IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,

Appellant,

v. **Case No. SC17-2151**
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Delmer Smith, was convicted of first-degree murder and sentenced to death for the brutal murder of Kathleen Briles. Smith attacked Briles while she returned home from the grocery store. He dragged her inside her home, where he bound, gagged, and beat her to death with her twenty-three-pound cast-iron sewing machine. *Smith v. State*, 170 So. 3d 745, 750 (Fla. 2015). Smith then stole numerous items from the home and later pawned many of the stolen items. *Id.* at 751.

The murder occurred on August 3, 2009. Kathleen's husband, Dr. James Briles, found her body when he came home from work in the early evening. (DAR V12/1966, 1972-73). Kathleen's car was parked in the driveway and had grocery bags in the trunk which contained perishable items. (DAR V12/1970; 2046). Dr. Briles noted that the house was unusually dark and very quiet; he had to unlock the back door to get inside, and the dog was acting anxious. (DAR V12/1972). He discovered his wife's body on the floor of their living room. She was still bound and gagged, and he knew she was dead. She was cold, had no pulse, and her jaw and head were deformed. (DAR V12/1972-73). Near her head was a 23-pound antique sewing machine that normally was kept in another room, with broken parts scattered around. (DAR V12/1973,

2030-32; V13/2098). The medical examiner determined from the numerous fractures that the sewing machine was thrown down onto the back of her head at least eight times, resulting in her death by blunt force trauma. (DAR V13/2116-19, 2123-31). Various other recent external and internal injuries were also noted at the autopsy. (DAR V13/2109-14, 2119-23).

Dr. Briles found the home in complete disarray, and the jewelry that his wife had been wearing missing, even her wedding ring had been taken from her finger. (DAR V12/1979-96, 2005-07, 2063). In addition to taking the jewelry off Kathleen's body, Smith had rummaged through the house and taken many valuable belongings estimated to be worth $30,000 to $40,000. (DAR V12/1996). Among the missing property were several unique items, linked directly to Smith shortly after the murder, including a diamond necklace, a men's watch, a Minnie Mouse keychain, a gold padlock key holder, a special set of nickel coins, and a medical encyclopedia. (DAR V12/1997-2005; V13/2229-31; V14/2299-2305).

Family members positively identified a diamond baguette necklace, pawned the day after the murder, as belonging to Kathleen Briles. (DAR V12/1997; V14/2299-2300; V15/2496-98). The necklace was pawned by James Cellecz, an acquaintance of Smith. (DAR V15/2480-81). Cellecz testified that Smith asked him to

pawn the necklace and some other jewelry which, according to Smith, belonged to a mutual friend, because Smith had forgotten his identification. (DAR V15/2480-82).

After Smith was arrested for a separate crime, he placed a few urgent calls to Martha Tejeda, insisting that she go to his storage unit and remove his large duffel bag. (DAR V13/2158-60, 2171-2222). She put the bag up in her attic and later turned it over to the police. (DAR V13/2161-64). There was a small safe inside the bag, and inside the safe police found the Minnie Mouse keychain, the coin set, the gold padlock, and the men's watch. (DAR V13/2229-31).

The Mickey Mouse keychain was a limited-edition piece from a specialty collection boutique in California which Dr. Briles had given Mrs. Briles on their anniversary. (DAR V12/1998-2000; V13/2246-56; V14/2301-02). When found in Smith's bag, it had additional keys which were later found to operate the car that Smith drove in August 2009. (DAR V13/2231; V14/2307-11). Michele Quinones testified that she was Smith's girlfriend at that time and that Smith had given her a set of keys to his car on the Minnie Mouse keychain. (DAR V14/2331).

The medical encyclopedia, which Cellecz had seen in Smith's car the day after the murder, was also among Smith's property at

Tejeda's house. (DAR V13/2164, 2236-37; V15/2483-84). A fingerprint identified as Smith's left index finger was noted on a page inside the book. (DAR V12/2033, 2035; V14/2280, 2283). The Briles's son identified the book as the same one he had borrowed from his mother; he recognized the way the cover was creased and the pages were frayed. (DAR V13/2264-66).

Smith also was known to carry a bag with a mask, gloves, and standard gray duct tape. (DAR V14/2332-33; V15/2483). Mrs. Briles's neck, wrists, and ankles had been bound with duct tape (V12/1972, 2064; V13/2098).

Surveillance cameras captured Mrs. Briles at a Publix grocery store in Palmetto, Florida, the afternoon of her death. (DAR V12/1957-58). Her car is seen leaving the parking lot and headed north at 3:38 p.m. (DAR V12/1960). Her home was in that direction, approximately six-and-a-half minutes from the store. (V14/2306).

Cell phone towers recorded the presence of Smith's cell phone very near to the Briles's home at about 3:44 p.m. that same day. (DAR V14/2408). A call of about six seconds came in to Smith's cell number, but it was not answered. (DAR V14/2418). Other calls and messages transmitted to Smith's phone that day reveal that about an hour before and an hour after the 3:44 p.m.

call, the phone was communicating with towers further south, near Smith's residence in North Port, in Sarasota County. (DAR V14/2404-12). Based on all the evidence introduced at trial, the jury convicted Smith as charged. (DAR V15/2652).

Penalty-phase evidence established that Smith had prior violent felony convictions for robbery and armed bank robbery. The State also established that Smith was on felony probation at the time of the murder. *Smith*, 170 So. 3d at 752. After hearing the evidence of aggravation and mitigation, the jury unanimously recommended that Smith be sentenced to death. *Id.* at 753.

In sentencing Smith to death, the trial court found that the aggravating circumstances overwhelmed the mitigating factors. *Id.* at 754. The court found the following five aggravating circumstances: (1) felony probation ("moderate weight"); (2) prior violent felony convictions ("great weight"); (3) "in the course of a burglary" ("moderate weight"); (4) pecuniary gain (which merged with the "in the course of a burglary aggravator"); and (5) heinous, atrocious, or cruel (HAC) ("great weight"). *Id.* The court found no statutory mitigation and found the following nonstatutory mitigation: (1) intermittent explosive disorder ("moderate weight"); (2) loving relationship with nieces ("little weight"); (3) physical,

emotional, and sexual abuse as a child ("little weight"); (4) acute academic failure and attention deficit disorder ("significant weight"); and (5) good conduct while in custody ("moderate weight"). *Id*.

This Court affirmed Smith's conviction for first-degree murder and sentence of death on appeal. *Smith*, 170 So. 3d at 766. Smith filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied, and his motion for rehearing was also denied. *Smith v. Florida*, 136 S. Ct. 980 (2016), *reh'g denied*, 136 S. Ct. 1487 (2016).

Smith subsequently filed a motion for postconviction relief raising the following seven claims:

1) Ineffective assistance of trial counsel for failing to file a motion to supress evidence the police found from the warrantless search of a duffel bag;

2) Ineffective assistance of counsel for failing to timely file and argue a motion to suppress based on the warrantless search and seizure of his cell phone;

3) The opinion of *Riley v. California*, 134 S. Ct. 2473 (2014), is retroactive to Smith's case;

4) Ineffective assistance of counsel for failing to hire an expert on cell phone tracking and towers to refute the State's expert witness;

5) Counsel was ineffective in waiving the right to cross-examine James Cellecz concerning his withholds of adjudication for child pornography;

6) Counsel was ineffective for failing to conduct a complete investigation of available mitigating circumstances; and

7) Smith's death sentence is unconstitutional in light of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

(PCR pp. 203-227).

An evidentiary hearing was held on all of Smith's claims except for claim seven, his *Hurst v. State* ("*Hurst*"), 202 So. 3d 40 (Fla. 2016) claim. Smith presented the following witnesses: Smith's trial attorneys, Daniel Hernandez and Bjorn Brunvand, expert witnesses Robert Aguero and Dr. Hyman Eisensetin, and his relatives Janet Shelton and Patricia Smith. The State cross-examined Smith's witnesses, but it did not present any additional witnesses. The relevant testimony from the evidentiary hearing is summarized below.

Attorney Daniel Hernandez

Attorney Daniel Hernandez was Smith's trial counsel for the guilt phase of his trial. (PCR p. 1095). Mr. Hernandez had been an attorney since 1977, and he had been handling capital cases since the 1980s. (PCR p. 1095). He had handled approximately thirty capital cases. (PCR p. 1095).

Mr. Hernandez testified that he did not retain a cell phone expert in Smith's case. (PCR p. 1109). He has done so in other cases, but he did not believe it would be helpful in this case.

(PCR pp. 1109, 1112, 1127). Mr. Hernandez explained that he cross-examined the State's expert, Detective Diamond ("Diamond"), in an effort to show that cell phone tracking was not "terribly specific." (PCR pp. 1109, 1126). He believed that the information that he could get out through the cross-examination of Diamond "was the better way to go" rather than hiring an independent cell phone expert. (PCR p. 1126).

Mr. Hernandez had not contemplated filing a motion to suppress the forensic investigation report of Smith's cell phone because warrantless searches of cell phones were lawful at the time the search was conducted. (PCR pp. 1101, 1103). He stated that "there was no basis for such a motion." (PCR p. 1101). Mr. Hernandez was aware of the case of *Smallwood v. State (Smallwood I)*, 61 So. 3d 448, 459 (Fla. 1st DCA 2011), but he did not remember when he first became aware of it. (PCR p. 1103).

Upon being asked if he would have raised the issue to preserve it if he had been aware that the Florida Supreme Court was going to be specifically addressing the issue of whether a warrantless search of a cell phone was constitutional, Mr. Hernandez stated that he might have filed a motion for continuance of the trial. (PCR p. 1104). He stated, "I don't think it would have changed my position regarding filing a

motion to suppress, because we're dealing with the law that existed at that time." (PCR p. 1104). Mr. Hernandez agreed that a motion could have been filed when the *Smallwood v. State (Smallwood II)*, 113 So. 3d 724, 740 (Fla. 2013), opinion came out before Smith's sentencing. (PCR p. 1106). Mr. Hernandez also stated that other witnesses, like Martha Tejeda, had Smith's cell phone number. (PCR p. 1124).

Mr. Hernandez admitted that he did not file a motion to suppress the evidence seized from the warrantless search of duffel bag. (PCR p. 1114). He explained,

> my understanding of it, number one, is that the police, based on overhearing a phone call with Mr. Smith and Ms. Tejeda, that they felt that there was some items that could be evidence in the case, that initially – and it was retrieved by Ms. Tejeda at the request of Mr. Smith. And that initially when the police approached her and asked for it, she did not turn it over […] the police left, but then she called law enforcement and said I want you to have this, and she turned it over to the police. And that revealed the encyclopedia as well as the other items in the duffel bag.

(PCR p. 1114). He testified that the items had been surrendered to the police by Ms. Tejeda and the items inside the bag were stolen. (PCR p. 1115). Mr. Hernandez explained that given the circumstances of what he knew about the bag and its contents, he never seriously felt that there was a good-faith basis for filing a motion to suppress. (PCR p. 1116).

Bjorn Brunvand

Attorney Bjorn Brunvand was appointed to handle Smith's case along with Mr. Hernandez. (PCR p. 1109). Mr. Brunvand handled the penalty phase of the trial, although he consulted with Mr. Hernandez about some of the guilt-phase issues. (PCR p. 1010). Mr. Brunvand has been a board-certified criminal trial lawyer since 1989, and he had been handling capital litigation since the early-to-mid 1990s. (PCR p. 1109). He handled approximately twenty-five capital trials and approximately twenty-five capital cases that did not go to trial. (PCR P. 1038).

Mr. Brunvand testified that Smith was not interested in the penalty-phase aspect of the case; his interest was in the guilt/innocence phase. (PCR p. 1012). "He did not wish for us to reach out to family. And if I remember right, there was a time period where he was not willing to meet with Dr. Eisenstein." (PCR p. 1012). Mr. Brunvand remembered that he had retained Dr. Eisenstein even though Smith did not want to participate. (PCR p. 1012). Mr. Brunvand recalled that Smith had initially refused to sign releases for the records, but at some point, he did sign the releases so that records could be obtained and provided to Dr. Eisenstein for his review. (PCR p. 1012).

Mr. Brunvand explained to Smith that his job was to try to save his life. (PCR p. 1014). Smith "wasn't very interested in it, […] but agreed to at least sign releases […] so that we could at least start that process. But as far as communicating with his family, he did not wish for us – in fact instructed us not to. Up until shortly before the trial." (PCR p. 1014). Smith also did not want his family to testify. (PCR p. 1139).

Mr. Brunvand admitted that even though Smith had instructed him not to reach out to his family, he eventually made the call to contact the family. (PCR p. 1016). Mr. Brunvand had Colleen Quinn-Adams assisting him as the mitigation specialist, and he had instructed Ms. Quinn-Adams to speak with Smith's sister Alice Smith. (PCR pp. 1016, 1019). Mr. Brunvand explained:

> So trying to maintain a relationship with a client is important, and trying to follow his wishes as far as who to contact and not to contact, I think is something we try to do to the extent that we can. However, as we were getting closer to trial my recollection is that I'm the one that basically advised Colleen Quinn-Adams that at this point I don't care about the fact that he's saying no, I want you to reach out to them.

(PCR p. 1016). After he told Smith that they had reached out to his sister Alice, Smith was "unhappy" and further attempts to reach out to his sisters were unsuccessful. (PCR pp. 1015, 1019). Mr. Brunvand explained,

> So Colleen Quinn-Adams had contact with her, obtained information, corroborated some information, we went to see Mr. Smith -– and I'm thinking it's probably about two weeks before trial, the beginning of trial – or the beginning of jury selection. He was upset that we had reached out to the family member. And what, if anything, happened as far as him having contact with the family member, I don't know, but that sister went from being cooperative and willing to talk with us to not responding to our phone calls.

(PCR p. 1015). After Smith learned that contact had been made with Alice Smith they "were not able to have any contact […] with any of the other siblings." (PCR p. 1019).

Mr. Brunvand testified that information from Smith's sisters, Janet and Patricia, about the abuse suffered by Smith would have further corroborated the information they already had from Smith's sister Alice. (PCR pp. 1021-22). If Smith's other siblings would have been willing to speak with Mr. Brunvand, he would have put them in touch with Dr. Eisenstein. (PCR p. 1020).

Dr. Hyman Eisenstein

Dr. Eisenstein, a clinical psychologist with a specialty in clinical neuropsychology, began working with capital and criminal cases thirty years ago. (PCR pp. 939, 941). His work in capital cases involved evaluating whether there are mitigating circumstances for a defendant. (PCR p. 941). He testified approximately 150 times, and all of his testimony has been for the defense. (PCR pp. 989-90).

Dr. Eisenstein was contacted by Mr. Brunvand and Mr. Hernandez in June of 2012, and he was retained to perform work in Smith's case. (PCR p. 943). Dr. Eisenstein reviewed background material provided to him by Mr. Brunvand, which included a psychiatric evaluation conducted by Dr. W.R. Robinson in 1986, a psychological report conducted by Ben May in 1986, summary, impressions, and recommendations of Dr. John DeLuca from 1988, Maxey Training School records from 1987-89, a presentence investigation report from Smith's federal case, Federal Bureau of Prison records from 1992-2008, and Venice Regional Medical Center records from 2009. (PCR pp. 946-47). He also completed a two-day neuropsychological evaluation on Smith. (PCR p. 943). His bill of services was admitted into evidence during the evidentiary hearing. (PCR pp. 943-44). He spent approximately 42 hours reviewing background materials or conducting face-to-face interviews with Smith. (PCR p. 993).

Dr. Eisenstein testified that he would have preferred to have been retained a minimum of six months prior to the trial, but he was only retained a month before the trial in Smith's case. (PCR pp. 944-45). Dr. Eisenstein believed that he was likely retained later because Smith was not willing to cooperate with the neuropsychological testing, and Smith had refused the

PET scan and MRI. (PCR pp. 945, 995).

Dr. Eisenstein was also aware of the fact that Smith was not allowing his attorneys to speak with his family prior to his trial. (PCR p. 995). Dr. Eisenstein said that this could have had something to do with why he was never provided the contact information for Smith's sisters. (PCR p. 995). Dr. Eisenstein believed that speaking with Smith's siblings that grew up with him would have been helpful to hear what they had to say about Smith being abused. (PCR p. 960). The information would have helped him understand to what extent the abuse occurred, how often, and how pervasive it was, "and really what were the conditions, and of course what was the impact on Mr. Smith and his siblings." (PCR p. 961). He testified that he was never provided that additional information concerning Smith's siblings or asked to go to Detroit to speak with them personally, although he admitted that had spoken with one of Smith's siblings, Alice Smith, on the phone when he was initially retained. (PCR pp. 962, 994, 1005).

Dr. Eisenstein originally testified at Smith's trial that Smith had been physically and emotionally abused; there had been allegations of sexual abuse by Smith's father; the entire family was subjected to psychological abuse; the mother and father were

emotionally abusive toward Smith; and the mother called Smith a "half-breed, n-word" and similar types of names. (PCR p. 998).

More recently, Dr. Eisenstein was retained by Smith's collateral counsel to conduct further evaluations of Smith and to do more investigation as to potential mitigating circumstances. (PCR p. 966). After spending an additional six to seven hours with Smith and conducting additional testing, Dr. Eisenstein did not gain any additional testing results that were dramatically different from the results of the first round of testing. (PCR pp. 988, 999).

In addition, Dr. Eisenstein went to Detroit with Smith's collateral counsel and his investigator to interview Smith's siblings to see what they had to say about the abuse and about growing up in Detroit. (PCR p. 967). He found the method of going to and personally speaking with the witnesses to be superior to speaking on the phone to them or relying on reports. (PCR p. 967).

In speaking with Patricia Smith, he learned that Smith's father was very strict. He used extension cords, sticks, metal rods, pots, pans, and belts to hit the children. (PCR p. 969). All the children were abused but Smith "got it the worst." (PCR p. 969). If Smith got in trouble in school and got paddled, he

then would get paddled again at home. (PCR p. 969). She compared Smith's abuse to slavery. She stated that he would get welts and red marks on his back. (PCR p. 969). Smith was also abused emotionally. He was called "half-breed, the n-word, and also a bitch." (PCR p. 970). Smith's father made them perform very hard and heavy manual labor involving bricks and iron rods. (PCR p. 971).

Dr. Eisenstein learned from Janet Shelton that there was a lot of domestic violence between their parents. (PCR p. 977). She advised that Smith was beat from the age of five until the age of approximately thirteen. (PCR p. 978). Smith was usually beat by his father, but sometimes his mother did as well. (PCR p. 979). Shelton stated that Smith was abused every weekend and every two to three days. (PCR p. 978). He would get "whoopings" with cords, switches, and belts. (PCR p. 978). Smith was often hit while he was naked after he had bathed. (PCR p. 978). According to Shelton, Smith would be tied to a pole in the basement and whopped there. (PCR p. 978). Smith's father also forced him to clean soot off bricks, pick up scrap metal, and clean copper and aluminum. (PCR pp. 979-89). Smith was called names like, "half-breed, the n-word, bitch, a piece of dirt, the s-word" and he was told "you'll never be anything, you are

nothing, get out and don't come back." (PCR p. 980).

Dr. Eisenstein testified that this additional information added "a very significant dimension" in terms of understanding the abuse and the effects it had; "it certainly gave an opportunity to expand upon a deeper and more thorough understanding of the diagnostic implications in this case." (PCR p. 983). His "additional diagnosis" was "child physical abuse, *confirmed*. And child psychological abuse, *confirmed*." (PCR p. 983) (emphasis added). He also added the diagnoses of post-traumatic stress disorder and borderline personality disorder resulting from the abuse Smith suffered. (PCR pp. 984, 1001).

Dr. Eisenstein admitted that he had initially diagnosed Smith with child abuse and emotional child abuse in his pretrial evaluation, but he explained that he wrote "confirmed" in his postconviction evaluation. (PCR p. 1000). He agreed that it had been confirmed in his mind through speaking with Smith's sisters. (PCR p. 1000). Upon being asked if Smith could have confirmed that information, Dr. Eisenstein stated, "The defendant has denied or hasn't been forthcoming with this information." (PCR p. 1001). Smith had never disclosed to Dr. Eisenstein that he had been physically, sexually, or emotionally abused. (PCR pp. 994, 999).

Smith's sister Janet Shelton testified during the evidentiary hearing via telephone. (PCR pp. 1047-1059). The video deposition of Patricia Smith was also admitted. (PCR pp. 345-371). Patricia Smith and Janet Shelton discussed Smith's childhood abuse and relayed information consistent with what they had provided Dr. Eisenstein.

Robert Aguero

Robert Aguero, who owns CTF DataPro, Incorporated, and conducts cell phone forensics and cell-tower data analysis, also testified for Smith. (PCR pp. 1064-65). While Aguero agreed with the majority of the mapping compiled by Detective Diamond (PCR pp. 1081-84) during the trial, Aguero believed that Diamond made some faulty assumptions with regard to cell phone tower 304. (PCR p. 1068) He explained that on the maps prepared by Diamond, the south-facing sector was made very narrow and the other two sectors were made very wide. (PCR p. 1069). "The only thing I read in the transcript was his opinion that the south-facing sector covered the freeway therefore it had to be smaller, and that the other two were just for overlapping coverage." (PCR p. 1069). Aguero made his map using 120 degrees to diagram tower 304, but he admitted that the figure was not exact. (PCR p. 1086). "Some can be a little less than 120, some can be a little

more than 120." (PCR p. 1086). The main point of contention between Aguero and Diamond was with the mapping of sector three. During cross-examination, Aguero drew both his and Diamond's diagrams of sector three to illustrate the difference of degrees between his sector and the one made by Diamond. (PCR pp. 1087-88).

Aguero also opined that Diamond had incorrectly testified that the furthest range of connection from the tower would have been seven to eight miles. (PCR p. 1072). Aguero testified that the maximum range tends to be closer to thirty miles. (PCR p. 1073). He clarified that that maximum range is not necessarily the operational range, and the operational range is smaller than thirty miles, but he had never heard of a range of seven to eight miles. (PCR p. 1073). Aguero concluded that the range could be from a few blocks from the tower all the way up to thirty miles. (PCR p. 1074).

Aguero conceded that Diamond's exhibit just showed the distance between the tower and the victim's residence; it did not purport to show where the cell phone was located. (PCR p. 1085). Diamond's map showed the victim's home to be 1.24 miles away from the cell tower, and Aguero agreed that it was within range of the tower by either his or Diamond's standards. (PCR p.

1085).

Aguero did not have an opinion as to what sector of tower 304 the victim's home was within. He stated that "potentially it could be within coverage" of sector three. (PCR p. 1091). According to Aguero, it would be impossible to pinpoint the location of a phone with the data used in this case, and he did not recall that Diamond had tried to pinpoint the location of the phone. (PCR p. 1091).

After the evidentiary hearing and submission of closing arguments, the circuit court subsequently entered an order ultimately denying all Smith's claims. With the first claim involving the failure to file a motion to suppress the contents of the duffel bag, the court found that Smith "had no legitimate expectation of privacy in the subject duffel bag because he abdicated ownership of the duffel bag, or at least extended dual ownership of the bag, to Ms. Tejeda." (PCR p. 713). The court pointed out that Smith had told Tejeda in recorded jail phone calls that "I need you to go take all my bags, they're big duff[el] bags. Take all of them to your house *and go through them*." (PCR p.713). Smith further told Tejeda to put the clothes from the duffel bag "in the trash." (PCR p. 713). The court found that the duffel bag was freely accessible to Tejeda and

she had full access to everything in it except the locked personal safe, which law enforcement obtained a warrant to search. (PCR p. 714). Therefore, it concluded that even if Smith's trial counsel had filed the motion to suppress, it would not have been granted; and because the motion would have been meritless, Smith's counsel cannot be ineffective. (PCR p. 715).

Under the second claim regarding the motion to suppress the search of Smith's cell phone, the lower court noted that Smith's trial counsel was operating under the precedent of *Smallwood I*, which affirmed the trial court's denial of a motion to suppress a warrantless search of a cell phone by finding it did not violate Fourth Amendment principles. (PCR p. 717). The court concluded that in light of *Smallwood I*, even if Smith's counsel had filed the proposed motion to suppress, it would have been denied by the trial judge. (PCR p. 718). "Defense counsel's failure to file a motion to suppress evidence obtained as a result of a search does not constitute ineffective representation where the case law at that time did not require suppression of the evidence." (PCR pp. 718-19).

The trial court found Smith's third claim alleging that *Riley v. California*, 134 S. Ct. 2473 (2014) should apply retroactively to his case procedurally barred. (PCR p. 720). The

court found that even if it had not been procedurally barred, the evidence obtained from Metro PCS would not have been excluded from Smith's trial under *Riley*. (PCR pp. 720-21).

The court also rejected Smith's ineffective assistance of counsel claim regarding the failure to hire an expert witness on cell phone tracking. The court noted that Smith's expert witness did not provide significant testimony during the evidentiary hearing. "Considering the totality of evidence presented, both during Mr. Smith's trial and at the evidentiary hearing, the Court finds the issue of whether the maximum range of typical cell tower is 7-8 miles (as Detective Diamond testified) versus 30 miles (as Mr. Aguero testified) is of no value at all." (PCR p. 724). The court further noted that the victim's home could have been within the limits of the map drawn by Smith's expert. (PCR p. 724). "In short, Mr. Smith has failed to establish that his proposed expert's testimony would have refuted the fact "that on 3:44 p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when smiths cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower that was 1.24 miles away from the victim's home." (PCR p. 724). The court lastly found that it was a strategic

decision for Smith's trial counsel to cross-examine the State's expert rather than hiring his own expert. (PCR p. 724).

Next, the lower court found Smith's fifth claim without merit because Smith's counsel could not cross-examine witness James Cellecz about his criminal convictions when adjudication was withheld. (PCR p. 726). As to claim six, the court found that Smith's counsel was not ineffective in his investigation of mitigation. The court found that the reasonableness of Smith's counsel's actions was substantially influenced by Smith's own actions in not wanting his family to be involved with his trial. (PCR pp. 728-29). Nevertheless, the court found that regardless of Smith's own lack of cooperation in preparing for the penalty phase of his trial, Dr. Eisenstein's additional opinions in his case "lead to no avail." (PCR p. 729). Specifically, "the proposed 'enhanced' mitigation evidence would not have outweighed the five aggravating circumstances the Court found at sentencing." (PCR p. 729). Lastly, the court found Smith's *Hurst* error was harmless given the unanimous jury recommendation for death. (PCR pp 731-32).

This appeal follows.

PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "DAR V_/_" with the appropriate volume number and page number inserted within the blanks. Additionally, the instant postconviction proceedings will be referred to as "PCR p. __" with the referenced page number of the record inserted in the blank.

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly denied Appellant's claim that his counsel was ineffective in his penalty-phase investigation of mitigating circumstances. Appellant instructed counsel not to involve his family in the penalty phase. Appellant now argues that his counsel should have obtained information from his sisters; however, at the time leading up to trial and during trial, Appellant prevented his counsel from communicating with his sisters. In addition to failing to prove deficient performance, Appellant also failed to establish prejudice where most of the information obtained from his sisters was cumulative of the penalty-phase evidence presented.

Issue II: This Court should affirm the lower court's denial of Appellant's claim that his counsel was ineffective in failing

to file a motion to suppress evidence seized from a warrantless search of a duffel bag. Appellant had asked Martha Tejeda to retrieve the duffel bag from his storage unit, to take it to her house, and to go through the bag. While the duffel bag was in Tejeda's possession, she turned it over to law enforcement. Law enforcement inventoried the contents of the bag and obtained a warrant to search a safe inside the duffel bag that contained most of the items at issue. The safe contained a rare coin collection, a Minnie Mouse key chain, a men's watch, and a lock, and there was also a medical encyclopedia inside the duffel bag that was not in the safe. All these items were stolen from the victim.

Notably, even without the search of the duffel bag, law enforcement acquired other stolen items from the victim that were linked to Appellant. Appellant had his friend James Cellecz pawn the victim's diamond necklace for him the day after the murder. Appellant also gave the victim's watch to his girlfriend Michele Quinones. Quinones subsequently turned the watch over to law enforcement. Given that there was evidence that Appellant had other stolen items from the victim, a motion to suppress the items from the duffel bag would not be dispositive. Accordingly, the trial court's denial of this claim should be affirmed.

Issue III: In his third issue, Appellant claims that his counsel was ineffective for failing to file a motion to suppress phone information and records. Appellant alleges that his counsel should have filed a motion to suppress a report listing Appellant's phone number, service provider, and contact list that law enforcement obtained using a scanning device on his phone without a warrant when his phone was in police custody; however, there was no basis for counsel to file the motion because warrants were not required at that time. Appellant essentially argues that counsel should have been on notice of the possibility of the law changing, but as this Court has long acknowledged, counsel cannot be deficient for failing to anticipate changes in the law. *Bradley v. State*, 33 So. 3d 664, 682 (Fla.), *as revised on denial of reh'g* (Apr. 22, 2010); *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2001); and *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992).

Additionally, Appellant argues that counsel should have filed a motion to suppress historical cell cite information records that law enforcement acquired from Metro PCS in 2009, but there was no case requiring law enforcement to obtain a warrant, and Fourth Amendment law at that time generally held that people did not have an expectation of privacy in phone

records. *Mitchell v. State*, 25 So. 3d 632, 635 (Fla. 4th DCA 2009) (holding that a cell phone user has no expectation of privacy in historical cell site information); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (no Fourth Amendment search occurred where the police, acting without a warrant, had the telephone company install and use a pen register to record the numbers dialed from the telephone at petitioner's home).

Issue IV: Appellant is not entitled to relief pursuant to *Riley v. California*, 134 S. Ct. 2473 (2014). The lower court properly determined that this claim was procedurally barred from being raised in a postconviction motion. Moreover, Appellant's argument that he is entitled to retroactive application of *Riley* is flawed. Appellant relies on the pipeline concept for retroactivity to claim entitlement to relief; however, his case is on collateral review, so the pipeline concept no longer applies to him.

Issue V: The lower court properly denied Appellant's claim that his counsel was ineffective for failing to hire an expert in cell phone towers and tracking. The expert that postconviction counsel hired, Robert Aguero, did not produce any testimony during the evidentiary hearing that, if had been presented during trial, would have resulted in Appellant's

acquittal. Aguero agreed with much of the testimony from the state's witness, Detective Diamond, regarding his cell phone tracking. Significantly, Aguero would not have refuted the main cell phone evidence used against Appellant at trial showing that Appellant's cell phone received a call around the time of the murder using a cell phone tower that was located 1.24 miles away from the victim's home.

Issue VI: The lower court's denial of relief pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), requires affirmance where Appellant's jury unanimously recommended death and any alleged *Hurst* error was clearly harmless.

STANDARD OF REVIEW

The instant case involves the appeal of Appellant's postconviction claims which mostly involve allegations of ineffective assistance of counsel. To be entitled to postconviction relief, Smith had to show that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Both the deficiency prong and the prejudice prong of the *Strickland* test present mixed questions of law and fact, so this Court employs a

mixed standard of review. *Wickham v. State*, 124 So. 3d 841, 858 (Fla. 2013).

Ineffective assistance claims are reviewed under a mixed standard of review because the performance and prejudice elements of *Strickland* present mixed questions of law and fact. *Bradley v. State*, 33 So. 3d 664, 672 (Fla. 2010). "Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses." *See Cox v. State*, 966 So. 2d 337, 357–58 (Fla. 2007). Therefore, this Court defers to the postconviction court's factual findings so long as those findings are supported by competent, substantial evidence. *Wickham v. State*, 124 So. 3d at 858. However, this Court reviews the postconviction court's legal conclusions de novo. *Lebron v. State*, 135 So. 3d 1040, 1052 (Fla. 2014).

When reviewing ineffective assistance of counsel claims, "[j]udicial scrutiny of counsel's performance must be highly deferential, and 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 v. Washington*, 466 U.S. 668, 669 (1984). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

ARGUMENT

ISSUE I

COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DENIAL OF RELIEF WHERE SMITH'S COUNSEL WAS NOT DEFICIENT IN HIS INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE ESPECIALLY GIVEN THAT IT WAS HAMPERED BY SMITH'S UNWILLINGNESS TO HAVE HIS SISTERS INVOLVED AND THERE WAS NO PREJUDICE WHEN THE MITIGATION PRESENTED BY DR. EISENSTEIN DURING THE EVIDENTIARY HEARING WAS CUMULATIVE OF HIS FINDINGS PRESENTED AT THE TRIAL.

In Smith's first claim, he alleges that his trial counsel failed to conduct a complete investigation of mitigating evidence. Smith's postconviction counsel asserts that he provided "Dr. Eisenstein [with] important additional mitigating evidence, acquired during the post-conviction investigation – and which could have been discovered at the time of trial – which significantly enhanced the opinions of Dr. Eisenstein concerning mitigating circumstances available in Mr. Smith's case." Initial Brief at 57 and 58. This simply is not true. As will be shown, after further investigation during the postconviction phase, including additional interviews conducted by Dr. Eisenstein, very little, if any, information was found that had not already been known by Dr. Eisenstein at the time of trial. Additionally, the only reason why Smith's counsel did not

present the additional information at issue to Dr. Eisenstein in the first place, is because Smith prevented him from doing so.

As Smith explains in his brief, the additional information that he felt was significant came from Smith's sisters Janet Shelton and Patricia Smith regarding physical and emotional abuse Smith suffered as a child from his parents. Initial Brief at 58-60. While Dr. Eisenstein had talked with Smith's sister Alice Smith over the phone when he was initially retained by Smith's trial counsel, he did not speak with Smith's other sisters Patricia Smith and Janet Shelton, nor did he meet with any of the sisters in person. When Smith's collateral counsel retained Dr. Eisenstein for the collateral proceedings, they traveled to Michigan together to speak with Smith's sisters Patricia and Janet. Smith now alleges that the information gleaned from Janet and Patricia was so significant that his trial counsel was ineffective for not obtaining it.

The standard for ineffective assistance of counsel is not whether collateral counsel has found any additional mitigating evidence that could have been presented. *Hodges v. State*, 885 So. 2d 338, 347 (Fla. 2004) (explaining that the presentation of additional mitigating evidence in the postconviction proceeding does not establish ineffective assistance of counsel). Instead,

Smith must show that his counsel's efforts fell outside the "broad range of reasonably competent performance under prevailing professional standards." *Id*. (quoting *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)). In deciding whether counsel was ineffective, this Court is required to examine not only counsel's alleged failure to investigate and present possible mitigating evidence, but the reasons for doing so. *Rodriguez v. State*, 919 So. 2d 1252, 1263 (Fla. 2005). Here, trial counsel was not able to speak with Smith's sisters Patricia and Janet because Smith did not want them involved at the time of the trial.

Smith's penalty-phase counsel, Bjorn Brunvand, who had been a board-certified criminal trial lawyer since 1989 and had been handling capital litigation since the 1990s, testified at Smith's postconviction evidentiary hearing that Smith was not interested in the penalty-phase aspect of the case. (PCR p. 1012). Smith also made it very clear that he did not want Mr. Brunvand reaching out to his family. (PCR pp. 1012, 1039).

Despite Smith's instruction to Mr. Brunvand not to involve his family, Mr. Brunvand eventually decided to have his mitigation specialist, Collen Quinn-Adams, contact Smith's sister Alice Smith. Mr. Brunvand explained during the

evidentiary hearing that it was getting closer to trial and he recalled telling Ms. Quinn-Adams “at this point I don’t care about the fact that he’s saying no, I want you to reach out to them.” (PCR p. 1016). According to Mr. Brunvand, after he told Smith that they had reached out to his sister Alice, Smith was “unhappy” and further attempts to communicate with Smith’s sisters were unsuccessful. (PCR pp. 1015, 1019). Smith has failed to show how his counsel’s performance was deficient under these circumstances.

The facts of this case are comparable to those in *Brown v. State*, 894 So. 2d 137, 146 (Fla. 2004), where Brown initially did not want to present any penalty-phase evidence but his counsel was able to convince him to allow the testimony of Dr. Dee and Brown’s mother. Brown subsequently raised a postconviction claim that his counsel was ineffective for failing to investigate and present mitigation evidence. *Brown*, 894 So. 2d at 146. However, this Court found that trial counsel's inability to present further mitigation could not be considered ineffective in light of Brown's limitations on counsel's penalty-phase investigation. *Id*; *see also Krawczuk v. State*, 92 So. 3d 195, 2044 (Fla. 2012) (where counsel’s ability to present mitigation was limited by the defendant’s desire not

to include his family).

The same is true for this case. Initially, Smith did not want to have anything to do with his penalty phase. He refused to meet with Dr. Eisenstein and refused being tested for mental health mitigation. (PCR p. 1012). Smith would not sign release forms for Mr. Brunvand to obtain records and documents that were relevant to mitigation. (PCR p. 1014). Mr. Brunvand was eventually able to convince Smith to sign releases, to meet with Dr. Eisenstein, and to undergo the testing, but he could not convince Smith to allow his family to be involved.

Smith did not want Mr. Brunvand speaking with his family, and Smith also withheld evidence from Dr. Eisenstein about the abuse he suffered as a child. Smith cannot fault his trial counsel for failing to gain additional information about Smith's abuse, when Smith withheld the information and prevented his counsel from obtaining it from Smith's family members. The lower court aptly noted "that 'the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" (PCR p. 728) (citing *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000)). Here, Mr. Brunvand presented all the information obtained during the penalty phase of Smith's trial, and the only reason why he did not present the

evidence obtained from Smith's sisters during the postconviction investigation is because Smith prevented him from doing so. The trial court correctly determined that **"any arguable shortcomings of the penalty phase of Mr. Smith's trial arose mainly from his strict instructions to counsel not to speak to his family members and that his own lack of cooperation in preparing for the penalty phase undermines his present allegations of ineffective assistance of counsel."** (PCR p. 729) (emphasis added). Competent, substantial evidence supports the trial court's ruling.

This Court should affirm the lower court's denial of relief because Smith's counsel cannot be considered deficient for failing to present evidence that Smith prevented him from obtaining. *See Brown v. State*, 894 So. 2d 137, 147 (Fla. 2004) (where the defendant's "lack of cooperation at the penalty phase undermines [the defendant's] present allegations of ineffective assistance of counsel."); *Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 2000) ("[W]hile counsel appears to have failed to give [the psychiatrist] sufficient information upon which to base an evaluation, counsel testified at the hearing that he would have given [the psychiatrist] everything within his possession, which in this case was apparently very little because of [the

defendant's] alleged lack of cooperation."); *Sims v. State*, 602 So. 2d 1253, 1257–58 (Fla. 1992) (concluding that counsel could not be considered ineffective for honoring the defendant's wishes where the defendant directed counsel not to collect other mitigating evidence). Smith failed to meet his burden of establishing deficient performance under *Strickland*.

Next, even if Smith's counsel could somehow be considered deficient, Smith has absolutely failed to show how he was prejudiced by the alleged deficiency. Smith alleges that his postconviction counsel found additional mitigation evidence that would have "significantly enhanced the opinions of Dr. Eisenstein concerning mitigating circumstances available in Mr. Smith's case," but Smith failed to prove as much during the evidentiary hearing.

Dr. Eisenstein testified at the evidentiary hearing that he had spent approximately forty-two hours reviewing background materials provided by Smith's penalty-phase counsel, Mr. Brunvand, and conducting face-to-face interviews with Smith prior to Smith's penalty phase. (PCR p. 993). He would have preferred to have been retained a minimum of six months prior to the trial, but he was only retained a month before the trial in Smith's case, which was likely because Smith had refused to

cooperate. (PCR pp. 944-45, 995).

Dr. Eisenstein explained that he had not spoken directly with Smith's siblings prior to the trial, and it would have been helpful to hear what they had to say about Smith being abused. (PCR p. 960). He testified that he was never provided that additional information concerning Smith's siblings or asked to go to Detroit to speak with them personally. (PCR p. 962). On the other hand, Dr. Eisenstein admitted that he was aware that Smith was not allowing his attorneys to speak with his family prior to his trial, so that may have had something to do with why he was never provided the contact information for Smith's sisters. (PCR p. 995). According to Dr. Eisenstein, the information from Smith's sisters would have aided him in understanding to what extent the abuse occurred, how often, and how pervasive it was, "and really what were the conditions, and of course what was the impact on Mr. Smith and his siblings." (PCR p. 961).

Even without that information, however, Dr. Eisenstein was still able to testify at Smith's trial that Smith had been physically and emotionally abused; there had been allegations of sexual abuse by Smith's father; the entire family was subjected to psychological abuse; the mother and father were emotionally

abusive toward Smith; and the mother called Smith a “half-breed, n-word” and similar types of names. (PCR p. 998). Dr. Eisenstein had initially diagnosed Smith with “child abuse and emotional abuse,” and he provided that diagnosis during the penalty phase. Notably, the trial court found the following mitigating circumstances during Smith’s penalty phase: Smith had intermittent explosive disorder, he was physically, emotionally, and sexually abused as a child, he had acute academic failure, and he had Attention Deficient Disorder.

Dr. Eisenstein’s additional investigation, interviews, and testing during the postconviction proceedings did not unearth any significant mitigation that had not already been presented during Smith’s trial. After spending an additional six to seven hours with Smith and conducting additional testing, Dr. Eisenstein did not gain any additional testing results that were dramatically different from the results of the first round of testing. (PCR p. 999). **The only true difference between Dr. Eisenstein’s pretrial and postconviction evaluations is that Dr. Eisenstein was able to “confirm” that Smith suffered from child abuse and emotional abuse after he had spoken to Smith’s sisters and he added the diagnosis of post-traumatic stress disorder from the abuse.** (PCR p. 1000). Smith has failed to show how this

additional information would have impacted his penalty phase.

The trial court properly determined that "regardless of Mr. Smith's own lack of cooperation in preparing for the penalty phase of his trial, […] Dr. Eisenstein's alleged *now*-significantly-enhanced opinions concerning mitigating circumstances available in Mr. Smith's case lead to no avail." (PCR p. 729). The presentation of any cumulative evidence or additional mitigation of "confirmed" abuse and ensuing post-traumatic stress disorder and borderline personality disorder from the abuse would not have resulted in a life sentence, especially when considered against the horrendous aggravation in Smith's case. *See Tanzi v. State*, 94 So. 3d 482, 493 (Fla. 2012); *Jones v. State,* 998 So. 2d 573, 584-85 (Fla. 2008). For all these reasons, the lower court's denial of this claim requires affirmance.

ISSUE II

SMITH FAILED TO ESTABLISH PREJUDICE BY HIS COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS THE VICTIM'S STOLEN ITEMS THAT WERE STORED IN SMITH'S DUFFEL BAG WHEN THE MOTION WOULD NOT HAVE BEEN DISPOSITIVE. SMITH ALSO FAILED TO ESTABLISH THAT HIS COUNSEL WAS DEFICIENT IN NOT SEEKING TO SUPPRESS CONTENTS OF THE BAG WHEN SMITH HAD GIVEN THE BAG TO MARTHA TEJEDA, HE HAD HER STORE IT AT HER HOUSE, HE INSTRUCTED HER TO GO THROUGH IT, AND SMITH HAD NO ACCESS TO THE BAG.

Smith's second claim involves the lower court's denial of Smith's ineffective assistance of counsel claim regarding his trial counsel's failure to file a motion to suppress evidence obtained from a warrantless search of a duffel bag. Smith argues that the following items should have been suppressed: a coin collection, a Minnie Mouse keychain, a men's Geneva watch, a medical encyclopedia, and a gold lock. All of these items were identified during trial as being stolen from the victim's home when she was murdered. *Smith*, 170 So. 3d at 751.

Under *Strickland*, Smith has the burden to show a "reasonable probability" that the result would have been different if his counsel would have filed the motion to suppress. *Butler v. State*, 100 So. 3d 638, 647 (Fla. 2012) (internal citations omitted). "*Strickland* does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but

rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Id.*

From the outset, this Court should know that the suppression of the coin collection, the Minnie Mouse keychain, the men's watch, the medical encyclopedia, and the lock **would not have** impacted the result of Smith's trial. Thus, Smith absolutely cannot show that he was prejudiced, in any way, by his counsel's failure to file a motion to suppress. Significantly, there were other items linked to Smith that were stolen from the victim's house on the day of the murder, and those items **were not found in the duffel bag at issue.**

Notably, a diamond baguette necklace had been pawned the day after the murder. At trial, James Cellecz testified that Smith had asked him to pawn various pieces of jewelry, including the diamond baguette necklace belonging to the victim. *Smith*, 170 So. 3d at 751. The necklace was introduced into evidence during trial, and both the victim's husband and the victim's daughter identified the necklace as belonging to the victim.[1]

[1] The State additionally presented the testimony of Joshua Hull, an inmate housed with Smith and Cellecz. Hull testified that Smith had asked him to send a message to Cellecz while in jail. *Smith*, 170 So. 3d at 752. According to Hull, Smith was upset with Cellecz because Smith had asked Cellez to pawn some "jewelry and stuff" and Cellecz was "snitching" on him.

(DAR V12/1997-98; V15/2497-98). Therefore, even if the items from the duffel bag would have been suppressed, Smith still would have been implicated in the murder by his possession and pawning of the victim's diamond necklace.

In addition to the diamond necklace, the State introduced evidence that Smith had a women's watch that belonged to the victim. It should be noted that the watch from the duffel bag was a men's watch from a his-and-her watch set. The women's watch from the watch set was not located in the duffel bag searched by law enforcement. Instead, it had been taken from the victim by Smith and given to Smith's girlfriend as a present. Michele Quinones testified at trial that Smith had given her a women's watch from a watch set. (DAR V14/1453-54). Quinones later turned the watch over to law enforcement. (DAR V14/1457, 1463). She identified the watch in court as the watch that Smith had given her. (DAR V14/1454).

The victim had been wearing that watch on the day she was murdered. (DAR V12/1950-53). When the victim's body was found by her husband, the watch she had been wearing that day was missing. *Smith*, 170 So. 3d at 750. **Therefore, even if the contents from the duffel bag would have been suppressed, there were stolen items introduced at trial that Smith had taken from**

the victim, and those items would not have been subject to any motion to suppress.

Furthermore, there was also testimonial evidence linking Smith to some of the items found within the duffel bag that could have been admitted even if the physical items in the duffel bag had been suppressed. For instance, Cellecz testified that the day after the murder, he observed a medical encyclopedia on the floor of Smith's vehicle, which seemed odd because Smith did not have any knowledge of medicine. *Smith*, 170 So. 3d at 751. Quinones also testified that Smith gave her a key to a vehicle that was on a Minnie Mouse key chain. (DAR V14/2331). In addition to Smith's possession of the items stolen from the victim when she was murdered, evidence further established that Smith was near the location of the murder when it occurred. *Smith*, 170 So. 3d at 752.

Smith has absolutely failed to show how he was prejudiced by his counsel's failure to file the motion to suppress the items from the duffel bag. Given that the motion to suppress would not have been dispositive, Smith cannot satisfy his burden under *Strickland. See Lynch v. State*, 2 So. 3d 47, 66–67 (Fla. 2008) (finding that Lynch suffered no prejudice by his counsel's failure to file a motion to suppress the phone calls between

Lynch and his wife when the material substance of Lynch's conversations with his wife would have been placed in evidence through the testimony of other witnesses); *see also Kormondy v. State*, 983 So. 2d 418, 437 (Fla. 2007) (affirming the denial of relief where Kormondy fails to provide any "argument or evidence to indicate that there is a reasonable probability that the outcome would have been different as a result of impeachment of the witness[.]"). Accordingly, the lower court's denial of this claim requires affirmance.

Considering Smith's failure to establish the prejudice prong of *Strickland*, this Court need not make a specific ruling on the deficiency prong. *Evans v. State*, 975 So. 2d 1035, 1043 (Fla. 2007). Nevertheless, Smith has also failed to prove that his counsel was deficient in failing to file a motion to suppress. In denying this claim, the lower court found that Smith "had no legitimate expectation of privacy in the subject duffel bag because he abdicated ownership of the duffel bag, or least extended dual ownership of the bag to Ms. Tejeda." (PCR p. 713). The court noted that in a recorded jail call made by Smith to Tejeda, Smith told her "I need you to take all of my bags, they're big duff[el] bags, Take all of them to your house and go through them." (PCR p. 713). Smith also told Tejeda to put the

clothes from the duffel bag “in the trash.” (PCR p. 713).

The court concluded that although the property belonged to Smith, “he practically begged Ms. Tejeda to retrieve if from the storage unit where it was previously located via multiple jail phone calls.” (PCR p. 714). Given that he asked her to go through it and to even throw some of the property away, “the duffel bag was freely accessible to Ms. Tejeda and she had full access to everything in it except the locked personal safe, for which Mr. Smith concedes law enforcement did obtain a search warrant.” (PCR p. 714). The court also found that after reviewing Tejeda’s trial testimony, she gave free and voluntary consent to law enforcement to search the duffel bag “that Smith had abdicated to her.” (PCR p. 714). The court ruled that even if Smith’s counsel would have filed the motion to suppress, it would not have been granted. (PCR p. 715). Smith has altogether failed to show how the trial court erred.

“Although warrantless searches and seizures are generally prohibited by the Fourth Amendment to the United States Constitution and article I, section 12, of the Florida Constitution, police may conduct a search without a warrant if consent is given or if the individual has abandoned his or her interest in the property in question.” *Caraballo v. State*, 39

So. 3d 1234, 1245 (Fla. 2010) (quoting *Peterka v. State*, 890 So. 2d 219, 243 (Fla. 2004)). Smith's proposed motion to suppress could have been denied under either basis.

"[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it … may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974).

> The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements […] but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n. 7.

Here, based on Smith's own demands to Tejeda, the duffel bag went from being secured in his storage unit, to going to Tejeda's house where she had complete control over it, and Smith had no access to it. Smith not only gave possession of the bag over to Tejeda, but he instructed her to go through the contents. It was reasonable for law enforcement to seize and search the duffel bag when Tejeda voluntarily turned it over to

law enforcement. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (quickly dismissing Frazier's challenge to the admission of clothing seized from his duffel bag when the bag was jointly used by Frazier and his cousin, the bag was left at the cousin's home, and the cousin consented to a search of the bag). In allowing Tejeda to access the bag and in leaving it at her house, Smith "must be taken to have assumed the risk that [Tejeda] would allow someone else to look inside." *Frazier*, 394 U.S. at 740.

By the same token, once Smith called Tejeda on a recorded line and told her to take the duffel bag and to go through it, he did not retain the expectation of privacy in the bag that he had when his bag was in his storage unit.

> In the law of property, the question ... is whether the owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, **the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment.... In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy.**

J.W. v. State, 95 So. 3d 372, 375 (Fla. 3d DCA 2012) (emphasis added) (citing *State v. Kennon*, 652 So. 2d 396, 398 (Fla. 2d DCA

1995, which quotes 1 Wayne R. LaFave, Search and Seizure § 2.6(b), 464–66 (2d ed.1987)). Based on the facts of this case, if Smith's counsel would have moved to suppress the contents of the duffel bag by alleging that the search of it was illegal, the motion would have been denied. *Heyne v. State*, 214 So. 3d 640, 647 (Fla. 2017) (where the defendant relinquished his interest in a box by putting it in the attic of person's house where he neither lived nor was an invited guest). Given the circumstances in which law enforcement acquired the duffel bag from Tejeda and the fact that a warrant was obtained for the search of the safe inside the duffel bag, Smith cannot show that his counsel's performance fell below an objective standard of reasonableness. *Id.*; *Frazier*, 394 U.S. at 740. For all these reasons, the lower court's denial of relief should be affirmed.

ISSUE III

SMITH'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPRESS INFORMATION OBTAINED FROM HIS CELL PHONE AND CELL PHONE RECORDS FROM HIS SERVICE PROVIDER WHEN THE EXISTING CASE LAW AT THAT TIME DID NOT REQUIRE SUPPRESSION OF THE EVIDENCE.

Next, Smith argues that this counsel was ineffective for failing to file a motion to suppress evidence collected from his cell phone. Smith's phone was lawfully in police custody because he had been arrested for another crime. As Smith explains in his

brief, while the phone was in police custody, law enforcement used a device to retrieve the phone's cell phone number, service provider, and his contact list. With that information, law enforcement was able to obtain cellular phone records from Smith's service provider, Metro PCS. The location data from Metro PCS was used as evidence at trial to show that Smith was near the victim's home when the murder occurred. Smith contends that his counsel was ineffective for not filing a motion to suppress this evidence because it was obtained without a warrant.

While the exact date that law enforcement obtained Smith's cell phone number from his phone is not in the record, it had to have occurred at some point between the time Smith was in custody for another crime during September 2009, and Smith's arrest for this case on February 8, 2010. (DAR V1/1-9). Subsequently, on April 29, 2011, the First District held in *Smallwood v. State (Smallwood I)*, 61 So. 3d 448, 459 (Fla. 1st DCA 2011), that a warrantless cell phone search was not a Fourth Amendment violation. In reaching that conclusion, the court relied on precedent from the United States Supreme Court in *United States v. Robinson*, 414 U.S. 218 (1973). *Smallwood*, 61 So. 3d at 459. The court concluded that a cell phone could be

searched incident to an arrest, and the warrantless search was not a Fourth Amendment violation.

The court, however, expressed concern in permitting an officer to search a defendant's phone when there was no indication to believe that the cell phone contained evidence of a crime. The court, therefore, certified the following question to this Court: "Does the holding in *United States v. Robinson*, allow a police officer to search through photographs contained within a cell phone which is on an arrestee's person at the time of a valid arrest, notwithstanding that there is no reasonable belief that the cell phone contains evidence of any crime." *Id.* at 462.

This Court subsequently accepted review of the case and answered the certified question in the negative. *Smallwood v. State (Smallwood II)*, 113 So. 3d 724, 740 (Fla. 2013). This Court further held that while law enforcement properly separated and assumed possession of a cell phone from Smallwood during the search incident to arrest, a warrant was required before the information, data, and content of the cell phone could be accessed and searched by law enforcement. *Id*. This Court's *Smallwood II* opinion was decided May 2, 2013, which was after Smith was convicted but prior to his sentencing.

Smith argues that his trial counsel should have filed a motion to suppress even though at the time of the search, there was no case law finding warrantless searches of cell phones to be violative of the Fourth Amendment. Notably, *Smallwood I* did not come out until **after** the search had occurred, and even then, the opinion **did not find** warrantless searches of cell phones incident to arrest to be a Fourth Amendment violation.

To get around that fact, Smith argues that the certified question by the First District in *Smallwood I* should have put trial counsel on notice and led him to file a motion to suppress the evidence. However, the certified question in *Smallwood I* did not pertain to the facts of this case, as it instead dealt with searches of photographs on a cell phone when there was no reasonable belief that the cell phone contained evidence of a crime. *See Smallwood I*, 61 So. 3d at 462. Here, law enforcement had developed Smith as a suspect, and his phone records could have been obtained from Metro PCS regardless. Law enforcement merely used a device on his phone to obtain identifying information. Smith fails to show how his counsel was deficient for not filing a motion to suppress based on the law at that time.

Smith's counsel cannot be ineffective for failing to pursue

a claim considered meritless at the time. *Deparvine v. State*, 146 So. 3d 1071, 1093 (Fla. 2014); *Branch v. State*, 952 So. 2d 470, 476 (Fla. 2006); and *Zakrzewski v. State,* 866 So. 2d 688, 694 (Fla. 2003); *see also Bradley v. State*, 33 So. 3d 664, 682 (Fla. 2010) (no deficiency for failing to raise a nonmeritorious legal theory); *Ramos v. State*, 559 So. 2d 705 (Fla. 4th DCA 1990) (the failure to file a motion to suppress the warrantless bus search of appellant's luggage was not ineffective assistance of counsel when case law at that time permitted law enforcement to board temporarily stopped buses to conduct random searches of luggage); and *Gettel v. State*, 449 So. 2d 413 (Fla. 2d DCA 1984) (where counsel's failure to file a motion to suppress evidence seized without a warrant was not ineffective assistance of counsel because the existing case law did not require suppression).

The lower court properly determined that if Smith's counsel would have filed a motion to suppress, it would have been unsupported by the law at that time and denied. (PCR p. 718-19). To the extent that the law has changed, trial counsel cannot be ineffective for failing to anticipate changes in the law. *Bradley v. State*, 33 So. 3d 664, 682 (Fla. 2010); *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2001); and *Nelms v. State*,

596 So. 2d 441, 442 (Fla. 1992). “The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result.” *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995). Smith failed to meet his burden under *Strickland* of establishing deficient performance based on the failure to file a motion to suppress.

Smith further argues that because *Smallwood II* was decided after Smith’s guilty verdict was obtained, but before his sentencing, Smith’s counsel could have raised the issue in a motion for new trial. In order to receive a new trial, Smith’s counsel would have been required to establish: (1) the jurors decided the verdict by lot; (2) the verdict was contrary to law or the weight of the evidence; or (3) new and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial. Fla. R. Crim. P. 3.600(a). The ruling of *Smallwood II* would not have served as a basis for the granting of a new trial in Smith’s case. Accordingly, the lower court properly determined that Smith’s counsel cannot be deemed ineffective for failing to file a motion to suppress or a motion for new trial,

as neither would have been successful at the time. *Johnston v. State*, 63 So. 3d 730, 739 (Fla. 2011) (affirming the denial of an ineffectiveness claim for failing to file a motion for new trial that would not have been successful).

This Court should also know that main evidence used against Smith at trial did not come from the retrieval of the contact and provider information from his cell phone, but rather, from law enforcement obtaining his cell phone records from his service provider, Metro PCS. Until the recent June 22, 2018, opinion of *Carpenter v. United States*, 138 S. Ct. 2206 (2018), it was generally not considered a Fourth Amendment violation for law enforcement to obtain wireless carrier cell-site records without a warrant. Prior to this opinion, warrantless seizures of cell phone records from cell phone companies had been permitted and deemed not to be violative of the Fourth Amendment. *Mitchell v. State*, 25 So. 3d 632, 635 (Fla. 4th DCA 2009) (holding that a cell phone user has no expectation of privacy in historical cell site information); and *Johnson v. State*, 110 So. 3d 954, 958 (Fla. 4th DCA 2013) (finding no error in the trial court's admission of phone records, retrieved without a warrant, showing the time and location where the defendant made and received phone calls); *see also State v.*

Jenkins, 294 Neb. 684, 701-02 (Neb. 2016) (explaining a person has no reasonable expectation of privacy in the cell phone records maintained by a service provider, including the date and time of calls, cell phone numbers involved, and the beginning and ending sector and cell tower associated with the call); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) ("All telephone users realize that they must 'convey' phone numbers to the telephone company" and "the phone company has facilities for making permanent records of the numbers they dial[,]" and "that the phone company does in fact record this information for a variety of legitimate business purposes."). Smith cannot show that his counsel was deficient for failing to file a motion to suppress the records from Metro PCS. Accordingly, Smith failed to establish deficient performance as required by *Strickland*.

Smith also failed to establish that there was a reasonable probability of a different result because even if his counsel would have filed the motion to suppress the information obtained from his cell phone and even if the motion had been granted, it would not have impacted the outcome of Smith's trial. Smith contends that he was prejudiced because the State called numerous witnesses from Smith's cell phone contact list, but that testimony was minimal and insignificant. Witnesses Kimberly

Osborne, Joshua Koch, Bryan Illyes, Jack Jones, Wesley Mills, Robert Witte, Kimberly Jackques, and Helene Milligan merely identified their phone numbers. (DAR V14/2445, 1507-08, DAR V15/2513, 2515, 2520, 2534, 2573, 2542). The witnesses had no memory of any phone conversations with Smith on the day of the murder, and none of the witnesses provided any incriminating testimony about the murder. Surely, Smith cannot show that he would have been acquitted or received a lesser sentence if that evidence would have been suppressed.

Furthermore, witness Michelle Quinones offered incriminating testimony linking Smith to the Minnie Mouse keychain and the watch, but Smith never proved that Quinones was developed as a witness due to the search of his cell phone by Detective Diamond. Instead, Quinones testified at trial that she called Detective Deniro from the Sarasota Police Department to pick up items that Smith had left at her house. (DAR V14/2334-35). Deniro had been investigating Smith as part of a separate investigation with the city of Sarasota, and it appears that Sarasota had independently acquired Quinones's contact information, as Detective Diamond's investigation was for the Manatee County Sheriff's Office. (DAR V14/2338-2340). Thus, even if the evidence Detective Diamond acquired from Smith's cell

phone had been suppressed, it would not have prevented Quinones from testifying about the watch and Minnie Mouse key chain at trial. In sum, just because Quinones was listed as a contact in Smith's phone does not mean that her testimony would have been excluded if Smith's proposed motion to suppress were granted.

Smith fails to offer any valid basis to show how he was prejudiced from his counsel's failure to challenge the detective's warrantless use of an extraction device on Smith's phone. Smith merely alleges that he was prejudiced because his contact list was used to have those witnesses testify that Smith, and not Cellecz, was using Smith's phone on the day of the murder. However, even if those witnesses had not testified, Cellecz himself testified at trial that **he did not borrow Smith's phone**. (V15/2484). So even if the evidence had been suppressed, Cellecz's testimony would have rebutted Smith's suggestion that Cellecz was the one who committed the murder while borrowing Smith's phone.

Next, Smith has not shown any prejudice from his trial counsel's failure to file a motion to suppress the records from Metro PCS. To establish prejudice as a result of trial counsel's failure to file a motion to suppress, Smith must demonstrate that the motion would have been successful, and the evidence in

question would have been excluded. *Lebron v. State*, 135 So. 3d 1040, 1053 (Fla. 2014). Smith could not meet that burden because, as previously illustrated, at the time of Smith's trial, case law supported the notion that a person had no legitimate privacy interest in historical cell site information from cell phone service providers. The location information used as evidence in this case was properly admitted at that time as business records. (DAR V14/2380-82, 2386). Had Smith's counsel filed a motion to suppress, it clearly would have been denied.

While Smith claims that his cell phone records would have been subject to suppression under the fruit of the poisonous tree doctrine, he fails to explain this theory. "[T]he fruit of the poisonous tree doctrine does not automatically render any and all evidence inadmissible." *Lebron v. State*, 135 So. 3d 1040, 1054 (Fla. 2014). Notably, the incriminating evidence placing Smith in the vicinity of the murder came from the Metro PCS records, not the search of his cell phone. Smith was a suspect in the murder investigation as well as various robberies in the area, and Smith was connected to many of the victim's stolen items. Law enforcement could have obtained Smith's phone number many different ways, including through James Cellecz, Michele Quinones, or Martha Tejeda, who all voluntarily spoke

with law enforcement about Smith and all had Smith's phone number. Even if law enforcement had not used the extraction device on Smith's cell phone, they could have acquired that information from Metro PCS.

For all these reasons, Smith is not entitled to postconviction relief. The lower court properly determined that the failure to file a motion to suppress cell phone evidence was not ineffective assistance of counsel where existing case law did not require suppression of the evidence. Accordingly, the lower court's denial of relief on this claim should be affirmed.

ISSUE IV

SMITH'S SUBSTANTIVE CLAIM PURSUANT TO *RILEY V.* CALIFORNIA, 134 S. CT. 2473 (2014), IS PROCEDURALLY BARRED FROM BEING RAISED IN HIS POSTCONVICTION PROCEEDINGS, AND *RILEY* IS NOT RETROACTIVE ON COLLATERAL REVIEW.

In this claim, Smith argues that he is entitled to retroactive application of *Riley v. California*, 134 S. Ct. 2473 (2014). The lower court properly rejected this argument as procedurally barred. (PCR p. 720). "Claims that should have been raised on direct appeal are procedurally barred from being raised in collateral proceedings." *Johnson v. State*, 104 So. 3d 1010, 1027 (Fla. 2012). Here, Smith's *Riley* claim is certainly a claim that should have been raised on direct appeal rather than

in his postconviction proceedings. Therefore, the claim is procedurally barred from collateral review. *Id.*; *see also Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999) (explaining that the Court has repeatedly found claims raised pursuant to *Caldwell v. Mississippi*, 472 U.S 320 (1985), can and should be raised on direct appeal and are procedurally barred in postconviction proceedings).

Moreover, Smith now raises his *Riley* claim when his case is already final. However, his only basis for claiming entitlement to relief under *Riley* is that his case was not yet final when *Riley* was issued. Given that this is a collateral proceeding, the "pipeline" concept for retroactivity that Smith relies upon is not applicable. Rather, the applicable test for retroactivity is *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

A change in the law does not apply retroactively under *Witt* "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) (quoting *Witt*, 387 So. 2d at 931)). Even if the first two prongs of *Witt* are satisfied, Smith cannot show that *Riley* is a "development of fundamental significance."

"To be a 'development of fundamental significance,' the change in law must 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' or alternatively, be 'of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno,* 388 U.S. 293 (1967),] and *Linkletter [v. Walker,* 381 U.S. 618 (1965)].'" *Mosley*, 209 So. 3d at 1766-77 (quoting *Witt*, 398 So. 2d at 929). The three-fold *Stovall/Linkletter* test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So. 2d at 926. Here, *Riley* certainly does not involve the power to regulate certain conduct or to impose certain penalties, nor is it a case of such sufficient magnitude that it would require retroactive application under *Stovall/Linkletter*.

Under the first factor of the *Stovall/Linkletter* test, the purpose served by the rule in *Riley* is that it does not extend the search incident to arrest exception to searches of data on cell phones. *Riley*, 134 S. Ct. at 2485. The opinion emphasizes a person's privacy interests in the information contained within

their cell phones, and it distinguishes cell phone searches from searches of physical items on an arrestee's person. *Id*. at 2489. The rule in *Riley* is a procedural rule, rather than a substantive one. *See Coppedge v. United States*, 2016 WL 2901740, at *5 (E.D.N.C. May 18, 2016), ("The rule in *Riley* is procedural[.]"). Substantive rules alter the range of conduct or the class of persons that the law punishes. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). *Riley* certainly does not do that. "There can be no doubt that *Riley* is not a substantive rule." *Cross v. Gilmore*, 164 F. Supp. 3d 818, 823 (E.D. Va. 2016). Given that *Riley* is a procedural rule, the purpose of the rule in *Riley* does not support retroactivity.

The second factor under the *Stovall/Linkletter* test is the extent of reliance on the old rule. Appellee notes that prior to the *Riley* decision, there was no bright-line rule from the United States Supreme Court regarding cell phone searches incident to arrest. While this Court's *Smallwood II* decision is consistent with *Riley*, and it was issued prior to *Riley*, the search in this case occurred prior to *Smallwood II* as well as *Smallwood I*. Given that law surrounding cell phone searches is still developing, the argument could be made that there was no long-standing reliance on an old rule.

On the other hand, it could also be argued that there was no precedent prohibiting warrantless cell phone searches incident to arrest, and prior to *Riley*, courts upholding such searches could rely upon long-standing precedent of *United States v. Robinson*, 414 U.S. 218 (1973). *Robinson* upheld a search incident to arrest that included inspection of a crumpled cigarette package containing heroin capsules that was located inside the defendant's jacket pocket. *United States v. Robinson*, 414 U.S. 218 (1973). Prior to the United States Supreme Court's opinion distinguishing cell phone searches from searches of other kinds of personal property in *Riley*, a search of a cell phone could have been compared to a search of a container in *Robinson*.

Lastly, the effect that retroactive application of *Riley* would have on the administration of justice weighs heavily against retroactive application. To apply *Riley* retroactively would mean that courts would have to revisit final convictions that had involved cell phone searches and they would have to extensively review court records. The retroactive application of *Riley* would lead to some defendants getting new trials due to warrantless searches that were not even considered unlawful when they were performed. This would be unnecessary and costly, and

it would have a significant, negative impact on victims' families. The prosecutors would also have a more difficult time with the new trials due to the passage of time. Accordingly, this factor weighs against retroactive application.

After weighing all three factors, this Court should conclude that *Riley* should not be applied retroactively. Notably, federal courts have consistently found that *Riley* is not retroactive under the federal retroactivity test in *Teague v. Lane*, 109 S. Ct. 1060 (1989). *See e.g., Cross v. Gilmore*, 164 F. Supp. 3d 818, 823 (E.D. Va. 2016) ("There can be no doubt that *Riley* is not a substantive rule; it does not circumscribe the legislative power of the government to prohibit specific conduct or to impose certain punishments on certain classes of defendants. […] Nor can there be any doubt that *Riley* is not a watershed rule of criminal procedure. Rules governing the collection of evidence do not cut to the heart of guilt or innocence, as Supreme Court precedent requires in order for a rule to be a watershed rule of criminal procedure."); *Cleveland v. Soto*, 2016 WL 3710199, at *4 (C.D. Cal. May 11, 2016) ("The Supreme Court has not held that *Riley* has retroactive application and, to date, the courts that have considered whether *Riley* is retroactive have concluded that it is not");

Coppedge v. United States, 2016 WL 2901740, at *4 (E.D.N.C. May 18, 2016) ("*Riley* does not apply retroactively on collateral review"); *Ly v. Beard*, 652 Fed. Appx. 550 (9th Cir. 2016) (finding *Riley* not retroactive to cases on collateral review).

This Court should find it persuasive that different federal courts have expressly considered the issue, albeit under a different retroactivity analysis, and found that *Riley* does not apply retroactivity. For all the foregoing reasons, this Court should find that *Riley* does not apply retroactively to Smith's case on collateral review.

Finally, Appellee notes that Smith has not raised an ineffective assistance of appellate counsel claim. To the extent that Smith may be arguing that his trial counsel was ineffective for not filing a motion to suppress so that the use of an extraction device on his cell phone could be raised on appeal under *Riley*, Appellee hereby incorporates by reference the argument and authority under Issue IV. Appellee further notes that Smith's trial counsel cannot be rendered ineffective merely because he failed to anticipate *Riley*. *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2001); *Bradley v. State*, 33 So. 3d 664, 682 (Fla.), *as revised on denial of reh'g* (Apr. 22, 2010) (citing *Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982) ("counsel

cannot be deemed ineffective for failing to predict a later Supreme Court decision."); *see also Cross v. Gilmore*, 164 F. Supp. 3d 818, 824 (E.D. Va. 2016) ("[I]t was not only petitioner's trial counsel who failed to anticipate *Riley*; so, too, did many courts, which further underscores the reasonableness of deciding not to challenge the warrantless search of petitioner's cell phone."). Additionally, all the reasons cited for why Smith was not prejudiced under Issue IV would also support a finding of harmless error in the event that this Court finds *Riley* retroactive to Appellant.

Based on the foregoing, the lower court's denial of this claim should be affirmed.

ISSUE V

SMITH FAILED TO SHOW THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE AN EXPERT WITNESS IN CELL PHONE TOWERS WHEN HIS COUNSEL'S DECISION NOT TO DO SO WAS STATEGIC AND AN EXPERT WOULD NOT HAVE IMPACTED SMITH'S TRIAL.

In his fifth claim, Smith argues that his counsel was ineffective for failing to hire an expert witness for cell phones and cell phone towers. In an effort to establish this claim, Smith's collateral counsel retained the services of Robert Aguero to challenge the State's cell phone evidence produced at trial from Detective Diamond. As noted by this Court

on direct appeal,

> The State presented evidence to establish that on 3:44 p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when Smith's cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower [tower 304] that was 1.24 miles away from the victim's home. This timing was particularly striking because the victim had left Publix at 3:38 p.m. and lived only a few minutes away from the store. Cell phone records further demonstrated that both before and after this time, Smith's cell phone was located close to where Smith lived in Sarasota County.

Smith v. State, 170 So. 3d 745, 752 (Fla. 2015). Smith sought to discredit that evidence through the hiring of Aguero. Smith claims that had his counsel hired an expert, "evidence could have been presented to the jury that the opinions offered by Detective Diamond were forensically unsound." Initial Brief at 86.

Smith was granted an evidentiary hearing on this claim, and he presented Aguero's testimony. Smith, however, failed to meet his burden under *Strickland*. Contrary to Smith's assertions, Aguero never opined that Diamond's opinions were forensically unsound. Instead, Aguero actually agreed with much of the work that Diamond performed in his case and had no problem with most of Diamond's cell tower mapping exhibits. The only seemingly differences in opinion between Aguero and Diamond had to do with

the size of the third sector of cell phone tower 304 and the furthest range that a cell phone could stay connected to a specific tower. **Nevertheless, both experts agreed that the victim's home was within the range of tower 304.** (PCR p. 1085).

With regard to sector three of tower 304, Aguero drew his version of sector three as well as Diamond's version for comparison value during the evidentiary hearing, and the difference was not sizable. (PCR pp. 1087-90). Aguero even testified that his own figure was not an exact measurement. (PCR p. 1086). Aguero also did not have an opinion whether the victim's home was inside or outside the coverage of sector three. Aguero testified that "potentially it could be within coverage." (PCR p. 1091).

In light of Aguero's testimony, Smith has altogether failed to show how he was prejudiced by his counsel's failure to hire Aguero. Aguero agreed with nearly all of Diamond's relevant findings. **Significantly, Aguero would not have refuted the main cell phone evidence against Smith: that Smith's cell phone received a call at 3:44 p.m. that used tower 304, which was located 1.24 miles away from the victim's home.** The evidence also showed Smith traveling from North Port all the way up to Manatee County around the time that the victim was at the

grocery store, and it further showed Smith traveling back after the murder. **Aguero did not dispute those records in any way.** In fact, he agreed with them. He explained that his "mapping showed the same type of movement" as Diamond's. (PCR p. 1083). Smith simply cannot prove that the presentation of the expert testimony would have resulted in a life sentence. *Green v. State*, 975 So. 2d 1090, 1107 (Fla. 2008) (defendant failed to establish the prejudice prong on a claim that counsel was ineffective for failing to retain an expert witness on dog tracking evidence).

Competent, substantial evidence supports the lower court's ruling that Smith's expert witness did not provide any significant testimony during the hearing. "Considering the totality of evidence presented, both during Mr. Smith's trial and at the evidentiary hearing, the Court finds the issue of whether the maximum range of typical cell tower is 7-8 miles (as Detective Diamond testified) versus 30 miles (as Mr. Aguero testified) is of no value at all." (PCR p. 724). The court further noted that victims' home could have been within the limits of the map drawn by Smith's expert. (PCR p. 724). "In short, Mr. Smith has failed to establish that his proposed expert's testimony would have refuted the fact "that on 3:44

p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when Smith's cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower that was 1.24 miles away from the victim's home." (PCR p. 724). The lower court's ruling requires affirmance.

In addition, Smith failed to show how his counsel was deficient in not presenting testimony of Aguero in the first place. Smith's trial counsel, Mr. Hernandez, testified at the evidentiary hearing, and his testimony established that he had a reasonable strategy for not presenting an expert witness in cell phone tracking. According to Mr. Hernandez, he did not retain a cell phone expert in Smith's case, despite having done so in other cases, because he did not believe it would be helpful in this case. (PCR pp. 1109, 1112, 1127).

Mr. Hernandez explained that his focus was on the cross-examination of the State's expert, Detective Diamond, in an effort to show that the cell phone tracking was not "terribly specific." (PCR pp. 1109, 1126). He believed that the information that he could get out through the cross-examination of Diamond "was the better way to go" rather than hiring an independent cell phone expert. (PCR p. 1126). The lower court

properly determined that it was a strategic decision for Smith's trial counsel to cross-examine the State's expert rather than hiring his own expert. (PCR p. 724).

Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Here, Mr. Hernandez made a strategic decision to focus on minimizing Diamond's testimony through cross-examination. This Court has "specifically recognized that the decision to rely on evidence elicited through cross-examination of the State's witnesses, in lieu of calling additional witnesses, can be sound trial strategy." *State v. Bright*, 200 So. 3d 710, 737 (Fla. 2016). The fact that Smith's postconviction counsel now disagrees with that strategy "makes no difference." *Id.*; *see also Cherry v. State*, 659 So. 2d 1069 (Fla. 1995) (The standard for ineffective assistance of counsel does not involve how present counsel would have proceeded in hindsight). Just because Smith's new collateral counsel would have hired Aguero, does not mean that his counsel was ineffective for not doing so.

The lower court properly denied this claim, and this Court should affirm the denial of relief.

ISSUE VI

SMITH IS NOT ENTITLED TO *HURST* RELIEF GIVEN THE UNANIMOUS JURY RECOMMENDATION IN HIS CASE.

In his final claim, Smith asserts that he is entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted by this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Smith's case became final January 25, 2016, and *Hurst v. Florida* was decided January 12, 2016. Therefore, the ruling in *Hurst v. Florida* applies to Smith's case.

Smith, however, is not entitled to relief because any alleged error was harmless. The jury in this case unanimously recommended Smith's sentence of death. The jury's unanimous recommendation is "precisely what [this Court] determined in *Hurst* to be constitutionally necessary to impose a sentence of death." *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016). As this Court has explained, a unanimous jury recommendation of death provides "the evidence necessary to conclude beyond a reasonable doubt that a rational jury would have unanimously found that sufficient aggravating factors existed to impose the death penalty and that those aggravating factors outweighed the mitigating circumstances presented." *Truehill v. State*, 211 So.

3d 930, 956 (Fla. 2017).

The jury members in this case were not informed that they must unanimously find that sufficient aggravating circumstances outweighed the mitigating circumstances, and they were told that they were not required to recommend death even if the aggravators outweighed the mitigators. Despite these instructions, the jury did, in fact, recommend death unanimously. Accordingly, the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendation. *Hall v. State*, 212 So. 3d 1001, 1035 (Fla.), *reh'g denied*, 2017 WL 1150799 (Fla. Mar. 28, 2017); *see also Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017) (the jury's unanimous verdict of death was "based on the conclusion of all twelve jurors that sufficient aggravating circumstances existed and such aggravating circumstances outweighed the mitigating circumstances."); *Kaczmar v. State*, 228 So. 3d 1, 9 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018) (given the jury instructions, this Court was confident beyond a reasonable doubt that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations). Given the jury's unanimous recommendation in this case, any alleged *Hurst* error would clearly be harmless.

Moreover, Smith's robbery convictions established beyond a reasonable doubt the existence of an aggravating factor. Smith's 1995 federal convictions also established that Smith was on felony probation when he committed the murder in this case, which was uncontroverted. These aggravating factors were "without and beyond dispute." *Hall v. State,* 212 So. 3d 1001, 1035 (Fla. 2017). It is, therefore, "inconceivable" that a jury would not have found the aggravation in Smith's case unanimously, especially given that two of the aggravators "were found automatic" (i.e. previously convicted of another violent felony and felony probation). *Hall*, 212 So. 3d at 1035.

The fact that the home was ransacked and Smith stole valuable and unique items from the victim's home supports a unanimous finding that the murder was committed during the course of a burglary and for pecuniary gain. The absolutely horrific facts surrounding Smith's murder of the victim in this case further support the finding of harmless error. *See, e.g. Hall*, 212 So. 3d at 1035 (finding that the egregious facts of the case supported the finding of harmless error where the defendant stabbed a corrections officer twenty-two times). Smith brutally murdered the victim by beating her to death with her own antique, twenty-three-pound sewing machine. Her husband

found her body lying in a pool of blood, with duct tape gagging her mouth and binding her hands and ankles. Her jaw and head were deformed from Smith's repeated blows. Her skull was so damaged by the blows that brain matter was visible.

The victim also had a lacerated liver, abrasions around her shoulders, a bruised elbow, lacerations to her scalp, an eyebrow injury, and a fractured jaw, in addition to her head injuries. The medical examiner believed that most of the injuries occurred while the victim was still alive. Given how Smith followed the victim into her house when she was returning from the grocery store and then bound, gagged, and brutally beat her to death, HAC is fully supported. The egregious facts of this case confirm that a rational jury unanimously found that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. *King v. State*, 211 So. 3d 866, 891-92 (Fla. 2017).

For all these reasons, the lower court properly found any *Hurst* error that may have occurred in Smith's sentencing to be harmless, and the lower court's ruling requires affirmance by this Court.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the denial of relief on all of Appellant's postconviction claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of July 27th, 2018, I filed the foregoing with the Clerk of Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Eric C. Pinkard, Special Assistant, Law Office of the Capital Collateral Regional Counsel, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, **pinkard@ccmr.state.fl.us**, **support@ccmr.state.fl.us**, and **epinkard@creedlawgroup.com**.

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CERTIFICATE OF FONT COMPLIANCE

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

/s/ Christina Z. Pacheco
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