IN THE
UNITED STATES SUPREME COURT

CASE NO.: _____

In re MICHAEL R. EVERETT,
PETITIONER,

VS.

THE STATE OF FLORIDA,
RESPONDENT.

ON REVIEW FROM THE ELEVENTH CIRCUIT COURT OF APPEAL

NO.: 19-10422-H

APPENDIX TO
PETITION FOR AN EXTRAORDINARY WRIT
OF HABEAS CORPUS

MICHAEL R. EVERETT-K51763
TOMOKA CORRECTIONAL INST.
3950 TIGER BAY ROAD
DAYTONA BEACH, FL 32124

APP. - A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10472-H

MICHAEL ROBERT EVERETT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Michael Everett, a Florida prisoner serving a life sentence for first-degree murder and burglary of a dwelling with a battery while armed with a dangerous weapon, moves for a certificate of appealability ("COA"), leave to proceed *in forma pauperis* ("IFP"), and leave to file excess words/pages, to appeal the dismissal of his 28 U.S.C. § 2254 petition and his motion for a new trial and to alter or amend judgment. To merit a COA, Mr. Everett must show that reasonable jurists would debate both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Mr. Everett § 2254 petition asserts 20 claims, none of which meet the standard for a grant of a COA. First, he failed to properly exhaust and procedurally defaulted Claims 1, 5, and 13, because he did not fairly present the federal natural of those claims in state court.

As to Claim 2, appellate counsel was not ineffective for failing to assert that the trial court improperly denied Mr. Everett's motion to suppress his confession, because he executed a valid waiver of his *Miranda*[1] rights, and, by all accounts, did not appear intoxicated. Nor did the police officers' conduct during the interrogation rise to the level of improper inducement.

As to Claims 3 and 4, appellate counsel was not ineffective for failing to assert that the trial court improperly denied Mr. Everett's motion for a judgment of acquittal, because the evidence at trial showed that the victim had multiple assaultive injuries; the victim's door had been kicked in; and the victim had made two incriminating telephone calls mere minutes before her death. As to Claim 6, trial counsel was not ineffective for failing to object to the presence of a sleeping juror, because the testimony from the state court's evidentiary hearing established that there was no credible evidence of a sleeping juror during Mr. Everett's trial.

As to Claims 7 and 17, trial counsel was not ineffective for failing to call two witnesses in support of Mr. Everett's motion *in limine*, because the witnesses saw an earlier incident unrelated to the subject of the victim's phone calls and, thus, it was irrelevant to the admissibility of those calls. As to Claim 8, the state presented sufficient evidence, such that a rational trier of fact could have found beyond a reasonable doubt that Mr. Everett intended to commit an offense inside the victim's home. Specifically, there was direct evidence of a forced entry, and circumstantial evidence, including the extent of the victim's injuries and a bar surveillance video, showing him, minutes before the incident, stashing a beer bottle in his back pocket, the glass from which matched the shattered glass at the scene.

As to Claim 9, Mr. Everett's claim—that the state resentencing court erred when it denied his *pro se* motions for a new trial and arrest of judgment—is wholly a matter of state law.

---

[1] *Miranda v. Arizona*, 384 U.S. 426 (1966).

Relatedly, as to Claims 14 and 19, resentencing counsel was not ineffective for failing to adopt motions, because his Fla. R. Crim. P. 3.590(a) motions were untimely by 6 years under Florida law.

As to Claim 10, trial counsel was not ineffective for failing to move to suppress Everett's confession on the grounds that the arresting officers lacked probable cause, because, according to the charging affidavit, the officers, prior to arresting him, knew that a 911 call named him as a homicide suspect, and the officers found the victim dead in her home with the door kicked in. As to Claims 11 and 17, trial counsel was not ineffective for failing to object to the state's alleged *Brady*[2] violation, because both he and counsel knew of the bar surveillance video.

As to Claims 12 and 18, trial counsel was not ineffective for failing to object to the trial court's alternative burglary instruction. As to the "remaining in" instruction, Mr. Everett's own testimony established that he had consent to enter the victim's residence. As to the "unlawful entry" instruction, the state presented evidence of a forced entry. In Claims 15 and 20, trial counsel was not ineffective for failing to call an allegedly exculpatory witness to negate the elements of the burglary offense, because the witness's deposition established that she knew that Mr. Everett and the victim were no longer together.

Finally, the district court did not abuse its discretion when it denied Mr. Everett's motion for a new trial and to alter or amend judgment, pursuant to Fed. R. Civ. P. 59(e). He did not allege that he had newly-discovered evidence, nor did he show that the district court committed a manifest error of fact or law. Accordingly, Mr. Everett's motion for a COA is DENIED. Consequently, his motion for IFP status, and his motion to file excess words/pages, are DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

APP. -B

Amended

IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT FLAGLER COUNTY, FLORIDA		STAMP FOR RECORDING
Division: 50 - HAMMOND, Case Number: **2007 CF 000022**	**JUDGMENT**	
PLAINTIFF **STATE OF FLORIDA** VS.	DEFENDANT **MICHAEL ROBERT EVERETT**	

☐ Probation Violator ☐ Community Control Violator ☐ Retrial ☒ Resentence

☒ The defendant, being personally before this court represented by BRETT C KOCIJAN the attorney of record, and the state represented by Ben Fox and having:

(Check applicable provision)

☐ 1. Been tried and found GUILTY by jury/by court of the following crime(s).
☐ 2. Enter a plea of GUILTY to the following crime(s).
☐ 3. entered a plea of NOLO CONTENDERE to the following crime(s)

Count	Crime	Offense State Number(s)	Degree of Crime	Case Number	OBTS Number
II	BURGLARY OF A DWELLING	810.02(3a)	2F	2007 CF 000022	DIRECT

(Check if Applicable)

☒ and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED that the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☐ and having been convicted or found guilty of, or having entered a plea of NOLO CONTENDERE or GUILTY, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794) or lewd or lascivious conduct (Ch. 800), or murder (§782.04), aggravated battery (§784.045), car jacking (§812.133), or home invasion robbery (§812.135), or any other offense specified in section 943.325, the defendant shall be required to submit blood specimens.

☐ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

FILED IN THE OFFICE OF THE
CLERK OF CIRCUIT COURT
Flagler County, Florida

MAR 2 4 2014

By CN Deputy Clerk
Paper No. 185

APP. B

IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
FLAGLER COUNTY, FLORIDA

FLAGLER COUNTY, FLORIDA

DEFENDANT: EVERETT, MICHAEL ROBERT CASE NUMBER: 2007 CF 000022

FINGERPRINTS OF DEFENDANT

1. RIGHT THUMB	2. RIGHT INDEX	3. RIGHT MIDDLE	4. RIGHT RING	5. RIGHT LITTLE
				
6. LEFT THUMB	**7. LEFT INDEX**	**8. LEFT MIDDLE**	**9. LEFT RING**	**10. LEFT LITTLE**
				

Fingerprints taken by: Deputy Hackenbracht TH NAME Deputy Schmidt TITLE

I HEREBY CERTIFY that the above and foregoing are the finger prints of the defendant, MICHAEL ROBERT EVERETT, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Flagler County, Florida, this 24 day of March, 2014.

J. Matthew Nash
JUDGE

DEFENDANT: MICHAEL ROBERT EVERETT CASE NUMBER: 2007 CF 000022 OBTS NUMBER: DIRECT

SENTENCE

As to Count 2 - BURGLARY OF A DWELLING

The defendant, being personally before this court, accompanied by the defendant's attorney of record, BRETT C KOCIJAN , and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

____ and the Court having on _____ deferred imposition of sentence until _____.

X and the Court having previously entered a judgment in this case on 4/17/08 now resentences the defendant.

____ and the Court having placed the defendant on probation / community control and having subsequently revoked the defendant's probation / community control

IT IS THE SENTENCE OF THE COURT THAT:

____ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $_____ As the 5% surcharge required by section 960.25 Florida Statutes.

__X__ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Flagler County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED (MARK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

____ For a term of natural life.

__X__ For a term of 15.00 Years _____ Months _____ Days.

____ Said SENTENCE SUSPENDED for a period _____ Years _____ Months _____ Days Subject to conditions set forth in this order.

IF "SPLIT" SENTENCE, COMPLETE THE APPROPRIATE PARAGRAPH

____ Followed by a period of Years Months Days On probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of Years, Months, Days Imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of Years, Months, Days Under supervision of the Department of Corrections according to the terms and conditions of probabtion/community control set forth in a separate order entered herein.

DEFENDANT: MICHAEL ROBERT EVERETT CASE NUMBER: 2007 CF 000022 OBTS NUMBER: DIRECT

SENTENCE

In the event the above sentence is to the Department of Corrections, the Sheriff of FLAGLER COUNTY, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statutes.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the state on showing of indigency.

In imposing the above sentence, the court further recommends:

THE COURT HEREBY ORDERS THE DEFENDANT:

- [X] Remanded to the FLAGLER COUNTY Detention Facility to be committed to the Department of Corrections;
- [ ] Released on Probation;
- [ ] Released on Community Control;
- [ ] Remanded to the FLAGLER COUNTY Detention Facility;
- [ ] Discharged/released.

DONE AND ORDERED
FLAGLER COUNTY , FL

CIRCUIT COURT GUIDE FLAGLER COUNTY, FLORIDA

JUDGE DATE
03/24/2014
NUNC PRO TUNC 4/17/2008

APP.-C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2011

MICHAEL ROBERT EVERETT,

Petitioner,

v. Case No. 5D11-1418

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed October 28, 2011

Petition Alleging Ineffectiveness of Appellate Counsel,
A Case of Original Jurisdiction.

Michael Robert Everett, Malone, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee,
and Kristen L. Davenport, Assistant Attorney
General, Daytona Beach, for Respondent.

GRIFFIN, J.

Petitioner seeks another appeal, alleging ineffective assistance of appellate counsel. *See* Fla. R. App. P. 9.141(c). On April 17, 2008, Petitioner was found guilty of first-degree felony murder and burglary of a dwelling with a battery while armed with a deadly weapon. He was sentenced on the same day to life imprisonment for both the felony murder and the burglary convictions, both counts to run concurrently. A notice of appeal was filed and the judgment and sentence were affirmed. *Everett v. State*, 7 So. 3d 544 (Fla. 5th DCA 2009).

APP D

Petitioner now raises four claims of ineffective appellate counsel; only one of which is meritorious. Count II of the two-count indictment charged burglary of a dwelling, a second-degree felony. *See* § 810.02(1) & (3), Fla. Stat. (2010). The charge asserted that Petitioner unlawfully entered or remained in a dwelling *with the intent* to commit either an assault, battery, or murder therein. The burglary count of the indictment did not allege that Petitioner committed an assault or a battery, and did not allege that Petitioner was armed with a deadly weapon,[1] although the evidence was ample to support such a charge, and the jury was instructed as to these aggravating circumstances. The jury found Petitioner guilty of burglary of a dwelling with a battery while armed with a dangerous weapon. Petitioner was sentenced to life imprisonment in accordance with the jury verdict for the first-degree felony punishable by life. Petitioner correctly contends that he could not be convicted of the first-degree burglary after being charged only with second-degree burglary.

A response to the petition was ordered, and the State does not represent that the indictment was ever amended. The State argues waiver because trial counsel did not raise the issue. The State also weakly argues that the indictment's allegations encompassed the aggravating factors of the burglary statute or, in the alternatie, that there was merely a "scrivener's error."

It is fundamental error to convict a defendant of a felony that is not charged. *See Keels v. State*, 792 So. 2d 1249 (Fla. 2d DCA 2001); *see also Brown v. State*, 41 So. 3d 259 (Fla. 4th DCA 2010); *Santin v. State*, 977 So. 2d 781 (Fla. 5th DCA 2008); *Zwick v. State*, 730 So. 2d 759 (Fla. 5th DCA 1999). In this case, Petitioner was charged with a

[1] *See* § 810.02(2)(a) & (b), Fla. Stat. (2010).

second-degree felony and then convicted and sentenced for a first-degree felony punishable by life, based on an erroneous verdict form and jury instructions. This was a fundamental error and appellate counsel was ineffective for failing to raise it.

We reverse the burglary conviction and vacate the sentence. We remand for correction of the judgment to classify the conviction as a second-degree felony and for resentencing.

PETITION GRANTED in part; DENIED in part; SENTENCE on Count II vacated and REMANDED.

SAWAYA and PALMER, JJ., concur.

APP.-D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MICHAEL ROBERT EVERETT,

Appellant,

v.

Case No. 5D14-1645

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 22, 2015

Appeal from the Circuit Court
for Flagler County,
J. David Walsh, Judge.

Michael Robert Everett, Daytona Beach, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, C.M., Senior Judge.

In 2008, Michael Everett was convicted of first-degree felony murder and burglary of a dwelling with a battery while armed with a deadly weapon. This court, in *Everett v. State,* 114 So. 3d 956 (Fla. 5th DCA 2011), reversed the burglary conviction because Everett was convicted of a first-degree burglary offense when he was actually charged

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with second-degree burglary. We reversed for entry of a corrected judgment and re-sentencing.

Everett's new claims of deficient representation are either insufficient, untimely, or both.

AFFIRMED.

ORFINGER and BERGER, JJ., concur.

APP.-E

MICHAEL EVERETT: I don't understand this, man. Can you help me get one?

OFFICER SMITH: (Inaudible.)

MICHAEL EVERETT: I don't get this. Man, you know I wouldn't fucking kill anybody. They're trying to say I killed Lindsay. There's no way. I love that girl. I don't get it, man. You know, there's a guy -- there's a guy that used to -- she's got -- that's got a restraint -- she's got a restraining order against. That's what I told him. You need to check him out. I mean, I don't know if he was stalking us or whatever, but --

Turn that thing off, man.

OFFICER SMITH: It's not on.

MICHAEL EVERETT: Yeah, it is. I see the light.

OFFICER SMITH: They're not recording (inaudible) --

MICHAEL EVERETT: Jesus Christ. I can't believe this. Jesus, man, I can't believe Lindsay -- somebody killed Lindsay and they're blaming me for it. I don't get it. This is nuts.

So, I mean, what, I'm being charged with this?

OFFICER SMITH: I don't know.

MICHAEL EVERETT: That's crazy, man. Oh, my God. They need to investigate that fucking guy that was --

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like this, man. It's nuts.

OFFICER SMITH: Well, I don't know. I don't know what's going on.

Don't touch that, man.

MICHAEL EVERETT: Turn it off.

OFFICER SMITH: It's not mine to touch. Why do you want to turn it off, dude?

MICHAEL EVERETT: I mean, why is it on, is what I don't understand.

OFFICER SMITH: I don't know. I don't know, man. This isn't my cup of tea.

MICHAEL EVERETT: Shit. (Unintelligible) -- bullshit.

Parliaments.

OFFICER SMITH: Hey, man.

MICHAEL EVERETT: Huh?

OFFICER SMITH: Buy one, get one.

MICHAEL EVERETT: Oh, yeah.

Oh, shit.

OFFICER SMITH: You fucked the one in my truck up, dude.

MICHAEL EVERETT: Huh?

OFFICER SMITH: You fucked the one in the truck up.

MICHAEL EVERETT: No. I only tapped it once. It

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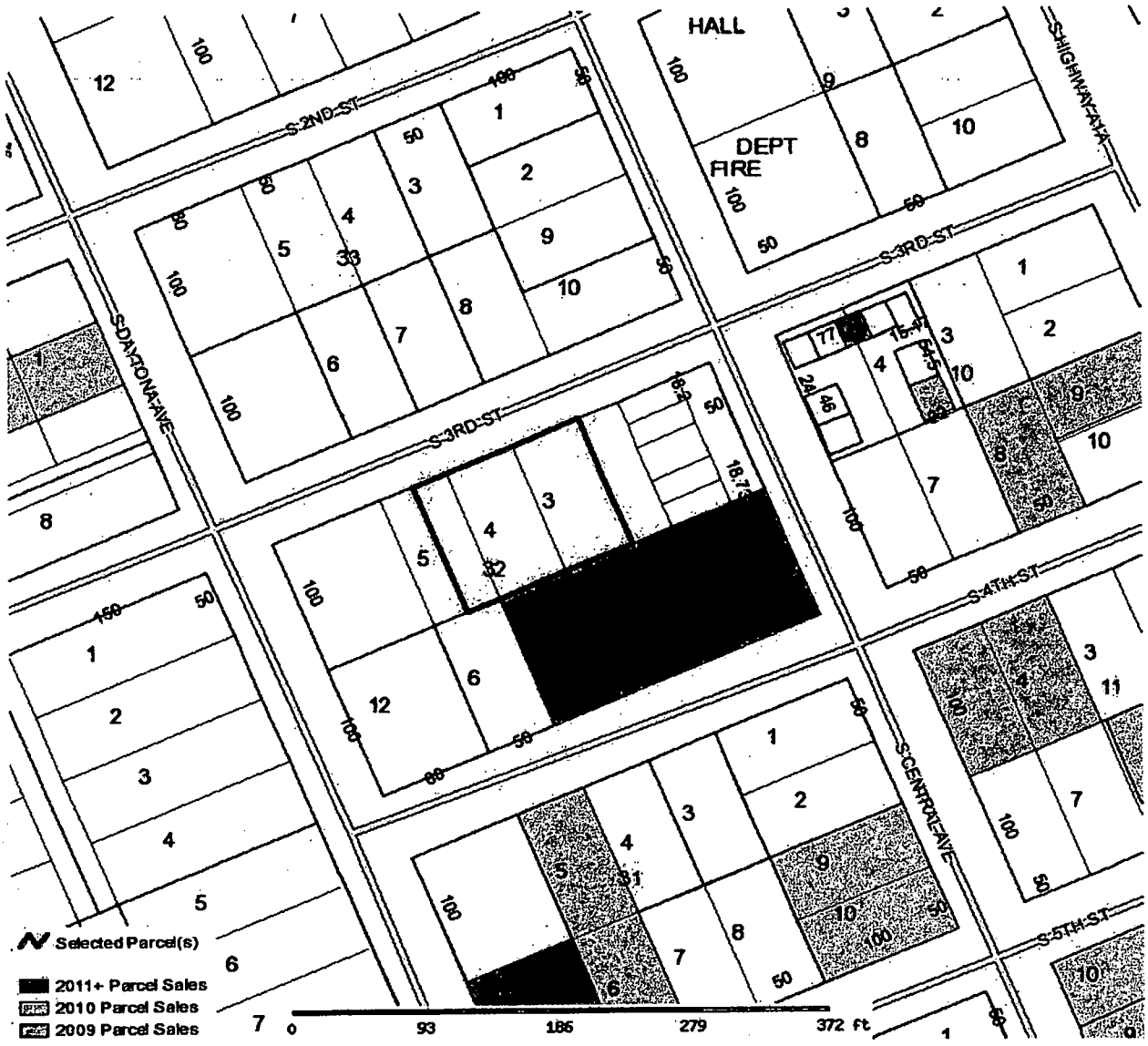
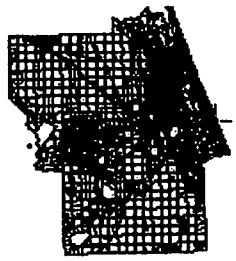


Flagler County Property Appraiser

Parcel: 12-12-31-4500-00320-0030 Sqft: 12503

Name:	S E OUTLINE HOLDING COMPANY	Land Value:	131,281
Site:	211 3RD ST S	Building Value:	98,331
Sale:	$200,000 on 02-1999 Vacant-N Qual-Q	Misc Value	2,632
Mail:	PO BOX 262 FLAGLER BEACH, FL 321360262	Just Value:	232,244
		Assessed Value:	232,244
		Exempt Value:	0
		Taxable Value:	232,244



Date printed: 04/23/12 16:16:47

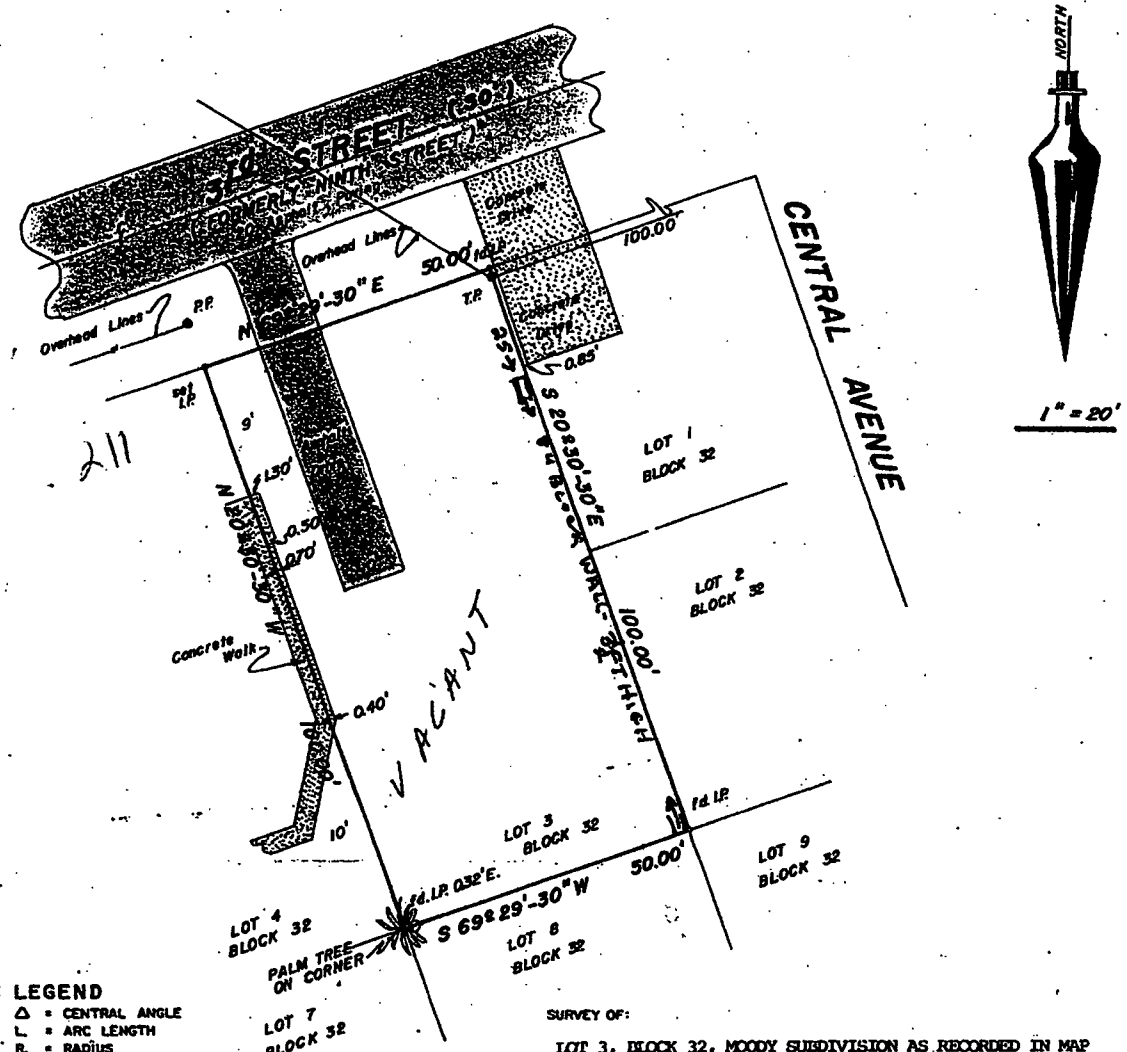
Flagler County Property Appraiser

Parcel: 12-12-31-4500-00500-0040 Sqft: 9077

Name:	LIBERTY BEACH LLC	Land Value:	57,750
Site:	212 DAYTONA AVE S	Building Value:	65,288
Sale:	$429,000 on 08-2004 Vacant=N Qual=Q	Misc Value:	970
Mail:	P O BOX 352086 PALM COAST, FL 32135	Just Value:	124,008
		Assessed Value:	124,008
		Exempt Value:	0
		Taxable Value:	124,008

Date printed: 04/11/12 : 16:07:24

"SKETCH OF SURVEY"



* LEGEND

- Δ = CENTRAL ANGLE
- L. = ARC LENGTH
- R. = RADIUS
- AVE.= AVENUE
- DR. = DRIVE
- RD. = ROAD
- ST. = STREET
- RLS= REGISTERED LAND SURVEYOR NUMBER
- R/W= RIGHT-OF-WAY
- ℄ = CENTERLINE
- N. = NORTH
- S. = SOUTH
- E. = EAST
- W. = WEST
- (P.) = PLAT (MAP) DIMENSION
- (D.) = DEED CALL
- (F.) = FIELD MEASUREMENT
- ■ = FOUND 4"x 4" CONCRETE MONUMENT
- ● = FOUND IRON PIPE
- ⊙ = FOUND IRON ROD
- ⊙ = FOUND NAIL & DISC
- ⊕ = SET NAIL & DISC
- ○ = SET IRON ROD (I.R.) & CAP L.B. NO. 5611
- □ = SET 4"x 4" CONCRETE MONUMENT
- ▼ = FOUND RAILROAD SPIKE
- ● = FOUND BOLT
- ⊘ = FOUND ANGLE IRON
- P.P. = POWER POLE
- POC = POINT OF COMMENCEMENT
- P.O.B.= POINT OF BEGINNING

SURVEY OF:

LOT 3, BLOCK 32, MOODY SUBDIVISION AS RECORDED IN MAP BOOK 1, PAGE 24, OF THE PUBLIC RECORDS OF FLAGLER COUNTY, FLORIDA.

This Survey is Certified to:

WILLIAM M. BABBITT

NOTES:

1. NO INSTRUMENTS OF RECORD REFLECTING EASEMENTS, RIGHTS-OF-WAY &/OR OWNERSHIP WERE FURNISHED THIS SURVEYOR EXCEPT AS SHOWN.
2. NO UNDERGROUND IMPROVEMENTS OR INSTALLATIONS HAVE BEEN LOCATED EXCEPT AS SHOWN.
3. LEGAL DESCRIPTION FURNISHED BY CLIENT.
4. WHERE APPLICABLE, MONUMENT DIAMETERS, ETC. &/OR R L S ARE SHOWN NEAR RESPECTIVE SYMBOL ABOVE, UNLESS SHOWN IN LEGEND AT LEFT.
5. FLOOD ZONE C PER FLOOD INSURANCE RATE MAP COMMUNITY-PANEL NUMBER 120087 0001 B DATED MAY 15, 1985

℄. Bearings are assumed.

* THIS SURVEY MAY NOT INCLUDE ALL OF THE SYMBOLS & ABBREVIATIONS SHOWN IN THE STANDARDIZED LEGEND ABOVE.

LAWRENCE R. DANIELS
PROFESSIONAL LAND SURVEYOR
FLORIDA REGISTRATION Nº 2622
MORTGAGE SURVEYS BOUNDARY SURVEYS
ELEVATION CERTIFICATES TOPOGRAPHICAL SURVEYS
REFINANCING SURVEYS
LAWRENCE R. DANIELS P.L.S. Nº 2622
133 CARROLL AVE. DeLAND FLA. PH. 734-8472

THIS "SKETCH OF SURVEY" IS HEREBY CERTIFIED AS MEETING THE MINIMUM TECHNICAL STANDARDS (21 HH-6, F.A.C.) SET FORTH BY THE FLORIDA BOARD OF LAND SURVEYORS, PURSUANT TO SECTION 472.027 OF THE FLORIDA STATUTES. VALID ONLY WITH EMBOSSED SEAL.

AMENDMENTS, REVISIONS, RECERTIFICATIONS (IF ANY) ARE NOTED ABOVE.

PREPARED FOR
BABBITT

DATE 4-19-93 JOB NO. 93-200
FIELD BOOK _____ PAGE _____
TYPE OF WORK BOUNDARY
PARTY CHIEF _____ I.D. _____
SHEET _____ OF _____

DRAWN BY LARRY
SCALE 1"=20'

FILE

APP. — H

111, 123 (2009) (quotation marks omitted). If there is "any reasonable argument that counsel satisfied Strickland's deferential standard," then a federal court may not disturb a state-court decision denying the claim. Richter, 562 U.S. at 105. As such, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). "Reviewing courts apply a 'strong presumption' that counsel's representation was 'within the wide range of reasonable professional assistance.'" Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1262 (11th Cir. 2016) (quoting Strickland, 466 U.S. at 689). "When this presumption is combined with § 2254(d), the result is double deference to the state court ruling on counsel's performance." Id. (citing Richter, 562 U.S. at 105); see also Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316, 1333-35 (11th Cir. 2013) (en banc) (Jordan, J., concurring); Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004).

V. Analysis

A. Ground One

Everett claims that the circuit court erred and violated his Confrontation Clause rights in overruling hearsay objections trial counsel raised when Jocelyn Moore testified Everett had "just been there" and Leif Halvorsen testified the victim told him that "[Everett]'s back." Doc. 30 at 11-13. The circuit court ruled these statements were excited utterances and admissible as exceptions to the hearsay rule pursuant to section 90.803(2), Florida Statutes. Id. at 11. According to Everett, the victim's comments did not establish when he had been there or when he had returned. Id. 12.

Therefore, he contends that the state could not prove the victim's statements were excited utterances. Id.

Respondents urge that Everett's failure to raise or argue the federal constitutional dimension of this claim in state court renders it unexhausted for federal habeas corpus purposes. Doc. 12 at 14-15. In the alternative, Respondents assert that the claim lacks merit. Id. at 19-20. In his Supplemental Reply, Everett contends any failure to properly exhaust this claim is excused because of ineffective assistance of counsel on direct appeal pursuant to Murrary v. Carrier or on state postconviction review pursuant to Martinez v. Ryan. Doc. 41 at 4-5.

In reviewing the record, the Court finds this claim is unexhausted because Everett did not present the federal nature of this claim to the state court. Everett raised a similar claim on direct appeal. Resp. Ex. C at 9-12. When briefing this issue, however, Everett did not state or suggest that it was a federal claim concerning the Confrontation Clause or any other federal constitutional guarantee. Id. Instead, Everett argued, in terms of state law only, that the circuit court erred in overruling his objections. Id. (citing Pressley v. State, 968 So. 2d 1039 (Fla. 5th DCA 2007); Burkey v. State, 922 So. 2d 1033 (Fla. 4th DCA 2006); Johnson v. State, 969 So. 2d 938 (Fla. 2007)). As such, Ground One is unexhausted and procedurally defaulted. See Baldwin, 541 U.S. at 29.

Everett's reliance on Martinez to establish cause to excuse this procedural default is misplaced because Martinez applies only to procedurally defaulted claims of ineffective assistance of trial counsel not raised in an initial collateral review

proceeding. See Martinez, 566 U.S. at 9 ("This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."); Gore v. Crews, 720 F.3d 811, 817 (11th Cir. 2013) ("By its own emphatic terms, the Supreme Court's decision in Martinez is limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel."). As Ground One is a claim of trial court error, Martinez is inapplicable and does not excuse Everett's procedural default. Gore, 720 F.3d at 817.

To the extent Everett relies on Carrier to argue that ineffective assistance of appellate counsel (IAAC) caused this claim to be procedurally defaulted, he is not entitled to relief. Everett did not raise an independent IAAC claim with the state courts as Carrier requires. Carrier, 477 U.S. at 488. Accordingly, this IAAC claim is unexhausted. Because Everett fails to show cause and prejudice to excuse this secondary layer of procedural default, he cannot show cause to excuse his primary procedural default. See Henderson, 353 F.3d at 897. Thus, the Court determines that Ground One has not been exhausted because Everett failed to fairly present it as a federal constitutional claim on direct appeal. Everett has failed to show cause to excuse this default or actual prejudice resulting from the bar. Moreover, he has failed to identify any fact warranting the application of the fundamental miscarriage of justice exception.

Nevertheless, had Everett properly exhausted this claim, Ground One is without merit. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Confrontation Clause bars the admission of "testimonial" hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68 (2004). Hearsay statements are testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 52. "[S]tatements made in private conversation are generally nontestimonial because there is no reason to believe that the statements will be used at trial." United States v. Berkman, 433 F. App'x 859, 863 (11th Cir. 2011) (citing United States v. U.S. Infrastructure, Inc., 576 F.3d 1195, 1209 (11th Cir. 2009)); see also United States v. Brown, 441 F.3d 1330, 1360 (11th Cir. 2006) ("The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by Crawford."). Under this reasoning, the victim's statements to Moore and Halvorsen do not fall within the ambit of prohibited testimonial hearsay statements contemplated by Crawford. See Crawford, 541 U.S. at 68 ("When nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law[.]").

Everett does not identify, and this Court is unable to locate, any "clearly established" federal authority showing that the Confrontation Clause is violated where a state court admits a non-testimonial spontaneous utterance under a state exception to the hearsay rule.[7] Accordingly, the state court's denial of this claim could not have been contrary to, or an unreasonable application of, clearly established federal law. Neither was the state court's rejection of this claim based upon an unreasonable determination of the facts. State court rulings on the admissibility of evidence generally are not within the scope of federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Therefore, Everett cannot obtain federal habeas relief and Ground One is denied.

B. Ground Two

Everett asserts that appellate counsel was ineffective for failing to argue that the circuit court erred when it denied his pre-trial motion to suppress his statements to the police. Doc. 30 at 14-20. According to Everett, the circuit court failed to consider the totality of the circumstances when it denied his motion. Id. at 14. He further asserts that police "promises of leniency, coupled with [his] intoxication, the lateness of the hour, no probable cause to arrest [him] . . . and his request that the tape recorder be turned off, violated Mr. Everett's rights under the federal totality of the circumstances standard." Id. at 15.

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[7] To the contrary, prior to its decision in Crawford, the United States Supreme Court determined that the excited utterance, or spontaneous statement, exception to the hearsay rule does not violate the Confrontation Clause. White v. Illinois, 502 U.S. 346, 355-57 (1992).

Everett raised the issue of his intoxication and the police officer's improper promises in a motion to suppress with the circuit court, and after a hearing, the court determined that the claim had no merit:

> The Defendant was questioned at the Flagler Beach Police Department concerning the murder of Lindsey Brown. The Defendant does not deny that he was given his Miranda warnings but he alleges he was too intoxicated to understand those rights or to voluntarily waive them. Additionally[,] the Defendant claims that the investigating officer improperly induced the inculpatory statements by making direct or implied promises.
>
> Even if intoxication is proven, such intoxication is a fact for the jury to consider in determining weight and credibility. Lindsey v. State, 66 Fla. 341 (1914). "A person under the influence of alcohol wa[i]ving constitutional rights is legally competent to do so if, despite the degree of intoxication, he is 'aware and able to comprehend and to communicate with coherence and rationality.'" Burns v. State, 584 So. 2d 1073, 1075 (Fla. 4th DCA 1991). After review of the Defendant's interview this Court finds he was not suffering from "mania" in that his responses had a contextual relationship, he was coherent and not rambling. See Lindsey and Burns, supra. Therefore the issue is properly before the jury.
>
> As to the issues of improper inducement, there is nothing in the record to suggest the statements were improperly induced. The interviewer simply informed the Defendant on several occasions that an accident was a less serious crime th[a]n one of intent. At no time was there an express quid pro quo bargain for the confession. See Bruno v. State, 574 So. 2d 76 (Fla. 1991).

(Resp. Ex. M, App. E). Everett did not appeal the denial of his motion to suppress. Resp. Ex. C. Instead, Everett argued in his state habeas petition that appellate counsel

was ineffective for failing to do so. Resp. Ex. L at 8-17. The Fifth DCA determined the claim was not meritorious but did so without analysis.[8] Resp. Ex. N at 2.

To the extent that the Fifth DCA decided the claim on the merits,[9] the Court will address the claim in accordance with the deferential standard for federal court review of state court adjudications. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Everett is not entitled to relief on the basis of this claim.

Nevertheless, even if the Fifth DCA's adjudication of this claim is not entitled to deference, Ground Two is without merit. First, having reviewed the statements Everett alleges demonstrate improper inducement, Doc. 30 at 16-17, the Court finds these statements are not expressing a quid pro quo bargain. Instead, the police merely inform Everett of the possibility of lesser offenses if the murder was done without intent. Second, reasonable appellate counsel could have decided against raising this claim on direct appeal because Everett testified under oath at his trial that he did not make his statement to police due to his hope of a lesser sentence, but because it was

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[8] Notably, Respondents assert this claim was properly exhausted. Doc. 12 at 15.

[9] In looking through the appellate court's per curiam affirmance to the circuit court's "relevant rationale," the Court presumes that the appellate court "adopted the same reasoning." Wilson, 138 S. Ct. at 1194.

the truth. Resp. Ex. B at 437. He testified that he was never worried about being charged with premeditated murder. Id. at 481. Therefore, any promises, express or implied, from the police did not cause Everett to make his statements to the police or render the statements involuntary. See Blake v. State, 972 So. 2d 839, 844 (Fla. 2007) ("[A] promise alone is not sufficient to render a confession involuntary. There must also be a *causal connection* between the police conduct and the confession.") (emphasis in original); see also Colorado v. Connelly, 479 U.S. 157, 164 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.").

Next, before he spoke with the police, Everett was advised of his Miranda[10] rights, and signed a form acknowledging such. Resp. Ex. M, App. D at 32, 58-59. Everett admitted at trial that he knew the consequences of speaking with the police but lied to them in hopes that he could divert police attention away from himself. Resp. Ex. B at 480. Everett also noted that "[i]t's legal for [the police] to lie to me during an interrogation, so why, why don't I have the right to lie to them?" Id. at 480. Reasonable appellate counsel could have concluded that Everett's Miranda waiver and statements at trial negated any argument on direct appeal that his confession to the police was involuntary.

Regarding Everett's claims he attempted to invoke his right to remain silent when he stated "turn off the recorder," the transcribed recording of the interrogation

[10] Miranda v. Arizona, 384 U.S. 436 (1966).

introduced at the suppression hearing and at trial does not include any reference to the conversation Everett alleges occurred on page fifteen of his Amended Petition. Resp. Exs. B at 144-235; M, App. D at 56-104. Nor does Everett provide any page numbers or citations to where this alleged conversation can be located. Moreover, the recorded statements reflect Everett waived his Miranda rights prior to confessing. Resp. Ex. B at 145-46. As such, the Court concludes Everett has failed to establish this conversation even occurred.

Finally, a defendant's intoxication during a police interview generally affects the credibility, not the admissibility, of a confession. Slade v. State, 129 So. 3d 461, 464 (Fla. 2d DCA 2014). However, the mind of the accused must have been "sufficiently clear and unhampered by the combination of his physical condition and the impact of the [intoxicant] that it can be [said] that he freely and voluntarily related his connection with the crime." Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964). Investigator Michael Shon McGuire testified at the hearing on Everett's motion to suppress that Everett was alert, responsive, and appeared to understand and appropriately answer the questions posed to him. Resp. Ex. M, App. D at 135-36. McGuire did not believe that Everett was intoxicated. Id. at 36. Likewise, Officer Lou Lizette Williams testified that Everett was "very coherent" during the interview and did not appear to be under the influence of alcohol or drugs. Id. at 54. She testified that Everett's demeanor did not change during the interview. Id. at 55. Upon review of the portion of the police interview contained in the suppression hearing transcript, Everett provided appropriate and cogent answers to the police officers' questions and

did not appear to be so intoxicated that his waiver was not freely and voluntarily given. Id. at 56-104. Reasonable appellate counsel could have concluded that the circuit court did not abuse its discretion when it found that Everett's level of "intoxication is a fact for the jury to consider in determining weight and credibility." Resp. Ex. M, App. E.

Because reasonable appellate counsel could have concluded that the arguments Everett now advances would have had little chance of success on direct appeal, appellate counsel's performance was not deficient for failing to raise them in Everett's appellate brief. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) ("[I]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.") (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)). Nor has Everett shown any actual prejudice as a result of appellate counsel's alleged errors. There is no basis to conclude that appellate counsel's alleged omissions had any effect on the appellate court's affirmance of Everett's convictions and sentences. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000) ("To determine whether [an ineffective assistance of appellate counsel claim has merit], we must decide whether the arguments the defendant alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal.") (citing Miller v. Dugger, 858 F.2d 1536, 1538 (11th Cir. 1988))). Everett fails to satisfy either prong of Strickland's ineffectiveness test. Accordingly, Ground Two is denied.

The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). As such, federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." Marshall v. Lonberger, 459 U.S. 422, 434 (1983).

At the evidentiary hearing on this claim, the testimony of Everett's parents was in direct conflict with the testimony of the trial judge, the state prosecutor, and Everett's own counsel. The state courts' conclusions that Everett did not demonstrate the presence of a sleeping juror is an implicit determination that the state courts found the testimony of counsel, the state court judge, and the prosecutor to be more credible than that of Everett's parents. Everett presents no clear and convincing evidence to rebut the presumption of correctness given the state court's factual conclusions or credibility determinations. See 28 U.S.C.A. § 2254(e)(1). Accordingly, Everett cannot establish deficient performance or prejudice; therefore, Ground Six is denied.

F. Grounds Seven and Seventeen[12]

Everett asserts that trial counsel was ineffective for failing to call Edwin Gravenstein and Ashley Gravenstein as witnesses to support his motion in limine to suppress the hearsay statements of Moore and Halvorsen. Doc. 30 at 37-40, 79-84. Everett claims that the Gravensteins overheard an argument between Everett and the victim earlier on the day she was murdered and that their testimony could have

[12] Ground Seventeen realleges claims raised in Grounds Seven and Eleven; therefore, the Court addresses aspects of Ground Seventeen in its analysis of both Grounds Seven and Eleven.

supported counsel's argument that the victim had time for "reflective thought" before she made her incriminating statements to Moore and Halvorsen. Doc. 30 at 38.

Everett raised this claim in his Rule 3.850 motion, and after conducting an evidentiary hearing, the post-conviction court denied the motion in a written order:

> [T]he Defendant alleges that counsel was ineffective for failing to investigate Edwin and Ashley Gravenstein as defense witnesses, in conjunction with the Defendant's Motion in Limine. Prior to the trial defense counsel filed a Motion in Limine to Exclude Hearsay Testimony and to direct the State of Florida and its witnesses not to state, mention or make any type of reference to statements allegedly made by the victim Lindsay Brown to Jocelyn Moore, Richard Moore or Leif Halvorsen, during a series of phone calls made on January 6, 2007, the night of her death. The defense claimed that the statements were inadmissible hearsay pursuant to Florida Statute Section 90.802 and none of the hearsay exceptions would apply. A hearing was conducted on April 2, 2008.
>
> On April 11, 2008 the Court entered an Order Denying the Motion in Limine finding that "[c]learly some of the statements do fall under the excited utterance and spontaneous statement exceptions to the hearsay rule. F.S. 90.803(1) & (2)," and further ordered that the admissibility of such evidence would be considered in a timely manner when evidence was sought to be admitted. At trial proffers were made and the court found the proffered testimony to be admissible. On direct appeal, raising the admission of those statements, *inter alia*, the conviction and sentence was upheld. Fifth District Court of Appeals, Case No.:5D08-1445, per curiam affirmed April 7, 2009; mandate issued April 29, 2009.
>
> The Defendant now claims that if trial counsel would have presented the testimony of Edwin and Ashley Gravenstein, neighbors of the decedent, their testimony would have impeached Jocelyn Moore's testimony on the timing of the victim, Lindsey Brown's confrontation with the Defendant, resulting in the exclusion of the hearsay statements made

> by the victim, and a different outcome to the trial. A review of the record clearly refutes this claim; the Gravensteins were referring to two incidents earlier in the day than the one described by Lindsey Brown to Mrs. Moore within less than an hour of her death. Jocelyn Moore testified that she received a call from Ms. Brown at about 9:40 PM on January 6, 2007. She testified Ms. Brown was sobbing uncontrollably and said that Michael [the Defendant] had *just* been to her house and had threatened her . . . that he was going to kill her. (Emphasis added). Ms. Brown hung up to call Leif Halvorsen and said she would call Mrs. Moore back. Leif Halvorsen testified that on January 6, 2007, at approximately 9:50 PM he received a call from Lindsey Brown. The call abruptly ended when she said . . . "he's back, I'm calling the cops."
>
> Depositions were taken from the Gravensteins on April 3, 2008. Mrs. Gravenstein stated that on January 6, 2007 she saw a gentleman leaving Ms. Brown's apartment – he called Ms. Brown a bitch and mumbled something about when he came back. Mrs. Gravenstein said it was still light out, mid to late afternoon, possible as late as 6:00 PM. Mr. Gravenstein had observed an incident earlier in the day, in the middle of the afternoon; his wife was not with him. The Gravensteins' statements would have had [sic] not been relevant to impeach the testimony of Mrs. Moore or Mr. Halvorsen, or to have affected the timeline of the crime as set forth in the trial. This Court does not find trial counsel to have been deficient by failing to call or present the testimony of these witnesses at either the motion in limine hearing or the trial. Furthermore, there is no prejudice, the evidence of guilt being overwhelming. Rimmer v. State, 59 So. 3d 763, 778 (Fla. 2010).

Resp. Ex. L at 106-08 (footnote and record citations omitted). The Fifth DCA affirmed the post-conviction court's conclusion in a written opinion, specifically finding that there was support for the lower court's finding that "the testimony of the witnesses now urged by defendant involved a separate meeting between the victim and defendant which occurred earlier in the day." Resp. Ex. K at 2.

To the extent that the Fifth DCA decided the claim on the merits, the Court will address the claim in accordance with the deferential standard for federal court review of state court adjudications. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Everett is not entitled to relief on the basis of this claim.

Nevertheless, even if the Fifth DCA's adjudication of this claim is not entitled to deference, Grounds Seven and Seventeen are without merit. A review of the Gravensteins' deposition testimony supports a conclusion that the interactions they witnessed were not the same encounters about which Moore and Halverson testified. Resp. Ex. G at 27-64. Both Gravensteins stated that they observed Everett during mid or late afternoon, when it was daylight, whereas Moore and Halverson relayed statements the victim made shortly before her death around 10 p.m. Resp. Exs. G at 30, 31, 35, 46, 48, 58; B at 265-68, 320. At trial, Everett testified that he visited the victim in the evening hours, stormed out of her apartment, and returned to a nearby bar. Resp. Ex. B at 418-19. He testified that he left the bar soon thereafter to apologize to the victim, but the second encounter resulted in the victim's death. Id. at 421, 428. A surveillance video from the bar shows that Everett initially entered at 6:30 p.m., left at 8:40 p.m., returned at 9:36 p.m., and left again at 9:44 p.m. Id. at 253-54. The victim's telephone calls to Moore and Halverson occurred between 9:30 p.m. and 9:50

p.m. Id. at 265-68, 320. Counsel testified at the evidentiary hearing on Everett's Rule 3.850 Motion that he knew the Gravensteins had observed different encounters than the ones that were the subject of the victim's telephone calls to her friends because Everett told him in confidence that he had actually gone to the victim's apartment three times on the day in question. Resp. Ex. H at 55-56. The victim and Everett had argued during this first daytime visit, and counsel concluded that "whatever the Gravensteins witnessed was not the subject of the phone call made to Jocelyn Moore." Id. at 58, 82.

Reasonable defense counsel could have concluded that the Gravensteins' observations of an earlier unrelated argument between Everett and the victim were irrelevant to Everett's hearsay claims. Reasonable counsel could have also strategically decided against calling the state's attention to the first altercation between Everett and the victim – particularly since the defense strategy involved showing that Everett had not planned to kill the victim and an earlier fight would not have supported that strategy.[13] Accordingly, Everett has failed to establish either deficient performance or prejudice; therefore, Grounds Seven and Seventeen are denied.

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[13] Because the Court's inquiry is an objective one, counsel's *actual* motivation is irrelevant on federal habeas review. See Castillo v. Sec'y, Fla. Dep't of Corr., 722 F.3d 1281, 1285 n.2 (11th Cir. 2013) ("The relevant question under Strickland's performance prong, which calls for an objective inquiry, is whether any reasonable lawyer could have elected not to object for strategic or tactical reasons, even if the actual defense counsel was not subjectively motivated by those reasons.").

APP. - I

ORIGINAL

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR FLAGLER COUNTY
CRIMINAL CASE NO. 2007-00022-CFFA

STATE OF FLORIDA

vs.

MICHAEL ROBERT EVERETT,

Defendant.

UNSWORN TELEPHONIC STATEMENT OF

EDWIN L. GRAVENSTEIN, III

Taken on Behalf of the Defendant

DATE TAKEN: April 3, 2008

TIME: 9:40 a.m. - 9:49 a.m.

PLACE: Office of the Public Defender
1769 East Moody Boulevard
Building 1
Bunnell, Florida

Stenographically Reported by:

Delina M. Valentik,
Registered Professional Reporter
Florida Professional Reporter

APPEARANCES:

Counsel for the State of Florida:

STEPHEN M. NELSON, ESQUIRE
Assistant State Attorney
1769 East Moody Boulevard, Building 1
Bunnell, FL 32110

Counsel for the Defendant:

MATTHEW D. PHILLIPS, ESQUIRE
Assistant Public Defender
251 North Ridgewood Avenue
Daytona Beach, FL 32114

I N D E X

INDEX OF EXHIBITS

(None.)

P R O C E E D I N G S

WHEREUPON

EDWIN L. GRAVENSTEIN, III

was examined by telephone and gave the following answers to the questions propounded:

MR. NELSON: All right. Here we go. There's another attorney in here, Matt Phillips, that represents the defendant in this case.

THE WITNESS: Okay. Terrific.

MR. PHILLIPS: Yeah, thanks for calling in today, Mr. Gravenstein. I appreciate your time.

THE WITNESS: No problem.

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q. Okay. Thanks. Like I said, my name is Matt Phillips. I'm attorney with the public defender's office. I'm representing Michael Everett. And we're going back to this incident from January 6 of 2007.

Do you recall what your address was at that time?

A. Oh, boy. Man, I should be able to.

Q. Well, I tell you what, if you don't remember the exact number, can you describe the place and like in relation to Lindsay Brown's apartment?

A. Yeah. Sure. It was a condo. A green

building. We lived in the far -- I believe our apartment was -- I believe it was 412, but that could be very wrong. And it was across the street from the place of the incident. Businesses below it. And it had a -- it was a condo with four units. Now has a silver building -- a silver roof to it. A tin roof, I believe.

Q. Okay. Well, that's a pretty good description.

Well, do you recall this particular day that we're talking about January 6 of 2007?

A. Yes, sure do. Exactly as far as what happened --

Q. What you observed. What do you remember observing that day?

A. Well, that day I do remember -- I do remember the boyfriend going in. I do remember seeing the boyfriend earlier that day go in the house. I do remember seeing them argue.

Q. You did not see them argue?

A. No, I do remember seeing them argue the day be -- or, that day earlier, earlier on that day.

Q. Do you remember about what time?

A. No, honestly, I do not.

I do not remember the time. Just I do remember seeing them argue earlier on that day.

Q. Do you remember where were they located when

you saw this argument you're describing?
A. The girlfriend was at the top of the stairs, the top of the stairs. And the boyfriend was at the bottom of the stairs.
Q. And was your wife with you when you saw this argument?
A. No, she was not.
Q. Okay. What do you recall observing during this first argument you're describing?
A. Don't really remember. I just remember as far as -- I just remember yelling. One of the things where you didn't really -- I didn't really watch it or really observe it that much. I do remember looking across the street, though, and going -- and kind of just seeing abrupt hand gestures and body movements that kind of resembled an argument as far as fast moving body gestures and just kind of just simply that, just body gestures like someone's in an argument or someone that's agitated.
Q. Okay. Were you able to overhear anything being said?
A. No, no, I was not.
Q. Okay. And the young lady was located at the top of the staircase?
A. That's correct.

Q. And where was the man located?
A. At the bottom of the staircase.
Q. Okay. And was this --
A. And he was leaving at that time.
Q. He was leaving. Okay. And I guess this was like daytime, like what, the middle of the afternoon?
A. Yes. Yeah, it was -- I think it was -- yeah, it was in the middle of the afternoon, I believe.
Q. Okay.
A. As far as I can remember, I don't want to give a definite -- I don't want to give, you know, a definite answer, but as far as what I can remember, I believe that's correct.
Q. Okay.
A. But I'm not certain.
Q. Okay. Well, what do you recall observing later on that day?
A. Well, as far as anything else that day, I do not -- I do remember -- I know my wife saw them argue as well. And I believe she said she -- I'm sure you have already talked to her. She said that he said something like I can't wait -- you wait till I get back, sort of thing.
Q. Okay. But this argument that was observed by your wife you were not present at that time?

A. No, I was not.
Q. Okay. And so simply what you know about that is what your wife has told you?
A. That's correct. Nothing that I seen firsthand.
Q. Okay. So would it be correct then the only time you saw Ms. Brown interacting with this man was that one time earlier in the day you just described?
A. That's correct.
Q. Okay. All right.
A. As far as that day in particular.
Q. Right. Had you ever seen that man there before?
A. Yes. Yes, I have.
Q. Do you recall like what was going on the times that you had seen him before?
A. Just simply coming in and out of the apartment. Apparently -- you could tell by, you know, the time that they spent together and everything they were apparently in some sort of relationship.
Q. Okay. Now --
A. Just simply coming in and out of the apartment.
Q. Okay. But you hadn't seen any arguments or anything like that earlier?
A. No. No.
Q. Okay. Now were you ever asked by the

investigators to try to identify this man?
A. I believe so. I believe -- at the time I don't believe I could. I do not remember exactly what he looked like.
Q. Okay. Can you give us a description?
A. Everything that we saw him from or as far as when we saw him was always from a distance.
Q. Okay. Do you recall like how he was dressed or a general physical description of the individual that saw that day?
A. No, I sure don't.
Q. How about this, do you think you could identify that individual again? If you were presented someone, do you think you could identify him?
A. Yes.
Q. And, I mean, if you saw him from a distance, I mean, do you think you'd be able to make out facial features, you know, try to make an identification?
A. Possibly. I would say, yes. I'm good at remembering faces once I've seen them due to the nature of the work that I do. So I'll say possibly.
Q. Okay.
A. There again not a definite.
Q. So you think you got a look at the face of the individual that we're talking about there on that day?

A. I'm sorry?
Q. Do you think you got a look at the face of the individual that we're talking about here, you know, you saw back on January 6th?
A. Yes, as far as remembering the face, I remember what he looks like. Like I say, I'm pretty sure I can remember him and know exactly what he looked like and the attributes of his face.
Q. Okay. Hey, what kind of business are you in that helps, you know, make identifications?
A. I'm a youth minister so I deal with people --
Q. Oh, okay.
A. -- and relationships and with that, remembering people in a -- in a very large group of people and having to remember certain faces and remember certain -- you can remember certain things about that person to identify with the relationship as far as, you know, being in a group, a big group, someone -- and person A, what are they like, who are they, what is the thing that makes them click versus person B so you don't get people confused.
Q. Okay. That makes sense. Okay. And do you recall speaking with the investigators about your observations?
A. I believe so. You know, I do remember speaking

with them that night.

Q. That was my next question. Did you ever talk to them again after that first time that you spoke with them?

A. No. No, we sure did not.

Q. Okay. Is there anything else you can think of about your observations on this particular day back in January of 2007 that you have not described for us yet?

A. I'm trying to think. No, honestly, I sure don't.

MR. PHILLIPS: Okay. Well, thank you here. Mr. Nelson, anything you want to follow up with?

CROSS-EXAMINATION

BY MR. NELSON:

Q. Did you ever see the individual that you're describing drive a car?

A. I believe so. And I -- there again, I don't remember if it was -- if it was the girlfriend's car that I remember seeing or his. I do -- I remember two cars. And I believe one was a red car and one was a green car. I could -- I remember where he parked. I can remember the location where he parked everyday. But as far as, you know, tell -- exactly to differentiate between the girlfriend's car and the boyfriend's car, I could not tell exactly which one was which at the time.

Q. Now, you indicated you remember where he parked everyday. Are you meaning that he parked at the location you saw this incident at everyday?

A. Yeah, I believe -- I believe so. I believe I remember seeing his car in a certain spot, but then I also think about it, I also remember him he also drove a bike as well. So because of the nature of the place -- because of the apartment complex and no one was assigned parking spots and sometimes it's kind of hard to say, you know, whose car is who, just because it's parked in the front of the building doesn't necessarily mean that's his car.

Q. Do you know where that individual lived?

A. No, I sure don't.

Who are we talking about? The girl that lived in the apartment or the boyfriend?

Q. The individual that you saw at the bottom of the stairs.

A. Okay. The -- no, no, I sure do not. I do not know where he lives.

Q. So, to your knowledge, he didn't live there?

A. No. No. I'm very certain that he did not live there.

Q. Did you ever have a conversation with the woman that lived at the apartment?

A. Other than small talk just simply hi, just waving, say hello, no, nothing, nothing -- any sort of deep conversation or monologue.

Q. What, from your observation then, led you to conclude that she -- that he was the boyfriend of that woman?

A. By simple -- one, I mean, I knew that she lived there. You could tell by the nature of him coming and going and her -- and them kissing, hugging good-bye. Watching him leave and watching her stay. Obviously, that indicates some sort of relationship. So just that for the simply them outside talking sometimes hugging, kissing, just showing intimate, you know, intimate motions, intimate gestures towards each other.

Q. When prior to this incident which you testified you saw him at the bottom of the steps did you last see her in any embrace of that individual?

A. Well, there was no sort of embrace or hugging going on that day that I can recall.

Q. My question was prior to that day and that incident that you observed when was the last time you would have physically observed anything that would lead you to conclude it was still a boyfriend/girlfriend relationship by way of hugging or a kiss or anything like that?

A. Well, as far as a specific day, I could not -- I can not remember. Nor can I necessarily remember, you know, days between or anything. So sorry I wouldn't know that.

Q. In other words, do you know whether it was a month before this incident, two months before this incident, five months or -- or how long?

A. You know, I really do not. I just remember -- I just remember that just kind of Ashley and I coming to the conclusion that they were girlfriend and boyfriend by seeing -- by just randomly seeing them do the things that a girlfriend and boyfriend does. As far as a specific day prior to that I couldn't tell.

Q. How long did you live at the condo at the address that you've given us?

A. In Flagler, a year.

Q. Okay. So you could have seen that any time during that one-year period. Is that correct?

A. That's correct, yes.

Q. Okay.

A. And she was living there before we were living there.

Q. Okay. What color car was it -- and I can't remember if I asked you this. What color car did the woman drive?

A. It was either a red car or a green car.
Q. Okay.
A. Like I said, it's sometimes hard to tell exactly whose car is whose in an apartment complex due to the nature of the residence.
Q. Okay.
A. Or due to the nature of the multi-housing residence.
Q. And --
A. I believe because it was on her side, it was either a red car or a green car.
Q. And did you see that male individual that you've described enter the apartment at any time?
A. Yes. Yes, I did.
Q. And tell me about that.
A. Well, as far as that day I do not remember seeing him going in, but just in general as far as my term of living -- living there, I just -- you know, just happen to remember seeing him walk up steps, knock on the door and her -- her letting him in.
Q. Okay. And then let's go to this day. I'm trying to pinpoint this day. This day that we're talking about where you saw him down at the bottom of the steps and you saw the woman at the top of the staircase, did you see him enter that residence that

day?

A. No, I just remember -- I just remember walking out and he was about a quarter way down the steps and because of the nature of him -- the way he was walking and everything, it seemed -- can't really -- you could tell -- I could tell by the way that he was holding his head and the way he was walking, the way that she was at the top of the steps, that they had definitely not just gotten done hugging or kissing or anything which normally they would do 'cause there was definitely an argument going on. And he kind of stopped and at that time I was getting in my car, I could see him looking up and talking, could not hear what they were saying, at that time I really did not -- I couldn't hear anything as far as listening in on conversation across the parking lot, but you could definitely tell that there was an argument just again because of the way they were -- the way they were gesturing.

Q. And at the time you made these observations were you inside or outside your residence?

A. I was inside my car.

Q. Inside your car. Sitting in the parking lot of your condo area?

A. That's correct, which faces directly over to their, to -- to where the lady lived.

Q. Did you see him walk up the steps?
A. No, I did not. I was coming out and coming down the steps by the time that he was coming down.
Q. Was your first observation of him when he was down the staircase approximately one quarter of the way?
A. Yes. Yes, he was, when -- as I was walking down, I looked over and saw that he was coming down, I continued to look down, you know, my steps so I didn't fall and then when I got -- when I -- as I walked to my car, I obviously -- my body was facing her apartment 'cause that's where my car was at. And I could notice at that time he was at the bottom of the steps and they were in some sort of argument.
Q. Did you leave before he did?
A. Yes, I did.
Q. Okay. So did you -- where was your last memory of where you saw him?
A. My last constant memory would be where he was at the bottom of the steps, talking or arguing or just being rude to the lady while I was driving -- while I was in my car.
Q. And do you recall where you were going?
A. I believe I was going to church to get some things done.
Q. Okay. And if I'm correct this was daylight

hours, in the afternoon hours, but you're not sure exactly when?

A. Yes, that's correct. It was daylight hours. It was afternoon. I do know that.

Q. You're sure it's after lunch time?

A. Yeah, I'm pretty sure it was after lunch time. And I know that I changed from one word to the other word, but I'm pretty sure it was after lunch time.

Q. Okay. And do you know what normally that person who lived in that apartment what her work hours were when she came and went from the apartment?

I'm not asking you to speculate, if you don't know. If you know, that's fine.

A. Yeah, I'm trying to think. I don't know, no, I sure don't.

MR. NELSON: Okay. I don't have any further questions.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q. Mr. Gravenstein, I neglected to ask you to identify yourself on the record, please. Could you state your name.

A. Yes, sure, it's Edwin L. Gravenstein, III.

Q. Okay. And you lived in Flagler Beach back in 2007, but now you live in Oakland, Florida?

A. That's correct.
Q. Where is Oakland located?
A. Oakland is located on the outskirts of Orlando. More specifically on the west side, the northwest side around Winter Garden between Winter Garden and Clermont.
Q. Oh, okay. You had a pretty good description of observing this man and this woman over, you know, some period of time that you were living there, it sounds like several months, did you actually see the man driving a car to that apartment?
A. No. But I do remember seeing a car that was there during some points and then seeing a car that was there not during some points. And it was usually whenever he was there that that car was there. So as far as kind of coming to a conclusion that that was his car is one of the things -- I never -- I can't remember -- right now I can not remember specifically him getting in the car, but coming to the conclusion that as far as him being there and that car was there and/or a bicycle was there.
Q. Okay. Now, was this automobile there on the day of January 6th, 2007?
A. Actually, I don't remember. I can not -- I could not tell you. I could not tell you for sure.
Q. Okay. And do you remember like what type of

car it was, what color it was, any details like that?

A. I believe, like I said, I know there was either a green car or a red car.

Q. Green or red?

A. Yeah. Just my memory now. I can not remember if the red car was hers or his or the green car was hers.

Q. Okay. And if I were to tell you the red car was like a little Mini that belonged to her, does that help your recollection any?

A. That's right. It was a Cooper, I believe, wasn't it?

Q. Yes.

A. Red Cooper. Okay.

Q. So what was the other car? It was green?

A. I believe it was green. And I could be describing someone else's car that was there, but I'm pretty sure it was his as far as it was --

Q. Do you remember what type of -- what type of car it was as far as like make, model, number of doors, anything like that?

A. I'm pretty sure it was a four door. And I'm pretty sure it was -- it was a Ford -- oh, man, as far as it was a longer car, I believe. A longer green car. It had -- I believe it did have four doors. And it was

styled kind of like a wagon.
Q. All right.
A. I believe that's correct.
Q. So it was some type of like station wagon kind of vehicle?
A. Yeah, it was a smaller station wagon, but it had that kind of wagon look to it.
MR. PHILLIPS: Okay. All right. I don't believe I have any more questions. Mr. Nelson.
MR. NELSON: Yeah. I have just a couple.

RECROSS-EXAMINATION

BY MR. NELSON:
Q. Did you ever see an individual with a yellow Corvette?
A. I do not believe so, no.
Q. Okay.
A. Is that what the -- is that what he did drive?
Q. Well, I can't put facts in your mind.
A. Okay.
Q. I'm just asking you questions about, you know, the case.
A. Okay. No, I don't believe so.
Q. Okay. And then let me ask you a few other questions. This individual that you indicated you saw that day give us a general description of his height,

build and hair color.
A. Okay. I believe he had dark hair. He -- he was he was a fairly -- as far as his build probably anywhere between five and six-foot range. And he had -- he had a surfer look to him, in a sense. As far as his build, he was -- you know, wasn't extremely fat or extremely skinny or anything. Looked like he was an active individual. I do believe he did surf, so that's pretty much all as far as -- as far as what I can remember of him.
Q. Do you recall whether or not he had glasses on?
A. No, I sure don't.
Q. Now, this individual that you saw her embrace a number of times although you don't remember when it was in that year period that you lived there particularly, did that individual wear glasses?
A. Honestly, I don't remember. There again, due to the distance that we were always -- that we were always kind of seeing him from.
Q. Okay. And do you remember whether or not during this year period of time that you happened to notice an embrace or not, whether there was embraces of other individuals, like another boyfriend?
A. No. No. I do know that it was who I saw there was always the same -- was always the same guy.

Q. Okay.
A. But we never -- we never built a relationship with her. We never -- other than just simply hi and hello. Just seeing him every -- you know, just seeing him on various occasions. I do remember it was always the same individual.
Q. Did you ever meet him and learn his name?
A. No, I sure did not, I did not.
MR. NELSON: Okay. No further questions.
MR. PHILLIPS: Thank you, sir. I don't have any questions either. We can go off the record now.
MR. NELSON: Same agreement. The state likewise agreed with Mr. Phillips to the same agreement that we had in the Ms. Gravenstein's case and that is that this statement could be used as any other deposition at trial or other proceeding.
MR. PHILLIPS: I agree with that.
THEREUPON, the unsworn telephonic statement of EDWIN L. GRAVENSTEIN, III, taken at the instance of MR. PHILLIPS was concluded.
NOTE: The original and one copy of the foregoing unsworn telephonic statement will be held by MR. PHILLIPS; copy to MR. NELSON.

WITNESS' ERRATA SHEET AND SIGNATURE INSTRUCTIONS

The original of the Errata Sheet has been delivered to MR. NELSON, Counsel for the State of Florida.

When the Errata Sheet has been completed by the witness and signed, a copy thereof should be delivered to each party of record and the ORIGINAL delivered to MR. PHILLIPS, Counsel for the defendant, to whom the original unsworn telephonic statement transcript was delivered.

INSTRUCTIONS TO WITNESS

After reading this volume of your unsworn telephonic statement, indicate any corrections or changes to your testimony and the reasons therefore on the Errata Sheet supplied to you and sign it. DO NOT make marks or notations on the transcript volume itself.

*** REPLACE THIS PAGE OF THE TRANSCRIPT WITH THE COMPLETED AND SIGNED ERRATA SHEET WHEN RECEIVED.

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF VOLUSIA

I, Delina M. Valentik, Registered Professional Reporter, Florida Professional Reporter, and Notary Public in and for the State of Florida at large, hereby certify that the witness appeared via telephone for the taking of the unsworn telephonic statement, and that I was authorized to and did stenographically and electronically report the unsworn telephonic statement, and that the transcript is a true and complete record of my stenographic notes and recordings thereof.

I FURTHER CERTIFY that I am neither an attorney, nor counsel for the parties to this cause, nor a relative or employee of any of the attorney or party connected with this litigation, nor am I financially interested in the outcome of this action.

Dated this APR - 3 2008 at Daytona Beach, Volusia County, Florida.

Delina M. Valentik

Delina M. Valentik,
Registered Professional Reporter
Florida Professional Reporter
SCLAFANI WILLIAMS COURT REPORTERS, INC.

VOLUME V

ORIGINAL

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR FLAGLER COUNTY
CRIMINAL CASE NO. 2007-00022-CFFA

STATE OF FLORIDA

vs.

MICHAEL ROBERT EVERETT,

Defendant.

UNSWORN TELEPHONIC STATEMENT OF

ASHLEY NICOLE GRAVENSTEIN

Taken on Behalf of the Defendant

DATE TAKEN: April 3, 2008

TIME: 9:40 a.m. - 9:49 a.m.

PLACE: Office of the Public Defender
1769 East Moody Boulevard
Building 1
Bunnell, Florida

Stenographically Reported by:

Delina M. Valentik,
Registered Professional Reporter
Florida Professional Reporter

APPEARANCES:

Counsel for the State of Florida:

STEPHEN M. NELSON, ESQUIRE
Assistant State Attorney
1769 East Moody Boulevard, Building 1
Bunnell, FL 32110

Counsel for the Defendant:

MATTHEW D. PHILLIPS, ESQUIRE
Assistant Public Defender
251 North Ridgewood Avenue
Daytona Beach, FL 32114

I N D E X

INDEX OF EXHIBITS

(None.)

P R O C E E D I N G S

WHEREUPON

ASHLEY NICOLE GRAVENSTEIN

was examined by telephone and gave the following answers to the questions propounded:

MR. PHILLIPS: Ma'am, thanks for making yourself available. My name is Matt Phillips. I'm an attorney with the public defender's office. And I needed to speak with you. Because of your contact with the detectives in this case you're now on a witness list.

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q. So just to begin with could you state your name for the record.

A. Sure, it's Ashley Nicole Gravenstein.

Q. And, ma'am, what was your address back on January 6 of 2007?

A. It was off of Central Avenue. It was 402, I believe, Central Avenue.

Q. Okay. And who did you live there with?

A. I lived there with my husband. His name is Edwin Gravenstein.

Q. Okay. Well, for today's purpose since we can't

identify -- the court reporter can't identify you over the phone Mr. Nelson, the state attorney, is going to stipulate that we could use this during trial.

So I just wanted to find out what you recall seeing back on January 6th. Do you have a recollection that day, ma'am?

A. I do, yes.

Q. What do you recall seeing?

A. As I was entering my apartment that afternoon, I saw a gentleman leaving the woman's apartment. And he said that her bitch and then mumbled something and said when I come back.

Q. And about how far away were you from this gentleman and Ms. Brown when you heard that statement?

A. It was across the parking lot.

Q. Okay. So you're -- are we talking just -- I don't know -- 20 or 30 feet, something like that?

A. Probably, yes. Between 30 and 50 feet probably.

Q. Okay. And had you ever seen this -- this man you're describing had you ever seen him before?

A. No.

Q. And were you ever shown any photo lineups or anything by the detectives?

A. No, I was not.

Q. Do you think you could identify that individual in the future like if someone was presented to you, do you think you could identify whether or not that's the same person?

A. Possibly. He was -- you know, he was a few feet away so to identify specific facial features, I remember what he was wearing and he had brown hair and glasses, but...

Q. Okay. Like glasses like regular glasses or sunglasses?

A. Glasses. Glasses. Regular glasses.

Q. Okay. And you're sure about that?

A. Yeah, I mean --

Q. Okay. And what kind of clothing do you recall this individual wearing?

A. I remember jeans and a dark jacket.

Q. And when you say dark, do you know what color?

A. No, I couldn't tell a color.

Q. Okay. And do you recall about what time this was?

A. Oh, gosh, probably mid to late afternoon.

Q. So it was still daylight out?

A. Yes. Yes, it was.

Q. Okay. Now, when you spoke to -- do you recall speaking to the detectives in this case?

A. Yes.
Q. How many times did you talk to them do you recall?
A. That night it was just once.
Q. Just once. Okay. They've got down here that you made that observation at approximately six o'clock in the evening. Do you recall telling the detectives that?
A. No, not giving them an exact time. I could have that day 'cause I would have remembered when I came home, but...
Q. Okay.
A. I can't tell you today when I came home that day.
Q. Right. Okay. So your recollection would have been better back then?
A. Yeah.
Q. Okay. All right. Do you remember anything else being said by this individual or by Lindsay Brown?
A. No, I do not.
Q. Okay. And what -- when -- where was this individual located when he made that statement, was he walking down the staircase or do you recall?
A. Yes, he was walking down the staircase from her apartment.

Q. And was this the staircase that goes to the parking lot or goes to the courtyard?
A. That goes to the parking lot, that leads directly in her front door.
Q. Down to where the cars are parked?
A. Yes.
Q. Okay. And do you recall where was she located when that statement was made?
A. I didn't see her.
Q. Oh, you didn't see her at all?
A. No.
Q. Okay.
A. The door was already closed. Her front door was already closed.
Q. I see. And was that like -- was it the regular solid front door or was it the screen door?
A. The solid front door.
Q. Okay. And where did this man go after you heard him make that statement?
A. He was just headed towards the street out of the parking lot.
Q. Okay. Like down past the flower shop?
A. Yes.
Q. Okay.
A. That direction. I just -- I don't know where

he went from there.
Q. But you just saw him walk towards the flower shop and the street?
A. Yes.
Q. Okay. And could you tell anything about his demeanor? You know, did he -- anything about -- not just what he said, but his demeanor how he was behaving?
A. No. No.
Q. Okay. And how about his -- the way he was walking, did he seem like he was walking okay or was he having any difficulty walking?
A. I didn't notice.
Q. Okay. Anything else you can think of about what you viewed that day in the parking lot that you haven't described for us yet?
A. No.
Q. And do you think everything you told me is the same as what you told the investigators?
A. I believe so, yes.
MR. PHILLIPS: Okay. Mr. Nelson, do you have any questions to follow up?
MR. NELSON: Yes.

CROSS-EXAMINATION

BY MR. NELSON:
Q. Ms. Gravenstein, do you personally know the

person who lived at the apartment that you saw this man walking down the steps from?

A. No, I do not.

Q. So you don't know that individual by name?

A. I just know that it's Ms. Brown.

Q. And how do you know that?

A. Because we witnessed the -- all of the action going on that evening, all the coroners coming out of her apartment.

Q. So prior to that time you did not know her name?

A. No, I did not.

Q. And did you know her at all by sight?

A. No.

Q. So you couldn't connect up her name or her physical features by sight?

A. No.

Q. Okay. And is your ability to locate the male on steps solely based on your seeing the commotion that night and relating it to the steps that you observed of that man that day?

A. I'm sorry. Can you rephrase it? I'm sorry.

Q. Yes. If you did not know the person who lived at that apartment by sight or by name, was the only way you connected that man to the steps involving this

incident, the commotion that you saw that night?
A. Yes.
Q. Okay. And were those same steps leading to the steps where you saw the police entering and exiting?
A. Yes.
Q. Okay. And is it correct of what I heard you say that you cannot say whether or not Ms. Brown was home at the time you saw this male coming down the steps?
A. Sure. Yes.
Q. I misunderstood that. Can you say whether or not she was home?
A. I did not see her, so I could not say.
Q. Okay. Do you know what kind of car she drove?
A. It's a red car.
Q. Did you see a red car in the parking lot?
A. Yes.
Q. Okay. So you saw a red car there, but you did not see her and you don't know whether or not she was up there?
A. No, the door was closed when he made that statement.
Q. And this red car that you say was hers, how do you know that if you didn't know her by sight?
A. I had seen a person coming and going from that

apartment frequently in that car.

Q. Uh-huh. And was that a female person?

A. Yes.

Q. Okay. And approximately what age was that female that you saw coming and going from the red car?

A. I could not say.

MR. NELSON: Okay. I don't have any further questions. Thank you.

THE WITNESS: Thank you.

MR. PHILLIPS: Thanks, Ms. Gravenstein.

We're going to go off the record.

MR. NELSON: Just by way of documenting the record, Mr. Phillips and I have agreed that this statement taken over the phone today of Mr. -- or, of Ms. Gravenstein will be agreed to be used just like any other deposition or sworn deposition in the trial or in any other proceeding.

MR. PHILLIPS: I agree with that. Thank you.

THEREUPON, the unsworn telephonic statement of ASLEY NICOLE GRAVENSTEIN, taken at the instance of MR. PHILLIPS was concluded.

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Dated this APR - 3 2008 at Daytona Beach, Volusia County, Florida.

Delina M. Valentik

Delina M. Valentik,
Registered Professional Reporter
Florida Professional Reporter
SCLAFANI WILLIAMS COURT REPORTERS, INC.