disorder type II. (V6, R801). In Danziger's opinion, because Jackson's mother also suffered from bipolar disorder, it "would lend some strength to the diagnosis" for Jackson because bipolar disorder "has a genetic component." (V6, R803). In Danziger's opinion, due to the stressors in Jackson's life, "it's not surprising that this is someone who would be at risk to develop an adult psychiatric illness." (V6, R804).

Danziger told the defense attorneys about Jackson's cannabis dependence. (V6, R818, 825). They discussed whether or not to use it as mitigation but, in Danziger's opinion, "it played very

little role in what took place in November 2004 ... I could not see any connection." (V6, R818, 829). In addition, Danziger said, "Marijuana's generally not associated with violence. People on Marijuana tend to be peaceful, lethargic, sleep, happy." (V6, R819, 830). Danziger "could not tie any substance use" to Jackson's behavior that the jury found to have taken place. (V6, R819). Danziger discussed the statutory mitigators with Keating and Bonamo because "that's the first thing I look at." (V6, R828, 829). In Danziger's opinion, he could not tie Jackson's substance abuse to extreme mental or emotional disturbance or that Jackson could not appreciate the criminality or conform his conduct. "I couldn't tie that." (V6, R829).

The collateral proceeding trial court denied all relief. This appeal follows.

SUMMARY OF ARGUMENT

The trial court properly denied relief on Jackson's penalty phase ineffective assistance of counsel claims. The findings of the trial court turn on credibility choices made after observing the witnesses testify and strategic decisions made by trial counsel. Those claims were properly denied by the trial court, because there is neither deficiency nor prejudice, and there is no reasonable possibility of a different result.

The guilt phase ineffective assistance of counsel claims were also properly denied. There were no "improper comments" during

the State's closing argument, nor was there any defect in defense counsel's closing argument. Likewise, because there is no error, the "cumulative error" claim fails.

Jackson's claim that certain claims should not have been summarily denied fails. The trial court's order denying relief is sufficient in all respects, and clearly establishes that summary denial was correct.

Jackson's motion for "DNA testing" was properly denied because he failed to carry his burden of pleading. The motion was properly denied under settled Florida law.

ARGUMENT

ISSUE I: THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

On pages 38-72 of his brief, Jackson says that the trial court should have granted relief on Claims 1, 6, 11, and 17, each of which was a claim of ineffectiveness of counsel.¹⁰ The standard of review applied by an appellate court when reviewing a trial court's ruling on a rule 3.850 motion following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses

¹⁰ In the heading on page 38, Jackson refers to "Claim 10." That is apparently a typographical error, since the argument is directed to Claim 11.

as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1987), quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), quoting *Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). Whether counsel was ineffective under *Strickland v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* standard, deficient performance and prejudice, present mixed questions of law and fact, which are subject to *de novo* review. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hast*y, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact)).

THE LEGAL STANDARD

Jackson's ineffective assistance of counsel claims are governed by the well-settled *Strickland v. Washington*, 466 U.S. 228 (1984), standard. The Florida Supreme Court has described

that standard in the following way:

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court established a two-pronged standard for determining whether counsel provided legally ineffective assistance. A defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant also must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*; see *Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.").

Reese v. State, 14 So. 3d 913, 917 (Fla. 2009). Or, stated somewhat differently:

The yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the United States Supreme Court in *Strickland*. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudiced the defendant. To establish the deficiency prong under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Garcia v. State*, 949 So. 2d 980, 987 (Fla. 2006). To establish the prejudice prong under *Strickland*, the defendant must prove that "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." *White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007) (quoting *Strickland*, 466 U.S. at 694).

Duest v. State, 12 So. 3d 734, 742 (Fla. 2009).

In the context of a case similar to this one, where the claim concerned an "uncalled" mental state expert, this Court said:

Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. 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. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions *de novo*. See *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Bates v. State, 3 So. 3d 1091, 1100 (Fla. 2009). A mental state evaluation is not constitutionally required in every case, and a defendant certainly has no constitutional right to a **favorable** mental state evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

This Court has said:

While we do not require a mental health evaluation for mitigation purposes in every capital case, *Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005), and "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every

case," *Wiggins*, 539 U.S. at 533, "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Riechmann*, 777 So. 2d at 350. Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty.'" *Arbelaez*, 898 So. 2d at 34 (quoting *Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

Jones v. State, 998 So. 2d 573, 583 (Fla. 2008).

Claim 1.

In denying relief on Claim 1, the collateral proceeding trial court said:

As to Claim 1, Mr. Keating testified that he was told by his private investigator, Mr. O'Malley, that he has used in the past and felt was a very confident investigator and that Mr. O'Malley had talked to Mr. Lewis and that **Mr. Lewis had backed off his original statement as to when he last saw his sister in reference to his birth date and that he was now saying it was only a couple or three days after his birth date which would have put it at or before the November 9, 2004, date the State was using.**

This Court finds that it was reasonable for Mr. Keating to rely on a private investigator that he had great confidence in and he did not act deficiently in relying on what he was told by his investigator about Mr. Lewis.

Also, the State had very persuasive evidence before the jury that the disappearance date of the victim, Ms. Paulk, was November 9, 2004, because of the traffic stop and arrest of Mr. Thomas which was clearly November 9, 2004, and that being the day that the victim was placed in the trunk of the car and last seen alive.

This Court finds there was strong evidence in front of the jury that they could reasonably accept the November 9, 2004, date and that even if the trial counsel was deficient in Claim 1, which this Court

finds he was not, then the prejudice prong has not been shown.

(V16, R2516). (emphasis added). Those findings turn completely on the facts from the evidentiary hearing and from trial, as well as the implicit credibility determinations of the post-conviction court, who heard the witnesses testify. Jackson has shown nothing more than his disagreement with the result as a basis for relief.

To establish a claim of ineffective assistance of counsel, Jackson has the burden of showing not only deficient performance but also prejudice.¹¹ As to prejudice, the question is whether, had Mr. Keating presented the vacillating and questionable testimony of Curtis Lewis, there is a reasonable probability of a different outcome. Larry Paulk, Fayonna Paulk, and Jessica Smith all testified at trial about the last time they saw Pallis. (V17, TT131, 146, 168). Calvin Morris testified that

¹¹ The burden falls on the defendant to identify specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. *Duest v. State*, 12 So. 3d 734, 742 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Second, the defendant must prove that the deficient performance resulted in prejudice. *Id.* Thus, the defendant must demonstrate that "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." *Id.* at 694, 104 S.Ct. 2052.

Jackson abducted Pallis, and he never saw her again. (V18, TT340, 344). Calvin Morris' grandmother testified that Calvin told her "two guys had Pallis." (V20, TT530). Curtis Vreen testified that after Pallis left his house with Jackson, he never saw or heard from her again. (V20, TT554, 556). Moreover, Latisha Allen testified that Jackson indicated he was going to kill Pallis, several witnesses were present when Jackson forced Pallis into the truck of the car, and Jackson made statements after the murder to individuals. See *Jackson v. State*, 25 So. 3d 518, 523-24 (Fla. 2010). As outlined by this Court on direct appeal:

Evidence showed that the victim stole Jackson's drugs and money while he slept. After he woke up, he contacted friends and acquaintances, searching for Paulk until he found her. Jackson, who was armed with a gun, then took Paulk to a place that he felt was safe—Allen's apartment. He bound the victim and kept her in the bathroom, showing her to his closest friends and explaining that Paulk had stolen from him. Allen asked Jackson if he was going to kill Paulk, and Jackson nodded his head yes. Once it was dark outside, Jackson used duct tape to further bind the victim and, after lookouts were posted, carried the victim to the trunk of his car, ignoring her pleas and overcoming her struggles. Paulk, who kept in frequent contact with her family, was not seen alive after that time. After her disappearance, Jackson made several incriminating statements, including, "no body, ... no case." Approximately six months after her disappearance, Paulk's naked and decomposing body was discovered in a shallow grave.

Jackson v. State, 25 So. 3d 518, 532 (Fla. 2009). Weighed against the incredible testimony of Curtis Lewis, testimony that Lewis might have seen Paulk after November 9 does not undermine

confidence in the jury's guilty verdict. The fact that Curtis Lewis has now re-aligned his testimony with his original statement must be evaluated not only for credibility but also considering the information Mr. Keating had at the time of trial and not presently. Review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Heath v. State*, 3 So. 3d 1017, 1027 (Fla. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). And, this Court recently said:

"[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Moreover, this Court has held, "That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient."

Everett v. State, 54 So.3d 464, 478 (Fla.2010) (citations omitted) (quoting *Anderson v. State*, 18 So. 3d 501, 509 (Fla. 2009); *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *State v. Coney*, 845 So. 2d 120 (Fla. 2003)). The collateral proceeding trial court correctly denied relief.

Claim 6.

In denying relief on Claim 6, the trial court said:

Claim 6 contends trial counsel was deficient in trying to argue the serial killer defense to the jury and also deficient in failing to consult or hire experts regarding a defense. As to this Claim this Court finds it was a trial tactic employed by Mr. Keating and he did testify he was aware of the potential danger of calling Captain Skipper, but he felt, in his opinion, that benefit would outweigh any potential damage. This Court finds that to be a reasonable tactical decision on the part of Mr. Keating and he was not deficient.

Mr. Keating had addressed during his testimony that he was trying to develop "grains of reasonable doubt in the jury" and this is a very common tactic used by criminal defense attorneys, particularly where there is a strong case for the State, to bring out any and all matters they feel might cause come reasonable doubt, either sufficient to get a not guilty verdict or a lesser included offense or even convince one juror out of twelve which can result in a hung jury. This Court finds that tactic to be reasonable and it was not a deficiency on the part of the trial counsel.

As previously noted, as to this Claim, there was some similarity to the killing of the victim in this case and some of the victims of the serial killer. The victims of the serial killer were drug users, some were drug dealers, and some were either known prostitutes or thought to be prostitutes, and at least two of the bodies of the women were found in the same general area of where the victim's body found and it was close in time, approximately a year to a year and a half difference.

Again, in reference to Claim 6, this Court finds that even if the trial counsel had not acted reasonably, which this Court finds they did act reasonably, the prejudice prong would not have been proven as the State had a very strong case and more than likely the result would have been the same even if the Defense had not tried to tie in the death of Ms. Paulk with the several other women by the serial killer.

Finally, as to the second part of Claim 6, that

failing to consult with experts regarding such a Claim, this Court finds that experts regarding crime scene reconstruction, interpretation, either it being at the apartment, the automobile, or the gravesite, since almost six months had passed from the time of the victim's disappearance to when the dog walker discovered her skeletal remains when his dog started scratching the ground, but experts would not have been helpful and the fact the trial counsel did not hire any crime scene reconstruction or interpretation experts was not unreasonable.

(V16, R2517-18). Those findings demonstrate that trial counsel made a reasonable tactical decision to press the "serial killer" theory, and the fact that current counsel, with the benefit of hindsight, might try the case differently means nothing in the *Strickland* analysis.

The law is well settled that counsel's investigation is presumed reasonable. Mr. Keating investigated, developed, and presented the theory of Pallis Paulk's "risky lifestyle" in addition to the "serial killer" theory. The fact that the prosecutor was privy to information which was not public and was able to impeach Capt. Skipper does not erase the fact that Mr. Keating was able to plant the seeds of reasonable doubt. In fact, Mr. Keating testified at the evidentiary hearing that he made a strategic decision to use the serial killings because they were so prominent in the area at the time. (EH468). That is a strategic decision, and strategic decisions after a reasonable investigation, such as this one, are virtually unassailable. The defendant must "overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 148 (1955); *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). Moreover, as Mr. Keating testified, the serial killer aspect was only one portion of the defense theory of "risky lifestyle." Even if Mr. Keating had not presented the serial-killer portion, the outcome of the proceeding would not have changed. There is no reasonable probability of a different result, and there is no basis for relief.

Claim 11.

The trial court denied relief on Claim 11, saying:

Claim 11 regarded the alleged failure of the trial counsel to investigate the victim's alleged background as a possible cooperating witness and as an informant in the greater Orange County area and that there may have been other persons interested in killing her because of that alleged fact.

Mr. Keating did testify that he was not aware of the victim's status over in Orange County as either a confidential informant or as a cooperating witness with the investigation of the strip club where she has worked or other strip clubs and that he was not aware of any articles in the Internet magazine.

He did testify that had he known about that it would have been helpful to support his arguments that there may have been other people interested in eliminating the victim.

There was testimony that Mr. Keating was aware of her connection with strip clubs over in the Orange County area and had sent his investigator over there to develop some leads, but apparently the investigator was not aware of the articles in the Internet magazine.

This Court finds that the trial counsel was not deficient in failing to discover the website articles referring to Ms. Paulk as a cooperating witness in the strip club investigations and, even if trial counsel was, this Court would find that the prejudice prong had not been proven as the time frame was not close.

The testimony at the evidentiary hearing was that the charges against the victim in the Orange County area were dropped around June of 2002, and that the investigation into the night club, Cleo's, where she worked, ended in December of 2002, with a civil consent agreement between the parties.

It is noted that the evidence is clear that Ms. Paulk did not turn up missing until November of 2004, almost two years later. This Court finds that it certainly would seem to be unreasonable for a trial counsel to try to argue that something that happened more than two years ago would still have resulted in Ms. Paulk's death because of that Orange County activity.

(V16, R2521-22). Those findings are correct, are supported by competent substantial evidence, and should not be disturbed. In any event, Mr. Keating did investigate Pallis Paulk's activities in Orlando. He wrote several memos to the investigator regarding investigating in Orlando. (State Exhibit #18). Mr. Keating delegated this responsibility to an experienced investigator and relied on that investigator. It is not unreasonable to rely on an experienced investigator, and counsel was not deficient. Further, Jackson cannot show prejudice. The one relevant article shows that Paulk was not a "confidential informant" for the MBI, and MBI Director Cocchiarella testified to this fact. Pallis Paulk was arrested on several offenses but was charged only with sale of cocaine. She was a cooperating witness, not a

confidential informant, and her charges were dismissed in June 2002.

In addition to failure of proof on deficiency, Jackson has failed to show prejudice. The "Morality Police" article relates to Paulk's cooperation in only **one** case. Further, the article relates that Paulk ultimately did not cooperate with the State, and that Cleo's (the strip club) got a sweetheart deal. Jackson's argument that someone from Cleo's might have killed the victim because she was a "confidential informant" is contradicted by the evidence introduced at the evidentiary hearing. Moreover, her unavailability to the State resulted in Cleo's getting only a "slap on the hand." Add those facts to the fact that the Cleo's case was resolved 15 months before Paulk was kidnapped by Jackson and never seen again, and Jackson's prejudice claim fails. There is no basis for relief.

Claim 17.

With respect to Claim 17, the trial court denied relief:

This Claim was that trial counsel was deficient in failing to investigate or present a present history of the defendant's substantial substance abuse. Again, as noted earlier, the testimony of both trial counsel during the December, 2011, evidentiary hearing addressed that issue and they made it clear it was a tactical decision on both of their parts that during the penalty phase they would put the great emphasis on the defendant's mental health issues, particularly as a child, his attempted suicide as a very young child, and for being institutionalized for mental issues for a couple of years when he was only eight or nine years old. **It is clear the trial counsel made a tactical decision that the mental health issue of the defendant**

at a young age would be a much stronger mitigating factor than any past or current drug use. Both attorneys testified they had extensively discussed this issue and felt emphasizing the defendant's drug use and some drug selling would be counterproductive in the juror's eyes as far as any mitigating issues.

This Court finds that was a reasonable tactical decision and the trial counsel was not deficient for not emphasizing the defendant's drug use, marijuana heavy drinking, and MDMA pills. In reference to this it is noted as previously addressed in this order that there was abundant evidence during the guilt phase and the penalty phase regarding, at least, touching on Mr. Jackson's, drug use, including his mother using drugs during her pregnancy with Mr. Jackson and Mr. Jackson being around drugs during his earlier years because of his mother's situation.

(V16, R2525-26). (emphasis added). The highlighted part of the trial court's order reflects testimony from defense counsel that is not uncommon in capital cases -- drug use is oftentimes counterproductive because juries do not regard it as mitigating. *Stein v. State*, 995 So. 2d 329, 338-39 (Fla. 2008); *Reed v. State/Crosby*, 875 So. 2d 415, 437 (Fla. 2004); See *King v. Lynaugh*, 868 F. 2d 1400, 1405 (5th Cir. 1989) ("...jurors are generally unsympathetic toward drug abusers, particularly those who commit violent crime"). It was neither deficient nor prejudicial for trial counsel to decide that "better" mitigation than drug use was available to them. Ultimately, this claim is merely that trial counsel was constitutionally ineffective because they did not win, and that is not the *Strickland* standard. Instead, this claim is about a disagreement with a considered, and thoroughly investigated, trial strategy. That

sort of decision is, as *Strickland* recognized, virtually unassailable.

ISSUE II. THE GUILT PHASE INEFFECTIVENESS CLAIMS

On pages 72-81 of his brief, Jackson raises various ineffectiveness claims -- most of them relate to the guilt phase of his capital trial. The standard of review, and the applicable legal standard, is the same as for Claim I, *supra*. The individual sup-parts of this claim are addressed separately below.

Claim 14.

Claim 14 is a "closing argument" claim, which the lower court rejected:

This Claim addressed the alleged failure of the trial counsel to object to certain alleged improper closing arguments by the prosecutors. There were several incidents raised.

As far as the failure to object to the State's comments about the victim's state of mind, this Court finds that was a fair comment on the evidence. As to the State's comment about Faith being the name of the victim's daughter, the Court finds that was reasonable and in response to Defense's closing arguments referring to the tattoos that the victim had apparently, one tattoo "Nasty Girl" and the other "Faith", as being indicative of the victim's risking life style. Again, this Court finds that to be a fair comment by the prosecutor and had there been objections, those objections would not have been sustained by this Court.

Also as to the comments by the prosecutor of the victim being hunted down, bound, placed into a tub, forced into a trunk, and then ultimately murdered were all facts, covered by testimony of the State's witnesses and it was not unreasonable for the Defense

attorney not to object to same, and had the Defense objected, the objection would not have been sustained by this Court.

As to the trial counsel not objecting to the Medical Examiner's testimony about animals unearthing the body, that was a fact in evidence for the jury to consider based on the testimony of the man walking the dog in the wooded area and discovering the skeletal remains. This Court finds those comments were reasonable by the prosecutor and had the Defense objected the objections would not have been sustained.

As to no objections being made about the prosecutor talking about some of the witnesses having courage to come in and testify and comments regarding threats, this Court finds those comments were fair comments in reference to the testimony and had there been an objection, said objections would not have been sustained. Specifically, Mr. Hunt testified he was told by others that Mr. Jackson intended to kill him, and witness Morris was allegedly threatened in the courtroom during the course of the trial, so this Court finds that is fair comment based on the evidence and the trial counsel was not unreasonable by not objecting and said objections, had they been made, would not have been sustained.

As to the State, in its rebuttal argument, using the term "easy pickings" that was in fair rebuttal to the trial counsel's argument trying to cast doubt on the witnesses' credibility, such as Mr. Hunt expecting to receive a benefit because of reduced charges, Mr. Morris being an accomplice to robbery and being sentenced only to probation, Mr. Vreen being a drug dealer, Mr. Thomas being arrested for driving without a license, Mr. Hunt smoking six joints of marijuana, Mr. Hunt hearing voices, and Mr. Hunt and Mr. Bush having a homosexual relationship.

This Court finds that was fair comment by the prosecutor replying to the Defense argument as to why those witnesses should not be believed and that the failure to object was not deficient and, had there had been an objection, this Court would not have sustained the objection.

As to the argument that the trial counsel failed to

object to rebuttal arguments by the prosecutor attacking the serial killer defense, this Court finds that those comments were fair comments and that trial counsel was not deficient in failing to object to said comments.

As to comments made by the prosecutor commenting on closing arguments regarding the co-defendant's action, Mr. Wooten, this Court finds that had nothing to do with this case as the defendants, Mr. Jackson and Mr. Wooten, were tried together. For these reasons stated this Court finds that trial counsel not deficient and their actions were reasonable and they did function as competent counsel as to Claim 14.

(V16, R2523-24). Those findings are correct in all respects, and should not be disturbed.

To the extent that any further discussion of this claim is warranted, the statements about the victim's state of mind are a fair comment on the evidence and were made in the initial closing argument. The statement regarding "Faith" being the name of the victim's daughter was in rebuttal to defense closing that tattoos of "Nasty Girl" and "Faith" were indicative of her risky lifestyle. (V25, 1327). The comments about the victim being hunted down, bound, stuck in a tub, crammed in a trunk and murdered are all facts in evidence. *Jackson v. State*, 25 So. 3d 518, 523-24 (Fla. 2010). The medical examiner testimony regarding animals unearthing the body is also a fact in evidence (V18, R238). The prosecutor's statements were fair comments on the evidence. See *Buzia v. State/Crosby*, 82 So. 3d 784, 796 (Fla. 2011); (defendant is an axe murderer); *Silvia v. State*, 60 So. 3d 959, 976 (Fla. 2011)(defendant attempted to

murder wife's father in addition to his wife and her mother); *Wade v. State*, 41 So. 3d 857, 869 (Fla. 2010) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.").

The statement regarding having courage to come in to testify is a fair comment on the evidence, as is the comment regarding threats. Hunt was told Jackson intended to kill him, and Morris was threatened **in the courtroom**.

The rebuttal statements about the defense being "easy pickings" was rebuttal to defense counsel's argument denigrating the witnesses' credibility as (1) Hunt expecting a benefit because of pending charges (V25, R1317); (2) Morris being an accomplice to the robbery of Jackson sentenced only to probation (V25, R1332, 1334); (3) Vreen being a drug seller (V25, R1333); (4) Thomas being arrested for driving without a license (V25, 1324); (5) Hunt smoking 6 joints of marijuana in one afternoon (V25, R1332); (6) Hunt hearing voices (V25, R1340); (7) Hunt and Bush having a homosexual relationship (V25, R1341).

The rebuttal statement regarding the serial killer defense and the various other theories of defense were likewise fair comment on the evidence. Defense counsel did argue that Pallis Paulk could have been killed by the serial killer who preyed on prostitutes, or by a john or dissatisfied customer because she

was a pimp, or by an overdose because of her drug use, or by AIDS. (V25, R1317-1321). Wide latitude is allowed in closing argument. The purpose of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. *Silvia, supra; Gonzalez v. State*, 990 So. 2d 1017, 1028-29 (Fla. 2008) (quoting *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985)). When the prosecutor's statements are read in context as rebuttal to the defense arguments, as they must be, they are not inappropriate. See *Wade v. State*, 41 So. 3d 857, 869 (Fla. 2010).

Because there is no merit to the underlying claim that the prosecutor's comments were improper, there is no ineffective assistance of counsel for failing to object to those comments. See *Pagan v. State*, 29 So. 3d 938, 949 (Fla. 2009 (citing *Heath v. State*, 3 So. 3d 1017, 1033 (Fla. 2009) (counsel cannot be deemed ineffective for failing to make a meritless argument)). Relief was properly denied.

Claim 15.

This claim is that defense counsel's closing argument was not "effective and coherent." The trial court found that:

The trial record stands on its own in reference to that. This Court finds that the closing arguments by the defense counsel was logical, coherent, and trial counsel was not deficient in its closing arguments.

(V16, R2524-25). Defense counsel's argument was 38 pages long.

(DAR, V25, R1313-50). Jackson's brief does not identify what shortcomings there allegedly were in closing argument, nor does his brief identify or explain what should have been done that was not. In other words, Jackson's conclusory brief does not identify any deficiency on the part of trial counsel, and does not explain how those unidentified failings satisfy the prejudice prong of *Strickland*. With no explanation of what should have been done but was not, there can be no reasonable probability of a different result. There is no basis for relief.

Claims 16, 20, and 21.

Claims 16, 20, and 21 are cumulative error claims. There can be no "cumulative error" in the absence of individual error. *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003). The collateral proceeding trial court resolved these claims in the following way:

Claim 16 was also set for argument only and not the taking of any testimony. This Claim was that the cumulative effect of trial counsel errors during the guilt phase deprived the defendant of a fair trial. This Court has found that the trial counsel was not deficient in any of the Claims argued so far and that the cumulative effect argument fails.

Claim 20 was another Claim which was scheduled for argument only and not taking of any testimony. That Claim was that the cumulative effect of the penalty phase errors denied the defendant a fair trial. Again, this Court has found that there were no errors committed by the trial counsel during the penalty phase.

Claim 21 again was an argument only Claim that the cumulative effect of trial counsel errors both in the guilt and penalty phase denied the defendant a fair trial. Again, this Court has

found that there were no errors committed by the trial counsel either in the guilt or penalty phase and had there been, which this Court finds did not occur, then the second prong, the prejudice prong had not been proven.

(V16, R2525-26). Those findings are correct in all respects, and should not be disturbed.

Claims 22 and 23.

Claims 22 and 23 are, according to Jackson, raised simply to preserve them for later review. As to Claim 22, this Court has repeatedly rejected challenges to the constitutionality of section 945.10 on the merits. See *Darling v. State*, 45 So. 3d 444, 448 (Fla. 2010) (citing *Ventura v. State*, 2 So. 3d 194, 197 n. 3 (Fla. 2009); see also *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008) ("We previously found section 945.10 facially constitutional and decline to recede from our decision now.")).

Additionally, even if this Court was willing to recede from this precedent, as of this date, the Governor has not signed a death warrant for Jackson; consequently, even if ordered to do so, the Department of Corrections could not state with any certainty who Jackson's eventual executioners would be. Cf. *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007) ("[T]his Court [previously] stated that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution.") (alterations in original) (quoting *Provenzano*, 761 So. 2d 1097, 1099 (Fla. 2000)). Claim 23 is an "incompetency for execution" claim which

is premature. That claim is not ripe for review since a death warrant has not been issued. This Court has repeatedly held that no relief is warranted under similar circumstances. See, e.g., *Gonzalez v. State*, 990 So. 2d 1017, 1035 (Fla. 2008) (rejecting claim that defendant may not be competent at the time of execution where defendant acknowledges that claim is not ripe for review and was being raised only for preservation purposes) (citing *State v. Coney*, 845 So. 2d 120, 137 n. 19 (Fla. 2003)). See also *Troy v. State*, 57 So. 2d 828 (Fla. 2011). There is no basis for relief of any sort on any claim or sub-claim contained in Issue II of Jackson's brief.

ISSUE III: THE "SUMMARY DENIAL" CLAIM

On pages 81-96 of his brief, Jackson says that he should have been afforded an evidentiary hearing on Claims 2, 5, 7, 12 and 18. Because these claims were summarily denied, that ruling will be affirmed so long as the law and competent substantial evidence support the denial of relief. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). With respect to all of these claims, the collateral proceeding trial court issued a written order denying relief on August 22, 2011. (V12, R1713-14). That order incorporated the rulings from the August 10, 2011 case management conference where the court entered rulings on these claims in open court. The transcript of that proceeding was attached to the order, and fully set forth the trial court's

rulings. In *Rose v. State*, 985 So. 2d 500, 503 (Fla. 2008), this Court cited *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006), for the proposition that "In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." The order in this case complies with those requirements in all respects, and there is no procedural deficiency.

Claim 2.

Jackson argues that counsel must ask jurors whether they are able to consider specific issues, such as neglect and abandonment, as mitigation. Thus, the argument goes, counsel failed to "uncover potential jurors from the venire who may refuse to consider valid mitigating evidence." Jackson does not identify any case law to support the claim counsel is ineffective unless he questions jurors about specific areas of mitigation.

Limited questioning regarding a juror's views on the death penalty, or "death qualification" is allowed pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). See *San Martin v. State*, 705 So. 2d 1337, 1343 (Fla. 1997), citing *Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 1764, 90 L.Ed.2d 137 (1986). This Court has repeatedly held that "[t]he scope of *voir dire* questioning rests in the

sound discretion of the court and will not be interfered with unless that discretion is clearly abused." *Darling v. State*, 808 So. 2d 145, 160 (Fla. 2002) (quoting *Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997)).

At the time of trial, the trial judge reviewed the two questions which have been recommended for death qualifying a jury and stated that he intended to ask the two questions. (DAR, V7, R997). The trial judge instructed the jury regarding aggravating and mitigating circumstances. (DAR, V7, R1002-03). The trial judge explained weighing aggravating and mitigating circumstances. (DAR, V7, R1010). The prosecutor questioned the jurors regarding aggravators and mitigators, (DAR, V7, R1137-38, 1139-40, 1141-42, 1146). Jackson's attorney questioned the jurors regarding mitigating circumstances. (DAR, V8, R1239-40, 1259, 1264-65, 1266; V12, R1854, 1856; V15, R2279-80, 2284-85). The codefendant's attorney talked to the jury about aggravators and mitigators. (DAR, V8, R1304).

Jackson cannot establish deficient performance or prejudice simply because counsel did not discuss the specifics of statutory/nonstatutory mitigation or specific mitigating circumstances. Jackson cites to no case law to support his theory that it is appropriate to discuss the specifics of mitigation in *voir dire*. The purpose of *voir dire* is to "obtain a fair and impartial jury, whose minds are free of all interest,

bias, or prejudice, not to shock potential jurors or to obtain a preview of their opinions of the evidence." *Hoskins v. State*, 965 So. 2d 1, 13 (Fla. 2007). The trial judge properly limited his questions to those recommended for capital cases, and the record reflects the trial judge's instructions and responses to venire members' questions were all consistent with the standard instructions for capital cases. See *Jones v. State*, 845 So. 2d 55, 67 (Fla. 2003); *Kearse v. State*, 770 So. 2d 1119, 1130 (Fla. 2000).

Likewise, Jackson cannot show prejudice because he did not identify any juror who, with more extensive questioning, would have been found to be either unqualified or biased. See *Davis v. State*, 928 So. 2d 1089, 1118 (Fla. 2005) (rejecting Davis's claim of ineffective assistance based on trial counsel's alleged failure to question the jurors about their views concerning drugs, alcohol abuse, and mental illness because Davis failed to demonstrate that any unqualified juror served in the case or that any juror was biased or had an animus toward Davis's theory of the case). See also *Ferrell v. State*, 29 So. 3d 959, 974 (Fla. 2010). With respect to both prongs of *Strickland*, this claim is conclusory and summary denial was appropriate. (V 1, R 74-5). Because there is absolutely no case law to support allowing questioning jurors about whether they would "give meaningful consideration" to mitigation evidence, and because

there is no case law support for the concept that counsel can use *voir dire* to get jurors to commit to deciding matters in a certain way, there is no legal basis for relief, and, consequently, there is an insufficiency of pleading. The collateral proceeding trial court properly denied this insufficiently pleaded and legally baseless claim without an evidentiary hearing. (V1, R74-5).

Claim 5.

Claim 5 is a claim that trial counsel was ineffective for not moving to sever Jackson's trial from his co-defendant's trial. **Trial counsel objected to the State's motion to consolidate.** (V6, R847-852; V3, 555). After the State elicited testimony that codefendant Wooten threatened witness Morris during jury selection, **trial counsel moved to sever his case from Wooten's.** (V24, R1237-40). Jackson claims trial counsel should have moved to sever yet again when Wooten testified about evidence of other bad acts which showed Jackson's "propensity to associate with or possess guns and that Mr. Jackson had a propensity to seek revenge or retribution." The testimony cited by Jackson involves Wooten's testimony at pages 1202 and 1224 of the record. Jackson moved to sever shortly thereafter, citing not only Wooten's threat to Morris, but also Wooten's testimony and the "pour-over" effect to Mr. Jackson which was more prejudicial than probative. (V24, R1239). Wooten's testimony involved a phone

call from Hunt regarding Jackson's cousin being killed in Melbourne. (V24, R1201). Dewayne, Latisha's boyfriend, got some guns and wanted Jackson to go to Melbourne. (V24, R1202, 1224). Wooten's testimony was speculation about what happened in Melbourne and did not indicate that Jackson went to Melbourne or threatened retribution. To the contrary, Wooten's testimony indicated that Jackson was not going to be involved with guns or going to Melbourne because he had been doing more "positive things" with his business and opening a new business. (V24, R1224, 1226, 1228). Wooten's testimony was obviously contrived in an attempt to explain Hunt's phone call in which Wooten implicated himself. The testimony was not prejudicial to Jackson.

Not only did trial counsel move for severance at two points in the trial, Wooten's testimony was not prejudicial to Jackson. Even if there were an inference that Jackson was involved with people who owned guns, that inference pales in comparison with the evidence Jackson was a drug dealer, kidnapped and killed Pallis Paulk because she stole from him, warned Latisha Allen the same could happen to her, and threatened Calvin Morris with a gun. Jackson fails to advise how counsel could have excluded Wooten's testimony since it is not *Bruton* material. This claim fails for lack of deficiency and prejudice.

To the extent that Jackson argues that the testimony violated

the court's order regarding Jackson carrying a gun, a similar issue was raised on direct appeal. This portion of the issue could have been raised on appeal together with the other "gun" issue and is procedurally barred. In any case, Wooten's testimony did not indicate Jackson was carrying a gun: it was Dewayne who had the guns.

Finally, Jackson claims trial counsel failed to "make the appropriate argument for severance." He makes conclusory allegations that the "controlled call is inadmissible hearsay against Mr. Jackson." As to the claim Hunt was a law enforcement agent, that issue is procedurally barred and could have been raised on direct appeal. Jackson has not shown that a severance would have been granted had he objected additional times, and has offered no legal basis for such a conclusion. The collateral proceeding trial court found that there was no deficient performance, and denied relief. That ruling is correct, and should be affirmed in all respects.

Claim 7.

Claim 7 in the "ineffective assistance" section of Jackson's brief is the same as Issue IV, which is addressed *infra*. The post-conviction motion for DNA testing was properly denied, and, because that is so, there can be no ineffectiveness associated with this claim. Issue IV is the principal argument on this claim, and the State incorporates and adopts those arguments

here to the extent appropriate. There is no basis for relief.

Claim 12.

Claim 12 is a guilt phase ineffectiveness claim that counsel failed to impeach Fred Hunt by calling Tonya Jackson as witness, and failed to use a prior statement of V'Shawn Miles regarding defendant's lack of knowledge of murder. Hunt testified at trial that Tonya Jackson, the defendant's wife, told him the defendant threatened to kill him. Jackson claims trial counsel should have called Tonya Jackson to testify she did not make that statement. This claim is facially insufficient because Jackson has not alleged that Tonya Jackson would testify she never told Hunt the defendant threatened him. He merely alleges trial counsel "should have rebutted" the testimony and that he "should have put Mrs. Jackson on the stand." He never says why this is so.

Jackson also claims trial counsel should have impeached V'Shawn Miles with a prior inconsistent statement. This claim is facially insufficient. Jackson fails to explain the materiality of impeachment on a collateral matter and, as a matter of law, this claim fails for lack of prejudice. The collateral proceeding trial court denied this claim, saying that on the face of the pleadings Jackson "has failed to make an argument and showing what these persons would say and how it would have been effective." (V 1, R109). That ruling is correct, is supported by the law, and should not be disturbed.

Claim 18.

Claim 18 is a penalty phase claim that it was ineffective to allow the court to take judicial notice of the date of Jackson's release from the Department of Corrections for purposes of proving that Jackson was a Prison Releasee Reoffender ("PRR"). Jackson acknowledges that "the prosecution easily proved up that Mr. Jackson was a PRR." Thus, he cannot show deficient performance or prejudice. This claim fails on the face of the record, as the collateral proceeding trial court found. (V 1, R115). As the trial court pointed out, there was no prejudice possible because the State would have proven PRR status with no difficulty. There is no basis for relief, and summary denial of this claim was proper. Unless Jackson can show that he did not meet PRR status, he cannot show prejudice, and the entire claim is no more than an academic exercise that has no point. Notably, Jackson has never claimed (or even suggested) that the PRR sentence could have been somehow excluded. That is a failure of proof, and there is no basis for relief.

ISSUE IV: THE DNA TESTING MOTION¹²

On pages 96-100 of his brief, Jackson says that his motion for DNA testing should have been granted. Under *Florida Rule of Criminal Procedure* 3.853, Jackson has the burden of demonstrating the probative value of each piece of evidence which he is seeking to be tested. *Robinson v. State*, 865 So. 2d 1259, 1264-65 (Fla.) (under the rule "[i]t is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence."), *cert. denied*, 540 U.S. 1171 (2004). It is well established that a motion for DNA testing under Rule 3.853 is subject to summary denial. *Lott v. State*, 931 So. 2d 807, 821 (Fla. 2006) (affirming denial of motion for DNA testing finding that "the defendant has embarked on a fishing expedition for genetic material whose existence and potential relevance is pure conjecture."); *Cole v. State*, 895 So. 2d 398, 403 (Fla. 2004) (affirming trial court's finding that Cole's allegations

¹² According to the FBI's website about CODIS and NDIS, "mtDNA [mitochondrial DNA] data is only searched with the missing person related indexes." <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet>. (visited Feb. 11, 2013). In other words, a mitochondrial DNA profile, assuming one could be generated, would not be searched against an offender database, but rather would only be compared (at best) to the missing persons database.

regarding DNA testing highly "speculative."); *Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005) (finding no reasonable probability of a different result based upon requested testing).

There is no freestanding constitutional right to post-conviction DNA testing. See *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319-23 (2009) (the Court held that there was not a federal constitutional right to obtain post-conviction access to the state's evidence for DNA testing). In any case, as noted, the State of Florida provides a reasonable procedure through which inmates can seek DNA testing. The fact that Florida places reasonable limits on such requests and prohibits irrelevant fishing expeditions, does not offend any constitutional principle.

Jackson has never articulated specific facts to show that testing of the three hairs found on or near the victim's body would exonerate him or lead to a reduced sentence. Hairs are transitory in nature and, contrary to Jackson's argument, the three hairs did not comprise any part of the evidence used by the State to establish Jackson's guilt in this case.

The victim's body had been placed in a shallow, outdoor grave, where she lay for months before her body was discovered. The State did not introduce hairs as evidence of Jackson or Wooten's guilt in this case. FDLE Analyst May briefly mentioned

the hair on direct examination to show, apparently, the logical sequence or course of her investigation. The defense sought to make an issue of the hairs on cross-examination of FDLE Analyst Kelly May and later during closing argument.¹³ While the defense tactic was understandable, it was merely a weak attempt to inject an element of doubt rather than any legitimate question surrounding the hair, its potential relevance, and the lack of any comparative analysis. There is no way of knowing when, how, or why such hairs came to be found in or around the grave site. Consequently, there is no basis to conclude that the hairs belonged to the victim's murderer. The State's compelling evidence identifying Jackson and Wooten as the individuals who kidnapped and murdered Paulk, which included eyewitness testimony and Jackson's admissions, would in no way be undermined by DNA testing of the hairs.

This Court has recognized that hair is inherently transitory and is unlikely to lead to admissible or relevant DNA results. For example, in *Overton v. State*, 976 So. 2d 536, 568 (Fla. 2007), this Court affirmed the denial of DNA testing on hair

¹³ Analyst May testified that although no analysis of those hairs was conducted, it was possible that Caucasian hair found in the debris site was hers. (DAR, V23, 1014-15). Head hairs are easily transferable. It was possible that the perpetrator could have transferred his head hair to the grave site. (DAR, V23, 1019).

recovered from tape that the defendant argued could have been used to bind the victim:

The hair could have easily originated from a large number of sources, including the carpet, comforter, victim's nightshirt, or any of the items thought to have been emptied from her purse which were discovered under the comforter upon which her body was found. See *id.* Likewise, the hair could have attached on contact with the belt or clothesline rope that were also used to bind Susan. See *id.* Thus, the 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. This assertion is the type of speculation that this Court has found to be a basis for denying a rule 3.853 motion. See *Lott*, 931 So. 2d at 821 (holding that the defendant "embarked on a fishing expedition for genetic material whose ... potential relevance is pure conjecture," and that the defendant could not "obtain DNA testing based on the speculative allegations in his motion"); *Hitchcock v. State*, 866 So. 2d 23, 26 (Fla. 2004) (speculative claims cannot form the basis of granting a motion for postconviction DNA testing).

See also *King v. State*, 808 So. 2d 1237, 1247-49 (Fla. 2002) (affirming denial of defendant's motion for DNA testing on hair found on victim's body where the trial court found that even if test showed that hair did not come from victim or the defendant, there was no reasonable probability that defendant would have been acquitted or received a life sentence); *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).

Similarly, in *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004),

this Court affirmed the trial court's rejection of DNA testing on hair and other items, finding the request too speculative to warrant such testing. The defendant argued that hair analysis conducted at the time of trial improperly included him as the source of the hair and improperly excluded his brother, Richard. Hitchcock also asserted that DNA testing on the hair "may" show that Hitchcock's brother strangled the victim and that his hair or blood was at the scene of the murder. Hitchcock then went on to list 24 items that he sought to have tested by an independent lab for DNA. *Hitchcock*, 866 So. 2d at 28.

The trial court denied the motion, stating the allegation that DNA testing may exonerate the defendant was too "speculative" to grant post-conviction DNA testing. The court noted that the defendant confessed to having sexual intercourse with the victim and that he failed to establish a reasonable probability that DNA testing would exonerate him of the victim's subsequent murder. The court noted that the presence of physical evidence linked to his brother Richard (who lived in the house with the victim), would "not establish that Defendant was not at the scene or that he did not commit the murder." *Hitchcock*, 866 So. 2d at 28.

This Court affirmed the trial court's denial of DNA testing under Rule 3.853, noting the defendant has the burden of meeting the requirements of the rule:

The clear requirement of these provisions is that a movant, in pleading the requirements of *rule 3.853*, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Hitchcock, 866 So. 2d at 27-28. This Court noted that Rule 3.853 does not authorize a speculative "fishing expedition," stating that "[i]t was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, 'how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime.'" *Id.* at S14 (quoting Rule 3.853) (emphasis in original).

The hairs in this case, one Caucasian and two apparently African-American, could have originated from any number of people, from persons walking dogs in the area, blown by the wind from distant or adjacent areas, to Sheriff's personnel working at the grave site, or, even transferred onto the grave site from the trunk Pallis Paulk was carried in after being forcibly placed in the defendant's car.¹⁴ The possibilities are endless.

¹⁴ As noted by this Court, a number of individuals were in Jackson's apartment around the time of the kidnapping. *Jackson*,

The circumstances of this case simply do not suggest that the hairs are in any way relevant to the identity of the murderers, who were proven at trial to be Jackson and Wooten. See *Gore v. State*, 32 So. 3d 614, 619 (Fla. 2010) ("Even if the DNA analysis indicates a source other than the victim or Gore, 'there is no reasonable probability that [he] would have been acquitted or received a life sentence,'") (quoting *Tompkins v. State*, 872 So. 2d 230, 243 (Fla. 2003)).

In denying the motion for DNA testing, the trial court said:

The Court holds that Defendant has not met his burden of proof under § 925.11 *Fla. Stat.* or Rule 3.853, *Fla. R. Crim. P.*, the rule governing procedures for obtaining DNA testing under § 925.11, *Fla. Stat.* A defendant has the burden to show that there may be DNA which would exonerate him or mitigate his sentence.

The Court further finds that the hair issues were a very minor aspect of the State's case. In fact, even the FDLE expert testified it was a minor issue for her. The hairs were found in what has been referred to as a gravesite. The site was a public area. The body was found approximately six (6) months after the victim turned up missing. Numerous law enforcement officers were in the vicinity as were medical examiner personnel.

The testimony at trial indicated that the victim was bound and gagged in the bathtub of the defendant's apartment, was taken out of the apartment and put into a car associated with the defendant while struggling with the defendant and, perhaps, the codefendant. There were numerous people in and out of the apartment. The defendant exhibited the victim bound and gagged in the bathtub. One witness asked the

25 So. 3d at 522-524.

defendant whether he was going to kill the victim, and the defendant nodded "yes," conveying that he intended to kill her. When the defendant heard that the victim's family members were accusing him of being involved with the victim's disappearance, he said he was not worried about it because if there was no body, there was no case. Subsequently, when the defendant learned the body was discovered, he called someone and asked them to go out to the gravesite and "step lightly," then call him back.

The Court finds the defense has failed to show the subject hairs have any relevance to the crime and that this is a fishing expedition. The hairs could have come from many sources. Again, defendant has failed to show that any DNA testing of the hairs could exonerate the defendant or mitigate his sentence.

(V12, R1685-87). Those findings are supported by the facts and are in accord with settled Florida law. There is no basis for relief.

Jackson makes a passing reference to "microscopic" analysis in his brief on page 93. *Florida Rule of Criminal Procedure* 3.852 was the basis for his motion, and that Rule has no provision at all for "microscopic" analysis. The Rule speaks to nothing other than DNA testing. Jackson's Rule 3.853 motion makes a passing reference to "microscopic comparison" at V10, R1367, but then asks that the DNA testing be performed at a specific DNA testing lab. The "microscopic comparison" component is not included in the relief sought, was not mentioned during the hearing on the testing motion (V1, R1-47), and has, for analytical purposes, been abandoned.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court affirm the denial of post-conviction relief.

CERTIFICATE OF SERVICE


I certify that a copy hereof has been furnished to the following by E-MAIL on February 18th, 2013: **Raheela Ahmed**, Assistant Capital Collateral Regional Counsel, ahmed@ccmr.state.fl.us, and support@ccmr.state.fl.us.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL


/s/ Kenneth S. Nunnelley

By: KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 998818
Attorney for Appellee
Office of the Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
ken.nunnelley@myfloridalegal.com
Secondary E-Mail:
CapApp@MyFloridaLegal.com
(386)238-4990
(386)22-0457 (FAX) / AG#:L12-2-1201