IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-02-1424

LOWER TRIBUNAL No. 85-8933 CFANO

MARK ALLEN DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Davis' motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the claims after an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"PC-R." – record on appeal after an evidentiary hearing;

"Supp. PC-R." – supplemental record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Davis requests oral argument.

STANDARD OF REVIEW

Mr. Davis' claims are all factual claims and therefore require that this Court conduct a de novo review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

On September 18, 1985, Mr. Davis was indicted and charged with premeditated first-degree murder, armed robbery and grand theft (R. 8-10). Mr. Davis pleaded not guilty (R. 68).

Mr. Davis' trial was held in January, 1987. The jury returned a verdict of guilty on each count (R. 217-9). The following week, after a brief penalty phase, the jury, by an 8 - 4 vote, recommended the death sentence and the trial court imposed death (R. 234, 265-73).

On June 1, 1990, during direct appeal, this Court remanded Mr. Davis' case for a hearing to determine whether Mr. Davis was absent from the courtroom during a critical stage of his trial, and if so, whether he waived his presence.

Circuit Judge John P. Griffin, Thirteenth Judicial Circuit of Florida, presided over the hearing and found that Mr. Davis did not make a valid waiver but that Mr. Davis was present during jury selection. This Court affirmed Mr. Davis' convictions and sentences on direct appeal. Davis v. State, 586 So. 2d 1038 (1991).

The United States Supreme Court granted certiorari, vacated judgement, and remanded to this Court for reconsideration in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992). Davis v. Florida, 112 S.Ct. 3021 (1992).

This Court affirmed Mr. Davis' convictions and sentences on remand from the United States Supreme Court. Davis v. State, 620 So. 2d 152 (1993). The United States Supreme Court

subsequently denied certiorari. Davis v. State, 114 S.Ct. 1205 (1994).

In July, 1995, Mr. Davis filed an incomplete Rule 3.850 motion (PC-R. 25-191).

On June 7, 1996, Mr. Davis moved to disqualify Judge Penick from presiding over his case in postconviction (PC-R. 201-10). Judge Penick denied the motion (PC-R. 220). On April 22, 1998, this Court denied Mr. Davis' Petition for Writ of Prohibition, for Extraordinary Relief and for a Writ of Mandamus. Davis v. Penick, 719 So. 2d 286 (Fla. 1998).

Mr. Davis' filed an amended Rule 3.850 motion on May 3, 2000 (PC-R. 2044-2267). An incomplete Huff hearing was held on June 28, 2000 (PC-R. 2299-2362). On October 3, 2001, the court entered an order granting Mr. Davis an evidentiary hearing and summarily denying the rest of Mr. Davis' claims (PC-R. 2701-15). The evidentiary hearing was held November 5-9, 2001. On March 28, 2002, the court entered an order denying Mr. Davis' claims (PC-R. 2898-2928).

Mr. Davis filed a motion for rehearing which was denied on May 16, 2002 (PC-R. 3162-6). Mr. Davis timely filed a notice of appeal (PC-R. 3167-8).

STATEMENT OF THE FACTS

A. THE TRIAL

Mr. Davis was charged with premeditated first-degree murder, armed robbery and grand theft (R. 8-10). Mr. Davis pleaded not guilty to all three counts (R. 68).

On October 26, 1985, the Office of the Public Defender was appointed to represent Mr. Davis (R. 12).

On February 27, 1986, Mr. Davis, pro se, filed a Motion to Act as Co-Counsel (109-10). Mr. Davis requested that he be able to file motions, make objections and gain additional time in the law library to conduct research. The court granted his motion (R. 123). Subsequently, Mr. Davis filed a few written motions (R. 130-1, 132-3, 140-1, 156). The court only responded to Mr. Davis' Motion for the Appointment of Investigator (R. 140-1), and informed Mr. Davis that his motion would be forwarded to the Public Defender's Office (R. 139).

On July 17, 1986, the defense's Motion for Costs to Hire Confidential Psychiatrist/Psychologist was heard (R. 572), at which time the following exchange occurred:

> MR. McMILLEN: It may be for the guilt phase also. I would not want to officially, on the record, preclude the guilt phase.
>
> THE COURT: Right.
>
> * * *
>
> MR. McMILLEN: And the facts of this case --
>
> THE COURT: Yeah, this is really weird.
>
> MR. McMILLEN: There may be a psychological situation, not McNaughton, in guilt phase, but could arise, and as a result was recognized as a frenzy-type of action because of the number of stab wounds to this person.
>
> THE COURT: I have no problem with moving for appointment of a confidential expert.

(R. 572). While the court granted the motion, no expert was

appointed at this time.

On October 22, 1986, Mr. McMillen moved to withdraw due to a conflict that arose because the Office of the Public Defender represented a witness who was expected to testify for the State (R. 579-80). The court granted the motion (R. 159), and appointed John Thor White as trial counsel.

Six days before trial, on January 7, 1987, Dr. David Diffendale, a psychologist, was appointed to evaluate Mr. Davis (R. 182). On July 12, 1987, he issued his report (Def. Ex. 1). In his report, Dr. Diffendale noted the following characteristics about Mr. Davis: “impulsivity, low frustration tolerance, lack of trust in others, and deep belief that he is his only protector". Dr. Diffendale went on to state:

> The defendant's mental state at the time of the offense was influenced by many factors.
>
> A. He admits to "drinking all day" and was reportedly seen drinking by witnesses. . . . The first factor then is he had some degree of alcohol intoxication.
>
> B. . . . The first is his explosive, impulsive anger. He has a history of over-responding with violent anger when sexually approached by males in jail. When asked, he reported continuing to beat others who had approached him long after they had ceased struggling. He reports "loosing (sic) it" when he feels threatened. This mode of behavior may explain the excessive stab wounds.
>
> C. His slight stature, lack of traditional male success, and alcoholic father all would tend to make him insecure in his role as a man. . . . His psychological test results also suggest severe anxiety over his sexuality. The above would combine to make sexual interaction with another male a threat to his core identity.

> D. The final set of factors likely to effect his mental state at the time of the offense is his feelings of inadequacy, anger against authority, and anger against older men. From the defendant's early childhood, the defendant's father was an alcoholic who regularly abused his wife and children. Children of such families grow up with lower self-esteem and feelings of inadequacy. Amphetamine and alcohol, his drugs of choice, both serve to enhance the user's feelings of power and effectiveness. . .
>
> His rage at authority and older men began with his alcoholic, abusive father and was nurtured by his spending nearly three quarters of his life past the age of 13, in penal institutions. Such institutions are controlled by males, older than he, who he saw as threatening him in abusive and arbitrary ways. As with his father, he was helpless to defend himself against them except possible by use of excessive force.
>
> * * *
>
> The above factors combined make it quite possible that the defendant did "loose it" (sic) once in a scuffle with the victim, especially if the victim picked up the larger knife as the defendant claims.

(Def. Ex. 1). Dr. Diffendale concluded: Mr. Davis' "response to the situation leading to the victim's death is understandable given the defendant's family history, jail experiences, psychological make-up and intoxication" (Def. Ex. 1).

Dr. Diffendale also stated: “He is smart enough to know that he would be blamed. He did nothing to cover himself or throw suspicion away from himself. **If this act had been premeditated, he is bright enough and has had enough criminal exposure to do a better job**” (Def. Ex. 1)(emphasis added).

On January 13, 1986, trial commenced. After the State presented it’s opening statement (R. 905-8), defense counsel

reserved his opening statement (R. 908).

Over the course of 2 days, the State presented it's case to the jury: Raymond Hansbrough, the victim's son-in-law described the victim's background and his move to Florida (R. 1005-7). Mr. Hansbrough believed that Mr. Landis had approximately $500 in cash on July 1st (R. 1007).[1] At 6:30 p.m., Mr. Landis came to his daughter's house to check-in and this was the last time he saw Mr. Landis (R. 1008).

On the evening of July 2, 1985, the police and fire department were called to the Gandy Efficiency Apartments in St. Petersburg (R. 910, 914). When they arrived they found Orville Landis' body in one of the apartments (R. 910, 914). Mr. Landis had been stabbed (R. 910).

Kim Rieck and Beverly Castle had recently moved to Florida and lived at the apartment complex (R. 917, 953-4). Rieck explained that she lived in an apartment with her boyfriend, Carl Kearney, and her mother, Castle, lived in another apartment (R. 917-8). Kearney managed the apartments (R. 919).

Rieck also explained that she knew Mr. Davis from Pekin, Illinois, because he was friends with Kearney (R. 919). Mr. Davis arrived in Florida 4 days before the crime (R. 920). Mr. Davis spent those days around the apartment complex and

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[1]Mr. Hansbrough was never cross examined by trial counsel. His statements to law enforcement are inconsistent with his testimony concerning the amount of money Mr. Landis obtained.

slept in his car, empty apartments and at the Kearney's (R. 921).

On Monday, July 1st, Mr. Landis rented an apartment from Rieck (R. 923). Rieck testified that Mr. Davis was at the apartments on July 1st and met Mr. Landis because she had sent him to get her a match (R. 925-6). Thereafter, Rieck observed Mr. Davis in Mr. Landis' apartment where they were talking and drinking beers (R. 927).

Rieck testified that at some point in the day, Mr. Davis told her: "he was going to take the old man for what he could" (R. 927), and that "he said get him drunk and see what he could get out of him" (R. 928). Mr. Davis also expressed his belief that the victim was "queer" (R. 929).

As to Mr. Davis' level of intoxication, the State inquired:

> Q: Do you know how much either one of them had to drink during the day?
>
> A: No.
>
> Q: Did you have later contact with Mark Davis that day?
>
> A: Yep.
>
> Q: Can you tell us a little about that?
>
> A: It was around four-thirty or five o'clock. We had Mark take us to get Carl's car . . .
>
> Q: Now, did Mark Davis do the driving at any point in time?
>
> A: Yes, he took us there.
>
> Q: Did he have any difficulty in driving the car

when he took you there?

A: No, he didn't.

Q: During the course of the day when you had conversations with him, was his speech slurred or impaired in any fashion?

A: No, it wasn't.

Q: Was he staggering or unable to walk properly in your opinion on all other observations of the man?

A: No.

(R. 930-1).[2]

Rieck testified that at 11:30 p.m. or midnight, Mr. Davis came to her room and asked to borrow a pair of socks (R. 934). He also told them he would see them in a couple of years (R. 934). He did not appear intoxicated (R. 935).

Contrary to Rieck's testimony, Castle testified that she was present at the apartment complex the morning of July 1st (R. 925, 954, 957). She testified that she observed Mr. Davis assist Mr. Landis move into his apartment (R. 959). Castle also testified that Mr. Davis wanted Mr. Landis to get involved in his tattooing business (R. 960). Castle described Mr. Davis as "a nervous young man" (R. 974).

When asked if she had seen Mr. Davis drinking, Castle said: "I seen him with a can of beer in his hands." (R. 960).

Later in the evening, Castle saw Mr. Davis and the victim

[2]Rieck testified that Mr. Davis gave them a ride in his car. However, Mr. Davis' car had been previously impounded because it was reported stolen from Illinois.

arguing about money (R. 961). Castle testified:

> Q: What do you mean they were arguing about money? Can you tell us what that conversation was?
>
> A: Okay. I was sitting out in front of my apartment. Like I had said it was hot. There was no air conditioning. That's the reason I was even out there. And Mark was calling Skip a queer and said he was going to rip the old man off.
>
> * * *
>
> Q: He use any other words to describe how he was going to take Mr. Landis and what he was going to take if he was going to take something?
>
> A: Just said he was going to rip him off and do him in.

(R. 961-2). Later, Castle added her interpretation of what Mr. Davis said: "Well, that's young kids talk. I have a teenager you know. To do away with someone at least the way children I know talk, was to kill them, get rid of them" (R. 972).

Castle was again asked about Mr. Davis' intoxication. She testified that at approximately 8:00 p.m., "Mark didn't seem like he was drunk . . . He wasn't stumbling around like [the victim] was anyway. He seemed coherent. He knew what he was doing" (R. 965). She also testified that Mr. Davis stopped drinking in the evening (R. 991). On cross examination, defense counsel attempted to impeach Castle with her statement that was taken on July 2nd, wherein Castle told the police that Mark got drunker and drunker throughout the day (R. 977), and that Mr. Davis and Mr. Landis drank beer and vodka (R. 979). During the statement, Detective Rhodes specifically asked Castle if they were both drunk and Castle

stated: “Oh, bad, very bad.”. Additionally, Castle had told the police that at 10:30 p.m., “they were both real drunk.” (R. 978).

Castle testified that she saw Mr. Davis between 11:00 p.m. and midnight and that he told her and David Vickers that he had to leave right away and he would see them in a few years (R. 967). Later, she saw Mr. Davis drive away in Mr. Landis’ car.

Detectives Rhodes and Halliday testified that they interrogated Mr. Davis when he was arrested in Illinois (R. 1262). Initially, Mr. Davis denied having any knowledge about the victim’s death (R. 1272). Shortly thereafter, Mr. Davis told them that he wanted to tell the truth (R. 1274). Det. Rhodes told the jury:

> At that point, Mark said, I guess I will tell you the truth. He started back and he told everything was true about meeting the victim earlier that day with the beer, that he had helped him unload his car, they had drank some, that he had borrowed $20 from the victim during the day and he pawned his tattoo equipment. He had a blue and white cooler with Tattoo equipment inside it and he had borrowed $20 from the equipment, gave him that as security.
>
> He then said that he and the victim drank and went to several bars, the Dave’s Aqua Lounge and Golden Arrow Pub and he said about 11, somewhere around 11 o’clock, the victim went to bed.
>
> He went down – he went back over to the Golden Arrow Pub. You (sic) came back for a pair of socks from Carl Kearney, went back and knocked on the victim’s door and said the victim was dressed in nothing but a pair of pants, no shirt, no shoes. He told the victim he needed to borrow – at this point Davis didn’t remember whether it was $2 or $5 that he needed to borrow from him. The victim told him he would have to do something for it. He reached down and grabbed – Davis said, grabbed my nuts and I struck him at this time with my right hand

somewhere around the neck or throat area, knocking him down on the floor.

* * *

Victim laid there grasping for breath and choking. In a little bit, he got back up and he struck him the second time. He didn't know where he struck him, whether right hand or his left hand. He hit him again. They began to fight. He walked back to the small room towards the kitchen area. Victim picked up a long butcher knife. He took the butcher knife away from the victim and began hitting him with it.

Q: . . . At that point in time is he saying they were over by the bed?

A: On the bed.

* * *

A: He said he hit him several times with the knife, with the big butcher knife. He got a smaller knife which is over in that area and that he cut his throat with the smaller knife and stabbed him several times with it.

Then he said, he got up, washed the blood off the knives in the bathroom sink and washed his hands.

* * *

Said went through the victim's wallet. He got 80 or $85 out of the wallet and at this time, he was afraid so he took the victim's car and he went to Tampa.

(R. 1274-7). One significant difference between Det. Rhodes and Det. Halliday's testimony was that Det. Halliday testified that before Mr. Davis provided his statement, the detective suggested that the crime was committed because the victim made a sexual advance (R. 1289).

Shannon Stevens met Mr. Davis at the Pinellas County Jail. Stevens testified that Mr. Davis made a statement to him:

Mark told me that he had killed the man, that the man was queer and he was hustling him.

* * *

He told me that he met the man moving into a motel, like efficiency building, where he was staying and there was other people from his hometown staying there. He told me that the man had a six pack of beer, bought a six

> pack of beer. He helped the man move his stuff in the room. He said he later pawned his tattoo machine to the man for $20. Him and the man had went to the bar and had some drinks and later they come back from the bar and were at the room, were drinking some more, and he said he was hustling the man and the man woke up and caught him and a fight broke out and he killed him.

(R. 1205). Stevens also testified that Mr. Davis was "going to try for second degree murder" (R. 1206). The State inquired as to whether inmates talked about what worked in cases and Stevens agreed that that happened (R. 1206). Stevens also testified that he had seen Mr. Davis in the law library (R. 1208). The State, through Stevens, elicited testimony that suggested Mr. Davis manufactured his defense (R. 1208-10).

Stevens testified that when he asked Mr. Davis about all of the stab wounds, Mr. Davis told him that the "guy wouldn't go down" (R. 1212).

As to whether Stevens was receiving any benefit for his testimony, Stevens testified:

> Q: Because of some information that you may have, have you been promised any leniency or any plea bargain, any special treatment, because of your coming in here and testifying?
>
> A: No, ma'am.
>
> Q: Have you asked for any leniency for any of your sentences as a result of your testimony in this case?
>
> A: No, ma'am. Neither asked nor received.

(R. 1194).

As to physical evidence, testimony was presented that a large butcher knife was found in the trash can and the broken

handle of a knife handle was found in the bathroom sink, both of which had blood on them (R. 1013, 1035). The victim was found clutching a Bic lighter and hair in his hands (R. 1028). Also, while not presented to the jury evidence existed that Mr. Davis' blood was found at the scene (R. 538).

Mr. Davis' fingerprints were found on an empty beer can in the trash, on his tattoo materials and a bottle (R. 1182).

Blood was spattered throughout the apartment, but was mainly concentrated near the bed, underneath the window (R. 1023-4). The State also elicited testimony that the victim was found with semen in his anus (R. 1044). As to matching the semen sample to a source, FBI Agent Errera testified that he could neither include nor exclude Mr. Davis as the source (R. 1045).

Joan Wood, the medical examiner, testified that the time of death was between 10:30 p.m. on the night of the 1st and 4:30 a.m. the next morning (R. 1094). She identified fifteen stab wounds to Mr. Landis' chest, abdomen, neck and back (R. 1096-7, 1116). She also identified other wounds to Mr. Landis' face and body, including defensive wounds and a wound on his hand which could be consistent with having struggled for the knife (R. 1109). Dr. Wood opined that the injuries were inflicted while Mr. Landis was alive (R. 1115). Dr. Wood testified that the stabbing and cutting wounds to the neck, chest and abdomen caused Mr. Landis' death (R. 1124).

At the beginning of the second day of testimony, the

State requested that the defense reveal whether or not Dr. Diffendale was going to be called as a witness so that the State could depose him (R. 1154-6). Defense counsel informed the court that he had not decided whether to use Dr. Diffendale in the penalty phase (R. 1157). He stated that Dr. Diffendale needed to meet further with Mr. Davis and counsel (R. 1159, 1162).

After the State rested it's case, trial counsel indicated that he would be resting without putting on any evidence (R. 1312). Trial counsel then told the court: "I am now verbally advising the State that Dr. Diffendale is a witness for the Defense for the sentencing phase in the event that a sentencing phase takes place" (R. 1313).

In it's closing argument the State capitalized on Stevens' testimony and argued that Mr. Davis manufactured his defense:

> I didn't tell them what I told you. I am claiming self-defense. I have my theories. The facts you heard is from a jail house lawyer. Well, there sits one. He is busy on his defenses in this case, doing his legal research, listening to scuttle-butt at the jail to see what defenses work, what defenses didn't work, to decide what's going to be the best defense for him in this case. And what did he think the best defense was? The old man is a queer and made a sexual advance.

(R. 1420-1).

During closing arguments, trial counsel conceded that Mr. Davis was guilty of grand theft auto (R. 1362). Defense counsel also argued that Mr. Davis was intoxicated at the time of the crime (R. 1366-8). Defense counsel told the jury that

Castle was minimizing Mr. Davis' intoxication. He also told the jury that Stevens could not be believed because he had pending unresolved charges (R. 1373-4). Trial counsel abandoned self defense by telling the jury that the case was not a self defense case and he was not presenting it as such (R. 1431).

The jury found Mr. Davis guilty as charged (R. 217-9).

At the conclusion of the guilt phase, trial counsel again stated that he was going to present Dr. Diffendale and Betty Davis, Mr. Davis' mother, during the penalty phase and he would make the witnesses available for depositions (R.1480-1).

The afternoon before the penalty phase was to begin, trial counsel informed the court that Dr. Diffendale, Mrs. Davis and Mr. Davis were all penalty phase witnesses (Jan. 22, 1987 transcript, p.6)[3].

Furthermore, throughout the penalty phase charge conference, the parties argued about the propriety of introducing a prior juvenile adjudication to support the prior violent felony aggravator (Jan. 22, 1987 transcript, p. 12-3, 22). The State agreed that Mr. Davis' attempted armed robbery was a juvenile adjudication and not an adult felony conviction

[3]While the transcript is included in the record on appeal, it is not numbered properly, and will be referred to by date.

(R. 1494), but argued that the law allowed the introduction of the juvenile offense (R. 1503).

At the start of the penalty phase, the State presented the testimony of Officer Craig Salmon. Ofc. Salmon testified that he was a police officer in Pekin, Illinois (R. 1511). Ofc. Salmon testified that Mr. Davis attempted to rob a 60 year old man who ran a grocery store (R. 1512). At the time of the attempted robbery, Mr. Davis had a kitchen knife (R. 1515). Additionally, the State introduced documents regarding Mr. Davis' parole status at the time of the crime (R. 1508-9).

The defense's only witness was Mark Davis. Mr. Davis testified that he was 23 years old and was from Pekin, Illinois (R. 1517-8). Mr. Davis told the jury that he had 2 brothers and 2 sisters (R. 1518), and that his mother and cousin were in the hall (R. 1519). Mr. Davis also testified:

> Q: Mr. Davis, looking back on the incident that has been the subject of this trial, have you reflected, and if so, can you express to the jury what your feelings are now looking back in time as to what happened, what your feelings are as it would relate to that homicide, that murder that took place?
>
> A: Just wish to hell it never happened, that's all.
>
> * * *
>
> Q: If it were your lot in life, if it were your fate in life to receive a life sentence as opposed to a death sentence do you have the will to live under those circumstances of confinement that would be the conditions of such a sentence?
>
> A: Yes, I do.
>
> Q: Mr. Davis throughout some of your formative years you have, in fact, spent a considerable amount of time in

one kind of institution or another, and by that I mean a jail or youth home or prison, things of that nature; is that true?

A: Yes, sir.

* * *

Q: Do you believe that you've adjusted to that lifestyle of confinement? Do you feel as though you can live, if you're given a life sentence, without being disruptive and so on and so forth?

A: Yes, sir. It's something I've learned to accept.

* * *

Q: Mr. Davis, you and I together have made a conscious decision in this case, have we not?

A: Yes, sir.

Q: As it relates to your mother's testimony?

A: Yes, sir.

Q: And you've decided after discussing that matter with me that she will not be called as a witness in your case notwithstanding the fact that she's in the hall; is that correct, sir?

A: Yes, sir.

Q: Would you tell the jury why you made such a decision?

A: I just don't – she's been through a lot already and I don't want to see her go through this stuff.

(R. 1519-22).

On cross examination, the State questioned Mr. Davis about his involvement in escape attempts from the jail and his attempt to make home-made alcohol in jail (R. 1536-40).

In closing argument, the State argued that the prior violent felony aggravator was proven because of the contemporaneous robbery conviction and the juvenile adjudication for attempted armed robbery (R. 1552). The State

also argued that Mr. Davis killed the victim to prevent a lawful arrest (R. 1554); that the crime was committed for pecuniary gain (R. 1556); that the murder was committed in the course of a robbery (R. 1553); that Mr. Davis was on parole at the time of the murder (R. 1551); that the crime was especially wicked, evil atrocious or cruel (R. 1557); and that the crime was committed in a cold, calculated and premeditated manner (R. 1559).[4]

The State also made an improper "Golden Rule" argument to the jury:

> Folks, I ask you to do something. If any of you have a second hand on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate Orville Landis and the time he spent, not two minutes, but closer to five minutes with his throat cut, bleeding profusely, then with that man continuing to attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones, with enough force in his back to have nine of the eleven stab wounds, again, through his body breaking bones. And that two to five minutes to Orville Landis. I suggest to you, was like an eternity of pain, suffering and hell. That is cruel punishment, that is cruel treatment to a victim.

(R. 1558-9).

The State told the jury that the defense had the burden to prove mitigating factors (R. 1550), and that Mr. Davis' testimony proved he could not abide by rules in prison (R. 1564).

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[4]The jury was instructed on these aggravators (R. 1578-9).

Trial counsel argued that Mr. Davis was intoxicated throughout the day of the crime (R. 1569). Mr White told the jury: "maybe I'm wrong, but it strikes me that Mr. Mark Davis is not totally morally bankrupt. I think he has displayed the remnants of morality . . ." (R. 1571).

The jury recommended death by an 8-4 vote (R. 234).

The following week a sentencing hearing was held. At the hearing, the State presented the testimony of Scott Hopkins, an investigator for the State, who testified that he spoke to people who told him that the 1980 attempted armed robbery was an adult conviction and not a juvenile adjudication (R. 1605).

The State also requested that the court hear from the victim's daughter (R. 1610), Katherine Hansborough, who urged the court to impose the death penalty (R. 1614).

The court sentenced Mr. Davis to death (R. 1641-2).

B. THE POSTCONVICTION EVIDENTIARY HEARING

At Mr. Davis' hearing, a significant portion of the testimonial evidence was devoted to illustrating the tragic childhood he suffered. To that effect, all of Mr. Davis' immediate family members testified, including, his father, John; his mother, Betty; his brothers Mike and Tracy and his sisters, Candace Lohnes and Shari Uhlman.[5] Additionally,

[5]For purposes of clarity, Mr. Davis and his family members will be referred to by their first names in this section.

Mark's friends, Meri Blinn and Rick Hall and his neighbor, Johnsie Haynes also testified, as well as Mary Jo Buchanan, Mark's cousin. The testimony of these witnesses provided a detailed picture of Mark Davis' childhood and adolescence:

Mark Davis was born in October, 1963, in Pekin, Illinois (PC-R. 4090). While his father did not know Mark's birthdate, or where he fell in the order of children (PC-R. 3802-3), Mark was the fourth of five children (PC-R. 4090).

Pekin was a poor town where "you had to be tough" and "had to have some type of name" (PC-R. 3814, 3964). Pekin was a haven for gangs, drug manufacturing and drug dealing (PC-R. 3815-6, 3788). Tracy testified that the town was known for manufacturing crystal meth, which is an amphetamine (PC-R. 3815-6).

Mark's father John admitted that he has been a heavy drinker and an alcoholic all of his life (PC-R. 3803, 4098). Most of the time when he came home at night he was drunk (PC-R. 3803, 3973). Mr. Haynes testified that unless you could find John early in the morning, you would find him drunk (PC-R. 3957). Shari testified that her father started drinking in the morning and drank throughout the day and night (PC-R. 3986).

John's alcoholism impacted every aspect of the Davis' environment: Money was spent on alcohol and gambling instead of food and rent; John physically, mentally and emotionally abused his wife and children when he was drunk; John would

desert the family and have affairs with other women; and John was unpredictable and caused the family members to feel anxious and on edge about what would happen at any moment.

John worked as a roofer for many years, but could not make money due to the seasonal nature of his job (PC-R. 3804, 3965, 4095). Later he got a job at Caterpillar (PC-R. 3965, 4095). But, even when he had a dependable source of income, his money was still spent on gambling and drinking (PC-R. 3985, 4015).

The little money there was, Mark's father drank away (PC-R. 3806, 3819, 3965-6). Mike remembers that on Fridays, when it was payday, he would get sent to the tavern to try to get money from his father so that the family could buy food (PC-R. 3966). The Davis' were considered the "low class poor people" (PC-R. 3814), and "didn't have much of anything" (PC-R. 3964, 4016).

There were times when the family did not have food (PC-R. 3819). The family relied on government commodities and tabs at local grocery stores for food (PC-R. 3966-7). The family's diet consisted of "potatoes and lots of Spam", beans and rice and for something sweet the kids would eat mayonnaise and sugar sandwiches (PC-R. 3984, 4016).

At times the family was homeless because they would be evicted for not paying rent (PC-R. 3951). During one of these periods the family moved into Betty's sister's house, where 9 to 11 people lived in a one bedroom house (PC-R. 3951).

Needless to say the family moved several times (PC-R. 3955, 3967, 4016). Even when the family did have a roof over it's head, sometimes it would not have heat or gas (PC-R. 3985, 4016).

John's alcoholism forced Betty to try to work while still caring for her five children (PC-R. 3956). The family had very few clothes (PC-R. 3984), and Mike was forced to drop out of high school so that he could help support the family (PC-R. 3968).

To compound the financial problems, John would abandon the family at times, sometimes to have affairs (PC-R. 3805, 3819, 3971, 3975, 4109).

John was violent and abusive (PC-R. 3820, 3956, 3971). John beat his children and his wife (PC-R. 3820). The children would witness their mother's beatings (PC-R. 3971, 4021). Shari testified that she and Mark have: "witnesse[d] him throwing my mother down the hall" (PC-R. 3991). Even Mark's father admitted that he struck his children and wife when he was drunk (PC-R. 3804).

The younger children, Mark and Shari, received the worst abuse (PC-R. 3974). One summer, Mike made Mark come stay with he and his wife so that he could give Mark a break from his father (PC-R. 3974).

John was also verbally abusive with his wife and children (PC-R. 3821, 3957, 3971, 4023, 4102). Betty testified: "[Mark's father] put him down. I mean, he put him down and he

made him feel like sometimes he was worthless, you know" (PC-R. 4106).

John's alcoholism caused him to be unpredictable (PC-R. 3987, 3989, 4017, 4099, 4110). Shari explained:

> Q: Okay. And how would your dad act when he was drinking?
>
> A: Depended. He went through stages. A little happy mood and then very violent.
>
> Q: What was his violent mood like?
>
> A: Very angry and he always got Mark first.
>
> Q: He got Mark first?
>
> A: Yeah. Took more out on Mark than me.
>
> Q: I know this will be hard for you to talk about. How did he treat Mark?
>
> A: Very hostile. Very, very mean.
>
> Q: Yeah.
>
> A: He always felt like Mark was doing something wrong.
>
> Q: Was Mark doing something wrong?
>
> A: No, he would always just try to appease my dad and he never could.
>
> Q: What kinds of things would your father say to Mark?
>
> A: You son of a bitch, God damn, Mark. That God damn kid of mine.
>
> Q: How old was Mark when he would say things like this to him?
>
> A: As far as we can remember growing up.
>
> * * *
>
> A: He was always so angry at Mark. From the minute he walked in the door he wanted to know what Mark was doing.

> Q: Yeah. And can you describe some of the times that you saw your father hit Mark when you weren't being taken out of the room? How would he hit Mark?
>
> A: He liked to grab his shirt, grab it by the collar and hit against his head.
>
> Q: How would Mark react to this treatment?
>
> A: Try to apologize for something he didn't do. Just very apologetic and trying to so my dad wouldn't be more angry with him.

(PC-R. 3987-8). Betty added: "If J[ohn] didn't come directly home from work, it was like walking on eggs" (PC-R. 4110).

At one point, the State of Illinois forced Betty to choose between her husband and her children due to the abusive home environment (PC-R. 4017, 4107). John moved out of the house for approximately 1 year (PC-R. 4019). Candy testified:

> That was the best year I ever remember and the best part was – we didn't have any more money. Mom worked, but she stretched and we made it. But didn't have fear. I didn't have to go to bed and hear them hollering or screaming or hitting one of the others and it was a great time . . . . It was great until he came back later and –

(PC-R. 4019).

Tracy testified that in order to avoid the abuse "he got to the point to where I hung with my friends more than I did at home" (PC-R. 3820). Eventually, Mark began to stay away, too (PC-R. 3989). Shari stated: "his nervous system was just shot" (PC-R. 3989).

John also mistreated his children in other ways. Johnsie Haynes described John filling Mark's baby bottle with beer

when Mark was still in diapers (PC-R. 3958). When Mark was 8, he was admitted to a hospital in St. Louis for treatment of a life threatening kidney disease (PC-R. 3970, 4096), and his father did not want to visit him (PC-R. 4013, 4097).

When Betty was asked why she didn't leave the abusive home situation she responded: "I don't know. . . I've always been an independent person and I had nowhere to go. I could have had somewhere to go, but I felt I had to handle my own problems myself, you know" (PC-R. 4111).

Mark idolized his brother Tracy who "had a big influence on Mark" (PC-R. 3922, 3795, 3959-60, 3992, 4012). Mark was a follower (PC-R. 4012). Tracy admitted that he was a founding member of a gang in town (PC-R 3817), and described himself as a drug addict who was in and out of jail (PC-R. 3823). Tracy has always felt responsible for Mark's crimes:

> Q: Okay. Tracy, you said that you started rejecting Mark when you had raped him?
>
> A: Yeah, uh-huh.
>
> Q: But what else do you feel responsible in Mark's life for causing him to be in trouble and that kind of thing? What are the types of things that you feel responsible for, getting him into drugs, you know that type of thing?
>
> A: Well, me not living a good life, trying to be somebody that I wasn't, trying to be somebody and my little brother idolized me a lot, wanted to be just like me, wanted to become a motorcyclist.
> I was a tattooist. He wanted to be a tattooist. I draw. He wants to draw.
> Ever since I seen Mark trying to be like me and I knew I didn't have my own life straightened out, that I wasn't on the right path and I didn't want to see him follow me because I felt like I wasn't on the right path.

Q: Uh-huh.

A: Because I kept going in and out of jail and in trouble.

Q: Uh-huh.

A: And then I blamed myself for getting him involved in a burglary.

Q: Uh-huh.

A: And then I set up a robbery once and that's when I really wanted to stay away from him because here I felt like I'm getting my little brother into trouble, into something that – that's not right.

Q: Uh-huh. So you pulled him into your crimes basically?

A: Yes.

Q: Okay.

A: My lifestyle.

Q: What about the drug use, you pull him into that?

A: I felt like I pulled him into my world and my world was filled with drugs, robbery crime, a fake life.

(PC-R. 3834-5).

Meri Blinn was Mark's close friend and later, when she married Tracy, his sister-in-law (PC-R. 3920). Ms. Blinn corroborated Tracy's testimony about his feelings of guilt (PC-R. 3927). She explained that Tracy felt guilty and he would have nightmares (PC-R. 3927). Tracy told her that he used Mark as a lookout during crimes (PC-R. 3937).

Tracy also testified that he anally raped his little brother when he was 15 or 16 years old and Mark was 6 (PC-R. 3826). Tracy had been molested as a child by a neighbor (PC-

R. 3826). Tracy testified that the rape occurred when he and Mark were taking a bath together (PC-R. 3825). Tracy testified:

> Q: When he was a child, did [Mark] ever come to you and ask you if you wanted him to do that again for you?
>
> A: It was shortly after that.
>
> Q: What did he say to you, Tracy?
>
> A: He said hey, would you like to try that again?
>
> Q: Okay. Did he tell you that he wanted to make you happy?
>
> A: Yes.
>
> * * *
>
> Q: Okay. Tracy, what happened during that exchange?
>
> A: Well, during that there, I knew that that was wrong and that's when I started rejecting my little brother. Avoiding him and staying away from him because I knew it was wrong.
>
> Q: Did you feel ashamed?
>
> A: Yes, I did. I felt real ashamed and real bad now.
>
> Q: Have you thought about that, what happened with Mark? Did you ever think about that in your later life?
>
> A: It's ate at me for years.
>
> Q: Uh-huh.
>
> A: Then when Mark got in trouble it ate at me more. The more I've learned about what happened the more it ate at me. It's ate at me so much that I believe that it ruined my first marriage, because I was so filled with guilt blaming myself thinking I got my little brother in trouble. I got him started in some field that's not right. . . .

(PC-R. 3833-4).

Tracy also related an incident about being sexually

approached by a male in a bus depot (PC-R. 3831). Tracy said he "flipped out" and pulled a straight razor on the individual (PC-R. 3831).

Mark's friend, Meri Blinn described Mark: "He was lots of fun to be around. He was real caring. He was just a good-natured person" (PC-R. 3921). Mark's siblings also described him as a "bubbly" "on the go" kid (PC-R. 3974). Candy told the court that her brother was always fun as a child (PC-R. 4011). As he got older, Mark was protective of his younger sister, Shari, and worried about her (PC-R. 3982). Mark was also a talented artist who mastered inks, oils, chalks and pastels (PC-R. 3982-3).

Mark's mother told the court that when Mark was 10 he saved a little boy from drowning in the lake (PC-R. 4112-3). Betty would not have known about the incident, but she saw a note that Mark received from the boy's mother (PC-R. 4113).

However, Marks' abusive, chaotic home environment soon took its toll. Mark started doing what Tracy had done and stayed away from home as much as he could (PC-R. 3959). Likewise, Mark's friends knew that Mark had a serious drug problem (PC-R. 3923). Mark used crystal meth, cocaine, crank, marijuana and pills (PC-R. 3923). He used drugs every day (PC-R. 3924). Mark also drank alcohol on a daily basis (PC-R. 3924-5). Marks' drug and alcohol use started when he was only 11 (PC-R. 3959).

Indeed, Rick Hall met Mark when they were about 13 years

old (PC-R. 3789). Rick testified about Mark's drug habit and how he used drugs and alcohol daily (PC-R. 3790, 3792). He described Mark's habit as progressing to stronger drugs and more frequent use over the time Mr. Hall knew Mark (PC-R. 3791). At one point, Mark's habit was so bad that he had to wear long sleeve shirts to cover the track marks on his arms (PC-R. 3791).

Mr. Hall also described an incident when Mark "snapped" when someone implied that he had engaged in homosexual sex (PC-R. 3794).

Despite Mark's serious drug and alcohol problem his friend's trusted him around their children (PC-R. 3921, 3793). Ms. Blinn testified that she would trust him not to hurt her daughter (PC-R. 3941).

None of the witnesses, other than Mark's mother was contacted by trial counsel or asked to testify at Mr. Davis' capital trial (PC-R. 3795, 3808, 3835, 3930, 3961, 3975, 3995, 4024, 4533). Candy testified: "I knew mom was down there for the trial I didn't know that she was going to testify. I didn't think we had an opportunity" (PC-R. 4027).

Betty Davis testified about her communications with trial counsel: She spoke to Mr. White to arrange travel to Florida because she was a potential character witness (PC-R. 4114). She arrived in Florida the day before the penalty phase (PC-R. 4114). Mr. White met Betty at the airport and spoke to her about Mark's background during the drive to his office (PC-R.

4115). They "didn't really discuss all that much", like the Davis' economic status, Mark's drug use or Mark's siblings (PC-R. 4137). Betty didn't even think that Mr. White asked about John's alcoholism (PC-R. 4139-40). Mr. White was ill that night (PC-R. 4141).

After arriving at his office Mr. White asked her to review some papers and asked her if she wanted to look at the "pictures" (PC-R. 4115). Mr. White then hurriedly transported Betty to the State Attorney's Office and she spoke to the trial prosecutor (PC-R. 4115). Later, Mr. White and Betty talked at the motel. All total Mr. White spent only an hour to an hour and a half with Betty discussing Mark's background (PC-R. 4150).

While Betty testified that: "I was nervous on how I would react and hold up. I mean this was my son, you know" (PC-R. 4117), she also stated: "I was willing to do anything that I could" (PC-R. 4118). Betty also testified that her niece traveled to Florida to be with her:

> No, I went by myself. He got me the ticket and I flew by myself, but then I have a niece, that she felt that I shouldn't be there by myself so, between her and my daughter and the church, everybody, they got money together and got her a ticket to come down.

(PC-R. 4117).

The morning of the penalty phase, Betty was told to wait in the hall because she was a witness (PC-R. 4143, 4151).

Mary Jo Buchanan also testified at the evidentiary hearing about her communications with Mr. White and her Aunt

Betty. She traveled to Florida to be with her Aunt Betty at the time of Mr. Davis' penalty phase (PC-R. 4530). Mrs. Buchanan was aware of the circumstances under which Mark was raised (PC-R. 4531-2). Mr. White did not ask Mrs. Buchanan to testify (PC-R. 4533). Mrs. Buchanan testified that her Aunt Betty never told her that she did not want to testify (PC-R. 4533).

Dr. Michael Maher, M.D., testified at the evidentiary hearing. Dr. Maher conducted an evaluation of Mr. Davis in which he interviewed Mr. Davis, reviewed extensive background materials, including neuropsychological testing data and interviewed Tracy Davis (PC-R. 4162-3). Dr. Maher concluded that Mr. Davis suffers from chronic posttraumatic stress disorder (PTSD) and polysubstance abuse (PC-R. 4169). Dr. Maher believed that the PTSD primarily related to childhood trauma, including "a rape by his brother" (PC-R. 4169). Dr. Maher also found that Mr. Davis suffered from depression (PC-R. 4169). Dr. Maher testified that PTSD is a major mental illness and he explained:

> What it means is that he currently suffers from it, has suffered from it essentially his entire life. Certainly his entire adult life. Certain impairments in thinking, limitations in his capacity to emotionally appreciate his surroundings, his feelings or the feelings of others. He suffers from a vulnerability to utilize self destructive mechanisms to escape from bad feelings, memories, thoughts, reactions. And he is excessively vulnerable to self-destructive and destructive to others impulsive actions, particularly when faced with particular circumstances which are closely associated with the original traumatic experiences.
>
> * * *

> The history provided by the defendant and then corroborated by his brother that he lived in a household where there was a good deal of chaos and disorganization in terms of the parents and children's responsibility and behavior, where there was a chronic pattern of emotional and psychological abuse and a consistent, if not relentless, but nonetheless consistent pattern of physical abuse among family members and specifically that his brother anally raped him when he was approximately six or seven years old and then had another sexual contact with him soon after that.

(PC-R. 4171). Dr. Maher testified that his diagnosis:

> provides a great deal of insight and understanding into [Mr. Davis'] reactions, his motivation, his history, that pattern of his life, the vulnerability to alcohol and substance abuse or misuse. His inclination to behave impulsively and destructively under the influence of circumstances where alcohol and sexual tension are both present.

(PC-R. 4172). Specifically, Dr. Maher discussed PTSD:

> The primary symptom of posttraumatic stress disorder has to do with anxiety. Anxiety that is associated with fears, somewhat to some extent rational fears, to some extent irrational fears, particularly fears that are in some way associated with a prior trauma which a person has experienced. So that for example if the trauma is a sexual trauma, they may have heightened fears about situations where there is sexual tension or sexual behavior.
>
> * * *
>
> They have a tendency to both be obsessed, if you will, by those fears and concerns and at the same time wish to escape from and avoid thoughts of those fears and concerns. This is one of the reasons that substance abuse is quite common in these individuals. Sleep disturbances are common.

(PC-R. 4174-5).

Dr. Maher identified the primary trauma for Mr. Davis as the anal rape by his brother (PC-R. 4175). Additionally, Mr. Davis' abusive environment contributed to causing the mental illness (PC-R. 4176). Dr. Maher explained that the trauma of

the anal rape was compounded and intensified by Tracy Davis' rejection of Mr. Davis following the event, particularly because Mr. Davis looked up to Tracy (PC-R. 4180-1). Dr. Maher also explained that Mr. Davis' fears were of homosexual issues and feelings (PC-R. 4183). Dr. Maher indicated that the background records supported his identification of Mr. Davis' fears.

The fact that Mr. Davis believed that the victim was homosexual "would have raised his general level of tension and anxiety" (PC-R. 4195). "It would have made him both disdain the victim and experience fear and concern that the victim might hurt him" (PC-R. 4195). Dr. Maher testified that Mr. Davis is exceptionally sensitive to issues of being seen as the target of homosexual interest (PC-R. 4198).

Dr. Maher also explained that polysubstance abuse meant that as a kid, Mr. Davis used a lot of different drugs and developed a psychological and physiological dependence on them, including alcohol (PC-R. 4172-3).

Dr. Maher concluded that Mr. Davis suffered from PTSD at the time of the crime (PC-R. 4187). He also believed that due to Mr. Davis' mental state, Mr. Davis was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-R. 4186). Dr. Maher also found that Mr. Davis' capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired (PC-R. 4186).

Dr. Maher opined that Mr. Davis' childhood would be very relevant to the penalty phase in order to explain Mr. Davis' behavior on the day of the crime (PC-R. 4188). He stated: "His sexual history is specifically relevant with regard to the issues of his feelings about homosexual interactions. And the substance abuse problems, even independent of any connection to other issues I think are also relevant" (PC-R. 4188).

Dr. Maher did not believe that the cold, calculated and premeditated aggravator was established in this case because the PTSD and chronic substance dependence, "separately and independently had an affect to diminish and impair" his capacity to premeditate (PC-R. 4193-4). In fact, Dr. Maher testified that Mr. Davis did not have the capacity to premeditate the murder at all (PC-R. 4194). Dr. Maher stated that quite simply Mr. Davis could not ask himself, "do I want to kill this individual or not and then make a decision to do so" (PC-R. 4194).

Dr. Maher found that Dr. Diffendale's report contained valuable evidence (PC-R. 4234). Dr. Maher also testified that the Diffendale report supported his conclusions (PC-R. 4235).

The State presented the testimony of Dr. Sidney Merin who disagreed with much of Dr. Maher's testimony. Dr. Merin evaluated Mr. Davis a few days before the evidentiary hearing (PC-R. 4593). Dr. Merin met with Mr. Davis and performed some psychological testing; he also reviewed some of the background

records obtained at the time of trial (PC-R. 4594).

Dr. Merin found that Mr. Davis' test results illustrated that Mr. Davis is an individual who acts "impulsively", and who is emotionally less mature (PC-R. 4624). Dr. Merin testified: "These are often individuals who had some degree if agitated, where they find themselves frustrated. There is minor elevation on the PA scale which often has to do with a sense of suspiciousness, distrust, misinterpreting the motives of other people, and in that manner they often get themselves in trouble" (PC-R. 4624-5). Further, Dr. Merin testified:

> He reveals on certain other scales, content scales which are not the ten clinical scales, some degree of anxiety, some depression, a little bit of obsessiveness, family problems which apparently were significant for him.
>
> * * *
>
> He's also high on the scale that's referred to as the PK scale. That is sometimes misinterpreted as being a posttraumatic disorder scale. You have to be very, very careful with that scale, because it in fact does not determine in and of itself the presence of PTSD, posttraumatic stress disorder. In fact the items on that scale are very obvious with respect on revealing certain problems.

(PC-R. 4628).

Like Dr. Maher, Dr. Merin concluded that Mr. Davis suffered from an axis one disorder of polysubstance abuse (PC-R. 4656). Dr. Merin believed that Mr. Davis has psychological problems (PC-R. 4740). Indeed, Dr. Merin's initial opinion was:

> This rage at the time of the killing represented the cumulative affects of years of abuse, drinking and drug use. The numerous stabs (sic) of the victim served to drain off hate, rage, and bitterness, accumulated

regarding family and the world.

(PC-R. 4728, 4797).

However, despite the test results indicating anxiety and depression, Dr. Merin also testified that he did not believe that Mr. Davis suffered from PTSD (PC-R. 4657, 4736, 4739). Instead he believed that Mr. Davis suffered from a personality disorder, not otherwise specified (PC-R. 4658-9). Dr. Merin did not believe that Mr. Davis suffered from PTSD because he did not feel that the anal rape at 6 years old by his brother was traumatic:

> A: You have to factor into that, despite what you've indicated here just a moment ago, whether it's traumatic, whether it was horrible for him, whether it disrupted him right at that point regarding the incident itself, and historically or the information I had is that it did not.
>
> Q: So being anally raped when you're six or seven years old would not be a traumatic event?
>
> A: Not necessarily. If you grow up in a dysfunctional family where nobody is certain of when you're going to have some sort of discipline and things are chaotic with one or both of the parents and something of that nature happens, you're in an environment where that may be something that may not be particularly rare, especially, if he admired his brother.
>
> Q: Well, couldn't it in fact be more traumatic, because it was coming from someone who he looked up to and who he idolized?
>
> A: No.
>
> Q: No, okay.
>
> A: It's unlikely. He liked his brother. He wanted to model himself after his brother. His brother was his idol, therefore; let my brother do whatever he wants.
>
> Q: Can a six-year-old or seven-year-old consent to being anally raped?

A: They can say yes and they can avoid crying. They can also run in and tell mommy and daddy that Tracy did this to me, but he didn't.

Q: – children who are sexually molested, do they always come forward with the facts surrounding the sexual abuse?

A: No, not at all. In fact, as for example, a child who may be sexually molested, a little girl by grandpa or an uncle, after that if it goes against their grain, if it strikes their conscience as being inappropriate, they avoid that individual. They stay away from them. They don't go over to grandpa's house, they don't go over to uncle's house. And very often they will tell a parent, but equally often they won't.

They'll show some sort of behavior that would indicate an alert adult that they have some problem with a particular adult.

Q: So, because he liked his brother, it wasn't traumatic for him to be anally raped at the age of six?

A: He went back to his brother. He may have had some effect of this, some adverse effect, but it certainly didn't last long on the basis of his own statement.

* * *

Q: Do you think he enjoyed it, being anally raped at the age of six?

A: I don't know whether he enjoyed it. All I know is what I learned and that is he went back to his brother. His brother was his idol. He, on the basis of that he apparently did not mind it. He never told anybody about it.

Q: So if you don't tell people about [it] you don't mind it?

A: Oh, no, that's stretching it.

Q: If you don't tell people and you go back to the person who is the assailant, then you don't mind it?

A: Well, you decrease the prospect that you really minded it.

Q: Does a six or seven year old know – I mean would they know what to – what that was even all about? Would they understand what happened to them?

A: Well they understand that they have been anally assaulted and they may well understand by that age, certainly understand that that is really a no-no, but in his particular environment, again he may not have minded it as evidenced by the fact that he went back.

Now, very often that may occur to a young child, but it doesn't become meaningful to them, until perhaps they move into adolescence a 12, 13, 14 years of age and look back and say, oh, now I know what happened.

Q: So could his traumatic sort of feeling trauma about it then come back to him when he turns 12 or 13 years old and turns to severe drug and alcohol abuse?

A: Very often it does come back at that time. It doesn't necessarily come back. I'm suggesting that it's at that age, that they often place a value or an interpretation on the behavior that occurred back at six or seven years of age, but by that time they're into a half-a-dozen other things which then dissipates whatever concerns, whatever worries they have about it.

* * *

Q: Let's talk about physical violence. Does a child who gets physically abused necessarily avoid the abuser?

A: Have a lot of anxiety about getting around the abuser and very often avoid it, exactly the way Mr. Davis did. Recall, he would get out of the house as often as he could. He would stay away. He would run away from home. He would do all sorts of things to avoid being there.

Q: So, in fact, the trauma he suffered did manifest itself?

A: What trauma?

Q: The anal rape manifested itself; is that what you're saying?

A: You are attaching the word "trauma" to it. I'm not. It's an incident that occurred to him and as we look at it as reasonable, logical adults it should be trauma, but it may not have been traumatic to him.

Q: Well, if it wasn't traumatic, then why would it result in turning to drugs and alcohol, avoiding the home as much as possible? I mean why would it do that to him?

A: You're attaching, in my opinion, an erroneous result of that. He didn't run away from home because of

the assault. He ran away from home and he stayed away from home because of the behavior of his father.

Q: Well, could he have suffered trauma from physical abuse, then?

A: He could have.

Q: Perhaps we're just arguing the wrong trauma?

(PC-R. 4763-9). Dr. Merin did not believe that the anal rape was an adequate enough trauma to support a PTSD diagnosis (PC-R. 4781, 4784). In fact, Dr. Merin believed that for Mark Davis being anally raped by his brother when he was 6 years old "was another day at the ranch" (PC-R. 4796).

John Thor White was Mr. Davis' trial attorney (PC-R. 4246). At the time he was appointed to represent Mr. Davis, in October 1986, he had just finished the capital trial of Kaysie Dudley (PC-R. 4254). The jury recommended death in Dudley, but the judge did not sentence her until the week that Mr. Davis was sentenced to death. Mr. White's billing statement reflected that he spent a total of 134 hours working on Mr. Davis' case – 63 of those hours in court. Thus, trial counsel spent only 71 hours, under two weeks, preparing and investigating Mr. Davis' case. Mr. White also believed that the only time assigned to penalty phase investigation occurred the night before the penalty phase (PC-R.4274-5).

Mr. White testified that he focused most of his energies in Mr. Davis' case on the guilt phase (PC-R. 4263). His dominant strategy at the penalty phase was to "put before the jury the defendant's – the circumstances of his very troubled

upbringing" (PC-R. 4364). Mr. White believed that he had an affirmative duty to provide mitigating evidence (PC-R. 4372-3).

Mr. White testified: "I can tell you the intention was to call the defendant's mother as our penalty phase witness. I don't recall any other individual being contemplated on behalf of the defendant" (PC-R. 4274). Mr. White also testified that he chose Mr. Davis' mother because he believed she had knowledge about his background (PC-R. 4280-1). Mr. White also stated that he believed that the jury would have been moved by Mrs. Davis' testimony; "whenever I thought of Mark Davis' mother I thought of apple pie" (PC-R. 4513).

Mr. White admitted, and his billing statement reflected that his interview with Mr. Davis' mother occurred after the jury returned a verdict of guilty, the day before the penalty phase was scheduled to begin (PC-R. 4276-7). Mr. White did not have an investigator assisting him (PC-R. 4279). Mr. White did not speak to any other mitigation witness (PC-R. 4282, 4339).

Mr. White did not travel to Pekin, Illinois to interview Mr. Davis' family (PC-R. 4269), but he was interested in information about Mr. Davis' upbringing (PC-R. 4279). Mr. White did not obtain any background records himself (PC-R. 4334).

Mr. White wanted information to rebut the cold, calculated and premeditated aggravator (PC-R. 4306), but he

also felt that he had enough evidence about intoxication (PC-R. 4307).

In regards to Dr. Diffendale, Mr. White could not recall when the doctor was appointed or when he received his report:

> Q: If the record reflected that on January 8, 1987 that you filed a motion for appointment –
>
> A: Okay.
>
> Q: – of the doctor, would that –
>
> A: That's probably –
>
> Q: – be consistent with your recollection?
>
> A: No really, I'll buy into that.
>
> MR. MARTIN: Excuse me, what? January 8 of '87? We're talking four days before trial. I don't understand.
>
> * * *
>
> MR. MARTIN: . . . It's still four days before, for the doctor to do that. I'm concerned that we might be misreading that.

(PC-R. 4317-8). Like the Assistant State Attorney, Mr. White did not think it was good practice to obtain an expert's opinion the day before trial (PC-R. 4506).

Mr. White also did not believe that there was anything useful in Mr. Davis' background records that were collected by the Public Defender's Office (PC-R. 4327). But, Mr. White conceded that drug overdoses and suicide attempts at a young age may be mitigating (PC-R. 4327), because they would indicate that something was wrong (PC-R. 4329). Mr. White also believed that the economic status of the family and the fact that Mr. Davis suffered from physical and emotional abuse

by his father would be mitigating evidence (PC-R. 4329). Additionally, Mr. White testified that Mr. Davis' history of drug and alcohol abuse, and his drinking on the day of the crime could constitute mitigation (PC-R. 4498).

During his testimony, while being confronted with the fact that the jury heard almost nothing about Mr. Davis' background, trial counsel stated that Mr. Davis did not want mitigating evidence presented (PC-R. 4330). Mr. White testified that Mr. Davis wanted the electric chair (PC-R. 4330).

Further, contrary to Betty Davis' testimony, Mr. White testified that Mrs. Davis was worried that she may say something that would cause her son to receive the death penalty, therefore she did not want to testify (PC-R. 4331). Mr. White stated that he and Mr. Davis decided that Mr. Davis would testify instead (PC-R. 4331), despite the fact that he believed that this idea would result in a death sentence (PC-R. 4332). Nonetheless, Mr. White proposed this idea (PC-R. 4336). Mr. White claimed:

> I mean it was his choice. We discussed it together. That's the direction he wanted to go. I already told you, you know, his position was I'm going to get death. That's fine. I'm going to do 10 or 11 years. That's all I want. I mean, that's almost his exact words.

(PC-R. 4333). Mr. White was also asked:

> Q: And if there were witnesses with mitigation, other relatives, that could have – that had more information on Mr. Davis that the mother had and they had been in town, would you have wanted to use them?

A: Probably yes.

Q: You certainly weren't locked in to just using Mark Davis if there were other witnesses available?

A: Correct.

(PC-R. 4358).

Mr. White acknowledged that he had made a statement following the jury's recommendation of death:

> Juries may decide guilt and recommend punishment but sentencings are done before judges, there's no sense in putting on "the dog and pony show."

(Def. Ex. 35). Additionally, Mr. White stated: "This was a guy who nothing nice could be said about him. He didn't fall off a swing when he was a kid, he had no history of mental problems and he had spent 13 years in juvenile halls or prison." (Def. Ex. 35).

Mr. White did not think that Dr. Diffendale's report was favorable; he believed that the report showed Mr. Davis in a negative light (PC-R. 4337). But Mr. White admitted that the information in the report "seemed to dove tail with the facts in this case" (PC-R. 4432-3). Mr. White could not recall if he asked Dr. Diffendale to render an opinion regarding the statutory mental health mitigators (PC-R. 4496). However, Mr. White later conceded that the information about Mr. Davis "losing it" could be mitigating (PC-R. 4503).

Mr. White did not put on any evidence or submit any memorandum for the sentencing hearing (PC-R. 4517).

As to guilt phase, Mr. White testified that he generally

just relied on arguing that the State had not met its burden (PC-R. 4291). Mr. White testified that he did not think that the case was complex (PC-R. 4394). Specifically, Mr. White testified:

> A: One thing that I tried to do or I did was bring out the fact that the victim had semen in his anus. The reason for that was to sort or maybe reduce to a small degree sympathy or compassion that perhaps the jury might otherwise have had for the victim.
>
> Q: You felt that the victim should somehow – they should have less compassion for the victim?
>
> A: Well, just, you know, showing that he wasn't this perfect person. That he was, you know, he had been drinking hard. He had moved into this sleazy apartment complex. He may have had a homosexual relationship with somebody . . .

(PC-R. 4296).

After an evening of reflection, Mr. White amended his theory of the case and testified that he wanted to make Mr. Davis' confession believable (PC-R. 4312).[6]

While Mr. White wanted intoxication to be in evidence (PC-R. 4297), and he believed it was a "very viable defense" (PC-R. 4313), he believed that he "significantly developed" issues relating to intoxication with the State's witnesses and that he did not want to give up the last closing argument (PC-R. 4294). However, Mr. White admitted that he did not speak to several witnesses (PC-R. 4295).

Regarding intoxication, Rieck's pre-trial statements

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[6]However, it was impossible to make the confession "believeable" when trial counsel abandoned self defense. See R. 1431.

contradicted her trial testimony. In her initial statement, taken by Det. Rhodes at the crime scene, Rieck reported that Mr. Davis drank heavily the day of the crime(Def. Ex. 5). More importantly, during her taped statement Rieck admitted that when Mr. Davis entered her apartment between eleven-thirty and midnight she thought he was drunk (Def. Ex. 4).

Castle also gave several pre-trial statements which were not utilized at trial, all of which contradicted her trial testimony. The State described Castle's statement in a summary:

> [S]he also observed defendant go to the bar next door on foot at about 4:00, he was gone several hours. He went alone. When he got back at about 6-6:30, he wanted more beer, he appeared hyper, his eyes were glassy and glared, he stared, she believed he was drunk."

(Def. Ex. 13). Furthermore, Castle also told the State that she saw Mr. Davis at 10:30 p.m. and she described Mr. Davis as acting "real drunk" (Def. Ex. 13).

Police reports and notes produced by the State were also introduced at the evidentiary hearing. Glenda South was interviewed several times by law enforcement. Each time she maintained that Mr. Davis was intoxicated throughout the day of the crime. South provided a taped statement in which she told the investigator ("RR"):

> RR: Okay, were they drinking at this time?
> GS: They were drunk.
> RR: They were drunk? Had you seen them drinking any at all during the day?
> GS: I didn't see them drinking, but they could barely walk, they were so drunk.
> RR: Okay, when you say they were drunk, were, was his

speech slurred or something that indicated to you that he was drunk, couldn't stand up, they were staggering?
GS: Ah, they just couldn't walk . . .

(Def. Ex. 2). Additionally, George Lee and Jean Born saw Mr. Davis during the evening hours of July 1st. Both witnesses told the detectives that Mr. Davis drank quite a few drinks while at the bar and he appeared to be drunk (Def. Exs. 5 & 6).

Carl Kearney, Rieck's boyfriend, also made a statement contradicting Rieck's trial testimony, when he told the police that when Mr. Davis entered his room around eleven-thirty or midnight, Mr. Davis was drunk (Def. Ex. 11).

At the hearing the State pointed out that Mr. White may not have received some of the inconsistent statements in the case:

> Q: And back in 1985, 86, and 87, do you recall that that particular time the law regarding police reports was that the state was allowed to Millerize police reports, do you recall that?
>
> A: Yes.
>
> Q: You would actually get police reports with big holes or chunks cut out or taped off, correct?
>
> A: Yes.

(PC-R. 4411-2). Again, the State inquired:

> Q: . . . We discussed the fact that as far as the police reports were concerned they were Millerized, correct?
>
> A: I believe so.
>
> Q: So you would not have had whatever statements she made in the police reports, correct, because they were verbatim. They would have been cut out by the State?

A: If they were nonverbatim they probably would not be in there.

(PC-R. 4474-5).

As to the Diffendale report, Mr. White did not think the report would be helpful at the guilt phase, but he did acknowledge that "I get the impression that the doctor felt that maybe indeed this was not premeditated . . . " (PC-R. 4450-1).

At the hearing Mr. White also addressed Mr. Davis' status at trial; he explained that "the fact that [Mr. Davis] had legally recognized as co-counsel to me from a practical standpoint had very little meaning. It meant that, at least arguably he had the right to file pleadings and some things like that" (PC-R. 4341). Mr. White did not feel that Mr. Davis had any higher status than that of a client and he did not treat Mr. Davis as co-counsel (PC-R. 4342-3).

Mr. White also testified that he would have wanted facts of any deals with the witnesses (PC-R. 4344). In that regard, Stevens testified at the hearing that he met with the State about Mr. Davis' case (PC-R. 4545), and at that time, he was trying to get out of jail (PC-R. 4552).

Prior to testifying, Stevens spoke to the State about helping him reinstate his gain time (PC-R. 4548), and the State told Stevens that "they would see what they could do" (PC-R. 4550). In fact, following the trial, the State sent a letter, dated January 29, 1987, to the Adult Services Program

Director:

> Shannon Stevens was recently sentenced in our Circuit to a year and a day in the Department of Corrections for an escape from the Department of Corrections in May of 1986. While he was being held in the Pinellas County Jail, he obtained information about two other County Jail Inmates who were charged with first degree murder. Mr. Stevens contacted our Office, cooperated fully, and ultimately testified in both murder trials. The information he provided was very beneficial to these cases.
>
> In speaking with Shannon Stevens, he indicated that because of this escape charge he will lose any gain time he may have accumulated on his former DOC sentence. In light of his cooperation, I told Mr. Stevens our Office would request the Department of Corrections to retain, if at all possible, any gain time he has accrued. We would appreciate any consideration you can give in this matter.

(Def. Ex. 17).

Gary Dolan and Kenneth Gardner were also willing to provide information to the State in return for benefits.

Dolan was incarcerated with Mr. Davis at the jail for a few months in 1986 (PC-R. 3855). Mr. Davis discussed his case with Dolan, but he always maintained that the victim made a sexual advance to him (PC-R. 3857). Mr. Davis also always told Dolan that he and the victim were drinking (PC-R. 3857).

Dolan was told by the State that the State was interested in information about Mr. Davis' case (PC-R. 3859). Dolan testified that the State implied that he would be rewarded for information that was helpful to the State's cause (PC-R. 3863). Additionally, after speaking to the State about Mr. Davis' case, Dolan knew that the State wanted "certain things brought out" (PC-R. 3863), and believed that the State wanted

information about a robbery (PC-R. 3864). Dolan was moved out of Mr. Davis' cell and was unable to gain any more information from him (PC-R. 3865).

Dolan testified that Mr. Davis never discussed escape attempts with him, but was present when Dolan informed others of his plans to escape (PC-R. 3868-9). Dolan also explained that Mr. Davis got upset when inmates referred to them as their "boy", because it implied a homosexual relationship (PC-R. 3870).

Gardner also met Mr. Davis when Gardner received a new trial and was sent back to the jail (PC-R. 4035). Mr. Davis discussed his case (PC-R. 4036), but he was always consistent about the fact that the victim made a sexual advance. Gardner met with the State and he asked if he knew anything about Mr. Davis' case (PC-R. 4029). The State asked him if he could find out more (PC-R. 4040).

Gardner did not want to go back to death row and he was willing to do anything to make sure that he would receive a life sentence (PC-R. 4038). He lied during the deposition in Mr. Davis' case and testified to what the State wanted him to say (PC-R. 4046, Def. Ex. 15).

Gardner testified that Stevens told Gardner that he was going to testify against Mr. Davis in order to get a deal (PC-R. 4048).

SUMMARY OF ARGUMENT

Mark Davis' trial attorney expended a total of 71 hours

preparing for his capital trial. No preparation for penalty phase was conducted prior to the commencement of trial. In fact, trial counsel had the attitude that there was “no sense in putting on the dog and pony show" because there was nothing nice to say about his client. While “nice” information can certainly be mitigating, Mr. Davis’ background provided much more compelling mitigation which would have explained much about him as a person and much about the crime.

The background information was readily available in documents obtained by the Public Defender’s Office, through Mr. Davis and his family, and within Dr. Diffendale’s report. The small amount of mitigation the trial attorney did discover he failed to place before the jury or judge.

To compound matters, trial counsel failed to interview witnesses regarding Mr. Davis’ intoxication on the day and evening of the crime. Trial counsel failed to interview a single witness for guilt phase. Instead, he relied upon the State to provide witness statements which he used to cross examine the State’s witnesses. However, the State withheld other statements in police reports and summaries which would have further impeached the State’s witnesses and provided trial counsel with witnesses to corroborate Mr. Davis’ statement.

The State also withheld information regarding Mr. Davis’ prior juvenile adjudication for attempted robbery. Initially, the State conceded that the prior adjudication was a juvenile

offense, but the State argued that they were allowed to present the prior juvenile adjudication to the jury, and they did. The State presented the court records regarding the adjudication and also presented the testimony of the investigating Officer, Officer Salmon.

Later, at the sentencing hearing the State reversed their position and claimed that the conviction was an adult felony conviction. The State presented the testimony of Scott Hopkins, an investigator from the State Attorney's Office, who testified that several people had told him that the offense resulted in an adult conviction. The State knew this testimony to be false.

No adversarial testing occurred at either the guilt or penalty phase of Mr. Davis' capital trial. Confidence is undermined in both the verdict and sentence. Relief is warranted.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS' INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE CLAIM. MR. DAVIS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED.

A. DEFICIENT PERFORMANCE

Mr. Davis' trial counsel failed in his duty to provide effective legal representation for his client at the penalty phase. There was a wealth of mitigation that trial counsel never presented because his inadequate investigation failed to discover it. What mitigation he did know of, he never presented. As a result, Mr. Davis was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence.

Trial counsel's theory of penalty phase is reflected when, on the day that the jury recommended that Mr. Davis be sentenced to death, counsel remarked:

> Juries may decide guilt and recommend punishment but sentencings are done before judges, **there's no sense in putting on "the dog and pony show."**

(Def. Ex. 35)(emphasis added). Trial counsel also commented that there was nothing "nice" to say about Mr. Davis (Def. Ex. 35).

It is no wonder that trial counsel only began to prepare for the penalty phase after the jury found Mr. Davis guilty of first degree murder when he believed that the jury served such an unimportant role in the sentencing process and that he was

only looking for "nice" information. Likewise, it is undisputed that counsel retained a mental health expert 6 days before trial and received his report the day before trial (Def. Ex. 1). Trial counsel's billing records reflect that, at a maximum, trial counsel spent less than 11 hours preparing for the penalty phase (Def. Ex. 32). His investigation included speaking to his client. He also interviewed his client's mother and met with Dr. Diffendale, both the day before penalty phase (Def. Ex. 32).

In fact, Mr. White testified at the evidentiary hearing that he focused his energies on Mr. Davis' guilt phase and that he may have told Mr. Davis' mother that Mr. Davis was going to receive the death penalty (PC-R. 4263).[7] Most importantly, Mr. White's "investigation" cannot be deemed reasonable because he admitted that he never even contemplated calling any one other than Mr. Davis' mother to testify (PC-R. 4274).

The lower court excused trial counsel's lack of investigation by finding:

> To sum up so far, the 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

[7]Throughout Mr. White's testimony, he made clear that he had no hope that Mr. Davis could receive a life sentence and that he personally believed that Mr. Davis should be sentenced to death for his crime. It is necessary to keep trial counsel's personal feelings in mind when evaluating his performance.

> 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.

(PC-R. 2924). However, the testimony and exhibits presented at the evidentiary hearing demonstrate that trial counsel did not conduct an adequate investigation.

Trial counsel may have had general knowledge about Mr. Davis' background, indeed Mr. Davis provided information about himself, including that he was abused by his father and was a drug addict and alcoholic. But, trial counsel failed to uncover the details, chronology or story about Mr. Davis' life. Had he thoroughly interviewed Mr. Davis, his immediate family members and friends he would have realized that more importantly than finding something "nice" to say about Mr. Davis, he could present the jury with the compelling picture of Mr. Davis' tragic life.[8] Further, by interviewing Mr. Davis' family members trial counsel would have learned that each one had different details to convey that Mr. Davis' mother did not know. Such information would have provided the

[8]Trial counsel's file includes several awards and commendations that Mr. Davis achieved as a child (Def. Ex. 32). The documents contain "nice" information about Mr. Davis: his GED, his welding certificate, a certificate of merit for his work on the school newspaper and a note from his sixth grade teacher and newspaper advisor about his assistance, as well as other awards and report cards (Def. Ex. 32). None of these documents or any testimony relating to these documents was introduced for the jury or judge's consideration.

basis for several non-statutory mitigators.

For example, Mr. Davis' father admitted that he was a horrible parent. He testified at the evidentiary hearing that he was an alcoholic who drank and gambled his paycheck and failed to provide for his family (PC-R. 3803). The impact of John Davis' testimony and admission, that he was very cruel to his family and a horrible parent, is unquantifiable.

Likewise, Tracy Davis' acknowledgment that he knew his little brother idolized him and he "felt like [he] pulled him into my world and my world was filled with drugs, robbery, crime" would have had a dramatic effect on the jury that was charged with the duty to recommend whether Mr. Davis lived or died. Tracy Davis also admitted that when his brother was only 6, he anally raped him (PC-R.3826)

Also, Mr. Davis' sister, Shari, described how Mr. Davis curled up on a ball on the end of her bed because his "nerves were shot" and how as soon as her father arrived home in the evening he would take out his anger on her brother (PC-R. 3989).

Meri Blinn and Rick Hall, Mr. Davis' friends testified that Mr. Davis started using drugs when he was still a child, at 11 or 12 years of age, and they described how his drug and alcohol habit progressed to a severe addiction (PC-R. 3923-5).

While Mr. Davis informed trial counsel of his father's brutality and his own problems with addiction, trial counsel

failed to delve any further into these topics which were commonly recognized and known to establish mitigation. The lower court's finding that trial counsel was aware of the mitigation is not substantiated. Even without speaking to any additional witnesses, had trial counsel conducted any investigation or reviewed any documents he would have been able to present evidence of the home environment in which Mr. Davis was raised. For instance, on September 19, 1967, when Mr. Davis was nearly four years old, his mother attempted to divorce his father because the State of Illinois instructed Mrs. Davis that if she did not seek a divorce and remove her children from her husband's custody, the children would be taken into custody by the State (Def. Ex. 9F). The complaint alleged:

> 7a. That subsequent to the marriage, Defendant, disregarding his marriage vows, commenced the excessive use of intoxicating liquors, and has since, and just prior to the commencement of this action, been guilty of habitual drunkenness for more than two years, and because of this conduct on the Part of Defendant, Plaintiff has ceased to live with Defendant as his wife.
>
> 7b. That Defendant has been guilty of extreme and repeated mental cruelty without cause or provocation . . . that on numerous and diverse occasions Defendant, while in an intoxicated condition, has struck the minor children of the parties hereto in the presence of their mother, without cause or provocation on the part of said children or Plaintiff, causing said children marks and bruises and pain and suffering by Defendant's continued course of abusive conduct toward Plaintiff and the four minor children of the parties hereto whereby she has suffered loss of weight, mental agitation and impairment of health; that on or about the 15th day of September, 1967, Defendant admitted to Plaintiff that he committed adultery . . .

(Def. Ex. 9F). An injunction was also issued which prevented

Mr. Davis' father from residing with his family (Def. Ex. 9F).

Likewise, Mr. Davis' medical records illustrated that at the ages of 12 and 13 he overdosed on drugs and was taken to the emergency room for treatment (Def. Ex. 9A).[9] Around this age he also complained of severe left-side headaches (Def. Ex. 9A).

Had the witnesses testified at trial or the records been introduced, trial counsel could have told a story of an infant who had no control when his father poured beer in his baby bottle, and who, in his formative years, witnessed and experienced violence from an individual who was supposed to love and support him. Trial counsel could have described how the instability of moving, being evicted and not having food could affect a child. Trial counsel could have showed the jury how a once happy-go-lucky child, who in fact saved another child's life when he was 10, could turn into a suicidal, depressed, drug addict and alcoholic before he was

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[9]Contrary to the lower court's finding, Mr. Davis' mother was unaware of the extent of drugs and alcohol her son was consuming. She believed that Mr. Davis may have been using marijuana when he was in high school, but she did not know that he was actually addicted to meth-amphetamines and other pills and consumed drugs and alcohol on a daily basis (PC-R. 4119-20). Also, counsel cannot be said to have selected the best witness when he did not interview any other potential witnesses. In fact, Mrs. Davis also testified that she was unaware that her husband beat and abused her son when she was not home (PC-R. 4119-20). While Mrs. Davis would have made a compelling witness, other witnesses were necessary to provide the jury with a complete picture of Mr. Davis' life.

even a teenager.

This Court has held: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). Trial counsel failed to discover many of the details which established compelling mitigation.

Furthermore, the lower court found that Mr. Davis thwarted trial counsel's strategy of presenting the testimony of Mr. Davis' mother to the jury:

> This Court finds that the decision not to put the defendant's mother on the witness stand was the defendant's voluntary choice. Trial counsel's actions were not deficient in failing to put the defendant's mother on the witness stand. Trial counsel had followed the proper course in investigating, selecting and securing the witness. The fact that the witness failed to testify was the result of the defendant's voluntary and rational decision.

(PC-R. 2918-9).

At the evidentiary hearing, trial counsel maintained that his strategy was to present Mrs. Davis' testimony to the jury because he believed she would make a good witness and could relay the pertinent facts of Mr. Davis' childhood (PC-R. 4274). Trial counsel testified that Mrs. Davis told him that she was afraid of testifying and therefore Mr. Davis made the decision not to call his mother (PC-R. 4330-1).

First, Betty Davis and Mary Jo Buchanan's testimony refutes trial counsel's testimony that Mrs. Davis did not want to testify. Mrs. Davis recalled that she was nervous about

testifying but she never told Mr. White that she did not want to testify (PC-R. 4117). Likewise, Mrs. Buchanan remembered that Mrs. Davis believed that she was going to testify and she never stated that she did not want to testify (PC-R. 4553).

Second, it was not Mr. Davis' decision about what evidence to present at the penalty phase. Mr. Davis did not waive mitigation, therefore it was trial counsel's responsibility to make the decisions about the mitigation to present. As trial counsel admitted, he was certain that Mr. Davis would receive the death penalty if he only presented Mr. Davis' testimony to the jury. Thus, such a decision was unreasonable.

Third, Mr. White's strategy of only calling Mrs. Davis to testify was also not reasonable. A trial attorney's strategy is not reasonable where he fails to investigate and prepare. See Wiggins v. Smith, 539 U.S. 510 (2003). Mr. White did not interview any other family member or mitigation witness (PC-R. 4282, 4339). Mr. White did not obtain any background materials (PC-R. 4334). In order for a trial attorney's strategy to be deemed reasonable the attorney must have the knowledge to make a reasoned decision.

Also, Mr. White's testimony is not credible. Mrs. Buchanan was at the courthouse the morning of the penalty phase. She was available and able to testify about Mr. Davis' background. At the evidentiary hearing, trial counsel admitted:

> Q: And if there were witnesses with mitigation, other relatives, that could have – that had more information on Mr. Davis that the mother had and they had been in town, would you have wanted to use them?
>
> A: Probably yes.

(PC-R. 4358). Yet, at the time of trial, counsel apparently failed to even consider presenting the testimony of Mrs. Buchanan in lieu of Mr. Davis' mother (PC-R. 4274). Ignoring potential witnesses cannot be considered reasonable.

Trial counsel failed to challenge the prior violent felony aggravator. Instead, trial counsel allowed the State to present an inadmissible juvenile adjudication as an aggravator. At a minimum, trial counsel could have limited the impact of the aggravator by presenting evidence of the circumstances of the crime and rebutting Ofc. Salmon's testimony.

The juvenile attempted armed robbery was of a grocery store. Had counsel even conducted a cursory investigate in preparation for the penalty phase, the jury would have learned that Mr. Davis and other members of his family had in the past committed offenses in order to obtain food. Money at the Davis household was always tight as a result of the father's alcoholism. This evidence could have greatly lessened the prejudicial impact of the evidence the state was able to admit. Counsel's performance in preparing for and cross-examination of this witness was deficient.

Also, trial counsel failed to limit Ofc. Salmon's

testimony and allowed the jury to hear prejudicial evidence of Ofc. Salmon's description of the robbery which was certainly outweighed the probative value above and beyond the fact of Mr. Davis' adjudication. Any other facts of the crime to which Officer Salmon testified were superfluous and prejudiced Mr. Davis.

Trial counsel also failed to investigate and prepare the mental health aspect of mitigation. At trial, counsel obtained an expert 6 days before trial was scheduled to begin and received the report the day before trial (Def. Ex. 1). The expert who did examine Mr. Davis was not asked to evaluate him for potential mitigating evidence (Def. Ex. 1). Dr. Diffendale's report reflects that Mr. Davis was forthright and provided mitigating information about his background (Id.). When trial counsel received the report he indicated to the trial court, contrary to his testimony at the evidentiary hearing that he intended on presenting the testimony of Dr. Diffendale during the penalty phase of the trial (R. 1157, 1313). Yet, he did not.

Without realizing trial counsel's contradictory testimony, the lower court found that: "After reviewing the [Diffendale] report this Court agrees with trial counsel's assessment of the report. The bad does outweigh the good." (PC-R. 2917). The court cited a section of Dr. Diffendale's report in which he suggests that rehabilitation may not be possible within the constraints of the criminal justice

system.[10] The lower court concluded: "Since admitting the report into evidence would likely have done more harm than good, it was reasonable for trial counsel not to admit the report". (PC-R. 2917). However, the lower court's order is in error. In Florida, future dangerousness or inability to rehabilitate a capital defendant are inadmissible aggravating factors. Therefore, had trial counsel presented the testimony of Dr. Diffendale, he could have excluded any reference to Dr. Diffendale's opinion about Mr. Davis' ability for rehabilitation. At the same time, Mr. White could have presented all of the "good" parts of Dr. Diffendale's opinion, including Dr. Diffendale's conclusion that: "The above factors [detailing Mr. Davis' life] combined make it quite possible that the defendant did "lose it" once in a scuffle with the victim, . . ." (Def. Ex. 1). Dr. Diffendale's conclusion that Mr. Davis "lost it" is extremely relevant and helpful to establishing the statutory mental health mitigators.

Furthermore, Dr. Diffendale's report outlines several recognized non-statutory mitigators, including: alcohol consumption on the day of the crime, severe anxiety, child abuse, poverty, having an alcoholic father, witnessing his mother being abused, and drug addiction (Id.). Dr.

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[10]The report itself demonstrates that Mr. Davis was denied an adequate mental health evaluation. Dr. Diffendale did not understand or intend his report to consider mitigation, statutory or nonstatutory. See Def. Ex. 1. Inadvertently, the report is helpful and includes statutory mental health and nonstatutory mitigation.

Diffendale's conclusions were relevant and explained a great deal about Mark Davis.

As to the mitigation contained in the report, the lower court stated: "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." (PC-R. 2920). First, the lower court cannot substitute it's judgement for that of Mr. White. Mr. White did not testify that he made a strategic decision to keep Mr. Davis' drug addiction from the jury. Second, had Mr. White called Dr. Diffendale to testify, Dr. Diffendale could have explained to the jury that "[c]hildren of such families [like Mark Davis] grow up with lower self-esteem and feelings of inadequacy. Amphetamine and alcohol, [Mark Davis'] drugs of choice, both serve to enhance the user's feelings of power and effectiveness." (Def. Ex. 1). Dr. Diffendale could have explained who Mark Davis was and why he developed a debilitating addiction to drugs and alcohol. Surely, a jury would not fault a twelve year old boy for trying to escape his horrible existence by turning to drugs and alcohol, particularly when Mr. Davis' father supplied him with beer when he was only a baby. Finally, the lower court's order fails to consider that this Court is responsible for reviewing every death sentence and conducting a proportionality review, and has recognized drug and alcohol addiction as mitigating evidence. Therefore, even if Mr. White wanted to prevent the

jury from hearing this information, he was obligated to present it at the sentencing hearing so that all of the recognized statutory and non-statutory mitigation was in the record for the direct appeal. Mr. White testified that he had no strategy in not presenting mitigating evidence at the sentencing hearing (PC-R. 4364).

Furthermore, accepting Dr. Merin's opinion that the report was "adequate" ignores the fact that like Dr. Diffendale, Dr. Merin was retained a week before the evidentiary hearing and did not conduct his evaluation until two days before the hearing was scheduled to begin (PC-R. 4587). Also, Dr. Merin did no more than a cursory review, if at all, of the voluminous background materials and changed his opinion after consulting with the State (PC-R. 4580). Dr. Merin's opinions should have been given little, if any, weight. However, even Dr. Merin found non-statutory mitigating evidence, both mental health and background evidence. See Ragsdale v. State,798 So. 2d 713 (Fla. 2001).

Mr. Davis' trial counsel also failed to present evidence concerning Mr. Davis' good behavior during his previous incarceration. This evidence would have rebutted the State's cross examination of Mr. Davis. Skipper v. South Carolina, 476 U.S. 1 (1986).

Regarding the aggravating circumstances, defense counsel failed to present evidence to negate the existence of the "cold, calculated and premeditated state of mind or evidence

of justification. The court relied in part on the testimony of a guilt phase witness to support this aggravating circumstance. Counsel had failed to depose this crucial witness. Guilt phase witnesses had previously stated that Mr. Davis was intoxicated on the night of this offense. Intoxication undermines any ability to form the intent necessary of this aggravator.

Additionally Mr. Davis could not form the specific intent required for the CCP aggravator because of the trauma resulting from his molestation and childhood abuse. Mr. Davis' action was the result of an impulse to defend himself from a perceived assault and a reaction resulting from previous abuse. A finding of moral and legal justification negates the finding of the "cold, calculated, premeditated" aggravating circumstance.

This case is quite similar to the recent Supreme Court opinion in Williams v. Taylor, 529 U.S. 362 (2000). In that case, the Supreme Court agreed with the trial court that the defendant, Terry Williams, received ineffective assistance of counsel during the penalty phase. The Supreme Court described the ineffective assistance of counsel that Mr. Williams received:

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial (citations omitted). They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation . . . . [h]ad they done so, the jury would

> have learned that Williams had been severely and repeatedly beaten by his father . . . they failed to seek prison records recording Williams' commendations . . . . or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way."

p. 30-34). Similar inadequacies can be pointed to in the representation that Mr. Davis received during the penalty phase: Trial counsel spent only little time preparing for penalty phase; trial counsel failed to conduct an investigation into Mr. Davis' childhood, which would have uncovered the abuse heaped upon by Mr. Davis' father; and trial counsel failed to bring forth Mr. Davis' record of good behavior while in prison.

Mr. Davis' trial attorney's performance and "investigation" cannot be deemed reasonable. He failed to speak to anyone other than Mr. Davis and his mother. He did not retain an investigator to travel to Pekin, Illinois to speak to Mr. Davis' family members, friends and neighbors. Additionally, trial counsel failed to collect or supply his mental health expert with any information to assist him with his evaluation of Mr. Davis. Trial counsel's cursory phone interview with Mrs. Davis, an embarrassed, battered wife, was unreasonable. In fact, Mrs. Davis testified that when she arrived in Tampa, Florida, Mr. White spent very little time preparing her for her testimony (PC-R. 4114). Mr. White's investigation amounted to no investigation at all. See Rose v. State, 675 So. 2d 567 (Fla. 1996).

B. PREJUDICE

Defense counsel failed to investigate, prepare and present a case for life in the penalty phase and as a result, neither the judge or jury was ever informed about the mitigation which existed that they should have considered, found and weighed in favor of a life sentence.

In denying Mr. Davis' claim the lower court ignored the mitigation presented at the evidentiary hearing. For example, the court found that Mr. Davis' severe drug addiction would not be mitigating in Pinellas County (PC-R. 2920). However, in forming such a conclusion, the lower court ignores the testimony of Mr. White and the law. Mr. White testified that the drug overdoses and suicide attempts documented in Mr. Davis' records may be mitigating because they would indicate that something was wrong at an early age (PC-R. 4329).

Also, had trial counsel effectively prepared a mental health expert, the expert could have explained how the tragic circumstances of Mr. Davis' childhood and Mr. Davis' mental makeup, which included depression, drove him to use drugs and alcohol at a very young age.

This Court has repeatedly stated that a defendant's drug and alcohol addiction may constitute strong mitigation. Mahn v. State, 714 So. 2d 391, 400-1 (Fla. 1998); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). The lower court's refusal to consider the evidence that Mr. Davis struggled with longstanding,

severe addictions with methamphetamine and alcohol is error.

The lower court also discounted Tracy Davis' testimony and admission that he influenced his brother to use drugs and serve as a look-out when Tracy committed crimes and that he anally raped his brother when Mark was only six.[11] The lower court found that Tracy Davis would not have been available at the time of Mr. Davis' trial (PC-R. 2922). The court also stated: "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. A jury would not necessarily view this as mitigation. In fact, it might very well reach the opposite conclusion." (PC-R. 2922).

Again, the lower court ignored the testimony and law. Tracy Davis testified that before Mark Davis' trial he resided in Tennessee (PC-R. 3838). Mark wrote Tracy during this time period and Mrs. Davis also kept in touch with her son Tracy (PC-R. 3838-9). Tracy's family knew how to reach him. Also, Tracy knew that his mom planned on traveling to Florida for his brother's trial (PC-R. 3839). Tracy Davis repeatedly testified that despite any legal problems he had he would have traveled to Florida to testify on behalf of his brother (PC-R. 3840, 3841). He explained that his younger brother had

[11]Curiously, the lower court credited and relied on Dr. Merin's testimony in denying Mr. Davis relief, yet Dr. Merin found the statements and testimony regarding the anal rape to be trustworthy.

traveled to California once when he learned that Tracy was incarcerated there, and thus, he too would have been available for his brother (PC-R. 3841).

Likewise, the court ignored the fact that Tracy Davis caused Mark to participate in Tracy's criminal activity and use drugs at a young age. Had the jury known that many of Mr. Davis' legal problems and his addictions stemmed from his older brother's encouragement, whom he idolized, the jury would not have held him responsible for his behavior.[12]

As to Michael Davis' testimony, the lower 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.

(PC-R. 2923-4). The lower court's disregard of Michael Davis' testimony was in error.

At the evidentiary hearing, all of Mr. Davis' siblings testified. In fact, during the testimony of Sheri Uhlman, Candace Lohnes and Tracy Davis, the State objected to testimony that revealed that the witnesses all suffered from emotional scars and struggled with the abuse and neglect they experienced during their childhoods.[13]

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[12]Trial counsel himself questioned Mr. Davis about his prior criminal conduct, yet he did nothing to minimize Mr. Davis' conduct by showing his minimal participation or explain that Tracy "pulled" Mark into his world.

[13]Sheri Uhlman's testimony that she became pregnant at a very young age, was repeatedly involved in abusive

Michael Davis explained that he was the first child and therefore was the first child to leave the family house (PC-R. 3965). Additionally, Michael explained that his father's abuse of his siblings worsened over the years and his father was particularly abusive to Mark (PC-R. 3974).

Furthermore, even Michael Davis struggled in his adult life, yet the lower court failed to consider this evidence. (PC-R. 3201, Tab 23).

At trial, Mr. White presented the testimony of his client and elicited testimony from Mr. Davis that he had been confined to juvenile institutions for 4 - 5 years. Mr. White asked Mr. Davis almost no questions about his family or his problems (R. 1518-22). He failed to ask Mr. Davis a single

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relationships and she had tried to commit suicide was objected to by the State and sustained by the lower court (PC-R. 3995). Candace Lohnes testified that she had been involved in several abusive marriages and suffered from her childhood traumas (PC-R. 4025). Tracy Davis testified that he was a recovering drug addict and alcoholic whose first marriage had failed due to his inability to deal with the trauma of his childhood (PC-R. 3835). Mr. Davis also testified that he had been sexually molested by a neighbor and in his adult life was confronted with a homosexual advance and reacted violently (PC-R. 3830). Considering the lower court's ruling, the court oddly refused to and did not consider the problems that Mr. Davis' siblings, other than Michael, experienced in their adult lives which illustrated the traumas they suffered as children.

Considering that 4 out of 5 of the children had difficulties and "unstable" adult lives, even the law of averages would argue that one may in fact have a fairly stable life.

question about his alcohol use on the day of the crime.[14]

Defense counsel's closing argument was couched in apologetic terms: "maybe I'm wrong, but it strikes me that Mr. Mark Davis is not totally morally bankrupt" (R. 1571).

Defense counsel conceded the existence of three aggravating circumstances (R. 1567) without the consent of Mr. Davis (see also counsel's comments regarding the pecuniary gain aggravating circumstance, at T. 13), and allowed the jury to be instructed on aggravators that did not apply to Mr. Davis' case and were not found by the court. Defense counsel also introduced a collateral crime during sentencing that had not been offered by the state during either the guilt or penalty phase (R. 1569).

The court found four aggravating factors and **no mitigating circumstances** (PC-R. 2900).[15]

Had trial counsel investigated he could have presented the horrific background of Mark Davis. See Statement of Facts, supra. Additionally, Dr. Maher testified to statutory

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[14]Mr. Davis' plea to the jury to spare his life illustrates that trial counsel was not candid when he testified that Mr. Davis wanted the electric chair.

[15]Two of the aggravators on which the jury was instructed and the trial court found were unconstitutionally vague, however, trial counsel failed to object to the erroneous instructions. Also, the prior violent felony aggravator was based on an impermissible contemporaneous conviction and a juvenile adjudication. Thus, the prior violent felony aggravator was improper. Other aggravators were not found by the court.

mitigation and non-statutory mitigation regarding Mr. Davis' mental health and background. Both the State's expert and Dr. Maher agree that at the time of the crime Mr. Davis suffered from a recognized mental disorder: Dr. Maher believed that Mr. Davis suffered from Post-Traumatic Stress Disorder (PC-R. 4169) and Dr. Merin believed that Mr. Davis suffered from a personality disorder, not otherwise specified, but with borderline features (PC-R. 4656). Both Dr. Maher and Dr. Merin diagnosed Mr. Davis with polysubstance abuse (PC-R. 4169, 4656). Dr. Merin agreed that Mr. Davis' test results illustrated extreme anxiety and indicated no sign of malingering (PC-R. 4736).[16] While Dr. Merin and Dr. Maher disagreed as to part of the diagnosis, Dr. Merin admitted that Dr. Maher's opinion was reasonable (PC-R. 4828-30).

Dr. Maher believed that at the time of the crime Mr. Davis was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was impaired (PC-R. 4186). Finally, Dr. Maher testified that there was evidence to rebut the presence of the "cold calculated and premeditated" aggravating factor (PC-R. 4187).

The lower court completely ignored Dr. Maher's testimony and even ignored the fact that Dr. Merin found mitigation both

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[16]Dr. Merin found Mr. Davis' recollection of his early childhood molestation credible, but believed that it did not constitute a traumatic event for Mr. Davis because "it was just another day at the ranch" for him (PC-R. 4796).

in Mr. Davis' mental health and background.

Trial counsel's failure to present compelling statutory and non-statutory mitigation and failure to challenge the aggravating circumstances prejudiced Mr. Davis. Had trial counsel investigated and prepared for the penalty there is no question that the jury, which was split 8 to 4, would have recommended a life sentence. Relief is proper.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS' CLAIM THAT HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE.

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So. 2d 174 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001). Exculpatory and

material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. at 434; Strickler v. Greene, 119 S,Ct. at 1952.

This Court has indicated that the question is whether the State possessed exculpatory “information” that it did not reveal to the defendant. Young v. State, 739 So.2d 553 (Fla. 1999).

“Courts should consider not only how the State’s suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant’s ability to investigate or present other aspects of the case.” Rogers v. State, 782 So. 2d at 385. This includes impeachment presentable through cross-examination challenging the “thoroughness and even good faith of the [police] investigation.” Kyles v. Whitley, 514 U.S. at 446.

Upon his arrest in Illinois, Mr. Davis made a statement to law enforcement that he had stabbed the victim. He also told the police that he and the victim had been drinking throughout the day and evening. Mr. Davis’ statement was

corroborated by several witnesses who observed Mr. Davis on the day of the crime and who provided statements to the police and law enforcement in the days following the crime. At the evidentiary hearing, trial counsel testified that he wanted to place Mr. Davis' intoxication before the jury (PC-R. 4952), and at trial, the jury was instructed on voluntary intoxication (R. 1460-61).

At the evidentiary hearing, the State admitted that police reports and statements of witnesses were not disclosed to trial counsel:

> MR. MARTIN: Judge, back in 1987 there was a case dealing with a discovery issue of what was required by the State to provide in discovery and the law was that the state only had to provide police reports that contained observations of the police officer, defendant's statement, verbatim statements of witnesses.
>
> If it was non-verbatim, if it was a summary of a witness statement, then it may be excised and back then we actually cut it out and the defense attorney got pieces of paper with holes in it.
>
> * * *
>
> THE COURT: Mr. White would have gotten the sanitized rather than --
>
> 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. . . He probably didn't get that.

(PC-R. 4567).

As the State conceded, trial witness Rieck's statement to police that was contained in Det. O'Brien's July 3, 1985, report was not disclosed to trial counsel. Rieck testified at trial that Mr. Davis gave her a ride to pick up her boyfriend's car in the early evening, in his vehicle, and at

that time Mr. Davis was not intoxicated (R. 930-1). However, her undisclosed statement indicates that she never told the police that Mr. 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”. (Def. Ex. 6).

Furthermore, the State did not provide the statements of Jean Born and Glenda South, which were also contained in the report. Born had met Mr. Davis and the victim at a bar at approximately 10:30 p.m. the night of the crime. She told the police that “they were both drunk”. (Def. Ex. 6).

Consistent with Mr. Davis’ statement and the statements of the witnesses, South’s “Millerized”, or undisclosed statement also placed Mr. Davis at the victim’s apartment at approximately 11:00 p.m. (Def. Ex. 6). She claimed that “they were both drunk and talking loud” (Def. Ex. 6).

Likewise, much of Det. Rhodes’ report, dated July 31, 1985, was withheld from the defense. The report contained valuable evidence that South believed Mr. Davis was “unstable” and “nuts” (Def. Ex. 5). Also, George Lee told the police that he encountered Mr. Davis in a bar on the evening of July 1st, and he observed that Mr. Davis bought quite a few drinks and was drinking (Def. Ex. 5). He believed that he last saw Mr. Davis around midnight (Def. Ex. 5).

The State also failed to disclose statements from numerous witnesses contained in a “synopsis” (Def. Ex. 12).

Castle's statement to the prosecutor conflicted with her trial testimony. Castle told the prosecutor: "She also observed defendant go to the bar next door on foot at about 4:00, he was gone several hours. He went alone. When he got back at about 6 - 6:30, he wanted more beer, he appeared hyper, his eyes were glassy and glared, he stared, she believed he was drunk" (Def. Ex. 12).

The undisclosed statements and "synopsis," included statements from witnesses who testified at trial. The undisclosed statements, could have been used for impeachment purposes. The undisclosed statements corroborated Mr. Davis' statement to the police and would have assisted him in establishing that he was drinking and intoxicated throughout the day and evening of the crime.

Despite the State's admission that the reports were suppressed, the lower court held that Mr. Davis had not proved his claim. Rather, the court found: "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" (PC-R. 2907). The lower court's finding is not supported by the evidence introduced at Mr. Davis' evidentiary hearing.

At trial, defense counsel did not call any witnesses to testify about Mr. Davis' level of intoxication. Instead, counsel attempted to impeach Rieck and Castle with their verbatim statements – the only statements trial counsel had in

his possession.

Therefore, counsel was precluded from properly impeaching the witnesses to show that their statements had evolved from the day following the crime when they both told the police that Mr. Davis was drunk shortly before the crime occurred, until the time of trial when the witnesses minimized Mr. Davis' level of intoxication and testified that he was able to drive and did not appear intoxicated. Further, the witnesses added important details to their trial testimony that were not included in their initial statements to law enforcement. For example, Castle added the statement that Mr. Davis allegedly told her that he was going to "do [the victim] in". Castle was the only witness who testified in this regard. Likewise, Rieck added the testimony about Mr. Davis informing her that he planned to "take the old man for what he could." The "non-Millerized" reports would have allowed counsel to introduce the serious inconsistencies in Rieck and Castle's trial testimony and show that the witnesses had been coached.[17] See Banks v. Dretke, 124 S.Ct. 1256, 1278 (2004).

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[17]Castle's inconsistencies were not confined to Mr. Davis' intoxication. She changed other important details from her statement to her testimony. For instance, who was with her in the apartment when Mr. Davis came to the door, what was said and what happened were all different. Castle's testimony was drastically more unfavorable toward Mr. Davis. Either Castle was coached to testify differently than her statement or she chose to testify more unfavorably. Either way, the inconsistencies were important to demonstrate her lack of credibility and bias.

In Cardona v. State, this Court found that the State violated Brady by suppressing several witness statements provided to the State and law enforcement by Cardona's co-defendant. 826 So. 2d 968 (2002). At issue were several statements which provided impeachment evidence. Id. 974. This Court held: "[T]he fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative." Id. Similarly, while trial counsel attempted to impeach Rieck and Castle regarding Mr. Davis' level of intoxication, their undisclosed statements would have provided trial counsel with other matters for impeachment as well as more compelling impeachment evidence on intoxication.

Additionally, the State admitted that it suppressed statements from several other witnesses regarding Mr. Davis' level of intoxication. Born, South, Lee, Kearney and Hubbard all told the police that they interacted with Mr. Davis and the victim on the night of the crime. All of the witnesses offered information about intoxication. In fact, the effect of all of the testimony is that Mr. Davis drank heavily throughout the day and was observed to be drunk throughout the afternoon, evening and night of the crime, including moments before the crime when Mr. Davis spoke to Kearney and Rieck in their motel room.

The witnesses' observations and impression that Mr. Davis was drunk not only further impeached the State's case and Rieck and Castle, but also supplied independent evidence which

corroborated Mr. Davis' statement to the police.

Moreover, the evidence of Mr. Davis' intoxication was also material and exculpatory to the penalty phase. Even the State recognized the value Mr. Davis' intoxication had on his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The State contemplated the statutory mitigator based upon the argument that Mr. Davis was drunk. See Def. Ex. 21. However, the State failed to disclose the witness statements which corroborated Mr. Davis' statement that he was intoxicated at the time of the crime.

The State also suppressed the deal it made with Shannon Stevens. Stevens testified at trial that Mr. Davis made a statement to him in jail. Steven's testimony was inconsistent with many of the State's witnesses and with Mr. Davis' statement. Also, Stevens' testimony was false as demonstrated from the jail records concerning inmate housing (Def. Ex. 34). Stevens testified that he was not receiving any benefit or leniency for his testimony (R. 1194). Steven's testimony was false.

At the evidentiary hearing, Stevens testified that prior to the trial, he spoke to the State about helping him reinstate his gain time (PC-R. 4548), and the State told him that "they would see what they could do" (PC-R. 4550). In fact, following the trial, the State sent a letter, dated January 29, 1987, to the Adult Services Program Director

regarding Stevens:

> Shannon Stevens was recently sentenced in our Circuit
> . . . While he was being held in the Pinellas County Jail, he obtained information about two other County Jail Inmates who were charged with first degree murder. Mr. Stevens contacted our Office, cooperated fully, and ultimately testified in both murder trials. The information he provided was very beneficial to these cases.
>
> In speaking with Shannon Stevens, he indicated that because of this escape charge he will lose any gain time he may have accumulated on his former DOC sentence. In light of his cooperation, I told Mr. Stevens our Office would request the Department of Corrections to retain, if at all possible, any gain time he has accrued. We would appreciate any consideration you can give in this matter.

(Def. Ex. 17). Additionally, upon sentencing Stevens, the State indicated that part of the deal with Stevens which was noted by the judge was that "defendant not to lose his good + gain time on his burglary charge." (Def. Ex. 36). Stevens testified falsely and the State failed to correct Steven's testimony.

Despite testimony to the contrary, the lower court found that "no deal was made and no promises were made." (PC-R. 2908). In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is

violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959).

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. (emphasis added).

In Mr. Davis' case, the State failed to correct false and misleading testimony of a crucial witness. To make matters worse, that State then presented false and/or misleading argument based on the testimony.

Indeed, the State capitalized on Steven's testimony and argued that Mr. Davis had manufactured his defense while incarcerated at the jail.[18]

Furthermore, the letter the State wrote on Stevens' behalf also illustrates more suppressed impeachment evidence. The letter reflects that Stevens contacted that State with information. Stevens testified that the State contacted him after he innocently revealed that he had information about Mr.

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[18]Trial counsel failed to rebut the State's argument by reminding the jury that Mr. Davis provided a statement to law enforcement upon his arrest, long before he was ever detained at the jail or before he spent any time in the law library.

Davis' case. Also, the jury never heard that Stevens provided information on another homicide case.[19] This evidence was critical to illustrate that Stevens was a desperate man who wanted to reduce his prison sentences.

Stevens was a key witness against Mr. Davis. His testimony refuted Mr. Davis' statement to the police and gave the jury the impression that Mr. Davis fabricated his statement so that he would be able to argue that the victim had made a sexual advance toward him. Stevens testified that he expected to receive no benefits. However, Stevens' testimony at the evidentiary hearing contradicts his trial testimony. The lower court's finding is in error. Stevens' testimony cannot be considered harmless.

The State also suppressed favorable evidence at the penalty phase. Perhaps most egregiously, the State possessed information that the prior conviction used as an aggravator against Mr. Davis was a juvenile adjudication and therefore not a permissible aggravating factor.

A memorandum, dated December 8, 1986, from a State's investigator stated: "Regarding the previous robbery conviction that DAVIS had in Pekin, Illinois, all records have been destroyed according to Detective Soloman because DAVIS was a juvenile at the time." (Def. Ex. 22). Further, notes

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[19]Soon after Gardner was exposed as to having a deal in Mr. Davis' case, Stevens appeared; at that time Stevens had been set to testify in the case in which Gardner ultimately testified.

from the prosecutor's file reflect that she knew that the prior offense was a juvenile offense and not and adult conviction. See Def. Ex 23 ("juvenile parole violation - 83").

During the penalty phase, the prosecutor admitted that the juvenile adjudication was not an adult conviction, but argued that juvenile offenses could be used to support the prior violent felony aggravator (R. 1494, 1503). Det. Salmon testified about the facts surrounding the attempted robbery (R. 1512-5).

During the sentencing hearing the State claimed that she had learned that the attempted robbery was an adult conviction. At the sentencing hearing, the State presented the false testimony of Scott Hopkins, the same investigator who authored the memorandum, who testified that he spoke to people who told him that the 1980 attempted armed robbery was an adult conviction and not a juvenile adjudication (R. 1605).

The lower court ignored the memorandum and incorrectly found: "There is nothing to suggest the State withheld evidence or acted improperly in admitting the Illinois offense into evidence." (PC-R. 2908).

The memorandum, Det. Salmon's statement and the State's notes supported the defense's position that the crime was a juvenile offense and therefore could not be used to support the prior violent felony aggravator. The State violated Brady and Giglio by deliberately deceiving the court and jurors.

The jury recommended death by a narrow 8-4 vote. The

jury did not know the extent of Mr. Davis' intoxication and was also instructed to consider the prior violent felony aggravator even though it was not an adult conviction and was improper for them to consider as an aggravator.

Additionally, the State suppressed the identity of other witnesses from defense counsel. Gary Dolan was an individual who was housed with Mr. Davis and negotiated with the State to provide testimony against Mr. Davis in exchange for a reduced sentence on his own charges (PC-R. 3855-63).

During Mr. Davis' testimony at the penalty phase, the State asked Mr. Davis if he was involved in an escape attempt at the jail. The State implied that Mr. Davis was involved with Mr. Dolan in an escape attempt. In fact he was not. Dolan testified that Mr. Davis was present when he discussed an escape attempt, but he was not involved (PC-R. 3868-9).

Justice demands that Mr. Davis receive a new trial. Cardona v. State, 826 So. 2d 968 (Fla. 2002); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Of course, the effects of the State's misconduct detailed in the above argument are not limited to Mr. Davis' guilt phase. Garcia, Young. The undisclosed exculpatory evidence causes confidence to be undermined in the reliability of the death sentence. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS' CLAIM THAT HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

The lower court simply relied on Mr. White's testimony at the evidentiary hearing in denying Mr. Davis' claim. However, the court never even recognized that much of Mr. White's testimony was contradicted by the trial record, testimony from the evidentiary hearing and documents.

From the very outset of Mr. Davis' capital trial, trial counsel was ineffective. Counsel failed to depose key witnesses, make pre-trial motions and investigate Mr. Davis' case.

The trial court appointed John Thor White to represent Mr. Davis on October 23, 1986, after the Public Defender's Office withdrew from Mr. Davis' case due to conflict (R. 579-

80). Mr. White's billing statement reflects that he spent a total of 134 hours working on Mr. Davis' case (Def. Ex. 32). Mr. White spent 63 of those hours in court (Id.). Thus, trial counsel spent only 71 hours, under two weeks, preparing and investigating Mr. Davis' case, including penalty phase. Trial counsel's billing statement indicates that other than filing a motion for continuance on the day Mr. Davis' case was set for trial, he filed no pre-trial motions (Id.). He failed to file a motion to suppress Mr. Davis' statements, motions in limine regarding photos or victim impact information or any other motions.[20]

Furthermore, trial counsel failed to depose or take statements from several witnesses listed in the State's discovery. Trial counsel did not speak to Jean Born, Jeff Hubbard, Douglas Matheny or George Lee. All of these witnesses provided statements which were favorable to Mr. Davis' defense. See Def. Exs. 2, 3, 4, 5, 6, 7, 8, 11, 13). Trial counsel's deficient performance severely prejudiced Mr. Davis. Additionally, trial counsel failed to request funds for an investigator. Mr. Davis' filed a pro se Motion for Appointment of Investigator, in which he stated: "Defendant has many areas of his defense that require the appointment of a private investigator to question and to assemble potential defense witnesses" (R. 140-1). The trial court sent Mr.

[20]Davis made only 1 statement to law enforcement. Law enforcement's version of that statement differs.

Davis' motion to the Public Defender's Office and no action was taken. Trial counsel failed to renew this request after he began representing Mr. Davis.

As to voir dire, the lower court merely dismissed Mr. Davis' claim stating that it was based on speculation. However, Mr. Davis pointed to trial counsel's ineffectiveness during voir dire wherein defense counsel failed to question jurors about their views regarding the major issues in Mr. Davis' case. The potential jurors were never questioned about their views regarding drugs, alcohol abuse or mental illness.

Defense counsel further abdicated his role during voir dire by "stipulating" to the removal for cause of 11 potential jurors (R. 764-66). These potential jurors were removed for cause as a result of their views about the death penalty despite the fact that counsel made no attempts at rehabilitation. Defense counsel's efforts to rehabilitate jurors whom he did question were insufficient. This was also deficient performance.

Defense counsel also failed to ensure that Mr. Davis' basic right to an unbiased jury was preserved by never questioning a juror who socialized with the judge (R. 798, see also R. 794). At the start of the trial, defense counsel's lack of preparation became evident. Initially, trial counsel waived opening statement. The lower court believed that Mr. White's strategy not "to box his client in to some course of strategy" (PC-R. 2903) was reasonable.

However, Mr. White's testimony was nothing more than a post hoc rationalization because he had no strategy to present. Cole v. State, 700 So. 2d 33 (5th DCA Fla. 1997). Even at the evidentiary hearing he testified to multiple, inconsistent beliefs of what his strategy was (PC-R. 4295, 4312, 4403).[21]

The failure to fashion any strategy was obvious when trial counsel failed to use plentiful and available evidence of Mr. Davis' voluntary intoxication at the time of the offense. Counsel could have used this evidence in a number of significant ways both at trial and sentencing. Counsel failed to develop a defense of voluntary intoxication and failed to present evidence of intoxication to rebut specific intent, premeditation or aggravating circumstances.

Counsel failed to discover prior to trial the inconsistent

statements of Beverly Castle and Kim Rieck. As a result, counsel was not able to effectively cross examine these key witnesses. The lower court found, again based solely on Mr. White's testimony, that Mr. White had the pretrial statements and believed that he sufficiently impeached the witnesses. However, at the evidentiary hearing, the State admitted that

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[21]Initially, Mr. White stated his strategy was to show that the victim did not deserve the jury's sympathy. After a night of reflection he testified that it was to pit the detectives against each other, which the record reflects he did not do. Then, he stated his strategy was intoxication. Mr. White's testimony was incredibly self-serving. He also admitted to preparing for the hearing with the State.

Mr. White would not have received the non-verbatim statements. Thus, Mr. White clearly did not have all of the witnesses' pre-trial statements. The lower court's order is clearly in error.

At trial, Kim Rieck testified that she saw Mr. Davis throughout the day and evening of July 1, 1985 (R. 930-952). Specifically, Rieck testified:

> Q: About what time did you see him?
>
> A: Eleven-thirty or twelve o'clock.
>
> Q: How did you come to see him about eleven-thirty or twelve o'clock?
>
> A: He knocked on our door.
>
> * * *
>
> Q: At that point in time, was there anything about his appearance or his manner of speech that lead you to believe that he was intoxicated?
>
> A: No.

(R. 352-354). However, Rieck's pre-trial statements contradicted her trial testimony. Rieck reported that Mr. Davis drank heavily the day of the crime (Def. Ex. 5). More importantly, during her taped statement Rieck admitted that when Mr. Davis entered her apartment between eleven-thirty and midnight she thought he was drunk. Despite trial counsel's recollection at the evidentiary hearing, the record reflects that trial counsel failed to impeach Rieck with these statements.

Beverly Castle also testified at Mr. Davis' trial (R. 953-994). Castle testified: "Mark didn't seem like he was

drunk to me" (R. 965), and later that evening, when Mark came by her apartment she believed he was sober (R. 967). However, Castle gave several pre-trial statements all of which contradicted her trial testimony. The prosecutor Castle's statement in a memorandum:

> [S]he also observed defendant go to the bar next door on foot at about 4:00, he was gone several hours. He went alone. When he got back at about 6-6:30, he wanted more beer, he appeared hyper, his eyes were glassy and glared, he stared, she believed he was drunk."

(Def. Ex. 13). Furthermore, Castle also told the prosecutor that she saw Mr. Davis at 10:30 p.m. and he was acting "real drunk".

In addition, Castle's statements and testimony differed on several key points, all of which made Mr. Davis appear more unfavorable to the jury, yet trial counsel did not impeach her with the statements.

Contrary to trial counsel's testimony, and the lower court's order (PC-R. 2904), he did not thoroughly impeach Rieck and Castle. Counsel's failure to properly cross-examine and impeach Rieck and Castle is inexplicable.

Not only did counsel forego fully cross-examining the State's witnesses as to Mr. Davis' intoxication on the day of the crime, he also failed to present testimony of several other witnesses who had contact with Mr. Davis on July 1st and who provided statements to investigators about their knowledge of the crucial issue of Mr. Davis' intoxication. Police reports and the State's notes indicate that trial counsel

could have presented strong evidence that Mr. Davis was severely intoxicated throughout the day of the crime. See Def. Exs. 2, 3, 4, 5, 6, 7, 8, 11, 13. Glenda South was interviewed several times by law enforcement. Each time she maintained that Mr. Davis was intoxicated throughout the day of the crime. South provided a taped statement in which she told the investigator ("RR"):

> RR: Okay, were they drinking at this time?
> GS: They were drunk.
> RR: They were drunk? Had you seen them drinking any at all during the day?
> GS: I didn't see them drinking, but they could barely walk, they were so drunk.
> RR: Okay, when you say they were drunk, were, was his speech slurred or something that indicated to you that he was drunk, couldn't stand up, they were staggering?
> GS: Ah, they just couldn't walk . . .

(Def. Ex. 2). Additionally, George Lee and Jean Born saw Mr. Davis during the evening hours of July 1st. Both witnesses told the investigating detectives that Mr. Davis drank quite a few drinks while at the bar and he appeared to be drunk (Def. Ex. 5).

The State also took a statement from Carl Kearney, Rieck's boyfriend. Kearney, contradicting Rieck's trial testimony, told the police that when Mr. Davis entered his room around eleven-thirty or midnight, Mr. Davis was drunk (Def. Ex. 5).

The lower court found that Mr. White knew of the information (PC-R. 2902). Again, contrary to the lower court’s order, Mr. White was not provided with the

statements.[22] He did not speak to the witnesses or depose them, so he had no idea about the testimony they may provide. Trial counsel's strategy is only reasonable to the extent that his investigation was reasonable. Here, Mr. White made no investigation and therefore could not assess the value of the witnesses' potential testimony.

At a minimum, counsel could have presented five witnesses who would have testified that Mr. Davis was intoxicated throughout the entire day and evening of the crime, even perhaps moments before the crime. These witnesses were available and would have testified in accordance with their statements. To suggest that maintaining the final closing statement in lieu of presenting compelling witnesses to Mr. Davis' intoxication is ridiculous and if Mr. White is believable, unreasonable.

First, Mr. White did not even have many of the statements. Second, he obtained practically no evidence from impeaching Rieck and Castle to substantiate Mr. Davis' statement that he was intoxicated on the night of the crime. And third, his testimony that the witnesses "might" have unfavorable information was pure speculation since he did not speak to any of them.

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[22]The lower court stated that he had reviewed the statements (PC-R. 2903), but those statements were "Millerized" and never turned over. Thus, the lower court erred in relying on suppressed evidence to deny Mr. Davis' claim.

Furthermore, trial counsel failed to obtain a mental health expert to explain how Mr. Davis' intoxication at the time of the offense would have affected his ability to form the specific intent. This important evidence was not developed for the jury or for consideration by the mental health expert. Confidence is undermined in the outcome by counsel's deficient performance.

Indisputably, an expert was not retained until days before trial and trial counsel did not receive Dr. Diffendale's report until the day before trial began (Def. Ex. 1). Dr. Diffendale's report considered Mr. Davis' intoxication along with his background in concluding: "The above factors [including intoxication] combined make it quite possible that the defendant did "loose it" once in a scuffle with the victim, especially if the victim picked up the larger knife as the defendant claims." (Def. Ex. 1). Trial counsel admitted that Dr. Diffendale's report reflected his opinion that premeditation did not exist (PC-R. ___). Yet, trial counsel failed to even consider presenting Dr. Diffendale's testimony to the jury.

Also, trial counsel failed to object to the inadequate jury instruction on voluntary intoxication. See R. 1460-61.

Florida law on the voluntary intoxication defense is clear: "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(citations omitted).

Voluntary intoxication could have been employed as a defense to Mr. Davis' robbery and first-degree murder charge and could have rebutted the necessary element of specific intent and premeditation.

Use of Mr. Davis' long history of drug and alcohol abuse, evidence of his intoxication at the time of the offense and an appropriate mental health expert would have prevented a verdict of guilty of first-degree murder since there could not have been any finding of specific intent or premeditation. Prejudice from counsel's failure is clear because Mr. Davis could not have formed specific intent for robbery or premeditated murder. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970).

Trial counsel was also woefully ineffective in attempting to present a self-defense or sexual advance defense. Trial counsel failed to present any evidence to support Mr. Davis' confession regarding the sexual advance made by the victim and the ensuing struggle. Detective O'Brien stated in his deposition that the victim's apartment showed signs of a struggle (Def. Ex. ___), yet trial counsel failed to present this evidence to the jury. In fact, trial counsel failed to question any of the witnesses who observed the crime scene and testified at the trial about the appearance of the victim's apartment.

In his statement to the police, which the jury heard, Mr. Davis admitted that the victim had made a sexual advance toward him by grabbing his crotch and informing Mr. Davis that he would exchange sex for money.

A nonviolent homosexual advance may constitute sufficient provocation to incite an individual to lose his self-control and commit acts in the heat of passion, thus mitigating murder to manslaughter. See e.g., State v. Skaggs, 586 P.2d 1279, 1284 (Ariz. 1978); Walden v. State, 307 S.E.2d 474, 475 (Ga. 1983); People v. Saldivar, N.E.2d 1138, 1139 (Ill. 1986).

Despite counsel's knowledge of Mr. Davis' account of the crime, he did nothing to advance his theory of provocation. Counsel knew: 1) Mr. Davis believed that the victim was a homosexual and he told several people about his belief; 2) Mr. Davis confessed to the crime immediately upon being arrested and told the detectives that the victim made a sexual advance toward him; 3) by several witnesses' accounts the victim was intoxicated; 4) the victim had recently engaged in homosexual act; 5) the victim's injuries corroborated Mr. Davis' admission that he had struck the victim in the face and neck; 6) the amount of wounds supported a frenzied response to the victim's sexual advance; 7) Mr. Davis' blood was found at the scene which supported his statement that victim had a knife (R. ___). Counsel, however, presented no lay or expert testimony to establish these facts and this defense. Had trial counsel prepared or investigated the provocation defense

he would have learned that Mr. Davis reacted strongly and disgustedly to the idea of homosexual activity, be it consensual or forcible. Mr. Davis was the victim of molestation by his older brother, Tracy, who anally assaulted him when he was just six years old. Also, after Mr. Davis was released from a juvenile detention center he furiously reacted at the suggestion that he engaged in homosexual sex or the suggestion that he was the victim of homosexual rape while he was incarcerated (PC-R. ___).[23]

Trial counsel also possessed available, compelling mental health information that would have further supported this theory. During his evaluation of Mr. Davis, Dr. David C. Diffendale, trial counsel's confidential expert, noted the following characteristics about Mr. Davis: "impulsivity, low frustration tolerance, lack of trust in others, and deep belief that he is his only protector". Dr. Diffendale went on to state:

> The defendant's mental state at the time of the offense was influenced by many factors.
>
> A. He admits to "drinking all day" . . . The first factor then is he had some degree of alcohol intoxication.
>
> B. . . . The first is his explosive, impulsive

[23]The lower court believed that Mr. Davis' overreaction was unfavorable. Even if the specific circumstance of violence was admissible it actually supported Mr. Davis' version of events that he "lost it" when the homosexual advance was made. Thus, the evidence also tended to disprove the State's argument that Mr. Davis manufactured his defense.

> anger. He has a history of over-responding with violent anger when sexually approached by males in jail. When asked, he reported continuing to beat others who had approached him long after they had ceased struggling. He reports "loosing [sic] it" when he feels threatened. This mode of behavior may explain the excessive stab wounds.
>
> C. His slight stature, lack of traditional male success, and alcoholic father all would tend to make him insecure in his role as a man. . . His psychological test results also suggest severe anxiety over his sexuality. The above would combine to make sexual interaction with another male a threat to his core identity.
>
> D. The final set of factors likely to effect his mental state at the time of the offense is his feelings of inadequacy, anger against authority, and anger against older men. From the defendant's early childhood, the defendant's father was an alcoholic who regularly abused his wife and children. Children of such families grow up with lower self-esteem and feelings of inadequacy. Amphetamine and alcohol, his drugs of choice, both serve to enhance the user's feelings of power and effectiveness. . .
>
> * * *
>
> The above factors combined make it quite possible that the defendant did "loose it" [sic] once in a scuffle with the victim, especially if the victim picked up the larger knife as the defendant claims.

(Def. Ex. 1). Dr. Diffendale concluded: Mr. Davis' "response to the situation leading to the victim's death is understandable given the defendant's family history, jail experiences, psychological make-up and intoxication". Dr. Diffendale's report was beneficial to Mr. Davis' defense and Mr. White admitted that it indicated that Mr. Davis did not premeditate the crime (PC-R. 4450-1) – testimony the lower court ignored.

Had counsel presented this evidence to the jury he could have explained Mr. Davis' actions. The trial court instructed

the jury on justifiable homicide and excusable homicide (R. 193-195). As to excusable homicide the jury heard:

> The killing of human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon sudden combat . . .

(R. 195). However, the jury heard the instructions without hearing any testimony, other than Mr. Davis' statement. Without the corroborating testimony surrounding the circumstances of the offense and specifically about Mr. Davis' psychological make-up, the jury had little evidence to apply to the instructions.

Counsel also failed to effectively assist Mr. Davis when counsel forfeited opportunities to negotiate with the state as to whether the state would seek the death penalty in Mr. Davis' case. The State received permission to offer Mr. Davis a plea, (Def. Ex. 14), however, counsel was unprepared to plea bargain.

Even after Mr. Davis' capital trial, his attorney failed to properly represent him. On May 13, 1987, months after Mr. Davis had been sentenced to death, his trial attorney admitted that he had “not timely filed” the notice of appeal (R. 276-277). "At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkom, 684 F. 2d 794, 805 (11th Cir. 1982); accord Porter v. Wainwright, 805 F. 2d 930, 933 (11th Cir. 1986). Moreover, to

be effective, counsel must present "an intelligent and knowledgeable defense. Cunningham v. Zant, 928 F. 2d at 1016.

This Court can also take into consideration that all of the errors that occurred at Mr. Davis' trial, cumulatively, establish that Mr. Davis did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

No adversarial testing occurred at the guilt phase of Mr. Davis' capital trial. Relief is proper.

ARGUMENT IV

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

The prosecutors in Mr. Davis' case engaged in improper conduct. The prosecutors made improper comments and introduced inadmissible evidence to the jury.

The prosecution improperly commented on Mr. Davis failure to testify:

> Although the state has the burden of proving a Defendant in a Criminal case guilty of the crime which we have him charged, the Defendant has the same power to subpoena witnesses. If he chose, he could have called any witnesses in his behalf. So let him try to have you think we're hiding something, we certainly are not.

(R. 1388-89). Additionally, the prosecutor argued:

> Did you at any point in time hear Mr. White impeach those ladies on the statements this defendant made to them? Do you think for one minute if the defendant hadn't made those statements and they reported those...reported those statements to the police that night on July 2nd when the murder was discovered, don't you think he would have been

standing there, impeaching.

(R. 1401). And further:

> All of those statements made by that defendant have not been challenged once by the defense in this case. They haven't been challenged because the defendant made his intent clear all day long as to what he was going to do with the victim in this case.

(R. 1421). These arguments impermissibly comment on the fact that Mr. Davis did not testify during the guilt phase in violation of Doyle v. Ohio, 426 U.S. 610 (1976); Wainwright v. Greenfield, 474 U.S. 284 (1986).

The prosecution also attempted to inflame the jury by referring to Mr. Davis as a biker (R. 1418-19), and by penalizing Mr. Davis' for exercising his right to assist counsel:

> What else did he tell you? That this Defendant, showed him an article from his hometown paper and first thing he though, my Lord, this article says he confessed. How can you confess and try to get a lesser crime, a murder two or something less. Explain that to me and what did he tell you? What did he tell Shannon Stevens? I didn't tell them what I told you. I am claiming self-defense. I have my theories. The facts you heard is from a jailhouse lawyer. Well there sits one, he is busy on his defense in this case, doing his legal research, listening to scuttle-butt at the jail to see what defenses work, what defenses didn't work, to decide what's the best defense for him in this case. And what did he think the best defense was? The old man is a queer and made a sexual advance.

(R. 1420).

The prosecutor's "Golden Rule" argument was also improper. See R. 1558-9.

The lower court's finding that the comments were "insignificant" was in error. Trial counsel's failure to

object was deficient.

It was also improper for the prosecutor to argue and present testimony about Mr. Davis' juvenile adjudication during the penalty phase to support the aggravating circumstance of conviction of a prior violent felony. A juvenile adjudication is not a "conviction" within the meaning of 921.141(5)(b), Fla. Statutes. Merck v. State, 664 So.2d 939 (Fla. 1995).

The prosecutor knew that the attempted robbery was charged as a juvenile offense and Mr. Davis was adjudicated delinquent, not transferred to adult court and charged with a felony. See Def. Exs. 22 and 23. The prosecutor's actions were improper and highly prejudicial.

The lower court's order, stating that the juvenile offense is "subject to different interpretations" is not supported by the record.

Also the prosecutor knew about Mr. Davis' intoxication at the time of the offense and memorialized the fact that the substantial impairment mitigator may apply (Def. Ex. 21). The prosecutor had no good faith basis to argue that Mr. Davis was not intoxicated. The prosecutor improperly argued that the mitigator was not present:

> This Court should reject any argument that the Defendant was substantially impaired based upon the testimony of eyewitnesses and the Defendant's own testimony at trial. Although there is evidence that the Defendant had been drinking prior to the murder, there is no evidence to substantiate any substantial impairment on the Defendant's part.

(R. 255). The prosecutor's representation to the Court is false. The prosecutor was privy to interview transcripts of statements made by witnesses who believed that Mr. Davis was drunk on the day and night of the offense. See Def Exs. 2, 3, 4, 5, 6, 7, 8, 11, 13. Mr. Davis was entitled to have a sentencing proceeding free from prosecutorial misconduct.

Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.), here, because of the prosecutor's inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).

This Court has held that when improper conduct by a prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990).

Defense counsel's unreasonable failure to object to the improper commentary of the prosecution prejudiced Davis. No tactical or strategic reason for failing to object is applicable. Relief is proper.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. 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.

A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance. Ake

v. Oklahoma, 470 U.S. 68 (1985). What is required is a "psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). Also, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

The lower court denied Mr. Davis' claim based on the testimony of Dr. Merin and trial counsel. Both believed that Dr. Diffendale's evaluation and report for competency to proceed, conducted within a few days of the trial and provided to trial counsel on the day before trial began were adequate . The lower court ignored the fact that like Dr. Diffendale, Dr. Merin was also retained days before the evidentiary hearing and performed an evaluation two days before the hearing began. Also, like Dr. Diffendale, Dr. Merin cursorily reviewed limited background materials, if at all. Additionally, Dr. Merin changed his opinion after consulting with the State. The lower court erred in crediting Dr. Merin's opinion as to the adequacy of the evaluation.

Also, contrary to Dr. Merin's opinion, generally accepted mental health principles require that an accurate medical and social history be obtained because it is often only from the details in the history that organic disease or major mental

illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient because patients are frequently unreliable sources of their own history. See Mason v. State, 489 So. 2d 734, 737 (Fla. 1986).

In Mr. Davis' case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense." Ake, 105 S. Ct. at 1096 (1985). Dr. Diffendale's memorandum to Mr. Davis' trial counsel, itself, illustrates the limitedness of his evaluation:

> Information for this report was obtained from (trial counsel), who described the charge, the known evidence, the statements of the prosecution witnesses, and his interaction with (Mr. Davis.) In addition, the medical records of (Mr. Davis) covering the period of the pre-trial incarceration period were reviewed. Two interviews, of one, and over two hours, were held with (Mr. Davis), covering past history, current mental status and mental status at the time of the offense. In addition, psychological tests . . . were administered.

Def. Ex. 1. Dr. Diffendale's failure to gather independent historical data prior to evaluating Mr. Davis rendered the evaluation incomplete and constitutionally infirm. Mr. Davis' judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense," Ake, 105 S. Ct. at 1095.

In this case, as discussed above, sources of information

necessary for an expert to render a professionally competent evaluation were not investigated and what information was available was never presented. As a result, Mr. Davis' judge and jury were unable to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095. Confidence in the outcome is undermined because the result of the proceedings in Mr. Davis' case is unreliable. Relief is proper.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING MR. 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. AS A RESULT MR. DAVIS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING LAW.

At the evidentiary hearing, Gary Dolan testified that he incarcerated at the jail in the same cell as Mr. Davis and Mr. Davis made statements about his case (PC-R. 3856-7). The statements were consistent with Mr. Davis' statement to law enforcement (PC-R. 3857). Dolan revealed the information to his attorney and soon after met with the State (PC-R. 3858-9). Dolan was told that the State was interested in various cases and he may receive benefits for any information; the State specifically informed Dolan that they were interested in information to establish a robbery in Mr. Davis' case (PC-R. 3859-60, 3864). Dolan testified that Mr. Davis never told him

that he committed the crime because of a robbery (PC-R. 3868). Also, Dolan testified that he attempted to escape from the jail, but Mr. Davis was never involved in the escape attempts (PC-R. 3868).

Kenneth Gardner also testified at the evidentiary hearing that he had been incarcerated at the jail with Mr. Davis (PC-R. 4035). Mr. Davis told him about the crime and explained that the victim had made a sexual advance and Mr. Davis "flipped out" (PC-R. 4036). Gardner testified that he was desperate not to return to death row, so he lied about Mr. Davis' statements (PC-R. 4045; Def. Ex. 15). The State had told him that it was necessary that Mr. Davis intended to commit the crimes and Gardner was instructed to get certain information from Mr. Davis (PC-R. 4045, 4072). Gardner had also discussed Mr. Davis' case with Shannon Stevens and Stevens told him that he was wanted to get a deal in exchange for information about the Davis case (PC-R. 4047-9).

The lower court found that the testimony of Dolan and Gardner was not credible. As to Dolan, the lower court believed that he held a grudge against the State. However, Dolan testified that he was angry at specific representatives with the State Attorney, he did not hold any ill will to the office (PC-R. 3901).

The lower court ignored the evidence about Dolan. Dolan provided several statements to the State about Mr. Davis' case. And, during Dolan's postconviction appeal, he told the

Honorable Judge Gerard O'Brien that he had provided assistance to the (Def. Ex. 39). Dolan negotiated a deal in his case in exchange for information regarding Mr. Davis' capital case, but the court ignored the information.

As to Gardner, the court found that his testimony was inconsistent with other witnesses. However, the lower court ignored the documentary evidence which corroborated Gardner's testimony. The State knew Gardner was lying at his deposition (Def. Ex. 15). And a handwritten note located in the State's Attorney's file corroborates the negotiations between Gardner and the State:

> 7/8/86 Meeting w/JTR & Bev Andrew,
> JTR advised that Gardner is willing to flip & testify vs. Davis for Murder II, 20-40 - Both Davis & Gardner cases discussed w/JTR - JTR advised that we could accept plea to Murder I & waiver of death on both cases if we chose - To disc. cases with V's relatives. MM 7/8/86

(Def Ex. 14).[24] Gardner pled guilty to first degree murder and was sentenced to life days after Mr. Davis was sentenced to death.

Also, two weeks before Mr. Davis' capital trial, Gardner admitted in his deposition in the Davis case that if he pleaded guilty he would receive a life sentence for his case. The State's earlier concern that Gardner "will not make the worlds (sic) greatest witness" led them to seek out additional

---

[24]MM stands for Mary McKeown, the Assistant State Attorney who prosecuted Mr. Davis; JTR stands for James Russell, the Pinellas County State Attorney

snitches. On November 25, 1986, the State listed Shannon Stevens as a witness against Mr. Davis. Stevens testified that Mr. Davis had made inculpatory statements to him regarding the crime. Stevens also testified that he hoped he would receive a lesser sentence for his testimony, but that no deals had been made with the State (R. 1194). However, notes form the State Attorney's file indicates that Stevens and the State were engaged in negotiating a deal. The State sought information regarding Stevens' case and who represented him (Def. Ex. 17). Also, Stevens was sentenced shortly after the Davis case and he received the lowest possible sentence for his escape from the Department of Corrections (Def. Ex. 36). Additionally, the State brokered a further benefit on Stevens' behalf which encompassed reinstating the gain time he would have lost because of the escape conviction. (Def. Exs. 17).

At the time when the snitches were instructed to obtain information from Mr. Davis he had been charged. The snitches, as State agents, interrogated Mr. Davis. At no time during the interrogations was Mr. Davis ever given any Miranda warnings. See Miranda v. Arizona, 384 U.S. 436 (1966). Accordingly Mr. Davis' fifth Amendment rights were violated.

This was not a situation where one has to guess if the State "must have known" that its agent would take the steps necessary to secure statements for the Government. United States v. Henry, 447 U.S. 264, 271 (1980).

The Supreme Court has recognized that "[d]irect proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." Moulton, 106 S.Ct. at 487 & n.12. That is why the standard only requires a showing of what the Government "must have known." Id. at 487 n.12, citing, United States v. Henry. Here, that showing is clearly met if not proven beyond a reasonable doubt.

The testimony and documents introduced at the evidentiary hearing prove Mr. Davis' claim. Relief is proper.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, MARK ALLEN DAVIS, urges this Court to reverse the lower court's order and grant Mr. Davis Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Candance Sabella, Senior Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Tampa, Florida 33607, on April ___, 2004.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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