IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-803

STATE OF FLORIDA,

Appellant,

v.

HENRY A. DAVIS,

Appellee.

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

ANSWER BRIEF OF THE APPELLEE AND INITIAL BRIEF OF THE CROSS-APPELLANT

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ANSWER BRIEF

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CROSS-APPEAL

ARGUMENT I: The circuit erred in finding that Mr. Davis was not deprived of the effective assistance of counsel at the guilt phase, where counsel failed to investigate and present available evidence that Reginald Shepard killed Joyce Ezell, failed to impeach a critical state witness, and failed to suppress a prejudicial photo-pack identification.

ARGUMENT II: The circuit erred in finding that Mr. Davis was not deprived of the effective assistance of counsel at the penalty phase, where counsel did not challenge the application of the heinous, atrocious, or cruel aggravator or present available evidence that Henry Davis did not kill the victim, establishing the mitigating factors that Henry acted under extreme duress or the substantial domination of another person, and Henry was an accomplice in the offense and his participation was relatively minor. § 921.141(6)(d)(e) Fla. Stat. (1987).

ARGUMENT III: Newly discovered evidence establishes that Henry Davis is innocent of first degree murder, and the circuit court erred in holding that the evidence would not be admissible in a new trial.

ARGUMENT IV: Counsel's failure to preserve prosecutorial misconduct for appellate review was ineffective assistance of counsel, and the circuit court erred in holding that the claim was procedurally barred.

ARGUMENT V: The circuit court erred in holding that many constitutional claims were procedurally barred, when the substantive claim was counsel's failure to challenge the constitutional claim.

ARGUMENT VI: The cumulative effect of the errors that occurred during Mr.

Davis' trial violated his constitutional rights to a fair trial.

ANSWER BRIEF

ARGUMENT I

THE CIRCUIT COURT DID NOT ABUSE IT'S DISCRETION IN DETERMINING THAT COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MENTAL MITIGATION AT MR. DAVIS' PENALTY PHASE WAS INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED MR. DAVIS' RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Standard of Review.

In deciding ineffective assistance of counsel claims, this Court reviews legal questions de novo and gives great discretion to the circuit court's findings of fact and credibility determinations.

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. This requires an independent review of the trial court's legal conclusions, **while giving deference to the trial court's factual findings**.

Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted)(emphasis added).

> So long as its decisions are supported by competent

> substantial evidence, **this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.**

Porter v. State, 788 So.2d 917, 923 (Fla.2001)(emphasis added).

2. The Circuit Court's Findings of Fact and Credibility Determinations.

> Brawley noted he favors a "less is more" approach. A penalty phase in a death penalty case is not the time for a "less is more" strategy. This was not a case where there were and overwhelming number of aggravators versus scant mitigation. The only aggravators were HAC and in the course of a burglary. Every single bit of mitigation offered may have had a substantial effect on the jury's recommendation or the trial judge's sentence. Brawley failed to properly investigate and present this available mitigation evidence.

(PCRV7 1110).

A. Counsel's failure to adequately investigate and present evidence of Henry Davis' intellect and school performance during the penalty phase was deficient performance, and the prejudice is Henry Davis' death sentence.

The circuit court found that "Brawley failed to adequately investigate and present evidence concerning Davis' intellect and school performance." (PCRV7 1115). This factual finding is supported by competent and substantial evidence.

Counsel did not even attempt to obtain Henry's school records, though it was standard practice in capital defense (PCRV6 925, V7 1026). This prejudiced Henry Davis because the prosecutor was able to argue that Henry's borderline I.Q. was not mitigation because Henry graduated from high school with a regular diploma (P.R. V. 8, 1557).

Had counsel investigated and obtained Henry's school records (Defense Exhibit 4, stipulated into evidence without objection PCRV5 736), counsel could have refuted that argument. Henry did manage to receive a regular high school diploma, however, it took years of special education to get Henry that diploma. Henry's grades were poor. Henry spent ten years in classes in the specific learning disabilities program and repeated the eighth grade. In 1979, the Polk County public school system evaluated Henry and determined that he was in the borderline range of intelligence and functioned three to four years below his grade level. In 1982, the Polk County public school system reevaluated Henry and determined his academic achievement in all areas was two to seven years below his grade level. Though Henry was eighteen years old at the time of that evaluation, he functioned intellectually as an average fourteen year old. That report also noted that the district's earliest records show Henry's school performance was below average. Henry received speech therapy for two years and help for specific learning

disabilities continuously from 1973 (Defense Exhibit 4).

Henry graduated from high school with a regular diploma, but only with the help he received during ten years of special education. Henry certainly was not an average high school graduate. The circuit court did not abuse its discretion in holding that counsel's failure to present this evidence was ineffective assistance.

B. Counsel failed to make genuine attempts to contact Henry Davis' extended family, former friends, and former neighbors, all of whom could have offered crucial mitigating evidence. This failure was deficient performance and the resulting prejudice is Henry Davis' death sentence.

The circuit court found that counsel "made little or no efforts to contact Davis' family, friends, teachers for mitigation purposes" (PCRV7 1115). This finding is supported by competent and substantial evidence.

At the evidentiary hearing, counsel testified his penalty phase strategy was:

> Well the family members could talk about the head injury, the fall from the tree, which would tie in with Dr. Dee and Dr. McClane. The family members who are nice people, attractive people, they could humanize Henry. Since he hadn't taken the stand, I needed the jury to have some link with the humanness, the people, that were his people and cared about him. And, you know, they could talk about Henry as a human, as a person, and they did.

(PCRV7 1025).

To prepare to "humanize" Henry to the jury, **counsel did not** talk to Henry's

coaches, **counsel did not** talk to Henry's friends, **counsel did not** talk to the majority of Henry's family, and **counsel did not** talk to Henry's neighbors or visit Henry's neighborhood (PCRV6 897, V7 1032). Rather, counsel talked only to people associated with the trial, "like Bibby [a state witness] and his sister or sisters, I may have talked to both of them, and people that called and came to the trial that I met at different times" (PCRV7 1032).

To prepare his "humanizing" witnesses, counsel subpoenaed Henry's mother and sister (PCRV6 986).

> Q. Okay. And did Mr. Brawley talk to you about the kind of things he was going to ask you two when he called you up to the witness stand?
>
> A. No, he didn't.
>
> Q. He just called you up there and said, surprise, surprise, I'm going to ask you some questions, go on up there and see what happens?
>
> A. I guess he did.

(PCRV6 898).

Counsel did not ask Henry's mother and sister preparatory questions to elicit mitigating information about Henry's childhood and family relationships (PCRV6 889, 986-87). Rather, counsel elicited testimony that Henry fell out of a tree and was hospitalized, Henry had a normal childhood, and his mother thinks he is a

good boy (P.R. V.8 1299-1308).

Had counsel contacted Henry's friends, coaches, and family, he could have presented the following mitigating evidence.

Ron Kingry, Henry's track coach, testified that Henry was "mild mannered and easygoing" and never caused problems (PCRV4 621-22). Kingry was surprised to hear that Henry was charged with this crime because "from what I knew of him through track and field, it didn't seem to fit" (PCRV4 622). He also noted that Henry was not a bright kid (PCRV4 624). Nathan Menton, who also coached Henry in track, testified that Henry was "a very honorable and behaviorable [sic] student when he was in high school. We did not have any problems with Henry." (PCRV6 867).

Johnny Hamilton grew up with Henry (PCRV5 739). Henry was a nice, well-liked person who helped Mr. Hamilton's mother with chores (PCRV5 741). Dwayne Bell also grew up with Henry and described him as a "decent guy, got along with everybody" (PCRV5 907). He was surprised that Henry was convicted of this crime because "the person I knew, you know, didn't fit to convict him like that" (PCRV5 907).

Andrew Malveaux knew Henry Davis since Henry was six years old (PCRV5 811). They lived in the same neighborhood, and Henry worked with and for Mr.

Malveaux (PCRV5 811). Mr. Malveaux described Henry:

> He's a hard worker, a very good worker. Type young man that was blessed with a body in good physical condition, just a hard worker with a good attitude. . . he was easy to get along with. He did whatever I asked him to do. He never grumbled. He never complained. He's very easy to get along with, kept a smile on his face.

(PCRV5 811).

Henry's aunt, Vaunita Moore, described Henry as a "very nice sweet loving person" (PCRV5 818).

> Very nice person. He was – he's the type of person that if you need anything or he would take his shirt off his back and give it to you. That's just how he was, sweet as he can be.

(PCRV5 814-15).

***

> Every time I wanted him to do something for me he came and did it, no problem. Over at the house, move my furniture around. I call him, if he's available he will come and do it. He never said no. He was always just a good person.

(PCRV5 815).

Henry's sister, Katrice Hadley, described Henry:

> A humble person. He's very easygoing. I always say that he reminds me of my mom. A kind of – like a person that would give you anything. Just a good

person.

(PCRV5 822).

Mrs. Hadley testified that Henry saw and heard his stepfather beat his mother (PCRV5 821). Henry's stepfather treated Henry different than his sisters, he was "very mean" to Henry (PCRV5 822).

Henry's sister, Michelle Odom [Rochelle Oldham], testified that Henry is a "[v]ery good hearted, good person" (PCRV6 870). She also testified that it was easy to talk Henry into doing things (PCRV6 870). Henry was severely traumatized when his cousin, Jonathan Robinson, was murdered in his presence (PCRV6 870, 874).

Barbara Stoudemire, Henry's mother, testified that Henry's stepfather, James Stoudemire, treated Henry terribly. Stoudemire forced Henry to miss school and work long days in groves and on lawns beginning when Henry was only nine years old (PCRV6 884-87). Stoudemire took the money Henry made while working but did not use it to support the family (PCRV6 894-95). Stoudemire beat Barbara and threatened to kill her (PCRV6 887-88).

Henry's sister, Cheryl Epps, testified that Stoudemire made Henry work in the groves when Henry was only ten years old (PCRV6 955). He worked almost every day from six in the morning to four or five in the afternoon (PCRV6 955).

Stoudemire also made Henry's older sisters work in the groves, but he forced Henry to work harder than his sisters and did not give him breaks (PCRV6 956). When Henry was twelve, Stoudemire forced Henry to do yard work for him just about every day, all day (PCRV6 956-57). Henry's sisters did not do the yard work (PCRV6 956). Stoudemire treated Henry differently, worse, than he treated his sisters (PCRV6 957-58). Stoudemire lied to Barbara, trying to force Henry out of their house (PCRV6 958-59).

Stoudemire also severely physically abused Barbara. He hit her with his fists, once knocking out all of her teeth, gave her black eyes, and kicked her (PCRV6 959). He often threatened to kill Barbara, using a gun if Barbara or the kids did not hide it from him (PCRV6 960). Henry saw these fights (PCRV6 960-61). Henry was severely traumatized when his cousin was killed in front of him, and he blamed himself for running when his cousin was shot (PCRV6 963, 970).

Alma Davis testified that Stoudemire "used [Henry] bad", making him work in the groves as soon as he married Barbara (PCRV6 976). When working in the groves, Stoudemire treated Henry poorly and demanded more of Henry than he did of Henry's older sisters.

> He demanded quite more, more of Henry. Sweet – Henry – I call my brother Sweet, and he, he would make him work for hours and hours, hard and demanding. And like

> when we got to go to the grove with him and if we play around or we decide we tired and don't want to do it, he kind of let us get by. But Sweet he will come down and hit him up side the head or demand, you going to do this, and sorry, you know, just saw all kind of bad things to him. Because you're a boy and you're supposed to be able to do this, and you better do this and you better work, and you don't eat and all that kind of stuff.

(PCRV6 977, 990). Stoudemire forced Henry to miss school to work or forced him to work after school (PCRV6 977). Stoudemire took this money as well as the social security money the children received after their father died, but, despite the extra income, they had a low standard of living (PCRV6 990-91). Stoudemire beat Henry (PCRV6 991).

Stoudemire was a violent alcoholic (PCRV6 978). Every week, Henry saw Stoudemire abuse their mother:

> [H]e hit her with his fist, black her eyes, bust her lip. He ask something to her – like we came home one day and she was laying on the floor, she wouldn't walk, and she was crying. They were fighting. He really physically abused her, verbally abused her very bad. . . he used profanity and he would tell her he going to kill her and you guys stay with me and you better do this. He called her all kinds of bad names.

(PCRV6 979).

Because counsel did not investigate, none of this "humanizing" evidence was presented.

C. Counsel's failure to present evidence and establish the statutory mitigating factor of age was deficient performance, and the resulting prejudice is Henry Davis' death sentence.

The circuit court found:

> It is clear from the record that Brawley never requested an age mitigator jury instruction. He never questioned any of the witnesses concerning Davis' mental and emotional maturity despite the fact that he had evidence that Davis had the mental maturity of a fourteen year old child.

(PCRV7 1114). This finding is supported by competent and substantial evidence.

Though counsel should have been aware that Henry did not have the mental and emotional maturity of an average twenty-two year old man and counsel knew that many psychologists and psychiatrists evaluated Henry Davis, counsel did not ask them about Henry Davis' mental maturity. Henry Davis was twenty-two years old at the time of the incident, but Dr. Dee diagnosed Henry Davis' mental maturity as that of a child fourteen and a half or fifteen years old (PCRV6 952). Additionally, school records show that when Henry was eighteen years old, he functioned intellectually as an average fourteen year old. Had counsel established Henry's mental age, that, combined with his young age at the time of the crime, would have required instructions on and established the statutory age mitigating factor. Fla. Stat. § 921.141(6)(g) (1987). Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); Echols v. State, 484 So.2d 568, 575 (Fla. 1988); Sims v. State, 681 So.2d

1112, 1117 (Fla. 1996); Campbell v. State, 679 So.2d 720, 726 (Fla. 1996).

D. Counsel's failure to investigate and present specific evidence of Henry Davis' brain damage and epilepsy was deficient performance. The resulting prejudice is Henry Davis' death sentence.

> The Court finds that Brawley failed to effectively investigate, present and argue for statutory and non-statutory mitigation evidence concerning Davis' alleged mental illness, brain damage and epilepsy. He failed to properly prepare his expert witnesses for their presentations in the penalty phase. He should have taken the deposition of Dr. Westby instead of just reviewing her report. He failed to voir dire Dr. Westby and neglected to object to her testimony concerning lack of brain damage. Brawley never made any effort to obtain available medical reports and test results which could have been given to his experts for proper review prior to their testimony, and he never considered securing an expert to interpret and explain the existing EEG or request additional, more sensitive medical tests.

(PCRV7 1112-13). This finding is supported by competent and substantial evidence.

Counsel did not investigate and present available *objective* physical evidence of Henry Davis' brain damage and epilepsy. While Henry Davis was at Florida State Hospital, he had an EEG which revealed abnormal results. This EEG was mentioned in one of the reports a state psychologist wrote during Mr. Davis' treatment. Counsel attempted to introduce through the state's witnesses the fact that an EEG had been done, but counsel could not do so because they were not

qualified.

> Q. Now. Mr. Aguero asked you if you had any evidence of brain damage and I believe you said that you did not. Was Mr. Davis examined by Dr. Fred Vroom at your institution on August 25, 1988?
>
> A. Yes.
>
> Q. OK. And Dr. Vroom is a medical doctor; is that correct?
>
> A. Yes.
>
> Q. Did Dr. Vroom administer an EEG to Dr. Davis?
>
> A. Yes, he did.
>
> Q. And for the jury's information, what is an EEG?
>
> A. Electrocardiogram, its when they hook the little electrodes to their head and get their brain waves.
>
> Q. What is the purpose of an EEG?
>
> A. To find—
>
> MR. AGUERO: Objection, the witness hasn't been qualified as a medical expert.
>
> THE COURT: Sustained.

(PRV. 8 1450). That witness, Westby, could not even explain Dr. Vroom's EEG findings of dysrythmia and encephalopathy, nor could she define each word. Yet,

without understanding the results of the EEG, an objective measurement of brain waives, Westby concluded that Henry Davis has no brain damage (PR. V. 8 1434-35).

In 1992, Dr. Pineiro, a neurologist qualified to interpret EEG results, was hired for the re-weighing proceedings. At the time of the examination, Dr. Pinero knew nothing about the crime of which Henry was convicted and conducted an MRI and a more sensitive EEG (R. V. 4 525, 527). Howard Dimmig, the lawyer who represented Henry during the re-weighing, testified that hiring Dr. Pinero was standard practice.

> It is the common practice that you obtain all possible medical records as well as other records for a client and that you follow up on any leads that are developed there. So this was just a standard practice in the Tenth Circuit at the time.

(PCRV6 925).

During the re-weighing proceedings, Dr. Pinero's testimony was proffered by deposition and made part of the record on appeal. On July 18, 2000, Judge Strickland entered an Order admitting that deposition into evidence for these postconviction proceedings.[1]

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[1]As with many documents filed before the evidentiary hearing, this stipulation was not made part of the record on appeal. In December, 2002, Mr. Davis filed a

The MRI results were normal, however, the EEG showed evidence of anterior temporal lobe dysrythemia and epileptogenic characteristics affecting the left hemisphere (R. V. 4 528). Based on his neurological examination and documented records, Dr. Pinero concluded that Henry Davis suffers from encephalopathy, which is epilepsy of the temporal lobe, his intelligence is low or borderline and possibly mildly retarded, and he has diminished cognitive abilities (R. V. 4 528). Henry Davis' EEG showed secondary generalizations of brief durations which did not result in seizures, but Dr. Pinero thinks Henry had both partial seizures and initial partial seizures with secondary generalization (R. V. 4 532).

Temporal lobe epilepsy is brain damage because it is a neuro-electrical malfunction (R. V. 4 530). Studies show that people who suffer from temporal lobe epilepsy tend to commit more violent acts because they lack impulse control and react to trivial provocations with excessive violence (R. V. 4 530-531). Temporal lobe epilepsy causes psychomotor seizures, during which the brain recreates memories or feelings of deja vu and include partial hallucinations of the auditory, olfactory, and visual senses (R. V. 4 532). The body convulses only

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motion to supplement the record, asking that this stipulation be made part of the record.

during long seizures. Seizures caused by the temporal lobe epilepsy may cause amnesia (R. V. 4 528-529). Lay people would observe Henry's seizures as blank pauses or stares, diminished blinking, gazes fixed in abnormal or inappropriate manners, and abnormal facial gestures (R. V. 4 532, 534). The great majority of seizures cause amnesia during the postical period (R. V. 4 534).

Henry Davis' temporal lobe epilepsy is corroborated by lay witness and other expert testimony. Barbara Stoudemire, Cheryl Epps, and Alma Davis testified that Henry has always had a bad memory and that, throughout his life, he had blank pauses and stares (PCRV6 888-89, 964, 981). Alma Davis and Dr. McClane testified that Henry confabulates, which is "usually because of brain damage or some temporary brain alteration with a chemical. . . unconsciously filling in the gaps of memory and believing what you're saying" (PCRV5 765).

At Henry Davis' penalty phase, counsel presented Dr. Dee and Dr. McClane to testify to mental health mitigation. Both experts were part of the court appointed team hired to evaluate Henry's competency to stand trial (PCRV5 787). At the time they testified during the penalty phase, Dr. McClane had worked only on competence issues and not mitigation (PCRV5 787). The reports the experts completed and submitted concerned competency, and not mitigation. Without providing further mitigating information, counsel called both experts to testify at

Henry's penalty phase (PCRV5 792). Both experts testified at the evidentiary hearing that, had counsel given them Dr. Vroom's report which showed an abnormal EEG, they would have recommended that counsel get another, more sensitive, EEG to document Henry Davis' brain damage and seizure disorder (PCRV5 797, 835-36). The EEGs are conclusive evidence of brain damage; "the most objective evidence that I know of about this man that unequivocally demonstrate some kind of brain abnormality"; "further support and the most objective support obtainable for brain damage in this man anyway" (PCRV5 779, 796, 834). This conclusive and objective evidence was available through Dr. Vroom's report (PCRV5 847).

The EEGs objectively prove that Henry Davis has brain damage. This objective evidence conclusively refutes Westby's assertions that the EEG results which Dr. Vroom found consistent with a seizure disorder were a mistake .

> Q. And didn't Dr. Vroom say, and you quoted in the report, that the results of his EEG do collaborate with his, I guess the patient's—
>
> A. That's why I quoted it in the report because Dr. Vroom said it, I didn't.
>
> Q. OK. Dr. Vroom being a medical doctor–
>
> A. Uh-huh.

Q. –said it collaborated with a seizure disorder.

A. Uh-huh, which he had false information on to begin with.

(PR V 8 1453).

Q. And Dr. Vroom's examination showed that the examination was consistent with or at least was–collaborates with this description of the seizure disorder.

A. Which was bad information from the beginning.

Q. Well, maybe so, maybe not.

(PR V 81454). The EEGs also refute state witness Dr. Zwingleberg's statement that "just because somebody has a seizure disorder doesn't mean that that form of brain damage is going to result in them hurting somebody or that's a mitigating factor." (PR V 8 1487).

The EEGs support Dr. Dee's and Dr. McClane's opinions that both statutory mental health mitigators apply and nonstatutory mitigation of brain damage and epilepsy. Dr. Pinero testified that, when compared to the general population, Henry Davis' ability to conform his conduct to the requirements of the law was impaired because epilepsy diminishes Henry's capacity to control his impulses and to modulate violent tendencies (R. V. 4 536). Henry's brain damage, borderline intelligence, lifetime history of epilepsy, and other brain function abnormalities

increased Henry's impulsivity and impaired his ability to conform his conduct to the requirements of the law (R. V. 4 535-536). The stress of the incident probably triggered a seizure, and the postical stage caused Henry's confusion and amnesia (R. V. 4 535). Henry Davis has, "diminished responsibility and that he has organic, pathological, well-documented problems that could result in murder in an unexplained nature as this one." (R. V. 4 537). Had counsel investigated the abnormal results of Dr. Vroom's EEG, he could have presented this testimony to the judge and jury that sentenced Henry Davis to death.

E. Counsel's failure to effectively voir dire and object to Dr. Westby's qualifications as an expert witness in a penalty phase proceeding before she testified was deficient performance, and the prejudice is Henry Davis' death sentence.

> The Court finds that Brawley failed to effectively investigate, present and argue for statutory and non-statutory mitigation evidence concerning Davis' alleged mental illness, brain damage and epilepsy. . . . He should have taken the deposition of Dr. Westby instead of just reviewing her report. He failed to voir dire Dr. Westby and neglected to object to her testimony concerning lack of brain damage.

(PCRV7 1112-13). This finding is supported by competent and substantial evidence.

During the penalty phase, the state presented Dr. Westby, who testified that Henry Davis did not have brain damage (PR. V 8 1434, 1435).

Q. **Did any of those tests indicate to you that Mr. Davis had any sort of brain damage?**

A. **No**, we never could–he would show–let me see, he'd show a deficit on like word finding or visual naming, when you'd say what's–what's this or what's this or what's this you know. The tests that I think Dr. Dee was talking about this morning where he was below one percent or something, we gave him that test and he was fine on it, And then he comes back and he still can't do it for Dr. Dee. And you just don't–you don't see that kind of variability, if they've got a deficit there and it just doesn't come and go.

(PR. V. 8 1435). Westby is a psychologist and not a neuropsychologist. Counsel did not elicit this on voir dire and ask the court to limit her testimony accordingly.

Dr. Dee, who was qualified both at trial and at the evidentiary hearing as a neuropsychologist, testified that Dr. Westby was not qualified to give neuropsychological opinions.

Q. And Mr. Aguero mentioned that Dr. Westby did not hold herself out as a neuropsychologist. Did she render opinions about no evidence of brain damage based on neuropsychology testing?

A. Yes, she did. And she discounted tests that other people had given. It sounds like a neuropsychological opinion, sounds like it to me.

Q. And does one have to be trained as a neuropsychologist to have that training to be able to render those opinions based on

neuropsychology testing?

A. Yes.

(PCRV6 862). (see also V5 839-41, V6 856).

Because counsel did not voir dire Westby before she testified, the court accepted her as an expert without limiting the scope of her testimony (PR.V. 8 1429). She was then allowed to testify that, in her unqualified opinion, Henry was aggressive and threatened other patients, he had no significant head injuries and suffered no brain damage, he was manipulating the tests to malinger, and that there was basically nothing wrong with him (PR. V. 8 1438-39). Westby concluded that Henry Davis was malingering brain damage because Henry's head injuries had not "require[ed] hospitalization or coma or anything like that" and Henry's companions in the state hospital were "higher functioning"-- Westby's "yard test" (PR. V 8 1434-35, 1436, 1440).

After Westby's damaging testimony, counsel did not recall Dr. Dee to establish that Westby's testimony that Henry does not have brain damage was not competent and substantial. Had counsel called Dr. Dee in rebuttal, Dr. Dee would have testified, not only that Westby was not competent to give neuropsycological opinions regarding brain damage, but that Henry did not malinger on his competent neuropsychological tests, her "yard test" is not a test that measures organic brain

damage, and that Henry has organic brain damage.

> Q. Now, Dr. Westby talked about him malingering. How do you know he wasn't malingering on the neuropsychological testing?
>
> A. Well, something that's always interested me about this discussion of malingering, is that people seem to assume that if a person is malingering on one thing, they malinger everything. My impression is, you know, my best assessment of Henry Davis is that there was some malingering of the psychiatric condition. That is malingering in the sense that he probably represented it being a bit worse than it actually was. But I think it was still there. It doesn't mean it isn't there. And his understanding of brain function was so primitive that I doubt he's sophisticated enough to have known what to do to present himself as this kind of brain syndrome. It just seems unreasonable to suppose that that might be true. And certainly when I saw him, I didn't feel he was malingering whenever I evaluated him. Now, he might have done that with some other people. But when I was testing him I certainly didn't feel – he seemed to be working very earnestly. This is not like a personality test is what I'm trying to say. Neuropsychological testing is one on one and you have a chance to observe the person, how hard they are working, whether or not they seem to be giving adequate effort and attention and so forth. He certainly did seem to be to me. I think the tests were reliable which is the best one I could do.

(PCRV5 844-45).

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It's also commonplace that patients in all inpatient settings generally seem more disturbed when they speak to their doctors in their offices than they do on the ward or anyplace else. It's [sic.] very common observation. We don't quite understand why that's true. But they report a lot more symptoms when they talk to their doctors than they do or is reported about them when they are on the ward or in the observation area.

(PCRV6 861-62).

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Q. Dr. Westby also talked about a yard test that she determined that maybe Henry was malingering or didn't have signs of brain damage. Is that a recognized test?

A. No. I think it's almost sort of a humorist way of talking when they call it the yard test which kind of the things we observe, I guess, by watching them in the yard, you know, compared to the way they look in the office. Wasn't really a test.

Q. If Mr. Brawley had called you as a rebuttal, would you have been able to offer rebuttal to her yard test?

A. Yes. The characterizing of any kind of scientifically – with respect to observation, yeah. It's an acecdotal [sic] observation is all it is.

Q. Based on your evaluations and your testing, do you have an opinion to a reasonable degree of neuropsychological certainty, that Henry Davis suffers from brain damage?

A. Yes. My opinion is what it was back then. I do think he does and shows long evidence of it throughout most of his lifetime.

(PCRV5 841).

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Q. But she didn't use the yard test to say based on the yard test he has organic brain damage or he does not have organic brain damage or he is classified as organic brain syndrome. That wasn't the context in which it was offered, was it?

A. Well my best characterization of that would be, and I may be being unfair so, please, correct me if you think this is incorrect. I just read is [sic] it again, you know, after ten years. These people said this guy was brain – we watched and see. We got – we looked at the way he behaved and that was a bunch of bull, basically that was the effect of her testimony.

(PCRV5 857-58).

3. The Law.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. In Strickland, the United States

Supreme Court held that reasonable attorney performance requires counsel to conduct a *reasonable* investigation. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. This Court too has recognized that clearly defined obligation. "[W]e have recognized that an attorney has a strict duty to conduct a *reasonable* investigation of a defendant's background for possible mitigating evidence." State v. Reichmann, 777 So.2d 342, 350 (Fla.2000)(emphasis added). In a capital case penalty phase, the United States Supreme Court has defined counsel's obligation to conduct a "reasonable" investigation as an "obligation to conduct a **thorough** investigation of the defendant's background" for penalty phase mitigation. Williams v. Taylor, 529 U.S. 362, 376-78 (2000).

Appellant unscrupulously urges this Court to apply an incorrect standard in determining prejudice: "The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S. Ct. 838 (1993)." (Appellant's brief at 76). The Virginia Supreme Court used this standard to overturn a grant of habeas relief by a

Virginia trial court and was condemned by the United States Supreme Court. Williams v. Taylor, 529 U.S. 362, 391-94 (2000). "[T]he Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness **probably** affected the outcome of the proceeding." Id. at 393 (emphasis added). "Unlike that Virginia Supreme Court, the state trial judge omitted any reference to *Lockhart* and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective assistance of counsel claims. . . .The trial judge analyzed the ineffective assistance claim under the correct standard; the Virginia Supreme Court did not." Id. at 394-95.

As this Court has noted, the correct standard for determining prejudice **is** outcome determinative. Regarding the prejudice prong, this Court held:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. **The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.**

Stephens, 748 So.2d at 1033-34 (emphasis added) quoting Strickland, 466 U.S. at 688. Prejudice is a cumulative analysis. "[T]he entire postconviction record,

viewed as a whole and cumulative of mitigation evidence presented originally, raise[ed] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case" Strickland, 466 U.S. at 690. The circuit court considered all the circumstances in granting penalty phase relief. "The Court read the entire trial transcript, reviewed all depositions, motions and orders in preparation for the evidentiary hearing in this case. The evidentiary hearing took three days and involved over thirty witnesses as well as numerous exhibits." (PCRV7 1100-1). After three days of testimony, trial court made the determination from its "superior vantage point in assessing the credibility of witnesses and in making findings of fact" that counsel was deficient:

> Brawley failed to adequately investigate and present evidence concerning Davis' intellect and school performance. He made little or no efforts to contact Davis' family, friends, teachers for mitigation purposes. Brawley made no attempt to develop a mental age mitigator. He did not prepare his mitigation witnesses for their testimony. Mitigation investigation by Brawley was minimal to say the least.

(PCRV7 1115). Porter v. State, 788 So.2d 917, 923 (Fla. 2001). The circuit

court also determined that, due to counsel's deficient performance, "[C]onfidence in the outcome is undermined." (PCRV7 1110, 1113, 1114, 1115-16). That determination is supported by this Court's case law, and is materially indistinguishable from cases in which this Court granted or upheld penalty phase relief.

In Mitchell v. State, 595 So.2d 938 (Fla. 1992), this Court upheld a finding of ineffective assistance of penalty phase counsel where counsel had the defendant examined by two mental health experts but did not make arrangements for them to testify. In this case, because he was found incompetent for trial, Henry Davis was evaluated by three court appointed mental health professionals as well as a psychologist from Florida state hospital (PCRV5 787). Counsel presented two of them, Dr. Dee and Dr. McClane, to testify to mental health mitigation. At the time they testified during the penalty phase, Dr. McClane had worked only on competence issues and not mitigation (PCRV5 787). The reports the experts completed and submitted concerned competency, and not mitigation. Without providing further mitigating information, counsel called both experts to testify at Henry's penalty phase (PCRV5 792).

In Hildwin v. Dugger, 654 So.2d 107, 110 (Fla.1995), this Court found that Hildwin was prejudiced by ineffective assistance of penalty phase counsel. "We

recognize that Hildwin's trial counsel did present some evidence in mitigation at sentencing.. . .The defense called five lay witnesses. . . .The testimony of these witnesses was quite limited." Hildwin's post conviction proceedings revealed that two mental health experts found both statutory mental health mitigators and four nonstatutory mitigators existed: childhood abuse and neglect, history of substance abuse, signs of organic brain damage, and Hildwin performs well in a structured environment such as prison. Id. In this case, post conviction proceedings revealed objective evidence existed that supports both statutory mental health mitigators, evidence to support the statutory mitigator of age, and substantial nonstatutory mitigation: childhood abuse and neglect, organic brain damage, documentation of low intellect and learning problems, hard and diligent work ethic, and that Henry Davis is congenial and helpful man.

In Reichmann v. State, 777 So.2d at 350, this Court upheld the circuit court's finding that Reichmann's failure to investigate and present mitigating evidence at the penalty phase was ineffective assistance of counsel. This Court noted "**defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him**." Id. (emphasis added). At Reichmann's penalty phase, "defense counsel presented no evidence to counter the State's claims of aggravation or in support of mitigation."

Id. at 348. Likewise, in Mr. Davis' case, "defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him." Id. Defense counsel presented no evidence to counter the State's claims of aggravation and very little in support of mitigation.

In Ragsdale v. State, 798 So.2d 713 (Fla. 2001), this Court held that counsel's failure to investigate and present available mitigating evidence was ineffective assistance. "Indeed the record reflects that counsel's entire investigation consisted of a few calls made by his wife to Ragsdale's family members. Counsel did not know who his wife contacted or the content of the conversations between his wife and the individuals contacted." Ragsdale, 798 So.2d at 719. "[S]ince counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed decision not to present mitigation witnesses." Ragsdale, 798 So.2d at 720. Likewise, "Brawley did little or no investigation to uncover additional available mitigation evidence." (PCRV7 1109). "Brawley could, through reasonable diligence, have discovered those mitigation witnesses Davis presented at the evidentiary hearing." (PCRV7 1109-10). "[S]ince counsel did not conduct a reasonable investigation, he was not informed as to the extent of the [nonstatutory mitigation available] and thus he could not have made an informed decision not to

present mitigation witnesses." Ragsdale, 798 So.2d at 720.

As well, the United States Supreme Court granted relief in a similar case. In Williams v. Taylor, Williams was convicted of first degree murder and received a unanimous death recommendation during his penalty phase. Id. at 368-70. Williams had been convicted of several prior violent felonies, including an assault that left a woman in a "vegetative state" with no prognosis of recovery. Id. at 368. During the penalty phase, counsel presented "Williams' mother, two neighbors and a taped statement by a psychiatrist". Id. "The three witnesses briefly described Williams as a "nice boy" and not a violent person." Id. Habeas proceedings revealed that substantial background and mental health mitigation was available but Williams' counsel did not investigate it. The United States Supreme Court noted that, "not all of the additional evidence was favorable to Williams" but that "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." Id. at 398. Likewise, substantial background and objective evidence of mental health mitigation existed in this case, but counsel did not investigate it. Counsel's "failure to introduce the comparatively voluminous amount of evidence that did speak in [Henry Davis'] favor was not justified by a tactical decision to focus on [the fact that Henry Davis fell out of a tree]. Id. at

398.

Counsel was obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 685 (1984). Through his failure to investigate, prepare experts, and even hire experts, Henry Davis' counsel failed to provide a reliable adversarial testing process, and was therefore, ineffective. Though his strategy was to "humanize" Henry, counsel implemented it by talking only to people associated with the trial, "like Bibby [a state witness] and his sister or sisters, I may have talked to both of them, and people that called and came to the trial that I met at different times" (PCRV6 897, V7 1032). The only preparation counsel did for lay witness testimony was issuing two subpoenas. Though it was standard practice to obtain all possible medical records as well as other records for a client and follow up any leads, counsel merely relied on facts revealed during competency evaluations for mitigation. Counsel knew that the competency experts disagreed that Henry Davis had brain damage and epilepsy, but absolutely failed to follow up a lead which would conclusively establish both illnesses and support the statutory mental health mitigators (PCRV6 925). Counsel did not investigate and present evidence which would have established the statutory age mitigator. Counsel did not obtain school records which evidence Henry's learning disabilities and low intellect.

Had counsel presented mitigating evidence of Henry's childhood abuse, learning disabilities, low mental age, brain damage, and epilepsy, with testimony that Henry was a hard worker and a kind and generous man who worked to support his family from the time he was a young boy, there is "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams v. Taylor, 529 U.S. 362, 398-399 (2000). The circuit court found that "confidence in the outcome is undermined." Mr. Davis respectfully asks this Court to uphold that finding.

CROSS-APPEAL

ARGUMENT I

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. DAVIS WAS NOT DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

In deciding ineffective assistance of counsel claims, this Court reviews legal

questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice.

A. Counsel's failure to investigate Henry Davis' assertions of innocence and that Reginald Shepard and John Johnson killed the victim was deficient performance, and Henry Davis' conviction is the resulting prejudice.

From the time he was arrested, Henry Davis maintained that he did not kill Joyce Ezell. After attaining competency, Henry Davis told three of the four doctors monitoring his mental status that Reginald Shepard and John Johnson were at the victim's house when she was killed. Even so, counsel absolutely failed to investigate and present available evidence that Reginald Shepard killed Joyce Ezell.

The morning Joyce Ezell was killed, Lenvent Jones saw Henry Davis, John Johnson, and Reginald Shepard in Johnson's car in Joyce Ezell's driveway (PCRV5 725-26). That evening, Mr. Jones saw Shepard's brother on Lincoln Avenue (PCRV5 727, 729-30). Shepard's brother saw Shepard with blood all over

his clothes and assumed Shepard had been fighting (PCRV5 727-28). Counsel was aware of Mr. Jones' deposition, but failed to investigate it (PCRV7 1055-56).

About the time Joyce Ezell was killed, Reginald Shepard approached Levonsky Riley and offered to pay Mr. Riley $50 to drive him to an apartment complex called Sunrise (PCRV4 658-59). Mr. Riley drove Shepard to Sunrise (PCRV4 659). Shepard entered an apartment and returned to the car carrying a pair of jeans, shoes, and a t-shirt (PCRV4 660). The shoes were soaked with blood (PCRV4 661, 665, 673). Shepard explained that he cut his foot, however Mr. Riley noticed that he did not limp (PCRV4 661, 673). From Sunrise, Mr. Riley drove Shepard to a grove near Shepard's mother's house (PCRV4 662). Shepard directed Mr. Riley to drive into the grove. He exited the car with his bundle of bloody shoes and clothes, directed Mr. Riley to turn the car around, and returned to the car without his bloody bundle (PCRV4 662). They drove back to Lake Wales where Shepard bought beer and crack (PCRV4 671).

At the evidentiary hearing, counsel testified he told his investigator "to see what he could pull out of that and follow up on it" and "[m]y recollection is that he got back to me and said he couldn't get any corroboration or anything that I thought I could use at trial." (PCRV7 1029). Counsel could not remember what, if anything, this investigator did or did not do. Mr. Riley testified that neither counsel

nor his investigator asked him to take them out to look for the bloody clothes (PCRV4 664-66).

Alma Davis, Henry's sister, was married to Reginald Shepard's brother, William Shepard, when Joyce Ezell was murdered (PCRV6 982). When Henry was arrested, William Shepard went to find Reginald Shepard because William and Alma had heard that Reginald Shepard killed Joyce Ezell and that he was hiding in a grove (PCRV6 982, 1001). William Shepard found Reginald and brought him to Alma and William's house (PCRV6 982). Reginald Shepard was filthy, covered in sand and dirt, had spider webs in his hair, and smelled terrible (PCRV6 983). Reginald denied killing Joyce Ezell and said that he was just hiding out in the grove (PCRV6 982-83).

Alma was devastated, and Reginald Shepard consoled her:

> Red said – when he was telling me Sweet didn't do it, Am, I can assure you, trust me, Sweet didn't do it, Sweet probably did something if he was there, like that, if he was there they probably pushed him on in the car and pushed him away from there, but you know Sweet wouldn't do nothing like that.

(PCRV6 1011).

Counsel did not investigate the knife found at the crime scene. Had counsel investigated, counsel would have discovered that the alleged murder weapon

belonged to Reginald Shepard, who always carried a knife (PCRV3 415, V4 679-80, 742). Jerry Barnes identified the knife found at the victim's house as Reginald Shepard's knife.

> Yes. This is the knife. It's very much similar to the knife I described, brown with a little silvery kind of like that little silver stuff on each end.
>
> The knife that Red [Reginald Shepard] used to carry – Red always peeled his oranges. He peeled his grapefruits. He always used to do it because he had long fingernails. We wore the gloves because of these types of things. . . Red always kept a knife.

(PCRV4 679-80). John Johnson and Johnny Hamilton also testified that Reginald Shepard carried a knife (PCRV3 415, V4 742). With investigation, counsel also could have discovered that Reginald Shepard also owned a pair of gloves (PCRV4 678).

Counsel offered no real reason for his failure to investigate and present evidence that would create a reasonable doubt in this case.

> Q. So I mean, you already had him at the scene, wouldn't it be better to also place possibly the real killer at the scene also so that the jury would know that?
>
> A. The way I try a case is kind of a minimalist approach, and I believe that less is more. For some reason it was my decision then that this was not testimony that was going to help me. And I

> don't remember why I made that decision, but that's the way I try a case.

(PCRV7 1061).

The circuit court denied this claim, holding:

> Brawley's theory of defense was not to deny Davis' presence at the scene of the crime. As Brawley testified, he tried to convince the jury that Davis may have been present but someone else had committed the murder. The trial record reveals that Brawley pursued his theory both in cross-examinations of the state's witnesses and in final argument. Brawley's approach was a reasonable and informed strategic decision. Brawley's representation cannot be said to be ineffective in this regard.

(PCRV7 1106).

This conclusion is not supported by law. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Counsel did not investigate Reginald Shepard's bloody clothes and shoes or the fact that Reginald owned the knife found at the scene-or a knife identical to it, both of which would have corroborated Mr. Jones', Mr. Riley's, and Mrs Shepard's [Davis'] stories. None of this evidence was inconsistent with counsel's theory of the case; all of the evidence supports it. No reasonable professional judgment supports counsel's failure to investigate this evidence and

therefore, it was deficient performance. Counsel's failure to investigate and present this evidence prejudiced Henry Davis. Had counsel investigated and presented this evidence, there is a reasonable probability that at least one juror might have found a reasonable doubt that Henry Davis is guilty of first degree murder.

B. Counsel's failure to impeach David Roberts' testimony was deficient performance, and the resulting prejudice is Henry Davis' conviction.

At trial, state witness David Roberts testified that he saw Henry the night after the murder and Henry had scratches "starting to scab up with blood, hard blood on them"around his eyes (PR. V. 5, 977). Roberts testified that Henry told him an old lady scratched him, "they didn't intend to do it" and he "don't know why it happened", and that Henry pointed out where he took the victim's Cadillac (PR. V. 5, 977-79).

With very little effort, counsel could have impeached this evidence. Several other people who saw Henry Davis after Mrs. Ezell was murdered could have testified he was not scratched. Johnny Hamilton saw Henry Davis at the Sunrise apartments the day Mrs. Ezell was killed. Mr. Hamilton was close to Henry and saw no scratches (PCRV5 740). Charles Riley, one of the officers who arrested Henry at his mother's house and questioned Henry Davis for 20 minutes to an hour in a lighted room at the Lake Wales Jail, noticed nothing unusual (PCRV5 745).

Mr. Riley testified for the state at the trial. Edward Hendrix, the lead investigator on this case, who also arrested Henry at his mother's house, brought him to the Lake Wales Jail, questioned him, and personally charged him, recalled that Henry's face was not scratched (PCRV5 749). Mr. Hendrix also testified for the state at the trial. Katrice Hadley, Michelle Odom [Rochelle Oldham], Cheryl Epps, and Alma Davis, Henry's sisters, saw Henry the day Mrs. Ezell was killed or the night Henry was arrested and did not see any scratches (PCRV5 823;V6 869, 962, 984). Barbara Stoudemire, Henry's mother, saw Henry the night he was arrested (PCRV6 883). Henry's face was not scratched (PCRV6 883). Dwayne Bell also saw Henry the night he was arrested and noticed no scratches (PCRV6 908).

Counsel did not even need to investigate this information. Ms. Davis attended Henry's trial and when David Roberts testified that he saw Henry with scratches and dried blood on his face, she wrote counsel a note, telling him that she saw Henry that day and he had no scratches (PCRV6 984).

> Q. When did you learn that David Roberts claimed to have seen Henry with scratches?
>
> A. In the trial, while we were in the trial.
>
> Q. Did that surprise you?
>
> A. Yeah. I heard him say it while we was sitting in the trial that he had the scratches.

Q. Did you do anything?

A. Oh yeah. I, I, I wrote Dan Brawley a note. Because the stuff that he was saying and I knew that I had been with Sweet that day and I didn't see all the scratches and dried blood that he was saying, so I wrote Dan Brawley a note and I asked him, because I was sitting behind him, and I asked him to ask why nobody else saw these scratches, and why in – when he was arrested none of the pictures had the scratches on him.

Because at the time Sweet was lighter than what he is now, and told – and I brought it out to Dan Brawley that if he had all these scratches we would have seen them. And Dan Brawley told me don't worry about it, we just going to go with what we got.

(PCRV6 984-85).

Additionally, Henry Davis' booking photograph proves that he did not have scratches "starting to scab up with blood, hard blood on them"(PR. V. 5, 985).

A. . . . But it's Henry and it's dated 3/2/1987. I'm sure I did see this at the trial or around the time of the trial.

Q. All right. From a copy of that photograph, do you see any evidence of any kind of scratching around the eyes?

A. No.

(PCRV3 506). Counsel virtually ignored Ms. Davis and clearly ignored the book-in

photograph (PCRV6 884).

At the evidentiary hearing, counsel described his strategy regarding David Robert's testimony:

> my recollection there was no other testimony about the scratches and that it had some importance at the trial, and I dealt with that in a kind of negative fashion that there had been no corroboration of that and hence, if it had been true that you would have called witnesses to verify that and that because you didn't or couldn't that Roberts himself was not to be believed and the jury should disregard what he had said.

(PCRV7 1027). Essentially, his strategy was to do nothing. This strategy did not subject the state's case to an adversarial testing and it prejudiced Henry Davis. Had counsel impeached Roberts' testimony that Henry was scratched, even through simple cross-examination of state witnesses, counsel would also have impeached Roberts' statement that Henry admitted an old lady scratched him; if there were no scratches, there would be no reason to explain them (PR. V. 5, 977). If counsel showed that Roberts lied about the scratches, the jury would have disregarded Roberts' testimony that Henry told him "they didn't intend to do it" and he "don't know why it happened", and that Henry pointed out where he took the victim's Cadillac (PR. V. 5, 979).

The prejudice resulting from counsel's deficient performance is clear:

Roberts' assertion that Henry was scratched was the only evidence directly connecting Henry to the violent death. Without the scratches, the state had only circumstantial evidence-- an identification based on a prejudicial photo pack and Henry's fingerprints on the victim's personal property-- to prove Henry committed the murder. The FDLE serologist found no evidence of blood on the jeans Henry wore the day of the murder, and no trace evidence of scratching was found beneath the victim's finger nails (PR. V. 6, 1022; R V. 3, 514). If the jury heard impeachment testimony that Roberts lied about the scratches, there is a reasonable possibility that at least one juror would have concluded that Roberts' other incriminating statements were lies and that the state had not proved its case beyond a reasonable doubt.

The circuit court denied this claim, holding:

> Brawley, in his cross-examination of Roberts, did impeach him as to the statements allegedly made by Davis. Roberts initially testified that he saw scratches on Davis' face and Davis explained that an old lady scratched him. Roberts testified that he thought Davis was talking about "his old lady" a girlfriend. Brawley addressed the issue of scratches in closing arguments. He pointed out that not one other state witnesses had testified about seeing any scratches on Davis' face.
>
> Brawley's performance in this regard was reasonable and was not deficient.

(PCRV7 1107). The court erred as a matter of law. Counsel had an obligation to subject the case to an adversarial testing. Strickland, 466 U. S. at 688. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case" Strickland, 466 U.S. at 690. On the facts of this particular case, counsel's failure to act was deficient performance. Impeaching on the meaning of "old lady" is not reasonable when counsel could have impeached Roberts' entire testimony. Though evidence placed him at the scene of the crime, no witness testified that they saw Henry Davis commit this murder. Only David Roberts' testimony that Henry was scratched and admitted that an old lady scratched him connected Henry Davis to the actual murder. Counsel could have presented overwhelming competent and substantial evidence that David Roberts' testimony was false through a simple presentation of witnesses, or counsel could have simply elicited the evidence from *state witnesses* on cross examination. Counsel could not do so however, because he failed to look at the book in photograph and ask questions. Counsel's lethargic attempt to challenge David Roberts' testimony in closing argument did not subject this case to an adversarial testing, and confidence in the outcome is undermined. Strickland, 466 U.S. at 688.

C. Counsel's failure to file a motion to suppress, seek suppression, and

effectively impeach Harold Brown's identification of Henry Davis was deficient performance, and Henry Davis' conviction is the resulting prejudice.

At trial, Harold Brown testified that he saw Henry Davis outside of the victim's house the morning she was killed. In deposition, Harold Brown stated he saw a black male from a distance of approximately 150 feet (H. Brown Deposition 16). Mr. Brown described the black male he saw as having "medium" black skin the color of a "Hershey bar", "reasonably tall and slender and had a narrow face, and hair fairly tall on top of his head, but not protruding on the sides... I don't think it covered his ears", and he thought the person might have had a mustache (H. Brown Deposition 21,22). There was absolutely nothing about the person's physical appearance that struck Mr. Brown. He could not describe the man's features or remember if the man wore a watch or jewelry (H. Brown Deposition 16-22). After Mr. Brown failed to identify a suspect from photographs the police showed him at the police station, the police brought another photo pack to Mr. Brown's house. Only then, could Mr. Brown identify Henry Davis (H. Brown Deposition 9).

The photo pack the police brought to Mr. Brown was inherently prejudicial and designed for Mr. Brown to identify Henry Davis. Mr. Davis is the only person in the pack wearing his hair "fairly tall on top of his head, but not protruding on the

sides" and not covering his ears (H. Brown Deposition 22). None of the other men pictured had hair "reasonably tall on top of their heads" (H. Brown Deposition 22). Three of the other men pictured had hair that covered their ears, and the other two had hair on the side of their heads. The photo pack contained six mug shots. Using those pictures, there was no way for Mr. Brown to determine, as he did from a distance of approximately 150 feet, that anyone in the pack was "reasonably tall and slender". Because Mr. Brown could not describe the person he saw beyond medium black skin the color of a "Hershey bar" and the hairstyle, the photo pack, in which only Mr. Davis wore the hairstyle Mr. Brown described, was designed to mark Henry Davis. Counsel did not challenge the photo pack identification. Counsel's failure to move to suppress the identification based on this prejudicial photo pack was deficient performance; the resulting prejudice is an unconstitutional identification that led to Henry Davis' conviction and death sentence.

The circuit court denied this issue holding, "Brawley did not file a motion to suppress the photo-pak because he felt that ethically he had no legal grounds to do so . . . Brawley felt he could not successfully argue to the jury that his client was a victim of mis-identification. Brawley's performance as to this issue was reasonable and not deficient." (PCRV7 1108).

The circuit court erred. Ethically and legally, counsel was obligated to

subject this case to an adversarial testing. Brown could have easily seen any other slender African American male who happened to be at the victim's house, including Reginald Shepard. This was consistent with counsel's theory of the case and would have added reasonable doubt. Confidence in the outcome is undermined. Strickland, 466 U.S. at 688.

D. Counsel allowed Henry Davis' race to become a conflict of interest which prejudicially affected counsel's representation.

Counsel began and ended Mr. Davis' capital trial with racist comments. During voir dire, counsel told the jury:

> There is something about myself that I'd like to tell you, and then I'd like to ask you a question. Sometimes **I just don't like black people. Sometimes black people make me mad just because they're black.** And, you know, I don't like that about myself. It makes me feel ashamed. But, you know, sometimes if this was a thermometer of my feelings, and if you took it all the way up to the top, and this was one, this was five, all the way up here was ten, you know, **my feelings would sometimes start to boil and I get so mad towards black people because they're black that it might go all the way up to the top of that scale**.

(PR V. 2, 348). During his closing argument, counsel stated:

> Henry is a black man, Mrs. Ezell was a white woman. We are all of us white. I'm a white southerner. You have told me and the court that you would disregard and not base your verdict on the question of race. I will believe you, I will trust you on that. It is hard for me to talk to

> you, my friends and neighbors, about something like this. I will not believe that race will be a factor in your decision, but I will ask you to be especially vigilant, because being a white southerner, I know where I come from. And I told you a little bit when we were questioning you as to potential jurors about some feelings that I have, and maybe very deep down y'all have them too.

(PR V. 9, 1588).

At the evidentiary hearing, counsel testified that he is not racist and that these racist statements were a "high risk" strategy to force the jurors to confront any racist feelings they may have (PCRV3 479-83, 486, V4 533-35). Counsel also testified that he did not defend Henry Davis any differently than he would have defended a white person (PCRV4 534). However, counsel's own statements and actions in Henry Davis' defense belie his statement that Henry Davis' race did not affect his representation.

When asked by the Court, counsel stated that he was not a racist (PCRV4, 534). Counsel also testified:

> Q. If you don't like somebody, I don't care if they're oriental or black or whatever, you don't like that person simply because of their skin is that in fact at some level racist?
>
> A. Yes.

(PCRV3 483). Counsel admitted that "[s]ometimes I just don't like black people.

Sometimes black people make me mad just because they're black**"** (PR V. 2, 348). Thus, counsel did admit that, at some level, he is racist.

The circuit court denied this claim, holding: "Nothing in this record supports Davis' claim that his attorney is a racist and as a result failed to properly represent him. Davis' bare allegations of racism based on Brawley's statements, taken wholly out of context, are unwarranted, unproven, and untrue." (PCRV7 1103). This conclusion overlooks several examples of racial bias that are apparent in the record.

Racism is reflected in counsel's failure to challenge Mr. Brown's identification of Henry Davis. In deposition, Mr. Brown described the black male he saw as having "medium" black skin the color of a "Hershey bar", "reasonably tall and slender and had a narrow face, and hair fairly tall on top of his head, but not protruding on the sides... I don't think it covered his ears", and he thought the person might have had a mustache (H. Brown Deposition 21,22). Though nothing in this description distinguishes Henry Davis from any other tall and thin African American male living in Lake Wales, counsel testified that Brown's description was "an uncanny description of Henry Davis"; "he identified Henry and had previously described very, very closely what Henry looked like." (PCRV7 1029, 1052). Brown's description clearly did not describe "very, very closely" Henry

Davis.

Racism is likewise reflected in counsel's decision not to present Lenvent Jones to support counsel's own theory of the case, that Henry Davis was present at the murder but did not kill the victim. The morning Joyce Ezell was killed, Lenvent Jones saw Henry Davis, John Johnson, and Reginald Shepard in Johnson's car in Joyce Ezell's driveway (PCRV5 725-26). Counsel did not use this evidence to further cast doubt on Brown's identification.

> Q. If you could wouldn't it have been good to present that evidence of Bibby – first of all, Mr. Aguero talked about this person being an upstanding citizen. Are we – should you just take his word at face value that he is telling the truth?
>
> A. Well, I met Mr. Brown and I believed it to be true, and it didn't seem to me to be anything that was going to give us a lot of currency to argue about.
>
> Q. Now Mr. Brown was a white man?
>
> A. Yes
>
> Q. And Linven [sic] Jones was a black man?
>
> A. Yes.
>
> Q. Why couldn't Mr. Jones' story actually have been true – or why couldn't they both have been true and maybe there – one was there five minutes before the other one?

(PCRV7 1055).

***

> Q. And there was evidence that there was three people in Mrs. Ezell's car?
>
> A. There was – it was a reach but there was evidence. I made the argument anyway.

(PCRV7 1056-57).

Counsel admitted that when he looks at an African American man, the first thing he probably notices is the color of his skin (PCRV7 1041). This affected his decision not to move to suppress the prejudicial photopack.

> Q. Yeah, it is in the eye of the beholder. Okay. And I hate to beat a dead horse and get back on it, but do you somehow when you look at a black person is – is that the first thing that you see?
>
> A. It probably is. I don't know if in every situation. In this case, in this photopack, there are six young black men, they all appear to be about the same age – let's see – all but –I think they all have mustaches, they all have, you know, they're very – it appears to me to be a good photopack. And I don't know that I like that, you know. But there is nothing that I can see that makes Henry stand out except that he's a – at least as a young man he was a very distinctive looking young black man, you know. But I didn't – I'm not sure what you're asking me. So.
>
> Q. Does number four have close-cropped sides?

A. No.

Q. Does number one have close-cropped sides?

A. No.

Q. Can you see his ears? If you can you have better eyes than I do.

A. I don't know if that's true.

Q. How about number two, is that close-cropped sides?

A. No.

Q. Okay, we have number three, is that close-cropped sides?

A. It gets pretty close because the ears stand out.

Q. And is it a stand hairstyle?

A. It's an evenly cropped hair style, but it's in my – just looking at it myself it's not a flat top. It's – I guess you could say it was stand up.

Q. Okay. Is – how would you describe – does number six fit that description of a close-cropped sides and a stand-up hairstyle?

A. That's Henry. The sides don't appear to me to be real close -cropped. He's got a –

Q. But are they closer cropped than the top?

A. Yes, than the top.

Q. Okay.

A. He's got that stand up off to one side that he wore his hair that was then and – well, it adds to the distinctive look that he had.

(PCRV7 1041-42).

The color of Henry Davis' skin affected counsel's defense, from his failure to move to suppress the photo pack to his failure to enter Henry Davis' neighborhood and talk with his family to investigate and present a competent penalty phase. This was one aspect of counsel's deficiency in performance which prejudiced Henry Davis.

E. Conclusion.

Counsel described his theory of the case:

> [W]ithout admitting that Henry was present during the burglary, that if he was present there was no proof that he had done the killing, that his fingerprints could be explained by his presence at the burglary scene with other people, but that he was innocent of killing. And for that reason if not innocent of homicide, possibly innocent of a lesser degree, and certainly not someone who should get the death sentence because there was a reasonable doubt as to whether or not he had killed Mrs. Ezell.

(PCRV7 1033-34). Counsel also testified that in pursuing his defense in this case, he used a "minimalist approach" and that he believes "less is more" (PCRV7

1061).

Counsel's "minimalist" approach utterly failed to challenge the state's case . Alma Davis attended every day of Henry's trial, and attempted to question counsel about his lackadaisical approach. Usually, counsel dismissed her questions without answering them; he was otherwise occupied (PCRV6 985, 992-93).

> I sat in on the trial every day, and, and I was saying things to Dan – I'm not a lawyer, and I can see things, and I don't know why you're overlooking this or why you're not addressing this issue and why you not saying this. And, you know, I probably was getting on his nerves because I was like constantly everyday talking to him and every day trying to get him, well, what's going on, explain to me your strategy, explain to me because I see nothing.
>
> And I asked him if he will quit drawing, because it was very annoying to me as a sister to watch what my brother was going through and he was sitting there sketching.
>
> Q. During the trial?
>
> A. During the trial. And he really can draw very good.
>
> Q. What was he drawing, did you see?
>
> A. I saw one picture he drew Judge Strickland doing like this, I saw that, and he drew us, me and my mom and my sister we was sitting on the front row, and he drew my brother sitting at a long table, and it was him and he drew that.

(PCRV6 985-86).

Cumulatively, counsel's "minimalist", "less is more" approach in this case was deficient performance which prejudiced Henry Davis. Had counsel easily impeached Robert's testimony that Henry was scratched, Henry admitted an old lady scratched him, Henry stated "they didn't intend to do it" and he "don't know why it happened", and that Henry pointed out where he took the victim's Cadillac, the state's case would have been purely circumstantial (PR. V. 5, 977, 979).

With little investigation, counsel would have been able to create a reasonable doubt that was consistent with his theory of the case. Counsel could have suppressed the Brown's identification from the prejudicial photo pack or cast doubt on the identification with pictures of Reginald Shepard. Lenvent Jones would have testified that he saw Reginald Shepard, John Johnson, and Henry Davis at the victim's house. Jerry Barnes would have testified that the knife found at the crime scene was Reginald Shepard's and that Shepard owned a pair of gloves. John Johnson and Johnny Hamilton would have testified that Shepard always carried a knife. Levonsky Riley and Lenvent Jones would have testified about Shepard's bloody clothes (PCRV4 661, 665, 673; V5 727-28).

With this evidence and the evidence presented at trial that the FDLE serologist found no evidence of blood on the jeans Henry wore the day of the murder, no finger prints were found on the knife, and no trace evidence of

scratching was found beneath the victim's finger nails, there would have been a reasonable doubt (PR. V. 6, 1022; R V. 3, 514). Because counsel needed only to submit evidence sufficient to create a reasonable doubt, counsel's failure to investigate and present this evidence prejudiced Henry Davis. See Helton v. Secretary For The Department Of Corrections, 233 F.3d 1322, 1327 (11th Cir.App. 2000).

ARGUMENT II

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. DAVIS WAS NOT DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

In deciding ineffective assistance of counsel claims, this Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

Strickland requires reasonable attorney performance, and reasonable attorney performance requires counsel to conduct a *reasonable* investigation. "[C]hoices

made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91; State v. Reichmann, 777 So.2d 342, 350 (Fla.2000). In a capital case penalty phase, the United States Supreme Court has defined counsel's obligation to conduct a "reasonable" investigation as an "obligation to conduct a **thorough** investigation of the defendant's background" for penalty phase mitigation. Williams v. Taylor, 529 U.S. 362, 376-78 (2000)(emphasis added).

A. Counsel's failure to challenge the aggravating circumstance of heinous, atrocious, and cruel during the penalty phase of Henry Davis' trial was deficient performance and resulted in the trial court's erroneous finding that the circumstance was established and the imposition of Henry Davis' death sentence.

On direct appeal, the this Court approved the trial court's finding of the heinous, atrocious or cruel aggravator, holding:

> The victim **could have been** conscious for thirty to sixty minutes before her death. **Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him.** Further, the victim suffered stab wounds to her adam's apple [sic.] and upper chest, suggesting that she was stabbed while standing up or struggling. We find that the evidence establishes this factor beyond a reasonable doubt.

Davis v. State, 604 So.2d 794, 797 (Fla.1992)(emphasis added).

With very little effort, counsel could have effectively challenged the application of this aggravator. Heinous, atrocious, and cruel applies when the victim was conscious and aware of impending death, as evidenced by defensive wounds of self defense. Mahn v. State, 714 So.2d 391 (Fla. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996); Hansbough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987). Roberts' testimony that Henry said he was scratched by an old lady implied that the victim fought Henry while he attacked her. Effective counsel would have impeached this testimony through the law enforcement officers who arrested Henry the same night Roberts saw Henry, people who saw Henry before he was arrested, his book-in photograph, and the medical examiner.

Johnny Hamilton saw Henry Davis at the Sunrise apartments the day Mrs. Ezell was killed. Mr. Hamilton was close to Henry and saw no scratches (PCRV5 740). Charles Riley, one of the officers who arrested Henry at his mother's house and questioned Henry Davis for 20 minutes to an hour in a lighted room at the Lake Wales Jail, noticed nothing unusual about Henry's face (PCRV5 749). Edward Hendrix, the lead investigator on this case, who also arrested Henry at his mother's

house, brought him to the Lake Wales Jail, questioned him, and personally charged Henry, recalled that Henry's face was not scratched (PCRV5 749). Katrice Hadley, Michelle Odom [Rochelle Oldham], Cheryl Epps, and Alma Davis, Henry's sisters, saw Henry the day Mrs. Ezell was killed or the night Henry was arrested and did not see any scratches (PCRV5 823;V6 869, 962, 984). Barbara Stoudemire, Henry's mother, saw Henry the night he was arrested; Henry's face was not scratched (PCRV6 883). Dwayne Bell also saw Henry the night he was arrested and noticed no scratches (PCRV6 908).

Counsel did not even need to investigate this information. Ms. Davis attended Henry's trial and when David Roberts testified that he saw Henry with scratches and dried blood on his face, she wrote counsel a note, telling him that she saw Henry that day and he had no scratches (PCRV6 984). Additionally, Henry Davis' book-in photograph proves that he did not have scratches "starting to scab up with blood, hard blood on them"(PR. V. 5, 985). Counsel virtually ignored Ms. Davis and clearly ignored the book in photograph (PCRV6 884). Had counsel impeached Roberts' testimony that Henry was scratched, counsel would also have impeached Roberts' statement that Henry admitted an old lady scratched him, eliminating one of the bases for this Court's decision to uphold this aggravator (PR. V. 5, 977).

Counsel also failed to effectively question the medical examiner to refute this aggravator. At the evidentiary hearing, Dr. Jones testified that the victim had no defensive wounds (PCRV6 1020, V7 1022). The victim bled to death, but Dr. Jones could not determine how long it took (PCRV7 1021). Dr. Jones also could not determine when the victim lost consciousness, though "she might very well have lost consciousness because of fainting when attacked, or she did have evidence of a blow to the head, she could have lost consciousness from that also" (PCRV7 1021). Had counsel simply asked these questions, he would have eliminated another basis for this Court's decision to uphold this aggravator.

The above evidence, considered with crime scene evidence that the victim had no trace evidence beneath her fingernails, most of the blood was pooled beneath her, the jeans Henry wore the day of the crime showed no trace of blood, and the police found no other bloody clothes, refutes any evidence the state could use to establish the heinous atrocious or cruel aggravator beyond a reasonable doubt (PR. V. 4, 851,V. 5, 1022). The state would have had no evidence that the victim was conscious and struggled with her attacker, let alone with Henry Davis (PR. V. 5 891-906, V. 7 1295-99).

The circuit court denied this claim:

> Davis' argument concerning impeachment of David

> Robert's testimony concerning scratches on Davis' face was presented in Claim I-C. The Court has found that Brawley's performance was not deficient in this regard.
>
> With respect to Davis' argument that Brawley failed to effectively cross-examine the Medical Examiner and thus refute the HAC aggravator, the Court notes that the HAC was upheld on direct appeal by the Florida Supreme Court.
>
> Even though Davis was granted an evidentiary hearing on this claim, this Court finds that this issue was raised on direct appeal and should not have been re-litigated. This claim is procedurally barred and denied.

(PCRV7 1111). The circuit court erred.

First, this claim is not procedurally barred. When this Court upheld the HAC aggravator on direct appeal there was, due to counsel's ineffectiveness, no evidence to challenge it. A motion for postconviction relief is the proper place to raise an ineffective assistance of counsel claim. Reichmann, 777 So.2d at 348.

Second, counsel was ineffective in failing to challenge this aggravating circumstance. At Mr. Davis' penalty phase, counsel was obliged to subject the state's death eligibility case to an adversarial testing, including challenging the aggravators the state sought to establish. Reichmann, 777 So.2d at 348 ("*defense counsel presented no evidence to counter the State's claims of aggravation* or in support of mitigation)(emphasis added). Counsel's guilt phase cross examination

of Roberts and closing argument were absolutely inadequate to challenge this aggravating circumstance in the penalty phase. See Id. at 348. Counsel could have effectively challenged the aggravator at the penalty phase by asking only a few questions during his direct and cross examination, but counsel utterly failed to do so. Had counsel impeached Roberts' testimony and elicited testimony that there was no evidence of a struggle and the victim was just as likely unconscious in an instant as it was that she was conscious for thirty to sixty minutes, counsel would have created a reasonable doubt that this aggravator was established. The single remaining aggravator, that the murder occurred during the course of a burglary, would have rendered Henry Davis' death sentence unconstitutionally disproportionate and this Court probably would have vacated it. See Sinclair v. State, 657 So.2d 1138 (Fla.1995); Terrt v. State, 668 So.2d 954 (Fla. 1996); Hess v. State, 794 So.2d 1249 (Fla. 2001). Confidence in the outcome is undermined. Strickland, 466 U.S. 688.

B. Counsel's failure to investigate and establish that Reginald Shepard and John Johnson were at the victim's house and that Reginald Shepard actually killed the victim was deficient performance, and Henry Davis' death sentence is the resulting prejudice.

From the time he was arrested, Henry Davis maintained that he did not kill Joyce Ezell. After attaining competency, Henry Davis told three of the four doctors

monitoring his mental status that Reginald Shepard and John Johnson were at the victim's house when she was killed. Even so, counsel absolutely failed to investigate and present available evidence that Reginald Shepard killed Joyce Ezell.

The morning Joyce Ezell was killed, Lenvent Jones saw Henry Davis, John Johnson, and Reginald Shepard in Johnson's car in Joyce Ezell's driveway (PCRV5 725-26). That evening, Mr. Jones saw Shepard's brother on Lincoln Avenue (PCRV5 727, 729-30). Shepard's brother saw Shepard with blood all over his clothes and assumed Shepard had been fighting (PCRV5 727-28). Counsel was aware of Mr. Jones' deposition, but failed to investigate it (PCRV7 1055-56).

About the time Joyce Ezell was killed, Reginald Shepard approached Levonsky Riley and offered to pay Mr. Riley $50 to drive him to an apartment complex called Sunrise (PCRV4 658-59). Shepard entered an apartment and returned to the car carrying a pair of jeans, shoes, and a t-shirt (PCRV4 660). The shoes were soaked with blood (PCRV4 661, 665, 673). Shepard explained that he cut his foot, however Mr. Riley noticed that he did not limp (PCRV4 661, 673). From Sunrise, Mr. Riley drove Shepard to a grove near Shepard's mother's house (PCRV4 662). Shepard directed Mr. Riley to drive into the grove. He exited the car with his bundle of bloody shoes and clothes, directed Mr. Riley to turn the car around, and returned to the car without his bloody bundle (PCRV4 662). They

drove back to Lake Wales where Shepard bought beer and crack (PCRV4 671).

Counsel testified he told his investigator "to see what he could pull out of that and follow up on it" and "[m]y recollection is that he got back to me and said he couldn't get any corroboration or anything that I thought I could use at trial." (PCRV7 1029). At the evidentiary hearing, counsel could not remember what, if anything, this investigator did or did not do. Mr. Riley testified that neither counsel nor his investigator asked him to take them out to look for the bloody clothes (PCRV4 664-66).

The night Henry was arrested, William Shepard went to find Reginald Shepard because William and Alma Shepard had heard that Reginald Shepard killed Joyce Ezell and that he was hiding in a grove (PCRV6 982, 1001). William Shepard found Reginald and brought him to Alma and William's house (PCRV6 982). Reginald Shepard was filthy, covered in sand and dirt, had spider webs in his hair, and smelled terrible (PCRV6 983). Though Reginald denied killing Joyce Ezell and stated he was just hiding out in the grove, he convinced Alma that Henry did not kill Joyce Ezell (PCRV6 982-83).

Counsel did not investigate the knife found at the crime scene. Had counsel investigated, taken pictures and spoken with Reginald Shepard's friends, counsel would have discovered that the alleged murder weapon belonged to Reginald

Shepard, who always carried a knife (PCRV3 415, V4 679-80, V5 742). Jerry Barnes identified the knife found at the victim's house as Reginald Shepard's knife. (PCRV4 679-80). John Johnson and Johnny Hamilton also testified that Reginald Shepard carried a knife (PCRV3 415, V4742). With investigation, counsel also could have discovered that Reginald Shepard also owned a pair of gloves (PCRV4 678).

Counsel offered no real reason for his failure to investigate and present this mitigating evidence.

> Q. So I mean, you already had him at the scene, wouldn't it be better to also place possibly the real killer at the scene also so that the jury would know that?
>
> A. The way I try a case is kind of a minimalist approach, and I believe that less is more. For some reason it was my decision then that this was not testimony that was going to help me. And I don't remember why I made that decision, but that's the way I try a case.

(PCRV7 1061).

Counsel, with investigation, could have presented substantial evidence that Reginald Shepard killed the victim. With this evidence, counsel could have requested instructions for the statutory mitigators that Henry that he was an accomplice in the offense and his participation was relatively minor, and he acted

under extreme duress or the substantial domination of another person. § 921.141(6)(d)(e) Fla. Stat. (1987).

This evidence would also have provided a basis for expert testimony regarding the mitigators. At the evidentiary hearing, Dr. Dee testified that Henry, because of his brain damage and low IQ, Henry was most likely easily dominated.

> [H]e would certainly, probably as a result of his cerebral damage, an intellectually impoverished person could easily have been led by other people. Difficult to imagine him at the times when – first time I see him he's got an IQ of 75 to 79, eleventh grader. It's difficult to imagine him being a leader in a group, certainly he was a follower.

(PCRV5 844). Michelle Odom, Alma Davis, Cheryl Epps, and Barbara Stoudemire testified that it was very easy to convince Henry to do things (PCRV6 870, 888, 964, 981).

The circuit court denied this claim, citing to its analysis in Claim I B.

> Brawley's theory of defense was not to deny Davis' presence at the scene of the crime. As Brawley testified, he tried to convince the jury that Davis may have been present but someone else had committed the murder. The trial record reveals that Brawley pursued his theory both in cross-examinations of the state's witnesses and in final argument. Brawley's approach was a reasonable and informed strategic decision. Brawley's representation cannot be said to be ineffective in this regard.

(PCRV7 1106). This reasoning simply cannot apply to deny a *penalty phase*

claim. During the penalty phase, the jury clearly believed that Henry Davis was present at the scene and that he committed the murder; they found him guilty of first degree murder. The only state witness who testified was the medical examiner, counsel could not pursue that theory through him. The two lay witnesses that counsel did present, Henry's mother and sister, had no knowledge of the crime, so counsel could not pursue his theory through them. Counsel did attempt to pursue this theory through Dr. McClain, however Dr. McClain could not offer an opinion because he had no evidence that other people were at the victim's house.

> Q. Do you have an opinion as to whether or not Henry Davis acted under extreme duress or under the substantial domination of another person?
>
> A. I have an opinion about that.
>
> Q. All right.
>
> A. He--he told me since he gave me the same version that he gave Dr. Dee, he said he was acting under the influence of two other persons.
>
> The other piece of evidence that I would bring to – that bears on that is what his sisters told me about his need to please, or apparent attempts, extra attempts to please people subsequent to his head injury. If that is so, if that is a change in a behavior pattern, then one might speculate that he would be more likely than the average person to come under the influence of another.
>
> A third piece of evidence, although it wasn't – it

wasn't backed up in the summary, the record from the State Hospital, if I may take a moment to look it up. In their report of March 23rd, 1989, they say he appears to be easily led into inappropriate behavior.

Q. OK.

A. So, I really don't have an opinion as to whether he was under the – under the substantial influence of someone else at the time.

Q. OK.

A. But if he was telling the truth he was – and these small bits of evidence would seem to support his tendency to be more likely to come under the undue influence of another, then [sic] say, the average person.

Q. Is it consistent with the medical data of your examination that if his version is true or roughly true, that he could have acted under the substantial domination of another person?

A. Yes. Yes.

(PR 1398-99).

Had counsel investigated and presented evidence that Reginald Shepard and John Johnson were at the victim's house and that Reginald Shepard actually killed the victim, Dr. McClain would have had a basis for an opinion that Henry acted under extreme duress or the substantial domination of another person, and counsel would have had a basis to argue that Henry was an accomplice in the offense and

his participation was relatively minor. § 921.141(6)(d)(e) Fla. Stat. (1987). "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Counsel did not investigate Reginald Shepard's bloody clothes and shoes or the fact that Reginald owned the knife found at the scene-or a knife identical to it, both of which would have corroborated Mr. Jones', Mr. Riley's, and Mrs Shepard's [Davis'] stories. None of this evidence was inconsistent with counsel's theory of the case; all of the evidence supports it. No reasonable professional judgment supports counsel's failure to investigate this evidence and therefore, it was deficient performance. There is a reasonable probability that the jury would have found at least one of the mitigators established by the greater weight of the evidence, and the outcome would have been different. Confidence in the outcome is undermined. Strickland, 466 U.S. at 688.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT HENRY DAVIS IS INNOCENT. ACCORDINGLY, HIS CONVICTION OF FIRST DEGREE MURDER AND DEATH SENTENCE VIOLATE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES

CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

This Court has outlined two requirements needed to receive relief based on newly discovered evidence.

> First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). In reviewing newly discovered evidence claims, this Court gives deference to the circuit court's findings of fact if they are supported by competent and substantial evidence. Melendez v. State, 718 So.2d 746, 747 (Fla.1998).

After Henry Davis was convicted of and sentenced to death for the murder of Joyce Ezell, Reginald Shepard confessed at least eight times, to at least four

different people that he, and not Henry Davis, killed Joyce Ezell.[2] Each confession occurred after Henry Davis' trial, and therefore, were "unknown by the trial court, by the party, or by counsel at the time of trial" and neither Henry Davis nor his counsel could have known of the confessions by the use of diligence. Hallman, 371 So. 2d 482, 485 (Fla.1979). The confessions, which are consistent with each other and the evidence surrounding the crime, are of such nature that they would probably produce an acquittal or, at the very least, a life sentence on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991); Scott, 604 So. 2d 465, 468 (Fla.1992).

A. Newly discovered facts.

Cedric Christian

Reginald Shepard told Cedric Christian that he committed the murder for which Henry Davis has been sentenced to death (PCRV4 570-82, 595). Shepard, while high on heroin, went to the victim's house to borrow money. At first, the victim thought Shepard was Henry Davis. When she realized he was not Henry, the victim started screaming, and Shepard panicked, using the knife he always carried to kill her (PCRV4 573-75).

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[2]Collateral Counsel discovered another confession after the evidentiary hearing, and it was attached as Appendix A to the closing argument to the lower court.

Reginald Shepard confessed to Mr. Christian while they were roommates in the county jail (PCRV4 571). Shepard told Mr. Christian that he had to "confess his sins to this case because he got an innocent man sitting down getting punished for something he did" (PCRV4 571). Shepard then wrote a five page letter and asked Mr. Christian to deliver it to Henry Davis' mother (PCRV4 571). Because Mr. Christian was having his own problems with the police and was young and scared, Mr. Christian did not give the letter to Henry Davis' mother (PCRV4 573). Before he left the letter in a broken car, Mr. Christian read a small portion of it. The portion he read stated, "I'm sorry that I didn't come forward like a man supposed to, would y'all forgive me. But maybe y'all will understand when y'all read this letter" (PCRV4 572). When Mr. Christian next saw Shepard, Shepard asked Mr. Christian if he gave the letter to Henry's mom. Mr. Christian told him yes, even though he threw the letter away (PCRV4 577-78). Shepard was surprised that Henry's family never contacted him or visited him in prison after reading the letter (PCRV4 577).

Willie Watson

Reginald Shepard confessed to Willie Watson that he killed Joyce Ezell. In late 1990 and early 1991, Willie Watson lived with Reginald Shepard and Cedric Christian in the P dorm of the county jail annex (PCRV4 629). Shepard told Mr.

Watson, "[t]hat lady that they accused Sweetman of killing, I killed her" (PCRV4 629-30, 639).

When Mr. Watson saw Shepard at the 501 Club in Lake Wales later in 1991, Mr. Watson asked Shepard if he was going to confess to the authorities that he, and not Henry Davis, killed Joyce Ezell (PCRV4 630-32). Shepard responded, "I ain't going to switch places with him" (PCRV4 630).

Again in late 1993 or early 1994, while both were incarcerated at the Central Florida Reception Center in Orlando, Mr. Watson again asked Shepard if he was going to tell the authorities that he killed Joyce Ezell (PCRV4 631). Shepard responded, "Look man, I did it. But ain't no sympathy in the game. I ain't going to change places." (PCRV4 631).

Earl Pride

In early or middle 1994, Earl Pride shared a dorm with Reginald Shepard at the county jail annex in Bartow (PCRV5 686-87). While they were talking, Mr. Pride told Shepard, "Man that was messed up what you did to Sweetman" (PCRV5 687). Mr. Pride mentioned this because "[i]t's like common knowledge without proof around Lake Wales that Sweetmen's on death row for something that Red Shepard did" (PCRV5 697). Shepard responded, "Fuck that nigger, fuck that nigger", which Mr. Pride regarded as an "indirect confession" (PCRV5 687, 706).

Shepard then became quiet and left the room (PCRV5 687, 698).

Later, Mr. Pride told Shepard that he needed to help Henry Davis (PCRV5 688). Shepard looked remorseful and responded, "[m]y nigger, I'm going to straighten that man. I'm going to straighten that" (PCRV5 688). Mr. Pride testified that "I'm going to straighten it" means "some of the wrong that you've done you are going to make them right" (PCRV5 700). Shepard also told Mr. Pride that Shepard knew how it felt to take a life (PCRV5 689).

Mr. Pride did not tell the authorities about Shepard's confession for a number of reasons: he was afraid Shepard would hurt his family, he was more concerned about his own case, he did not want to be a snitch, he believed the state had already executed Henry Davis, and he forgot about it (PCRV5 691-92, 695, 696).

Willie Wilson

In 1992, Willie Wilson was incarcerated in the county jail with Reginald Shepard (PCRV5 708). One day, Mr. Wilson and Shepard remained in the day room while the other inmates went out for recreation (PCRV5 709). Mr. Wilson and Shepard talked. Shepard told Wilson that he was suffering and his family thought he would die on the streets (PCRV5 709). Shepard believed he was sick and suffering because he had hurt other people (PCRV5 709). Mr. Wilson also

heard rumors that Shepard killed Joyce Ezell and allowed Henry Davis to be convicted and sentenced to death for the murder, so he asked Shepard if he killed Joyce Ezell (PCRV5 709, 719). Shepard answered yes and stated that he wanted to do something but that he was afraid (PCRV5 709, 718). At that moment, the other inmates returned to the day room, the conversation changed, and Mr. Wilson never saw Shepard again (PCRV5 710).

Mr. Wilson did not tell the authorities that Shepard admitted that he killed Joyce Ezell because he was using drugs, concerned about his own case, and feeling selfish (PCRV5 710, 714-15). He forgot about Shepard's confession until 2000, when CCRC contacted him (PCRV5 711-12).

Taurus Scott

Taurus Scott testified that he once confronted Reginald Shepard while Shepard was harassing Taurus' younger sister (PCRV4 603). Reginald Shepard threatened to kill him like he "did that white lady" (PCRV4 603).

Elton Peterson [3]

Mr. Peterson knew Shepard from the streets in Lake Wales, and became

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[3]This confession was discovered by CCRC-Middle after the evidentiary hearing. Mr. Peterson signed an affidavit that was attached to Mr. Davis' closing argument for the circuit court to consider as corroborating evidence.

friends with Shepard while they served time together in the United States Prison in Atlanta, Georgia. One day, Shepard told Mr. Peterson that he had HIV, and he felt he caught the disease because he sinned. When Mr. Peterson asked Shepard what he meant, Shepard responded: "I killed a lady and somebody else is paying for it". Mr. Peterson did not tell anyone of this confession because Shepard never told him the name of the lady he killed or the name of the person paying for his sin. Only after the evidentiary hearing in this case while Mr. Peterson was in the Polk County South Jail, did he learn of Henry Davis' case and Shepard's involvement. Mr. Peterson does not know Henry Davis.

B. The newly discovered facts would probably produce an acquittal on retrial.

i. Admissibility.

These confessions would be admissible in a new trial and penalty phase under the Florida Statute 90.804(2)(c) exception to the rule against hearsay. Florida Statute 90.804(2)(c) provides that a statement is not precluded hearsay if the declarant is not available:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interests or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be

> true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Fla. Stat. § 90.804(2)(c) (2000). This Court held the test of admissibility under this exception, after showing the declarant's unavailability, is "whether the statements were relevant, tended to exculpate [the accused], and met the test of corroboration". Voorhees v. State, 699 So.2d 602, 612 (Fla.1997).

Reginald Shepard's confessions meet each of these requirements. Reginald Shepard died in July, 1995, so he is unavailable. The confessions are relevant both to issues of Henry Davis' guilt and to issues regarding his death sentence. The confessions exculpate Henry Davis and meet the test of corroboration.

In Chambers v. Mississippi, the United States Supreme Court held that excluding a third party's confessions to a murder because they were inadmissible hearsay violated Mr. Chambers' due process rights. Chambers v. Mississippi, 410 U.S. 284, 299-300 (1973).[4] Due process affords each criminal defendant the right

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[4]See also Washington v. Texas, 388 U.S. 14 (1967). In Washington, the trial court allowed Mr. Washington to testify but prevented him from presenting a corroborating witness. Id. The Supreme Court held that the preclusion of the corroborative evidence was unconstitutional even though the trial court allowed Washington's testimony. The right to present such evidence "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies".

to "a fair opportunity to defend against the State's case." Id. at 292. Essential to due process is the right to call witnesses on one's behalf. Id. The Court held that in certain circumstances where the ascertainment of guilt is implicated, this right trumps the rule against hearsay. Id. at 301. The Court noted circumstances that provide considerable assurance of the reliability of out-of-court confessions which make the confessions admissible, even if they are hearsay. Id. Among those the Court noted were: the three confessions were made spontaneously to a close acquaintance shortly after the murder, each confession was corroborated by some other evidence in the case, the sheer number of confessions, the confessions were "in a very real sense self-incriminatory and unquestionably against interest", the confessor had nothing to benefit by conferring, and he urged the people to whom he confessed not to "mess him up". Id. Reginald Shepard's confessions have similar assurances of reliability.

Reginald Shepard confessed to his friends and close acquaintances. Willie Wilson and Willie Watson knew both Reginald Shepard and Henry Davis (PCRV4 629, V5 707-8). Cedric Christian lived next door to Shepard. Shepard "pretty much like grew me up" (PCRV4 570).

Id. at 15-17.

> I guess I could say I known him all my life because he stayed right next door to me ever since I was a little boy and was born. . . He used to like fix my go cars. And one time he borrowed my bicycle and got it ran over by a car and he got me another bike. And he used to always keep money in my pocket.

(PCRV4 578). Mr. Christian is not friends with Henry Davis (PCRV4 584). Shepard was also close to Earl Pride, who does not know Henry Davis.

> But like I said, I knew this dude, Red Shepard, more than I knew him. So, if anybody, I would have their back. If anybody I would keep quiet for, it would be Red Shepard rather than this dude right here. . . .If I would lie for anybody it would be for Red Shepard rather than this dude here, because I've known Red all my life. Red has taken time to spend with me, taught me things. So I have more loyalty and respect for him rather than this dude here.

(PCRV5 701). Each person who testified that Reginald Shepard confessed to them had absolutely nothing to gain from testifying. Cedric Christian and Earl Pride were dear friends with Shepard and both would protect Shepard over Henry Davis (PCRV5 701).

Shepard's confessions are corroborated by other evidence in the case. The morning Joyce Ezell was killed, Lenvent Jones saw Henry Davis, John Johnson, and Reginald Shepard in Johnson's car in Joyce Ezell's driveway (PCRV5 725-26). That evening, Mr. Jones saw Shepard's brother on Lincoln Avenue (PCRV5 727,

729-30). Shepard's brother saw Shepard with blood all over his clothes and assumed Shepard had been fighting (PCRV5 727-28).

The confessions are corroborated by evidence previously discussed: Levonsky Riley's testimony about Shepard disposing of bloody clothes, Alma Davis' testimony that Shepard was hiding in orange groves the night Henry was arrested (PCRV4 658-59, 660-62, 673; V6 982-83, 1011). Moreover, the night after Joyce Ezell was killed, Reginald Shepard visited his mother while she was working (PCRV6 876-78). This was unusual (PCRV6 876). While Shepard and his mother were talking in a closet, Evelyn Credit overheard Shepard ask something like, "Mom, what should I do?" (PCRV6 881). Mrs. Credit interpreted the way Shepard asked the question to mean, "should I go and turn myself in?" (PCRV6 882).

Cedric Christian identified the knife found at the crime scene as the knife Shepard carried everyday before the murder (PCRV4 575, 593-94). Mr. Christian used the knife and watched Shepard use the knife during the years they spent together:

> Because Reginald Shepard, we sit in the yard. He learned me how to change spark plugs, he learned me how to put carburetors on cars. And we used the knife, like if the rotary button is sticking off the rotary caps and stuff like that, I know the knife. We use to peel sugar cane with the

> knife. . . That's the same knife he carried. If I was still 10 years back younger, I can show you – I had a little knife just like his. . . No, that's the knife. It ain't the kind of knife, that's the knife he carries.. . . Because I done peeled oranges and cane with that same knife what Reginald have. I done used this knife many times.

(PCRV4 592-94). Jerry Barnes also identified the knife found at the victim's house as Reginald Shepard's knife, and John Johnson and Johnny Hamilton also testified that Reginald Shepard carried a knife (PCRV3 415, V4 679-80, V5 742).

Crime scene evidence corroborates Shepard's confessions. The state found no prints on the knife found at the victim's house, however, Henry Davis left prints in the house and on some of the stolen property (PR. V. 6 1036, 1042, 1055). Had Henry used the knife, he probably would have left his finger prints on it as well. Because Henry's prints were not on all of the stolen property, it is very likely that Reginald Shepard used the knife to kill the victim and carry some of the stolen property. The victim was stabbed twenty one times, and the blood splatters all over the wall and furniture indicate that is was a very messy crime (PR. V. 5 851). However, the jeans Henry wore the day of the crime showed no trace of blood and the police found no other bloody clothes (PR. V. 4, 851,V. 5, 1022). Detective Hendrix testified that the condition of the victim's car clearly indicated that it carried at least three people after it was stolen (PR. V. 5 942). Moreover, Henry

Davis' fingerprints were found on only four of the more than fifteen stolen items found in the trunk of the victim's car (PR. V. 5 810-824; V. 6 1050-53). If Henry Davis was the only burglar, his prints should have been on all of the items as well as the knife.

Reginald Shepard had a reputation as a violent criminal and he frightened many of his friends. Cedric Christian testified that Reginald Shepard had a "quick temper" (PCRV4 576). "Like, he would go off on you and be ready to fight you, you know, you just get out of the way." (PCRV4 576). Alvin Benton testified that Reginald Shepard had a bad reputation. "He did plenty things bad, because I knew him from the neighborhood. He did a whole heap of things bad." (PCRV4 652). Earl Pride did not tell anyone after Reginald Shepard confessed to him because Mr. Pride feared him.

> I knew some of the slime Red done did. So, it wouldn't be nothing for him, you know – I didn't know how long he was facing – it wouldn't be nothing for him to hurt my little brother and stuff. I knew that probably I'd be all right. But I knew that maybe something could have happened to – I had a little brother or somebody that I cared about, you know what I'm saying.
>
> Because out there on the streets its slime. If I can't get you, I'm going to get somebody close to you. You know what I'm saying? Especially when your playing with a person's life. You're talking about murder. You're playing with somebody's life, so you never know

> what a person might do. They might go to the extreme of maybe killing your father or something, you know, trying to get back as like retribution for what you just did.

(PCRV5 691-92). Alma Davis described Reginald Shepard as a "master criminal" (PCRV5 1009). He abused drugs including heroin and crack cocaine (PCRV4 573-76, 671).

ii. This evidence would probably produce an acquittal on retrial.

Like Chambers, Henry Davis was placed at the scene of the murder. Chambers, 410 U.S. at 286-87. Also like Chambers, Henry Davis plead not guilty to the murder and has maintained his innocence for over fifteen years, there was no eyewitness to the actual murder, Henry Davis has not been identified as owning the murder weapon, and the person who likely committed the murder made at least nine separate confessions (in Chambers, it was three). Id. In Chambers, the United States Supreme Court found error and reversed the case, holding that the three confessions were sufficient challenge to the state's case and the court erred in denying their admission. Id. The confessions would be similarly admissible in Henry Davis' case.

iii. This evidence would result in a life sentence at a new penalty phase proceeding.

The confessions would also be clearly admissible in a penalty phase

proceeding, regardless of their admissibility at the guilt phase. Florida Statute 921.141(1) provides, "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Fla. Stat, §921.141(1) (1979). This Court has noted, "the exclusionary rules of evidence, including the rule barring use of hearsay statements are inapplicable in the penalty phase of a capital trial." Garcia v. State, 622 So.2d 1325, 1329 (Fla. 1993).

The confessions would establish the mitigating factors that Henry that he was an accomplice in the offense and his participation was relatively minor, and he acted under extreme duress or the substantial domination of another person, in addition to providing further support for the statutory mental health mitigators. § 921.141(6)(d)(e) Fla. Stat. (1987). The confessions likewise prove that a death sentence is unconstitutional under Enmund v. Florida, 458 U.S. 782 (1982). In Enmund v. Florida, the United States Supreme Court held that the death penalty is an unconstitutionally disproportionate sentence for a person who aids in a felony, during which a murder is committed by others, but the person did not kill, attempt to kill, or intend that a killing occur or that lethal force be used. Enmund, 458 U.S. 782 (1982). In Enmund, the evidence showed that Enmund planned the robbery,

drove his codefendants to the victim's house, and waited in the car while they robbed and killed the victims. Enmund 458 U.S. 803.

Reginald Shepard confessed that he killed the victim. "[C]onfessions are direct evidence". Meyers v. State, 704 So.2d 1368, 1370 (Fla.1997). Contrarily, there is no direct evidence that Henry Davis committed the murder or intended that a killing occur or that lethal force was used. In light of the newly discovered evidence of Reginald Shepard's confessions, Henry Davis' death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution. Enmund 458 U.S. at 801.

C. The Circuit Court.

In denying relief on this claim, the circuit court addressed only the admissibility of the confessions:

> The testimony of Watson, Christian, Pride, Wilson and Scott is not trustworthy nor believable when viewed in total context. The witnesses lack veracity and credibility. The conflicts in their testimony render their evidence unrelialble. The Court declines to address whether the witnesses' testimony constitutes newly discovered evidence since the evidence offered is not admissible as an exception to F.S. 90.804(2)(c). The evidence, because of the patent unreliability, would not be admissible in either Davis' guilt or penalty phase proceedings.

(PCRV7 1121-22). The circuit court erred.

The court looked at only three issues in determining that the above evidence was not credible. First, the court cited Mr. Watson's, Mr. Wilson's, Mr. Pride's, and Mr. Christian's criminal convictions. The fact that the people to whom Reginald Shepard confessed had criminal convictions does not and should not impact their credibility. Reginald Shepard was a career criminal, who spent the majority of his last years in jail or prison. Shepard confessed to the people he knew and spent time with. Because Shepard was in jail or prison, the people he knew and spent time with were in jail or prison with him. In fact, the confessions are credible because they are supported by jail and prison records which prove that Reginald Shepard was incarcerated with the people to whom he confessed (PCRV6 1011-18). The confessions are credible because they indicate a pattern of confessing. Shepard confessed while he was incarcerated and feeling ill or religious. The confessions are also corroborated by the physical evidence at the crime scene which indicates Shepard wore gloves, and that the hair found in the victim's car was not Henry Davis' (See the Stipulation Regarding DNA evidence)[5].

The court also cites "common sense" as a reason why the confessions are

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[5]As with many documents filed before the evidentiary hearing, this stipulation was not made part of the record on appeal. In December, 2002, Mr. Davis filed a motion to supplement the record, asking that this stipulation be made part of the record.

not credible (PCRV7 1120). The court felt that the explanations many of the people to whom Shepard confessed gave for not telling the authorities about the confessions were not "reasonable" and therefore violated some rule of common sense (PCRV7 1120). Given the circumstances of the people to whom Reginald Shepard confessed, they are, in fact, reasonable. Mr. Christian, Mr. Watson, and Mr. Pride feared Reginald Shepard and did not tell the authorities for that reason. It is reasonable to fear someone who has a reputation of violence, admitted that he killed an elderly woman by stabbing her 21 times, and was so cruel that he would permit another person to be executed for his crime. Mr. Wilson did not tell the authorities that Shepard admitted that he killed Joyce Ezell because he was using drugs and concerned about his own case (PCRV5 710, 714-15). It is reasonable to be overwhelmed by the prospects of legal problems and years in jail, especially when one is not educated. All of these reasons are reasonable given these witnesses' experience with Shepard and their backgrounds.

Finally, the court cited conflicts in witness testimony as a reason why the confessions are not credible (PCRV7 1120). The court found that Mr. Christian's and Mr. Watson's testimony was not credible because their recollections were not exactly the same.

Watson says they were bragging about past crimes when

> Shepard said he killed the victim. There was no statement about getting right with the Lord", no mention of pawning jewelry and no details of the crime given by Shepard. In contrast, Christian's version is that Shepard was confessing his sins to get right with the Lord, he gave details of the crime, said he pawned the jewelry in Port St. Lucie and that Davis was not at the scene of the crime.

(PCRV7 1120).

Though they were not exactly the same, Mr. Christian's and Mr. Watson's recollections were more similar than dissimilar. Mr. Christian could not remember the third individual who heard Reginald Shepard confess. Mr. Watson remembered that Mr. Christian was there (PCRV4 571, 629). Though Mr. Watson did not remember Reginald Shepard talking about religion while confessing, both Mr. Watson and Mr. Christian agreed that they were discussing the past, which included past crimes (PCRV4 571, 636). Shepard's reason for confessing was subject to various interpretations. Neither Mr. Christian nor Mr. Watson testified that Shepard used the victim's name (PCRV4 574, 583-85, 595, 630). Both Mr. Christian and Mr. Watson testified the confession occurred in a cell (PCRV4 581-82, 637). Mr. Christian testified that Reginald Shepard told him that *Shepard* pawned some jewelry in Port Saint Lucie (PCRV4 584-85). Only one ring, of all the missing and never recovered items, was proven at trial to be pawned in Winter

Haven. It is entirely possible that Shepard pawned stolen items in Port Saint Lucie.

The court labeled Mr. Wilson's not credible because it was "uncorroborated"-- meaning no one else heard Shepard confess to him (PCRV7 1121). As discussed above, there is substantial independent corroboration. The court dismissed Mr. Pride's testimony because it "consisted of his opinion or interpretation of Shepard's statements" (PCRV7 1121). Mr. Pride grew up with Shepard and lived with him in prison and was, for that reason, and excellent source to interpret Shepard's statements (PCRV5 701). The court found Taurus Scott incredible because "he had ample opportunity to tell his story to Davis' trial lawyers but didn't do so" (PCRV7 1121). This ignores the facts that Mr. Scott was a child, Mr. Davis' trial attorney did not listen to his family, and the confession happened after the trial.

D. Conclusion.

Reginald Shepard's confessions that he killed Mrs. Ezell are credible and competent evidence that Henry Davis has spent the last 12 years on death row for a capital murder that he did not commit. Justice requires a new trial so that Henry Davis can present this evidence to a jury. See 1 Smith v. State, 515 So.2d 182 (Fla.1987); Melendez v. State, 718 So.2d 746 (1998).

ARGUMENT IV

PROSECUTORIAL MISCONDUCT DURING THE COURSE OF MR. DAVIS' CASE RENDERED MR. DAVIS' CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED MISLEADING EVIDENCE AND IMPROPER ARGUMENT TO THE JURY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING.

Standard of Review.

In deciding ineffective assistance of counsel claims, this Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

The prosecutor's acts of misconduct, both individually and cumulatively, deprived Mr. Davis of his rights under the Sixth, Eighth, and Fourteenth Amendments. The prosecutor has a duty to correct testimony he or she knows is false when a witness conceals bias against the defendant through false testimony. Routley v. State, 590 So.2d 397, 400 (Fla. 1991). In Henry Davis' case, the prosecutor knowingly offered David Robert's false testimony that when he saw Henry the night Henry was arrested, Henry had scratches around his eyes (PR. V. 5 977). Henry was arrested only hours after Roberts claimed he saw these

scratches “starting to scab up with blood, hard blood on them”. However, arresting authorities Charles Riley and Edward Hendrix recalled that Henry’s face was not scratched (PCRV5 745, 749). Henry’s arrest photographs, which were taken less than twenty four hours after Roberts saw Henry, also show no scratches (Defense Exhibit). Because the false testimony probably affected the jury’s verdict, a new trial is required. Giglio v. United States, 405 U.S. 150, 154 (1972).

During closing argument, the prosecutor made arguments which were intended to and did inject elements of fear and emotion into the jury’s verdict. Garron v. State, 528 So.2d at 359. The prosecutor improperly appealed to the jurors’ emotions and suggested they base their verdicts on a form of retribution rather than the careful weighing process mandated by the law. The prosecutor stated that Henry Davis was “the judge, jury, and executioner” and “what he needs to get now is justice. Mrs. Ezell didn’t get any justice. Mrs. Ezell, as I said before, just got dead because he decided it”. (PR. V. 8 1544, 1559) (emphasis added). The prosecutor compounded his misconduct when he misstated the law and told the jury that, “every benefit is going to be given to the defendant, every benefit”. The prosecutor also improperly told the jury that Henry Davis’ mental health experts made everyone “bored to tears” and and offered personal opinions regarding Dr. Dee’s and Dr. McClane’s psychological tests asking, “[s]o how valid

is your stupid test?". (PR. V. 8 1545, 1547-48) (emphasis added). The prosecutor improperly made race an issue. "Now this is a black fellow in a well-to-do white neighborhood that Mr. Brown saw because it was a black man in his neighborhood" (PR. V. 8 1549-1550). These improper and racist statements, combined with the prosecutor's Golden Rule argument which this Court found to be improper on direct appeal, served only to inflame the jurors' emotions and risk a verdict and penalty based on such emotions and not the law. Davis v. State, 604 So.2d 794 (Fla.1992); Urbin v. State, 714 So.2d 411, 419 (Fla. 1998).

Other than the Golden rule violation, counsel did not object to any of the prosecutor's improper and prejudicial evidence and argument. This was deficient performance. There is a reasonable probability that the improper evidence and argument swayed at least one juror's verdict to death. Counsel's failure to thwart the misconduct and preserve the issues was thus, ineffective assistance of counsel.

The circuit court denied this claim: "No proof was presented to this court to support this claim." (PCRV7 1122). The court erred. Throughout the evidentiary hearing, extensive evidence was presented that proved beyond a reasonable doubt that David Robert's testimony was false and that the state had reason to know it was false. This, combined with the state's improper argument, more than likely affected the verdict. Accordingly, counsel's failure to preserve the issue was

ineffective assistance of counsel. Strickland, 466 U.S. at 688.

ARGUMENT V

THE CIRCUIT COURT ERRED IN FINDING THE FOLLOWING CLAIMS PROCEDURALLY BARRED.[6]

Standard of Review.

In deciding ineffective assistance of counsel claims, this Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

A. The Felony Murder Automatic Aggravator.

Mr. Davis' jury was instructed, "[t]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary." Mr. Davis' death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. This renders his death sentence unconstitutional because it automatically applies to every felony murder and failed to "genuinely narrow the class of persons eligible for the death penalty" Arave v. Creech, 507 U.S. 463, 474 (1993). (quoting Zant v. Stephens, 462 U.S. 862, 877

[6]This Court has repeatedly held that the following claims generally have no merit. They are raised herein to preserve the claims for future proceedings.

(1983)). See State v. Middlebrooks, 840 S.W.2d 317, 341-46 (Tenn. 1992); Engberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991).

The circuit court denied this claim, holding that it was a procedurally barred because it was not raised on appeal (PCRV7 1146). It was not raised on appeal because trial counsel did not effectively preserve the issue. Since the claim challenges trial counsel's performance, it is properly litigated in postconviction proceedings. The circuit court erred.

B. Improper Burden Shifting.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). See also Mullaney v. Wilbur, 421 U.S. 684 (1975). The court instructed the jury, "[s]hould you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether they outweigh any mitigating factors found to exist." (PR 1592). Because Henry Davis' sentencing jury was instructed that it could consider Florida's felony murder aggravating circumstance, he entered the penalty phase of his capital trial

with the burden of proving that death was not the appropriate penalty. This violated the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987).

The circuit court denied this claim, holding that it was a procedurally barred because it was not raised on appeal (PCRV7 1146). It was not raised on appeal because trial counsel did not effectively preserve the issue. Since the claim challenges trial counsel's performance, it is properly litigated in postconviction proceedings. The circuit court erred.

C. Denigration Of The Jury's Verdict.

Mr. Davis' jury was told that they only recommended a sentence to the judge, their recommendation was only advisory, and that the final decision as to what punishment is imposed rests solely with the judge. (PR. V. 8 1590-91). In Florida, both the jury and the trial court are sentencers. The jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985)(emphasis supplied). The trial

court's repeated denigration of the jury's role resulted in an unconstitutionally standardless death sentence that violates the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Mann v. Dugger, 844 F.2d 1466 (11th Cir. 1988).

The circuit court denied this claim, holding that it was a procedurally barred because it was not raised on appeal (PCRV7 1146). It was not raised on appeal because trial counsel did not effectively preserve the issue. Since the claim challenges trial counsel's performance, it is properly litigated in postconviction proceedings. The circuit court erred.

D. Bar Rules.

Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, Mr. Davis was entitled to a fair trial. However, Mr. Davis was not able to fully explore possible misconduct and jury biases because the court denied him the opportunity to conduct jury misconduct through juror interviews (PCRV3 390-99). To the extent it has and continues to preclude undersigned counsel from investigating and presenting constitutional issues without leave of court, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, is unconstitutional, violating his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and his Fourteenth Amendment right to equal protection of the laws.

The circuit court erred in denying this claim as procedurally barred because it was not raised on direct appeal (PCRV7 1146). Since postconviction investigation could not occur during the trial or direct appeal, this issue could only be raised in postconviction.

ARGUMENT VI

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DAVIS OF A FUNDAMENTALLY FAIR CAPITAL TRIAL AND PENALTY PHASE GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

In deciding ineffective assistance of counsel and cumulative error claims, this Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

Several errors occurred during Mr. Davis' capital trial. On direct appeal, this Court found that the prosecution made an improper statement during closing argument. Davis, 604 So.2d at 797. In postconviction proceedings, the circuit

court found that counsel was ineffective at the penalty phase of Mr. Davis' trial, violating his Sixth and Fourteenth Amendment rights to counsel. These errors clearly contributed to, if not caused, the death recommendation. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).

Additional substantive errors occurred during the guilt phase as well as the penalty phase. Counsel could have easily established a reasonable doubt to the charge of first degree murder and the propriety of the death sentence (see Cross-Appeal Arguments I and II), but counsel failed to do so. Counsel did not challenge the state witness that falsely testified that Mr. Davis' face was scratched, counsel did not investigate and present available evidence that Henry Davis was not alone at the victim's house and that Reginald Shepard likely killed the victim, counsel did not challenge an identification based on a prejudicial photopack which was designed to mark Henry Davis, and counsel did nothing to effectively challenge the state's burden in establishing the heinous, atrocious, or cruel aggravator. Furthermore, new evidence clearly establishes that Mr. Davis has been convicted of and sentenced to death for a murder that he did not commit (see Argument III). Cumulatively, these errors show that Mr. Davis did not receive the fundamentally fair capital trial and penalty phase to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See State

v. Gunsby, 670 So.2d 920 (Fla.1996); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Davis respectfully urges this Honorable Court to affirm the circuit court's order vacating his death sentence and granting a new penalty phase, and to reverse the circuit court's order denying a new guilt phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief/Cross Appeal Initial Brief has been furnished by U.S. Mail to all counsel of record on this ____ day of February, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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