IN THE SUPREME COURT OF FLORIDA

MARK ALLEN DAVIS,

Appellant,

v.

CASE NO. SC02-1424
Lower Tribunal No. CRC 85-8933 CFANO

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Chief of Capital Appeals
Florida Bar No. 0445071
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

The appellant, Mark A. Davis, was charged by indictment with first degree murder, robbery and grand theft. (TR 1/8)[1] The cause proceeded to trial on January 13, 1987. (TR 5/588) The jury returned a verdict of guilty as charged on all counts on January 20, 1987. (TR 2/220, TR 7/892) On January 23, 1987, the sentencing phase was commenced. At the conclusion of that hearing, the jury recommended by a vote of 8 to 4 that the appellant be sentenced to death. (TR 2/234, 265-73) The sentencing hearing was continued until January 30, 1987. At that time, the trial court made oral findings as to the aggravating factors in support of the death sentence and imposed sentences on all judgments before the court. (TR 11/1641-1645) A written sentencing order was filed on March 18, 1987 finding the following with regard to the aggravating and mitigating circumstances. (TR 2/269-73)

> 1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5),

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[1] Citation to the appellate records will be designated as follows:

> The trial record (Case No. 70,551) will be referred to as TR followed by the appropriate volume and page numbers (TR Vol. No./Page Nos.).
>
> The postconviction evidentiary hearing record in the instant case will be referred to as PCR followed by the appropriate volume and page numbers (PCR Vol. No./Page Nos.).

are as follows:

(a) That the capital felony was committed while the Defendant, MARK A. DAVIS, was under sentence of imprisonment.

(b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.

  (i) This Court specifically finds, based upon the evidence, that the Defendant has been convicted of the crime of Attempted Armed Robbery. The Attempted Armed Robbery was a felony involving the use or threatened use of violence to another person and that although the Defendant was 16 years of age at that time, he was not adjudicated delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult. Additionally, Defendant was found guilty of Robbery by the Jury herein which found him guilty of Murder in the First Degree.

(d) That the capital felony was committed while the Defendant was engaged in the commission of the crime of Robbery.

(f) That the capital felony was committed for pecuniary gain. ***SPECIAL NOTE:*** *This Court does find that aggravating factors, Florida Statute 921.141(5)(b), (d), and (f) exist in this case. However, the Court consider[s] these three factors as constituting only a single aggravating circumstance.*

(h) That the capital felony was especially heinous, atrocious, or cruel, in that the victim, Orville O. Landis, was severely beaten about the face, resulting in two black eyes and abrasions to his nose and forehead, as well as an injury to his mouth. After beating the victim, the Defendant cut the victim’s throat after either trying to strangle or strike the victim in the throat with sufficient force to break the victim’s hyoid bone. Further, while the victim was still alive, the Defendant slashed the victim’s throat eight times. One of these slashes severed the victim’s jugular vein. The evidence showed that the

slashes to the victim's throat area were made with a small-bladed knife. This knife was broken during the attack, thus forcing the Defendant to find another knife to continue the attack. The Defendant then savagely stabbed the victim with a large butcher knife. The Defendant stabbed the victim five times in the chest area with a butcher knife with such force that blood was splattered high onto the walls around the bed area, and two of the five chest wounds went entirely through the victim's body to the back tissue causing massive internal injuries. Notwithstanding all of these horrendous wounds to the victim, the Defendant continued to attack the victim stabbing him 11 times in the back. Nine of the 11 stabs inflicted with the larger knife (butcher knife) were driven completely through the body with sufficient force to break the victim's ribs in the knife blade's path and penetrate the victim's lungs and heart.

(i) That the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence clearly establishes beyond all reasonable doubt that MARK A. DAVIS had a premeditated and calculated design to murder the victim, Orville O. Landis. Earlier in the day of the murder, MARK A. DAVIS stated to Beverly Castle that he was going to "rip the old queer off and do away with him." Further, the Defendant's actions during the attack clearly establish his calculated and premeditated plan. He first beat the victim and attempted to cut his throat. However, before he could complete this endeavor, the knife broke. Retreating long enough to find yet a large butcher knife, the Defendant returned to the wounded victim and continued with the brutal and vicious attack on Orville O. Landis. "He wouldn't go down; he just would not die," the Defendant later said to Shannon Stevens.

2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.

3. That, as to mitigating circumstances, the Court

finds as follows:

(a) That the mitigating circumstance of whether the Defendant has significant history of prior criminal activity does not apply because the Defendant waived this circumstance in exchange for the State not putting on evidence to refute the Defendant's lack of a criminal record.

(b) That the Defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the Defendant's conduct nor did he consent to his acts.

(d) That the Defendant was not an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the Defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired. There is some evidence that the Defendant had been drinking prior to the murder, but no evidence to substantiate any substantial impairment on the Defendant's part. Witness testimony established the fact that the Defendant did not show any indicia of intoxication. The evidence clearly established the Defendant was able to have sufficient cognizant powers to clean the murder weapons, take the victim's money, steal the victim's car, negotiate and drive the victim's vehicle across the bridge into Tampa, obtain a motel room, and register under a fictitious name.

(g) That the age of the Defendant at the time of the crime, 21 years, is not a mitigating factor.

4. The Defendant, MARK A. DAVIS, attempted to raise an additional mitigating circumstance through his testimony during the penalty phase. This last mitigating factor which might be considered by the Court consisted of four areas of argument: (1) The Defendant did not take the stand and perjure himself during the guilt phase; (2) The Defendant had enough conscience not to call his

> mother to the stand to testify in mitigation for him; (3) The Defendant had adjusted well to prison life and would be satisfied to spend 25 years in State Prison; and (4) The Defendant comported himself like a 'gentleman' throughout the trial. The Court finds that the vast majority of all defendants who stand trial fall into areas (1), (2), and (4) raised by Defendant. As to area (3), Defendant, MARK A. DAVIS, admitted during cross-examination that he had discussed escape attempts with other prisoners and had participated in smuggling contraband into the Pinellas County Jail. Clearly, these are not mitigating circumstances sufficient to affect the aggravating circumstances present in this case.
>
> (TR 2/269-272)(emphasis added)

An appeal was then taken to this Court. Several briefs were filed prior to this Court's consideration of the case. The Initial Brief of Appellant raised the following claims:

> I. INTRODUCTION OF FLA. STAT. §921.141(5)(h) CONSTITUTES REVERSIBLE ERROR.
>
> A. UNDER MAYNARD, FLA. STAT. §921.141(5)(h) IS UNCONSTITUTIONAL.
>
> II. INTRODUCTION OF A VICTIM IMPACT STATEMENT IS UNCONSTITUTIONAL AS WELL AS REVERSIBLE ERROR REQUIRING RESENTENCING.
>
> A. UNDER BOOTH, INTRODUCTION OF A VICTIM IMPACT STATEMENT AT THE SENTENCING PHASE PURSUANT TO FLA. STAT. §921.141 CONSTITUTES REVERSIBLE ERROR.
>
> III. THE STATE DID NOT PROVE THAT THE CRIME WAS PREMEDITATED SO THAT FLA. STAT. §921.141(5)(i) WAS NOT APPLICABLE AS AN AGGRAVATING FACTOR.
>
> IV. THE COURT SHOULD ORDER A RESENTENCING SINCE IT CANNOT FORECAST THE JURY AND JUDGE'S FINDINGS IF THE PROCEEDINGS HAD BEEN FREE OF ERROR.

Appellant then filed a supplement to the initial brief,

asserting the following claim:

> INTRODUCTION OF PHOTOGRAPH #11-A AND THE VIDEO TAPE CONSTITUTES REVERSIBLE ERROR DUE TO THEIR INFLAMMATORY NATURE.

Mark Davis then filed a pro se brief raising these additional claims:

> PRO SE COMPANION BRIEF:
>
> I. THE TRIAL COURT ERRED IN LIMITING THE SCOPE OF THE DEFENDANTS RIGHT TO ACT AS CO-COUNSEL.
>
> II. THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES IN THE DEFENDANTS ABSENCE.
>
> THE RIGHT TO BE PRESENT DURING ALL CRITICAL STATES ATTACHES TO THE EXERCISE OF CAUSE CHALLENGES IN THE DEFENDANTS ABSENCE.
>
> A. UNDER FRANCIS, THE DEFENDANTS ABSENCE AT THIS CRITICAL STAGE OF HIS TRIAL BY JURY CONSTITUTES REVERSIBLE ERROR.
>
> III. COMMENTS ON A DEFENDANTS FAILURE TO TESTIFY IS SERIOUS ERROR.
>
> ANY COMMENTS BY THE PROSECUTION ON ACCUSED FAILURE TO TESTIFY IS A VIOLATION OF THE U.S. FIFTH AMENDMENT.
>
> IV. IT WAS PROSECUTORIAL ERROR FOR THE STATE TO ELICIT TESTIMONY WHICH PLACED THE DEFENDANTS CHARACTER AT ISSUE.
>
> V. IMPROPER COMMENTS BY THE PROSECUTOR IS SERIOUS ERROR.

During the direct appeal, this Court remanded the case for the circuit court to hold a hearing to determine whether Davis was absent when jury challenges were exercised and, if so,

whether he waived his presence. Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991) Circuit Judge John P. Griffin held the hearing where the trial court reporter, the trial judge, appellant, his trial counsel, and counsel for the State testified. Judge Griffin found that appellant was in the courtroom during the time in question. This Court agreed that the finding was supported by competent substantial evidence and therefore the issue was without merit. This Court also affirmed the judgment and sentence, Davis v. State, 586 So. 2d 1038 (Fla. 1991), denying Davis' claims for relief. A motion for rehearing was denied on October 30, 1991.

A Petition for Writ of Certiorari was then filed in the United States Supreme Court. On September 4, 1992, the Court granted the petition and remanded the case to this Court for consideration of the heinous, atrocious or cruel instruction in light of Espinosa v. Florida, 505 U.S. 1079 (1992). Upon review this Court determined that Davis' challenge to the jury instruction was procedurally barred and that error, if any, was harmless. Davis v. State, 620 So. 2d 152 (Fla. 1993). A motion for rehearing was denied, as was a subsequent petition to the United States Supreme Court. Davis. v. Florida, 510 U.S. 1170 (1994).

In July, 1995, appellant filed an incomplete motion to

vacate. (PCR 1/25-191). An amended motion was filed on May 4, 2000. (PCR 12/2044-67) An evidentiary hearing was held on November 5-9, 2001 and relief was denied on April 1, 2002. (PCR 17/2898-2928) A Motion for Rehearing was denied on May 16, 2002 and the Notice of Appeal was filed on June 17, 2002. (PCR 18/3167-8)

STATEMENT OF THE FACTS

A) TRIAL

Guilt Phase

The appellant, Mark Davis, had been staying at or in the parking lot of the Gandy Efficiency Apartments for four days prior to the murder of Landis. (TR 7/920) The victim, Orville "Skip" Landis, moved into Unit #1 of the Gandy Efficiency Apartments on July 1, 1986 and was assisted in his move by appellant. (TR 7/959) Subsequent to moving Landis into his apartment, appellant and Landis began drinking beer. (TR 7/930) During this time appellant obtained $20 from Landis and gave Landis tattoo equipment as collateral. (TR 7/931) Appellant told Kimberly Rieck that he planned to get the old man drunk and take whatever he could. (TR 7/928) During approximately the same time Davis told Beverly Castle that he was going to "rip him (Landis) off and do him in". (TR 7/962)

When Landis initially moved in he had not paid his rent or given a deposit. (TR 7/962) However, on that day Landis cashed a check for $250 and was given another $250 by his son-in-law. (TR 7/1007) Thereafter, Landis attempted to give Beverly Castle $285 for the rent and deposit and Castle told Landis that she would not take the money and that Landis would have to pay the money to Carl Kearney. (TR 7/962) Landis was intoxicated at

this time and appellant appeared to be in full control of his facilities. (TR 7/964-65) Appellant told Landis that he wanted some of Landis' money. (TR 7/963) Landis told Davis that he wasn't going to give him the money and made reference to the fact that he had already spent quite a bit drinking. (TR 7/964-65) At this point, Davis made a grab for Landis' wallet and Landis was able to pull away in time. Both Landis and Davis continued to argue as they went to Landis' apartment. (TR 7/966)

Landis was last seen alive at 8:30 by Beverly Castle. (TR 7/968) At approximately 11 - 12 that night Davis arrived at Castle's door and said that he had to leave right away and that he would be seen again in two or three years. Davis went from Castle's apartment to Rieck's apartment. (TR 7/966-67) Upon arriving at Rieck's apartment, Davis asked for a pair of socks and again stated that he would be seeing them again in two or three years. (TR 7/933-34) From that point, Davis was seen driving away in Landis' car. (TR 7/968)

During the morning and afternoon of July 2, 1986, Landis was not seen and Landis' dog was in the apartment. (TR 7/969) These facts caused Beverly Castle to become concerned that something was wrong, and as such, she got Carl Kearney to take a look into Landis' apartment. Kearney removed a glass panel from a window and looked inside Landis' apartment that evening. Kearney

observed Landis face down in a pool of blood on the mattress. (TR 7/969-70) Thereafter the police were called. When the police arrived they observed numerous stab wounds, a butcher knife in the trash can and tattoo equipment in a cooler. (TR 7/1012-13)

Medical Examiner Dr. Joan Wood reviewed the victim's body and determined that there were 11 stab wounds to the back, four stab wounds to the left side of the neck, one wound across the middle of the neck running from left to right, two stab wounds on the right side of the neck, two stab wounds above the breast, one stab wound below the breast, four stab wounds to the abdomen and substantial bruises to both eye areas that were the product of multiple blows to the face which occurred before death. (TR 8/1096-1115) Dr. Wood also testified that Landis had been choked with substantial force, that Landis was intoxicated to the degree that he was without his full facilities and that the perpetrator of the murder had been standing next to the bed during the murder. (TR 8/1119, 1121, 1126) Dr. Wood opined that it took Landis approximately ten minutes to die from this prolonged attack.

Fingerprint identification technician Thomas Jones testified that one of the beer cans found in Landis' room had Davis' fingerprints on it. (TR 8/1183)

Mark Davis made two admissions to killing Landis. He told Shannon Stevens that he killed Landis when Landis woke up while Davis was attempting to rob Landis. (TR 8/1205) Davis also confessed to law enforcement that he killed Landis. Particularly, Davis stated that he struck Landis after Landis had "grabbed his nuts" and that he stabbed Landis several times with a butcher knife that he had taken away from Landis. (TR 9/1275-76) Thereafter, Davis claimed that he went and obtained a smaller knife which he used to slit Landis' throat and stab Landis several more times. Davis stated that he took $80 - 85 from Landis' wallet and drove Landis' car to Tampa. (TR 9/1277)

Penalty Phase

The State presented evidence of Davis' May 16, 1983 judgment and sentence from Illinois for burglary, as well as a statement from the records supervisor that Davis was on parole at the time of the instant offense. (TR 11/1508) Thereafter, the State introduced Davis' judgment and sentence for attempted armed robbery in 1980. The State brought forth testimonial evidence that Davis committed this attempted armed robbery with a knife. (TR 11/1515)

Davis testified that he was 23 years old and that he had a family in Pekin, Illinois. He has two brothers and two sisters. (TR 11/1517-18) Davis testified that he had spent a

considerable amount of time in one kind of institution or another; institution meaning jail, youth home or prison. He stated that he "just wish to hell [the murder] never happened." (TR 11/1519) He professed to the jury that he had "the will to live" under the circumstances of confinement that would be the conditions of a life sentence as opposed to a death sentence.[2] (TR 11/1520) Over the State's objection Davis testified that the reason he went to trial in this case was because, "a lot of the actual incident I just didn't remember all of what happened back then and I just kind of wanted to get it over with." (TR 11/1521) Davis also testified that he was appointed as co-counsel and that although his mother was present in the courtroom, he and counsel had made the "conscious" decision not to call his mother during the sentencing phase so that she would not have to go through the ordeal. (TR 11/1518-22)

On cross-examination Davis admitted that even though he expressed concern for his mother, this wasn't the first time he'd put her through mental anguish. (TR 11/1523) Davis agreed that, as co-counsel, he'd had months to review the sworn statements of witnesses, police reports, his own prior

[2] Nevertheless, Davis admitted on cross-examination that he had received a pair of tennis shoes while he was in prison that contained a jeweler's wire which is commonly used for attempted escapes. Davis claimed the shoes were for another inmate who he refused to identify. (TR 11/1536-38)

statements, the FBI lab reports, the autopsy report, newspaper articles supplied to him by his prior lawyer - Michael McMillan and discuss his case with other inmates. (TR 11/1523-25) Over defense counsel's objection, Davis admitted that he'd had months and months to get his head clear about what happened.[3] (TR 11/1525-26) He also agreed that he had absconded from parole when he came to Florida and that he had only been out of jail about two months when he committed the instant murder. (TR 11/1529-30) In addition to his testimony concerning obtaining a jeweler's wire to facilitate an escape, Davis also claimed that the keys he attempted to make in prison were not for an escape but to get into a maintenance closet where they were going to make home-made wine.[4] (TR 11/1539) Davis also denied telling Stevens, Dolan or Gardner that he had aggravated a self-inflicted injury in order to escape while receiving medical treatment. (TR 11/1540-41)

On January 30, 1987, the trial court entertained a final sentencing hearing. At this time, the State presented evidence that Davis' 1980 judgment for armed robbery was disposed of as

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[3] The trial court denied the objection based on the State's position that Davis had opened the door by his prior testimony concerning his reason for going to trial. (TR 11/1527)

[4] On redirect Davis claimed the jeweler string was also obtained to get into the closet. (TR 11/1542)

an adult felony judgment rather than a juvenile disposition. (TR 11/1602-05) During this hearing a victim, Katherine Landis Hansbrough (victim's daughter), made a statement to the lower court in favor of the death sentence. (TR 11/1611-15) Davis was offered an opportunity to present further testimony and declined. (TR 11/1616) However, Davis offered exhibits with respect to the 1983 attempted armed robbery judgement being prosecuted as a juvenile offense and the State also presented documentary evidence that the 1983 conviction was treated as adult felony conviction. (TR 11/1616-29) Thereafter, Davis waived having a presentence investigation report prepared. (TR 11/1639) The trial court imposed a sentence of death. In the trial court's written sentencing order the court found five statutory aggravating factors, but merged the findings with regard to the contemporaneous robbery. The lower court further found that the tendered mitigating evidence was of little or no weight when compared to the aggravating factors. (TR 2/269-73)

B) POSTCONVICTION EVIDENTIARY HEARING

An evidentiary hearing was held on Davis' postconviction motion on November 5-9, 2001. Davis presented the following witnesses in support of the motion.

Rick Hall testified that he was a friend of Mark's since Mark was thirteen. (PCR 41/3789) Hall used to buy drugs from

Mark. (PCR 41/3788) Hall described their hometown of Pekin, Illinois in the 1970s and early 1980s as a biker town with lower class people. There were a lot a drugs. (PCR 41/3789) Hall testified that Mark Davis used a lot of drugs daily, including pot and acid and speed. He admitted that during the time he knew Davis, Davis was sometimes incarcerated. Hall claimed he knew about Davis' drug habit because he was a drug addict himself. Hall claimed Davis' habit was so severe at one point that he had to wear long sleeved shirts all the time to hide the track marks. (PCR 41/3790-91) Mark also used large quantities of alcohol; in Hall's opinion Davis was an alcoholic because he thinks anybody is who drinks daily for the buzz. (PCR 41/3792) Conversely, Hall testified that Davis had a good personality; that he liked him; he was a good person. Despite his testimony that Davis was an alcoholic and drug addict, Hall testified that he trusted Mark around his two daughters, that he had him watch his kids for him and that he wouldn't "have left my kids with anybody who I didn't trust." (PCR 41/3793)

Hall described Davis as only being violent when he had to be and usually only when he was under the influence of drugs and alcohol. He described a particular incident at a bar right when Davis was 19 and had just gotten out of the penitentiary. He said that Davis attacked a man for saying something about

bending over in the shower for “the soap or some gay remark or something and he put an ass whipping on him.” (PCR 41/3793-94)

Hall also recounted that Mark idolized his brother, Tracy Davis, but that Tracy was in a lot of trouble and “kind of a biker, drug addict.” (PCR 41/3795)

On cross-examination, Hall said he had been using marijuana since he was probably 11 but that he had stopped four years ago. He said he had previously been arrested for selling acid 21 years ago. (PCR 41/3797-98)

Hall said that he and Davis wrote letters to each other while Davis was in jail awaiting trial for the instant offense. In those letters, Davis never asked him to come to Florida to testify on his behalf. (PCR 41/3799-3800)

Mark Davis’ father, John Davis, testified that he and Mark’s mother had been married 51 years and that they had five children. Mark was the youngest. When Mark was growing up, John was an alcoholic. He testified that he “probably” would hit the members of his family on occasion with his open hand. He testified that he was a roofer and that they were poor when the kids were young. (PCR 41/3802-04) He flipped between claiming to not be absent too much when the children were growing up and being absent quite a bit while he was out looking for work to keep his family going. (PCR 41/3805) He testified that he

gambled and drank. (PCR 41/3805-06) He claims he was available to testify if someone offered to pay for his trip from Illinois to Florida. (PCR 41/3810) John Davis does not know what grade Mark finished in his education chain. (PCR 41/3812)

Mark Davis' older brother, Tracy Davis, testified for the defense. (PCR 41/3813) He explained that in their neighborhood "you had to be tough, you had to always be somebody that you're not really." He said that their neighborhood, the south end, was considered low class poor people. As time went on they did a little bit better, but they were always poor. (PCR 41/3814-15) Tracy Davis claimed that they did a lot of drugs including cocaine, heroin, crystal meth, acid, a lot of pot, a lot of smoking paraphernalia "and stuff." (PCR 41/3815)

Pekin was considered a biker town. The south end was where a lot of bikers lived because at that time they were considered poor, too. Davis said his reputation ended up being that of a snitch. (PCR 41/3816) He said he was in a gang named Iron Ax Men. He was one of the founding members of it that put it together and "a lot of us that put it together, we all had grew up around the Grim Reaper motorcycle club and it was always our fancy to become the Grim Reaper." (PCR 41/3817) He said the group that he was with was trying to get away from the outlaw type, more towards one like an American Motorcycle Association

Club or organization, where “you’re supposed to be doing riding, benefits raising charity.” (PCR 41/3817-18)

Tracy Davis testified that his dad “was an -- is an alcoholic”, but that he always tried working, always tried to provide a home as best he could. (PCR 41/3818) He said his father was wrapped up in his own personal problems and didn’t spend a lot of the quality time he should have with the kids. (PCR 41/3819)

Tracy Davis testified that when he was young, his father was abusive to him, he’d smack him in the back of the head and say, “Straighten up boy.” (PCR 41/3820) In his own way he was always trying to guide Tracy straight. Nevertheless, it got to the point to where Tracy hung out with his friends more than he did at home because his father would at times be drinking and arguing with their mother. Tracy claimed that his father beat his mother and that he’d seen his mother with black eyes. (PCR 41/3820) He was always verbally abusive, “just cut you down.” (PCR 41/3821)

With regard to his mother, Tracy testified that “mom was always there. She was kind of like who we looked up to, always tried to respect because mom always tried to keep us right, you know. She’s always honest, being honest, so that was her, just being honest.” (PCR 41/3821)

He described his relationship with Mark as just brothers; the younger one always wanting to hang with the older brother. (PCR 41/3822) He didn't know when Mark Davis started using drugs "because a lot of my life's been in and out of jail and stuff like that." When asked if he was aware that Mark had a drug habit, he responded, "He was getting there." He knew that because he "had a bad one himself." (PCR 41/3822-23)

Tracy Davis explained that one time the Illinois Department of Family Services intervened in his family and actually told his mother that she had to choose between living with the kids or their father. This intervention was a result of Tracy Davis lying to authorities and claiming his father abused him when, in actuality, his father was trying to save him from some trouble he had gotten into. (PCR 41/3824) As a result, his father had to stay away from home for one year. (PCR 41/3824)

When Mark was probably about six, Tracy Davis claims that he anally raped his brother. He said it was the result of someone sexually abusing him. (PCR 41/3826) He said that later Mark came to him and asked if he wanted him to do that again; that Mark wanted to make him happy. (PCR 41/3828) Tracy said he knew that it was wrong and that's when he started rejecting his little brother, avoiding him and staying away from him. (PCR 41/3829) Nevertheless, he also claimed that he pulled Mark into

his world and introduced him to crimes and drugs. (PCR 41/3835)

In 1985, ‘86, and ‘87 Tracy Davis was mostly in prison. He was in San Quentin and Stateville. (PCR 41/3836) In ‘86 to ‘87 he moved to Tennessee. He was in Marquenas County jail and when he went to San Quentin, “that’s when Mark went down.” (PCR 41/3837) He received letters from Mark Davis and was aware of Mark Davis’ trial in January of ‘87. (PCR 41/3838) At that time, he was on the run; went to Phoenix and was kind of jumping around because he was wanted for a parole violation. (PCR 41/3839) He believed that if he had come down to Florida to testify for Mark Davis there would have been a possibility that he would have been arrested and sent back to Pekin, Illinois. (PCR 41/3840) Nevertheless, he believed that if Mark Davis or his attorney had asked him, he would have come anyway and testified for Mark Davis. (PCR 41/3841)

Tracy Davis also testified on cross-examination that he lied to the Department of Family Services when he said his father had broken his hand; that he told them what they wanted to hear. He wanted to get his dad in trouble and it was his way of getting pay back on him. (PCR 41/3843-45)

Next, Gary Dolan testified that he is serving a non-capital life sentence but that he was in the Pinellas facility from 1986 to 1988 for about 24 to 25 months. (PCR 41/3854-55) During the

course of his custody in the Pinellas County jail, he was charged with some escape attempts. (PCR 41/3856) He said that "a handful of us white guys in the quad hung out together, confided with each other and spent hours a day talking." (PCR 41/3857) Mark Davis was one of those and in the course of several months' time, Dolan became privy to information about Davis' crime. Dolan, in turn, shared his intention to escape from the facility in Pinellas. Mark Davis admitted to Dolan that he had killed a man "he had been drinking with and there was a homosexual advances [sic] by one or the other or both involved and he just, he explained that he had done this and he said that they were both of them were drinking at the time heavily and that it was more less a situation where he didn't know a lot of people in the area and that the person he killed wasn't somebody that he was real friendly with." (PCR 41/3857)

After Dolan was charged with escape, he claimed that his attorney, Robert Dillinger, attempted to make a deal with the State and trade information Dolan had on Mark Davis and James Daley. (PCR 41/3858-60) He did not obtain any additional information from Davis as they were never in the same location again where that would be possible and he did not testify at Davis' trial. (PCR 41/3865) He denied that Mark Davis ever planned to escape with him, but admitted Davis was present when

it was planned. (PCR 41/3869)

Dolan's plea colloquy, dated March 11, 1988 and attached as State's Exhibit Seven to the State's 3.850 response, was admitted as State's Exhibit One at the hearing. (PCR 18/3180) The plea colloquy shows that Dolan did not receive a deal for his testimony against any witness. The State also brought out that although Dolan claimed that while he was represented by Dillinger he met with the State Attorney's Office four times and did a deposition regarding his "plea deal", there were only fourteen days between the first time his name came up in the Kenneth Gardner deposition and the trial in the instant case. (PCR 41/3882) The record from his sentencing shows that he told the sentencing court:

> And shortly after that time I had a public defender by the name of Jean Gobel [sic] and she said what you're looking at is in the vicinity of 30 years if you enter to a plea of guilty and she said unless I be willing to cooperate with the State with the detectives and give them some information that would be valuable if I had it in my possession and that would be the range of sentences I'm looking at.
>
> (PCR 41/3878-3879)

Dolan also denied that the only information he had about Davis he actually obtained from Kenneth Gardner. When questioned regarding his animosity towards the State because he received a life sentence and was not given a deal, Dolan

testified that the State did not honor the deal and he got nothing. (PCR 41/3890) He admitted, however, that at his sentencing he did not claim that he gave anyone information about the Davis case prior to Mr. Davis' trial or in his deposition. (PCR 41/3894)

In his order denying relief, with regard to Gary Dolan, Judge Penick found that, "Based upon this inconsistency, and from Dolan's demeanor and obvious grudge against the State, this Court finds his testimony not to be credible. This Court does not believe that the State solicited Dolan as an informant. This court finds that Dolan had no contact with the defendant's case, had no information to offer the defendant, and the State had no reason to list him as a potential witness or disclose him to the defendant as someone having any relevant information." (PCR 17/2910-11)

Davis' former sister-in-law, Mary Blinn, also testified for the defense. She and Mark were friends as teenagers and she later married his brother Tracy. (PCR 42/3920) She testified that she allowed the defendant to watch her children on occasion and that he was concerned about his younger sister. (PCR 42/3925-26) She also testified that the defendant was a drug addict, a heavy drinker, and that the defendant and Tracy would commit robberies together. (PCR 42/3927-30, 3938-41) The trial

court found this information to be “as damaging to the defendant as mitigating” and that “trial counsel was not deficient in not securing the testimony of this witness.” (PCR 17/2923)

Johansae Haynes, a neighborhood friend of the defendant from Pekin, Illinois, also testified to the circumstances of the defendant’s family. (PCR 42/3947-62)

Michael Davis, the defendant’s oldest brother, similarly testified about the circumstances of the family. He testified that he left high school to work on a garbage route to earn money for the household. He then enrolled in a vocation school and worked at night at a garage. He got his GED, graduated from vocational school as the number one student in his class and got a job with a trucking company. (PCR 42/3962-74) The trial court found that “this witness would not have been beneficial to the defendant. Essentially, this witness grew up in the same household under the same circumstances as the defendant. And yet, he overcame this and established a stable life. The jury would have contrasted this with the defendant’s lack of effort to overcome his circumstances.” (PCR 17/2923-24)

The defendant’s younger sister, Shari Uhlman, testified next about her relationship with the defendant, his artwork and about the household. She described the family as being poor and eating a lot of Spam, potatoes and mayonnaise and sugar

sandwiches. She said her father drank and gambled; that he took them fishing and was always drunk. She also said that her father never got along with Mark and that he would hit him when he was angry. She admitted on cross-examination that she had no information that her mother did not already know. (PCR 42/3981-4011)

Next, the defendant's older sister, Candace Louis, also testified to the circumstances of the defendant's household. She also admitted that there was nothing in her testimony that the mother did not know prior to trial. (PCR 42/4011-4031)

The defense then presented Kenneth Gardner who testified that he has been incarcerated for 19 years on burglary and robbery charges. He testified that Mark Davis told him about his case. (PCR 42/4034-35) He testified that Davis said "he and the victim went across the street to a bar and started shooting pool and everything else and he ain't a pool player, by way either. He lost, so they consequently -- they went back to the guy's house, or apartment, or whatever it was, and Mark, from what he had told me, had the habit of carrying a knife with him which, you know, I can understand, because I used to do the same thing myself, but anyway he wanted to borrow money off the victim, and I guess the victim was gay, or whatever you want to call it, and he made advances toward Mark. Mark had mentioned

prior to all of this, that he had been sexually abused as a kid, so when the guy started going after Mark and everything, Mark, I guess, as he put it, he flipped out." (PCR 42/4036)

Gardner claimed that he told the State he had information about Davis, they told him to get more and they would give him a deal for a reduced sentence. (PCR 42/4039-40) He could not say who he talked to but just that it was a man with the State. He said they did not like the fact that Mark said he was drunk and that he didn't have a plan to rip off the victim. Gardner claimed that he lied in his deposition about the statements Davis made because he was trying to keep from going to the chair. (PCR 42/4041-45) He described the plan with Mark Davis to escape as just talk "more or less." (PCR 42/4047)

Gardner also claimed that he received information from Shannon Stevens regarding the number of stab wounds and that he did not receive this information from Davis. (PCR 42/4049)

Gardner also claimed that the State had threatened him with contempt prior to the instant evidentiary hearing because he wouldn't talk to them. (PCR 42/4064)

On redirect by Ms. McDermott, Gardner testified that he knew what the State wanted him to say based on their body language because he had street smarts. (PCR 42/4067-68) Subsequently, he said that the prosecutor specifically stated that "we don't like

that testimony. Go back get and some more." When he was challenged at the evidentiary hearing by his prior statement to Ms. McDermott about reading body language, he said there were two different prosecutors. (PCR 42/4070-72)

Next Mark Davis' mother, Betty Davis, again testified concerning the circumstances surrounding Mark Davis' childhood and family. (PCR 43/4089-4153) She also described coming down to testify, being met at the plane by defense counsel and being prepped for her testimony. (PCR 43/4116) She claimed that she had no actual knowledge up until the time of sentencing of Mark's alcohol abuse or drug use, but she had been told by other people about it. (PCR 43/4127-30) She said that she was ready and willing to testify but she waited outside the courtroom and was not called. (PCR 43/4143-45)

Dr. Michael Maher, also testified for Davis at the evidentiary hearing. (PCR 43/4154) Dr. Maher evaluated the defendant and found several mitigating factors, including Post-Traumatic Stress Disorder. (PCR 43/4169) Dr. Maher testified that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime. He testified that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct within the requirements of law was substantially impaired. (PCR 43/4186-87) He also

testified that it would not have been possible for the defendant to have met the criteria for the cold, calculating and premeditated aggravating factor. (PCR 43/4193) Dr. Maher also opined that the defendant was homophobic and suffered from Post-Traumatic Stress Disorder at the time of the crime. (PCR 43/4183-85)

John Thor White testified that at the time he represented Davis he had been practicing law for approximately fifteen years. (PCR 44/4246) He had spent approximately five years with the public defender and then entered private practice as a criminal defense attorney. This was his third death penalty case as trial counsel. (PCR 44/4258) In addition, he had experience on appellate matters in death penalty cases, having filed briefs in two death penalty cases. (PCR 45/4371) He had attended seminars before on capital trials and was familiar with the case law applicable to death penalty cases. (PCR 44/4246-58; 45/4371-74)

Defendant's trial counsel testified that he had sufficient time to dedicate to the case. (PCR 44/4284) He also testified that this case was not complex nor involved. (PCR 45/4394) The public defender originally handled the case and it had made pre-trial motions and deposed the key witnesses. (PCR 45/4396) In addition, trial counsel had the taped statements of several

individuals. Trial counsel also had background information on the defendant that had been gathered by the public defender and there were no issues worthy of motion practice. (PCR 45/4397) In his opinion, the only thing he needed to do was read the prepared material and prepare a defense strategy in consultation with the defendant. No research or time on other issues was needed. (PCR 45/4398) He testified that if he needed more time he would have asked for it. (PCR 45/4399) His preparation for the case was not confined by any fees limitation; his focus was on defending the defendant. (PCR 44/4269) Trial counsel testified that he thought one of the major issues in the case was the admissibility of Davis' Illinois conviction. He spoke to the appellate lawyer about the issue. (PCR 44/4275)

Trial counsel testified that he had depositions and police reports showing what information Jean Born, Jeff Hubbard, Douglas Matheny and George Lee had and that based on those depositions and police reports he felt it was not necessary to take their depositions again for the type of defense they wanted to present. (PCR 44/4280) Trial counsel testified that there was no need for an investigator; that the facts were pretty well-developed and undisputed for the guilt phase. (PCR 44/4280) With regard to the penalty phase, White testified that he was aware of Davis' difficult upbringing and felt that his mother

could provide the salient facts that were needed in that regard. (PCR 44/4280) She could testify that his father was an abusive alcoholic and that Davis grew up poor. (PCR 44/4281) He didn't think there was much in Davis' life past age 13 that would be very mitigating. (PCR 44/4282) He thought he had a chance to win the penalty phase. He may have told Mrs. Davis that he felt Davis was going to get the death penalty. (PCR 44/4283) If the case had needed more time he would have given it more time. (PCR 44/4284)

Trial counsel had no recollection of his performance in voir dire other than that the defendant was participating and assisting him in the selection of the jury. (PCR 45/4472) Trial counsel explained that he generally does not give an opening statement because he does not want to box his client in to some course of action. (PCR 44/4291-4292) Trial counsel explained his strategy for failing to present evidence of the defendant's intoxication at the time of the offense. He testified that he did not want to present his own witnesses because the issues relating to the defendant's alleged intoxication were significantly developed during the State's own case, and he did not want to lose the opportunity to make the first and last closing arguments by calling a witness of his own. (PCR 44/4294) In addition, counsel testified that although a witness might be

favorable in one respect, that same witness might be dangerous in another. (PCR 44/4294) He also believed that he had sufficient evidence of intoxication. (PCR 44/4307) He testified that the other witnesses' statements were no stronger than what the State's witnesses had testified to during the State's case. (PCR 45/4406) White also testified that he successfully impeached both Beverly Castle and Kim Rieck with their prior inconsistent statements. (PCR 45/4405) He testified that he did not want to use Glenda South or Carl Kearney and lose last closing arguments. He noted that the witnesses had evidence unfavorable to the defendant and that their statements were no stronger than what the State's witnesses had already testified to. (PCR 45/4405-06)

With regard to the Diffendale report, trial counsel testified that the report did not establish an intoxication defense or negate specific intent. (PCR 45/4428) Moreover, the report contained information showing the defendant's violent nature. Trial counsel testified that it would not be good for a jury to hear that type of history. (PCR 45/4431) Trial counsel also testified that the State never offered a plea of life and that he did not prevent any negotiations between Davis and the State. (PCR 45/4486-87) Trial counsel also testified that it was Davis' decision to waive a PSI. (PCR 45/4490)

Appellant's cousin Mary Jo Buchanan was called as their next witness to testify concerning Davis' childhood. She also testified that she came down for the penalty phase with Davis' mother and that she spoke to Mark before the proceeding and told him she would be there. (PCR 46/4529-36)

Next, Shannon Stevens testified concerning his testimony at Mark Davis' 1987 trial. (PCR 46/4544) Stevens testified that there were no deals made or discussed with the State. (PCR 46/4549-50) He may have had the hope that the State would assist him in his effort to secure his gain time, but no deal was made and no promises were made. (PCR 46/4549-50)

The State then called Dr. Sidney Merin as a witness. (PCR 46/4581) Dr. Merin testified that the report prepared by the defendant's mental health expert at trial, Dr. Diffendale, was sufficient. In fact he testified that it was "pretty good." (PCR 46/4694) Dr. Merin testified that the background information contained in Dr. Diffendale's report was consistent with the background information provided by the defendant to Dr. Merin during his consultation with the defendant. (PCR 47/4711) Dr. Merin also testified that psychologists can get enough information from self-reporting to make a diagnosis. (PCR 47/4719-20) Dr. Merin testified that Dr. Diffendale had adequate time to perform his evaluation, the report was based

upon the appropriate type of information and testing relied upon by psychologists and Dr. Diffendale followed the procedures normally followed by other clinical psychologists. (PCR 47/4700-05) He testified that additional tests were not needed. (PCR 47/4706)

Dr. Merin also conducted his own evaluation of the defendant. The evaluation consisted of testing and an interview. (PCR 46/4593-94) He found that the defendant was bright average and that his brain was functioning well. (PCR 46/4598, 4622) He found no psychosis, brain damage, homophobia or Post-Traumatic Stress Disorder. (PCR 46/4656) He found that the defendant was *not* under the influence of extreme mental or emotional distress, that he could appreciate the criminality of his conduct, that there was nothing about his mental health that specifically negated his ability to form a specific intent for a premeditated crime and that the defendant's alcoholism was not the basis or reason for him committing the crime. (PCR 47/4693-97) He testified that Davis had lived a life that was inconsistent with many rules and laws. (PCR 47/4693) Nothing unusual occurred at the time of this killing that would have exceeded the level of stress or distress that he had been living with all those years. (PCR 47/4694) Dr. Merin concluded that Dr. Diffendale's results were consistent with his conclusions. (PCR 47/4706)

Frank Lauderback testified that he represented Kenneth Gardner with Tom McKeown at his retrial. (PCR 47/4679-82) At no time during his representation did he ever tell Gardner that the State wanted him to go and get information from Mark Davis. (PCR 47/4683-84)

Assistant State Attorney Beverly Andringa testified that when she prosecuted James Daley she listed Gary Dolan as a witness but that she did not call him at trial. She testified that she never gave Gary Dolan, or anyone else, a list of cases and suggested that they contact those individuals or say certain things about those individuals in return for any promises. (PCR 48/4894-97)

PRELIMINARY STATEMENT

Statement Regarding Procedural Bar

Davis raises a number of claims which are procedurally barred as claims which could have or should have been raised on direct appeal and are, therefore, not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So. 2d 206 (Fla.), cert. denied, 506 U.S. 839 (1992); Raulerson v. State, 420 So. 2d 517 (Fla. 1982); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Alvord v. State, 396 So. 2d 194 (Fla. 1981); Meeks v. State, 382 So. 2d 673 (Fla. 1980). An express finding by this Court of a procedural bar is also important so that any federal courts asked to consider the defendant's claims in the future will be able to discern the parameters of their federal habeas review. See Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977).

To counter the procedural bar to some of these issues, Davis has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has repeatedly held that issues which could have been, should have been and/or were raised on direct appeal are procedurally barred in the postconviction proceeding and that

"allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Thompson v. State, 759 So. 2d 650, 663-64 (Fla. 2000) (quoting, Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)).

SUMMARY OF THE ARGUMENT

Issue I: Appellant's first claim is that counsel was ineffective in the penalty phase for failing to adequately investigate Davis' background prior to trial. This claim was the subject of the evidentiary hearing below and was correctly rejected on both the prejudice and deficiency prongs as set forth in Strickland v. Washington, 466 U.S. 668, 686 (1984).

Issue II: Davis next asserts that the State withheld material exculpatory evidence. A number of these claims were not raised below and are, therefore, barred and do not constitute Brady[5] material because he received the alleged information from Det. O'Brien during his deposition. As counsel had the information from other sources and used that information to impeach the witness, there is no Brady violation. Further, as the gist of this testimony was before the jury, confidence in the outcome is not undermined.

Similarly, his remaining claims concerning information allegedly being withheld concerning information from informants was denied as meritless. As Davis has failed to prove that material evidence was withheld, the claims were properly denied.

Issue III: Appellant's next claim challenges counsel's effectiveness during the guilt phase. This claim was also

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

properly denied by the lower court as Davis has failed to show deficient performance and prejudice with regard to any of the alleged claims.

Issue IV: Appellant's next claim is that the trial court erred in denying his claim of prosecutorial misconduct. This claim is procedurally barred as it was raised and rejected on direct appeal. Moreover, the claim of error is not supported by the record.

Issue V: Davis' next claim is that counsel was ineffective for failing to provide his mental health expert with sufficient background to do a complete analysis. This claim was properly denied as Davis failed to show deficient performance and prejudice.

Issue VI: Davis' last claim is another Brady claim. The trial court found that none of the allegations were supported by the record and that no violation occurred. This finding should be affirmed.

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN DENYING DAVIS' INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE CLAIM.

Appellant's first claim is that counsel was ineffective in the penalty phase for failing to adequately investigate Davis' background prior to trial.[6] This claim was the subject of the evidentiary hearing below and was correctly rejected on both the prejudice and deficiency prongs as set forth in Strickland v. Washington, 466 U.S. 668, 686 (1984).

Recently this Court in Sochor, infra., reiterated the standard for reviewing the denial of ineffective assistance of counsel claims. This Court stated:

> When we review a circuit court's resolution of a Strickland claim, as we do here, we apply a mixed

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[6] All of Davis' ineffective assistance of counsel claims need to be considered in the context of the peculiar facts of this case. Davis demanded and received the right to act as his own co-counsel. Accordingly, his right to complain about counsel's performance is limited. See Downs v. State, 740 So. 2d 506, 516 (Fla. 1999) (where defendant waived his right to representation during the resentencing proceeding and counsel was appointed as "stand-by" counsel only he may not complain of counsel's failure to present mitigating evidence); Goode v. State, 403 So. 2d 931, 933 (Fla. 1981) (where defendant acted as his own attorney and could not later complain that his "co-counsel" ineffectively "co-represented" him). Even if Davis' self-representation did not bar review of counsel's actions, this Court has repeatedly held that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001).

> standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact. See id. at 698 ("Ineffectiveness is . . . a mixed question of law and fact."); Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). *We defer to the circuit court's factual findings, but we review de novo the circuit court's legal conclusions*. Stephens, 748 So. 2d at 1033 ("Thus, under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings."); see also Hodges v. State, 2003 Fla. LEXIS 1062, 28 Fla. L. Weekly S475, S476 (Fla. June 19, 2003) ("Ineffective assistance of counsel claims are mixed questions of law and fact, and are thus subject to plenary review based on the Strickland test. Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.") (citation omitted).
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> Sochor v. State, 29 Fla. L. Weekly S363, 364 (Fla. July 8, 2004)(emphasis added)

In the instant case, Davis was given an evidentiary hearing where he put on a number of witnesses in support of his claim. Subsequently, the lower court, in a very thorough and well-detailed 30 page order, denied relief. (PCR 17/2898-2928) The lower court found "that the trial counsel did an adequate investigation into the defendant's background. The testimony of the witnesses at the evidentiary hearing contained no information not substantially known to trial counsel. Therefore, he cannot be said to have conducted a deficient investigation into the defendant's background to establish

mitigating evidence." (PCR 17/2916-17) The lower court also found that Davis failed to show any prejudice because the four aggravating factors that existed in this case would have overwhelmed any of the mitigating evidence that Davis claims should have been presented at his penalty phase and therefore, the result would not have been changed with this mitigating evidence. (PCR 17/2926) Based on these findings, the State contends that Davis has failed to establish **deficient performance** and **prejudice** as required by Strickland v. Washington, 466 U.S. 668 (1984) sufficient to overcome the presumption that he was provided constitutionally effective counsel and, therefore, the lower court properly denied the claim.

Davis' claim that counsel failed to conduct an adequate investigation into Davis' background ignores the factual findings of the trial court and reasserts the unsubstantiated claim that counsel only talked to Davis, his mother and Dr. Diffendale and, therefore, the investigation cannot be deemed reasonable. He takes fault with the lower court's finding that trial counsel did an adequate investigation and that the testimony of *no* witness at the evidentiary hearing contained information that was not substantially known to counsel. Davis then repeats the testimony of those witnesses. This argument

completely ignores the fact that the lower court heard these witnesses and made factual findings with regard to their testimony. Specifically, the lower court stated:

> At the evidentiary hearing collateral counsel presented several witnesses in an effort to show the type of mitigation evidence that it believes should have been presented. This Court will examine each witness in light of the information known, or that reasonably should have been known, by trial counsel at the time of the penalty phase. First, collateral counsel called Ricky Joe Hall. Hall testified that he grew up with the defendant and that the defendant used a lot of different drugs on a daily basis starting about age 13. EH 15, 17. He also testified that the defendant was an alcoholic. EH 19. He testified that he had seen the defendant be violent before. EH 20. He also testified that he had the defendant watch his children for him and that he wouldn't let anyone he didn't trust watch his children. EH 20. Obviously, this testimony may be more damaging to the defendant than mitigating. It has been this Court's experience that jurors in Pinellas County do not always consider the daily ingestion of illegal drugs to be mitigating, quite the contrary. This Court finds that trial counsel's failure to call this witness was not deficient.
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> The next witness called was the defendant's father, John Davis. He testified that he was a heavy drinker most of his life, was an alcoholic, he occasionally struck members of his family and he drank away the house and food money. EH 30-33. Trial counsel knew about this information from the defendant and the defendant's mother. It was the type of information that the mother would have testified to. Trial counsel was not deficient in not securing this defendant for testimony at trial.
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> Next, collateral counsel called the defendant's second oldest brother Tracy Davis. Initially, this Court notes that this witness would not have been available to the defendant at the time of the penalty phase in 1987. Tracy testified on cross-examination that at the time his mom was down here in January of 1987 he was in jail. But then he testified that he

was not sure if his mom knew where he was. EH 66. He testified that "at the time I was on the run, went to Phoenix, and I was kind of jumping around at the time." EH 66. When asked to explain what on the run meant, he testified that "[t]hey was trying to violate my parole for a misdemeanor charge." EH 66. He also mentioned he was in Tennessee, drinking heavily and doing drugs at the time. EH 66-7. It was his understanding that if he had come down to Florida and testified at the time he could have been arrested and sent to Illinois. EH 67. Tracy testified that he would have come down to testify if asked. EH 67. However, he also testified that "but financially and the court systems, the mixed up mind I had at the time dealing with my parole and stuff like that, it was really confusing and at a bad time." EH 67. This Court finds Tracy's statement that he would have come to Florida to testify at the time despite the possibility of his being arrested not to be credible. Moreover, the testimony, although a bit confusing, indicates that he was unavailable at the time and that this family did not know where he was. This Court finds that even if his family had been able to locate him, given the admittedly unsettled state of his mind and circumstances at the time, he would not have risked arrest to come down to Florida to testify. Trial counsel was not ineffective for not securing this witness to testify. The evidence indicates that even if trial counsel had wanted to have Tracy testify, the family did not know his whereabouts because he was "on the run" at the time of the trial.

Even though Tracy would not have been available, this Court will examine his testimony. Tracy testified about both the town and the household that he and the defendant grew up in. EH 41-50. This was information that was known to the mother.

Tracy also testified that he and the defendant engaged in drug and alcohol abuse and also engaged in criminal activity (burglary, robbery) together while growing up. EH 61. A jury would not necessarily view this as mitigation. In fact, it might very well reach the opposite conclusion.

Finally, Tracy also testified about an incident that allegedly occurred many years ago when the defendant was about six and he was about fourteen or fifteen. He testified that he was in the bathtub with

his brother and he had sexual contact with him. EH 52. Specifically, he said that he had anally raped his brother. EH 53. He also testified that the defendant came to him shortly after that and asked him if he wanted to try that again. EH 55. Tracy testified that's when he started rejecting his little brother, avoiding him and staying away from him. EH 56. The Court finds this testimony suspect at best. The defendant never mentioned this to his trial counsel, never mentioned it to his mental health expert, and no other member of the family seems to have known about it. It seems only to have been mentioned somewhat recently. In fact, the defendant specifically denied ever having been sexually abused. Exhibit 3. If this incident had occurred, the defendant was aware of it. His failure to inform either his trial counsel or his mental health expert precludes him from complaining that his counsel was deficient for not using the information in mitigation. See Stewart v. State, 801 So.2d 59, 67 (Fla. 2001).

Trial counsel was not deficient in not presenting this witness. This Court finds that the witness was unavailable at the time of trial; the substance of his testimony about the town and household was known to the mother, the information about their drug and alcohol abuse, and their criminal background was as much damaging as mitigating; and the information about the anal rape was not credible.

Next, the defendant presented Mary Blinn. She was the defendant's former sister-in-law. She was Tracy's former wife. EH 147. She testified that she allowed the defendant to watch her children on occasion and that he was concerned about his younger sister. EH 148-9. She also testified that the defendant was a drug addict, a heavy drinker, and that the defendant and Tracy would go out to steal money. EH 150-1, 161-2. Obviously, this information was as damaging to the defendant as mitigating. Trial counsel was not deficient in not securing the testimony of this witness.

The next witness was Johansae Haynes. Essentially, he testified to the circumstances of the defendant's family. EH 175-186. This testimony was known to the mother and trial counsel.

Michael Davis, the defendant's oldest brother testified next. He testified about the circumstances

of the family. EH 191-203. He also testified that he left high school to work on a garbage route to earn money for the household. EH 195. He then enrolled in a vocation school and worked at night at a garage. EH 196. He got his GED, graduated from vocational school number one in his class and got a job with a trucking company. EH 197. This testimony was known to the defendant's mother. EH 206. This Court finds that this witness would not have been beneficial to the defendant. Essentially, this witness grew up in the same household under the same circumstances as the defendant. And yet, he overcame this and established a stable life. The jury would have contrasted this with the defendant's lack of effort to overcome his circumstances.

The defendant's younger sister, Shari Uhlman, testified next. She testified about her relationship with the defendant and about the household. EH 208-223. She admitted on cross-examination that the mother knew everything that she testified to. EH 226-7.

Finally, the defendant's older sister, Candace Louis, testified. Like the other siblings she testified to the circumstances of the defendant's household. EH 237-53. On cross-examination the witness testified that there was nothing in her testimony that the mother did not know. EH 254.

To sum up so far, this Court finds that the trial counsel did an adequate investigation into the defendant's background. The testimony of the witnesses at the evidentiary hearing contained no information not substantially known to trial counsel. Therefore, he can not be said to have conducted a deficient investigation into the defendant's background to establish mitigating evidence. Trial counsel selected the best possible witness, the defendant's mother, to testify to the jury about the defendant's upbringing. The mother was at the trial and prepared to testify. It was the defendant's decision not to call his mother. Trial counsel creatively used the defendant's decision not to have his mother testify in his favor during the closing argument in the penalty phase. A review of the testimony of the other family members and friends presented at the evidentiary hearing reveals much of it was as damaging as it was mitigating.

(PCR 17/2920-24)

The lower court also found that Davis himself did not want much mitigating evidence presented noting that trial counsel testified that Davis did not want mitigating evidence presented. Davis told his trial counsel that "I want the electric chair. I want to stay alive 10 or 11 years on death row. That's good enough for me." (PCR 17/2924-25)

To merit relief on a claim of ineffective assistance of counsel, Davis must show not only deficient performance, but also that the deficient performance so prejudiced his defense that, without the alleged errors, there is a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir. 1994). See also Rose v. State, 675 So. 2d 567, 570-71 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). This Court has denied relief in a number of similar cases where collateral counsel asserts that additional information should have been discovered. Sweet v. State, 810 So. 2d 854 (Fla. 2002); Bruno v. State, 807 So. 2d 55 (Fla. 2001); Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998); Breedlove v. State, 692 So. 2d 874 (Fla. 1997). In Bruno, this Court rejected this claim after stating:

> . . . Bruno argues that counsel was ineffective in

> failing to investigate and present available mitigation. The trial court rejected this claim [quote omitted]. . . We agree. . . . Counsel's performance in this case may not have been perfect, but it did not fall below the required standard. See Teffeteller v. Dugger, 734 So. 2d 1009, 1022 n. 14 (Fla.1999) ("[T]he legal standard is reasonably effective counsel, not perfect or error-free counsel."). Moreover, *counsel's performance cannot be considered deficient simply because the evidence presented during the 3.850 hearing may have been more detailed than the evidence presented at trial, especially in light of the fact that the substance of both presentations was essentially the same*. Finally, even assuming that counsel's performance was deficient, we agree with the trial court that Bruno has failed to satisfy the second prong of the Strickland test, as Bruno has not established that there is a reasonable probability that such deficiency affected the sentence.
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> Id. (emphasis added)

Trial counsel, in the instant case, pursued the investigation of mitigation through the defendant, his family and mental health experts. After consultation with his client, Davis refused to have his mother testify on his behalf. As for the mental health report from Dr. Diffendale, counsel testified in the evidentiary hearing that the report did not establish an intoxication defense or negate specific intent. (PCR 45/4428-29) Moreover, the report contained information showing the defendant's violent nature. Trial counsel testified that it would not be good for a jury to hear that type of history. (PCR 44/4431) The lower court reviewed the report, and agreed with

trial counsel's assessment of the report and its likely effect on the jury. As the trial court found, nothing that was presented at the evidentiary hearing was unknown to trial counsel and the defendant at the time of the penalty phase.

Counsel testified that the decision to limit the evidence was made by both he and Davis who was acting as his own co-counsel. (TR 11/1517-1542; PCR 17/2924-25) As previously noted, this Court has rejected a defendant's attempt to assert that his co-counsel was ineffective when he was acting as his own counsel. Downs v. State, supra. (where defendant waived his right to representation during the resentencing proceeding and counsel was appointed as "stand-by" counsel only he may not complain of counsel's failure to present mitigating evidence); Goode, supra. (where defendant acted as his own attorney and could not later complain that his "co-counsel" ineffectively "co-represented" him). Even if Davis' self-representation did not bar review of counsel's actions, this Court has repeatedly held that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Stewart, supra.

The only evidence that Davis presented at the evidentiary hearing that was previously unknown to counsel was a claim that Davis had been sexually abused by his brother Tracy and others.

The trial court specifically found Tracy's testimony about his alleged anal rape of his brother Mark to be "suspect at best." (PCR 17/2922) Davis never mentioned this to his trial counsel, never mentioned it to his mental health expert, and no other member of the family seems to have known about it. Trial counsel testified that Davis specifically denied ever having been sexually abused. The trial court found that if "this incident had occurred, the defendant was aware of it. His failure to inform either his trial counsel or his mental health expert precludes him from complaining that his counsel was deficient for not using the information in mitigation." (PCR 17/2922) Thus, as the trial court found, trial counsel was not deficient in not presenting this witness as the witness was unavailable at the time of trial; the substance of his testimony about the town and household was known to the mother; the information about their drug and alcohol abuse, and their criminal background was as much damaging as mitigating; and the information about the anal rape was not credible. (PCR 17/2922)

In Stewart at 67, this Court rejected a claim that counsel was ineffective for failing to discover evidence that Stewart had been abused by his stepfather when Stewart had never made such a claim to counsel or any of the mental health professionals. Similarly, in Power v. State, 29 Fla. L. Weekly

S207, S209 (Fla. May 6, 2004), this Court held that "where there is proof that counsel spent substantial effort on the case and was familiar with the mitigation, but also evidence that Power himself interfered with trial counsel's ability to obtain and present mitigating evidence, this Court will not overrule a trial court's conclusion that counsel's performance was not deficient." Finally, in Rutherford v. State, 727 So. 2d 216 (Fla. 1998), this Court affirmed the trial court's denial of postconviction relief where Rutherford claimed that counsel failed to properly investigate and present mitigating evidence. Like Davis, Rutherford also interfered with trial counsel's conduct by placing limitations on what could and could not be presented during the penalty phase. This Court found Rutherford's uncooperativeness a critical factor.

Davis additionally argues that counsel was ineffective for failing to challenge the CCP aggravating factor. Davis makes the unsupported allegation that he could not have formed the specific intent required for the CCP aggravating factor due to his alleged molestation and childhood abuse.[7] As the lower court

[7] In support of the CCP factor the trial court found:
(i) That the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence clearly establishes beyond all reasonable doubt that MARK A. DAVIS had a premeditated and calculated design to murder the

made a factual finding that this evidence was suspect and rejected it, counsel can hardly be deficient for failing to put on the evidence and no prejudice has been established.[8]

Davis' reliance on Williams v Taylor, 529 U.S. 362 (2000) to support his claim that counsel was ineffective is misplaced. In Williams, counsel had failed to investigate and discover evidence that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents'

> victim, Orville O. Landis. Earlier in the day of the murder, MARK A. DAVIS stated to Beverly Castle that he was going to "rip the old queer off and do away with him." Further, the Defendant's actions during the attack clearly establish his calculated and premeditated plan. He first beat the victim and attempted to cut his throat. However, before he could complete this endeavor, the knife broke. Retreating long enough to find yet a large butcher knife, the Defendant returned to the wounded victim and continued with the brutal and vicious attack on Orville O. Landis. "He wouldn't go down; he just would not die," the Defendant later said to Shannon Stevens. (TR 2/271)

[8] The lower court also found that Tracy was unavailable as a witness at the time of trial.

custody." Id. at 395. Additionally, there was evidence that Williams was borderline mentally retarded and had a fifth grade education. Id. at 396. Clearly, as the trial court's evaluation of the evidence shows, Davis' family history and background is unremarkable in comparison.

Davis has simply failed to present any credible evidence that was not known to trial counsel, that would have been truly mitigating or undermined the aggravating circumstances. Moreover, it is not sufficient to establish that counsel could have done more. Rather, to carry his burden to prove deficient performance, Davis must establish that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Windom v. State, 29 Fla. L. Weekly S191, S192 (Fla. May 6, 2004), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984). As this Court noted in Teffeteller v. Dugger, 734 So. 2d 1009, 1022 n. 14 (Fla. 1999), the legal standard is reasonably effective counsel, not perfect or error-free counsel.

Moreover, even if Davis had established that counsel's performance was deficient, he has not established that counsel's performance prejudiced him. As previously noted, Strickland requires the defendant to show that the deficient performance prejudiced the defense. This requires showing that counsel's

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown of the adversary process that renders the result unreliable. Strickland, 466 U.S. at 687. Thus, in order to establish the prejudice prong, Davis must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When considering a claim of ineffective assistance of penalty phase counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. See Sochor v. State, 29 Fla. L. Weekly S363 (Fla. July 8, 2004).

In the instant case, the trial court found that Davis had not established prejudice:

> Finally, the defendant has failed to show any prejudice. It is the defendant's burden to show that counsel's performance was such that there is a reasonable probability that, absent trial counsel's error, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. See Carroll v. State, 2002 WL 352844, (Fla. 2002); Cherry v. State, 781 So. 2d 1040 (Fla. 2001). The defendant must show that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding. Asay v. State, 769 So. 2d 974 (Fla. 2000). This Court found

> four aggravating factors, and the Florida Supreme Court upheld that finding. The aggravating factors are: (1) the murder was committed in a cold, calculating, and premeditated manner without any pretense of moral or legal justification; (2) the capital felony was committed while under sentence of imprisonment; (3) defendant had previously been convicted of a capital offense or felony involving the use or threat of violence; and (4) the murder was heinous, atrocious, or cruel. The Florida Supreme Court in Davis v. State, 620 So. 2d 152 (Fla. 1993) noted the severity of the murder in upholding the finding of the aggravating factor that the crime was heinous, atrocious, or cruel. To repeat: The medical examiner testified that the victim sustained [twenty-five] stab wounds to the back, chest, and neck; multiple blows to the face; was choked or hit with sufficient force to break his hyoid bone; was intoxicated to a degree that impaired his ability to defend himself; and was alive and conscious when each injury was inflicted. The evidence showed that the slashes to the victim's throat were made with a small-bladed knife, which was broken during the attack, and the wounds to the chest and back were made with a large butcher knife, found at the crime scene. In addition, in Davis v. State, 586 So. 2d 1038 (Fla. 1991) the Court, in upholding the finding of the aggravating factor that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, noted that a witness testified that the defendant told her that he was going to rip the victim off and do him in. With this evidence, this Court finds that the four aggravating factors would have overwhelmed any of the mitigating evidence that the defendant claims should have been presented at his penalty phase. The result would not have been changed with this mitigating evidence. Therefore, this Court finds that the defendant has failed to establish prejudice.
>
> (PCR 17/2925)

Again, to prevail on this claim, Davis must get over the hurdle that his own actions caused. Downs v. State, 740 So. 2d

506, 516 (Fla. 1999); Goode v. State, 403 So. 2d 931, 933 (Fla. 1981); Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001); Rutherford v. State, 727 So. 2d 216 (Fla. 1998). It was his decision to forgo the presentation of the testimony that his counsel had planned to present through his mother. It was his decision to deny any sexual abuse. Counsel cannot be faulted for Davis' own actions.

Furthermore, the failure to present evidence that Davis was raised in a two-parent family where his alcoholic father barely provided for the family and that the defendant began a life of drug abuse and crime at an early age, does not undermine confidence in the outcome. The trial court found that Davis planned to commit this murder/robbery and that the victim sustained twenty-five stab wounds to the back, chest, and neck; multiple blows to the face; was choked or hit with sufficient force to break his hyoid bone; was intoxicated to a degree that impaired his ability to defend himself; and was alive and conscious when each injury was inflicted. On appeal, this Court reviewed the sufficiency of the CCP factor and found that it was supported by the evidence, stating:

> Appellant asserts there was insufficient evidence that the murder was cold, calculated, and premeditated. n2 We disagree. Castle testified that appellant told her he was going to rip the victim off and "do him in." Furthermore, during the course of inflicting twenty-five stab wounds upon the victim, appellant

> first used a butcher knife and then resorted to a second knife to continue the brutal slaying. The medical expert opined that no struggle took place other than in the victim's bed, and that the attacker was standing next to the bed during the murder. These facts support the finding that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991)(footnote omitted)

Balanced against the insignificant evidence of mitigation now being urged, Davis has failed to establish prejudice. There is no reasonable probability that, absent the alleged errors, the sentencer would have concluded that the mitigating circumstances now offered outweighed the aggravating circumstances found by the trial court.

ISSUE II

WHETHER THE CIRCUIT COURT ERRED IN DENYING DAVIS' CLAIM THAT THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE.

Davis next asserts that the State withheld material exculpatory evidence. The portions of this claim that were specifically raised in the motion to vacate were the subject of an evidentiary hearing below.[9] After hearing and considering the arguments and evidence presented by Davis the trial court denied relief. With regard to Davis' Brady claim, the lower court found:

> **Claim V** is the defendant's claim that the State withheld material and exculpatory evidence and presented misleading evidence. This Court finds the defendant failed to prove these allegations.
>
> The defendant claims that the names of several individuals who provided statements to law enforcement and the State were not provided to him in discovery. Other than Gary Dolan, however, the defendant fails to identify who these individuals are.
>
> As to Gary Dolan, the defendant alleges that Dolan was a key witness because he befriended the defendant in accordance with the State's instructions and relayed information to the State about the defendant's defense. The testimony of Dolan at the evidentiary hearing, however, does not establish that he had anything exculpatory concerning the defendant. The only information he may have had was what he claims the defendant told him about the crime. Certainly, the defendant knew of Dolan and knew what, if

[9] As will be discussed, infra., Davis did not argue as he does now that the State erroneously suppressed evidence by supplying "Millerized" police reports to the defendant.

anything, he had told him. There was no showing that the State suppressed material, exculpatory evidence, and no showing that the defendant was prejudiced. (The allegation that he was recruited by the State will be addressed in Claim VI).

In addition, the defendant claims that the State failed to turn over exculpatory evidence about the defendant's alleged intoxication. Again, however, the defendant fails to identify any individuals. A review of the trial transcript reveals that the defendant's trial counsel did present evidence and argument in support of his contention that he was intoxicated at the time of the offense. R. 930-4, 942-4, 948, 960-1, 963-5, 976-81, 990-4, 1202-6, 1257-82, 1365-8, 1378-82, 1431-3.

The defendant claims that the State withheld evidence that deals or benefits had been discussed with witnesses. The defendant, however, failed to present sufficient evidence of any deals or discussions of deals with witnesses. Although the State did send a letter to the sentencing judge in Shannon Stevens' case, Shannon Stevens testified during the evidentiary hearing that there were no deals made or discussed with the State. EH 776-7. He may have had the hope that the State would assist him in his effort to secure his gain time, but no deal was made and no promises were made. As noted by trial counsel during his testimony at the evidentiary hearing in response to a question about jail-house informants being impeached on their testimony: "[I]n almost every case there is a realistic hope of reward." EH 572. He went on to say: "common sense is that somebody isn't in there out of a feeling of patriotism; testifying that more than likely they have an expectation of a hope that they will benefit one way or the other, after the fact." He noted that juries sense that. EH 572.

The defendant claims that the State misrepresented to the jury during the penalty phase that he had planned escapes from the Pinellas County Jail. A review of the trial transcript, however, reveals that the defendant admitted that he had planned possible escapes from the County Jail. See R. 1536.

In addition, the defendant claims that the State improperly admitted into evidence as a conviction an Illinois juvenile offense. He claims the State had

> documents in its possession that proved the Illinois offense was a juvenile delinquency. There is nothing to suggest the State withheld evidence or acted improperly in admitting the Illinois offense into evidence. Although the parties may have disagreed over whether or not the Illinois offense was a conviction under Florida law, and whether or not certain documents (Exhibit 4) supported their position, it is not improper for the State to attempt to get the evidence introduced. Certainly, the State did not withhold evidence on the matter. The documents in question were admitted into the record. Trial counsel for the defendant was fully aware that the Illinois matter was arguable. EH 738-9. He made numerous objections to its admissibility and admitted documents of his own pertaining to the Illinois offense. R. 1493-8, 1509-10, 1606-8, 1616-35.
>
> (PCR 17/2906-09)

A trial court's factual findings with regard to whether Brady material had been disclosed is a factual finding that should be upheld as long as it is supported by competent, substantial evidence. Way v. State, 760 So. 2d 903, 911 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999). The finding of the lower court is supported by competent, substantial evidence and should be affirmed.

Davis' first portion of this claim, that the State withheld police reports and statements of witnesses by "Millerizing"[10] the police reports provided to trial counsel, was not presented to

[10] Referring to the practice of redacting police reports and providing to the defense in discovery only those portions containing verbatim statements of witnesses as authorized by Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978).

the court below and is, therefore, barred. The only "evidence" supporting this claim is ASA Martin's statements during the evidentiary hearing that police reports were "Millerized" during the time of Davis' trial. (PCR 46/4567) Contrary to Davis' assertions, however, ASA Martin did not say that the statements given to defense counsel White were "Millerized." Rather, he stated that it was the practice at the time and that trial counsel "probably" did not get certain non-verbatim statements. (PCR 46/4566-68) In reference to the statement of Kimberley Rieck, ASA Martin specifically stated:

> MR. MARTIN: That is correct, and what would have been taken out is for example Kim Rieck, on page one of defense exhibit number six appears to be a non-verbatim statement of summary and I can look at mine because we have like lines. We know what was taken out. He probably didn't get that. He got the taped statement because that was verbatim.
>
> (PCR 46/794)

No evidence was presented at the hearing by the defense that counsel, in fact, did not receive "un-Millerized" reports. Nor was an argument made to the court that as a result of the "Millerizing" the defense was denied impeachment material. Accordingly, there is not only a failure of proof, but this claim is procedurally barred as it was not properly presented to the court below.

In any event, Davis now argues that, according to ASA Martin's statement, the summary of trial witness Kimberley Rieck's statement to police was deleted from Detective O'Brien's police July 3, 1985 police report. Again, only the statements made by ASA Martin during the introduction of defense exhibits are now being urged as evidence of a violation. Davis has not produced any testimony or evidence that this information was actually withheld from defense counsel. More, importantly, the only thing he asserts is missing is the fact that Det. O'Brien does not report that Rieck told him that Davis had given her a ride the previous evening or that he made any statement to her during the day about getting the victim drunk to see what he could get out of him. (Brief of Appellant at pg. 68) Det. O'Brien summarized his encounter with the sixteen year old Ms. Rieck when he responded to a call at the scene on the day the victim's body was discovered in the police report as follows:

> KIM RIECK, W/F, 16yoa, Apt. #5, 10608 Gandy Blvd. This female is a co-manager of the apartment complex. She states that Mark Davis is from Pekin, Illinois, her home town. He came to Florida last Thursday in a car he took wihtout [sic] permission from that state. He stayed in the car the first night and then slept in different apartments. The vehicle was recovered by this department and towed into the compound lot. He (Davis) was not apprehended for that crime. On the date the victim moved into the place of occurrence, he (Davis) went over to ask him for a cigarette. He and the victim had a few drinks and then went to two local bars where they drank on and off until 0030hrs. on July 2, 1985.

(PCR 19/3193, Def. Ex. 6 - Police Report of Det. O'Brien)

Because Davis did not raise this claim below and never sought to establish a Brady violation on this basis, we do not know which portions, if any, were actually deleted from the report. The trial record shows, that counsel moved pretrial to compel Miller portions of the police reports, which was granted. (TR 2/97-98, 101) Thus, counsel was clearly aware of the practice. (PCR 45/4411-12, 4474-75)

Notwithstanding, it is obvious that even if counsel did not receive this brief summary by one of the initial officers on the scene, it does not constitute Brady material because he received the same information from Det. O'Brien during his deposition. During the deposition Det. O'Brien essentially read his complete report to then trial defense counsel Jean Goebel. (TR 3/384-86) Additionally, defense counsel had the transcript of Rieck's oral interview. In fact, the trial record shows that counsel used Rieck's statements to impeach her.[11] (TR 7/942-43)

This Court in Tompkins v. State, 872 So. 2d 230 (Fla. 2003), has recently reiterated the three components of a true Brady violation as follows:

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[11] The transcript of that interview was introduced as Def. Ex. 4. (PCR 19/3191)

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
> [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and
> [3] prejudice must have ensued.
>
> Tompkins v. State, 872 So. 2d 230 (Fla. 2003), quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999) HN2

This Court noted that under the prejudice prong, the defendant must show that the suppressed evidence is material and that evidence is only material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Further, this Court noted that, "in determining materiality, the 'cumulative effect of the suppressed evidence must be considered.'" Tompkins, quoting Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002)(evaluating a Brady claim under the three prong test set forth in Strickler).

As counsel had the information from other sources and used that information to impeach the witness, there is no Brady violation. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2002) ("a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld

from the defendant.")

Similarly, he urges for the first time that the State did not provide the statements of Jean Born and Glenda South, which were also contained in the report. Again, as Det. O'Brien provided the information in his deposition that was contained in the police report, there is no Brady violation. Moreover, Davis does not even allege materiality or prejudice.

Davis next makes the unsupported allegation that much of Det. Rhodes' report was withheld and again fails to assert how he was prejudiced if the report was withheld. He simply urges that the report contained valuable evidence that Davis was "unstable" and "nuts." Det. Rhodes' report contains a summary of his interview with Glenda South who stated that when she met Davis - a week prior to the murder - he was "in her opinion, an unstable type person. One that was 'Nuts.'" (PCR 19/3192) The record contains a transcript of Det. Rhodes oral interview with Glenda South where she recounts her dealings with Davis and Landis. (PCR 19/3189) Further, Davis does not explain how the absence of this information undermines confidence in the outcome of the proceeding.[12]

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[12] Under the prejudice prong, the defendant must show that the suppressed evidence is material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a

Moreover, although this claim was not presented as a Brady claim to the lower court, it was raised as an ineffective assistance of counsel claim. Upon denying relief the lower court found:

> Next, the defendant claims that his counsel was ineffective because he failed to depose "key" witnesses. These individuals were Jean Born, Jeff Hubbard, Douglas Matheny and George Lee. These individuals were at a bar and had seen both the victim and the defendant at the bar earlier the day of the crime. Trial counsel, however, testified that he had depositions and police reports showing what information these individuals had. EH 693. The defendant failed to identify any information relating to the crime that these individuals had that was unknown to his trial counsel. The defendant has failed to establish that his trial counsel was ineffective for not deposing these individuals. This Court has reviewed the police reports (Exhibit 1) and agrees with trial counsel that there is nothing in them that was unknown to him.
>
> (PCR 17/2902)
>
> The defendant repeats his claim that his counsel should have put on other witnesses who had evidence of the defendant's alleged intoxication. This time he adds the name of Glenda South and Carl Kearney. Trial counsel testified that he did not want to use these witnesses because it would have forced him to lose his opportunity to have first and last closing arguments, the witnesses had evidence unfavorable to the defendant, and their statements were no stronger than what the State's witnesses had already testified to. EH 633-4. This Court finds this strategy reasonable. This Court has reviewed the police reports (Exhibit 2) and agrees with counsel that they contain no

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probability sufficient to undermine confidence in the outcome. Reed v. State, 29 Fla. L. Weekly S156 (Fla. April 15, 2004)

information not known to him.

(PCR 17/2904-05)

Both Det. Rhodes' and Det. O'Brien's complete police reports are attached to the order. (PCR 17/3006-09) While this finding deals with ineffective assistance, it disproves any claim of materiality because counsel testified that he would not have used it. Further, as the gist of this testimony was before the jury, confidence in the outcome is not undermined.

Davis next asserts that he was not provided with the statements contained in a "synopsis" at Def. Ex. 12. Exhibit twelve is actually miscellaneous handwritten memos. (PCR 33/3204) Defendant's Exhibit No. 13 contains a "synopsis" that was prepared for ASA McKeown by IPO Lynne Van Hoozen on August 15, summarizing the evidence they had available against Mark Davis and recommending that they proceed to the grand jury. The alleged failure to produce either exhibit was not brought forth at the hearing below. While counsel now contends that the State conceded that it would not have been provided, there is no reference to any record cite to support this contention. This claim is not properly before this Court. Notwithstanding the repeated effort to assert arguments that were not specifically made to the court below, the record does not support the contention that trial counsel was denied access to any material

information. This claim should be denied.

Next Davis takes exception to the trial court's findings that the transcript shows trial counsel presented evidence and argument that Davis was intoxicated. The lower court supported the finding with references to the record below, citing to R. 930-4, 942-4, 948, 960-1, 963-5, 976-81, 990-4, 1202-6, 1257-82, 1365-8, 1378-82, 1431-3. (PCR 17/2907) Ignoring this evidence, Davis again argues that counsel was limited to impeaching with their verbatim statements because it was the only thing he had. Clearly, this contention is refuted by the record and should be denied. As previously noted, even if he was not given nonverbatim statements, he was provided with the other reports, transcripts and depositions where the substance of the reports was repeated. Moreover, once again, Davis fails to allege any material evidence that undermines confidence in the outcome. This claim should be denied.

Davis next asserts that the State suppressed the deal it made with Shannon Stevens. This claim was presented below. At the evidentiary hearing Shannon Stevens denied making a deal as he had in his prior trial testimony and depositions. (TR 3/453, 8/ 1194, 1217, 1223-1224, 1246) He testified that he had been sentenced the prior Monday to a year and a day in prison on guidelines of community control, and to thirty months

imprisonment for escaping from work-release (TR 8/1193). The Pasco County charges of burglary and grand theft, to which he had pled guilty in August for the bottom of the guidelines and concurrent time, was set for sentencing the following Monday, having been postponed for the State to substantiate and obtain microfilm copies of his past record for guidelines scoring (TR 8/1193-1194).

On cross-examination, defense counsel brought out that Stevens had received the lowest possible prison sentence recommended by the guidelines, that the State had not objected to that sentence, and that his sentence was subject to reduction within 60 days (TR 8/1242-1243). Defense counsel also brought out that the judge could go below the guidelines in sentencing on the upcoming Monday, if he gave valid reasons in writing, but Stevens had bargained for the bottom of the guidelines. (TR 8/1243)

On redirect examination, Stevens explained that his defense counsel had not been aware of Stevens' association with Davis at the time of the guilty plea, and that Stevens had specifically waited until after the new law went into effect, which greatly reduced his guidelines range, before accepting the plea bargain for the bottom of the guidelines. (TR 8/ 1244-1245)

The record conclusively shows that Shannon Stevens was not

aware, at the time of his trial testimony on January 16, that the State would later decide to write a letter on January 29, asking the Department of Corrections to not forfeit Stevens' gain time, based on the escape conviction, because of his cooperation in Davis' murder case and that of another defendant. The record supports that defense counsel made the jury aware of the possibility of Stevens receiving a reduced sentence in exchange for his cooperation and does not support that the State withheld any promise of favorable treatment.

Based on the foregoing, the lower court denied this portion of the claim stating:

> The defendant claims that the State withheld evidence that deals or benefits had been discussed with witnesses. The defendant, however, failed to present sufficient evidence of any deals or discussions of deals with witnesses. Although the State did send a letter to the sentencing judge in Shannon Stevens' case, Shannon Stevens testified during the evidentiary hearing that there were no deals made or discussed with the State. EH 776-7. He may have had the hope that the State would assist him in his effort to secure his gain time, but no deal was made and no promises were made. As noted by trial counsel during his testimony at the evidentiary hearing in response to a question about jail-house informants being impeached on their testimony: "[I]n almost every case there is a realistic hope of reward." EH 572. He went on to say: "common sense is that somebody isn't in there out of a feeling of patriotism; testifying that more than likely they have an expectation of a hope that they will benefit one way or the other, after the fact." He noted that juries sense that. EH 572.
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> (PCR 17/2907)

This is a factual finding by the lower court that cannot be overturned unless this Court finds that it is not supported by competent substantial evidence. As Stevens and trial counsel both testified that no deal existed, Stevens' testimony essentially affirms his prior testimony and no credible evidence exists to the contrary, this finding is well supported by the evidence and should be affirmed. Moreover, as counsel argued to the jury that Stevens was getting some kind of reward for his testimony, confidence in the outcome of the proceeding is not undermined.

Next appellant repeats his postconviction allegation that the State presented false evidence concerning Davis' prior conviction. He now adds to the claim that a handwritten note from the prosecutor's file which makes reference to a juvenile parole violation was withheld and that it constitutes evidence the State knowingly presented false evidence. The matter was fully addressed during Davis' trial and ruled on by the trial court before being presented to the jury. (TR 11/1493-1498).

During the trial defense counsel objected again just before the State's introduction of the juvenile conviction and testimony of Officer Salmon, who was to testify about the juvenile conviction, and the court overruled the objection. (TR 11/1509-1510). Thereafter, in the sentencing phase before the

judge, the State put on testimony of Scott Hopkins, an investigator for the State Attorney. Hopkins had been deposed by defense counsel the day before. During sentencing, Hopkins was questioned concerning his receipt of documents and information regarding Davis' prosecution and sentence as an adult for the attempted armed robbery in Illinois. (TR 11/1601-1606, 1608-1609) Defense counsel objected on the grounds that some of the documents could be interpreted as referring to a juvenile disposition. (TR 11/1493, 1496, 1498, 1509-1510, 1606-1608) Over the State's objection that it was not an official statement, defense counsel admitted, in the sentencing phase, its own exhibits about the prior adjudication. (TR 11/1616-1635) These were matters fully developed on the appellate record and available for direct appeal. Therefore, the claim is procedurally barred in this postconviction proceeding. Rose v. State, 675 So. 2d 567, 569, n.1 (Fla. 1996)(Brady and Giglio claims were procedurally barred as available for appeal).

The lower court denied the claim stating:

> In addition, the defendant claims that the State improperly admitted into evidence as a conviction an Illinois juvenile offense. He claims the State had documents in its possession that proved the Illinois offense was a juvenile delinquency. There is nothing to suggest the State withheld evidence or acted improperly in admitting the Illinois offense into evidence. Although the parties may have disagreed over whether or not the Illinois offense was a conviction under Florida law, and whether or not

> certain documents (Exhibit 4) supported their position, it is not improper for the State to attempt to get the evidence introduced. Certainly, the State did not withhold evidence on the matter. The documents in question were admitted into the record. Trial counsel for the defendant was fully aware that the Illinois matter was arguable. EH 738-9. He made numerous objections to its admissibility and admitted documents of his own pertaining to the Illinois offense. R. 1493-8, 1509-10, 1606-8, 1616-35.
>
> (PCR 17/2908)

This finding is supported by competent substantial evidence and should be affirmed by this Court.

Finally, Davis again argues that the State suppressed the identity of other witnesses from defense counsel. Specifically, he asserts that the identity of Gary Dolan was not provided to the defense. Dolan was housed with the defendant and sought, but did not receive a deal, from the State in exchange for his testimony. The State did not call him as a witness. The facts do not support a Brady or Giglio[13] violation. To establish a Giglio claim, a defendant must show that the prosecutor presented material testimony which he knew to be false. Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998). In Robinson, this Court quoted Routly v. State, 590 So. 2d 397, 400 (Fla. 1991), which observed that "'the thrust of Giglio and its progeny has been to ensure that the jury know the facts that

[13] Giglio v. United States, 405 U.S. 150 (1972)

might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury.'" Robinson at 693. The record does not support that Gary Dolan was ever going to testify for or against Davis. There is no evidence that the State suppressed any favorable or impeaching evidence, or knowingly put on any false or misleading testimony. It is not alleged that the information of Dolan's name or any statement of his was unknown to Davis; nor is it alleged that it was material and exculpatory. Davis has not shown prejudice. Gary Dolan himself did not claim to have provided any information to the State about Mark Davis.

Gary Dolan testified at the evidentiary hearing that he is serving a non-capital life sentence but that he was in the Pinellas facility from 1986 to 1988 for about 24 to 25 months. During the course of his custody in the Pinellas County jail, he was charged with some escape attempts. (PCR 41/3856) He said that "a handful of us white guys in the quad hung out together, confided with each other and spent hours a day talking." (PCR 41/3857) Mark Davis was one of those and in the course of the several months time Dolan allegedly became privy to information about Davis' crime. Dolan in turn shared his intention to escape from the facility in Pinellas. Mark Davis purportedly admitted to Dolan that he had killed a man "he had been drinking

with and there was a homosexual advances [sic] by one or the other or both involved. He explained that they were both drinking at the time heavily, that it was more less a situation where he didn't know a lot of people in the area and that the person he killed wasn't somebody that he was real friendly with." (PCR 41/3857)

After Dolan was charged with escape, he claimed that his attorney Dillinger attempted to make a deal with the State and trade information Dolan had on Mark Davis and James Daley. (PCR 41/3858-60) He did not obtain any additional information from Davis as they were never in the same location again where that would be possible and he did not testify at Davis' trial. (PCR 41/3865) He denied that Mark Davis ever planned to escape with him, but admitted Davis was present when it was planned. (PCR 41/3869)

Dolan's plea colloquy, dated March 11, 1988 and attached as State's Exhibit Seven to the State's 3.850 response, was admitted as State's Exhibit One at the hearing. The plea colloquy shows that he did not receive a deal for his testimony against any witness. The State also brought out that although Dolan claimed that while he was represented by Dillinger, he met with the State Attorney's Office four times and did a deposition regarding his "plea deal" there were only fourteen days between

the first time his name came up in the Kenneth Gardner deposition and the trial in the instant case. The record from his sentencing shows that he told the sentencing court:

> And shortly after that time I had a public defender by the name of Jean Gobel [sic] and she said what you're looking at is in the vicinity of 30 years if you enter to a plea of guilty and she said unless I be willing to cooperate with the State with the detectives and give them some information that would be valuable if I had it in my possession and that would be the range of sentences I'm looking at.
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> (PCR 41/3879)

Dolan also denied that the only information he had about Davis he actually obtained from Kenneth Gardner. When questioned regarding his animosity towards the State because he received a life sentence and was not given a deal, Dolan testified that the State did not honor the deal and he got nothing. (PCR 41/3890) He admitted, however, that at his sentencing he did not claim that he gave anyone information about the Davis case prior to Mr. Davis' trial or in his deposition. (PCR 41/3894)

In his order denying relief, Judge Penick found with regard to Gary Dolan: "Based upon this inconsistency, and from Dolan's demeanor and obvious grudge against the State, this Court finds his testimony not to be credible. This Court does not believe that the State solicited Dolan as an informant. This Court finds that Dolan had no contact with the defendant's case, had

no information to offer the defendant, and the State had no reason to list him as a potential witness or disclose him to the defendant as someone having any relevant information." (PCR 17/2910-11) This claim was properly denied.

While acknowledging that Dolan did not testify, Davis alleges that the State used his information to falsely imply that Davis was planning an escape. The record speaks for itself on this sub-issue. The State first proffered the portion of cross-examination of Davis in the penalty phase about Davis' escape plans. (TR 11/1530-1535) Defense's objection, based on its being outside the scope of direct and not relevant to any aggravating factor, was overruled after the State's argument that it was relevant to counter Davis' testimony that he could adjust to confinement were he given a life sentence. (TR 11/1533-1534) After the proffer, the State questioned Davis, in front of the jury, about having discussed with other inmates how to escape from the Pinellas County Jail. Davis admitted that he had done so. (TR 11/1536) (This fact is now ignored by appellant.) Davis admitted that a pair of tennis shoes were sent into the jail, to his name, that were to have had a jeweler's wire saw blade concealed in them. However, Davis said the shoes and blade were for another inmate, and the shoes had been intercepted and reached him without the wire. (TR 11/1536-

1537) The other inmate was one with whom Davis had discussed escape, and would not name. (TR 11/1537-1538) Davis claimed not to know about jeweler's wire until discussing it with other inmate, and denied that the discussion had included using the wire for escape . (TR 11/1538) Davis admitted to making keys at the jail from casings of nine-volt batteries, but denied he was making them for an escape. He said they were to be used to gain access to a maintenance closet to hide homemade wine. (TR 11/1539) Davis admitted that he had received an injury while in the jail, which required medical treatment at a hospital outside the jail. He denied telling inmates Stevens, Dolan or Gardner that he had either self-inflicted the injury or blown air into it to make it worse, so that he could escape while outside the jail for medical treatment. (TR 11/1540-1541)

The State put on the record its efforts to locate witnesses for unexpected rebuttal on the escape issue and the problems encountered that ultimately led to the State's not presenting rebuttal. (TR 11/1542, 1544-1545, 1584-1585). The defense has not shown that the State's cross-examination of Davis was done in bad faith. The issue is completely presented on the appellate record. Therefore, it was available for appeal and barred for postconviction relief.

The trial court properly denied those claims that were

presented to it and this Court should affirm. As for the claims not specifically presented to the court below and for which no evidence was offered, this Court should deny the claims as procedurally barred. Similarly, this Court should find those claims that were available to be raised on direct appeal to be procedurally barred.

ISSUE III

WHETHER THE CIRCUIT COURT ERRED IN DENYING DAVIS' CLAIM THAT HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL.

Appellant's next claim challenges counsel's effectiveness during the guilt phase. Just as with the prior ineffective claim, ineffectiveness is a mixed question of law and fact.[14] This Court defers to the circuit court's factual findings, but reviews *de novo* the circuit court's legal conclusions. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999)("Thus, under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings.") To establish a claim that defense counsel was ineffective, a defendant must establish deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998). As the following will establish, this claim was also properly denied by the lower court as Davis has failed to show either deficient performance or prejudice with regard to any of the alleged claims.

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[14] Similarly, this claim must be viewed with the fact that Davis was acting as co-counsel in mind. As such he is equally responsible, if not more so, for any actions taken by counsel White.

In denying the claim, the lower court stated:

> The defendant's trial counsel, John Thor White, had been practicing law for approximately 15 years. He had spent approximately 5 years with the public defender, and then entered private practice as a criminal defense attorney. This was his third death penalty case as trial counsel. In addition, he had experience on appellate matters in death penalty cases, having filed briefs in two death penalty cases. He had attended seminars before on capital trials and was familiar with the case law applicable to death penalty cases. EH 472-82, 597-600.
>
> With that background, this Court will address each allegation of ineffective assistance of counsel. First, the defendant claims that his counsel had inadequate time to prepare for trial and that he should have filed pre-trial motions. During the evidentiary hearing, however, the defendant's trial counsel testified that he had sufficient time to dedicate to the case. EH 511. He also testified that this case was not complex or involved. EH 621. The public defender originally handled the case, and it had made pre-trial motions and deposed the key witnesses. EH 623. In addition, trial counsel had the taped statements of several individuals. EH 624. Trial counsel also had background information on the defendant that had been gathered by the public defender. EH 624. He testified that there were no issues worthy of motion practice. EH 624. In his opinion the only thing he needed to do was read the prepared material and prepare a defense strategy in consultation with the defendant. EH 625. No research or time on other issues was needed. EH 625. He testified that if he needed more time he would have asked for it. EH 626. The time he spent on the case was not curtailed because of any fees limitation, his focus was on defending the defendant. EH 496-7. The defendant's claim that trial counsel needed more time and should have asked for a continuance is refuted by trial counsel's above-described testimony. This Court finds that counsel had adequate time to prepare for the defendant's trial.
>
> The defendant's claim that his trial counsel should have filed pre-trial motions is without merit. There were no valid grounds to raise a motion to

suppress. In addition to trial counsel's statement that there were no issues worthy of motion practice, trial counsel also testified that he did not make a motion in limine regarding the photos of the victim's body because they were introduced as a demonstrative aid to assist Dr. Joan Wood in describing her testimony. As such, they were arguably necessary in order to present her testimony and he had no legal grounds to exclude them. EH 690. This Court finds that trial counsel was not ineffective for not making either a motion to suppress or a motion in limine. There were no grounds for either motion. This Court would not have granted either motion.

Next, the defendant claims that his counsel was ineffective because he failed to depose "key" witnesses. These individuals were Jean Born, Jeff Hubbard, Douglas Matheny and George Lee. These individuals were at a bar and had seen both the victim and the defendant at the bar earlier the day of the crime. Trial counsel, however, testified that he had depositions and police reports showing what information these individuals had. EH 693. The defendant failed to identify any information relating to the crime that these individuals had that was unknown to his trial counsel. The defendant has failed to establish that his trial counsel was ineffective for not deposing these individuals. This Court has reviewed the police reports (Exhibit 1) and agrees with trial counsel that there is nothing in them that was unknown to him.

The next allegation is that trial counsel should have asked for an investigator. At the evidentiary hearing trial counsel testified that there was no need for one. The facts were pretty well-developed and undisputed. EH 507. The allegation that counsel was deficient for not pursuing the defendant's desire to have a private investigator hired was refuted by trial counsel. He testified that the defendant did not request him to hire a private investigator. EH 694-5. This Court finds the defendant has failed to establish that his counsel was ineffective for failing to hire an investigator.

Next, the defendant argues that trial counsel was ineffective for various reasons in his conduct of voir dire. Trial counsel had no recollection of his performance in voir dire other than that the defendant

was participating and assisting him in the selection of the jury. EH 699. The defendant failed to demonstrate that counsel's performance was deficient. The defendant's argument on this point is merely speculation. No prejudice to the defendant has been demonstrated.

The defendant claims that his counsel was ineffective for waiving opening statement. Trial counsel explained that he generally does not give an opening statement because he does not want to box his client in to some course of action. EH 518. This is a reasonable trial strategy and therefore is not deficient performance.

Next, the defendant claims that trial counsel was ineffective for failing to use evidence of the defendant's intoxication at the time of the offense. Trial counsel explained his strategy on this point. He testified that he did not want to present his own witnesses because the issues relating to the defendant's alleged intoxication were significantly developed during the State's own case, and he did not want to lose the opportunity to make the first and last closing arguments by calling a witness of his own. EH 521. In addition, counsel testified that although a witness might be favorable in one respect, that same witness might be dangerous in another. EH 521. He also believed that he had sufficient evidence of intoxication. EH 534. Finally, he testified that the statements were no stronger than what the State's witnesses had testified to. EH 633. The record reflects that evidence of the defendant's alleged intoxication was presented to the jury. R. 1257-1282, 930-4, 942-4, 948, 960-1, 963-5, 976-81, 990-4, 1202-6. Trial counsel's strategy is reasonable and is in no way deficient performance. This Court finds the defendant failed to prove that trial counsel was ineffective in failing to use evidence of the defendant's alleged intoxication.

The defendant claims that his trial counsel was ineffective because he failed to discover inconsistent statements of Beverly Castle and Kim Rieck. This claim is without merit. The record shows that trial counsel impeached both witnesses with their prior inconsistent statements. R. 939-952, 973-984. At the evidentiary hearing trial counsel testified that he successfully impeached both witnesses with their prior

inconsistent statements. EH 632. This Court agrees with the trial counsel's assessment of the cross-examination.

The defendant repeats his claim that his counsel should have put on other witnesses who had evidence of the defendant's alleged intoxication. This time he adds the name of Glenda South and Carl Kearney. Trial counsel testified that he did not want to use these witnesses because it would have forced him to lose his opportunity to have first and last closing arguments, the witnesses had evidence unfavorable to the defendant, and their statements were no stronger than what the State's witnesses had already testified to. EH 633-4. This Court finds this strategy reasonable. This Court has reviewed the police reports (Exhibit 2) and agrees with counsel that they contain no information not known to him.

The defendant claims that his trial counsel was ineffective because he failed to use the mental health information provided in Dr. Diffendale's report (Exhibit 3) to support the defendant's theory of homosexual provocation and intoxication. Trial counsel, however, testified in the evidentiary hearing that the report did not establish an intoxication defense or negate specific intent. EH 655-6. Moreover, the report contained information showing the defendant's violent nature. Trial counsel testified that it would not be good for a jury to hear that type of history. EH 658. This Court has reviewed the report, and it agrees with trial counsel's assessment of the report and its likely effect on the jury. This Court notes that Dr. Diffendale is unavailable to testify. Trial counsel's strategy in not using the report was reasonable.

The defendant claims the jury instruction on voluntary intoxication was improper and that his counsel was ineffective for not objecting. The instruction, however, is proper. The defendant has done nothing to show how the instruction was improper. Counsel can not be held ineffective for not objecting to a proper instruction.

The defendant argues that his trial counsel was ineffective for not attempting to present a sexual advance defense. The record, however, refutes this claim. Trial counsel got this defense before the jury during the cross-examination of Detective Rhodes. R.

> 1257-1282. In addition, the crime scene video was shown to the jury. R. 1062-71. The jury was free to determine from the video if it appeared a struggle had occurred. Trial counsel also argued this defense during closing. R. 1365-8, 1378-82, 1431-3. The Court notes that trial counsel got both intoxication and self-defense jury instructions.
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> The defendant's allegation that trial counsel should have asked for a continuance has been addressed above. It is without merit. EH 511, 626.
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> The defendant claims that his counsel forfeited opportunities to negotiate with the State and that somehow counsel prevented the defendant from seeking a plea. Testimony of trial counsel at the evidentiary hearing, however, revealed that the State never offered a plea of life, and trial counsel did not prevent any negotiations. EH 713-14.
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> Finally, the defendant alleges that cumulative errors resulted in effective assistance of counsel. In light of this Court's above-stated findings, this claim is without merit. No error has been shown in trial counsel's representation. Therefore, there is no cumulative effect to consider.
>
> In summary, the defendant has failed to prove any of his allegations that his trial counsel was ineffective. He has not shown that his counsel's performance on any particular claim or his counsel's performance as a whole was legally deficient. No prejudice to the defendant has been demonstrated. He has not proved entitlement to relief pursuant to Strickland.
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> (PCR 17/2901-06)

These factual findings of the trial court are supported by competent substantial evidence and are therefore, entitled to deference. Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003) ("This Court will give deference to the trial court's findings of fact that are supported by competent, substantial evidence.") Even if Davis can point to other evidence, any conflicts in the

testimony are to be resolved in favor of the trial court's ruling as the trial court is "in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Power v. State, 29 Fla. L. Weekly S207, S208 (Fla. May 6, 2004)(quoting Stephens v. State, 748 So. 2d at 1034 (quoting Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976)). See also Smith v. State, 403 So. 2d 933, 935 (Fla. 1981)("We cannot substitute our judgment for that of the jury simply because the testimony came from the mouth of a disreputable felon who had been granted favors by the state and who admitted he lied when it would 'suit (his) fancy.'") As Davis has failed to show either deficient performance or prejudice with regard to any of the claims presented relief was properly denied.

Davis repeats his postconviction claim that counsel failed to depose "key" witnesses, make pretrial motions and investigate Davis' case. The lower court denied this claim after conducting an evidentiary hearing where he provided the defendant with the opportunity to present evidence in support of the claim. Davis' argument to the contrary, he simply failed to establish that counsel's performance was deficient and that he was prejudiced by that alleged deficiency. Davis' assertion that the lower court erred in relying upon trial counsel White's testimony in

denying Davis' claim of relief because it conflicts with other evidence in the record is without basis. As previously noted, resolving conflicts in the evidence is peculiarly within the province of the trial court.

Moreover, Davis is simply wrong when he says that White's testimony is contradicted by the record. Davis challenges counsel's performance for "failing" to take depositions. Counsel explained that he did not need to retake depositions *because prior trial counsel had already taken the depositions of the key witnesses*. Additionally, he had the transcribed statements and police reports. While Davis faults counsel for not repeating the work already done by prior counsel, he can point to no material fact that was overlooked by trial counsel. As the trial court found, Jean Born, Jeff Hubbard, Douglas Matheny and George Lee were individuals who were at the bar and had seen both the victim and the defendant at the bar earlier the day of the crime. Trial counsel had depositions and police reports showing what information these individuals had. Davis has failed to identify any information relating to the crime that these individuals had that was unknown to his trial counsel and the assertion that he could have presented more evidence of intoxication was addressed by counsel who explained that he knew of the evidence but that it was his strategy to bring this

evidence out during the State's case in order to preserve first and last closing. As these witnesses added nothing to the evidence that was already substantially presented during the State's case, counsel's strategic decision to not present it virtually unchallengeable. See Zakrzewski v. State, 866 So. 2d 688, 693 (Fla. 2003), citing Wiggins v. Smith, 539 U.S. 510 (2003)(quoting Strickland and reiterating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.")

Additionally, this Court has specifically recognized that a counsel's decision to forego the presentation of evidence in order to preserve first and last closing can be a reasonable strategy. Reed v. State, 29 Fla. L. Weekly S156, S161 (Fla. April 15, 2004)(trial counsel's decision to reserve first and last closing arguments and avoid the presentation of potentially perjurious testimony was not deficient performance); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)(affirming finding of reasonableness where three trial attorneys testified "that they consciously chose not to present evidence during their case because they believed they had presented enough evidence to the jury through cross-examination, and they felt it was more important to have the first and last word with the jury during closing argument.") The fact that present counsel would have

chosen a different strategy does not render counsel White's decision unreasonable. Cooper v. State, 856 So. 2d 969, 976 (Fla. 2003)("The issue before us is not 'what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense,' Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000).") Davis has failed to show either deficient performance or prejudice with regard to this claim.

Next Davis argues that the trial court erred in denying his challenge to counsel's voir dire. Davis claims prejudice from trial counsel's failure to seek "individualized questioning of the potential jurors" and for failing to question jurors concerning drug use, alcohol abuse, mental illness or the death penalty. Davis complains that White "abdicated his role" by stipulating to the removal of eleven jurors for cause. Davis does not explain what defense counsel could have done differently to rehabilitate those potential jurors whose feelings about the death penalty required their being excused for cause. Davis cites to the Trial Record at TR 764-66, but this context continued through TR 771, with the explanation surfacing that defense counsel stipulated to the State's challenge for cause and added one of his own, although

presenting an objection to the current state of the law requiring the challenges for cause, in the hopes of a change in the law. (TR 6/765-66, 770) See Funchess v. Wainwright, 486 So. 2d 592 (Fla. 1986)(rejecting the issue of a death-qualified jury.) Defense counsel renewed his objection the next day during the continued voir dire. (TR 6/857-858.) Davis has not shown prejudice on this issue. Defense counsel is not deficient for failure to make a futile objection to the excusal for cause and no prejudice can be shown. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

Davis also claims that defense counsel failed to ensure Davis's right to an unbiased jury. Specifically, Davis raises the fact that juror Cantlin acknowledged that she socialized with the judge. The judge first made known to both sides that he knew Mrs. Cantlin from his being in the Kiwanis with her husband. Mrs. Cantlin explained that she knew the judge from her husband's being in Kiwanis. She added that it was the only reason she knew the judge. She answered the prosecutor's question that it would not affect her ability to sit as a juror. (TR 6/798-99) Davis has not established that this juror was biased, nor that he suffered any prejudice from her being on the jury. As the lower court found, conjecture and speculation is insufficient to warrant postconviction relief. Van Poyck v.

State, 694 So. 2d 686, 696-7 (Fla. 1997)(denying IAC claim for failure to show prejudice); accord, State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983). Finally, the record shows that counsel conferred with Davis, who was acting as co-counsel, before the panel was sworn. (TR 6/877-79)

Conceding that counsel did impeach both Castle and Rieck, Davis contends next that counsel could have been more thorough.[15] Clearly, the issue before this Court is not whether trial counsel could have done a better job. "The appropriate legal standard is not error-free representation, but 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991), quoting Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987). Davis has failed to show either deficient performance or prejudice with regard to this claim.

Appellant next urges that counsel was ineffective for failing to obtain a mental health expert to explain how Davis' intoxication at the time of the crime would have affected his ability to form the specific intent. The record shows that

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[15] The trial record shows that defense counsel impeached both Rieck and Castle with their prior statements concerning Davis' level of intoxication. (TR 7/942-44, 975, 976, 978, 979, 980-82, 993-994)

counsel did obtain a mental health expert and that he made the decision to not present the witness after reviewing the report. As the trial court found, “the report did not establish an intoxication defense or negate specific intent.” “Moreover, the report contained information showing the defendant’s violent nature. Trial counsel testified that it would not be good for a jury to hear that type of history.” The lower court reviewed the report and agreed with trial counsel’s assessment of the report and its likely effect on the jury. Accordingly, the lower court found that trial counsel’s strategy in not using the report was reasonable and no prejudice resulted. (PCR 17/2905) This finding should be affirmed.

Appellant’s next complaint is that counsel did not object to the “inadequate” jury instruction on voluntary intoxication. First, the instruction was given and is contained in the record. Therefore, any perceived inadequacies were available for direct appeal and the claim is procedurally barred in this proceeding.

Furthermore, Davis does not explain how the instruction was inadequate. The trial record shows that at the end of the charge conference, trial counsel stated that there was not a standard jury instruction on voluntary intoxication but that he would produce one for the court to read to the jury. (TR 9/1350) The next day the jury was read an extensive instruction on

voluntary intoxication which, among other things, told the jury that voluntary intoxication could render the defendant incapable of forming the specific intent necessary to commit a crime. (TR 10/1460-61) The lower court denied this claim, stating, "The defendant claims the jury instruction on voluntary intoxication was improper and that his counsel was ineffective for not objecting. The instruction, however, is proper. The defendant has done nothing to show how the instruction was improper. Counsel can not be held ineffective for not objecting to a proper instruction." (PCR 17/2905) Relief was properly denied as Davis has failed to show either deficient performance or prejudice with regard to this claim. Patton v. State, 29 Fla. L. Weekly S243, S244 (Fla. May 20, 2004)(rejecting claim that voluntary intoxication defense was not pursued as vigorously as it should have been.)

In this same vein, Davis argues that his trial counsel's presentation of the "sexual advance defense" was "woefully ineffective." As the trial court found, however, the trial record refutes this claim. Trial counsel got this defense before the jury during the cross-examination of Detective Rhodes. (TR 9/1257-1282) In addition, the crime scene video was shown to the jury. (TR 8/1062-71) Any evidence of a struggle would have been apparent to the jury from the crime scene video.

Trial counsel also argued this defense during closing. (TR 10/1365-8, 1378-82, 1431-3) Finally, as the lower court noted, trial counsel got both intoxication and self-defense jury instructions. Further, this alleged defense is very much akin to a diminished capacity defense which this Court has rejected. See Henry v. State, 862 So. 2d 679, 683 (Fla. 2003). Accordingly, counsel's performance is not deficient and Davis has not established prejudice.

As for the alleged forfeiture of opportunities to negotiate with the State, there was no evidence presented in support of this claim. The trial court denied the claim stating, "Testimony of trial counsel at the evidentiary hearing, however, revealed that the State never offered a plea of life, and trial counsel did not prevent any negotiations. (PCR 17/2906) Davis has failed to show either deficient performance or prejudice with regard to this claim.

Davis concludes by asserting cumulative error. As he has not established any deficient performance or prejudice with regard to any of the foregoing claims, he is not entitled to relief. Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999)(concluding that the defendant's cumulative effect claim was properly denied relief where individual allegations of error were found to be without merit.) Based on the foregoing the

State asks this Court to affirm the trial court’s denial of this postconviction claim.

ISSUE IV

WHETHER THE CIRCUIT COURT ERRED IN DENYING DAVIS' CLAIM THAT HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY PROSECUTORIAL MISCONDUCT.

Appellant's next claim is that the trial court erred in denying his claim of prosecutorial misconduct. This claim is procedurally barred as it was raised and rejected on direct appeal.[16] Schwab v. State, 814 So. 2d 402, 415 (Fla. 2002). The lower court denied this claim stating:

> The defendant claims that the State made several improper comments. Specifically, the defendant argues that the State commented on his failure to testify and improperly placed his character at issue. These issues, however, were previously raised by the defendant in the pro se portion of his appeal to the Florida Supreme Court. The Court noted that the record did not support his argument. See footnote 7 in Davis v. State, 586 So.2d 1038 (Fla. 1991). Nevertheless, this Court has reviewed the individual comments, as well as the other alleged improper comments and finds that they were insignificant, viewed individually and cumulatively. Counsel's failure to object to them was not deficient, and they did not prejudice the defendant.
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> (PCR 17/2911)

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[16] Appellant pro se raises several claims [n7] which are unsupported by the record and are therefore without merit.

> n7 Comments made during trial (1) constituted impermissible comment on his failure to testify, (2) improperly placed his character at issue, or (3) were (without specificity) improper.
>
> Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991)

The lower's courts finding of a procedural bar is reviewed *de novo*. West v. State, 790 So. 2d 513, 514 (Fla. 5th DCA 2001) (stating that a finding of a procedural bar is reviewed de novo citing Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999)). See also Bailey v. Nagle, 172 F.3d 1299, 1302(11th Cir. 1999)(stating that whether a petitioner is procedurally barred from raising particular claims is a mixed question of law and fact that we review de novo). The standard for reviewing the Court's denial of the ineffective assistance of counsel claim has been fully set forth in the previous issue.

Despite Davis' attempt to obtain a second review of the same issue he raised on direct appeal, his conclusory allegation of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings are not a second appeal for issues properly litigated on direct appeal. Rivera v. State, 717 So. 2d 477, 488 (Fla. 1998); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Accordingly, this claim was properly denied.

Moreover, as the lower court found, and as this Court found on direct appeal, the claim of error based on the comments made by the prosecutor, is not supported by the record. As this claim has already been rejected by this Court, it is clear that

Davis cannot establish deficient performance and prejudice.

Davis also asserts that it was improper for the State to have argued the juvenile adjudication. As the trial court admitted the evidence, it clearly was not improper for the State to argue the facts in evidence. Furthermore, this issue was available for direct appeal and is, therefore, barred for review in a postconviction proceeding.

Similarly, his claim with regard to the prosecutor's argument that Davis was not substantially impaired could have been and should have been raised on direct appeal and is, therefore, procedurally barred herein. The argument was based on his review of the evidence and does not constitute prosecutorial misconduct.

The trial court properly denied all of the foregoing claims, as well as Davis' attempt to circumvent the procedural bar rule by asserting ineffective assistance of counsel. Rivera, at 488. The lower court's ruling should be affirmed.

ISSUE V

WHETHER THE LOWER COURT ERRED IN DENYING DAVIS' CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE HE DID NOT RECEIVE ADEQUATE MENTAL HEALTH ASSISTANCE.

Davis received a mental health expert for trial. Therefore, his mental health claim is couched in terms of an ineffective assistance of counsel claim. As previously noted, for claims of ineffective assistance of counsel this Court applies a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact. Accordingly, this Court defers to the circuit court's factual findings, but reviews *de novo* the circuit court's legal conclusions. Stephens, 748 So. 2d at 1033. Findings of fact will be affirmed if supported by competent substantial evidence.

In the instant case, this claim was the subject of the evidentiary hearing below and relief was denied. The lower court denied this claim stating:

> **Claim IX** is the defendant's claim that he was deprived of his rights because his mental health expert failed to render adequate assistance. In addition, the defendant further argues that his counsel was ineffective for failing to secure the background materials necessary for an adequate evaluation.
>
> The defendant alleges that his mental health

expert, Dr. Diffendale, failed to obtain information about his medical and social history from sources other than the defendant himself. He also claims that his counsel failed to secure sufficient material for his mental health expert. The defendant is not specific about what additional information counsel should have provided to the mental health expert. The report reflects that information was obtained from defense counsel. A review of the report reveals that Dr. Diffendale was familiar with the defendant's social history and his medical history. In addition, the report reflects that the Dr. had contact with the defendant's mother and obtained information about the defendant from her. Trial counsel testified that Dr. Diffendale knew about the defendant's upbringing. EH 661. Moreover, the State's expert witness who testified at the evidentiary hearing, Dr. Sidney Merin, testified that he reviewed Dr. Diffendale's report. Dr. Merin testified that the background information contained in Dr. Diffendale's report was consistent with the background information provided by the defendant to Dr. Merin during his consultation with the defendant. EH 938. Dr. Merin also testified that psychologists can get enough information from self-reporting to make a diagnosis. The defendant has not proved his allegation that either the mental health expert or trial counsel failed to secure sufficient background material. The report itself appears complete, and it mentions almost all of the information that was brought out in the evidentiary hearing -- including the defendant's upbringing and chronic drug and alcohol abuse. This Court finds that trial counsel secured the necessary background information and therefore he was not ineffective.

The defendant has not proved his allegations that he did not received adequate mental health assistance. Dr. Merin testified that the report prepared by the defendant's mental health expert at trial, Dr. Diffendale, was sufficient. In fact he testified that it was "pretty good." EH 1654. Dr. Merin testified that Dr. Diffendale had adequate time to perform his evaluation (EH 927); the report was based upon the appropriate type of information and testing relied upon by psychologists (EH 928); and Dr. Diffendale followed the procedures normally followed by other clinical psychologists. EH 932. He testified that

additional tests were not needed. EH 933, 946. This Court accepts Dr. Merin's analysis and assessment of Dr. Diffendale's procedures and report. This Court finds that the defendant did received adequate mental health assistance from Dr. Diffendale.

Dr. Merin also conducted his own evaluation of the defendant. The evaluation consisted of testing and an interview. EH 821-2. Dr. Merin found that the defendant was bright average and that his brain was functioning well. EH 828, 849. He found no psychosis, brain damage, homophobia or Post-Traumatic Stress Disorder. EH 863. He found that the defendant was not under the influence of extreme mental or emotional distress (EH 920); that he could appreciate the criminality of his conduct, (EH 921); there was nothing about his mental health that specifically negated his ability to form a specific intent for a premeditated crime (EH 922); and the defendant's alcoholism was not the basis or reason for him committing the crime. EH 923. Dr. Merin stated that these results were consistent with his conclusions. EH 933.

Dr. Merin's testimony contrasted with that of the defendant's expert, Dr. Michael Maher, who testified at the evidentiary hearing. Dr. Maher evaluated the defendant and found several mitigating factors, including Post-Traumatic Stress Disorder. Dr. Maher testified that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime. EH 413. He testified that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired. EH 413. He also testified that it would not have been possible for the defendant to have met the criteria for the cold, calculating and premeditated aggravating factor. EH 420. Dr. Maher also opined that the defendant was homophobic (EH 410) and suffered from Post-Traumatic Stress Disorder at the time of the crime. EH 412.

This Court is not persuaded by Dr. Maher's testimony. Dr. Maher's opinion seems to be based in part on matters that occurred after the trial in 1987. The Court found Dr. Merin's testimony to be more persuasive. The defendant's argument that counsel was ineffective for providing the defendant with a

> psychologist and not a psychiatrist is without merit. The defendant has not demonstrated that he is entitled to the services of a psychiatrist rather than a psychologist. The defendant has cited no authority in support of his proposition.
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> In addition, the defendant claims his trial counsel failed to make the results of the examination available to the Court. This claim has previously been addressed. Trial counsel did not want to admit the report or put Dr. Diffendale on the stand because the results of the examination were more negative than positive. EH 564, 672. Trial counsel testified that the results, taken as a whole, would not have helped prove the existence of statutory and non-statutory mitigators. EH 664-5. Trial counsel said that the expert almost recommended a death sentence. EH 669-71. In addition, Dr. Merin testified that the report was consistent with his conclusion. EH 933. Dr. Merin's conclusion did not find statutory mitigating evidence. EH 920-4. Neither did Dr. Merin conclude that any aggravating factors were negated. Since this Court has found Dr. Merin's testimony to be persuasive, this Court finds that Dr. Diffendale's report would have had only limited value. The report would not have provided the judge and jury with statutory mitigation or negated any statutory aggravating factors. In addition, this Court's review of the report supports the decision of the trial counsel. Putting on the expert or admitting the report would not, taken as a whole, have helped the defendant. It likely would have reinforced the jury's and this Court's decision. This Court finds that the defendant's decision not to present the report or put the mental health expert on the stand was reasonable under the circumstances.
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> (PCR 17/2913-16)

Despite this exhaustive analysis by the lower court, Davis is urging this Court to reverse the factual findings of the lower court because other evidence conflicts with those findings. As previously noted, any conflicts in the testimony

are to be resolved in favor of the trial court's ruling as the trial court is "in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Power v. State, 29 Fla. L. Weekly S207, S208 (Fla. May 6, 2004)(quoting Stephens v. State, 748 So. 2d at 1034 (quoting Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976)). The trial court's finding are supported by competent, substantial evidence and should be affirmed.

This Court in Hodges, supra., rejected a similar argument where the record showed that counsel had obtained an expert who evaluated the defendant, stating:

> Hodges argues that penalty phase counsel's failure to ensure that Hodges received the benefit of fully informed mental health experts constituted prejudicially deficient performance and deprived Hodges of his entitlement to expert psychiatric assistance as required under Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985). HN6 The United States Supreme Court held in Ake that where an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 470 U.S. at 83.
>
> Hodges' Ake claim lacks merit. Hodges does not argue that he was denied access to mental health professionals or that these professionals failed to conduct the appropriate examinations. Indeed, any such claim would run contrary to Dr. Maher's testimony that he conducted a standard psychiatric evaluation of

> Hodges prior to trial. Hodges had access to multiple mental health experts prior to trial, and the experts performed all of the essential tasks required by Ake. Thus, Hodges fails to establish a violation of the Ake rule. See Johnson v. State, 769 So. 2d 990, 1005 (Fla. 2000). Instead, Hodges simply recasts his ineffective assistance of counsel argument, which we reject for the reasons stated above.
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> Hodges v. State, 28 Fla. L. Weekly S475, 478 (Fla. June 19, 2003)

As in Hodges, the denial of this claim should be affirmed because Davis has failed to show deficient performance and prejudice.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING DAVIS' CLAIM THAT THE STATE FAILED TO REVEAL THAT IT HAD MADE PROMISES OF LENIENT TREATMENT TO JAILHOUSE INFORMANTS WHO WERE OPERATING AS AGENTS OF THE STATE IN VIOLATION OF BRADY V. MARYLAND, GIGLIO V. UNITED STATES, MIRANDA V. ARIZONA AND U.S. V. HENRY.

Once again Davis is asserting the completely unsubstantiated claim that the State failed to reveal that it had made promises of leniency to jailhouse informants for testimony. This claim was the subject of an evidentiary hearing. After hearing all of the witnesses, the lower court found that the claim was unsupported by the evidence and denied relief.

In reviewing claims that the State withheld information regarding jailhouse informants, this Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews *de novo* the application of those facts to the law. Lightbourne v. State, 841 So. 2d 431, 437 (Fla. 2003). As the following will establish, the trial court's factual conclusion that no deals existed are supported by competent, substantial evidence and should be affirmed by this Court.

Specifically, the lower court stated:

> **Claim VI** is the defendant's claim that the State

failed to reveal that it made promises to jailhouse informants or that they were operating as agents of the State. This Court finds that the defendant has failed to prove his allegations.

As to the claim that the State made promises to three alleged jailhouse informants, two of the individuals never testified at trial. The only individual who testified at the defendant's trial was Shannon Stevens. **Stevens testified at the evidentiary hearing and denied that there ever was a deal with the State in exchange for his testimony.** EH 776-7. The defendant has failed to prove his allegation.

The two individuals who did not testify at trial were Gary Dolan and Keith Gardner. The defendant alleges that they were both agents of the State.

As to Keith Gardner, this Court finds his testimony at the evidentiary hearing to be completely unreliable. Essentially, he testified that what he said at his December 1986 deposition and in his statement to the State was a lie. EH 272-3. He stated during the evidentiary hearing that his attorney at the time of the defendant's trial was Frank Louderback, and that Louderback told him the State wanted him to go and get information from the defendant. EH 286-7. Attorney Frank Louderback, however, testified that he never told the defendant this. EH 911. In addition, Gardner testified that an investigator for the State recently threatened him with no parole because he did not want to talk to the State about his case. EH 278-9. The investigator, James Lenas, testified that he never made any comment to Gardner about his parole. EH 1144. Faced with these two separate contradictions to Gardner's testimony, and based upon Gardner's demeanor at the evidentiary hearing, this Court finds his testimony to be not credible. **The defendant has failed to prove his allegation that Gardner was an agent of the State or that the State attempted to recruit Gardner as its agent.**

As to Gary Dolan, this individual was obviously very angry that he did not get the benefit of an understanding or informal agreement he believed he had with the State. He is currently serving a life sentence without the possibility of parole. From Dolan's demeanor and response to the State's

> questions, it was obvious that he believed an injustice was done to him by the State at his sentencing, when he received a life sentence. At his sentencing Dolan argued to the sentencing judge that he had an agreement with the State that in recognition of his work as a jailhouse informant he would receive a lesser sentence, or at the very least he deserved a lesser sentence because of his efforts. (Exhibit 5). Nowhere during the sentencing, however, does Dolan ever list any efforts in the defendant's case. In addition, Dolan testified during the evidentiary hearing that the State, specifically Assistant State Attorney Beverly Andrews, showed him a list of cases and suggested that he obtain information about those individuals in exchange for a plea bargain on his pending crimes. EH 86-7. Beverly Andringa (formerly Andrews) testified in the evidentiary hearing that she never told Dolan to go and get information from a particular defendant in return for any promise. EH 1124. **Based upon this inconsistency, and from Dolan's demeanor and obvious grudge against the State, this Court finds his testimony not to be credible. This Court does not believe that the State solicited Dolan as an informant.** This court finds that Dolan had no contact with the defendant's case, had no information to offer the defendant, and the State had no reason to list him as a potential witness or disclose him to the defendant as someone having any relevant information.
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> (PCR 17/ 2908-11)(emphasis added)

To establish a Brady violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001)(citing Strickler v. Greene, 527 U.S. 263 (1999)).

A Giglio violation is established when a petitioner shows that: (1) a witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Sochor v. State, 29 Fla. L. Weekly S363, 375 (Fla. July 8, 2004). Davis has failed to carry his burden to show either a Brady or a Giglio violation. Similarly, he has also failed to show that the State violated Miranda or Henry[17]. Neither claim is supported by the evidence. As there is no factual basis for the claim, there can be no relief granted.

The single jailhouse informant that actually testified at trial, Shannon Stevens, denied he was an agent of the State or that he received a deal in exchange for his testimony. Dolan did not testify at trial and although he tried to cut a deal for his "information," he did not receive one and was not returned to a cell near Davis. (PCR 41/3858-60, 3865) Kenneth Gardner did not testify at trial and the lower court found that his testimony at the evidentiary hearing was simply unreliable. His testimony concerning the State's instructing him to get information was vague and evasive. At one point Gardner testified that he knew what the State wanted him to say based on their body language because he had street smarts. (PCR 42/4067-

[17] Miranda v. Arizona, 384 U.S. 436 (1966) and United States v. Henry, 447 U.S. 264 (1980).

68) Moreover, although he stated during the evidentiary hearing that his trial attorney, Frank Lauderback told him the State wanted him to go and get information from the defendant, Attorney Frank Lauderback denied ever instructing Gardner to get any information. (PCR 47/4684)

This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. Windom v. State, 29 Fla. L. Weekly S191, 193-94 (Fla. May 6, 2004). See also Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994)(stating that recanted testimony, especially when it involves a confession of perjury, is exceedingly unreliable). Here the trial court's well documented analysis is supported by competent, substantial evidence and should be affirmed by this Court. Based on these facts Davis simply cannot establish any constitutional violation that undermines confidence in the outcome of the proceeding. No relief is warranted.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Linda McDermott, Esq., 141 N.E. 30th Street, Wilton Manors, Florida 33334 and to C. Marie King, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this _____ day of July, 2004.

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).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CANDANCE M. SABELLA
Assistant Attorney General
Chief of Capital Appeals
Florida Bar No. 0445071
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE