

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1580

Eddie Wayne Davis

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Davis lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Davis accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Mr. Davis had been charged by indictment on April 7, 1994, with one count of first degree murder, one count of burglary with assault, one count of kidnapping of a child under 13 and one count of sexual battery on a child under 12, in the Circuit Court for the Tenth Judicial Circuit of Florida. (R.Vol. I - 3).

Mr. Davis was tried between May 22, 1995, and June 1, 1995. The jury returned a verdict of guilty on all four counts . (R. Vol. XVIII - 2157).

The same jury reconvened between June 6, 1995, and June 9, 1995, for penalty phase proceedings. The court sentenced Mr. Davis on June 30, 1995, upholding the jury's recommendation of the death sentence for the first degree murder conviction.

(PCR. Vol. I - 166).

The court sentenced Mr. Davis to a life sentence with a minimum mandatory of twenty-five (25) years without parole on count 4 to run consecutive to count 1 if count 1 would ever be reduced to a life sentence. On count 2, Mr. Davis was sentenced to 19 years Florida State Prison. On count 3, Mr. Davis was sentenced to 19 years Florida State Prison. The sentences imposed on counts 2,3 and 4 were to run concurrently. The trial court further found Mr. Davis to be a sexual predator under Section 775.21, Florida Statutes. (1994). Mr. Davis was sentenced by the Honorable Daniel True Andrews, Tenth Judicial Circuit, Polk County, who was also the trial judge.

On June 5, 1997, the Florida Supreme Court affirmed the judgement of guilt and sentence of death. Davis v. State, 698 So.2d 1182 (Fla. 1997). The rehearing was denied on September 11, 1997.

The Florida Supreme Court issued a Mandate on October 13, 1997.

The United States Supreme Court denied Mr. Davis' petition for certiorari on February 23, 1998. Davis v. Florida, 522 U.S. 1127, 118 S. Ct. 1076. 140 L. Ed.2d 134 (1998).

The first motion to vacate judgement of conviction and sentence was filed on May 27, 1998 by CCRC Middle region.

Mr. Davis' Request for Production of Public Records has been pending since September 9, 1998.

Mr. Davis' Pro Se Motion to Dismiss Counsel was filed January 27, 1999. Hearing was set for May 21, 1999.

An Order to set post conviction relief deadlines was filed on June 4, 1999. A deadline was set for March 31, 2000, to file final motion.

On January 4, 2000, this deadline was extended to May 31, 2000.

The deadline was subsequently extended until June 23, 2000.

On June 23, 2000, Mr. Davis' FIRST AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCES WITH SPECIAL REQUEST FOR LEAVE TO AMEND AND FOR EVIDENTIARY HEARING was filed with the trial court.

On January 25, 2001, a Huff hearing was held at the Polk County Courthouse, Courtroom 8A, before the Honorable Randall G. McDonald, Judge of the above styled cause.

On January 30, 2001, the court entered an order styled: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS FIRST AMENDED MOTION TO VACATE JUDGMENTS AND SENTENCES.

Mr. Davis was granted an evidentiary hearing on claims IB, IC, IE, IIA (as orally amended), IIB, IIC (to the extent the

defendant will be permitted to present testimony by his expert on post traumatic stress disorder), IIE, IIF, IIG, III, V, and VII (based on cumulative errors derived from the matters the Court has permitted a hearing on).

On October 8 & 9, 2001, an evidentiary hearing was held before the Honorable Randall McDonald in the Circuit Court of the Tenth Judicial Circuit.

On June 11, 2002, Judge McDonald entered an order denying Mr. Davis' First Amended Motion To Vacate Judgment Of Convictions and Sentences.

This appeal follows.

II. STATEMENT OF THE FACTS

An evidentiary hearing was held on October 8 & 9 on claims IB, IC, IE, IIA (as orally amended), IIB, IIC (to the extent the defendant will be permitted to present testimony by his expert on post traumatic stress disorder), IIE, IIF, IIG, III, V, and VII (based on cumulative errors derived from the matters the court had permitted a hearing on). (PCR. Vol.II -III 282-410). Claim IB alleged that trial counsel was ineffective for failing to adequately investigate the criminal past of a key witness, Eddie Arnold Davis and to impeach his testimony at trial. Claim IC alleged that trial counsel was ineffective for failure to present the defense of voluntary intoxication as a valid defense

to first degree murder. Claim IE alleged that trial counsel was ineffective for failing to investigate or prepare on the issue of DNA evidence. Claim IIA was orally amended to allege that counsel was ineffective for failing to call Alicia Riggall during the penalty phase of the trial. Claim IIB alleged that counsel was ineffective for failing to call Eddie Wayne Davis to testify at the penalty phase of the trial. Claim IIC alleged 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. Claim IIE alleged that trial counsel was ineffective by failing to provide any physical evidence of organic brain damage in preparation for the penalty phase of Mr. Davis' trial. Claim IIF alleged that trial counsel was ineffective for failing to call Brenda Reincke to testify at the penalty phase of the trial. Claim IIG alleged that trial counsel was ineffective by failing to move for a competency evaluation during the penalty phase of the trial, or in the alternative, for failing to make a motion to instruct the jury that Mr. Davis was under the influence of a psychotropic drug during the penalty phase of the trial. Claim III alleged that Mr. Davis did not make a knowing intelligent and voluntary waiver of his right to conflict free counsel. Claim V alleged that trial counsel was ineffective by failing to subject the

prosecution's case to meaningful adversarial testing in the guilt phase of the defendant's trial by conceding guilt without consultation. Claim VII alleged ineffective assistance of counsel based on cumulative errors derived from the matters the trial court had permitted a hearing on.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF AUSTIN MASLANIK

Austin Maslanik testified that he was the lead attorney on Mr. Davis' case and was employed by the Office of the Public Defender during the entirety of his representation. (PCR. Vol. IV- 503). Maslanik stated that he reviewed all the depositions taken in the case and took notes through out the trial. (PCR. Vol. IV - 504). He stated that he had used an integrated defense in Mr. Davis' case and had started the integrated defense in jury selection. (PCR. Vol. IV-505). Maslanik also testified that he had tried numerous capital sexual battery cases and in his experience, defendants were also abused as children. (PCR. Vol. IV - 506). He testified that although he suspected that Mr. Davis had been abused sexually, he could not pinpoint a time when he suspected the abuse. (PCR, Vol. IV - 506).

Mr. Maslanik also testified that although his pre trial investigation revealed that Mr. Davis was a longtime alcoholic,

was exposed to moonshine liquor as a toddler, was stealing at an early age to get alcoholic beverages, and was extremely intoxicated at the time of the offense, trial counsel did not call an expert in first phase to support the defense of voluntary intoxication. (PCR. Vol. IV 507- 508). Dr. McClain, was a psychiatrist who had some special training and experience in the area of pharmacology and Dr. McClain could have been qualified as an expert as to voluntary intoxication in the guilt phase. (PCR. Vol. IV - 510). Mr. Maslanik also testified that calling an expert in the first phase of the trial in regards to the voluntary intoxication as to Mr. Davis' guilt on the charge of first degree murder, would not have been inconsistent with his strategy in the penalty phase of the trial. (PCR. Vol. - 510). In regards to Mr. Davis being questioned by the trial court as to his taking the stand in penalty phase, Maslanik stated that the trial court usually questions the defendant as to whether or not the defendant wants to take the stand in penalty phase and then the defendant responds to the trial court. (PCR. Vol. IV - 513). Mr. Maslanik could not recall if information regarding Mr. Davis' sexual abuse as a child was provided to Dr. McClain. (PCR. Vol. IV - 515). Mr. Maslanik testified that he was provided a prison number by Eddie Arnold Davis, yet nothing was done to investigate his prison number

case. (PCR. - 516). Mr. Maslanik further testified that parts of Eddie Arnold Davis' testimony were not helpful to his son and that had Maslanik impeached Eddie Arnold Davis with his prior felony conviction, Eddie Arnold Davis' credibility as a witness may have diminished his credibility before the jury. (PCR. Vol. IV - 517). Maslanik further testified on redirect examination that in his opinion, Mr. Davis was highly intoxicated at the time of the incident and he doubted that he could remember everything that happened that night, and Maslanik was sure that there are things in his confessions that Davis made up to fill in the spaces or maybe were suggested by other people. Whether it was suggested by police or other people, Maslanik did not know. (PCR. Vol. - 543).

B. TESTIMONY OF TONI MALONEY

Toni Maloney is a private investigator who was employed by the Public Defender's Office at the time of Mr. Davis' trial. Maloney worked with Austin Maslanik and Bob Norgard in the defense of Eddie Wayne Davis in 1994/1995. (PCR. Vol. IV - 548). Maloney's opinion as to Mr. Davis' competency during trial was based solely visual observations. (PCR. Vol. IV - 550). She was never asked to talk to him during the trial to assess his competence. (PCR. Vol. IV - 550). Maloney testified that she wouldn't have been surprised if Mr. Davis was medicated

during trial. (PCR. Vol. IV - 551). Maloney testified that due to the passage of time, she could not tell the trial court if Mr. Davis was medicated during the trial, if he was medicated in the middle of the trial, or if he was medicated at the conclusion of the guilt phase of the trial and the commencement of the penalty phase of the trial. (PCR. Vol. IV - 552).

C. TESTIMONY OF DOCTOR MICHAEL MAHER

Dr. Michael Maher is a physician and psychiatrist who testified at the evidentiary hearing. He was tendered as an expert in the field of forensic psychiatry with no voir dire by the State. (PCR. Vol. IV - 556). Dr. Maher examined Mr. Davis on June 19, 2000. (PCR. Vol. IV - 557). Upon examining Mr. Davis, Dr. Maher noted that Mr. Davis had some very limited coordination findings. (PCR. Vol. IV - 558). Dr. Maher testified that Porphyria is a metabolic disease that is related to the way the body chemically processes blood and blood products. It can result in a toxic condition when the metabolic products are not fully and properly processed by the body. (PCR. Vol. IV - 558-59). There are a variety of symptoms that can be exhibited, but they tend to particularly include mental confusion, disorientation, poor judgment, irritability, impulsiveness. Poor coordination is another thing that can occur, and under severe circumstances, coma can occur. (PCR.

Vol. IV - 559). There are specific metabolic tests used in the testing for Porphyria, however, Dr. Maher was not familiar with the biochemical details of those tests. (PCR. Vol. IV - 559). Dr. Maher testified that given the neurological damage to Mr. Davis, it is possible that he was suffering from Porphyria and never tested for that. (PCR. Vol. IV - 559). As a result of his examination, Dr. Maher came to the conclusion that Mr. Davis was suffering from very substantial mental impairment that was related both to his acute intoxication at the time, and to underlying subtle but significant brain dysfunction associated with early exposure to alcohol and to being a chronic alcoholic. (PCR. Vol. IV - 560). In regards to memory, Dr. Maher testified that the normal process of memory and particularly the process of memory under circumstances of distress or impairment function much less like a video camera recording in a chronological sequence, events, and much more like a snapshot camera or a still camera taking momentary pictures of particular parts of an event, storing those, sometimes with a great deal of detail, and then upon recall, reconstructing them into a chronologically logical and consistent story, which may be related more like a video recording, but is drawn from what might be called snapshot memories. (PCR. Vol. IV - 561). Dr. Maher opined that Mr. Davis does not have a clear, chronologically consistent, logical,

rational memory of the events associated with the offense. (PCR. Vol. IV - 563). Dr. Maher further went on to explain Korsakoff's Syndrome. Korsakoff Syndrome is a type of brain impairment and brain dysfunction which occurs in alcoholics, primarily in people with particular kinds of brain injury. People who suffer from Korsakoff Syndrome engage in confabulation. They answer questions and describe stories in a way that sound like it is logical, but in fact, they have very little memory of what they're being asked of, and they fill in the spaces of their absent memory simply by making things up as they go along. (PCR. Vol.IV- 563-64). When asked if someone were to suggest to Mr. Davis that he had taken the child to a trailer, would Mr. Davis make up the fact that he did, when in fact there is no physical evidence to substantiate that the victim was ever in the trailer, Dr. Maher testified that Mr. Davis may very well make it up. That's the kind of thing that an individual in this type of impaired state of memory might make up. Dr. Maher further opined that it might be that he feels and believes that that must have happened, and in fact, becomes convinced that Davis is reporting his own memory accurately when, in fact, he is doing nothing of the sort. (PCR. Vol. IV - 564). Dr. Maher testified that with regard to Davis' alcohol intoxication, at the time of the offense, Davis

was sufficiently impaired that his capacity to commit premeditated acts, specifically acts of murder, was very significantly impaired. (PCR. Vol. IV - 564). In regards to Davis' statements which were not only inconsistent with each other but also were inconsistent with other physical evidence, Dr. Maher opined that these stories are more consistent with a disorganized, impulsive attempt to put together fragmented memories and impressions into a story that makes some sense to Davis at the time of the telling of the story, and that's absolutely consistent with what would be seen in somebody who is impaired and confabulating. (PCR. Vol. IV - 567). In regards to the details of the two confessions, Dr. Maher was unable to determine if Mr. Davis remembered the detail, or was remembering what he was told by law enforcement. (PCR. Vol. IV - 575). Dr. Maher further opined that at some point, it is very likely that Mr. Davis became convinced that certain things that did not happen, did in fact happen. And he then has a memory of their happening, which was not of an original physical event, but of his developing the belief that they happened. So he's remembering a story rather than an event, but he's remembering it as if it is a true event. (PCR. Vol. IV - 575-76). Dr. Maher testified that chronic alcoholics have poor impulse control and that would be one of the important factors in

supporting his conclusion that Mr. Davis did not have the requisite intent to commit first-degree murder. (PCR. Vol. IV -576-77).

D. TESTIMONY OF ROBERT NORGARD

Robert Norgard, along with Austin Maslanik represented Eddie Wayne Davis at his trial. (PCR. Vol. IV - 584). Robert Norgard could not recall ever having any conversations with Eddie Wayne Davis about whether he would testify in either the guilt phase of the trial or the penalty phase of the trial. (PCR. Vol. IV - 587). Mr. Norgard testified that in regards to the theory of the case based on the facts presented, discussions regarding the theory of the case would have been with Austin Maslanik only, no direct communication with Mr. Davis on that level would have taken place. (PCR. Vol. IV - 588). Mr. Norgard testified that he knew that Mr. Davis was prescribed Sinequan during the trial and that Mr. Davis was becoming agitated during the course of the proceedings. (PCR. Vol. IV - 591). Mr. Norgard did not ask for the standard jury instruction on psychotropic medication. He did not ask for a special jury instruction as to a drug such as Sinequan, and at one point Mr. Norgard requested the court to be allowed to testify as to Mr. Davis' reaction to the evidence as a way of mitigation, and that request was denied based on the state's objection. (PCR. Vol.

IV - 591).

E. TESTIMONY OF DOCTOR SHERRI BOURG - CARTER

Dr. Sherri Bourg - Carter was qualified as an expert forensic psychologist and expert in post traumatic stress disorder and in the area of child sexual abuse. (PCR. Vol. IV - 604). Dr. Carter saw Mr. Davis on 6/13/00 in order to assess allegations Davis had made of sexual abuse both as an adult and as a child, and to determine how credible or reasonable those allegations were and what effect, if any did those experiences have on his functioning. (PCR. Vol. IV - 604-05). Dr. Carter testified that she found documentation in DOC records that Mr. Davis was sexually abused as a child and that Mr. Davis was sexually assaulted in prison . (PCR. Vol. IV - 607). In regards to his first childhood experience of sexual abuse, Mr. Davis stated that the first time was about when Davis was ten or eleven years old, he could not be sure, his stepfather was drunk, his mother was not in the home. Mr. Davis was in his room and the stepfather came into his room, grabbed Mr. Davis by the neck, threw Mr. Davis on the bed and said "don't say anything", and then proceeded to rape Mr. Davis anally. Mr. Davis reported that the anal rape resulted in rectal bleeding. It resulted in some difficulties over the next couple of days going to the bathroom. (PCR. Vol. IV - 608). Dr. Carter

opined that this incident of sexual abuse was real. She based that opinion on the fact that there's a lot of factors to see if someone is just telling you they've been sexually abused for secondary gain or if it's more likely that they have actually been sexually abused. One thing that Dr. Carter tries to do in determining whether a person has been sexually abused, is to get defendants to endorse things that are not really common in sexual abuse cases, but the defendants who haven't been sexually abused don't know that and defendants readily endorse it because Dr. Carter suggests it. Dr. Carter reported that Mr. Davis didn't "buy those things." Dr. Carter then testified that Mr. Davis did not go along with any of the normal false information that she gives people. Davis did add information that most people do not think to add when they have not been sexually abused, but they are trying to act as if they have been. (PCR. Vol. IV - 609). Dr. Carter further testified that when Mr. Davis recalled the abuse suffered by him at the hands of his stepfather, Mr. Davis had what is known as intrusive thoughts, smells came to him of how his stepfather smelled when Mr. Davis was being assaulted. (PCR. Vol. IV - 610). Dr. Carter further testified that when she was talking to Mr. Davis at the correctional facility, Mr. Davis, although he had been convicted and sentenced, was very reluctant to talk about the childhood

abuse. Dr. Carter testified that when people would pass by in the hallway, Mr. Davis would stop talking and put his head down as if he didn't want anybody to hear what he was telling Dr. Carter. According to Dr. Carter, it is very hard to fake that kind of effect, that kind of emotion when you are talking about an experience unless Mr. Davis actually had the experience. (PCR. Vol. IV - 611). The fact that Mr. Davis became extremely uncomfortable in going into the actual details of the sexual child abuse, was indicative of someone who has actually had the experience as opposed to feigning the experience. This discomfort was evidenced by the fact that Mr. Davis cried during the time he was disclosing the abuse. (PCR. Vol. IV - 612). Dr. Carter also interviewed Mr. Davis' mother in an attempt to gain additional history regarding Mr. Davis. Mr. Davis's mother, one Glenda Parker, stated in retrospect, there are red flags that she probably should have noticed or should have paid more attention to in regards to sexual abuse of Mr. Davis. (PCR. Vol. IV - 613). Dr. Carter also testified as to the exposure to alcohol that Mr. Davis experienced. Glenda Parker told Dr. Carter that when Mr. Davis was four years old Glenda Parker had gone into a store and had left Mr. Davis with the stepfather and an uncle, and when Parker came out of the store, Mr. Davis could not walk. Eddie Davis was stumbling,

and Parker asked what happened. It turned out that the stepfather and uncle had given young Eddie moonshine and they thought it was funny because Eddie was stumbling around as if he were drunk and he couldn't stand up. (PCR. Vol. IV - 614).

Dr. Carter's opinion was at the time she saw Mr. Davis, he was suffering from major depression, which has been recurrent throughout his life, a Post Traumatic Stress Disorder, alcohol dependence, and poly drug abuse, and an Antisocial Personality Disorder. (PCR. Vol. IV - 615). Dr. Carter explained Post Traumatic Stress Disorder as a reaction that people have who've been exposed to some type of event that involves actual or threatened death or serious injury to another person or fear or sense of helplessness, something very express that happens to a person. And occasionally when those experiences happen to a person, they develop symptoms associated with that event and they're clustered into three categories, arousal, intrusion, intrusive experiences, like thoughts coming to you when you don't want them to, or flashbacks or nightmares, or avoidance symptoms where you avoid the things that remind you of the traumatic event. (PCR. Vol. IV - 615). Dr. Carter reviewed the trial testimony of Dr. McClain. (PCR. Vol. IV - 615). Dr. McClain was not an expert in Post Traumatic Stress. (PCR. Vol. IV - 616). Dr. Carter testified that the earliest reference to

sexual assault of Mr. Davis is on 4/15/94. It was Dr. Carter's understanding that this disclosure is prior to Mr. Davis' conviction in the guilt phase of the case. (PCR. Vol. IV - 617). Dr. Carter further testified that Mr. Davis had brought up his history of sexual abuse to prison authorities and based on that disclosure and other symptoms that they were observing, prison mental health experts gave Mr. Davis a diagnosis of Post Traumatic Stress Disorder and indicated that treatment was recommended for the symptoms that they were observing. (PCR. Vol. IV - 619). On direct examination, Dr. Carter testified that there were "red flags" which the trial attorneys and their experts should have caught. Said "red flags" were indicators that Mr. Davis was a victim of child sexual abuse and sexual abuse suffered by Mr. Davis while in the Florida State Prison system. (PCR. Vol. IV - 619). The most obvious "red flag" was the nature of the case itself. (PCR. Vol. IV - 619). Dr. Carter explained that "when you're dealing with a person who, by no one's account, is diagnosed as a pedophile, so to speak, someone who repeatedly preys on young children or children at all, and then someone who engages in this type of behavior where a child is sexually abused and then ultimately killed, the first thing that I would think, at least would come to my mind, would - does this person have a history of sexual abuse in their

background, because it's just - it's not - it's not normal. It's not usual that someone would just sexually attack a child without any kind of background or basis in doing that." (PCR. Vol. IV - 619-20). Dr. Carter testified that Mr. Davis expressed surprise at the detail in the questioning that Carter was going into in regards to the abuse that Mr. Davis had suffered, Mr. Davis had never been questioned regarding sexual abuse in any great detail. (PCR. Vol. IV 621). Dr. Carter opined that the reason that Mr. Davis was not questioned extensively as to the sexual abuse he had suffered was that the doctors themselves are not comfortable discussing the details of sexual abuse if a doctor does not have a background in the subject of sexual abuse. (PCR. Vol. IV - 622). This lack of detailed questioning of sexual abuse victims such as Mr. Davis, prevents the mental health professional from getting the information he or she needs to receive a more credible history and then be equipped to counter cross examination by one side or the other, one attorney or the other as to the lack of credibility to the victim's story. (PCR. Vol. IV - 623). Dr. Carter opined that the jury should have been made aware of the sexual abuse that Mr. Davis suffered, not as justification for the rape and murder of a child, but rather as an explanation as to the amount of pent up rage that would have had to be present

in order for a previously docile and non violent person such as Mr. Davis was as evidenced by Davis' lack of violent criminal history, to commit such a violent and depraved act. (PCR. Vol. IV - 625). Dr. Carter further testified that as an expert in Post Traumatic Stress, it would be important to determine if Mr. Davis was having a flashback at any time during the actual crime because there was a history in the records provided to Dr. Carter where Davis reported symptoms of flashbacks, and if Mr. Davis was having a flashback at any time during the incident, certainly that may have affected his decision making and his judgment at the time in his decision making. (PCR. Vol. V - 626). Dr. Carter also opined that extreme trauma can change not just a person's mental state but also a person's personality and the way a person interacts with other people. (PCR. Vol. V - 629). Dr. Carter testified that the contention advanced by the State expert at the time of Mr. Davis' trial, that contention being that a person's basic personality is established at age eleven or twelve, basically the onset of adolescence, and no matter what happens to a person through out a lifetime, that personality cannot change, is simply not a valid contention and that contention is not supported by research on Post Traumatic Stress Disorder. (PCR. Vol. V - 629-30). Furthermore, as the incidents of assault become more vicious or more traumatizing,

those incidents of assault are going to continue to change the way Mr. Davis viewed himself, the way he viewed others, and the way he interacts with other people. (PCR. Vol. V - 630). Dr. Carter testified that of the two defense experts, Doctors Krop and McClain, Dr. Krop had more experience in the field of sexual abuse treatment, yet Krop did not interview Mr. Davis as to the sexual abuse. It was Dr. McClain, who did not have a background or expertise in sexual abuse who questioned Mr. Davis. (PCR. Vol. V - 631-32). Mr. Davis, in spite of the evidence in the jail records, was never tested as to inventories for victimization, rather he was tested as to whether he was a perpetrator. (PCR. Vol. V - 635). Dr. Carter testified that had she been asked to evaluate Post Traumatic Stress as to how it would have affected Mr. Davis at the crime, she would have explored the issue of flashbacks. (PCR. Vol. V - 651-52). Dr. Carter further testified that had an expert in Post Traumatic Stress and sexual abuse been retained, in order for the jury to give any weight to the proposed testimony of Post Traumatic Stress, the jury would have to be made aware of the expert's background and expertise in order to properly evaluate the expert testimony. (PCR. Vol. V - 653).

F. THE LOWER COURT'S ORDER

In its ORDER DENYING FIRST AMENDED MOTION TO VACATE JUDGMENT

OF CONVICTIONS AND SENTENCES, dated June 11, 2002, the lower court denied all relief after the evidentiary hearing. In the order, the court stated that it will address the claims in the order presented in the Motion.

CLAIM I

MR. DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF HIS TRIAL BY HIS TRIAL COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IA. Failure to move for a mistrial upon the lower court's allowance of the state attorney's leaving an enlarged photograph of the victim's body as it was discovered in the dumpster to remain in front of the jury without it being properly published. This claim was previously denied because the issue raised is procedurally barred. Additionally, the record conclusively rebuts this claim.

IB. Trial Counsel was ineffective by failing to adequately investigate the criminal past of a key witness, Eddie Arnold Davis, and to impeach said witness at trial.

The trial court denied the claim based on the testimony of Austin Maslanik who testified that he was aware of the criminal past of Eddie Arnold Davis and was going to call Eddie Arnold Davis as a witness in the penalty phase. The trial court held that Maslanik made an informed, strategic decision not to

impeach Eddie Arnold Davis.

IC. Failure to present the defense of voluntary intoxication as a valid defense to first-degree murder.

The trial court held 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." The claim was therefore denied.

ID. Defense counsel rendered ineffective legal assistance by failing to procure a change of venue thus resulting in the denial of a fair trial in violation of his rights under the sixth and eighth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

This claim was previously denied because the issue raised is procedurally barred.

IE. Failure to investigate or prepare on the issue of DNA evidence.

Maslanik testified that due to the confession and overwhelming amount of evidence, identity was not at issue, therefore there was no need to attack the DNA evidence presented at trial. This claim was therefore denied.

IF. Failure to effectively move to suppress Defendant's

confession or alternatively to argue to the jury as to its inherent unreliability.

This claim was previously denied because the issue raised is procedurally barred.

CLAIM II (Penalty Phase)

MR. DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS TRIAL BY HIS TRIAL COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IIA. Trial counsel was ineffective for failing to cross-examine Alicia Riggall during the penalty phase of the trial.

The trial court held that "The decision not to cross-examine Riggall was an informed, tactical one and Maslanik's performance was reasonable and not deficient." Accordingly, this claim was denied.

IIB. Trial counsel was ineffective for failing to call Eddie Wayne Davis to testify at the penalty phase of the trial.

The trial court held: "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."

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.

The trial court held: "The Court finds that Dr. McClane did testify during the penalty phase on Post Traumatic Stress Disorder. The Court finds that Dr. McClane testified that Davis was diagnosed with PTSD. (R. At 2851). McClane also described to the jury the effects of PTSD. (R. at 2863). Maslanik testified that he believed Dr. McClane'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."

IID. Failure to develop sufficiently the voluntary intoxication as a persuasive mitigator.

The trial court held that this claim was previously denied because the record conclusively rebuts it.

IIE. Trial counsel was ineffective by failing to provide any physical evidence of organic brain damage in preparation for the penalty phase of Defendant's trial.

The trial court held that Davis failed to present any testimony

regarding this issue at the evidentiary hearing. Accordingly, this claim is DENIED.

IIF. Trial counsel was ineffective for failing to call Brenda Reincke to testify at the penalty phase of trial.

This witness was unable to be located for trial nor was she able to be located for the evidentiary hearing. Accordingly, trial counsel's performance was not deficient and this claim is DENIED.

IIG. Trial counsel was ineffective by failing to move for a competency evaluation during the penalty phase of the trial, or in the alternative, for failing to make a motion to instruct the jury that Mr. Davis was under the influence of a psychotropic drug during the penalty phase of the trial.

The trial court held that: "Davis was taking Sinequan, an antidepressant, during the trial. As such, he was not entitled to a psychotropic medication instruction. Additionally, there is not a standard jury instruction on antidepressant medication. The record reflects that Davis had been taking Sinequan on and off for some time to treat his depression. Accordingly, this is a medication he would be used to taking, and nothing in the record suggests that he suffered abnormal effects from the medication. Considering the above factors, this claim is therefore DENIED."

CLAIM III

A CONFLICT OF INTEREST BETWEEN COUNSEL AND MR. DAVIS PREVENTED COUNSEL FROM RENDERING EFFECTIVE ASSISTANCE AND DENIED MR. DAVIS HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND MR. DAVIS DID NOT MAKE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS RIGHT TO CONFLICT FREE COUNSEL.

The trial court held that this claim was without merit.

CLAIM IV

MR. DAVIS IS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. DAVIS' LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The trial court held that Claim IV was previously denied because the Defendant has never made a motion to interview jurors and thus this claim has no merit.

CLAIM V

MR. DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING IN THE GUILT PHASE OF THE DEFENDANT'S TRIAL BY CONCEDED GUILT WITHOUT CONSULTATION.

The trial court held that trial counsel was not required to

consult with Davis regarding their trial strategy. See Atwater v. State, 788 So.2d 223 (Fla. 2001). Accordingly, trial counsel's performance was not deficient. Trial counsel did not, however, concede that Davis was guilty of first-degree murder. In fact, trial counsel attempted to rebut the element of premeditation. (R. At 1339-40). Additionally, there is not a reasonable probability the result of the proceedings would have been different due to the overwhelming evidence against Davis. As Such, neither prong of *Strickland* has been met and this claim is DENIED.

CLAIM VI

DEFENDANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

The trial court held that Claim VI was previously denied because it was not properly brought in a Motion for Post Conviction Relief when the defendant is not under a death warrant. Mr. Davis is not under a death warrant.

CLAIM VII

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 GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. DAVIS RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

The trial court held that this claim was previously denied because the issue raised is procedurally barred.

CLAIM VIII

MR. DAVIS' TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court held: "Davis claims he did not receive a fundamentally fair trial due to the sheer number and types of errors involved in his trial. Based on the above rulings, the Court finds that there was not a significant number of errors in Davis' trial, and due to the overwhelming evidence of guilt, there is not a reasonable likelihood that the outcome would have been different. See Strickland. This claim therefore, is DENIED."

CLAIM IX

MR. DAVIS WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF MR. DAVIS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES

**CONSTITUTION, AS WELL AS HIS RIGHTS UNDER
THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.**

The trial court held that Claim IX was previously denied because the record conclusively rebuts it.

CLAIM X

**MR. DAVIS IS DENIED HIS RIGHTS UNDER THE
EIGHTH AND FOURTEENTH AMENDMENTS OF THE
UNITED STATES CONSTITUTION AND UNDER THE
CORRESPONDING PROVISIONS OF THE FLORIDA
CONSTITUTION BECAUSE EXECUTION BE
ELECTROCUTION IS CRUEL AND OR UNUSUAL
PUNISHMENT.**

The trial court held that Claim X was previously denied because it is moot. Lethal injection is now the method of execution in Florida unless an inmate requests otherwise.

CLAIM XI

**EXECUTION BY LETHAL INJECTION CONSTITUTES
CRUEL AND UNUSUAL PUNISHMENT AND WOULD
DEPRIVE MR. DAVIS OF DUE PROCESS AND EQUAL
PROTECTION OF THE LAWS IN VIOLATION OF THE
FOURTH , FIFTH, SIXTH EIGHTH, AND FOURTEENTH
AMENDMENTS TO THE UNITED STATES
CONSTITUTION.**

The trial court held that: This claim was previously denied because the Florida Supreme Court has ruled that, in fact, lethal injection does not constitute cruel and unusual punishment.

CLAIM XII

THE DECISIONS OF BRIM V. STATE, 695 So.2d 268 (Fla. 1997) and MURRAY V. STATE, 692 So.2d 157 (Fla. 1997) ESTABLISH THAT MR. DAVIS' CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court held that this claim was previously denied because the issue raised is procedurally barred.

SUMMARY OF THE ARGUMENTS

(1) 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 Mr. Davis wanted to take the witness stand in the penalty phase of his trial.

(2) The lower court erred in denying Mr. 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.

(3) 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.

(4) The lower court erred in denying without a hearing Mr. Davis' sub claim that trial counsel was ineffective for failing to argue the inherent unreliability of the confessions to the jury.

(5) 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, eighth, and fourteenth amendments.

(6) Mr. Davis' Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Davis may be incompetent at time of execution.

(7) 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 error deprived him of the fundamentally fair trial guaranteed under the sixth, eighth, and fourteenth amendments.

ARGUMENT I

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 MR. DAVIS WANTED TO TAKE THE WITNESS STAND IN THE PENALTY PHASE OF HIS TRIAL.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

During the penalty phase of Mr. Davis' trial, during a bench conference for which Mr. Davis was not present, the trial court inquired of Mr. Norgard if anybody saw the need for the court to inquire if the defendant wanted to say anything in the penalty phase. Mr. Norgard replied, " No, sir." (R. Vol. XXIII - 2966).

Mr. Norgard testified during the evidentiary hearing that he could not recall ever having any conversations with Mr. Davis about whether Mr. Davis would testify in either the guilt phase of the trial or the penalty phase of the trial. (PCR. Vol. IV - 587). The trial court questioned Mr. Davis as to whether he wanted to testify in the guilt phase of his trial. (R. Vol. XVII - 2009).

At the evidentiary hearing, Mr. Austin Maslanik had detailed his experience in death penalty cases and testified further that the trial court usually questions the defendant as to whether or not the defendant wants to take the stand in penalty phase and then the defendant responds to the trial court. (PCR. Vol. IV - 513).

In United States v. Scott, 909 F. 2d 488,490 (11th Cir. 1990), the court held:

It is clear then that a defendant's right to testify "is now a recognized fundamental

right." *Ortega v. O'Leary*, 843 F.2d at 261. See *Faretta*, 422 U.S. at 819 n. 15, 95 S. Ct. at 2533 n. 15. Accordingly, the right to testify is personal and cannot be waived by counsel. *United States v. Martinez*, 883 F. 2d 750, 756 (9th Cir. 1989), *petition for cert. filed*, No. 89-7539 (May 17, 1990): *United States v. Long*, 857 F.2d 436, 447 n. 9 (8th Cir. 1988) *Ortega*, 843 F.2d at 261; *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (*per curiam*). *Cert. denied*, 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 600 (1986); see also *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (" It is ...recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.") *Id.* at 490.

It is Mr. Davis' contention that when Norgard assured the trial court that there was no need for the trial court to inquire if the defendant wanted to say anything in the penalty phase of his trial, Norgard had waived Mr. Davis' fundamental right to testify. It was fundamental error for the trial court to allow Mr. Norgard to waive Mr. Davis' right to testify. Furthermore it was ineffective assistance of penalty phase counsel to waive Mr. Davis' fundamental right to testify without consulting with Mr. Davis. The sentence of death is the resulting prejudice. The importance of Mr. Davis testifying in the penalty phase of his trial should not be overlooked by this Court when this Court reviews the cavalier manner in which Mr. Norgard dismisses the

importance of asking Davis whether he wanted to testify in penalty phase.

In Rock v. Arkansas, 483 U.S. 44, 52 107 S.Ct. 2704, 2709 (1987), The Supreme Court of the United States held:

Moreover, in Faretta v. California, 422 U.S., at 819, 95 S.Ct., at 2533, the Court recognized that the Sixth Amendment

"Grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (Emphasis added.)

Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. *Id.* at 52, 2709.

The penalty phase jury heard the incidents of sexual abuse by Mr. Davis' stepfather described by a third party in a very dry and shortened manner. (R. Vol. XXII - 2829). Pursuant to Rock, Mr. Davis had the right to present those incidents of sexual abuse in his own words. Mr. Davis had the right to describe the horror and shame he felt when his stepfather, Brad Hudson, first grabbed him by the neck, threw him on the bed in the deserted

house, told him not to say anything and then proceeded to rape him anally, so forcefully as to cause his rectum to bleed and to make going to the bathroom painful. Mr. Davis should have been allowed to state in his own words how often this occurred, how many times he must have crouched in fear, when his mother left and his stepfather had begun to drink.

Dr. McClane went on to testify that he had reviewed Mr. Davis' prison medical records and those records noted that Davis was vulnerable to sexual abuse in prison. (R. Vol. XXII - 2845). Dr. McClane testified that Davis admitted that he was abused in prison several times. (R. Vol. XXII - 2847). Mr. Davis should have been permitted to detail the prison sexual abuse that he suffered in his own words. He should have been able to detail the horrible memories of the child sexual abuse that the prison sexual abuse rekindled. Mr. Davis should have been permitted to inform the jury about the constant isolation of protective custody which he voluntarily chose rather than to be constantly abused by larger and stronger inmates. Mr. Norgard waived Mr. Davis' right to testify in his own words when he did not allow Mr. Davis to inform the trial court whether he wanted to testify in the penalty phase of his trial. It is clear from the case law cited above that the decision of whether or not Mr. Davis would testify in the penalty phase of his trial was Mr.

Davis' decision not Mr. Norgard's.

In Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989), the defendant was denied relief based on the testimony of his attorney in post conviction proceedings. The court held:

At the post-conviction hearing, Ms. Sfaciotti testified that she and her client discussed several times whether the defendant should take the stand, and that it was their mutual decision not to put the defendant on the stand. Ms. Sfaciotti also testified that it was her practice to let her client testify if the client so desired. Furthermore, on the eighth day of trial, in the presence of Mr. Galowski, defense counsel informed the court that Mr. Galowski would not testify. Id. at 636.

At the post-conviction hearing, Mr. Norgard testified that he could not recall ever having any conversations with Eddie Wayne Davis about whether he would testify in either the guilt phase of the trial or the penalty phase of the trial. (PCR. Vol. IV-587). Mr. Norgard also testified that in regards to the theory of the case based on the facts presented, discussions regarding the theory of the case would have been exclusively with Austin Maslanik only. No direct communication with Mr. Davis on that level would have taken place. (PCR. Vol. IV - 588). Mr. Davis contends that the failure of his penalty phase counsel to advise him of the advantages and disadvantages of testifying in the penalty phase of his trial fell far below normal professional standards. The very least counsel should have done is ask his

client if he desired to testify before he waived his client's right at the bench conference.

In Nichols v. Butler, 917 F.2d 518, 520, 521 (11th Cir. 1990) the court held:

The district court found that prior to petitioner's two day trial, he and his attorney discussed whether petitioner should testify. Counsel's strong advice to him was that he not testify because that would allow the prosecution to inform the jury of his three prior felony convictions and his drug-abuse problems. Initially, petitioner concurred with this advice. Following the first day of his trial, however, he changed his mind and told his attorney that he wanted to testify in his own defense. A heated argument ensued because of counsel's strong belief that petitioner would hurt his case more that he would help it by testifying. Counsel told petitioner that the case was going well and that his testimony was not necessary. Nevertheless, the petitioner insisted. Counsel then told petitioner that, if he insisted upon testifying, counsel would seek to withdraw and he could proceed *pro se* or seek appointment of another attorney. Petitioner then relented, feeling that he would be harmed more by the withdrawal of his attorney in mid-trial. The next day several defense witnesses were offered and the defense rested without petitioner taking the stand. When Counsel announced that the defense rested, petitioner said nothing and did not otherwise indicate to the court that he wanted to testify. The district court also found that the reasons counsel insisted that petitioner not testify did not include any concern that petitioner intended to commit perjury. Rather, counsel felt as a strategic and tactical matter that the trial had proceeded in a favorable way and

that petitioner's testimony would merely reveal to the jury his criminal history and drug use. Counsel never sought to withdraw, and he testified that his opposition to the petitioner testifying was not based on any concern that he might perjure himself....Concluding that petitioner's right to testify was violated by his attorney's threat to withdraw and that this violation was not harmless, the district court's order granting the writ of habeas corpus is due to be affirmed. Id. at 520, 521.

In its order denying this claim, the lower court relied upon the fact that Davis did not affirmatively request to testify when the defense rested in the penalty phase of his trial. Mr. Davis respectfully contends that the lower court erred in placing this burden on Mr. Davis.

In United States v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992), the court held:

Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant's right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. Alternatively, if defense counsel never

informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted "within the range of competence demanded of attorneys in criminal cases," and the defendant clearly has not received reasonably effective assistance of counsel. Id. at 1534.

It is clear from the testimony at the post-conviction hearing that counsel had no direct communication with Mr. Davis concerning the issue of whether Mr. Davis would testify in the guilt or penalty phase. The *Teague* court went on to hold: "[W]e hold that a criminal defendant has a fundamental constitutional right to testify on his behalf, that this right is personal to the defendant, and that the right cannot be waived by defense counsel." Id. at 1535. Furthermore, it is clear from the record at trial that Mr. Norgard waived Mr. Davis' right to testify at a bench conference while Mr. Davis was seated at counsel table. Counsel Norgard's unauthorized waiver effectually deprived Mr. Davis of the opportunity to exercise his fundamental right to testify on his own behalf in a proceeding where his very life was at stake. The law is clear and unambiguous that the right to testify is personal to Mr.

Davis and only he could waive it. Counsel Norgard's unauthorized waiver at the bench conference cannot be legally viewed as a substitute for a fully informed waiver by Mr. Davis.

In DeLuca v. Lord, 858 F. Supp. 1330, 1361 (S.D. New York 1994) the court held:

This corroborating testimony persuades the Court that DeLuca was, in fact, unaware that she had the ultimate right to decide whether or not to testify. Since the preponderance of evidence suggests that the petitioner was unaware that it was ultimately her decision whether or not to testify, and counsel admittedly did not correct that misperception, this Court finds that petitioner has been denied effective assistance of counsel. Id. at 1361

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. His own Counsel failed to inform him of his right to testify. Counsel further exacerbated his ineffectiveness by shielding Mr. Davis from having the opportunity to personally decide whether to exercise his fundamental right to testify by his unauthorized waiver to the court at the bench conference. The *DeLuca* court went on to hold:

The testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence,

speak for himself. *Nichols v. Butler*, 953 F. 2d 1550, 1553 (11th Cir. 1992) (quoting *Green v. United States* 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)). Id. at 1361.

Eddie Wayne Davis might have spoken to the penalty phase jury with "halting eloquence." Davis' testimony concerning the degrading child sexual abuse would have been far more persuasive to a jury than a disinterested mental health witnesses who was not qualified to speak as to Davis' Post Traumatic Stress Disorder. Davis' testimony concerning his repeated requests to be placed in protective custody so he would not have to endure the sexual abuse by larger, stronger inmates and how that abuse rekindled the terrible memories of the child sexual abuse could have been more persuasive to the penalty phase jury than the jury hearing these facts second hand from a witness who did not have experience in the field of child sexual abuse or post traumatic stress disorder. Mr. Davis also could have testified as to the remorse he felt. Pursuant to the case law cited above, Mr. Davis contends that the second hand opinions tendered by other witnesses would not have been as eloquent as Davis' own expression of remorse. Mr. Davis contends that if he were allowed to confirm the mitigation presented during the penalty phase of his trial, the jury would have recommended life, not death.

In Deaton v. Dugger, 635 So.2d 4 (Fla. 1993), a new penalty phase proceeding was granted based on similar facts as the case at bar. In Deaton's evidentiary hearing, the following question was asked of and answered by Deaton's trial counsel:

Q. In terms of the penalty phase, did you explain to [Deaton] mitigating circumstances that you could pursue?

A. No, except he could testify as to his treatment and how he was emotionally abused as a child. Just very briefly, if he wanted to testify. Id. at 9

It is clear from the testimony of Mr. Norgard that he had very little personal contact with Mr. Davis prior to the penalty phase proceeding. Furthermore, Mr. Norgard knew that Mr. Davis had been prescribed Sinequan during the trial. The Deaton Court held:

The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made. Id. at 8

In the case at bar, the trial court had stated on the record that the trial may be divided into two parts. "First, the jury will be asked to decide if the defendant is guilty or not guilty. This is referred to as the guilt phase of the trial,

and is the same as any other trial in a criminal case. If at the conclusion of the guilt phase of the trial the jury finds the defendant not guilty, or finds the defendant guilty of some lesser charge than first-degree murder, the jury will be discharged. If however, the jury finds the defendant guilty of the charge of first-degree murder as charged by the indictment, the trial will then proceed to a penalty phase. In the penalty phase of the trial the State has the burden of showing that certain statutory aggravating factors exist which justify the imposition of the death penalty. The jury will hear additional evidence and/or argument concerning whether the State has proven these aggravating factors, and, if so, whether mitigating circumstances exist that outweigh the aggravating circumstances." (R. Vol. IV - 556). Mr. Davis was not an attorney, nor was he a particularly astute person, he could not have been expected to understand that he had the right to present any other factors in his background that would mitigate against imposition of the death penalty. His testimony concerning his background, told in his own words, was another factor that would mitigate against the imposition of the death penalty. Mr. Davis contends that it was ineffective assistance of counsel for trial counsel not to have explained to Mr. Davis the nature and dynamics of the penalty phase proceedings. The

trial court had already stated that the trial was to be divided upon the finding of guilty as charged. Trial counsel should have explained to Mr. Davis what kind of aggravation was going to be presented by the State and what mitigation was to be presented by the defense. At the very least as in Deaton, trial counsel should have explained briefly that Mr. Davis could testify if he wanted to in penalty phase. The record does not support a finding that Mr. Davis knowingly, voluntarily, and intelligently waived his right to testify. The failure of counsel to inform Mr. Davis of his fundamental right to testify at the penalty phase, and the unauthorized waiver of that right at the bench conference, constitutes ineffective assistance of counsel. The spectacle of conducting a penalty phase proceeding while the defendant is totally unaware of his fundamental right to testify sufficiently undermines confidence in the outcome at the proceeding to satisfy the prejudice prong of the Strickland standard.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. 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.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

During the penalty phase of Mr. Davis' trial one Dr. Thomas McClain was called by the defense and qualified as an expert in the area of forensic psychiatry and pharmacology. (R. Vol. XXII - 2818). Dr. McClain testified that psychiatrists do less psychological testing in their practices than do psychologists. (R. Vol. XXII - 2819) Dr. McClain was qualified as an expert in the area of forensic psychiatry and pharmacology and no other field. (R. Vol. XXII - 2823). Dr. Sherrie Bourg-Carter was qualified as a forensic psychologist and post traumatic stress disorder and in child sexual abuse. (PCR. Vol. IV - 602-04). Dr. McClain originally was asked by trial counsel to examine Mr. Davis alcohol use or abuse, and determine the extent of the alcohol abuse throughout his life. (R. Vol. XXII -2823). Mr. Davis contends that any opinion as to Mr. Davis' post traumatic stress and child sexual abuse was destroyed when, under cross examination, Dr. McClain admitted that he was not specially

trained in the area of sexual abuse of children, and that his particular specialty was pharmacology, and it was not a major part of his practice to work with abused children. (R. Vol. XXII - 2876). Mr. Davis contends that when trial counsel learned of the nature of the charges, the rape and murder of a small child, and certainly upon reading the protective custody requests made by Mr. Davis in the Florida State Prison system, competent counsel would have been put on notice that Mr. Davis had sexual problems which needed to be addressed by an expert in the field. Since this was not Dr. McClain's field of study he was unable to properly explore and present this area of non statutory mitigation.

Dr. Bourg-Carter testified at the evidentiary hearing that Mr. Davis did not readily disclose the details of his sexual abuse to either Dr. McClain or Dr. Krop. It was only through skillful, persistent questioning that Mr. Davis disclosed this mitigation. (PCR. Vol. IV -610-12). Mr. Davis contends that this mitigation was not obtained by the mental health witnesses in his trial because they were not trained to do so and were unable to tender expert testimony in the field of child sexual abuse because McClain was not an expert in this field. In Ake v. Oklahoma, 470 U.S. 68, 80-1, 105 S. Ct. 1087, 1095 (1985), the Supreme Court of the United States held:

[T]hat when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, a psychiatrist can identify the "elusive and often deceptive" symptoms of insanity *Solesbee v. Balkcom*, 339 U.S. 9, 12, 70 S.Ct. 457, 458, 94 L. Ed. 604 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. Id. at 80-1** 1095.

In the case at bar, Dr. McClain was unable to properly interview Mr. Davis about his child sexual abuse because he lacked experience in the field. Dr. Bourg-Carter could and did gather

details about Mr. Davis' child sexual abuse because she knew through her experience that victims of such abuse usually are reluctant to discuss the details of the actual abuse, and persistent questioning is required. Mr. Davis contends that Dr. McClain was not qualified to present this mitigation, was not found to be an expert in the field of post traumatic stress disorder and child sexual abuse and his opinion was neutralized by the State pointing out his lack of qualifications in this area. Dr. McClain's bare conclusion that Mr. Davis suffered from post traumatic stress disorder, (R. Vol. XXII - 2851) coupled with a dry, undetailed, explanation that post traumatic stress is the "development of suppressed, repressed rage and anger and resentment because of all the oppression and abuse." (R. Vol. XXII - 2864), gave the penalty phase jury no insight as to what effect this disorder had on Mr. Davis and how this explains his actions and state of mind. Dr. Krop's explanation of post traumatic stress disorder is equally vague, undetailed and dry. (R. Vol. XIX -2343). Mr. Davis contends that this one sentence, bare bones, definition put forth by Dr. McClain and the definition put forth by Dr. Krop, does not reflect the reality that the Court recognized in AKE. There is no gathering of facts to be shared with the jury. No plausible conclusion about the defendant's mental condition and about the

effects of this disorder has on behavior is tendered. No opinion is offered about how the defendant's mental condition might have affected his behavior at the time in question. No elusive and often deceptive symptoms of insanity are identified. Dr. McClain, nor Dr. Krop, did not translate a medical diagnosis into language that will assist the jury and therefore offer evidence in a form that has meaning for the task at hand. The jurors had no training in psychiatric matters, and they were not assisted by Dr. McClain or Dr. Krop to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. None of the above was done because Dr. McClain was not an expert in the field of post traumatic stress disorder and child sexual abuse. This is analogous to a patient consulting a dermatologist when the patient is having a heart attack. The dermatologist, although a licensed medical doctor, is unable to render an expert opinion because he is not qualified in that specialized field. So it is with disorders of the mind. Trial counsel was ineffective in not retaining an expert in the field of post traumatic stress and child sexual abuse to examine Mr. Davis. Counsel was on notice due to the nature of the charges that sexual abuse was an issue to be explored and presented to the penalty phase jury. Had this mitigation been presented by a qualified expert, as it

was done in the evidentiary hearing, the jury would have been provided with an explanation as to why a passive, petty criminal who had no previous crimes of violence in his background, had so much uncontrollable rage in his soul that would cause him to do what he did. Trial counsel was ineffective for failing to present qualified, competent expert testimony as to post traumatic stress disorder. The failure to present this testimony sufficiently undermines confidence in the outcome of the proceeding to satisfy the prejudice prong of the Strickland standard. A new penalty phase proceeding is warranted.

ARGUMENT 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.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

Austin Maslanik testified that calling an expert in the

first phase of the trial in regards to the voluntary intoxication as to Mr. Davis' guilt on the charge of first degree murder, would not have been inconsistent with his strategy in the penalty phase of the trial. (PCR. Vol. IV - 510). The lower court in it's order, characterized counsel's failure to ask for an instruction on voluntary intoxication as to first degree murder as ineffective, Mr. Davis contends that he was also entitled to an instruction on voluntary intoxication for the majority of the underlying felonies that he was also charged with in the indictment. In Linehan v. State, 476 So.2d 1262 (Fla. 1985), held:

The courts of this state have applied this standard to allow the voluntary intoxication defense in cases involving specific intent crimes. See, e. g., *Cirack* (first-degree murder); *Jenkins v. State*, 58 Fla. 62, 50 So. 582 (1909) (breaking and entering with intent to commit misdemeanor); *Heathcoat v. State*, 430 So.2d 945 (Fla. 2d DCA 1983) (burglary, robbery, aggravated battery, and aggravated assault); *Williams v. New England Mutual Life Insurance Co.*, 419 So.2d 766 (Fla. 1st DCA 1982).... as noted above , voluntary intoxication has been recognized in this state for more than ninety years as a valid defense to specific intent crimes. Id. at 1264

In Heddleson v. State, 512 So.2d 957 (Fla. 4th DCA 1987), the court held that kidnapping is a specific intent crime. Mr. Davis would have been entitled to an instruction on every felony

except sexual battery. Since the trial court has conceded the first prong of *Strickland* in regards to this claim, the opinion that the result would not have been different is speculative. Mr. Davis contends that the evidence in the guilt phase was not subjected to a fair adversarial testing. The confidence in the outcome is undermined and the verdict of guilt is unreliable.

ARGUMENT 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.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

The lower court erred in denying a hearing for the sub claim, that trial counsel was ineffective for failing to argue to the jury as to the inherent unreliability of Defendant's confession. The inherent unreliability of the confessions in this case is related to the issue of voluntary intoxication in the guilt phase of the trial and a hearing as to the reliability

of the confession applies to the issue of voluntary intoxication should have been allowed. In Odom v. State, 770 So.2d 195 (Fla. 2nd DCA 2000), the trial court denied Odom's claim without an evidentiary hearing, the court held:

The trial court summarily denied Odom's motion on this ground without attaching the portions of the record showing what occurred after the detective returned to the courtroom with his notes. Therefore, it is impossible for this court to determine whether, in fact, defense counsel did review the notes and whether defense counsel continued with any cross-examination following the detective's return. If the information was not in the detective's notes as he testified it was, this would have impeached the detective's testimony and bolstered Odom's credibility. Because the attachments to the trial court's order do not clearly refute Odom's allegations, we are compelled to remand this case to the trial court for it to either attach those portions of the record showing conclusively that Odom's claim is without merit or to conduct an evidentiary hearing on this issue. Id. at 196

Mr. Davis' allegations that counsel did not attack the reliability of the confessions are pled in his motion. (PCR. Vol II 316-317). There are no attachments to the trial court's order to refute Davis' allegations. During the evidentiary hearing Mr. Maslanik admitted that the confessions were "somewhat inconsistent" with the physical evidence. (PCR. Vol IV - 541). Mr. Maslanik opined that Mr. Davis was highly intoxicated at the time of this incident and he doubted if Davis

could remember everything that happened that night, and Maslanik was sure that there were things in Davis' confessions that Davis made up to fill in the spaces or maybe were suggested by other people. (PCR. Vol IV - 543). Effective trial counsel would have cross examined the police detectives who allegedly heard these confessions. Trial counsel could have pointed out the inconsistent parts of the confessions and bolstered the defense of voluntary intoxication. In Tyler v. State, 793 So.2d 137 (Fla. 2nd DCA 2001), the court held:

It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief. *Richardson v. State* 617 So.2d 801, 803 (Fla. 2nd DCA 1993) *Kegler v. State* 712 So.2d 1167,1168 (Fla. 2nd DCA 1998). As stated previously, Osterhout was a key witness for the State. The accounts of the witnesses to the shooting were inconsistent according to Tyler and arguably did not establish a credible identification of the shooter. Therefore, Osterhout's testimony regarding Tyler's alleged confession was central to the State's case and the impeachment of his testimony was essential to Tyler's defense. Testimony that Tyler was vomiting and incoherent in the back of the ambulance, where the confession allegedly took place, would have been important to Tyler's case. Thus, trial counsel's failure to impeach Osterhout's testimony on cross examination or by calling Dixon to testify was not reasonable and it prejudiced Tyler's defense. We therefore reverse and remand for an evidentiary hearing since the record

provided does not conclusively refute this claim.
Id. at 144.

Mr. Davis contends that the failure of trial counsel to cross examine regards to the inconsistent confessions fell below reasonable professional standards. Mr. Maslanik testified at the evidentiary hearing that he always knew there were two confessions in this case. (PCR. Vol. IV - 525). Mr. Maslanik also testified that he was aware that one confession was "somewhat inconsistent" with the physical evidence. (PCR. Vol. IV - 541). Mr. Maslanik also testified that he never argued which confession was the correct one. (PCR. Vol. IV - 544). Mr. Davis contends that the failure of trial counsel to explore the inconsistent confessions and their inconsistencies with the physical evidence gave the jury the mistaken impression that Mr. Davis was able to recall with great detail, the facts surrounding the crime. Mr. Davis was simply agreeing with whatever the detectives suggested to him. The jury would have realized that Mr. Davis had no independent recall of the events because of his extreme intoxication. This testimony would have conclusively established that Davis lacked the requisite intent to commit the crimes. The likelihood of the jury returning a verdict of guilty of a lesser offense is great. Due to trial counsel's unprofessional errors Mr. Davis was deprived of a fair

adversarial testing of the evidence in the guilt phase of his trial, confidence in the outcome is undermined and the verdict of guilt is unreliable.

ARGUMENT 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.

Florida's capital sentencing scheme denies right to due process, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty nor narrow the application of the death penalty to the worst offenders.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. This leads to the arbitrary and capricious imposition of the death penalty, and violates the Eighth Amendment.

Florida's capital sentencing procedure does not have the

independent weighing of aggravating and mitigating circumstances envisioned in Proffitt v. Florida, 428 U. S. 242 (1976).

Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony-murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence as strong as to outweigh the aggravating factors. Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U. S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and capricious imposition of the death penalty, as in Mr. Davis' case, and thus violates the Eighth Amendment.

Florida's capital sentencing procedure does not utilize the independent weighing of aggravating and mitigating circumstances envisioned in Proffitt v. Florida, 428 U.S. 242 (1976). Proffitt is particularly offended when, as in this case, the judge finds,

a statutory aggravator (CCP) which both includes the element of premeditation and is struck on direct appeal.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia; Espinosa v. Florida, 112 S.Ct. 2926 (1992). Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors. The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Richmond v. Lewis, 113 S. Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F. 2d 1469 (11th Cir. 1988). To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F. 2d 94 (5th Cir. 1990).

Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this

case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Davis' case entitles him to relief. The lower court erred in denying this claim.

ARGUMENT VI

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

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to

Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986) (If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985)).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L. Ed. 2d 849 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L. Ed. 2d 203 (1993) (the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000), the 11th Circuit Court of Appeals has stated:

Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct.

1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it. [citations omitted] Id. at 1235

Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b) (2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion.

Given that federal law requires, that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this action. Mr. Davis has been incarcerated since 1994. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. In as much as Mr. Davis may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

ARGUMENT 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 ERROR DEPRIVED HIM
OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED
UNDER THE SIXTH, EIGHTH, AND FOURTEENTH
AMENDMENTS.

Eddie Wayne Davis did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Eddie Davis' trial, when considered as a whole, virtually dictated the verdict of guilt and the sentence of death. The errors have been revealed in the 3.850 motion and this appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted Eddie Wayne Davis' trial. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Eddie Wayne Davis His fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 662 So.2d 51 (Fla. 5th DCA 1993); Landry v.

State, 620 So2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Davis contends he never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Davis moves this Honorable Court to:

1. Vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 27th, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial

Brief of Appellant was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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