Filing # 18245867 Electronically Filed 09/15/2014 04:13:36 PM

RECEIVED, 9/15/2014 16:18:46, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CLEMENTE JAVIER AGUIRRE-JARQUIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-2092

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RESPONSE TO STATEMENT REGARDING ORAL ARGUMENT

The State recognizes that oral argument is routinely granted in capital cases and defers to the Court as to whether argument is necessary.

STATEMENT REGARDING AMICI CURIAE

The Amici Curiae join supporting Appellant to offer their collective opinion that the newly discovered evidence warrants a new trial.[1] The Amici add nothing relevant that was not articulated by Appellant and in no way aid in the resolution of this case. Indeed, the argument for a new trial by the Amici is no different than Appellant's newly discovered evidence argument. This case does not present a circumstance for this Court to announce a new development in the law; this case rest solely on the facts from trial and post-conviction and the credibility of the post-conviction experts applicable to well settled precedent. Furthermore, while the "Statement of Interest of Amici Curiae"

[1] In the motion Amici to accept the brief in support of the Appellant, counsel for the Amici represented having, "requested consent from counsel for the State of Florida, but has not received a response as of the filing of this motion." Counsel for the Amici sent the undersigned an email at 6:13 p.m. after the close of business on July 16, 2014, requesting the State's position on their brief. The following day, July 17, 2014, the undersigned was out of the office all day attending a hearing in another county. The amici brief and motion to accept were filed on July 17, 2014, between 1:58 and 2:03 p.m. while the undersigned was out of the office and prior to having any reasonable opportunity to respond to the Amici. No other attempts were made by counsel for the Amici to contact the undersigned.

demonstrates distinguished careers in public service, it is entirely irrelevant to the resolution of the case and should be stricken. Specifically, identifying the political affiliation of the Amici can be nothing more than an attempt to inject partisanship into the judiciary that should remain insulated from political sway. The State objects to the arguments Amici and rests on the arguments submitted below to support affirming the trial court's denial of relief.

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In an introductory statement Aguirre likens his case to that of *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013). Aside from *Hildwin* and *Swafford* being cases involving claims of newly discovered evidence and *Fitzpatrick* being a case involving claims of trial counsel's ineffectiveness, the similarities end there. As will be discussed below, Aguirre's case is a far cry from those three instances where this Court granted the defendants relief.

PRILIMINARY STATEMENT

This case presents a post-conviction appeal after Appellant was denied relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter "Rule 3.851" or "3.851") in the Circuit Court for Seminole County, Florida. Appellant was convicted, among other things, of two counts of first-degree murder for which he received two death sentences in 2006. *Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009). This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Aguirre." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel." Unless indicated otherwise, bold or italic typeface emphasis is supplied.

Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

This Court summarized the factual and procedural history for this case in its opinion following the direct appeal:

> I. FACTUAL AND PROCEDURAL BACKGROUND
>
> At the time of the murders, Aguirre worked at a restaurant as a dishwasher and a prep cook. One of his duties was washing the knives. At one point, all three of the men who lived at 117 Vagabond Way worked at the same restaurant.
>
> The victims, Cheryl Williams and Carol Bareis, lived next door to Aguirre. Carol was Cheryl's mother. Cheryl's daughter, Samantha Williams, lived with her mother and grandmother. Carol was a stroke victim, partially paralyzed, and spent most of her time in a wheelchair.
>
> Aguirre was an acquaintance of his neighbors and occasionally visited with them socially. Samantha testified that several months before the murders she awoke at 2 a.m., and Aguirre was standing over her bed. She screamed at him and forcefully told him to leave. Samantha escorted Aguirre out the front door and locked the door behind him. The next day she reiterated that he was not to enter their residence at night without permission.
>
> On the night of June 16, 2004, Mark Van Sandt, who was in a relationship with Samantha, went to 121 Vagabond Way to visit Samantha. He arrived at the residence around 7:30 p.m. and stayed until approximately 11:30 p.m. Samantha decided to leave with Mark and stay at his parents' house that night. When Samantha and Mark left the residence at 121 Vagabond Way, both Cheryl and Carol were inside and alive.…
>
> Deputy Pensa of the Seminole County Sheriff's Department was the first law enforcement officer to arrive. Deputy Pensa forcibly entered

through the back door. Subsequently, two other officers, Bates and Miller, arrived at the scene. Pensa and Bates noticed blood on the floor. The officers located Cheryl's body, which blocked the front door. Thereafter, deputy Pensa found Carol lying dead on the floor in the living room. She was lying face down in a pool of blood next to her wheelchair.

One of the crime scene analysts found a ten-inch chef's knife while searching the property. The knife was found between Aguirre's residence and the victims' residence. The knife was the same make and model used at Aguirre's place of employment. After speaking with the head chef at the restaurant where Aguirre worked, law enforcement officers determined that a ten-inch chef's knife was missing from the restaurant.[FN2]

> FN2. Aguirre's roommates also stated that the knife was similar to one that had been at their residence, which was also missing. Samantha Williams testified that her family did not own a knife of that type.

At approximately 11 a.m. on June 17, deputies knocked on the door of 117 Vagabond Way and asked Aguirre and his two roommates if they knew anything about what happened next door. Aguirre told the officers he did not know there was a problem next door. Later that same day, Aguirre approached law enforcement officers and told them that he had information about what occurred next door. He told the officers that he went into the home and saw that Cheryl was dead. However, at this point, Aguirre told them that he only knew of Cheryl's death. After Aguirre's conversations with police, he was arrested for tampering with evidence from a crime scene. Subsequently, Aguirre was indicted for murder....

All of the stab wounds sustained by Cheryl and Carol were consistent with being caused by the chef's knife found between the victims' residence and Aguirre's residence. The knife contained Cheryl's blood on the handle and Carol's blood on the blade, indicating that Cheryl was killed first.

….Of the 64 [bloody shoe] impressions that were comparable, all 64 were consistent with the footwear of Aguirre. The soles of his shoes

contained Cheryl's blood….Aguirre's underwear, socks, T-shirt, and shorts contained Cheryl's blood. Further, Aguirre's T-shirt, shorts, and underwear contained Carol's blood and DNA.

A Florida Department of Law Enforcement (FDLE) bloodstain pattern analyst also examined Aguirre's clothing. Aguirre's shorts had contact stains on both the front and back. The back of his shorts also had bloodstains that were not contact stains but arrived on his shorts through some type of motion, either impact spatter or cast off. His socks had contact stains as well as spots that were "consistent with dropped blood."

According to Aguirre's testimony during the guilt phase, he had the day before the murders off from work so he began drinking early. He and his friends continued to drink throughout the day and night.[FN4] Aguirre returned back to 117 Vagabond Way at approximately 5 a.m. on the morning of the murders.

> FN4. Dr. Day, Aguirre's psychologist, testified during the penalty phase that Aguirre admitted to obtaining and using powder cocaine the day before the murders.

Aguirre stated that he watched television and then got up to look for beer. There was no beer in his trailer so he walked next door. He attempted to go inside, but Cheryl's body was blocking the door. However, he managed to make it inside, and he lifted Cheryl's body on to his lap and tried to revive her. He realized she was dead so he put her back on the floor where he found her. Aguirre then walked toward the living room where Carol spent the majority of her time and found her dead as well. While in the house, Aguirre noticed the murder weapon sitting on a box near where Cheryl was lying. He stated that he feared the killer was still inside the house; therefore, he picked up the knife and screamed, "Is anybody here?" There was no reply. He then walked to Samantha's room. She was not there, but her room had been ransacked.

Thereafter, Aguirre ran outside towards his residence and tossed the knife into the grass. He then stripped off all his clothes, placed them in a plastic bag, set the bag on top of his shed, and bathed. Aguirre initially planned to burn the clothes. He explained that he did not call

police and report the murders because he was an illegal immigrant and afraid of deportation.…

> FN6. For the murder of Cheryl Williams, Judge Eaton found the following aggravators: (1) the defendant was previously convicted of another capital felony (moderate weight); (2) the capital felony was committed while the defendant was engaged in the commission of a burglary (moderate, but less than great weight); (3) the capital felony was especially heinous, atrocious, or cruel (great weight). For the murder of Carol Bareis, Judge Eaton found the following aggravators: (1) the defendant was previously convicted of another capital felony (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of a burglary (moderate, but less than great weight); (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (great weight); (4) the capital felony was especially heinous, atrocious, or cruel (great weight); (5) the victim of the capital felony was particularly vulnerable due to advanced age or disability (great weight).

The following mitigating circumstances were found: (1) under the influence of extreme mental or emotional disturbance (moderate weight); (2) substantially impaired ability to appreciate the criminality of his conduct (moderate weight); (3) age (24) (little weight); (4) long term substance abuse problem (moderate weight); (5) dysfunctional family setting (little weight); (6) childhood abuse (little weight); (7) poor performance in school (little weight); (8) brain damage from substance abuse (moderate weight).

Aguirre-Jarquin, 9 So. 3d at 598-600. Following the denial of post-conviction relief in the trial court, Aguirre filed a notice of appeal in October 2013 and his initial brief in July 2014. This answer follows.

EVIDENTIARY HEARING

The trial court held the evidentiary in two parts. The penalty phase claims were presented on March 19-23, 2012. The guilt phase claims were presented on May 13-21, 2013.[2] Because trial counsel testified at both hearings, the outline of their testimony is consolidated. All other witnesses are outlined according to the hearing in which they testified.[3]

Trial Counsel

James Figgatt

James Figgatt has been defending capital cases since the late 1970s. His first capital case was in 1978 or 1979 in Marion County. (V13, R110). He worked at the Seminole County Public Defender's office from 1981 to 2010 when he retired. (V13, R63). In 2004, Figgatt was the Chief Trial Attorney in the Capital Division for Seminole County. Figgatt and Caudill were the only two attorneys in the capital section in 2004—they worked together for about nine years. (V13, R63-4, 111). They handled all first-degree murder cases whether or not they were death penalty cases. They also occasionally handled second-degree murder cases and capital

[2] The trial court bifurcated the hearing to allow Aguirre time to pursue DNA testing.

[3] Not all witnesses that testified at the hearings are outlined; only those relevant to the issues on appeal.

sexual battery cases. (V13, R63-4).

Figgatt and Caudill worked both phases of Aguirre's trial together but Caudill was lead attorney. (V13, R64, 111). They had many discussions, "we were professionally more equals than subordinate or superior." If there was something Figgatt thought should be done he talked to Caudill about it. (V13, R65). Aguirre was a cooperative client and did not limit counsels' investigation. (V13, R65, 68). Figgatt has conducted mitigation investigations that included travelling to other states but he had not travelled outside of the country. (V13, R68-9). The public defender's office required submission of cost approval forms that include several areas such as hiring interpreters or experts. The public defender or his executive assistant public defender approved costs. (V13, R72). Figgatt did not recall any difficulty in getting costs approved during the 2004-2006 period. (V13, R71, 72).

Counsels' strategy for the guilt phase was that a "crazed drugged individual [who]...wasn't involved in the commission of this crime." For the penalty phase, counsels' strategy was arguing "what was wrong with him at the time he did this because [the jury] sort of concluded that he did do this." Based on Aguirre's self-reporting, counsel focused on his level of intoxication and consumption of controlled substances. (V13, R73). The defense hired Dr. Deborah Day, psychologist, in December 2004. She met with Aguirre 11 times. (V13, R73, 74, 114). An interpreter was present when Dr. Day met with Aguirre, as well as either

Figgatt or Caudill. (V13, R113-14). Figgatt said Dr. Day "does not render an opinion unless she got a good feeling about the person over the course of time." (V13, R114). Dr. Day recommended hiring Dr. Gebel. (V13, R115). Figgatt said Caudill decided to retain Dr. Gebel, neurologist, before the trial to assess Aguirre's mental state at the time of the murders. (V13, R76, 83, 116). Although Gebel testified at the *Spencer* hearing, Figgatt could not recall why Gebel was not called as a witness during the penalty phase. (V13, R81, 84). The bulk of the work for the penalty phase rested on Caudill. (V13, R116).

Aguirre's statement to police and trial testimony consisted of Aguirre explaining why he had gone to the victims' home, why he did not call police, and the steps he took after finding the victim's bodies. (V13, R92). The State argued Aguirre's "consciousness of guilt" as to why Aguirre had not called police subsequent to discovering the bodies. (V13, R92). The State also argued Aguirre's "consciousness of guilt" as it pertained to some of his clothing found on the roof of a shed adjacent to the property where the murders occurred. (V13, R93). To counter the State's consciousness of guilt argument, Figgatt's trial strategy was that Aguirre's was unlawfully in the United States and therefore his "primary concern" was deportation and the accommodations that would be provided for a person being deported. (V1, R93-4, 95). Figgatt questioned the veniremen regarding their feelings about illegal immigrants but did not investigate the

conditions of deportation. (V13, R97-99).

Aguirre was always brought in the courtroom before the jury was seated. (V13, R120, 122). Aguirre did not have any restraints on his hands. (V13, R123). Aguirre was provided with a shirt, tie, slacks, socks, and shoes. He did not wear jail clothes during the trial. (V13, R131). One time during the penalty phase Aguirre was led out of the courtroom after he had outburst during Dr. Riebsame's testimony.[4] (V13, R104-05). Figgatt thought the jury *heard* Aguirre's shackles; he would have moved for a mistrial if he believed the jury *saw* Aguirre's shackles as he was escorted out of the courtroom. (V13, R101, 117). Nonetheless, Figgatt is accustomed to the shackle noise and tends to "tune it out." (V1, R118).

Aguirre was "adamant" that he was innocent. (V19, R1324, 1325). Figgatt and Caudill discussed all of the evidence with Aguirre. (V19, R1325). Counsel had several discussions with Aguirre that his bloody fingerprint was identified on the murder weapon, the knife, which was found discarded in the yard between the victims' home and Aguirre's residence. (V19, R1325, 1326). Nonetheless, Aguirre continually denied committing the crimes. (V19, R1326).

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[4] Joint Exhibit 1 is a CD containing a certified copy of the videotaped trial. (V13, R135).

Samantha Williams's[5] background was not investigated at all. (V19, R1336, 1344-45). Figgatt was not aware that Samantha had worked at the bar Pretzels or that Aguirre was a patron there. (V19, R1336). He did not speak to anyone who worked at Pretzels. (V19, R1337). He did not file a motion to view the crime scene and did not recall viewing the evidence. (V19, R1338, 1340). The Defense subpoenaed Van Sandt for a deposition but he did not show up. (V19, R1341).

DNA expert Candy Zuleger was hired for the guilt phase. (V19, R1342). Figgatt did not recall the specific conversation he had with Zuleger. Caudill asked her questions while Figgatt took notes. She would have been Caudill's witness if she testified. (V19, R1344). An independent medical examiner was not hired because "the cause of death was pretty clear." (V19, R1345).

Timothy Caudill

Timothy Caudill has been defending capital cases for almost 15 years. (V14, R386-87, 473). He has defended "hundreds" of felony cases. (V15, R474). From 2004 to 2006, Caudill and Figgatt were the only attorneys in the capital unit of the public defender's office. They handled first-degree murder cases, second-degree murder cases, and capital sexual battery cases. Their case load averaged around 12

[5] Because Samantha and Cheryl Williams share the same last name, their first names will be used to avoid confusion.

to 15 cases with the majority consisting of death penalty cases. (V14, R387-88). Of the many capital cases that Caudill defended, eight were sentenced to death. (V15, R510).

Caudill was lead counsel for Aguirre's case. (V14, R388-89). He met with Aguirre soon after his appointment. (V15, R440). "There was never an occasion in this case that I went to the jail to see him without an interpreter." (V15, R441, 470). He "immediately" began a mitigation investigation by talking to Aguirre about "the circumstances surrounding the offenses that he was accused of and his life." He asked Aguirre for names of witnesses, family members, and contacts. (V15, R441, 442). Caudill contacted both of Aguirre's sisters who lived locally. (V15, R442). They assisted with obtaining names of witnesses and information from Honduras.[6] (V15, R453-54, 489). Counsel asked Aguirre's sisters and the Honduran consulate to find anyone in Honduras who was willing to write letters on Aguirre's behalf. (V15, R422, 452, 490). Caudill received many letters from Honduran family and friends which contained positive information on Aguirre's family, upbringing, cultural background, information on substance abuse, and anything that was helpful in presenting mitigating circumstances. (V15, R407,

[6] Caudill recalled Aguirre's sisters provided him with Aguirre's mother's name, their other sister's name, father or stepfather's name, and possible names of other people who knew him. (V15, R490).

423). Caudill retained Dr. Day, psychologist, for Aguirre's case because he had a long-standing working relationship with her "and we always worked well together and I have a lot of confidence in her." Nonetheless, he makes individual choices when retaining experts so they are "best suited to a particular case." (V15, R442-43).

Aguirre was initially a cooperative client—he was more inclined to discuss the guilt phase rather than mitigation and the penalty phase. (V14, R389). Although Aguirre was "reluctant" to involve his family "from an emotional standpoint," he did not tell Caudill not to talk to family. (V14, R390). Aguirre explained that his mother was ill in Honduras and he did not want her to know he had been accused of murder. (V14, R389-90). Aguirre eventually understood the importance of the penalty phase and provided Caudill the names of potential witnesses and family members. (V14, R389, 390). Dr. Day met with Aguirre many times; "between eleven and fifteen" which, in Caudill's experience, is Dr. Day's practice when working on capital cases. (V15, R443, 444).

Caudill provided Dr. Day with copies of multiple letters[7] that he had received from Honduran family and friends written on Aguirre's behalf. He also

[7] Both the Spanish and English-translated versions of the letters were admitted at the penalty phase. (V15, R450).

gave Dr. Day copies of Aguirre's medical records, school records, and public records that had been introduced into evidence, along with a full copy of discovery as Caudill received it. (V15, R444-45). Dr. Day testified at both the penalty phase and *Spencer* hearing. (V15, R445). Day's penalty phase testimony was quite extensive. (V15, R454).

Two *Nelson* hearings were held where Aguirre expressed his frustration with the progress of his case. (V14, R390).[8] Aguirre was concerned about having all discovery material translated into Spanish. Aguirre also expressed concern that counsel were spending too much time on the penalty phase rather than the guilt phase. (V14, R391). Caudill's office requires a cost approval form[9] for "everything that costs money." (V14, R391). He submitted three cost approval forms in reference to hiring Dr. Gebel. (V14, R392). Caudill did not recall having a conversation with Gebel where Gebel offered information that Caudill wanted to present at the penalty phase. (V14, R394-95). Gebel's testimony at the *Spencer*

[8] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). Figgatt testified that a *Nelson* hearing is "not uncommon because it takes a long time to develop and prepare for this kind of trial. And we are often going in directions which make no sense to our client. So we're asking questions and conducting investigations that have nothing to do with whether or not the individual is guilty of something." (V13, R66).

[9] Caudill submitted numerous cost approval forms that he described as equaling "a ream of paper." (V15, R471, 488).

hearing included information about Aguirre's substance abuse, "so it was additional information from a different angle." (V14, R395).

The defense strategy for the penalty phase was to present psychological issues that had to do with Aguirre's cultural background and that Aguirre suffered from substance abuse. Caudill also wanted to "humanize him" so that Aguirre would be presented in a positive way. Dr. Day testified as to these matters. (V14, R396). Sergeant Negri was called as a witness to present evidence of Aguirre's intoxication at or near the time of his arrest. (V14, R396).

Caudill said Dr. Day recommended hiring a neurologist after the penalty phase had concluded. (V15, R447, 494). Caudill retained Dr. Gebel because he had worked with him on a previous case. (V15, R448). Dr. Gebel had not reached conclusions at the time the penalty phase was held, therefore Dr. Gebel was only called as a witness at the *Spencer* hearing. (V15, R445, 448-49, 498). Caudill did not want to subject Dr. Gebel to cross-examination (at the penalty phase) if he had not finished Aguirre's evaluation. (V15, R449). Caudill made a strategic decision to present testimony through Aguirre's expert witnesses, Dr. Day and Dr. Gebel. (V15, R458).

Caudill spoke to Aguirre's sisters and the husband of one of them before the trial. (V14, R398). They had conversations on the phone and in person. (V15, R405). Some short conversations were in English but Caudill had the interpreter

present most of the time. (V15, R406). Aguirre's sister Ana said she would testify but Aguirre was reluctant to have his family involved and did not want to put his sisters through the "emotional trauma" of coming to court, seeing Aguirre, and then testifying. (V14, R399). After speaking with Aguirre's sisters, Caudill made a strategic decision not to call them as witnesses. (V15, R459, 473). "They were too "emotional and (it) got to the point where...I felt like they weren't going to be able to take the witness stand and testify." (V14, R399; V15, R405, 459-60, 505). One, if not both, of Aguirre's sisters talked to Dr. Day. (V15, R406, 454). Caudill said Ana provided information to both Dr. Day and him about Aguirre's upbringing and life in Honduras. (V15, R454). Caudill followed up on all of the witness names provided to him by either Aguirre or his sisters. (V15, R457). He obtained numerous photographs that depicted Aguirre's Honduran activities and submitted them into evidence at the penalty phase. (V15, R460-61).

The public defender's office did not have SKYPE capability in 2006. Caudill did not recall further investigating the technological capabilities of presenting witnesses via video. (V15, R426). Caudill said it was a damaging fact that Aguirre was illegally in the United States. (V3, R423). It was important to mention this during *voir dire* because: 1) the defense would not have prevented the State from doing so; and 2) counsel could ascertain which jurors, if any, would indicate they would not be a fair juror. (V15, R429).

Caudill consulted with two people with experience in Honduran culture—the Honduran consulate, Mr. Siercke, and Mr. Van Hissenhoven, the interpreter for Aguirre's trial. (V15, R429-30). Van Hissenhoven was familiar with Honduran culture as well as the economic strata that Aguirre came from. (V15, R465-66, 499). Van Hissenhoven indicated Aguirre was not from a wealthy area, he "...did not come from a high socioeconomic status." (15, R499, 500). Aguirre also indicated he was not from a wealthy area of Honduras. (V15, R500). Caudill said Van Hissenhoven worked with many attorneys on capital cases and "for many, many years [has] done a tremendous amount of work in immigration court...federal court which has given him experience...in cultural issues...that are very germane to capital cases." (V15, R430, 466, 499-500). Van Hissenhoven was not called as a witness because the defense would have had to use a different interpreter. (V15, R430-31, 467). Mr. Siercke was "very cooperative" with getting records and contacting family on Aguirre's behalf. Siercke spoke with Aguirre's mother and sister and discussed getting Aguirre's medical and school records. Siercke "reported back to me that he had conversations, actual conversation with the mother because I have a memory of him speaking about her health among other things." (V15, R491, 492). Siercke was familiar with the area with Aguirre was raised. (V15, R453). It was more advantageous to have Siercke speak with Aguirre's mother because Siercke was from that country "and was familiar with

the setting in which she lived and that environment...I didn't think I could accomplish the same thing in a telephone conversation with her." (V15, R493). Also as important, Mr. Van Hissenhoven was very helpful in gaining Aguirre's trust and cooperation. (V15, R467-68).

Aguirre was shackled during the trial which was routine practice in the Eighteenth Circuit. (V15, R437). Caudill did not file a motion objecting to the shackling because it would not have been granted. (V15, R476-77, 502-03). Although Aguirre got upset during Dr. Riebsame's testimony and he was led out of the courtroom, Caudill did not move for a mistrial as he believed the jury did not see the shackles. (V15, R437-38). Aguirre's outburst included "expletives" toward the assistant state attorney. In Caudill's opinion, it was best for Aguirre's outburst "to end quickly without further damage to his case" and a chance of "success in ultimately saving his life" and prevent "further damage to him because I didn't want him to get hurt." (V15, R477-78). Nonetheless, the trial court ensured that Aguirre was brought in and out of the courtroom before the jury entered or was dismissed. In addition, Aguirre was not restrained in any manner when he walked to the witness stand and testified in his own defense. (V15, R479, 480, 481).

Caudill and Aguirre discussed violence that occurred in Honduras. Aguirre only talked about one friend of his that was murdered. (V15, R458-59). Aguirre however, told Caudill he came to the United States to "pursue the American

dream." Aguirre wanted to work, send money back to his family, and eventually return to Honduras to marry his girlfriend. (V15, R464-65).

Caudill recalled Aguirre testified that he had disposed of his clothes by tossing them on the shed rooftop because "he had an extreme emotional response having found the two bodies...[and] also that he was intoxicated." Aguirre also expressed his fear of deportation. (V15, R431).

The theory for the guilt phase was that Aguirre "didn't do it and somebody else must have." Aguirre "always" told Caudill that "he was innocent." (V19, R1354). Aguirre's choose to testify at trial, "[I]t is, obviously, the defendant's choice in all trials to testify. The case law is clear that we cannot prevent them from testifying" unless "we believe that the defendant is going to commit perjury." (V19, R1354). Aguirre wanted to testify that he had not picked up the knife and discarded it. (V19, R1355). Aguirre "made it very clear to me that he was going to commit perjury." Aguirre knew the knife had "come from his house and where he worked." "He did not want to testify to that." (V19, R1393). Caudill, however, told Aguirre that he had to testify as to what he had previously told Caudill—that he had picked up the murder weapon and discarded in the yard, "even though I had some reason to dispute his credibility as to his claim of innocence." (V19, R1355). Caudill "gave him the benefit of the doubt." (V19, R1357, 1393; V20, R1407).

There was no serious discussion about hiring a crime scene expert. Caudill

would have needed cost approval to do so. (V19, R1359-60). Caudill obtained cost approval to hire DNA expert Candy Zuleger who review discovery materials, data, and assisted in preparing for depositions. (V19, R1360-61). Caudill made a strategic decision not to request further independent DNA testing because "it would not benefit Mr. Aguirre to search for the absence, which there appeared to be, of his DNA at the crime scene...and there didn't appear to be any DNA that would be relevant, as I saw the case at the time, to investigate or presentation of his defense...I didn't see a reason to get independent testing to try to find anyone else's DNA." (V19, R1362-63, 1365). There was not "enough evidence at the time to warrant independent DNA testing" that would "give rise to a relevant and wise argument that someone else did it." (V19, R1390, 1391). Aguirre consistently told Caudill he had discovered the bodies, had rolled Williams on to his lap and then rolled her back. (V19, R1366, 1392).

Caudill did not consult with an expert on whether or not Aguirre would have received injuries to himself. Caudill handled multiple trials involving different injuries, the types of blood that are left behind in relation or a result of those injuries, and speaking to many different experts on bloodstain pattern analysis. Caudill relied upon his own experience as an attorney in dealing with cases where people get injured and bleed. (V19, R1381-82, 1385, 1389). Whether or not an assailant is cut or bleeds in a stabbing case "depends upon the nature of the injuries

and then what happens after the person is injured." There has to be a basis to investigate whether or not an assailant bled at a crime. (V19, R1385-86). Parts of the home were very bloody and some parts had very little blood at all. (V19, R1391). Caudill argued that bloodstains found in other rooms of the trailer/home were not tested by the State. (V19, R1388). Nonetheless, Caudill "didn't see the amount of blood that could be associated with someone other than [Cheryl] or [Carol] Bareis." (V19, R1390).

The medical examiner's report stated that Cheryl had so many defensive stab wounds which Caudill believed "was in Aguirre's favor." It indicated a struggle and that Cheryl was running away and was not tortured with "little pinprick wounds" had she been in a stationary position. (V19, R1364, 1387). Caudill "didn't see any issues that gave rise to a need to hire an independent medical examiner." (V19, R1366).

Aguirre claimed he was at Pretzels bar the night before he discovered the bodies. Aguirre's alibi was discussed with Investigator Doug Harris. Caudill did not recall whether or not Harris went to Pretzels. (V19, R1366-67). Caudill did not recall whether or not he knew Samantha worked at Pretzels. He had some information on Samantha's background but he did not conduct an additional investigation. (V19, R1368, 1371, 1372). Caudill had no reliable basis to obtain Samantha's mental health records; he did not have "any acceptable theory under

which I could have used them as evidence at trial." (V19, R1383). He would have been "extremely hesitant" to suggest Samantha had committed these murders. (V19, R1384). Samantha lived with her mother and grandmother. Caudill was worried that Samantha believed Aguirre was attracted to her, "had come on to her and she rebuffed him." Evidence indicated Samantha was not at home when her relatives were killed. (V19, R1371, 1386).

Samantha was never considered to be a potential suspect. "She had an alibi...and there simply wasn't any other evidence at that time that was credible or admissible that gave rise to a reason to investigate her as a possible suspect from a factual basis." (V24, R2291-92, 2378). Caudill asked his investigator to "find out any and all other investigations" that pertained to Aguirre's case—"which we did not put all of it in writing." They constantly discussed the case. Caudill trusts the investigators "to do their work." (V24, R2363-64, 2390-91).

Dr. Day visited Aguirre numerous times and always in the presence of an interpreter. Caudill was present for most of the visits although there were times Day went to the jail with Caudill. During one weekend meeting, Day and Van Hissenhoven went to the jail without Caudill. (V19, R1394; V20, R1405, 1406). The following Monday, Day told Caudill that Aguirre told both her and Van Hissenhoven, "I did this to them...There was no question about what he meant." (V19, R1394, 1397, 1398; V20, R1405). Caudill went to see Aguirre two days

later. But, "he [Aguirre] didn't want to talk about that." (V20, R1406). And, because Aguirre did not tell Caudill what he had told Day and Van Hissenhoven, Caudill gave Aguirre "the benefit of the doubt" because he had not "heard it personally." Caudill did not alert the court about potential false testimony when Aguirre took the stand in his own defense. (V20, R1407, 1408). Caudill, however, "saw it as a breakthrough at the time in terms of mitigation...it was going to put us in a better situation to try to accomplish the goal...which was to save his life and avoid the death penalty because our mitigation was going to be stronger."

The Guilt Phase Hearing

Experts

Dr. Thomas Beaver

Dr. Thomas Beaver, former chief medical examiner for Volusia and Seminole Counties, performed the autopsies on Cheryl and Bareis.[10] (V19, R1264). Cheryl died in a face down position. After Beaver rolled her body over, blood drained out and down her side. No blood was found on the flooring underneath or on her thigh except for what dripped after she was rolled. (V19, R1276). Based upon the blood patterns around Cheryl's body, her body was not moved after she

[10] Dr. Beaver was employed as the chief medical examiner for Alameda County, California, at the time of the evidentiary hearing. (V19, R1264).

succumbed to her injuries. (V19, R1278, 1280). The blood evidence was inconsistent with Cheryl's body being lifted and placed in someone's lap. (V19, R1280-81). Cheryl would have had an additional impression from her shirt on her neck if her body had been lifted and then laid back down. (V19, R1281). "This was a very bloody scene." It was significant that there was a lack of blood in certain areas. (V19, R1281).

If Cheryl's body had been picked up and then placed back down, there would have been additional bloody marks "another ring around that area of skin, there would be blood smearing underneath, there wouldn't be the sparing." (V 19, R1298). There was no evidence that Cheryl's body had been moved, although, "it's possible." Cheryl's body was moved in Beaver's presence and photographs were then taken at his direction. (V19, R1282, 1287, 1294, 1295).

Dr. Daniel Spitz

Dr. Daniel Spitz, chief medical examiner for Macomb and St. Clair Counties, Michigan, is licensed in both Michigan and Florida. (V19, R1231). Spitz's opined there was a double impression ring of blood, "two very obvious well-defined blood drips which are parallel to one another on the lower portion of the back" consistent with a lay person having moved Cheryl before Beaver's arrival. (V19, R1307, 1308, 1311). It was a "subtle or slight movement." (V19, R1308, 1314, 1317).

Spitz opined that after Cheryl's body was initially rolled, blood dripped across her lower back, which then became subjected to gravity, and dried on the floor near her. (V19, R1310-11). Although Cheryl had two puncture wounds in close proximity, the blood pattern was outside the range of gravity which to him indicated Cheryl's body had been moved. (V19, R1315). The "double line" pattern was only on one side of Cheryl's body. (V19, R1317). Spitz's believed that Cheryl's body was in advanced rigor mortis. In Spitz's opinion, "with a body in advanced rigor mortis, you can roll a body and roll it back and it would be essentially…in the same position." (V19, R1318, 1320-21). Spitz explained, "there is a subtle difference" between the two positions that Cheryl's body was in before and after it "was moved." (V19, R1319).

Jacquline Grossi

Jacquline Grossi, lead crime scene analyst, Seminole County Sheriff's Office "SCSO," reported to the crime scene at 9:50 a.m. on June 17, 2004. (V20, R1482-83). Grossi collected possible evidence of the killer's blood since "it's possible" for an assailant to get cut in stabbing cases. (V20, R1487). Grossi did not collect the "blanket divider" hanging in the doorway between the southeast living room and kitchen because she "did not observe any evidence on that blanket." (V24, R2254-55). "Anything that looked like blood was selected and swabbed." (V24, R2267). The purpose of her notations was to cross reference the stains

with the photographs she took. She typically does not note whether or not a stain was wet. (V24, R2265).

Cheryl's body was not moved until the medical examiner arrived. (V24, R2270). She was lying face down in the foyer with a roll of roofing felt paper underneath her midsection. (V24, R2270). Her body was slightly tilted to the left because her left leg was straight out but her right leg was slightly bents at the hip and knee. Her left arm was up above her head and her right forearm was near the roofing paper roll. Her hands were joined in her hair by her forehead. (V24, R2270-71). "There were no smears or anything like that" that indicated the blood around Cheryl's body had been disturbed. (V24, R2271, 2276-77).

Barrie Goetz

Barrie Goetz, self-employed forensic consultant, previously worked in various forensic-type positions for the Indiana State Police Laboratory and the Colorado Bureau of Investigations. (V20, R1498-99). Goetz said that weapons like a pocket knife or kitchen knife that do not have "a hilt" become "slipperier" and harder to grip. "And, without the hilt, the person who is the perpetrator wielding the knife, his hand can slip off of the handle onto the blade and cut their fingers, palm...." If multiple "stabbing and swinging and slicing" movements occur, the potential exists for the perpetrator to get cut. Cuts could also occur if a knife deflects off either the victim or an object. Potential cuts can vary in size. (V20,

R1504). An assailant could "bleed a lot at a scene...bleed very little...[or] not at all." (V20, R1505). The weapon in this case was "a large commercial-size knife, or large cooking knife." It did not appear to have a serrated cutting edge and it had a synthetic-type handle. There was a guard between the handle and the blade "designed...so your hand does not go onto the blade." (V21, R1611-12). The blade protruded below the handle. There was a notch for a person's forefinger for holding the knife in a normal manner. (V21, R1610, 1611). The knife would not readily slip from one's grasp during normal use. (V21, R1611).

Aguirre's shoeprints were found at the murder scene. "Physically, those shoes were present at the scene." Blood stains on Aguirre's clothing linked him to Cheryl's blood. (V20, R1515). The footwear patterns around Cheryl's body were "passive transfers of blood…it appears to be a deliberate walking around the deceased body...not running or sliding." (V20, R1515-16).

Goetz examined Aguirre's shorts; nylon swimming trunks with a polyester mesh lining. (V20, R1521). Goetz said that a synthetic fiber like nylon absorbs blood differently than nature fibers like cotton. "Blood does not immediately absorb in once projected, it actually skims across the top of the surface, and then eventually soaks in." (V20, R1521). Because nylon is water-repellant, in Goetz's opinion, "after [blood] finally absorbs in and spreads out, [it]leaves a much bigger stain than a drop of blood on cotton." (V20, R1525). There would be a distinctive

pattern of projected blood on nylon but not on cotton. (V20, R1522). Goetz opined that, "all of the stains" on Aguirre's shorts contained "a transfer of blood." (V20, R1522-23). Goetz also opined that the shorts did not contain any evidence of projected blood. (V20, R1523, 1524, 1596).

Drops of blood were located on the floor of the southeast bathroom—the only working bathroom. This was significant to Goetz because the bathroom was far away from "the two bloodletting areas...the foyer and the northwest bedroom. Someone either transported the blood there somehow or was able to drip it or they were bleeding themselves and dripped the blood." (V20, R1538-39). The DNA profile of the blood droplets matched Samantha's DNA. (V20, R1540, 1543, 1544, 1548; V11, R1973).[11] A DNA profile obtained from towels collected from the southeast bathroom floor matched Cheryl's blood. (V20, R1548, 1548). A DNA profile of a bloodstain located on the southeast bathroom door about 39 inches from the top matched Samantha's blood. (V20, R1551; SEBD-3). A partial DNA profile of blood found in the southeast bedroom matched Cheryl's. (V20, R1544-46). A DNA profile of blood stains on the southeast living room floor matched Samantha's. (V11, R1985). Two other blood stains matched a partial DNA profile of Cheryl's. The southeast living room was located between the kitchen and the

[11] Grossi's DNA report at trial indicated "drops of suspected blood were observed on the floor." (V20, R1548).

south hallway. (V20, R1553, 1555. 1558). A blanket that was used as a divider that separated the living room from the south hallway did not contain Samantha's blood. (V20, R1561, 1599; V21, R1616). Cheryl's blood was identified on the south wall in Samantha's bedroom. (V21, R1606). A blood stain on the southwest bathroom wall at seventy-four inches high matched Samantha's DNA. (V20, R1563-64; V11, R1986). The southwest bathroom floor also contained a bloodstain that matched the DNA profile of Samantha. (V20, R1562, 1563-64, 1567; V11, R1986). A bloodstained "NicoDerm container" found underneath a mirror lying on the southwest bathroom floor contained the DNA profile of Cheryl. (V20, R1568). The mirror itself contained a footwear impression that matched Aguirre's. (V21, R1604). Goetz did not know how or when the mirror ended up on top of the container. (V21, R1607).

A bloodstain found on the kitchen floor contained Samantha's DNA. (V20, R1584; V21, R1606; V11, R1987). Other bloodstains on the floor contained both victims' blood. (V21, R1606). A bloodstain found on the wooden leg of a kitchen chair "consistent with a fabric transfer" but "not consistent with the bloodstain nylon" shorts, contained a partial DNA profile of Cheryl. (V20, R1586, 1587, 1588-89, 1597). Two more stains on the chair were consistent with Cheryl's DNA profile. (V20, R1590-91).

In Goetz's opinion, the present DNA results indicating that Samantha's

blood was found in different locations is consistent with Samantha bleeding at the scene and bleeding in the working bathroom. "[I]f you're a perpetrator that's bloodstained and injured somewhat, from my experience at crime scenes, they often go to a restroom to clean up their blood, check their injuries. That would all be consistent with Samantha Williams being the perpetrator of the homicide[s]...cleaning up both the blood that's on her from the victims and also her own injury that was producing blood droplets at the scene." (V20, R1595). The areas within the home where Samantha's blood was located were consistent with a moving, injured person who was dripping blood. (V20, R1595-96). Further, in Goetz's opinion, an "injured hand" removed the mirror from the wall and laid it on the floor which then left "transferred bloodstains." (V20, R1596). Goetz did not have any information that indicated Samantha had sustained injuries to her hands or any part of her body contemporaneously with these murders. (V21, R1604-05). It was Goetz's "theory" that Samantha walked about the house with a cut hand after she committed the murders. (V21, R1605).

Lay Witnesses

Jaime Bernard

Jaime Bernard was a bartender at Pretzels bar from 1998 to 2008. (V21, R1618, 1620, 1621). During proffered testimony, Bernard said she aware that Samantha did not like Cheryl, which was common knowledge in their community.

(V21, R1652-53). Bernard's friend Peter Nompleggi told Bernard that Cheryl "had a drug problem and that one of the reasons that Sam hated her mother so much was because [Cheryl] made [Samantha] have sex with [Cheryl's] drug dealers." (V21, R1653).

Samantha Williams

She lived with her mother and grandmother on Vagabond Way. (V21, R1721, 1723). Samantha was eighteen-years-old the first time she was "Baker Acted" in 2001. (V21, R1724). Her mother called police because she could not control Samantha's behavior. (V21, R1726). She "may have" yelled and screamed at hospital personnel but she did not recall the incident. (V21, R1726, 1727, 1734).

Samantha did not recall being arrested for disorderly conduct in December 2007. (V21, R1741). She did not recall telling the arresting officer that she was responsible for her mother's and grandmother's murders or saying that they "died for me." (V21, R1741-42). Samantha said, however, "They died because somebody was in my house looking for me." (V21, R1742). She has a lot of guilt because "they gave their lives for me because somebody came into my house looking for me." (V21, R1773).

Samantha set fire to the bedding in the trailer in August 2010. She called police after she attempted to set herself on fire. (V21, R1744). She has been under psychiatric care since she was 14-years-old. She has been diagnosed with

schizoaffective disorder, Bipolar disorder, posttraumatic stress disorder (PTSD), and intermittent explosive disorder. (V21, R1745, 1746). She abused alcohol from twelve-years-old although she quit in 2012. (V21, R1754). She has a history of black-outs but did not recall when they started. (V21, R1756, 1766). Samantha does not hurt other people—"I hurt myself." (V21, R1758).

Samantha testified at trial that, about seven months before the murders, Aguirre had come into her room and stood next to her bed. (V21, R1753-54). Samantha recalled telling police that marks on her arms were burn marks she got at work. (V22, R1805). She specifically recalled how she got the marks because "whenever I reached in the oven to grab those trays of bread my arm had touched the top of the oven." (V22, R1807). Samantha told police that her mother and grandmother typically got up at 5:30 or 6:00 in the morning because her grandmother liked her coffee. (V22, R1812). Although Samantha was responsible for cleaning her side of the home, she did not do so. She did not clean the wood floors with soap and water because it would ruin them. The bathrooms contained mold, dirt, grime, and rust. (V22, R1813, 1818, 1821).

Samantha voluntarily submitted a DNA sample in 2012. She did not discuss the results with the State. (V21, R1789; V22, R1813). She knows her DNA was found in the trailer."Of course, my DNA is going to be in my house." (V21, R1790). Her blood was in the trailer because "I've busted windows out of my

house with my hands and my head." (V21, R1795). Samantha lived in the trailer for twenty-six years. (V21, R1797; V22, R1808). She bled in the trailer when she sustained a hand injury in 1998 that require surgery. She bled when she punched out the southeast bathroom window in 2002. (V22, R1808-09, 1817). Virtually every window in the trailer was replaced because she broke them with either her head or hands. In the time frame leading up to the murders, she used to bang her head in her home and ultimately bled. (V22, R1810).

Candace Nagata

Candace Nagata has known Samantha for about 15 years. (V22, R1832, 1849). On March 31, 2008, she wrote a statement that Samantha had repeatedly beat her head against a wall during a time when Samantha was being Baker Acted. (V22, R1832, 1834). She did not recall stating that Samantha had threatened to kill her. (V22, R1850). Nagata stated several times that she did not recall the actions as stated in the March statement. (V22, R1833, 1834, 1836, 1850). Samantha told Nagata, "she felt responsible for her mother and grandmother because she was not there to protect them, that if she had been there, that she felt she could have saved their lives" if she had been home when they were murdered. (V22, R1850).

Monica George

Monica George was the manager and part owner of Pretzels bar. Aguirre was a regular customer. Samantha was a waitress for about six months and also a

customer. (V22, R1894-95, 1897, 1901). George eventually fired Samantha for stealing. Samantha gave "free drinks" to her mother and did not get along with other staff. (V22, R1902). Samantha was known for her "dishonesty" within the community. (V22, R1904).

Mark Van Sandt

Mark Van Sandt, Samantha's former boyfriend, also testified at trial. (V22, R1920). The night before the murders, Samantha argued with her mother. Cheryl "had just got done cleaning" and said Samantha was "already making a mess, and that argument turned into us...and that's how we left." He and Samantha went to Phil Kudash's home but immediately left and went to his parents. (V22, R1920-21, 1924). Samantha verbally fought with her mother on more than one occasion. The severity depended on how much each one of them drank and the "actual situation." (V22, R1922, 1923). Samantha was never physically violent with him. (V22, R1923). She "more or less…it was more of a verbal whenever she would get mad." (V22, R1923).

Van Sandt and Samantha spent the night at his parents' house. Samantha was lying next to him when he got up at around 4:00 a.m. to use the bathroom. (V24, R2219-20, 2229). He was a light sleeper but Samantha was a heavy sleeper. (V24, R2222). There was no blood on Samantha or his sheets. (V24, R2229). His bathroom was completely clean. (V24, R2230). Samantha was in the same clothes

as the prior night. (V24, R2232). Van Sandt met up with Samantha later that day after he was questioned by police on June 17. (V24, R2217). He did not see any injuries on her. (V24, R2217). He drove a "very loud" 600 horsepower diesel truck with a "customized exhaust" that he had left parked on the street. He did not hear the truck start during the night. One would have to familiar with the accelerator to be able to even attempt to reduce the sound of his truck. The driver's seat was in the same position as he had left it. (V24, R2220, 2221, 2223, 2230). Samantha did not know how to drive the heavy duty truck. (V24, R2228).

Jack Van Sandt

Jack Van Sandt is Mark's father. When Jack got home at about 10:00 a.m. the day of the murders, he informed Samantha of her relatives' deaths. Samantha "was devastated [and] collapsed in the driveway" before he took her to the crime scene. (V24, R2239-40, 2245). Samantha did not have a car or a driver's license. (V24, R2247). Samantha had no injuries. (V24, R2240). Mr. Van Sandt did not approve of Samantha dating his son.

Carol Nicole Casey

Carol Casey, childhood friend of Samantha's, moved away from their neighborhood when Casey was 17-years-old. (V22, R1974-75). In August 2010, Casey was living with her mother on Vagabond Way. On August 11, Casey went to Samantha's trailer because Samantha had set her bedding on fire. (V22, R1979).

Samantha said, "the demons in her head made her do it...made her kill her mom." Casey informed the police officer on the scene about Samantha's statement but did not follow up with anyone else "because of the way that he blew me off." (V22, R1981, 1983, 1984). Samantha did not say anything about her grandmother "Memaw or anybody else." (V22, R1991, 1992). About three months later, Casey observed Samantha "putting a stabbing motion towards her chest, and she told me that the demons had made her do it and she was crying. She said that she had hurt her mom." (V22, R1984). Samantha had been drinking heavily and was subsequently Baker Acted. (V22, 1988).

Deputy Diane Goglas

Deputy Diane Goglas responded to a call at Samantha's home in September 2001. (V23, R2027-28). The call resulted in Samantha being Baker Acted. (V23, R2027). Once hospitalized, Samantha stated that she did not care if she died. (V23, R2030). Goglas responded to a call at Samantha's trailer on October 19, 2010, which also resulted in Samantha being Baker Acted. Goglas was informed that Samantha had hit her father and injured herself. (V23, R2030, 2032, 2046). During proffered testimony, Goglas said Samantha made a statement, "I deserve to...die."

Detective Marcos Ramirez

Detective Marcos Ramirez was a patrol officer on December 6, 2007, when he was dispatched for a disturbance call at Mugshots bar. (V23, R2049, 2050,

2051). Samantha was arrested for disorderly intoxication. (V23, R2052, 2059, 2083). A digitally recorded video of Samantha's ride to jail in Ramirez' patrol car was published for the court.[12] (V23, R2059, 2080, Def. Exh. 94). Samantha made several statements which included: "Is it my fault?...It's my fault...Do you understand that they…died for me?...my mother and grandmother were murdered....(V23, R2069-70). "My mother died for me." "I'm sorry that...I'm alive." (V23, R2071). Ramirez was not aware of Samantha's relatives' murders and attributed her statements to intoxication. (V23, R2084).

Investigator Robert Hemmert

Investigator Robert Hemmert[13] has been lead investigator in hundreds of murder cases, including Aguirre's, during his 27 year career. (V23, R2167-68, 2169, 2188, 2190). On June 17, 2004, Hemmert obtained a search warrant for Samantha's trailer. (V23, R2168, 2191). Hemmert did not observe any injuries to Samantha during several interviews he conducted with her on June 17. He looked for injuries on anyone he came into contact with "particularly [as it] relate[d] to this case." (V23, R2180, 2197-98). Hemmert's supervisor, Sergeant Negri, asked Samantha about marks on her arm which she explained were burn marks. There

[12] The trial court reviewed the entire video recording which was approximately 26 minutes. (V23, R2077).

[13] Hemmert did not testify at trial. (V23, R2191).

were no incised wounds, stabbing wounds, or blood on Samantha. No blood, "none, whatsoever." She did not complain of any wounds, either. (V23, R2180, 2181, 2182). Samantha was upset, emotional, shaking, and cried at times; "Typical with an individual that has just learned that her family members have been killed." (V23, R2182-83, 2192).

During an interview which was conducted in Spanish, Aguirre again stated that he went "just inside" the front door where he found Cheryl. "He never walked any further into the hallway or the trailer...he never saw the second body." Further, Aguirre did not walk on steps that led into the side of the home. (V23, R2185; V24, R2211-12). Aguirre eventually said he lifted Cheryl's body. (V24, R2206, 2210). He never said he rolled Cheryl's body over. (V24, R2210). Hemmert does not speak Spanish; as a result, Agent Hildalgo conducted most of the interview. (V24, R2207). In Hemmert's experience, Aguirre's statements were inconsistent due to the footwear patterns found throughout the home as well as the amount of blood found on Aguirre's clothing. There was also blood on one of Aguirre's socks that was covered by one of his shoes. (V23, R2186). Hemmert did not observe anything that indicated Cheryl's body had been re-positioned. She died where she was found. (V23, R2187).

Christine Snyder

Christine Snyder, crime scene analyst, specializes in footwear analysis and

comparison. She testified at both the evidentiary hearing and Aguirre's trial. (V25, R2415-16, 2417). Snyder explained the types of footwear patterns: A positive impression occurs when a shoe steps into a pool of liquid and then steps onto a clean surface, leaving an impression of the liquid on that surface; A negative impression occurs when a clean shoe steps into a pool of liquid and the liquid is removed from the pool onto the bottom of the shoe. (V25, R2420-21). There were only positive impressions in suspect blood at the crime scene, not any negative impressions. (V25, R2421, 22). Snyder would normally expect to find negative impressions if a person came to a scene several hours after the blood was spilled, stepped in the blood and made positive impressions. (V25, R2422).

There were a couple of impressions in the foyer by the doorway to the northwest living room either partially or completely covered by milk crates, and a positive footwear impression found under Cheryl's foot, which covered about an inch of that impression. (V25, R2423-28). A footwear impression inside the front door area was consistent with that footwear being placed down and Cheryl's blood spilled on top of it. (V25, R2430, 2432). Snyder opined that if the blood had been there first, most likely a negative impression would be near the toe area; however, that did not occur. (V25, R2430-31). All of the footwear impressions in suspected blood inside the residence were similar to Aguirre's shoes. Four footwear impressions taken from the front porch area outside of the residence

matched Aguirre's footwear. (V25, R2433, 2434).

Penalty Phase Hearing

Deputy Samuel Belfiore

Deputy Samuel Belfiore was the lead courtroom deputy during Aguirre's trial. (V17, R88-89, 990). Inmates in custody are routinely shackled as an administrative policy. (V18, R1007-08). Defendants are shackled with leg restraints connected to a belly chain with either a small or large linked chain before leaving the jail. (V17, R990-91; V18, R1009). Aguirre's leg restraints were the same restraints used on defendants on a daily basis. (V17, R989-90).

Prior to the start of a proceeding, the belly chain is removed from a defendant with the leg restraints left in place. Defendants are instructed to keep legs underneath the defense's desk and to remain seated when the jury comes in the courtroom. "It's not that much chain and they're not that loud." (V17, R992; V18, R1014). After the defendant is seated with his legs under the table, the jury "virtually cannot hear anything because of the fact that they're in that little box and the sound is muffled." (V17, R992). The noise is also muffled by the three-sided framed desk, the noise of the courtroom, and computer noises. (V17, R993, 998).

Approximately two weeks prior to the evidentiary hearing, (at the State's request) Belfiore sat in each jury seat used during Aguirre's trial, "moving all around in the seats" to see if jurors were able to view Aguirre's leg shackles. (V17,

R989, 997; V18, R1009-10, 1013). Jurors would only have been able to see Aguirre "for a brief instant should they be looking at him" when he had his outburst during the penalty phase. (V18, R1013).

Aguirre sat closest to the deputy's desk with his attorneys next to him. (V17, R993). Belfiore did not hear chains when he was posted by the jury. (V17, R994). Aguirre stood up during Dr. Riebsame's testimony. Two deputies immediately grabbed each of Aguirre's arms and escorted him out the courtroom door into a holding cell. The incident took approximately 5-10 seconds. (V17, R994-95).

Etienne Van Hissenhoven

Etienne Van Hissenhoven is a court-certified Spanish and English speaking interpreter and translator. He has been interpreting for about twenty-five years; all those years were in the Seminole County Judicial Circuit. (V13, R139-40, 142, 145; V17, R807). Although he was born in Colombia, and Spanish is his native language, Van Hissenhoven said it is generally not difficult to speak Spanish with someone from another Spanish-speaking country. "When you are in formal settings, such as in the courtroom, this Spanish is very similar, similar to English spoken by people from England or Australia, the formal setting makes it very even….Informal settings sometimes not so much." Socioeconomic backgrounds may also make Spanish more difficult to understand. (V13, R141).

Aguirre's Spanish was very good. Aguirre is "an educated man so the

Spanish is very...neutral." (V13, R142). Aguirre was shackled during his trial. (V13, R150-51, 161). Van Hissenhoven recalled when Aguirre got upset during Dr. Riebsame's testimony. Aguirre stood up, and, in English, he called Riebsame a liar. Bailiffs removed Aguirre removed from the courtroom. The jury was present at the time. Van Hissenhoven continued interpreting while Aguirre was led out of the courtroom. (V13, R156, 157, 160). Van Hissenhoven does not consider himself to be a cultural expert. He participates in capital cases as an interpreter. He did not recall having conversations with Aguirre, defense counsel, or Dr. Day regarding Central American culture. (V17, R810-11, 812).

Suzy Kaczmarek

Suzy Kaczmarek was formerly a bartender at Pretzel's Bar in Altamonte Springs. (V13, R165, 166). She knew Aguirre by his nickname, "Shorty." (V13, R168-69). Aguirre was friendly and played a lot of pool. (V13, R169). Aguirre liked to drink beer but was "never" aggressive when he drank and was always respectful toward her. (V13, R170, 172). Kaczmarek never saw Aguirre "falling down drunk." He was always able to function. She never saw Aguirre abuse cocaine. (V13, R174, 175). Aguirre was never irritable and did not have outbursts of anger. He got along well with others and was not a "loner." (V13, R176).

Susan Cruz

Susan Cruz, clinical project coordinator at the School of Medicine,

University of Maryland, works as a consultant in criminal and immigration cases. (V14, R237-38). Cruz had never conducted a mitigation investigation for a capital case in Florida nor had she ever been qualified as an expert in mitigation investigation in Florida. (V14, R280-81). She was qualified as an expert in "country conditions in Honduras." (V14, R256-57). Cruz met with Aguirre in September 2010 and December 2010. (V14, R258). They spoke about Aguirre's experiences while being raised in Honduras; family life, community life, as well as his school and social experiences. (V14, R258). Aguirre also told Cruz what it was like when he arrived in the United States along with his experiences up until his arrest. (V14, R258).

Aguirre told Cruz he left Honduras because he was afraid for his life. There were gangs and violent events he witnessed in his neighborhood. (V14, R259). Aguirre was harassed when he refused to join a street gang. Gangs "engaged in pretty much every crime." As a result, Aguirre's mother sent him to live in Nicaragua for a few months. (V14, R309, 310). Aguirre told Cruz he did not call police when he found the victim's bodies because he was afraid he would be deported. (V14, R259). Cruz was aware that Aguirre voluntarily spoke to police several times after the victims were discovered. (V14, R329). Cruz explained that in Honduran culture, the National police control law enforcement throughout the country. She opined that Aguirre did not understand that local Florida police

entities did not control immigration issues and therefore, "he was very afraid of contacting the police because, as he understood it, they also had powers that an immigration agent would also hold." (V14, R259-60). Cruz spoke with Aguirre's two sisters in 2010. She also spoke with Kaczmarek. She went to Honduras in October 2010 and again in February 2012 where she conducted several family and community interviews.[14] (V14, R267, 269-70). Many of Aguirre's Honduran friends described him as "the center of attention." He danced and sang and "was fun to be around." He was not a violent, impulsive, out-of-control person. (V14, R323, 324). Aguirre would "rather walk away from conflict." (V14, R322). Aguirre drank, but was not a "violent drunk." (V14, R324).

Ana Carela

Ana Carela, Aguirre's older sister by five years, came to the United States from Honduras in 2000. (V14, R347, 348). She kept in contact with Aguirre and their mother. (V14, R366). Carela obtained a work visa in 2004, became a legal resident in 2006, and lives in the Orlando area. (V14, R347, 348, 372).

Carela and Aguirre took care of each other while growing up. Their mother worked and their other sister Karina helped take care of them. Karina, who is nine

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[14] Cruz spoke to 32 people in Honduras that included Aguirre's mother, neighbors, school friends and teammates, and former employers. (V14, R269-70, 287-93).

years older than Carela, was the disciplinarian when their mother was not around. (V14, R349, 368). When Carela was 18-years-old, their mother stopped working. Carela became the sole financial support for the family. (V14, R349-50).

Carela asked Aguirre's trial counsel prior to the trial how she could help her brother. (V14, R366, 367). She did not, however, offer any information to Aguirre's counsel, "I only responded to the questions he made to me." (V14, R368). Carela was told there was nothing she could do; however, she would have testified had she been asked. (V14, R367, 374). She and Karina did not attend Aguirre's trial because "it was too painful...we still continue crying." (V14, R369).

Erlinda Jarquin

Erlinda Jarquin, Aguirre's mother, said Aguirre was a difficult birth and sickly when he was born. He had an eye infection, a fever, and was "completely black and blue." They were both hospitalized for "more than a month." (V15, R26-27, 528). Aguirre's father left the family when Aguirre was three-years-old. (V15 , R532). Jarquin took care of Aguirre while she worked. Her daughters helped with Aguirre's care after he turned eight-years-old. (V15, R532). Aguirre was "a very, very good-mannered boy." (V15, R533). Jarquin sent Aguirre to Nicaragua for "safety reasons" when he was a teenager. Gangs became prevalent when Aguirre was about twenty-years-old. (V15, R534).

Jarquin was not aware that Aguirre claimed he regularly abused alcohol, and

sniffed paint thinner and shoe glue at fourteen-years-old. She was not aware that Aguirre claimed his sister Karina hit him with sticks and belts when she watched him. Jarquin did not see any bruise or injuries on Aguirre. (V15, R542). Jarquin was not aware Aguirre claimed he was sexually abused by a thirteen-year-old babysitter when he was eight-years-old. (V15, R542). Jarquin saw Aguirre drink alcohol after he turned eighteen-years-old; however, she did not see him abuse cocaine or drugs. (V15, R543). Erlinda said a neighbor's son, Aguirre's friend Edwin Espino, was murdered near their home in 2000. (V15, R549). Aguirre continually attended school through high school when he received his diploma. (V15, R545-46). He lived with Jarquin until he moved to the United States in 2003. (V15, R544).

Jarquin learned of Aguirre's arrest in June 2004. (V15, R539). Honduran consulate Siercke came to her house in 2006. (V15, R539). Siercke said he would get her a travel visa to come to the United States. She gathered supportive letters from family and friends on Aguirre's behalf. (V15, R540). Aguirre's Honduran girlfriend helped Jarquin write a letter because she could not read or write. (V15, R527, 541, 548). Her letter said that Aguirre had a normal childhood and, as a teenager, he was the same person. (V15, R549). The letter also said that Aguirre wanted to go to the United States because he could not find work. Further, when Aguirre found the American dream, he wanted to marry his Honduran girlfriend

who lived in Honduras. Aguirre was to earn money and then return to his home country. (V15, R549).

Magali Espino

Magali Espino was Aguirre's Honduran neighbor. Her brother Edwin, Aguirre's very good friend, was 18 years old when he was murdered by a gang in 2000. (V15, R554, 556, 558). Police did not investigate the murder which is common in Honduras. (V15, R568).

Luis Orellana

Luis Orellana was Aguirre's work supervisor in Honduras from 1997 until Aguirre left for United States. (V15, R576, 580). Aguirre had a very positive attitude, was efficient, and worked well with others. He was never aggressive and never had a negative attitude. Aguirre demonstrated exemplary conduct at work and in his home life. He was not impulsive or violent. (V15, R582-83, 584, 589, 590).

Eduardo Zeron

Eduardo Zeron is a Honduran attorney and a childhood friend of Aguirre's. (V15, R595-96, 619). Aguirre drank a lot of alcohol on weekends when he was a teenager but was always "peaceful, he was not violent." (V16, R604). Problems with gangs started in 2002. (V16, R625). The gang patrolled the streets committing crimes and murder. (V16, R605-06, 620). Zeron and Aguirre took precautions by

travelling together in the neighborhood. (V16, R613). Murders occurred from 2003 through the present time; however, some of the violence began shortly before Aguirre left Honduras in 2003. (V16, R617-18, 620-21). Aguirre called Zeron several times after he moved to the United States. (V16, R613).

Valdette Willmann

Valdette Willmann is a Catholic nun in charge of a Honduran program for deportees. The program provides food, shelter, transportation, medicine, educational training, and interaction with other deportees. (V16, R637-38, 659). Deportees arrive on special flights, are handcuffed, and cannot go to the bathroom for 5-6 hours. (V16, R642-43, 703). Some Honduran deportees reported being physically abused. (V16, R698, 700). A stigma is attached to deportees upon their return to Honduras. (V16, R692-93). Willmann did not know if all deportees to returning to any country are treated the same way. (V16, R708). Willmann was contacted by Aguirre's family in 2006 subsequent to the murders. (V16, R706). She would have testified on Aguirre's behalf at trial if she had been asked. (V16, R705).

Laureen Bustillo

Laureen Bustillo was Aguirre's Honduran girlfriend in 2001. (V16, R673, 674). Aguirre was "never" aggressive toward her. When he drank, which was mostly on weekends, Aguirre was affectionate. (V16, R675-76). Bustillo knew

Aguirre entered the United States illegally in 2001. (V16, R681-82). She planned on joining him the following year. (V16, R682). He was going to work and send Bustillo money so she could also moved to the States. (V16, R678). Aguirre never sent her any money. (V16, R683). They never discussed Aguirre returning to Honduras. (V16, R683).

Experts

Dr. Jorge Villalba

Jorge Villalba, M.D., is a psychiatrist and the medical director for the Florida Institute for Neurologic Rehabilitation in Wauchula, Florida. (V17, R815-16). Villalba evaluated Aguirre for PTSD. Aguirre self-reported traumatic events that occurred in Honduras. Aguirre witnessing his friend Edwin getting shot and killed when Aguirre was age 20; witnessing a stranger getting stabbed and killed when Aguirre was age 14; and, at age 17, witnessing a man being shot and killed in the middle of the playing field while Aguirre played soccer with his friends. (V17, R838-39, 884-85). In Villalba's opinion, due to these events, Aguirre suffers from PTSD. (V17, R840). Aguirre's symptoms were self-reported. (V17, R851, 856-58, 901).

Aguirre self-reported that his alcohol and drug abuse increased subsequent to the traumatic events that occurred in Honduras. (V17, R861). At 13 to 14-years-old, Aguirre had problems sleeping and problems with his temper. (V17, R863,

887-88, 894). He had nightmares, no longer enjoyed music, reading, or playing soccer. (V17, R861, 862, 863, 864). He became hyper-vigilant and continued to be after he moved to the United States. (V17, R864-65, 910-12). Aguirre felt irritable—"approximately two to three times a week he felt like punching somebody out for no particular reason." (V17, R863-64, 887, 905). Aguirre reported, however, "he could suppress his rage." (V17, R864). Aguirre reported that his substance abuse increased even more when he moved to the United States—"he became a much heavier drinker" and his cocaine abused increased. (V17, R861-62).

In Villalba's opinion, Aguirre's actions the day of the murders were consistent with PTSD. (V17, R894). Aguirre "was an individual that [suffered] from PTSD that had lost all voluntary control, rage. Rage attacks are common with PTSD." (V17, R895). Further, "Somebody who stabbed somebody over a hundred times, yes, it's consistent with rage." (V17, R895, 898). Villalba said rage also caused Aguirre to stab Bareis two times who was an "even more helpless [person] in a wheelchair...less defensive, less able to fight back."(V17, R898). When Aguirre committed these murders, he was not acting "in a rational manner." In Villalba's opinion, "PTSD was a significant factor, yes, in committing these crimes." (V17, R896). In Villalba's opinion, Aguirre was "severely emotionally disturbed or mentally disturbed." (V17, R900).

Dr. William Riebsame

William Riebsame, Ph.D., a forensic psychologist, testified for the State at Aguirre's penalty phase. (V17, R914, 940). Aguirre did not tell Riebsame that he witnessed his friend Edwin's murder. He did not mention that he witnessed a man being stabbed to death. And he did not mention seeing a person killed on the local soccer field. (V17, R920-21).

The tests Dr. Villalba administered to Aguirre in English (in which Villalba translated into Spanish) and also the Spanish version test indicated Aguirre gave different answers on the English version than the Spanish version. (V17, R923, 941-43). In addition, Riebsame said it is not an approved method in psychological testing for the test administrator to translate a test. (V17, R923-24). And because the tests were given in close proximity to one another, (September 8 and September 30), in Riebsame's opinion, the test-taker becomes familiar with the test and therefore, interpretation of the data is questionable. (V17, R925-26).

If Aguirre had previously experienced traumatic events, then Riebsame "expected that Mr. Aguirre would have seen the violent circumstances and back away, avoiding...encountering it because of how it might have generated the PTSD reaction on his part." (V17, R932, 933, 963). In addition, in Riebsame's opinion, a person in a PTSD rage would not re-approach the crime scene and interject himself into the investigation. "That's contrary to the diagnosis." (V17, R934).

Dr. Jeffrey Danziger

Jeffrey Danziger, M.D., has been a psychiatrist for almost thirty years and has treated patients with PTSD. (V18, R1043, 1046). In comparison to the testing administered by Dr. Villalba, Dr. Day's Spanish version testing is more reliable because it is "only six months after, not seven-and-a-half years after." (V18, R1056, 1118-19). In Danziger's opinion, "the closer in time the data is the more accurate it is." (V18, R1057).

A PTSD diagnosis is "reliant substantially on what an individual tells you." (V18, R1098). DOC records did not indicate any symptoms of psychological distress. (V18, R1099, 1100-01, 1124-25). In Danziger's opinion, witnessing traumatic events does not automatically result in PTSD. (V18, R1103). In Danziger's opinion, someone with PTSD who is exposed to dead bodies, might experience fright or horror or physiological changes; "heart pounding, shortness of breath, tremors, shake fearfulness, intense anxiety...as if they were reliving the long ago trauma." Someone with PTSD would not lift a dead body, remain in the area, and seek out additional victims. "Someone would flee in horror…." (V18, R1105-06). Aguirre's actions subsequent to discovering Williams and Bareis did not indicate anxiety, apprehension, worry, or fear. In Danziger's opinion, Aguirre does not suffer from PTSD. (V18, R1107-08).

SUMMARY OF ARGUMENT

The only evidence the Defendant has to support his theory that Samantha Williams was the real murderer is inadmissible character evidence and mental health records and a few drops of her blood found in her residence. Most significantly, none of the stains with Samantha's DNA contained a mixture of Samantha's DNA with either of the victims' DNA. Samantha's statements were expressions of survivor's remorse, not admissions of guilt. They all occurred only after Aguirre was sentenced to death and they lack specific knowledge about the murders that was not known to the general public. The additional theories presented through Aguirre's experts were speculative and contradicted by the evidence and logical reasoning.

Trial counsel consulted with a DNA expert and had no reason to pursue additional testing. Counsel is not ineffective simply because Aguirre has found an expert in post-conviction with a more favorable, albeit incredible, opinion. Even if counsel had presented experts such as Goetz or Spitz, it would not have changed the outcome. Their opinions were no more than theories based on conjecture.

The penalty phase evidence Aguirre produced in post-conviction was either cumulative to or contradicted by the evidence presented at trial. Aguirre's expert on PTSD completely contradicted Aguirre's version of events and Dr. Villalba's opinion was discredited. Trial counsel investigated and presented a comprehensive

case in mitigation through an experienced and qualified mental health expert along with numerous letters written on Aguirre's behalf. Counsel is not ineffective simply because the next lawyers to represent Aguirre may have presented the case differently.

Aguirre is not entitled to relief for any other reason. Any error regarding his shackles is procedurally barred and was invited by Aguirre's own actions. This Court should abstain from reading text into the Florida Constitution or statutes that simply is not there. The trial court's denial of DNA testing for the hair in Cheryl's hand was abandoned after denial and the trial court was correct on the merits. Every other trace evidence hair collected from Cheryl's body belonged to her and her hands were located in her own hair when her body was found.

ARGUMENT

As an initial matter, Appellant references this Court's opinion on direct appeal and claims, "the State's case against Aguirre was entirely 'circumstantial.'" (*Initial Brief* at 12; *Amici* at 16) (citing *Aguirre-Jarquin,* 9 So. 3d at 605). Aguirre and his amici grossly distort this Court's characterization of the evidence in this case on direct appeal. While this Court characterized the evidence of the *burglary* conviction as circumstantial, it by no means characterized the evidence of the *murder* convictions as circumstantial.

When discussing Aguirre's claim that he should have been granted a

judgment of acquittal on the burglary charge, this Court went through the analysis of the State's additional burden in a circumstantial evidence case and stated, about the burglary, "Th[e] circumstantial evidence…clearly supports Aguirre's burglary conviction. *Aguirre-Jarquin*, 9 So. 3d at 606. But when the Court analyzed the sufficiency of the evidence of the murder conviction, the Court stated,

> [Aguirre] admitted to handling the murder weapon, which the evidence indicated was missing from his place of employment. There is also voluminous forensic evidence linking him to the murders. Aguirre's clothes were found in a bag on the roof of his home and were covered in the victims' blood. His shorts contained blood stains that were not contact stains and could have only arrived through motion. The murder weapon is the same make and model of a knife missing from his place of employment. Bloody footprints found inside the home match his shoes, and the blood of one of the victims was found on the soles of his shoes. Accordingly, there is sufficient evidence to support the murder convictions.

Aguirre-Jarquin, 9 So. 3d at 609. Even without the evidence about contact stains, the murder convictions are by no means supported "entirely by circumstantial evidence" as Aguirre inaccurately argues. This Court did not conduct the circumstantial evidence analysis for the murder convictions. *Cf. Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014). To state otherwise is a disingenuous twisting of the undisputed facts[15] and this Court's opinion.

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[15] The undisputed facts being that Aguirre admits to holding the murder weapon, he does not contest the shoe imprint evidence nor the victims' blood on his clothing and shoes, and none of his post-conviction claims refute that the murder

I. Whether Newly Discovered Evidence Entitles Aguirre to a New Trial

Aguirre claims that he is entitled to a new trial based on the following evidence about Samantha: the presence of Samantha's DNA in the house where she resided and was known to have previously injured herself and bled; statements that Samantha made years after the murders—many while intoxicated—to the affect that she was "responsible" for her mother's and grandmother's deaths, that she "wished to die," and that it was "her fault" her family was dead; and character evidence and a mental health history that Aguirre argues demonstrates Samantha's propensity for violence.

A. Standard of Review

In order to obtain a new trial based on newly discovered evidence, the Defendant must prove, "(1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013), *citing Jones v. State (Jones II)*, 709 So. 2d 512, 521 (Fla. 1998). "Newly discovered evidence satisfies the second prong of the *Jones II* test if it 'weakens the case against [the

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weapon is a knife missing from Aguirre's place of employment.

defendant] so as to give rise to a reasonable doubt as to his culpability.'" *Reed*, 116 So. 3d at 264, *citing Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012).

Credibility determinations by the trial court are entitled to deference on appeal. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999) (recognizing the trial court's superior vantage point in observing bearing, demeanor, and credibility of witnesses).

B. Trial Court Order

After hearing twelve days of post-conviction evidence bifurcated over a fourteen month time-span, the trial court entered a comprehensive, detailed sixty-eight page order that included numerous findings of fact, credibility findings, and conclusions of law denying Aguirre's claims. Regarding the evidence Aguirre presented accusing Samantha Williams as the murderer in this case, the trial court summarized its lengthy analysis, finding,

> The only evidence the Defendant had to support his theory that Samantha Williams was the real murderer was **inadmissible character evidence**, a **Baker Act proceeding from three years prior to the murders for injuring herself**, and **a few drops of her blood found in her residence**. This evidence is insufficient to cast doubt on the verdict in his case. Aside from Samantha Williams' strong alibi and the inadmissible character evidence, the Defendant's story defied logic and reason.

(V12, R2202-03).

C. Argument

1. Whether the DNA evidence, Samantha's statements, and Samantha's mental health records meet the *Jones* standard

The DNA

Aguirre's theory in post-conviction is that Samantha's DNA is present in her residence because she cut herself with the murder weapon when the victims were stabbed repeatedly and she then dripped blood in areas "near" the victims' blood. Of the 161 individual items of evidence tested for DNA,[16] only eight of them were identified with a partial or full match to Samantha's DNA profile. Of those eight items, none of them contained a mixture of more than one DNA profile—the entire profile showed only the presence of Samantha's DNA. (V11, R1957-58, 1963, 1965-66, 1973). The defense focused on seven of the eight full or partial DNA profiles of Samantha Williams located in the southeast bathroom, southwest bathroom, and the southeast living room.

Most significantly, none of the eight stains with Samantha's DNA contained a mixture of Samantha's DNA with either of the victims' DNA. If Aguirre's theory were correct—that Samantha cut herself and bled *while* stabbing the victims and causing them to bleed profusely—then Samantha's blood dropped simultaneously

[16] By stipulation, the DNA reports were entered into evidence as Defense Exhibits 75-83, and 86. (V9, R1604-05).

with the victims' without mixing in a single instance. It would be nearly impossible for that to happen. The lack of a mixed profile alone reduces Aguirre's theory about Samantha to conjecture at best. A far cry from raising a *reasonable* doubt as required under the newly discovered evidence standard.

To that end, Aguirre overstates the significance of the post-conviction DNA evidence. He identified the unremarkable fact that Samantha's DNA is located in the house where she resided at the time of the murders. Aguirre ignores the evidence that Samantha has previously injured herself in the house by breaking things and causing herself to bleed; a fact that Goetz (Aguirre's forensic expert) did not consider in forming his opinions about Samantha injuring herself during the murders. Aguirre also attempts to dismiss the fact that the residence where the murders took place remained in a perpetual state of uncleanliness, thus the presence of Samantha's DNA from the previous injuries would not likely have been cleaned up as Aguirre implies. Mark Van Sandt mentioned Cheryl having "just cleaned up," close in time to the murder. But contrary to Aguirre's characterization that Cheryl "mopped" the floor (*Initial Brief* at 7), there was no context as to how or to what degree Cheryl cleaned. Several of Samantha's blood stains appeared to have been walked over or had something like clothing dropped on them, indicating that they were present prior to the murders.

Aguirre's crime-scene reconstruction expert Goetz testified that the only

way to determine the age of a blood stain is to look at the color. There was no evidence of any scientific tests available to determine the age of DNA. Some of the stains that Goetz concluded were "fresh" were not photographed until several days after the murders. Ms. Grossi, the FDLE crime scene analyst, testified that she did not typically note whether a stain was wet or dry. Goetz speculated about the age of the blood stains.

Through Goetz, Aguirre theorized that Samantha would have to have cut herself during the murders and then held her wounds to slow or stop the bleeding (therefore getting blood on her hands). Goetz then theorized that Samantha would have touched the blanket that acted as a door to the south hallway, yet Grossi testified that she did not collect the blanket because it did not contain any sign of blood (or other evidence) on it. Aguirre also theorized that Samantha went into the half-bath through the southwest bedroom to clean up after the murders and while doing so took the mirror off of the wall and laid it on the floor.

The trial court found that "Goetz's opinions [were] highly unlikely. Mr. Goetz's opinion…was based on several false assumptions, which undermines the reliability of his conclusions." (V12, R178). Indeed, for Aguirre's theory from Goetz to be correct, Samantha would have to have taken a four-foot mirror off of the wall with bloody hands, gently lay it down on the floor without breaking it and without getting any blood on it, yet somehow leave a single drop of blood on the

floor by the bathroom door and get blood on the wall at six-feet, two-inches in the air. Aguirre's theory is speculative and defies common sense. In fact, "Goetz admitted on cross examination [that his] conclusion was purely speculation." (V12, R2179; V21, R1605). And at the bottom of all of the speculation about Samantha bleeding during the murders, there is no evidence that Samantha was injured. (V23, R2180, V24, R2240).

Lastly regarding the DNA, Aguirre grandstands on the fact that his DNA was not detected in any of the post-conviction testing. Yet that fact is not new evidence. The absence of Aguirre's DNA was a major feature of trial counsel's argument in closing to the jury. **Aguirre's jury already heard that his DNA was not present**. And of the many speculative assumptions that Goetz made in forming his theory for Aguirre, one was that the killer must have injured himself during the murders because that is common in stabbing cases. Yet the murder weapon was a large knife with a flat and blunt, hilt-like portion of the blade that significantly reduced the likelihood of slippage and injury. Aguirre's theory about the presence of Samantha's DNA and the absence of his is supported only by conjecture and simply defies logic. The evidence would not likely produce an acquittal on retrial.

Samantha's Statements

Aguirre also claims that numerous statements that Samantha made following the murders of her mother and grandmother implicate her as the actual murderer

and would be admissible if Aguirre were retried.

In August 2010, after a day of heavy drinking, Samantha set fire to a blanket in her house. After authorities arrived, neighborhood resident and friend of Samantha's, Nicole Carey, heard Samantha say, "The demons made me do it." Casey also testified that six months later Samantha said, "The demons made her do it," while making a stabbing motion towards her (Samantha's) chest.

In December 2007, Samantha was arrested (and thereafter Baker Acted) and video from the police patrol car showed her clearly upset and barely coherent. Samantha stated repeatedly, "They died for me…my mother died for me…could you understand that," and "I'm sorry." She also asked the officer if it was her fault and said that they were murdered because of her and it was her fault. Samantha also stated, "I wish you were dead three years ago," and repeatedly said, "I wish you were dead." As the trial court observed, it was unclear who "you" is. (V12, R2220).

In 2008, after being Baker Acted, Samantha beat her head against a concrete wall and stated, "I am responsible for my mom dying…it's all my fault…I want to die…I don't have anything to live for." The witness, Candace Nagata, could not remember the incident, so the police report was admitted as a recorded recollection. (V12, R2220). Nagata's statement from the police report also indicated that Samantha threw glass objects across the room and threatened to kill

Nagata when she offered to take Samantha home.

Criminal defendants may admit third party confessions that bear substantial assurances of trustworthiness. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). To determine the trustworthiness of a third-party confession, this Court looks at the spontaneity of the statement (when it was made in relation to the murder and to whom it was said), corroboration by other evidence, the incriminating nature of the statement, and the availability of the declarant to be cross-examined. *Jones II*, 709 So. 2d at 524 (applying *Chambers*, 410 U.S. at 300). In *Jones*, this Court found testimony about a third-party confession inadmissible when the statements were made only after the defendant had been sentenced to death and in some instances the witnesses waited anywhere from four years to over a decade to report the information. 709 So. 2d at 525. Also, alleged third-party admissions are inadmissible when they lack specificity, such as mentioning unique details about the murders. *Id*.

All of Samantha's statements were made between three and six years after the murders. In each instance, Samantha was either intoxicated or receiving mental health treatment and in a highly emotional state. The only evidence that corroborates the statements is the unremarkable fact that Samantha's DNA was found in the house where she resided. And aside from identifying the victims (her own mother and grandmother) and saying that they were stabbed (public

knowledge by the time of the statements), the statements lack specificity about any details of the murders. At bottom, when Samantha's statements are considered in their totality, it is clear that they are an emotional expression of survivor's remorse. That is to say, Samantha feels responsible for the death of her mother and grandmother because of her social association with Aguirre. It is clear from the statements that Samantha believes that if she had never socialized with Aguirre, he may not have murdered her family. Aguirre's attempt to spin Samantha's emotional statements out of context to support a third-part confession theory should fail. The statements do not meet any of the requirements under *Chambers* or *Jones*.

Samantha's Character and Mental Health

The last category of evidence Aguirre uses to accuse Samantha of the murders consists of what Aguirre describes as, "Samantha's history of violence," and "mental health history." (*Initial Brief* at 59). Indeed, Aguirre also characterized this evidence as Samantha's "long history of mental illness, substance abuse, and rage," that sheds light on Samantha's "questionable character." (*Initial Brief* at 31, 49).

Aguirre points to an incident in October 2010 where Samantha was again Baker Acted after having struck her father. The arresting officer concluded Samantha was likely to harm others. Samantha also stated, "[I] deserve to f**king

die." (V23, R2030, 2032, 2046). Aguirre also reaches back to a September 2001 Baker Act incident where Samantha was committed by her mother. While Samantha was in the hospital with her mother at her bedside, Samantha was spitting at people and screaming, "I'm going to f**king kill you, I'll kill all of you if I get out." (See Def. Exh. 90, Bates 1040). And Aguirre presented the testimony of a bartender from Pretzels Bar, Jesse Bernard, who said that everyone knew that Samantha and her mother had a strained relationship and that Samantha hated her mother because "Cheryl made Samantha have sex with her [Cheryl's] drug dealers." Monica George, also from Pretzels, stated that she fired Samantha for stealing tips, not getting along with the staff, and providing free drinks to her mother Cheryl.

When a defendant seeks to admit character evidence to show that someone else committed the crime, the same rules of evidence of bad character or propensity apply just as if the State were seeking to admit the evidence against a defendant. *State v. Savino,* 567 So. 2d 892, 894 (Fla. 1990), *cited in McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2005). This Court reasoned so because, "Such evidence should benefit a criminal defendant no more than it should benefit the state." *Savino*, 567 So. 2d at 894. For the evidence to be relevant it must bear a "close similarity in facts, a unique or 'fingerprint' type of information." *Id*. This

Court has refused to admit "reverse *Williams*[17] rule evidence" concerning the possible guilt of an uncharged person when the evidence is "speculative, remote, or unsupported." *Carey v. State*, 705 So. 2d 977, 978 (Fla. 4th DCA 1998) (citing *Blanco v. State*, 452 So. 2d 520 (Fla. 1984)). "Evidence of bad character or propensity to commit a crime by another [will] not be admitted." *Huggins v. State*, 889 So. 2d 743, 762 (Fla. 2004) (quoting *Savino*, 567 So. 2d at 894).

The additional character evidence Aguirre claims supports his theory can be described as nothing but inadmissible propensity evidence in its purest form supported by rank hearsay and privileged, irrelevant mental health records. Aguirre's argument regarding Samantha boils down to this: because Samantha has a history of mental illness, has been emotionally violent (almost always injuring herself, not another), and has at times demonstrated bad character, she must be the killer. Never would this Court sustain an attempt by the State to admit bad character evidence such as this to demonstrate a defendant's propensity to commit capital murder. Aguirre should benefit from this evidence no more than would the State if the prosecution were attempting to present the type of evidence Aguirre submits.

Indeed, the testimony about Cheryl requiring Samantha to have sex with

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[17] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

drug dealers (thus implying a motive for Samantha to kill Cheryl) was contrary to what Aguirre claimed in his motion to the trial court and implied in his brief to this Court. (V7, R1267; V21, R1653; *Initial Brief* at 31). The bartender, Ms. Bernard, testified that it was her friend Peter Nompleggi who made the statement about Cheryl having Samantha sleep with drug dealers. Bernard provided no context of how or when Nompleggi obtained that information. There was nothing to verify its accuracy. Bernard's testimony is classic hearsay layered upon unreliable hearsay.

Monica George's testimony about Samantha is textbook propensity evidence prohibited under section 90.404(1), Florida Statutes. *See Dennis v. State*, 817 So. 2d 741, 762-63 (Fla. 2002) (Admission of character evidence that defendant and ex-girlfriend had problems because of his jealousy was erroneous propensity evidence). *See also Holland v. State*, 636 So. 2d 1289, 1293 (Fla. 1994) (In prosecution for the murder of a police officer, evidence of a prior incident where the defendant struggled with an officer at an arrest and reached for the officer's service revolver was inadmissible as it would only be used to show the defendant's propensity to struggle with police officers when arrested). And the evidence of Samantha's 2001 Baker Act episode occurred three years prior to the murders with her mother at her side. The statements of "I'll kill you," were nothing more than an emotional rant directed at no particular person, certainly not the victims in this case. None of the character evidence is admissible and it does not support a viable

theory in Aguirre's favor.

2. Additional Forensic Evidence

Aguirre also claims that additional forensic evidence about blood stains and shoe impressions supports his theory in post-conviction. Aguirre presented the testimony of Goetz to opine that the stains on Aguirre's shorts were transfer stains rather than projected stains and that the stain of Cheryl Williams's blood on the chair in the kitchen could not have come from Aguirre's nylon shorts. (*Initial Brief* at 34-35). Goetz also opined that the shoe impression evidence from trial is consistent with Aguirre's theory that he passively walked around the residence after finding the dead bodies and there was no evidence of excessive movement. Aguirre also presented Dr. Spitz who opined that a small, incomplete double ring of blood on Cheryl's body supported Aguirre's claim that he moved the body by picking it up to check for a pulse. Spitz also opined that the body must have been briefly moved before the medical examiner arrived at the murder scene because of two parallel blood drips on Cheryl's back. (*Initial Brief* at 37-38).

Movement of Cheryl's Body

Dr. Beaver testified, consistent with his trial testimony, that Cheryl's body had not been moved prior to his arrival at the murder scene. The trial court noted the following facts that supported Dr. Beaver and rebutted Dr. Spitz.

> [T]here was a line of blood depicted along the center of Cheryl Williams' thigh that corresponded with the line of blood on the floor.

> There was also an absence of blood along the outer thigh to right of that line of blood which was mirrored by an absence of blood to left of the line of blood along the floor. When Dr. Beaver rolled her body over, the contact between the thigh and the line of blood on the floor was broken and caused the drips of blood on her thigh as depicted in State's Exs 4 and 11. These areas of sparing, areas on the body where there was an absence of blood, indicated she died face down and her body had not been moved. According to Dr. Beaver, the sparing demonstrated in State's Exs 5-7 and 9, also substantiated the prone position of her body when she died. State's Ex. 8 depicted a single band of blood without a secondary impression that formed a pattern on her chin and a comparable area of sparing where her chin was in contact with her shirt.…The court noted Dr. Spitz never provided an explanation why there were not any double impressions on her leg and chin, or adequately explain why the double contour in the ring of blood on her torso was only present in a small fraction of the ring.

(V12, R2195-96). After identifying the inconsistencies in Dr. Spitz's testimony that "called his opinion into question." (V12, R2196). The trial court held, "[T]his Court finds the testimony of Dr. Beaver that the body was only moved once after Cheryl Williams died, at his direction, credible and does not find Dr. Spitz's testimony credible." (V12, R2197).

While Aguirre presented Dr. Spitz to support his story that he lifted Cheryl's body up onto his lap to check her pulse, Dr. Sptiz's opinions were incredible and inconsistent with the facts. For Dr. Spitz to be correct, Aguirre would have to have lifted Cheryl's upper body off of the ground onto his knees then place the body back down into the exact location from where he lifted it. Aguirre would have to have ensured that the head, neck, and legs were in the exact same position to ensure no additional smears, streaks, or impressions were created on her body. The

trial court found that this theory "strained the bounds of credibility." (V12, R2197).

Dr. Spitz identified one partial double line on Cheryl's torso to support his theory of "subtle movement." But in Aguirre's version, lifting Cheryl's upper body into his knees is more than "subtle" movement. And Dr. Spitz has nothing to say to contend with the sparing (lack of blood) on Cheryl's chin and her thigh identified by Dr. Beaver that support the conclusion that she was not moved until Dr. Beaver directed her body to be moved while at the scene. Indeed, Dr. Beaver identified portions of Cheryl's upper and lower body that supported the conclusion that she died in the prone position and had not been moved until he (Beaver) arrived at the scene. Dr. Sptiz's opinions were inconsistent with the undisputed facts and the trial court's credibility findings are supported by competent, substantial evidence.

Blood Stains

According to Goetz, all of the blood stains on the nylon shorts that Aguirre was wearing were the result of blood transfer—either a bloody object came in contact with the shorts or vice versa. Goetz opined that there was no evidence of projected blood on the shorts. Goetz also opined that Cheryl's blood stain in the kitchen on the leg of a chair was consistent with a fabric transfer from something like cotton or denim rather than Aguirre's nylon shorts.

At trial, the jury heard the same evidence about the blood stains on Aguirre's clothing. As the trial court found,

> Mr. Henderson; a State witness, similarly testified at trial that all of the stains on the Defendant's t-shirt were contact stains, while the shorts' bloodstains were contact stains and pooled stains. Mr. Henderson testified some circles or oval shaped stains on the back of the shorts were insufficient to render an opinion as to whether they were caused by impact spatter, but said it was unusual for impact spatter to be on the back of the shorts. He also acknowledged there were some void areas on the shorts indicating they were folded when the blood made contact, possibly caused by someone bending over or kneeling. **He also never identified cast-off stains on the clothes**…. Likewise, trial counsel repeatedly argued in closing arguments there was no evidence of projected blood on the Defendant's clothing and the bloodstain patterns on his clothing were consistent with his version of events.

(DAR Vol. 12, R. 1283-84, 1303-1306, 1309-1310, 1313-14; DAR Vol. 13, R. 1492, 1530-31). Regarding the bloodstain on the chair-leg in the kitchen, the trial court found,

> [T]he Defendant was of an extremely short stature and was wearing a long cotton t-shirt soaked with blood. Specifically, the bottom of the cotton shirt revealed Cheryl Williams' blood, which based upon the height of the defendant, length of the shirt and location of the stain conceivably transferred the weave pattern to the chair.

(V12, R2202).

The evidence about the blood stains on Aguirre's shorts is nearly identical to the evidence presented at trial. The examiner at trial acknowledged that he could not say one way or the other whether the stains were impact or cast-off stains. Trial counsel argued that there was no evidence that the stains were cast-off stains. Aguirre has presented the same argument and evidence in post-conviction. *See Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009) ("In determining whether the

evidence compels a new trial…the court should determine whether the [new] evidence is cumulative to other evidence in the case") (internal quotations omitted). Notwithstanding the cumulative nature of the evidence, Aguirre's theory about the stains on the back of his shorts fails to account for how blood got onto the *back* of his nylon shorts (that are supposed to repel liquid) when according to him, he was never seated on the floor, and when he squatted down to pick up Cheryl's upper body, he was facing her. Neither does Aguirre's theory account for the fact that he had Cheryl's blood on his *underwear*.

Aguirre's theory about the blood stain on the kitchen chair leg is shortsighted. Goetz opined that the stain on the chair leg was a transfer stain from a material such as denim or cotton rather than the nylon shorts Aguirre was wearing. The trial court reached a logical conclusion as to how the stain came from Aguirre's long cotton t-shirt. Notwithstanding the trial court's findings, Aguirre's theory myopically focuses on the *killer* as having transferred the stain of Cheryl's blood onto the chair leg from clothing the killer was wearing. Aguirre ignores that overwhelming likelihood that the stain of Cheryl's blood on the chair leg came from the *victim* herself in the course of being stabbed over 120 times, defending herself, and at times crawling on her hands and knees to flee. (DAR V12, R1365, 1399) ("The stab wounds on her back, together with her askew clothing, indicated Williams was attempting to crawl away from her attacker"). Goetz opined that the

transfer came from a more absorbent material such as cotton or denim; like the cotton shirt or denim/corduroy shorts Cheryl was wearing. (V9, R1621-25; State Exh. 4-8).

Footwear Impressions

Aguirre also claims that the post-conviction evidence supports his theory that he passively walked around the residence after finding the victims. Goetz testified that the footwear impressions were "passive" impressions that showed no visible slippage or movement. The trial court observed that Goetz "inaccurately described [the footwear impressions] as passive transfers in blood." (V12, R2198).

> What Mr. Goetz referred to as passive is actually called a positive impression. It occurs when a shoe steps into a pool of liquid and then steps onto a clean surface, leaving an impression of the liquid on that surface. Whereas, a negative impression is when a clean shoe steps into a pool of liquid and the liquid is removed from the pool onto the bottom of the shoe. This results in a negative impression in the pool of liquid. Mr. Goetz's opinions lack the required expertise and are contrary to the evidence.[18]
> …
>
> According to Ms. Snyder [the State's expert], one would expect to find negative impressions if a person came to a scene several hours after the blood was spilled, stepped in the blood and made positive impressions like the defendant had testified. Yet, there were only positive impressions in suspect blood at the crime scene, not any

[18] The trial court found that, "Although Mr. Goetz has an extensive background in crime scene investigations, he does not have the expertise in footwear impressions as does the state's expert Christine Snyder." (V, R, trial court order).

> negative impressions. There were a couple of impressions in the foyer by the doorway to the northwest living room either partially or completely covered by milk crates, and a positive footwear impression found under Cheryl Williams' foot, which covered about an inch of that impression.

(V12, R2199).

There is no dispute that the footwear impressions belong to Aguirre. There were sixty-seven footwear impressions identified at the murder scene; sixty-four of them were suitable for comparison. All sixty-four impressions were consistent with Aguirre's shoes and there were no other footwear impressions at the scene.

First, notwithstanding the lack of credibility in Goetz's testimony, the evidence about the footwear impressions is not new. Trial counsel argued to the jury that the footwear impressions showed no sign of a struggle, no different than what he argues now in post-conviction. (DAR, V13, R1491). Second, Goetz's testimony is incredible. Goetz does not have the requisite expertise in footwear impressions and he described the impressions using the incorrect forensic terminology. (V25, R2421, 2422). Third, Aguirre's theory about footwear is contradicted by the evidence. For Aguirre's theory to be correct, the actual murderer (who Aguirre alleges is Samantha) would have to have engaged in a violent struggle with Cheryl, stabbing her over 120 times, and scattering her blood throughout the house without leaving a single foot impression behind, then Aguirre discovered the bodies and left the only footprints throughout the house.

Aguirre's theory is further discredited by the presence of his footwear impressions *under* Cheryl's body and *under* milk creates that had fallen. Indeed, Aguirre's footwear impression is under Cheryl's foot on the opposite end of her body from where Aguirre claims to have squatted down, picked her up and checked for a pulse. The footwear impression under the fallen milk crates indicates that the crates fell after Aguirre left the print. The milk crates and Cheryl's body came to rest *after* Aguirre left the print. Furthermore, the footwear impressions are inconsistent with what Aguirre told investigators; that is, that he did not walk down hallway into the trailer, did not see Bareis's body, and did not walk on the porch. Yet his footwear prints were all around the house including around Bareis's body and on the front porch, and his fingerprints were on the propane tank in Samantha's bedroom. (V19, R1245; V25, R2407, 2410-11). This, coupled with the absence of negative impressions, discredits Aguirre's theory as to how his footwear impressions were at the scene. Ultimately, the additional forensic evidence that Aguirre presented was incredible. The evidence was either cumulative to what was presented and argued at trial or it simply defied logic and reason.

3. Samantha's Alibi

While Aguirre argues that he has weakened Samantha's alibi, as the discussion above demonstrates, he has failed to do so. According to Aguirre's

theory, Samantha would have to have sneaked out of the Van Sandt residence, drive Mark Van Sandt's loud truck undetected to the scene, murder her mother and grandmother in a violent struggle, drive back undetected, shower, immaculately clean Mark Van Sandt's white bathroom, get rid of her cloths and towels, and get back into bed undetected all before 6:30 a.m. Yet Van Sandt testified that when he woke the next morning at 6:30 a.m., Samantha was there and there were no cuts, marks, or injuries to her body. There was no blood on her person, clothing, or the sheets. There was nothing in the bathroom to suggest that she had cleaned herself. Samantha did not drive Mark's truck, which by all accounts was a very loud, 600 horsepower vehicle that required special knowledge of the accelerator for one to decrease the sound from the loud muffler. Samantha did not know how to operate Van Sandt's truck nor did Van Sandt have to adjust the seat when he drove the truck the next morning.

Even so, the planning and execution that Samantha would have to have demonstrated for Aguirre's theory to be correct is all behavior that is completely contradicted by the spontaneous, volatile manner in which Aguirre describes Samantha. The unremarkable and unpersuasive evidence Aguirre has presented in post-conviction has done nothing to undermine Samantha's credible Alibi. At bottom, Aguirre's newly discovered evidence claim should fail because the evidence either does not qualify as new evidence or would not likely result in an

acquittal on retrial.

D. Appellant's Case Law is Distinguishable

Appellant cites *Hildwin*, 141 So. 3d 1178 and *Swafford*, 125 So. 3d 760, to support his newly discovered evidence claim. Yet both of those cases involved very different circumstances. *Hildwin* and *Swafford* were cases that were over 25 and 30 years old respectively and both defendants had been convicted based on forensic evidence from the 1980s that was later discredited through advances in DNA testing in post-conviction. In *Hildwin*, biological material was discovered on a pair of underwear and a washcloth. 141 So. 3d at 1182-83. The forensic evidence from 1986—prior to advances in nuclear DNA testing—concluded that the biological material came from a non-secretor (one who does not secrete blood into the bodily fluids), that Hildwin was an non-secretor, and that Hildwin's alternate suspect was not. *Id*. *See also Hildwin v. State*, 531 So. 2d 124, 125 (Fla. 1988). Over twenty years later, more advanced DNA testing actually excluded Hildwin and specifically identified the Hildwin's alternate suspect. To that end, the apex of this Court's reasoning in granting a new trial was the fact that in Hildwin's original prosecution, the State relied on the flawed, less specific biological evidence to identify Hildwin and exclude the alternate suspect.

In *Swafford*, forensic evidence from 1982 was used to establish that semen was present in the body of the victim, thus supporting the state's sexual battery

charge that was a major pillar of the murder conviction. 124 So. 3d at 762. Twenty-three years later, forensic testing in 2005 showed that the original test indicating the presence of semen was inaccurate. *Id*. at 766. The culmination of this Court's reasoning for granting Swafford a new trial was the fact that the State relied so heavily on the sexual battery to support the murder conviction and in the Court's opinion, discrediting the sexual battery swept the legs out from under the murder conviction. *Id*. at 772-73.[19]

In both *Hildwin* and *Swafford*, the forensic evidence was later undermined by advances in science. Aguirre presents no such circumstance. Unlike *Hildwin* and *Swafford*, there was no DNA evidence used by the State to identify Aguirre as the killer and exclude the alternate suspect. Aguirre has always had the benefit of the fact that his DNA was not recovered from the crime scene—his jury heard that fact and argument about it from trial counsel. And Samantha's alibi excludes her from the house at the time of the murders, but it has never been suggested that her DNA would not be in her own home. Unlike *Swafford*, the murder convictions are not propped up by other charges that have been questioned; Aguirre does not attack

[19] *Swafford* is, of course, further distanced from Aguirre's case by the fact that Roy Swafford later pled guilty to the murder for which he was granted a new trial along with another murder of nearly identical facts and circumstances. The analysis in Swafford's case simply does not apply here. *See Swafford v. State*, SC10-1772, notice of filing, 2/13/14, Guilty plea in *State v. Roy Clifton Swafford*, 2014-300226 CFDB; 1983-003425 CFAES.

in post-conviction his burglary conviction and the burglary was not a necessary circumstance to support the murders. And while Aguirre found Samantha's DNA in her home, unlike *Hildwin* and *Swafford*, the post-conviction forensic testing has not *discredited* or *contradicted* any of the forensic evidence from trial. Aguirre has simply added unremarkable facts and presented speculative theories unsupported by the evidence and reason. Furthermore, *Hildwin* and *Swafford* do nothing to rebut the fact that Aguirre admitted to handling the murder weapon, his cloths were covered in the victims' blood down to his underwear, his are the only shoeprints tracked all around and *under* the victims and objects in the home (some in contradiction to his own statements), and his fingerprints are on the propane tank in the house. The facts, circumstances, and reasoning in *Hildwin* and *Swafford* are distinguishable and inapplicable to Aguirre's case.

II. Whether Trial Counsel was Ineffective during the Guilt Phase of Trial

Aguirre claims that his trial attorneys were ineffective in their guilt phase investigation of his case. Specifically, Aguirre alleges that trial counsel should have consulted with an independent DNA examiner and presented rebuttal DNA evidence, more thoroughly investigated Samantha as an alternate suspect, and consulted with and presented an independent forensic expert such as Goetz. (*Initial Brief* at 65, 70, 76).

A. Standard of Review

To establish a claim for ineffective assistance of trial counsel:

> [T]he defendant must show that…counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment….[T]he defendant must [also] show [if counsel was deficient] that…counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to establish the first prong, Aguirre must prove that, "counsel's representation fell below an objective standard of reasonableness," *Wheeler v. State*, 124 So. 3d 865, 873 (Fla. 2013)…measured by the prevailing professional norms under the circumstances as seen "from counsel's prospective faced at the time" of trial. *Hannon v. State*, 941 So. 2d 1109, 1125 (Fla. 2006). The prejudice prong is met only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different…." *Wheeler*, 124 So. 3d at 873.

There is a strong presumption that counsel's performance was constitutionally effective. *Hannon*, 941 So. 2d at 1118. "A fair assessment of attorney 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." *Strickland*, 466 U.S. at 689. Because a court can make a finding on the prejudice

prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui v. State*, 59 So. 3d 82, 95-97 (Fla. 2011).

"An attorney can almost always be second-guessed for not doing more." *Kilgore v. State, 55* So. 3d 487, 500 (Fla. 2010). But that is not the standard under *Strickland*; "Deficient performance involves 'particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.'" *Kilgore,* 55 So. 3d at 500. "A court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Kilgore, 55* So. 3d at 500 (quoting *Wiggins v. Smith*, 539 U.S. 510, 527 (2003)).

B. Trial Court's Order

Regarding counsel's investigation into Samantha and consultation with independent experts, the trial court held,

> Trial counsel was not ineffective to not consider [Samantha] a viable alternate suspect due to her alibi, as well as being a sympathetic victim. Furthermore, the lay witnesses, in their entirety, largely presented inadmissible character evidence or evidence that did not aid the Defendant's case.…
>
> Attorney Caudill made the strategic decision to pursue a theory of

> defense on the lack of Defendant's DNA evidence and the State's failure to conduct adequate DNA testing of the evidence to discover the true perpetrator without identifying a particular alternate suspect….there was no evidence of injury to Samantha Williams supporting [the post-conviction] defense theory she was the assailant in this case. She had a solid alibi and there was no other credible and/or admissible evidence that gave reason to investigate her as an alternative suspect….[T]rial counsel pursued a defense based upon the lack of the Defendant's DNA at the crime scene. [T]he Court finds trial counsel's strategic decision not to conduct independent DNA testing was a reasonable one.…
>
> [E]ven if trial counsel had conducted independent DNA testing and presented this evidence at the Defendant's trial, it would not have affected the outcome of the proceedings. None of the evidence presented at the evidentiary hearing weakened Samantha Williams' alibi for the time of the murders or strengthened his theory of the case. The residence at 121 Vagabond Way was not in a state of pristine cleanliness such that a few drops of Samantha Williams' blood, several of which were barely visible in the crime scene photographs, were so out of place as to render them significant. Considering the filth of the home revealed in the crime scene photographs, especially the two bathrooms, the presence of Samantha Williams DNA in her residence is not unusual or compelling evidence. This is compounded by her testimony…that she had broken every window in the home with either her head or her hand.

(V12, R2176, 2180-81).

C. Argument

While not addressed in Aguirre's initial brief, much of Attorney Caudill's actions were driven by the information provided by and actions of Aguirre. *Strickland*, 466 U.S. at 691 ("What is reasonable may be determined or substantially influenced by the defendant's own statements or actions"). As Aguirre's trial approached, Attorney Caudill became concerned that Aguirre may

perjure himself if he testified at the guilt phase of his trial.

Caudill discussed a major point of concern for him leading up to trial. Aguirre "made it very clear to me that he was going to commit perjury." Aguirre knew the knife had "come from his house and where he worked." "He did not want to testify to that." (V19, R1393). Caudill, however, told Aguirre that he had to testify as to what he had previously told Caudill—that he had picked up the murder weapon and discarded it in the yard, "even though I had some reason to dispute his credibility as to his claim of innocence."[20] (V19, R1355). Caudill "gave him the benefit of the doubt." (V19, R1357, 1393; V20, R1407).

Independent DNA Testing

Bottom line, the defense *did* consult with a DNA expert then decided that independent DNA testing would was not going to assist in Aguirre's defense. Attorney Caudill testified that he retained and consulted with DNA expert Candy Zuleger to review all of the DNA evidence. "Trial counsel is not required to continue searching for an expert who would give [the defendant] a more favorable assessment…." *Anderson v. State,* 18 So. 3d 501, 511-12 (Fla. 2009). "The fact that [the Defendant] has now secured the testimony of a more favorable…expert simply does not establish that the original [expert] was insufficient." *Floyd v. State,*

[20] Referencing the fact that Dr. Day reported that Aguirre had admitted "doing this to them," when discussing the murder of the victims.

18 So. 3d 432, 453-54 (Fla. 2009); *Davis v. State*, 928 So. 2d 1089, 1124 (Fla. 2005). Caudill testified that based on the information Aguirre provided about having discovered the bodies and rolling one of them onto his lap, as Caudill saw the case at that time there was not enough information to warrant independent DNA testing. The State's DNA evidence already demonstrated the absence of Aguirre's DNA. Based on the amount of the victims' blood at the scene, Caudill did not see where the amount of bloodstains not tested by the State could be associated with someone other than the victims. Based on this, coupled with Aguirre's explanation as to why the victims' blood was on his clothing, it was reasonable for trial counsel to decide that not to further investigate the DNA evidence.

Even if counsel should have further pursued independent DNA testing, the post-conviction results would not have changed the outcome. Aguirre's jury already heard about the absence of his DNA at the scene and the presence of Samantha's DNA in a few places in her home where she was known to have injured herself is not compelling. *See Crain v. State*, 78 So. 3d 1025, 1041 (Fla. 2011).

Investigating Samantha

As discussed in the previous issue, when a defendant seeks to admit evidence of third party guilt, the evidence must be the same type of evidence that

would be admissible were the third party on trial for the murders. *Savino*, 567 So. 2d at 894. Mental health records are typically prohibited from disclosure. Fla. Stat. § 90.503(2), *State v. Roberson*, 884 So. 2d 976, 978-79 (Fla. 5th DCA 2004). The party seeking disclosure of mental health or Baker Act records "must make a threshold showing that the records are likely to contain relevant evidence." Fla. Stat. § 394.4615(2)(c); *C.L. v. Judd*, 993 So.2d 991, 995 (Fla. 2nd DCA 2007) (citing *Roberson*, 884 So. 2d at 978). The party must set forth a good faith factual basis and cannot engage in a fishing expedition. *Roberson*, 884 So.2d at 978.

Trial counsel would have had no good faith basis to explore Samantha's mental health records. Attorney Caudill testified that he did not investigate Samantha's relationship with her mother or history of violence and mental illness. Regarding the Baker Act records and incident reports about Samantha's mental health, Caudill testified that he did not know of a viable legal theory under which he could have obtained the records or used them as evidence at trial. (V19, R1383). Caudill also testified that he was not sure to what result an investigation into Samantha's mental health history would have in connection with this case: if it would have been to "suggest that Samantha committed these murder," Caudill would have been "very hesitant to even think about going there." (V19, R1384). Based on the nature of the records and their lack of relevance, Caudill was right to be hesitant to go after Samantha. *See Schoenwetter v. State*, 46 So. 3d 535, 546

(Fla. 2010) (Counsel cannot be deficient for failing to make a meritless argument).

Even if this Court were to assume that counsel was deficient for not at least seeking the mental health records and investigating Samantha further, Aguirre suffered no prejudice. As discussed previously, the background evidence of Samantha's character and mental health is inadmissible propensity evidence or privileged mental health evidence with no relevant basis for admissibility at Aguirre's trial. It would have made no difference in the outcome of Aguirre's trial if trial counsel had looked into this information further because it would not have been admissible and trial counsel would not have been permitted to argue what Aguirre submits now; that is, simply because Samantha has a history of mental health treatment and several instances of demonstrating bad character, she must be the killer. Because Aguirre would not have been permitted to admit the evidence and make such an inflammatory argument at his trial, there is no prejudice.

Forensic Expert

Simply because an expert such as Goetz may be available does not mean counsel is required to consult with him or present the his testimony at trial. *Knight v. State*, 923 So. 2d 387, 396 (Fla. 2005) ("It is not whether counsel could have done more; perfection is not required"). *Jones v. State*, 998 So. 2d 573, 583 (Fla. 2008) ("*Strickland* does not require counsel to investigate every conceivable line evidence...[or] present evidence [in]…every case"). Attorney Caudill was aware of

forensic experts the Public Defender had used in the past. Caudill would have to have gotten approval for the costs of such an expert. He got approval to consult with the DNA expert but relied on his own experience with forensic evidence rather than hiring an individual like Goetz.

Even if counsel should have at least consulted with an independent forensic expert such as Goetz, the speculative theories presented in post-conviction demonstrate that Aguirre suffered no prejudice from the failure to do so. Even if trial counsel had presented Goetz's theory, it would not have been persuasive. As discussed above, Goetz's theory was contradicted by the evidence, defied logic and reason, and did nothing to discredit Samantha's solid alibi. *See Evans v. State,* 975 So. 2d 1035, 1046 (Fla. 2007) ("Murder defendant failed to show prejudice resulting from trial counsel's failure to obtain forensic evidence to dispute witness testimony that defendant told her "that he had to get a new suit because he got [the victim's] brains all over it").

D. Appellant's Case Law Distinguishable

Aguirre cites *Fitzpatrick*, 118 So. 3d 737, to support his ineffectiveness claim. In *Fitzpatrick*, the theory of guilt was supported primarily by testimony about the seminal fluid in the murder victim that belonged to the defendant. The sexual assault nurse testified for the State that because there was no sign of semen in the victim's underwear, the sexual intercourse was likely nonconsensual and

happened contemporaneous with the murder. *Id*. at 754-57. Fitzpatrick claimed that the sex was consensual hours before she was murdered. In post-conviction, the evidence demonstrated that the nurse overstated her conclusions about the semen, the nurse was not qualified to render the opinions presented, and counsel was woefully inexperienced with regard to this evidence and did not consult with an expert or verify the nurse's qualifications. *Id*. at 756-59.

Yet in Aguirre's case, Caudill and Figgatt are veteran capital defense attorneys with over four decades of experience between the two of them. Both have substantial experience handling cases that involve DNA, blood spatter, footwear impressions, and fingerprints. And Caudill consulted with a DNA expert prior to trial. Furthermore, there has been nothing in post-conviction to question the qualifications of any of the State's experts or suggest that any of the State's experts at trial overstated their conclusions. To that end, the State did not rely on DNA evidence at trial to put Aguirre at the murder scene. Indeed, Aguirre has only added insignificant facts and speculative rebuttal to the forensic evidence from trial. *Fitzpartick* does nothing to support Aguirre's claims.

III. Whether Counsel was Ineffective at the Penalty Phase of Trial

Aguirre claims that trial counsel was ineffective in the penalty phase for failing to investigate Aguirre's past or talk to anyone in Aguirre's native Honduras, present an effective mitigation case or read into evidence any of the letters received

on Aguirre's behalf, and failing to humanize Aguirre. (*Initial Brief* at 85, 89, 91).

A. Standard of Review

Whether or not counsel was ineffective in the penalty phase is reviewed under the standard in *Strickland*, 466 U.S. at 687. For claims that allege counsel was ineffective during the penalty phase, prejudice is measured by "whether the error of trial counsel undermines the [c]ourt's confidence in the sentence of death when viewed in context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Wheeler*, 124 So. 3d at 873. Like the guilt phase, the presumption that counsel was effective, the elimination of hindsight distortion, and avoiding a ruling on deficiency when Appellant cannot show prejudice all apply in the penalty phase. *See Strickland*, 466 U.S. at 689; *Franqui*, 59 So. 3d at 95-97.

B. Trial Court Order

The trial court made the following findings about trial counsel's investigation and presentation of mitigation,

> According to Attorneys Caudill and Figgatt, the theory in the penalty phase was that the Defendant had certain psychological issues because of his background, cultural issues and substance abuse.…[T]hey retained Dr. Day, the only live defense witness who testified in the penalty phase. Attorney Caudill spoke to two of the Defendant's sisters, who were so emotional Attorney Caudill believed they were not able to testify at trial. Only one sister was actually present at trial. He had one or both sisters talk to Dr. Day. He also asked Defendant's sisters to obtain letters from friends and family in Honduras, who were not testifying, to provide information about the Defendant's

> background, upbringing and family to try to humanize the Defendant for the catchall mitigator. They sought to humanize the Defendant by presenting evidence of his singing and sports activities in Honduras. He asked the Defendant and his family for photographs for trial. The letters and photographs received from family and friends were admitted in evidence during the penalty phase.

(V12, R2204-05). Regarding the testimony about Aguirre's background, the trial court found, "the lay witnesses at the hearing provided very little additional information beyond what was contained in their letters." The court also noted that, "the testimony of the lay witnesses was inconsistent with Dr. Villalba's diagnosis of PTSD." And specifically regarding Dr. Villalba's PTSD diagnosis, the court found,

> [A] PTSD diagnosis relies heavily on self-reporting and the Defendant was inconsistent with all the professionals in this case. The Defendant did not report any symptoms consistent with a PTSD diagnosis to either Dr. Day or Dr. Riebsame, who evaluated the Defendant in closer proximity to the murders. While he did report symptoms his reporting was inconsistent with each interview with Dr. Villalba, Dr. Riebsame and Dr. Danziger as indicated *infra*. This Court finds that the Defendant has failed to establish that he was suffering from PTSD at the time of the murders. Furthermore, even assuming his version of events, the Defendant's alleged behavior after the murders was inconsistent with someone who suffered from PTSD. Contrary to the defense's assertion in its closing argument, Dr. Villalba testified that the murder of Cheryl Williams was consistent with someone suffering from PTSD. Accordingly, even if the Defendant had suffered from PTSD at the time of the murders, his expert's testimony contradicts his own testimony and failed to provide an explanation for actions as per his theory. Therefore, the Defendant failed to demonstrate trial counsel was ineffective for failing to present evidence of PTSD during the guilt phase of his trial.

(V12, R2192).

C. Argument

Ineffectiveness claim fails when the mitigation from post-conviction is cumulative to the mitigation from the penalty phase. *Troy v. State*, 57 So. 3d 828, 835 (Fla. 2011). *See also Lynch*, 2 So. 3d at 70-71 ("[The defendant's] ignorance of hypothetical, unsupported defenses and comparatively minor mental health diagnosis could not have affected his decision to waive a penalty-phase jury"). As *Strickland* itself teaches, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. *Cf. Anderson v. State*, 18 So. 3d 501, 510 (Fla. 2009) (Counsel was not deficient in failing to discover sexual abuse incident from defendant's childhood where Defendant withheld the information from his attorney).

The question under *Strickland* is not what the best lawyer would do and it is certainly not what the next lawyer would do, but what a reasonable lawyer would do under similar circumstances as viewed from counsel's perspective at the time of trial. *See Knight*, 923 So. 2d at 396 (The test is "not whether counsel could have done more"). Indeed, "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted…unless it is shown that no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

Aguirre's penalty phase claim is nothing more than a defendant claiming to have new counsel with a better strategy. Attorney Caudill obtained over forty letters on Aguirre's behalf from individuals in Honduras who knew Aguirre and submitted those letters to the jury in the penalty phase. Faulting counsel because he did not *read* the letters to the jurors is a classic example faulting counsel for not doing more. Caudill contacted Aguirre's sisters who assisted in gathering the letters. Caudill also spoke with the Honduran consulate and requested assistance in investigating Aguirre's background for mitigation. Specifically, Caudill asked the consulate to assist in gathering Aguirre's school and medical records from Honduras. Caudill obtained the records and provided them to Dr. Day. Caudill also attempted to contact other family members, including Aguirre's mother. Caudill hired Dr. Day to evaluate Aguirre for mental health mitigation. Ultimately, counsel used Dr. Day to present a comprehensive case in mitigation.

Aguirre's penalty phase jury heard extensive information about his background and mental health, to include the following facts. His mother had difficulty during appellant's delivery and Aguirre suffered oxygen deprivation. He was very sickly as a child. (DAR, V14, R139). Appellant's parents separated and his father did not provide much support to his family. Appellant's mother worked as a maid. (DAR, V14, R139-40). As a child, appellant was disciplined with beatings from hands, belts, wooden sticks, or any object that was handy. (DAR,

V14, R143-44). When appellant was eight years old, he and a male friend were sexually abused by a thirteen-year-old neighborhood girl. (DAR, V14, R144-45). The area where appellant grew up was stricken with poverty. Gangs were prevalent and essentially ran the community. Appellant had a friend who was murdered by a gang. (DAR, V14, R146-47). Appellant obtained the equivalent of a high school diploma. His schooling ended at the age of eighteen. (DAR, V14, R148-49). Appellant was ridiculed for his short stature. This resulted in low self esteem and difficulty in establishing trusting relationships. (DAR, V14, R149-50).

Appellant had a history of using drugs, especially inhalants. He began using cocaine at the age of eighteen and it became his drug of choice. He was able to get cocaine cheaply from his roommates. (DAR, V14, R161). Dr. Day concluded that Aguirre committed the murders under extreme mental or emotional distress. The trial court found these circumstances as mitigation for Aguirre and assigned each various weight. The trial court also concluded that Aguirre's capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law was also substantially impaired and that Aguirre's age at the time of the murders was mitigating. Although appellant had a chronological age of twenty-four at the time of the murders, appellant had both significant emotional immaturity and mental problems.

Most of the evidence Aguirre presented in post-conviction was cumulative

to the evidence presented at his penalty phase. On the other hand, some of the witnesses in post-conviction contradicted what Aguirre claimed they would say. Contrary to what Aguirre told his post-conviction "cultural expert," Aguirre's mother testified that he came to the United States to "seek the American dream" (just as Aguirre told Caudill), not because of gang violence. Aguirre's mother also denied that her son suffered from any abuse or was part of a dysfunctional family. And Aguirre's reporting of traumatic events that are supposed to have cause him to suffer from PTSD was inconsistent from one expert to the next.

The incredible PTSD diagnosis is of particular importance. Aguirre wanted to use the PTSD diagnosis for a dual purpose; to explain his incriminating behavior after discovering the bodies and also to explain his emotional distress in committing the murders. When questioned about Aguirre's innocence theory regarding PTSD, Dr. Villalba could not assume that Aguirre did not commit the murders. A necessary prerequisite for Dr. Villalba's opinion about PTSD was that Aguirre committed the murders. More than just an alternative theory, Aguirre's theories from guilt phase to penalty phase about PTSD are complete contradictions of one another. Aguirre's penalty phase ineffectiveness claim should fail.

IV. Whether a New Trial is Warranted on Other Bases

In addition to the primary arguments above, Aguirre raises three additional bases he claims entitle him to relief.

1. Counsel Ineffective for Failing to Object to Shackling

During the penalty phase testimony of the State's mental health expert, Aguirre stood up in an emotional outburst. Aguirre's outburst included "expletives" toward the assistant state attorney. When Aguirre stood up, courtroom deputies immediately grabbed each of Aguirre's arms and escorted him out the courtroom door into a holding cell—the incident took approximately 5-10 seconds.

A. Standard of Review

Courts cannot routinely place defendants in shackles or other physical restraints *visible* to the jury during the penalty phase of a capital proceeding. *Deck v. Missouri*, 544 U.S. 622, 633 (2005) (emphasis added). The due process component of this claim is, of course, a direct appeal issue procedurally barred in post-conviction. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006). Whether counsel was ineffective for failing to object to the restrains is reviewed under the *Strickland* standard. 466 U.S. at 687.

B. Trial Court's Order

The trial found that any error in exposing Aguirre's shackles was invited by his own actions. The court also found that counsel was not deficient in failing to raise a futile objection to the court's standing policy on shackles when they were not visible. (V12, R2216).

C. Argument

"It would be a manifest miscarriage of justice to the victims and the citizens of this community to [grant the Defendant relief] under the circumstances herein when the circumstances have been created by the defendant himself." *Wike v. State*, 698 So. 2d 817, 819-20 (Fla. 1997).

First, if any juror saw Aguirre's shackles, Aguirre caused the circumstance that would have exposed his shackles to the venire. *Id*. Second, Aguirre overstates the constitutional principle from *Deck*, which limits its prohibition to *visible* shackles. *Deck*, 544 U.S. at 632. *Deck* does not prohibit the use of shackles in the manner Judge Eaton employed for capital cases in his circuit. The courtroom deputy ensured, at the State's request, that none of the jurors would be able to see the restraints as long as Aguirre remained seated as instructed. Third, both Figgatt and Caudill testified that it was customary for a capital defendant to be shackled during both the guilt and penalty phases in the Eighteenth Circuit.[21] *See Gordon v. State*, 863 So. 2d 1215, 1223 (Fla. 2003) (Counsel is not ineffective for failing to raise a motion that would have been futile). Figgatt would have moved for a mistrial if he believed the jury *saw* Aguirre's shackles as he was escorted out of the courtroom. Caudill did not move for a mistrial as he believed the jury did not see

[21] During Aguirre's testimony in the guilt phase, he was not shackled.

the shackles. In Caudill's opinion, it was best for Aguirre's outburst "to end quickly without further damage to his case" and a chance of "success in ultimately saving his life" and prevent "further damage to him because I didn't want him to get hurt." *See Johnson v. State*, 135 So. 3d 1002, 1017 (Fla. 2014) (deciding not to draw attention to a comment can constitute sound trial strategy, including…deliberately cho[osing] not to object…or…declin[ing] a curative instruction).

According to Deputy Belfiore, the only time that any member of the jury could have seen that Aguirre was restrained was during the brief period in the penalty phase when Aguirre was removed from the courtroom after his outburst—a spectacle of Aguirre's own doing. The State and courtroom deputies took substantial precautions to avoid calling the jury's attention to the shackles, as were the circumstances of Aguirre's removal from the courtroom. Under those circumstances, trial counsel was reasonable to believe that challenging Judge Eaton's policy would have been futile and drawing further attention to Aguirre's outburst would have been more damaging.

Even assuming that some member of the jury might have been looking at exactly the right spot at exactly the right time to observe the shackles, Aguirre's behavior invited any error. He was instructed to keep his legs under the defense table, and cannot have reasonably believed that his outburst would not result in

him being removed from the courtroom. Any error was brought about by the defendant's own actions—he should not be heard to complain. *See Jones v. State*, 449 So. 2d 253, 261-262 (Fla. 1984); *See also England v. State*, 940 So. 2d 389, 403-404 (Fla. 2006) (This Court finding no error when the trial judge had England's mouth duck-taped because due to repeated outbursts).

2. The Free Standing Innocence Claim

It is unclear how Aguirre excises the general principals in this claim from the relief that would be granted if he were to succeed on either of the first two issues before this Court. The merits of this issue are entirely contingent on Aguirre's success or failure in establishing the claims in arguments "I" and "II" above. If Aguirre is asking this Court to read something into the Florida Constitution or statutes that is not there, this Court should decline to do so. *See Lewis v. Leon County*, 73 So. 3d 151, 153-54 (Fla. 2013) ("If the language [used in the constitution] is clear [and] unambiguous…then it must be enforced as written"); *Koile v. State*, 934 So. 2d 1226, 1230-31 (Fla. 2006) ("When the statute is clear and ambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent"). There can be no ambiguity in the absence of text that Aguirre asks this Court to read into the Constitution and speculate as to the intent of the framers and votes. *Id*. The State defers to its arguments above regarding whether Aguirre is entitled to

a new trial.

3. Whether Further DNA Testing is Warranted

Aguirre argues that if this Court finds the record insufficient, it should reverse the trial court's order denying DNA testing of a hair from Cheryl's hand and remand back to the trial court to order the testing. The hair that Aguirre references was taken from Cheryl's left hand and was labeled ME-14e; Cheryl had a hair-scrunchie on her left hand. ME-14e was collected along with other items labeled ME-14a through ME-14i as standards from Cheryl's body by the medical examiner (e.g., ME-14i was a hair with red-brown staining that returned positive results for blood; the hair and blood stain on the hair matched Cheryl's DNA profile) (V10, R1908-09). Also, Item JG-42a was four hairs found on the rear of Cheryl's left knee that all matched Cheryl Williams. (V11, R1976). Item JG-42b was hair from the palm surface of Cheryl's right hand and the DNA test results were inconclusive. (V11, R1976). The trial court granted testing for JG-42a and JG-42b but denied testing as to ME-14e. The trial court reasoned that based on the transitory nature of hair and Cheryl's hair-scrunchie on her left hand near ME-14e, testing was not likely to result in any form of relief of Aguirre. (V7, R1312; V19, R2830).

First, Aguirre should be barred from raising this issue now on appeal. After the trial court first denied Aguirre's request to test ME-14e (among other items),

Aguirre did not appeal the trial court's order. And this Court has certainly entertain appeals from the denial of a motion for DNA testing while post-conviction claims under 3.851 were still proceeding in the trial court below. *See generally Hitchcock v. State*, 866 So. 3d 23 (Fla. 2004), then *Hitchcock v. State*, 991 So. 3d 337 (Fla. 2008). Second, it was abundantly clear to the trial court that the hair found on Cheryl Williams's body was not going to have any probative value to Aguirre's claim of innocence. Aguirre claims that the hair "clutched in Cheryl's left hand" must have come from a struggle between she and Samantha and that the hair matched the general color and length of Samantha's. Aguirre ignores the fact that the other trace evidence hairs tested from Cheryl's person matched Cheryl, as expected, and the general color and length of the hair in ME-14e also matches that of Cheryl. Furthermore, when Cheryl's body was discovered, both of her hands were located above her head in her own hair. This Court should reject Aguirre's claim about DNA testing of ME-14e. *See Hitchcock*, 866 So. 2d at 28 (This Court noted that the presence of physical evidence that may be linked Hitchcock's brother Richard (who lived in the house with the victim) would not establish that the defendant was not at the scene or did not commit the murder). *See also 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") (internal quotations omitted).

CONCLUSION

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

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I certify that on September 15, 2014, I filed the foregoing pleading using the E-Portal system which will generate a notice of filing and electronically service the document on the following: Maria E. Deliberato, Assistant CCRC-Middle, deliberato@ccmr.state.fl.us; Julissa R. Fontan, Assistant CCRC-Middle; fontan@ccmr.state.fl.us, support@ccmr.state.fl.us; Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136; Marie-Louise Samuel Parmer, Esquire, marie@samuelsparmerlaw.com; The Samuels Parmer Law Firm, P.O. Box 18988, Tampa, FL 33679; Lindsey C. Boney IV, Esquire, lboney@babc.com; Ashley B. Burnett, Esquire, aburkett@babc.com; Kevin C. Newsom, Esquire, knewsom@babc.com, Bradley Atrant Boult Cummings, LLP, 1819 Fifth Avenue North, Birmingham, AL 35203; Nina Morrison, Esquire, nmorrison@innocenceproject.org, Innocence Project, 400 Worth Street, Suite 701, New York, NY 10013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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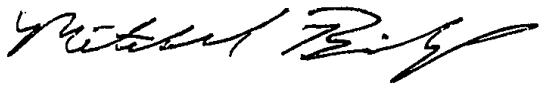
/S/ 

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