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,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply brief addresses arguments I, II, and IV of Mr. Davis' initial brief. As to all other issues, Mr. Davis stands on the previously filed initial brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

ISSUE I

THE APPELLEE IS INCORRECT IN ASSERTING THAT THE LOWER COURT DID NOT ERR 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.

On page 21 of Appellee's Answer brief, Appellee's contention that Mr. Davis is procedurally barred from asserting that fundamental error occurred because it is not properly raised in a post conviction proceeding is contrary to Florida law. In Willie v. State, 600 So.2d 479 (Fla. 1st DCA 1992) the court held:

> the doctrine of fundamental error operates as a narrow exception to the general prohibition contained in Rule 3.850. To be a fundamental error, the error must be one which amounts to a denial of due process of law. *See, e.g. Sochor v. State,* 580 So.2d 595 (Fla. 1991); *Ray v. State,* 403 So.2d 956 (Fla. 1981). A fundamental error may be raised for the first time at any point, including in a post conviction proceeding. Id. at 482.

In Hill v. State, 730 So.2d 322 (Fla. 1st DCA 1999), the court held:

> Although Rule 3.850(c) "does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence," fundamental error --

> *i. e.,* "error...which amounts to a denial of due process" -- can be raised for the first time in a post conviction proceeding. Id. at 323.

Mr. Davis had a fundamental right to decide whether or not he would testify at the penalty phase of his trial. To deny him the right to make that decision was a denial of due process. 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.

Norgard had waived Mr. Davis' fundamental right to testify when he assured the trial court that there was no need to inquire if the defendant wanted to say anything in the penalty phase of his trial. 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. Appellee's reliance on Lawrence v. State, 831 So.2d 121 (Fla. 2002) is misplaced. In *Lawrence,* trial counsel testified at defendant's 3.850 hearing that he actually encouraged the defendant to testify in penalty phase and the defendant refused. Id. at 132. In Mr. Davis' case, it is clear from the testimony of his trial counsel at the 3.850 hearing, that Robert Norgard did not discuss the matter of Mr. Davis' proposed penalty phase testimony. (PCR. Vol. IV-587). The issue in *Lawrence* was whether defendant's waiver of his right to testify in penalty phase was on the record or off the record. In Mr. Davis' case, Norgard clearly waived a right that was not his to waive. It was Davis' right, not Norgard's.

Appellee' reliance on Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), is again misplaced. The *Torres* court stated in a footnote:

> FN2. Although we expressly hold that a trial court does not have an affirmative duty to make a record inquiry concerning a defendant's waiver of the right to testify, we note that it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record

> inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation with counsel, not to take the stand. Such an inquiry will, in many cases, avoid post conviction claims of ineffective assistance of counsel based of allegations that counsel failed to adequately explain the right or actively refused to allow the defendant to take the stand. Id. at 411.

Subsequent to this 1988 case, trial courts have been taking this Court's advice and have been making record inquiries. Indeed, one such inquiry was done at the close of the guilt phase in Mr. Davis' case. Some type of inquiry, whether on the record or off the record, should have been done at the close of the penalty phase in Mr. Davis' case. Pursuant to the testimony of Robert Norgard at the 3.850 hearing, neither the State, the trial court nor Davis' own counsel determined whether Davis knew the nature of the penalty phase proceedings and whether Davis knew he had a decision to make regarding his testimony in penalty phase.

ISSUE II

> **APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT DID NOT ERR 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.**

In Asay v. State, 769 So.2d 974 (Fla. 2000), the Court held:

> This Court has found counsel's performance was deficient where counsel "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. *Rose*, 675 So.2d at 572, *Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla. 1995) ("woefully inadequate" investigation failed to reveal a large amount of mitigating evidence, such as prior psychiatric hospitalizations and statutory mental health mitigators); *State v. Lara,* 581 So. 2d 1288, 1289 (Fla. 1991) (finding counsel "virtually ignored" preparation for penalty phase). Id. at 985.

Dr. McClane's testimony that Mr. Davis had suffered child sexual abuse was effectively destroyed when it was brought out in cross examination that he was not an expert in that field. (R. Vol. XXII-2876). Dr. Krop's explanation of post traumatic stress disorder was vague, undetailed and dry. (R. Vol. XIX-2343). There was no gathering of facts that would have aided the jury in understanding the extent of the sexual abuse suffered by Mr. Davis both at the hands of his stepfather and in prison. An investigation into Mr. Davis' sexual abuse during his childhood and in prison should have been done. The disclosure of the abuse came about in the guilt phase of the trial. (PCR. Vol IV-617). Mr. Davis had never been questioned regarding sexual abuse in any great detail. (PCR. Vol. IV-621). According to Dr. Carter's testimony, the reason Mr. Davis was not questioned extensively as to the sexual abuse he had

suffered was that the doctors themselves were not comfortable discussing the details of sexual abuse if they did not have a background in the subject of sexual abuse. (PCR. Vol. IV-622). Counsel points to the Statutory Mitigation Factors found by the trial court on page 28 of Appellee's brief. Mr. Davis contends details of the sexual abuse should have been presented to the jury, trial court's consideration of this evidence was not the issue, and the jury had already recommended death for Mr. Davis because this valuable mitigation was not properly presented to them. They were unable to weigh this mitigation properly because it was not investigated nor was it evaluated by a professional in the field of sexual abuse.

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, psychiatrists 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 therefor 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), without detailing the actual abuse, 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. The reluctance of Mr. Davis to disclose the details of the abuse he suffered is an example of the "elusive and often deceptive symptoms of insanity". Neither

Dr. McClain nor Dr. Krop translated 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 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.

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)

Austin Maslanik, Mr. Davis' attorney, indicated in the post conviction hearing that he was aware that Mr. Davis had admitted in at least two statements to police, that he had been drinking heavily at the time of the offense. (PCR. Vol IV -507-08). Mr. Maslanik testified that he had argued that Mr. Davis' mental state was the issue in the guilt phase, and that intoxication was a part of that mental state. (PCR. Vol. IV-522).

Dr. Alexander Melmud testified as to the extent of the victim's vaginal injuries at trial. (R. Vol.X-1683). Dr. Melmud opined that if the victim had sustained this type of injury and had walked seven blocks, he would expect to see blood streaks on her legs, however he only observed blood flowing on

her right thigh, the side she was found on. (R. Vol. X- 1692). The trial court further clarifies this point in the following manner:

> **THE COURT**: All right, Doctor, is it possible that she could walk seven blocks and not get blood streaked down her legs and it all go into the panties?
>
> **THE WITNESS**: No.
>
> **THE COURT**: Why do you say that?
>
> **THE WITNESS**: Because this is a thin, small panties, very thin material, and blood will flow through the panties, on her legs, and you will be able to see the blood streaks on her legs. (R. Vol. X-1695).

In the 3.850 hearing, Austin Maslanik testified that he was aware of the two confessions and that the second confession was somewhat inconsistent with the evidence. (PCR. Vol. IV -540-41). Maslanik further testifies in the 3.850 hearing regarding Davis' mental state:

> Okay. My opinion about it is this: Is I think that Mr. Davis was highly intoxicated at the time of this incident and I doubt that he could remember everything that

> happened that night, and I'm sure that there are things that, in his confessions, that he made up to fill in the spaces or maybe were suggested by other people. Whether it be police or other people, I don't know. Okay? (PCR.Vol.IV -543).

Appellee's contention on page 56 of her brief that this is a minor detail is misleading to the ultimate issue of the claim. The ultimate issue is that counsel was ineffective for failing to argue to the jury the inherent unreliability of the confessions. Mr. Maslanik had concerns regarding the reliability of the confessions and discussed those concerns in the 3.850 hearing:

> **Q**. Was there also somewhat of a problem in that regard with the – the facts that you knew the state could go into what Mr. Davis recalled with some specificity about the crime in his confessions?
>
> **A**. That – that also is a factor that many times when you use a voluntary intoxication defense, the state will argue when there's a confession that the defendant has given, you know, detailed information and can recall

it. And I've actually seen situations like that where the experts, you know, agree that that's true, and that somewhat diminishes an expert's opinion about that.

Q. And clearly in this case, Mr. Davis did give some very very detailed accounts of what had happened with regard to going into Kimberly Water's house, where he took her from there, what he did to her afterwards, and the manner in which she was killed and so forth, is that true?

A. I think that the record reflects that, yes. (PCR. Vol IV -530-31).

In light of Mr. Maslanik's further testimony where he doubted that Davis remembered everything that happened and parts of the confessions were suggested to Davis by other people, Mr. Davis contends that trial counsel was ineffective in failing to argue that the "very very detailed accounts of what had happened" which the State had alluded to in the post conviction hearing, were in reality suggestions given to Mr. Davis by other people. Furthermore, the suggestion that the victim was brutally molested and then walked seven blocks to the place of her death was in direct contradiction to the evidence clarified

by the trial court at trial. Trial counsel was ineffective in failing to argue to the jury that the confessions were not reliable because the details of the confessions were suggested to Davis by other people, and details of the confessions were inconsistent with the evidence. The fact that Davis killed the victim is not at issue here, what is at issue is whether Mr. Davis could have formed the requisite intent to do so. Mr. Maslanik testified in the 3.850 hearing that intoxication would go to the state of mind of the defendant at the time of the offense and he thought it would be important to bring that out in the guilt phase. (PCR. Vol. IV-509). Mr. Davis contends that had trial counsel argued that the confessions were inconsistent with the evidence and details had been suggested to Mr. Davis, his intoxicated state would have been apparent to the jury and his lack of ability to formulate specific intent would have been clearly established. The likelihood of Mr. Davis receiving a lesser included offence would have been great. In light of the obvious prejudice suffered by Mr. Davis in that the jury was not made aware that the confessions conflicted with each other and conflicted with the physical evidence at trial, the jury was unable to evaluate the extreme high level of intoxication which prevented Mr. Davis from forming the requisite intent. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Eddie Wayne Davis' rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2003.

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I hereby certify that a true copy of the foregoing Reply Brief, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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