IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS,

Appellant,

v. **CASE NO. SC02-1580**
Lower Tribunal No. CF 94-1248 A1-XX
STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

References to the direct appeal record will be designated as (TR V#/#). References to the instant post-conviction record will be designated as (PCR V#/#).

STATEMENT OF THE CASE

Eddie Wayne Davis was indicted on April 7, 1994 for first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. (PCR 1/127-131) He was found guilty as charged, the jury unanimously recommended a sentence of death and the trial court sentenced Davis to death. (PCR 1/132-163) This Court affirmed the sentence. Davis v. State, 698 So. 2d 1182 (Fla. 1997). Davis's motion for rehearing was denied on September 11, 1997 and the mandate was filed on October 15, 1997. (PCR 1/169) The U.S. Supreme Court denied certiorari on February 28, 1998. Davis v. Florida, 522 U.S. 1127 (1998).

Davis' initial Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend was filed pursuant to Florida Rule of Criminal Procedure 3.850 on May 28, 1998. (PCR 2/180-204) After a series of motions and responses for records requests, the Court sent out an Order setting post-conviction relief deadlines. (PCR 2/279-281) On June 23, 2000, Davis filed his First Amended Motion to Vacate Judgement of Convictions and Sentences with Special Request for Leave to Amend and for Evidentiary Hearing. (PCR 2-3/282-410) The State responded on August 21, 2000. (PCR 3/415-21) A hearing was held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) on January

25, 2001, based on the June 23, 2000 Motion to Vacate Judgement of Convictions and Sentences. (PCR 3/422-53) The Court entered an Order Granting in Part and Denying in Part Defendant's Request for an Evidentiary Hearing on his First Amended Motion to Vacate Judgement and Sentences on January 30, 2001. (PCR 4/454-95)

On October 8 and 9, 2001, an evidentiary hearing was held on the following claims: 1) failure to investigate Eddie Arnold Davis, 2) failure to present voluntary intoxication, 3) failure to investigate or prepare on the issue of DNA evidence, 4) failure to cross-examine Alicia Riggall, Davis' control release officer, 5) failure to call defendant to testify at penalty phase, 6) failure to present expert testimony on his post-traumatic stress disorder, 7) failure to provide any physical evidence of organic brain damage, 8) failure to call Brenda Reincke, a neighbor, as a witness during the penalty phase, 8) failure to move for competency evaluation or failed to move to instruct the jury that he was under the influence of a psychotropic drug during the penalty phase, 9) a conflict of interest existed between counsel and the Defendant, 10) failure to subject the prosecution's case to meaningful adversarial testing in the guilt phase of his trial by conceding guilt without consultation, and 11) cumulative error. (PCR 4-5/496-

686) The motion was denied on June 12, 2002 and a timely Notice of Appeal followed. (PCR 687-713, 714)

STATEMENT OF FACTS

The salient facts from Davis' trial were set forth by this Court as follows in the direct appeal opinion:

> On the afternoon of March 4, 1994, police found the body of eleven-year-old Kimberly Waters in a dumpster not far from her home. She had numerous bruises on her body, and the area between her vagina and anus had been lacerated. An autopsy revealed that the cause of death was strangulation.
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> On March 5, police questioned Davis, a former boyfriend of Kimberly's mother, at the new residence where he and his girlfriend were moving. Davis denied having any knowledge of the incident and said that he had been drinking at a nearby bar on the night of the murder. Later that same day police again located Davis at a job site and brought him to the police station for further questioning, where he repeated his alibi. Davis also agreed to and did provide a blood sample.
>
> While Davis was being questioned at the station, police obtained a pair of blood-stained boots from the trailer Davis and his girlfriend had just vacated. Subsequent DNA tests revealed that the blood on the boots was consistent with the victim's blood and that Davis's DNA matched scrapings taken from the victim's fingernails. A warrant was issued for Davis's arrest.
>
> On March 18, Davis agreed to go to the police station for more questioning. He was not told about the arrest warrant. At the station, he denied any involvement and repeated the alibi he had given earlier. After about fifteen minutes, police advised Davis of the DNA test results. Davis insisted they had the wrong person and asked if he was being arrested. Police told him that he was. At that point Davis requested to contact his mother so she could obtain an attorney for him, and the interview ceased. Davis was placed in a holding cell.
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> A few minutes later, while Davis was in the holding cell, Major Grady Judd approached him and, making eye contact, said that he was disappointed in Davis. When Davis responded inaudibly, Judd asked him to repeat what he had said. Davis made a comment suggesting that the victim's mother, Beverly Schultz,

was involved. Judd explained that he could not discuss the case with Davis unless he reinitiated contact because Davis had requested an attorney. Davis said he wanted to talk, and he did so, confessing to the crimes against Kimberly and implicating Beverly Schultz as having solicited the crimes. Within a half hour after this interview, police conducted a taped interview in which Davis gave statements similar in substance to the untaped confession. Davis's full Miranda warnings were not read to him until the taped confession began.

In May, 1994, Davis wrote a note asking to speak to detectives about the case. In response, police conducted a second taped interview on May 26, 1994. Police asked Davis if he was willing to proceed without the advice of his counsel, to which Davis responded yes, but specific Miranda warnings were not recited to Davis. During this interview, Davis again confessed to killing Kimberly but stated that Beverly Schultz was not involved. Davis explained that he originally went to Schultz's house to look for money to buy more beer. Because Schultz normally did not work on Thursday nights and because her car was gone, Davis believed that no one was home. Indeed, Schultz was not home at the time because she had agreed to work a double shift at the nursing rehabilitation center where she was employed. However, her daughters, Crystal and Kimberly, were at the house sleeping. When Davis turned on the lights in Beverly Schultz's bedroom, he saw Kimberly, who was sleeping in Schultz's bed. Kimberly woke up and saw him. He put his hand over her mouth and told her not to holler, telling her that he wanted to talk to her. Kimberly went with him into the living room. Davis put a rag in her mouth so she could not yell.

Davis related that they went outside and jumped a fence into the adjacent trailer park where Davis's old trailer was located. Davis said that while they were in the trailer, he tried to put his penis inside of Kimberly. When he did not succeed, he resorted to pushing two of his fingers into Kimberly's vagina. Afterwards, Davis took Kimberly to the nearby Moose Lodge. He struck her several times, then placed a piece of plastic over her mouth. She struggled and ripped the plastic with her fingers but Davis held it over her mouth and nose until she stopped moving. He

put her in a dumpster and left.

Davis moved to suppress the March 18 and May 26 statements he made to law enforcement officers, arguing that his Miranda rights were violated. The trial court denied those motions. The jury found Davis guilty of first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. The jury unanimously recommended a sentence of death and the trial court sentenced Davis to death.

Davis v. State, 698 So. 2d at 1186-87 (Fla. 1997)(footnote omitted).

In his Order denying post conviction relief, the Honorable Judge Randall McDonald made the following factual findings from the evidentiary hearing:

During the evidentiary hearing, Davis presented a number of witnesses to support his claim of ineffectiveness of counsel in both the guilt phase and the penalty phase. Davis also presented testimony to support his claim that there was a conflict of interest between counsel and him, and that he did not knowingly intelligently and voluntarily waive his right to conflict free counsel. Davis also presented witnesses to support his claim that the trial was fraught with procedural and substantive errors. A summary of the testimony follows:

A. Austin Maslanik

Davis first presented Austin Maslanik, an attorney with the Public Defender's Office. The Public Defender's Office was appointed to represent Davis on March 19, 1994 and Maslanik took over representation from Robert J. Trogolo on October 1, 1994. Maslanik along with Robert Norgard represented Davis during jury selection and throughout the trial. At the time he took over this case, Maslanik had tried approximately fifty first-degree murder cases and about twenty of those were death penalty cases.

Maslanik and Mr. Norgard both taught various seminars on death penalty issues. Maslanik testified that upon taking the case over from Trogolo, he conferred with Trogolo, and reviewed the file. Maslanik made notes each time he had attorney/client contact with Davis, as well as notes throughout the trial.

When questioned about Eddie Arnold Davis, the Defendant's father, Maslanik conceded that parts of his testimony were not helpful to Davis. Maslanik looked at Eddie Arnold Davis' Criminal Justice Information System (CJIS) history, and it appeared as though none of those cases led to a conviction. Maslanik did not impeach Eddie Arnold Davis with his prior felony conviction, and was not aware of who represented him previously. Maslanik believed the conviction was about twenty years old. Also, Maslanik testified that he was going to call Eddie Arnold Davis in the penalty phase, and considered that when deciding not to impeach him in the guilt phase.

Maslanik testified that his strategy involved an integrated defense where he tried to present the defense in the guilt phase consistent with the defense in the penalty phase. Maslanik used a theme that Davis was sexually abused as a child, and integrated the defense of voluntary intoxication. However, Maslanik did not call an expert in the guilt phase to support the defense of voluntary intoxication. Evidence was presented at trial that Davis was intoxicated on the night of the offense. Maslanik testified that voluntary intoxication is a defense to first-degree premeditated murder, and calling an expert for the defense of voluntary intoxication would not have been inconsistent with the penalty phase. However, Maslanik felt that the voluntary intoxication instruction creates a high standard to be able to say someone was intoxicated to the point where it negates intent. Also, Davis was charged with other offenses that were general intent crimes and the Court would have to instruct the jury that the voluntary intoxication defense wouldn't apply to those offenses. Maslanik believed that if there was not an instruction, the jurors may accept the argument the defense was making about Davis' mental state being diminished by the alcohol, and not apply it as technically as if they would have had an instruction on voluntary intoxication. Additionally, Maslanik

testified that Davis' confession was full of details he was able to recall; therefore he did not believe a voluntary intoxication instruction was warranted.

Regarding Alicia Riggall, Davis' control release officer, Maslanik testified that he did not call her as a witness, nor did he depose her because Davis had some control release violations and he thought she would be unhelpful. Maslanik also testified that he didn't have anything to rebut the fact that Davis was on controlled release.

Maslanik testified that he discussed with Davis testifying in the penalty phase. Specifically, Maslanik's notes reflect him asking Davis what he would testify to if he did, and how he felt about Kimberly's death. Maslanik did not recall what Davis' response was. Maslanik stated that he would've offered advice to Davis regarding whether or not he should testify, but that it was ultimately Davis' decision. Maslanik called experts and family members to elicit Davis' history regarding his childhood, abuse, alcoholism. Also, Maslanik stated he had located and read the colloquy given to Davis as to whether or not he wished to testify in the guilt phase of the trial only.

Regarding the claim of Post Traumatic Stress Disorder, Maslanik retained Dr. McLane. Maslanik testified that he believed Dr. McLane's overall qualifications would qualify him to render an opinion on child abuse. Maslanik testified that his records reflected physical abuse, but he doesn't recall any of the records reflecting sexual abuse. Maslanik stated that the information regarding sexual abuse developed later. Maslanik also discussed what role Toni Maloney played in preparing Davis' case. Ms. Maloney previously worked for Peace River Center for Personal Development conducting forensic evaluations of criminally charged people, and is skilled at detecting people with mental health issues. Ms. Maloney conducted an in-depth interview with Davis once the Public Defender was appointed, and contacted family members, developed family history and looked for evidence of abuse, and other mitigating factors. All of the information she gathered was turned over to Maslanik.

Regarding Brenda Reincke, Maslanik stated that he believed she had been deposed at one time, and a

subpoena was issued for her for the trial, but it was unserved because the process server was unable to locate her.

Maslanik also testified that there were notes in his file indicating that Davis was at one time taking Prozac and later Sinequan, but he did not recall what, if anything, Davis was taking at trial. When asked if he recalled Davis becoming very difficult to control during the penalty phase where experts were testifying as to his homosexual rape, Maslanik did not recall. However, he testified he had seen portions of the transcripts where Mr. Norgard brought this to the Court's attention. Maslanik testified he did not ask for a special instruction regarding Davis' medication, and that he did not believe he would be entitled to an instruction of that nature because they were not pursuing an insanity or mental health defense. Dr. McLane saw Davis between the guilt and penalty phase and there was no indication he was incompetent. Additionally, none of the mental health experts that examined Davis ever suggested that Davis needed to undergo testing because of brain damage he may have.

Maslanik testified that he never discussed with Mr. Davis a possible conflict regarding prior representation of Eddie Arnold Davis and he never saw it as a problem because he believed the case they represented him on was nolle prossed, and someone else eventually handled it.

Throughout the trial, Maslanik never reported to the jury that Davis was not guilty, and was integrating the defense with the expectation that Davis would be convicted of first-degree murder. Maslanik testified that Davis confessed to the murder at least twice, and never denied making those statements. For a short period of time, Davis said someone else committed the murder, but then abandoned that statement.

B. Toni Maloney

The State presented Toni Maloney, a private investigator who was formerly employed with the Office of the Public Defender as a forensic mental health specialist. During the last ten to twelve years of Ms. Maloney's employment with the Public Defender, her focus was on capital cases. Ms. Maloney worked with

Mr. Norgard and Mr. Maslanik prior to and during the trial of Davis. During the trial, Ms. Maloney testified she had regular contact with Davis, and that she does not recall being concerned that Davis may not be competent to proceed. Ms. Maloney testified that it was part of her duties to check and see if the defendants they were representing were on any kind of psychotropic or antidepressant medication. Ms. Maloney testified that she checked his Polk County Jail records several times throughout the period of time Davis was represented by the Public Defender to determine what kind of medication he was taking. Ms. Maloney testified she does not have an independent recollection of whether Davis was taking Sinequan during either phase of the trial.

C. Dr. Michael Maher, M.D.

Davis next presented Dr. Michael Maher, M.D. who is a physician and a psychiatrist licensed in Florida and a board certified forensic psychiatrist. Dr. Maher testified that he has often been qualified as an expert in forensic psychiatry. Dr. Maher was contacted by Davis' appellate counsel in early 2000, and examined Davis on June 19, 2000 at the Florida State Prison in Starke. Dr. Maher testified that he had not read any police reports, statements of Davis, or doctors' reports about this case prior to going to Starke. Dr. Maher spent approximately two and a half hours with Davis, and during that time he did a neurological exam on Davis. Dr. Maher testified he found no significant abnormalities, but that it was possible Davis was suffering from Porphyria, a metabolic disease related to the way the body chemically processes blood and blood products. During Dr. Maher's interview with Davis, Davis told him he estimated he had 10 to 12 beers during the day of the murder. Dr. Maher testified that Porphyria is aggravated by alcohol use, and if David had Porphyria and indulged in alcohol, he would become irritable and impulsive. Dr. Maher testified that whether Davis would be violent because of the intoxication and Porphyria would be speculative. However, Dr. Maher explained that he was never asked to examine Davis to see if he suffered from Porphyria. Dr. Maher concluded that Davis was suffering from very

substantial mental impairment related to his acute intoxication and underlying subtle brain dysfunction associated with early exposure to alcohol, and being a chronic alcoholic.

Dr. Maher described Korsakoff's Syndrome as a type of brain impairment that occurs in alcoholics. Dr. Maher testified that people with Korsakoff's Syndrome answer questions and describe stories in a way that sounds like it is logically relevant and accurate, but in fact, they have very little memory of what they're being asked of. Dr. Maher explained that if Davis suffered from Korsakoff's Syndrome, he might very well make up the fact that he took the child to a trailer if someone had suggested it to him. Dr. Maher testified that to the best of his knowledge, Davis does not suffer from Korsakoff's Syndrome.

As to the defense of voluntary intoxication, Dr. Maher testified that he thinks Davis, at the time of the offense, was sufficiently impaired such that his capacity to commit premeditated acts was significantly impaired. Dr. Maher testified that just because a defendant is able to recall a particular series of events with great clarity does not mean he was not intoxicated. Dr. Maher testified that unscrewing a light bulb before entering the trailer would have some bearing on his opinion as to whether or not Davis was too intoxicated to form the specific intent to commit first-degree murder. However, Dr. Maher explained that in isolation, the fact that Davis unscrewed the light bulb wouldn't have much bearing on his opinion because Davis may have done that solely on his reaction to the light. When asked about the fact Davis gave a statement inconsistent with the physical evidence, Dr. Maher testified that those statements are more consistent with a disorganized, impulsive attempt to put together fragmented memories and impressions into a story that makes sense at the time. Dr. Maher testified that that would be consistent with what would be seen in somebody who is impaired and confabulating. Dr. Maher testified that due to Davis' brain damage and intoxication, it would be difficult if not impossible for Davis to form the specific intent to commit first-degree murder.

On cross-examination, Dr. Maher admitted that he based his decisions about Davis basically from what Davis said. He did not verify any of the information

with witnesses from the trial, or family members. Maher also testified that it would not surprise him if Davis' memory were worse in 2000, six years after the murder, than it was at the time of the murder. He also testified that he was aware that Davis had been on death row for six years and contemplating at least filing a motion attacking his conviction. When questioned about the fact Davis recalled several details that were verified by the police such as; how the victim was laying on the bed when he entered the room, where the rag was he used to stuff in her mouth, where the piece of plastic was he used to suffocate her with, how she was lying in the dumpster, Dr. Maher testified that if all of those things can be objectively verified, then they couldn't be confabulated, therefore the details would be based on Davis' own recollection. Dr. Maher also conceded that those details might change his opinion about whether Davis was substantially impaired by alcohol with regard to forming intent. Dr. Maher testified that he was provided with the testimony of Dr. Dee, Dr. Krop, Dr. McLane, and Dr. Marron after his interview with Davis.

D. Robert Norgard

The State called Mr. Norgard, an attorney in the private practice of law. Mr. Norgard has been a criminal defense attorney since 1981, and has tried approximately 20-25 death penalty cases. Mr. Norgard was employed by the Public Defender's Office in 1994/1995 and along with Mr. Maslanik, represented Davis.

Mr. Norgard testified that he didn't have any independent recollection of discussing with Davis whether or not he would testify during the guilt or penalty phase. He also stated that he didn't discuss with Davis his guilt or innocence because Mr. Maslanik was the lead attorney for the guilt phase and he would've had that discussion with Davis.

Mr. Norgard testified that he didn't have any independent recollection of whether or not Davis was on Sinequan at the trial, but that the record reflected he was aware of that during the trial. Additionally, Mr. Norgard recalled some aspects of the evidence presented that made Davis agitated. Mr.

Norgard testified that he requested to be allowed to testify as to Davis' reaction to the evidence, but that request was denied. Mr. Norgard stated they did not request a standard instruction on psychotropic medications, or a special instruction for Sinequan. Mr. Norgard testified that there were no issues as to Davis being incompetent during the penalty phase.

As to the integrated defense, Mr. Norgard testified that the theory of the case was not a he-didn't-do-it defense. Mr. Norgard testified that it was their strategy to get the jury to find Davis guilty of something less and avoid the death penalty.

E. Dr. Sherri Bourg-Carter

Dr. Carter was called by the Defense, and is a licensed psychologist in the State of Florida. Dr. Carter is in private practice in forensic psychology in Fort Lauderdale, and specializes in forensic psychology, with a sub-speciality in child sexual abuse. Dr. Carter has been qualified as an expert in child sexual abuse and Post Traumatic Stress Disorder in Florida courts. On June 13, 2000, Dr. Carter met with Davis to assess allegations he made of sexual abuse as an adult and child. Dr. Carter was asked to determine how credible those allegations were and if those experiences hade [sic] any effect on his functioning. Dr. Carter administered an MMPI-2 test and a Trauma Symptom Inventory test directly to Davis. After meeting with Davis, Dr. Carter received Davis' prison records from 1998, 1991 and 1994. Dr. Carter also had prior psychological evaluations that were done when Davis was ten, eleven and twelve, as well as prior test data from 1994. Dr. Carter also reviewed the transcript of testimony of Dr. Krop and Dr. McLane at the penalty phase.

Dr. Carter testified that in the DOC records, she found documentation of sexual assaults by other inmates, as well as documentation of sexual abuse of Davis as a child by his stepfather. Dr. Carter believed the history given to her by Davis was credible. Dr. Carter testified that is has been her experience, and it is in the literature that males who are sexual assaulted tend to experience more problems and humiliation. After speaking with Davis, Dr. Carter spoke with Davis' mother who relayed that Davis

suffered physical abuse and emotional abuse at the hand of his stepfather. Davis' mother was unaware of the sexual abuse, but said looking back there were red flags that she should've paid more attention to. Dr. Carter testified that Davis' mother told her of an incident when he was four years old where his stepfather gave him moonshine to the point he was intoxicated. Dr. Carter testified that in her opinion at the time she was seeing him, Davis was suffering from major depression, which has been recurrent throughout his life, Post Traumatic Stress Disorder, alcohol dependence, poly drug abuse and an Antisocial Personality Disorder. Dr. Carter testified that either Dr. Krop or Dr. McLane also diagnosed Davis with Antisocial Personality Disorder. Dr. Carter testified that she was aware that the jury was told Davis suffers from Post Traumatic Stress Disorder, and that Dr. McLane never said he didn't have sufficient expertise to recognize or diagnose Post Traumatic Stress Disorder.

Dr. Carter explained that people who have been sexually abused would prefer not to disclose that. She explained that the most probable reason why Davis wouldn't have disclosed his sexual abuse until June of '95 is because he would have felt humiliated, embarrassed and ashamed. Dr. Carter testified that Davis did disclose the sexual abuse by his father in the prison records, and that the nature of the case itself would immediately indicate to her that there was a possibility Davis was sexually abused as a child. Dr. Carter believed it would be important for the jury to know Davis was sexually abused because it may explain some of the rage he had while committing this murder. Dr. Carter testified that it would be important to know if Davis was having a flashback of his sexual abuse when this offense occurred. Dr. Carter conceded that she did not ask Davis any questions to determine if he was having flashbacks at the time of the crime because she wasn't asked to do that. Additionally, Dr. Carter testified that there is not a 100% correlation that everyone who has raped or sexually abused someone has been a victim of sexual abuse in the past. Dr. Carter also conceded that she does not know if a jury would consider the sexual abuse a mitigating factor or not.

Dr. Carter does not agree with the testimony of

Dr. Marron that sexual abuse at the age Davis was sexually abused would not change his basic personality. Dr. Carter testified that after reviewing Davis' records, she believed he didn't start off in a solid, functional family and it got progressively worse as he grew. Given his background, the abuse Davis suffered would continue to alter his personality and the way he viewed and interacted with others. After reviewing Dr. Krop's testimony, Dr. Carter testified that it appeared he could have been qualified as an expert in sexual abuse, and she wondered why Dr. McLane interviewed Davis regarding the sexual abuse instead of Dr. Krop. Dr. Carter explained that Dr. McLane did not have a background in sexual abuse, and Dr. Krop does. Dr. Carter testified that she believed Dr. Krop should have picked up on the sexual abuse after reviewing the records. However, Dr. Carter did not ask for all of the records that Dr. Krop reviewed in order to testify because it originally wasn't an issue. Also, Dr. Carter had not reviewed any of the police reports or confessions, and never talked to Dr. Dee, Dr. Krop or Dr. Marron.

(PCR 5/692-702)

STANDARD OF REVIEW

Ineffective Assistance of Counsel

Davis' first three claims assert claims of ineffective assistance of counsel. An evidentiary hearing was held on all three claims. This Court has set forth the standard of review after an evidentiary hearing, as follows: "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001), citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter at 923. Accord Bruno v. State, 807 So. 2d 55 (Fla. 2001) (Standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: the appellate court must defer to the trial court's findings on factual issues, but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.)

Summary Denial

Issues four through seven were summarily denied. This Court in Reaves v. State, 826 So. 2d 932 (Fla. 2002), (quoting Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)) has recently summarized the applicable standard when reviewing a summary denial of a postconviction motion:

> [A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

See also McLin v. State, 2002 WL 31027106, 27 Fla. L. Weekly S743, (Fla. 2002); Foster v. State, 810 So. 2d 910, 914 (Fla. 2002); Peede v. State, 748 So. 2d 253, 257 (Fla. 1999)). A trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998).

SUMMARY OF THE ARGUMENT

Davis first claims that counsel was ineffective for failing to insist that the court inquire as to whether Davis wanted to take the witness stand during the penalty phase of his trial and that it was fundamental error to allow defense counsel to waive Davis' right to testify. To the extent that Davis is asserting fundamental error occurred by allowing defense counsel to waive Davis' right to testify, it is procedurally barred as a direct appeal issue. As for Davis' claim of ineffective assistance of counsel for failing to obtain an on-the-record waiver, it is the state's contention that this claim was properly denied as Davis has not shown either deficient performance or prejudice with regard to this claim.

Appellant acknowledges that trial counsel presented two mental health experts who testified that Davis was suffering from post traumatic stress syndrome, but urges that trial counsel was ineffective for failing to present any evidence or expert testimony on the issue of the defendant having suffered post traumatic stress due to extensive sexual abuse. Given the fact that counsel presented three mental health experts, two of which were able to reach a conclusion that Davis suffered from post traumatic stress disorder and given the fact that trial court agreed that the defendant may have suffered from post

traumatic stress disorder and found the statutory mental mitigator that was being urged by trial counsel, Davis is unable to establish that counsel's performance was deficient or that he suffered any prejudice from the failure to present additional expert testimony.

Appellant's next claim is that counsel was ineffective for failing to present an expert on the defense of voluntary intoxication and for failing to request an instruction on the defense. Given Davis' numerous confessions detailing the events of the crime and the absence of any evidence at trial or during the evidentiary hearing that would mandate a finding that Davis was so intoxicated that he was incapable of forming the requisite intent, Davis has not established deficient performance or a reasonable probability that the jury would not have found him guilty of first-degree murder even if it had been presented with expert testimony and given an instruction on voluntary intoxication.

While conceding that trial counsel filed a motion to suppress the statements made by Davis, Davis next argues that trial counsel was ineffective for failing to argue the inherent unreliability of Davis' confessions in his motion to suppress statements or by presenting witnesses to same at trial. This claim was summarily denied as procedurally barred. Even if this

claim was properly before this Court, Davis is not entitled to relief as he has not established that counsel's performance was deficient performance and that he was prejudiced by the failure to challenge the statement's "inherent unreliability."

Davis' next claim is that Florida's capital sentencing statute is unconstitutional and is procedurally barred. Moreover, even if this claim was not procedurally barred, it is without merit.

Davis next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of execution. As this issue is premature it should be denied.

Davis' next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. The claim must be rejected because none of the allegations demonstrate any error, individually or collectively.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST THAT THE COURT INQUIRE OF EDDIE WAYNE DAVIS AS TO WHETHER DAVIS WANTED TO TAKE THE WITNESS STAND IN THE PENALTY PHASE OF HIS TRIAL.

Davis first claims that counsel was ineffective for failing to insist that the court inquire as to whether Davis wanted to take the witness stand during the penalty phase of his trial and that it was fundamental error to allow defense counsel to waive Davis' right to testify.

Upon rejection of this claim after an evidentiary hearing, the lower court made the following findings:

> **IIB. Trial Counsel was ineffective for failing to call Eddie Wayne Davis to testify at the penalty phase of the trial.**
>
> Davis contends that trial counsel did not request the Court to inquire of the Defendant as to whether he wanted to testify in the penalty phase. Davis contends he could have testified in the penalty phase as to his state of mind at the time of the killing, as well as his fear and anxiety of homosexual rape and sexual abuse. Davis relies on Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993).
>
> In Deaton, the trial judge concluded that because his counsel failed to adequately investigate mitigation, Deaton's waiver of his right to testify and call witnesses was not knowingly, voluntarily and intelligent. Here, trial counsel did call witnesses and present sufficient mitigation evidence. Additionally, there was no testimony presented that Davis affirmatively requested to testify in the

> penalty phase, and his attorneys failed to call him as a witness. During the guilt phase, the Court did inquire of the Defendant whether he wanted to testify, and made Defendant aware that whether or not to testify was completely his decision. (R. at 2009). Based on the above factors, this claim is DENIED.

To the extent that Davis is asserting that fundamental error occurred by allowing defense counsel to waive Davis' right to testify, it is procedurally barred as a direct appeal issue. The factual basis of this claim, as asserted by Davis, was readily apparent from the record and, therefore, could have been raised on direct appeal. As it is not properly raised in this proceeding and as a motion for post conviction relief is not to be used as a second appeal, this claim should be rejected as procedurally barred. Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Robinson v. State, 707 So. 2d 688, 690 n.2, 690 (Fla. 1998); Clark v. State, 690 So. 2d 1280, 1282 n.3 (Fla. 1997); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994). Moreover, as will be shown below, the claim is simply without merit and no error, fundamental or otherwise, has been shown. See Lawrence v. State, 831 So. 2d 121 (Fla. 2002) (due process does not require that the Defendant waive his right to testify on-the-record.)

As for Davis' claim of ineffective assistance of counsel for failing to obtain an on-the-record waiver, it is the state's

contention that this claim was properly denied as Davis has not shown either deficient performance or prejudice with regard to this claim. In Oisorio v. State, 676 So. 2d 1363, 1364-1365 (Fla. 1996), this Court rejected the notion that there was a *per se* rule of prejudice and held that in order to obtain postconviction relief, a defendant claiming his or her right to testify was violated must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. As the following will establish, Davis has neither established deficient performance nor prejudice with regard to this claim and is not entitled to relief.

First, as previously noted, there is no legal requirement that counsel obtain an on-the-record waiver of the right to testify. This Court in Lawrence v. State, 831 So. 2d 121 (Fla. 2002), has recently rejected a claim of an ineffective assistance of counsel claim where defense counsel failed to inform Lawrence of his right to testify and to obtain an on-the-record waiver of that right, stating:

> In addition, the Defendant erroneously contends that counsel should have obtained the waiver of his right to testify on-the-record to ensure that the waiver was knowing and intelligent. However, due process does not require that the Defendant waive his right to testify on-the-record. See Torres-Arboledo v. State, 524 So. 2d 403, 410-411 (Fla. 1988). See also Carmichael v. State, 715 So. 2d 247, 255 (Fla. 1998) (Pariente, J., concurring in result only). Therefore,

> the Defendant has failed to demonstrate either a deficient performance by counsel or the probability of a different outcome based on counsel's actions.
>
> The record of the evidentiary hearing supports the trial judge's findings. Lawrence contends that this Court should adopt a rule requiring a record waiver of the right to testify. As he acknowledges, this Court has considered and rejected this claim. See Occhicone v. State, 570 So. 2d 902 (Fla. 1990); State v. Singletary, 549 So. 2d 996 (Fla. 1989); Torres-Arboledo v. State, 524 So. 2d 403, 410-11 (Fla. 1988). Therefore, we affirm the trial court's denial of this ineffective assistance of counsel claim.
>
> Id.

As this Court noted in Lawrence, the claim that an on-the-record waiver is necessary has been considered and rejected time and again, Id., Occhicone v. State, 570 So. 2d 902 (Fla. 1990); State v. Singletary, 549 So. 2d 996 (Fla. 1989); Torres-Arboledo v. State, 524 So. 2d 403, 410-11 (Fla. 1988), and Davis has not presented any basis for this Court to reverse this position. Accordingly, since the law does not require an on-the-record waiver, counsel's performance cannot be deemed deficient for failing to obtain one. Lawrence.

Moreover, Davis has not established prejudice. "It is not enough to say that the defendant would have testified, but for the incorrect advice of counsel. To show prejudice, the defendant must also show that the testimony at issue would likely have changed the outcome of the case." Odom v. State, 782 So. 2d 510, 513 (Fla. 1st DCA 2001), (Padavano, J., concurring.)

See also Maharaj v. State, 778 So. 2d 944, 958 (Fla. 2000) (where defendant did not testify at the evidentiary hearing or proffer any proposed testimony, defense failed to demonstrate deficient performance and prejudice under Strickland); Demurjian v. State, 727 So. 2d 324, 327 (Fla. 4th DCA 1999)(No prejudice shown where confession detailing his self-defense claim was before the jury and numerous statements were inconsistent.)

In the instant case, Davis did not testify at the evidentiary hearing and he did not present any evidence that he wanted to testify, what the substance of that testimony would be or that he was not informed that he had the right to testify in the penalty phase.[1] Nevertheless, he relies upon the completely unsupported conclusion that "it is uncontroverted that Mr. Davis was unaware that he had the ultimate right to decide whether or not to testify at the penalty phase" and that "his own counsel

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[1] The record shows an on-the-record waiver of the right to testify during the guilt phase:
THE COURT: What I need to know from you is whether or not you want to testify. It's got to be your decision. Do you want to tell your side? If you do, then I read the jury an instruction saying that they're to weigh your testimony like they do any other witnesses. If you choose not to testify, I will read an instruction telling the jurors they're not to in any way hold that against you, because it's your right not to testify. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Davis, what do you want to do?
THE DEFENDANT: I don't want to testify, sir.
THE COURT: Okay, this is your decision?
THE DEFENDANT: Yes, sir. (TR. 17/2008-2009)

failed to inform him of his right to testify." (Initial Brief of Appellant, pg 38)

Contrary to Davis' assertions, his allegation is specifically refuted by the testimony of trial counsel Austin Maslanik. In response to an inquiry as to whether he ever talked to Davis about testifying in the penalty phase of the trial, Maslanik stated, "Yes, I had." (PCR 4/511) Maslanik further testified that his procedure is to talk to the client about testifying in guilt and penalty phase. He would give them his advice but if they insisted, the ultimate decision was theirs to make. He testified that his notes reflect that he and Davis discussed what Davis could tell the jury about his life and how he feels about Kimberly's death. (PCR 4/512) He also noted that Davis never told him he wanted to testify.[2] (PCR 4/531)

Similarly, Davis has not asserted to this Court that he actually wanted to testify. Davis merely asserts that he had a right to testify and if Norgard had allowed the court to inquire, he "**might** have spoken to the jury with 'halting eloquence' about his degrading child sexual abuse [which] would have been far more persuasive to a jury than a 'disinterested

[2] Co-counsel, Robert Norgard testified that Maslanik was lead counsel and that he had no recollection of talking to the defendant about testifying. (PCR 4/587)

mental health person.'" (Initial Brief of Appellant, page 38, emphasis added) A bare allegation that he "**might**" have wanted to testify is clearly insufficient to carry his burden of establishing prejudice. This coupled with the facts that Davis never expressed a desire to testify, despite being clearly informed of his right to do so by the court and by counsel, and that no evidence was presented that Davis wanted to testify refutes any contention that Davis was denied the right to testify or the ineffective assistance of counsel. Accordingly, the trial court properly denied the claim.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING DAVIS' CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT ANY EVIDENCE OR EXPERT TESTIMONY ON THE ISSUE OF THE DEFENDANT HAVING SUFFERED POST TRAUMATIC STRESS DUE TO EXTENSIVE SEXUAL ABUSE.

Appellant phrases his next claim as a claim that trial counsel was ineffective for failing to present any evidence or expert testimony on the issue of the defendant having suffered post traumatic stress due to extensive sexual abuse. Nevertheless, he acknowledges that trial counsel did present two mental health experts who testified that Davis was suffering from post traumatic stress syndrome. He contends, however, that

the experts were not sufficiently qualified and that another expert would have been able to get more information about his child sexual abuse and given the jury a better explanation as to why he committed the crime. Current counsel's disagreement with trial counsel's strategic decisions, does not establish a basis for relief. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (concluding that present counsel's disagreements as to strategy does not necessarily satisfy Strickland because standard is not how present counsel would have, in hindsight, proceeded); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.) See also Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."). Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. See Occhicone at 1048; Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987). As the following will establish Davis is not entitled to relief on this claim.

This claim was addressed at the evidentiary hearing below

and was denied by the trial court on the following basis:

> **IIC. Trial Counsel rendered ineffective assistance of counsel by failing to present any evidence or expert testimony on the issue of the Defendant having suffered post-traumatic stress.**
>
> Davis claims that trial counsel did not present any evidence that Davis suffered from Post Traumatic Stress Disorder in the penalty phase. Additionally, Davis claims that Dr. McLane was not qualified as an expert on Post Traumatic Stress Disorder and this prejudiced Davis.
>
> Maslanik testified that Dr. McLane did testify during the penalty phase on Post Traumatic Stress Disorder. The Court finds that Dr. McLane testified that Davis was diagnosed with PTSD. (R. at 2851), McLane also described to the jury the effects of PTSD. (R. at 2863). Maslanik testified that he believed Dr. McLane's overall qualifications would qualify him to render an opinion on PTSD. Additionally, Dr. Harry Krop, PhD testified that Davis was diagnosed with PTSD and described PTSD to the jury. (R. at 2343.) Accordingly, this claim is DENIED.

Additionally, the record shows that the trial court recognized two of the mental health experts had found the existence of post traumatic stress syndrome and that it, along with a variety of other factors, established the statutory mitigating factor of extreme mental or emotional distress. With regard to this factor the sentencing order states:

> **MITIGATING FACTORS**
>
> Statutory Mitigation Factors:
>
> In its sentencing memorandum, the defendant requested the Court to consider the following

statutory mitigation circumstances:

1. The Capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Two clinical psychologists, Dr. Harry Krop and Dr. Henry Dee, and one psychiatrist, Dr. Thomas McClane, testified for the defense. One clinical psychologist, Dr. Sydney Merin, testified for the state.

Dr. Krop, who has a specialty in the area of sexual abuse, testified the defendant has no sexual deviant propensities and what the defendant did was out of character. He diagnosed the defendant as suffering from: dystimea; alcohol abuse; post traumatic stress disorder as a result of the defendant's abused childhood; learning disability which defendant has overcome; borderline personality disorder and antisocial personality disorder. He further testified the defendant came from a dysfunctional family and has an I.Q. of 80, which places the defendant in the low average percentage of the population. The combination of all of the above leads the doctor to believe the defendant was under a serious influence of extreme mental or emotional disturbance at the time of the murder.

Dr. Dee testified the defendant suffers from mild to moderate organic brain damage and bases this upon differences in test scores, (verbal memory and non-verbal memory). This, however, is not verified by any physical evidence such as a C.A.T. Scan. The doctor further testified he had no idea why the defendant committed the murder and that the defendant suffers from: borderline personality disorder, but does not suffer from anti-social personality disorder as testified by Dr. Krop. The defendant also suffers from alcohol abuse and major depression. The doctor felt the defendant was under a moderate to severe mental or emotional disturbance at the time of the murder. The Court finds moderate to severe to be a very broad range.

Dr. Thomas McClane testified the defendant came from a dysfunctional family, had a learning disability, attempted suicide twice, had chronic alcohol dependance, was immature for his age, was borderline intellectual functioning and suffered from: post traumatic stress disorder; alcohol abuse; anti-

social personality disorder; borderline personality disorder and major depression.

After interviewing the defendant for 3/4 of an hour on June 3rd, just prior to the penalty phase, he learned from the defendant that the defendant suffered from sexual abuse at the hands of his stepfather, Bradford Hudson. The doctor was able to speculate on what caused the defendant to commit the murder and presented a diagram showing:

> The defendant suffered from a life-long victimization due to verbal, physical and sexual abuse. He had suppressed rage that emerged because of the defendant's intoxication; post traumatic stress disorder; defendant's limited intelligence; the shock of being discovered by the victim, which caused the defendant to experience fear and panic resulting in the violent act of the murder.

The doctor, taking everything into account, felt the defendant was under the influence of an extreme mental or emotional disturbance at the time of the murder.

Dr. Sydney Merin testified the defendant was not under the influence of an extreme mental or emotional disturbance at the time of the murder. The doctor felt the defendant suffered from an anti-social personality and that the defendant engaged in repeated behavior that got him in to trouble.

The doctor, however, testified in opposition to the three other doctors that the defendant was not suffering from a borderline personality disorder, the doctor felt the defendant had a behavior disorder due to the way he was brought up.

The Court has for consideration: two doctors (Dr. Krop and Dr. McClane) who feel this mitigator applies; one doctor who says maybe it applies (Dr. Dee testified "moderate to severe") and one doctor who says it does not apply (Dr. Merin).

Although the testimony of the doctors conflicts, it is apparent to this Court the defendant came from a dysfunctional family; the defendant is an alcoholic, with low self-esteem; the defendant had an abused, neglected childhood; the defendant has had learning

> disabilities, which he has overcome; the defendant is immature for his age; the defendant may have an anti-social personality disorder; the defendant may have suffered from post-traumatic stress disorder; the defendant has suffered from chronic depression and anxiety; the defendant has had poor impulse control and defective judgment at times and the defendant has suffered from attention deficit hyperactivity disorder. The Court is reasonably convinced this mitigating factor exists and gives it great weight.
>
> (TR 5/744-47)(emphasis added)

This Court has repeatedly rejected similar claims. For example, in Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002), this Court rejected Gaskin's argument that counsel was ineffective during the penalty phase of his trial for failing to investigate and present mitigating testimony of mental health experts and additional lay witnesses. This Court noted that in order to prevail on this claim, Gaskin must demonstrate that but for counsel's errors, he probably would have received a life sentence. Id. at 1247. This Court also noted that, "We have held that counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.' Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)" and, therefore, where the newly presented expert's testimony represents not only a recent and more favorable defense expert opinion, but an opinion that was cumulative to one that was already presented to the trial court, confidence in the outcome of the proceeding was

not undermined. Id. at 1250. See also Carroll v. State, 815 So. 2d 601, 618 (Fla. 2002)(fact that Carroll secured testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient nor does it establish prejudice.)

In Gudinas v. State, 816 So. 2d 1095, 1107 (Fla. 2002) this Court rejected claim that counsel was ineffective for failing to hire a neuropharmacologist where bulk of evidence was presented through other experts. This Court also rejected Gudinas' claim that trial counsel was also ineffective during his penalty phase for failing to hire a social worker in addition to the mitigation experts that were retained, stating:

> The record is undisputed that counsel did hire and consult with mental health experts for the purpose of determining the effect of Gudinas's social history on his life and this case. Counsel cannot be found ineffective for failing to provide cumulative evidence. See Card v. State, 497 So. 2d 1169, 1175 (Fla. 1986). Additionally, the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy. The Strickland Court acknowledged, "Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689, 104 S.Ct. 2052. Further, this Court has stated, "The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995).
>
> Id. at 1108 (emphasis added)

As this Court found in Gudinas, the argument presented herein that counsel should not have solely relied on the two experts who testified that Davis suffered from post traumatic stress disorder due to the sexual abuse he suffered both as a child and as an adult is merely a case of second guessing.

Moreover, a review of Dr. Bourg-Carter's testimony in comparison to the testimony of the other experts presented by trial counsel does not undermine confidence in the outcome of the proceeding. Gaskin at 1250 (where newly presented expert's testimony represents not only a recent and more favorable defense expert opinion, but an opinion that was cumulative to one that was already presented to the trial court, confidence in the outcome of the proceeding was not undermined.) Dr. Bourg-Carter testified that she was a licensed psychologist. (PCR 4/596) Her doctoral dissertation was in the development of child sexual abuse interview formats and she did an internship in forensic psychology. (PCR 4/597) She stated that she had been qualified as an expert in the field of PTSD but conceded that it is a part of the field of psychology and that her expertise in PTSD was a result of working with sexually abused children as a forensic psychologist. (PCR 4/599-604)

With regard to Davis, Dr. Bourg-Carter testified that she found documentation of sexual assaults by other inmates, as well

as documentation of sexual abuse of Davis as a child by his stepfather. She testified that Davis told her that he had been sexually assaulted by his father and that after that he started running away. (PCR 4/608) She stated that it was difficult to get details from Davis but that he did remember smells and feelings. (PCR 4/612) She testified that it has been her experience, and it is in the literature that males who are sexual assaulted tend to experience more problems and humiliation. (PCR 4/613) Dr. Bourg-Carter testified that in her opinion at the time she was seeing him, Davis was suffering from major depression, which has been recurrent throughout his life, post traumatic stress disorder, alcohol dependence, poly drug abuse and an antisocial personality disorder. (PCR 4/615) She described post traumatic stress disorder as a reaction that people occasionally have when they have been exposed to some type of event that involves actual or threatened death or serious injury. Occasionally these people experience flashbacks, nightmares or avoidance symptoms. Although Dr. Bourg-Carter testified that it would be important to know if Davis was having a flashback of his sexual abuse when this offense occurred, she conceded that she did not ask Davis any questions to determine if he was having flashbacks at the time of the crime. (PCR 4/626, 5/650)) Additionally, Dr. Bourg-

Carter testified that there is not a 100% correlation that everyone who has raped or sexually abused someone has been a victim of sexual abuse in the past. Dr. Bourg-Carter also conceded that she does not know if a jury would consider the sexual abuse a mitigating factor or not. (PCR 5/640-44)

Dr. Bourg-Carter admitted that either Dr. Krop or Dr. McCLain also diagnosed Davis with antisocial personality disorder, that the jury was told Davis suffers from post traumatic stress disorder, and that Dr. McClain never said he didn't have sufficient expertise to recognize or diagnose post traumatic stress disorder. (PCR 5/647-49) After reviewing Dr. Krop's testimony, Dr. Bourg-Carter testified that it appeared he could have been qualified as an expert in sexual abuse, and she wondered why Dr. McCLain interviewed Davis regarding the sexual abuse instead of Dr. Krop. (PCR 4/632-34) Dr. Bourg-Carter testified that she believed Dr. Krop should have picked up on the sexual abuse after reviewing the records. However, Dr. Bourg-Carter did not ask for all of the records that Dr. Krop reviewed in order to testify because it originally wasn't an issue. Also, Dr. Bourg-Carter had not reviewed any of the police reports or confessions, and never talked to Dr. Dee, Dr. Krop or Dr. Merin. (PCR 5/637-39)

"[T]he issue is not what is possible or 'what is prudent or

appropriate, but only what is constitutionally compelled.'" Chandler v. United States, 218 F. 3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting Burger v. Kemp, 483 U.S. 776,(1987)), cert. denied, 531 U.S. 1204 (2001). "The petitioner must establish that particular and identified acts or omissions of counsel 'were outside the wide range of professionally competent assistance.'" Id. at 1314 (quoting Burger, 483 U.S. at 795). Nothing in the foregoing testimony in any way supports a contention that counsel was deficient or that Davis suffered any prejudice from the failure to obtain the expert testimony presented at the evidentiary hearing. This is especially true, given the fact that counsel presented three mental health experts, two of which were able to reach a conclusion that Davis suffered from post traumatic stress disorder and given the fact that trial court agreed that the defendant may have suffered from post traumatic stress disorder and found the statutory mental mitigator that was being urged by trial counsel. As Davis is unable to establish that counsel's performance was deficient or that he suffered any prejudice from the failure to present additional expert testimony, this claim should be denied.

ISSUE III

THE LOWER COURT ERRED IN DENYING MR. DAVIS' CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT THE DEFENSE OF VOLUNTARY INTOXICATION AS A VALID DEFENSE TO FIRST DEGREE MURDER. (AS STATED BY APPELLANT)

Appellant's next claim is that counsel was ineffective for failing to present an expert on the defense of voluntary intoxication and for failing to request an instruction on the defense. This claim was addressed at the evidentiary hearing below and rejected by the trial court as follows:

> **IC. Failure to present the defense of voluntary intoxication as a valid defense to first-degree murder.**
>
> Davis claims that his trial counsel did nothing in the guilt phase to present actual evidence of the Defendant lacking the specific intent required for a finding of guilt on the charge of first-degree murder due to his voluntary intoxication.
>
> Maslanik conceded that voluntary intoxication is a defense to first-degree premeditated murder, and that calling an expert for that defense would not have been inconsistent with the penalty phase. However, Maslanik testified that he did present evidence of Davis' intoxication, but felt that the voluntary intoxication instruction creates too high a standard to be able to say someone was intoxicated to the extent that it negates intent. Maslanik also testified that Davis was charged with other general intent crimes, and the Court would have to instruct the jury that the defense of voluntary intoxication would not apply to those offenses. Maslanik testified that he presented evidence of Davis' intoxication and believed the jurors would more readily accept the argument that Davis' mental state was diminished by alcohol, and would not apply it as technically as they

> would with an instruction.
>
> Even though counsel's failure to ask for an instruction on voluntary intoxication could be characterized as ineffective, the evidence was such that if an instruction had been given, there is not a reasonable probability that the result would have been different. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). This claim is therefore DENIED.

Davis urges that the lower court's statement that, "Even though counsel's failure to ask for an instruction on voluntary intoxication could be characterized as ineffective, the evidence was such that if an instruction had been given, there is not a reasonable probability that the result would have been different" constitutes a concession on the first prong of Strickland v. Washington, 466 U.S. 668 (1984) and that the conclusion that the outcome of the proceeding would not have been different is speculative. This argument is baseless in fact and law.

The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55 (Fla. 2001). Thus, even if the court had actually made a finding of ineffectiveness, this Court would still need to review the legal conclusions. Clearly, however, no such finding was made. The

order simply states that the actions *could* be characterized as ineffective--not that counsel was ineffective.

Furthermore, under Strickland, there are two prongs that must be found before counsel can be determined to be ineffective. The court must find that counsel's performance was deficient and that the defendant was actually prejudiced by the deficiency. The trial court's determination that the outcome of the proceedings would not have been different is a determination that Davis suffered no prejudice. As no prejudice was found, counsel could not have been found to be ineffective. Similarly, Davis' next contention that the lower court's conclusion as to the outcome is purely speculative is sheer sophistry; it is the trial court's responsibility to make that determination under Strickland based on the facts presented in the record. As the following will establish, Davis has failed to satisfy his burden to show that counsel's performance was deficient *and* prejudicial.

At trial, Davis was represented by two well respected and exceptionally experienced capital trial lawyers, Austin Maslanik and Robert Norgard. At the time of trial, Maslanik had been a criminal defense lawyer for 16 years. By 1994, he had handled 50 or so first degree murder cases and had tried probably 20 death penalty cases. (PCR 4/526) Norgard testified that he has

tried 20 to 25 cases where the state has sought the death penalty.[3] (PCR 4/582-83) Additionally, both Maslanik and Norgard teach criminal defense lawyers on the death penalty. (PCR 4/527) Norgard testified that he has taught other attorneys how to defend capital cases since 1988. (PCR 4/582-83)

Both lawyers testified at the evidentiary hearing concerning their extensive preparation, planning and representation of Davis in the instant case. Defense counsel Maslanik testified that while he offered evidence of intoxication and argued it to the jury, he intentionally did not ask for the instruction because of the limiting nature of the instruction. Maslanik noted that he used their cross examination of the state's witnesses to establish that Davis had a lot to drink during the day of the homicide. (PCR 4/528)

Maslanik testified that he believes the voluntary intoxication instruction creates a very high standard in order to say someone was legally intoxicated.[4] Plus, he explained that

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[3] Interestingly, collateral counsel even offered to stipulate that Norgard is an excellent capital attorney and has a lot of experience in Florida. (PCR 4/582-83)

[4] CR JURY INST 3.04(g), Voluntary Intoxication states:

A defense asserted in this case is voluntary intoxication by use of [alcohol] [drugs].

The use of [alcohol] [drugs] to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.

since there were certain offenses he was charged with that were general intent crimes which intoxication did not negate, the court would have had to instruct jury that it did not apply to those. Their conclusion was that if the jurors are not limited by the instruction they may accept what defense counsel told them about diminished capacity. (PCR 4/529) Counsel also noted that Davis gave a number of very detailed confessions which negated a claim that his level of intoxication was sufficient to support the standard set forth in the standard jury instruction. (PCR 4/529-30) Based on these facts, they decided against requesting the instruction and, instead relied upon making the argument to the jury.

This Court has repeatedly rejected claims that counsel was ineffective for failing to present a defense of voluntary intoxication or request an instruction on same where the record reveals, as it does in the instant case, that the decision was

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However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.

As I have told you, [the intent to (specific intent charged)][premeditated design to kill] [(other mental state)] is an essential element of the crime of (crime charged).

Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of [alcohol] [drugs] as to be incapable of forming [the intent to (specific intent charged)] [premeditated design to kill] [(other mental state)], or you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged).

based on sound strategic reasons. Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001)(record demonstrates that counsel made an informed and reasoned decision not to pursue a voluntary intoxication defense); Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992) (holding that counsel's decision not to pursue voluntary intoxication defense was a strategic decision, not deficient performance, where defense counsel testified that he rejected the defense because the defendant "recounted of the incident with 'great detail and particularity' in his confession").

In fact, this Court has had the occasion to address a similar claim against defense counsel Norgard in Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000). In that case, Norgard similarly testified that in his experience, juries do not like the intoxication defense and that it was harder to sell to a jury than insanity, which is also unpopular with juries. In affirming the denial of Johnson's claim of ineffective assistance of counsel for failing to present a voluntary intoxication defense, this Court affirmed the lower court's ordering stating:

> The court is satisfied that the tactical decision not to present a defense of voluntary intoxication did not constitute ineffective assistance of counsel. Simply because the insanity defense did not work, it does not mean that the theory of the defense was flawed. Furthermore, the court is convinced that a

> presentation of an intoxication defense would not have changed the ultimate outcome of the proceedings. State v. Johnson order at 15.
>
> Id. at 1001

As in Johnson, these experienced lawyers made a reasoned and sound strategical decision as to how to present evidence of voluntary intoxication. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

Notably, this Court has repeatedly rejected the claim made herein, that counsel should have presented an expert witness on the subject. In Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000), as in the instant case, defense counsel decided to present intoxication evidence through cross examination of state witnesses rather than presenting expert witnesses. Upon reviewing Occhicone's claim that counsel was ineffective for failing to present additional witnesses this Court held:

> After a review of the record and the trial court's findings, we find no proper basis for overturning the trial court's conclusion that defense counsel were not deficient nor was Occhicone sufficiently prejudiced by the alleged deficiency to mandate a new trial. We find no error in the trial court's conclusion that counsel's conduct and decision not to present any independent evidence of Occhicone's intoxication constituted a strategic decision of counsel. If we were to accept Occhicone's challenge to this conduct, we would find ourselves engaging in the hindsight analysis so many courts have warned should not occur

> when evaluating ineffective assistance of counsel claims. The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.
>
> Id at 1048-1049.

See also Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989) (where record shows that trial counsel presented substantial evidence of Atkins' intoxication and competently argued this point to the jury during closing argument counsel is not constitutionally ineffective for failing to present expert testimony.)

Davis' argument is further undermined by the ultimate conclusions of the expert he presented at the evidentiary hearing. Dr. Michael Maher testified below for the defense on the issue of intoxication. He spent approximately two and a half hours with Davis, during which time he conducted a neurological exam on Davis. Dr. Maher testified he found no significant abnormalities. He suggested that although he did not examine Davis for the disease, it was possible Davis was suffering from Porphyria. Dr. Maher testified that Porphyria is aggravated by alcohol use, and *if* Davis had Porphyria and indulged in alcohol, he would become irritable and impulsive. As to the defense of voluntary intoxication, relying on Davis' statements that he had 10 to 12 beers before the offense, Dr.

Maher testified that he thinks Davis was sufficiently impaired such that his capacity to commit premeditated acts was significantly impaired. He opined that Davis' inconsistent statements indicates he was intoxicated. (PCR 4/553-60)

On cross-examination, however, Dr. Maher admitted that he based his decisions about Davis basically from what Davis said. (PCR 4/569) He did not verify any of the information with witnesses from the trial, or family members. When questioned about the fact Davis recalled several details that were verified by the police such as how the victim was laying on the bed when he entered the room, where the rag was he used to stuff in her mouth, where the piece of plastic was he used to suffocate her with, how she was lying in the dumpster, Dr. Maher testified that if all of those things can be objectively verified, then they couldn't be confabulated, therefore the details would be based on Davis' own recollection. **Dr. Maher conceded that those details might change his opinion about whether Davis was substantially impaired by alcohol with regard to forming intent**. (PCR 4/568-73) Thus, Davis' own expert was unable to conclude that he was substantially impaired after being presented with the facts.

When this expert's testimony is considered in context of defense counsel's testimony and the evidence presented at trial,

it is clear that Davis has not and cannot establish that there is a reasonable probability that the jury would not have found him guilty of first-degree murder even if it had been presented with expert testimony and given an instruction on voluntary intoxication. Accord Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988). See also Johnson at 1001. (No prejudice where court is convinced that a presentation of an intoxication defense would not have changed the ultimate outcome of the proceedings); Routly v. State, 590 So. 2d 397, 401 (Fla. 1991) (finding defendant did not demonstrate reasonable probability that outcome would have been different because the evidence not presented by counsel was already before the judge and jury, but in a different form).

At trial, the state presented overwhelming evidence of Davis' guilt; evidence that refutes any contention that Davis was so intoxicated that he was incapable of forming the requisite intent. As previously noted, at the core of this evidence were Davis' own detailed confessions.[5] In his March 18, 1994 statement to Detectives Smith and McWaters, Davis said that after drinking at Altura's and the Siesta bar, he went to Beverly's house at 2:00 a.m. He told the detectives that he

[5] In addition to these confessions, the state also introduced DNA evidence that tied Davis to the crime.

unscrewed the front porch light bulb, and walked in the front door, which Beverly had told him would be unlocked. (TR 14/1562, 16/1845) He put a piece of cloth or silk, a rag or T-shirt that he found at the house, over his head to hide his identity. (TR 14/1563-1564, 16/1845, 17/1956, 1994) He found Kimberly Waters asleep in her mother's waterbed. (TR 14/1563-1564) He woke her up, told her to be quiet or he would hurt her, and put his hand over her mouth. (TR 14/1564, 16/1846) He stood her up and walked her to the front door, where he put a rag that he found in the residence over her mouth, and walked her outside. (TR 14/1564, 16/1846) Appellant walked Kimberly to the Moose Club, where he pulled the rag out of her mouth, laid her down on the concrete and sat on her. (TR 14/1565-1566, 16/1847-1848, 17/1959) Davis told them that when the covering came off his face, Kimberly recognized him, and called his name, Wayne. (TR 14/1566, 16/1847-1848) Appellant became scared; he penetrated Kimberly's vagina hard three to five times with two fingers. (TR 14/1566-1567, 16/1848, 1854, 17/1957-1958) She was thrashing around, and told him to quit it. (TR 14/1567) He put the rag back into her mouth. (TR 16/1848, 1850, 17/1959) Appellant stood up, hit her in the face or head several times with his fist, but she was still conscious. (TR 14/1567, 16/1849, 17/1957, 1959) Appellant found a piece of white

plastic bag and held it over her face. (TR 14/1567, 16/1850-1851) She was fighting with him and thrashing around. (TR 14/1568) Appellant was scared, and doing his best to stop her. (TR 14/1568) When she stopped moving, he picked Kimberly up and threw her in the dumpster. (TR.14/1568, 16/1851-1852) Davis said he went home, washed up, and drank some beer. (TR 14/1568, 16/1852) He tossed the rag that had been in Kimberly's mouth, which he used to wipe the blood off his hands, onto the roof of his house. (TR 16/1853) Three months later, in his May 26, 1994, statement Davis told Detectives Hamilton and Harkins that he had been drinking in Altura's, and returned home around 10:30 p.m. (TR 17/1963-1964) After changing pants, he went to the Siesta Bar and drank. (TR 17/1964) He started walking home, but ended up at Beverly's house. (TR 17/1964) Beverly usually did not work on Thursday nights and, because her car was gone, Appellant thought she was not home. (TR 17/1964) He unscrewed the light bulb on the front porch and entered the house through the unlocked front door to look for money to buy more beer at the bar. (TR 17/1964) He went into Beverly's room, because that was where she usually hid money in a drawer. (TR 17/1964) He turned on the bedroom light and saw Kimberly lying in Beverly's bed. (TR 17/1964) Before he could turn off the light, she saw him. (TR 17/1964) He put his hand over

Kimberly's mouth and told her not to holler, that he wanted to talk to her. (TR 17/1964) He told Kimberly to come with him, but did not tell her why. (TR 17/1964-1965) In the living room, Appellant picked up a rag and put it into her mouth so that she could not yell. (TR 17/1965) Kimberly did not say anything, because Appellant told her he did not want to have to hurt her. (TR 17/1965) They went out the front door and jumped a fence into the next trailer park. (TR 17/1965) They went into trailer number five, where Appellant had been living. He told the detectives that he molested Kimberly in the trailer. (TR 17/1965)

At that point Davis began to cry. After he calmed down, the detectives asked him if they could record his statement. He agreed. This tape was played for the jury. In this next statement Appellant recounted again that he had been drinking in Alturas, his girlfriend brought him home around 10:30, he changed pants, went to the bar, started drinking, and had a lot of beer. (TR 17/1973-1974) He left the bar and called Susie, then started walking home, but found himself on Beverly's porch. (TR 17/1974) He thought there was nobody home, because Beverly's car was gone, and she did not usually work on Thursday nights. (TR 17/1974) Appellant unscrewed the light bulb and entered the house through the unlocked front door to look for

some extra change to buy more beer. (TR 17/1974) He did not have anything covering his face. (TR 17/1983) He went into Beverly's room, because she usually had money there in a drawer, and turned on the light. (TR 17/1974) Kimberly was in the bed, and before Appellant could turn the light off, she saw him. (TR 17/1974) Appellant rushed around the side of the bed, put his hand over her mouth, and said, "Please don't holler. I just want to talk to you. You come with me." (TR 17/1974) They walked into the living room, were Appellant picked up a rag and put it in her mouth so she could not yell. (TR 17/1975) He told Kimberly not to "holler," and said he did not want to have to hurt her. (TR 17/1975) They went outside and jumped the fence into another trailer park. (TR 17/1975) They went into trailer five, where Appellant said he "molested" Kimberly.[6] (TR 17/1975) He tried to put his penis in her, but it would not go, and so he pushed two fingers into her forcefully as far as they would go. (TR 17/1977-1978) Kimberly started "crying real bad," and said she was hurting. (TR 17/1977-1978) Appellant told her to get dressed, and took her from there to the Moose Lodge. (TR 17/1975-1977) She was calling his name and asking where they were going. (TR 17/1975) She wanted to go home; she

[6] Blood was found in the bedroom, living room and on the table in the trailer. (TR 16/1801-03, 1817-18)

was tired and wanted to go to bed. (TR 17/1978-1979) Appellant told her they were going for a walk. (TR 17/1979) He was scared and did not know what to do. (TR 17/1975-1976) He did not want anybody to know he had done something like that. (TR 17/1975) He hit Kimberly one time in the forehead with his fist to get her to lie down on the concrete walkway. (TR 17/1976, 1979-1980) He put a piece of plastic over her mouth. (TR 17/1976) She ripped the plastic with her fingers, but Appellant held it over her nose and mouth for a couple of minutes until she stopped moving. (TR 17/1976, 1980-1981) He picked her up, put her in the dumpster and left. (TR 17/1976) He did not know if she was dead, but thought maybe she had just passed out. (TR 17/1976-1977) He told the detectives that he thought if nobody found her for a couple of days, he could get away, using money he would earn working for his father. (TR 17/1977) Appellant said he then went home, drank some more beer, and went to bed. (TR 17/1981-1982) He went to work the next morning. (TR 17/1982)

Given Davis' numerous confessions detailing the events of the crime and the absence of any evidence at trial or during the evidentiary hearing that would mandate a finding that Davis was so intoxicated that he was incapable of forming the requisite intent, Davis has not established deficient performance or a

reasonable probability that the jury would not have found him guilty of first-degree murder even if it had been presented with expert testimony and given an instruction on voluntary intoxication. The trial court properly denied this claim.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING WITHOUT A HEARING THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY MOVE TO SUPPRESS DEFENDANT'S CONFESSION OR ALTERNATIVELY TO ARGUE TO THE JURY AS TO ITS INHERENT UNRELIABILITY. (AS STATED BY APPELLANT)

While conceding that trial counsel filed a motion to suppress the statements made by Davis, Davis argued in his motion to vacate that trial counsel was ineffective for failing to argue the inherent unreliability of Davis' confessions in his motion to suppress statements or by presenting witnesses to same at trial. The alleged inherent unreliability claim is based on Davis' contention that details in the confession were inconsistent with the physical evidence. (PCR 2/314-17) This claim was summarily denied as procedurally barred. (PCR 4/454)[7]

Davis raised the denial of his motion to suppress on direct appeal to this Court. After an exhaustive review of the claim, this Court denied relief stating:

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[7] Contrary to appellant's assertions, this claim was denied on legal versus factual grounds and, therefore, the rule does not require that a copy of that portion of the files and records be attached to the order." Fla. R.Crim. P. 3.850(d). Moreover, this Court has held that to "support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Spencer v. State, 2002 WL 534441, 27 Fla. L. Weekly S323, (Fla. 2002). The trial court clearly stated its rationale.

As his first issue, Davis contends that the trial court erred in admitting the statements he made to law enforcement officers on March 18 and May 26. We address the statements made at each stage separately. First, with respect to the statements Davis made at the police station on March 18 before he was arrested, the trial court found that whether a Miranda violation had occurred was moot because Davis had not made any incriminating statements during that interview. However, Miranda prohibits the use of all statements made by an accused during custodial interrogation if the accused has not first been warned of the right against self-incrimination and the right to counsel. Thus, statements obtained in violation of Miranda are inadmissible, regardless of whether they are inculpatory or exculpatory.

Nevertheless, we uphold the admissibility of Davis's prearrest statements on a different basis. Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation. Absent one or the other, Miranda warnings are not required. Alston v. Redman, 34 F.3d 1237, 1243 (3d Cir. 1994) (citing Miranda, 384 U.S. at 477-78, 86 S.Ct. at 1629-30); Sapp v. State, 690 So. 2d 581 (Fla. 1997); see also Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980) ("It is clear that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."). Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody. Rather, there must exist a "restraint on freedom of movement of the degree associated with a formal arrest." Roman v. State, 475 So. 2d 1228, 1231 (Fla. 1985). The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation. Id.

The circumstances of this case lead us to conclude that Davis was not in custody at the time he made the

prearrest statements. Police had questioned Davis several times prior to March 18. At least once he had gone to the police station voluntarily for questioning and was permitted to leave. It is therefore unlikely that a reasonable person in Davis's position would have perceived that he was in custody until he was formally arrested. In any event, any error in admitting these prearrest statements was harmless. Davis did not say anything during the prearrest interview that he had not already said to police on previous occasions.

Next we address the admissibility of the untaped confession Davis made to Major Judd and Lieutenant Schreiber while in the holding cell. Davis points out that because he had invoked his right to counsel upon being arrested (and the trial court found that he had), police were prohibited under Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), from interrogating Davis unless he reinitiated contact. According to Davis, Judd's expression of his disappointment in Davis constituted initiation of contact by police in violation of Edwards. The trial court made a finding that Major Judd's statement did not constitute interrogation as defined in Innis and Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). We agree with the trial court's analysis and result. First, Judd's statement was not an express questioning of Davis. Second, Judd's statement was not the functional equivalent of express questioning because there was no allegation or showing in the record that the statement was reasonably likely to elicit an incriminating response from Davis based on his emotional or mental state. See Mauro, 481 U.S. at 526-27, 107 S.Ct. at 1935; Innis, 446 U.S. at 300-301, 100 S.Ct. at 1689-90. Moreover, although Judd eventually did ask Davis to repeat himself, thereby asking a question, it was not intended to elicit an incriminating response. For all Judd knew, Davis could have been asking for a drink of water; surely Judd was permitted to ascertain what Davis had said.

Alternatively, Davis argues that even if he reinitiated contact, Judd should have given him Miranda warnings before interviewing him in the holding cell, pursuant to Kight v. State, 512 So. 2d

922 (Fla. 1987); disapproved on other grounds, Owen v. State, 596 So. 2d 985 (Fla. 1992). In Kight, the Court held that a defendant who reinitiated contact with police after having invoked his Fifth Amendment right to counsel was entitled to a fresh set of Miranda warnings before being interrogated. Id. at 926. Yet, this Court later held in Christmas v. State, 632 So. 2d 1368 (Fla. 1994), that where the defendant who was in custody voluntarily initiated a conversation with law enforcement officers in which the defendant provided information about the case, Miranda warnings were not required.

Although in this case Major Judd did not read Davis his Miranda rights as they are usually set forth, the record shows that as soon as Judd understood that Davis was making statements about the murder, Judd explained to Davis that he would have to reinitiate contact with police because he had asked for a lawyer. Moreover, when Davis said that he could not afford an attorney, Judd assured him that the State would provide him with one. Therefore, it would be easy to conclude that a formal reading of the Miranda warnings was unnecessary. However, the requirement of giving Miranda warnings before custodial interrogation is a prophylactic rule intended to ensure that the uninformed or uneducated in our society know they are guaranteed the rights encompassed in the warnings. As far as we can tell, Davis had never been advised of his Miranda rights with respect to this case before talking to Judd. Under these circumstances, we are compelled to conclude that Davis's untaped confession to Judd should have been suppressed.

Notwithstanding, the erroneous admission of this confession was harmless beyond a reasonable doubt. Shortly after confessing in his holding cell, Davis gave a taped statement in which he voluntarily gave the same information contained in his prior statement to Judd. This statement was clearly admissible because Davis was fully informed of (and waived) his Miranda rights before the start of the taping session. See Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (holding that although defendant's voluntarily given initial statement was inadmissible

> because of Miranda violation, subsequent statement, made after careful Miranda warnings were given and waiver was obtained, was admissible).
>
> As to the second taped confession, given on May 26, Davis was not given a fresh set of Miranda warnings, although he was reminded of his right to the advice of counsel. However, numerous state and federal courts have rejected the talismanic notion that a complete readvisement of Miranda warnings is necessary every time an accused undergoes additional custodial interrogation. See Brown v. State, 661 P.2d 1024 (Wyo.1983), and cases cited therein. Rather than adhere to an overly mechanical application of Miranda, we believe that once Miranda has been complied with, the better test for admissibility of statements made in subsequent or successive custodial interrogations is whether the statements were given voluntarily. Such an inquiry must consider the totality of the circumstances. We recede from those portions of Kight and Christmas that may be inconsistent with this analysis.
>
> In this case, Davis had previously received full Miranda warnings and he validly waived them. There is no evidence of coercion; in fact, Davis was responsible for initiating the contact that led to this second taped confession. He was once again apprised of his right to counsel. Under these circumstances, we conclude that the second taped confession was voluntary and that the underlying concerns of Miranda were fully satisfied. Thus, there was no error in admitting the second taped confession.
>
> Davis v. State, 698 So. 2d 1182, 1187-1189 (Fla. 1997) (footnote omitted)

As the challenge to the admissibility of Davis' numerous confessions was raised on direct appeal, it is procedurally barred in a rule 3.850 motion. Schwab v. State, 814 So. 2d 402, 415 (Fla. 2002) Despite Davis' attempt to obtain a second review of his motion to suppress by impermissibly using "a

different argument to relitigate the same issue" he raised on direct appeal, Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995), his conclusory allegation of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings are not a second appeal for issues properly litigated on direct appeal. Rivera v. State, 717 So. 2d 477, 488 (Fla. 1998); Medina v. State, 573 So. 2d 293, 295 (Fla.1990); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Even if this claim was properly before this Court, Davis is not entitled to relief as he has not established that counsel's performance was deficient performance and that he was prejudiced by the failure to challenge the statement's "inherent unreliability."

Notably, Davis does not allege what facts are inconsistent nor has he cited to one single case where this Court has upheld a challenge to a confession based on "inherent unreliability" or that has found that counsel is ineffective for failing to challenge his own client's statements as inconsistent with the evidence.

Moreover, Davis' argument that the confessions had inconsistent details which constitutes evidence that Davis was simply agreeing with whatever the detectives suggested to him is refuted by the record. First, Davis' numerous statements

describing his taking young Kimberly from her bed in the middle of the night, the subsequent molestation, the fatal beating and the disposal of her lifeless body in the dumpster were substantially similar. Additionally, as Davis' confession was taped and played for the jury, the jury could hear whatever detectives said to Davis. Moreover, the record shows that Davis was able to lead detectives to evidence that was previously undiscovered. (TR 16/1853) Finally, regardless of how Davis described the kidnaping, DNA evidence clearly established that Davis was responsible for this crime and all of Davis' confessions conclude with the fact that he and he alone committed this heinous crime. Cf. Barnhill v. State, 834 S0. 2d 836 (Fla. 2002)(trial judge is not prevented from relying on specific statements made by the defendant if they have indicia of reliability, even if the defendant has given several conflicting statements.) The fact that over a period of months he added a few minor details that in no way diminished his culpability does not undermine confidence in the outcome of the proceeding and counsel can hardly be faulted for not dwelling on the details of his client's confession.

ISSUE V

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. (AS STATED BY APPELLANT)

Davis' next claim was summarily denied as procedurally barred. (PCR 4/454) Clearly, this is a direct issue and is not properly before this Court in a post-conviction motion. Peede v. State, 748 So. 2d 253 (Fla. 1999)(challenge to constitutionality of the capital sentencing statute procedurally barred in motion to vacate because they were raised or should have been raised on direct appeal.)

Moreover, even if this claim was not procedurally barred, it is without merit. Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Hoskins v. State, 702 So. 2d 202, 208 (Fla. 1997); Elledge v. State, 706 So. 2d 1340, 1346 (Fla. 1997).

Accordingly, the trial court properly denied this claim.

ISSUE VI

MR. DAVIS' EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. DAVIS MAY BE INCOMPETENT AT TIME OF EXECUTION. (AS STATED BY APPELLANT)

Davis next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of execution. He concedes, however, that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. Thus, this claim is without merit. See Hunter v. State, 817 So. 2d 786 (Fla. 2002); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001).

ISSUE VII

THE LOWER COURT ERRED IN DENYING MR. DAVIS' CLAIM THAT MR. DAVIS' TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. (AS STATED BY APPELLANT)

Davis' next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Davis' demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. No relief is warranted. Atwater v. State, 788 So. 2d 223, 238 (Fla. 2001)(where no errors occurred, cumulative error claim is without merit); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also fail); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless.)

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, Assistant CCC, Office of the Capital Collateral Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of March, 2003.

CERTIFICATE OF FONT COMPLIANCE

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

_____

COUNSEL FOR APPELLEE