IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

CASE NO. SC02-803
Lower Tribunal No. 87-1387

HENRY ALEXANDER DAVIS

Appellee/Cross-Appellant.
_____/

ANSWER BRIEF OF CROSS-APPELLEE AND REPLY BRIEF OF THE APPELLANT ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Phone: (813) 287-7910
Fax: (813) 281-5501

COUNSEL FOR STATE OF FLORIDA

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PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record will be referred to as “TR.”, followed by the appropriate page number. Post conviction record will be referred to as “PCR”, followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The State generally relies upon the Statement of the Case and Facts set forth in its initial brief. Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

STATE APPEAL

Trial counsel retained a mental health advisor and called two qualified mental health experts during the penalty phase to testify that Davis suffered from brain damage. Each concluded that both statutory mental health mitigators applied at the time Davis committed the murder. Trial counsel also presented the testimony of Davis' mother and oldest sister. None of the additional evidence developed by collateral counsel with the benefit of time and hindsight constitutes compelling mitigation. Confidence in the outcome of Davis' penalty phase is not undermined.

DAVIS' CROSS-APPEAL

ISSUE I - The evidence which Davis contends should have been presented by trial counsel was either inadmissible, or of such dubious value that presentation of such evidence would have harmed counsel's credibility in the eyes of the jury. The circuit court properly rejected the ineffective assistance claim as Davis failed to establish either deficient performance or resulting prejudice. **ISSUE II** - The record refutes any allegation that counsel was ineffective during the penalty phase. Trial counsel did challenge application of the heinous, atrocious, and cruel aggravator. Although collateral counsel

faults defense counsel for failing to provide his experts with evidence so that they could render an opinion that Davis was under the substantial domination or influence of another person at the time of the murder, collateral counsel failed to present such evidence through Davis' own experts during the evidentiary hearing. Moreover, the "evidence" collateral counsel has developed to support such a theory is either not credible, not admissible, or both.

ISSUE III - Davis' newly discovered evidence in the form of hearsay statements allegedly made by the long dead Reginald Shepard would not be admissible during the guilt or penalty phases of Davis' trial. The circuit court, after hearing such testimony, concluded that the witnesses to Shepard's alleged confessions were not credible. The newly developed "evidence" does not establish that Davis is innocent. Overwhelming evidence established Davis' guilt in this case.

ISSUE IV - Davis' claims of prosecutorial misconduct are procedurally barred. To the extent he raises an allegation of ineffective assistance, Davis provided no evidence to support his claims.

ISSUE V - The circuit court properly denied Davis' various claims as either procedurally barred or without merit.

ISSUE VI - As Davis has failed to establish individual errors

below, there is no cumulative effect to consider.

APPELLANT'S/CROSS-APPELLEE'S REPLY ARGUMENT

ISSUE

WHETHER THE POST-CONVICTION COURT ERRED IN FINDING THAT DAVIS' COUNSEL PROVIDED INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE FOR FAILING TO UNCOVER AND PRESENT ADDITIONAL MITIGATING EVIDENCE.

Davis contends that the circuit court's finding of deficiency and prejudice "is materially indistinguishable from cases in which this Court granted or upheld penalty phase relief." (Davis' Brief at 29). The State disagrees.

Davis' reliance upon Mitchell v. State, 595 So. 2d 938 (Fla. 1992), for the proposition that counsel was ineffective during the penalty phase is misplaced. In Mitchell, defense counsel presented absolutely no evidence during the penalty phase. Counsel simply assumed that he would obtain an acquittal and would not have to proceed with the penalty phase. Mitchell, 595 So. 2d at 941, 942. Although defense counsel had Mitchell examined by two mental health experts prior to the penalty phase, he made no arrangement for them to testify. "Both of these doctors indicated that had they been asked, they could have testified to both statutory and non-statutory mitigation." Mitchell, 595 So. 2d at 942. In addition, family members could have testified about his history of child abuse, his character,

and, his history of substance abuse. Id.

In contrast to Mitchell, defense counsel in this case offered the testimony of two mental health experts, Dr. Dee and Dr. McClane. Both experts offered their opinion that the statutory mental status mitigators applied in his case. Moreover, defense counsel offered Davis' mother and sister who were called to corroborate the history of head injury and attempt to humanize Davis in the eyes of the jury. Indeed, even with the benefit of time and hindsight, collateral counsel only offered the same two mental health experts to testify during the evidentiary hearing below.[1] They simply confirmed their original opinions. See e.g. PCR-5, 788 (EEG supported and therefore strengthened his original conclusion). That additional friends or family members could have been called does not establish counsel's representation was inadequate. And, it certainly does not compare to Mitchell where absolutely no evidence was presented by defense counsel during the penalty phase.

Similarly, Ragsdale v. State, 798 So. 2d 713 (Fla. 2001),

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[1]Although collateral counsel offered Dr. Pineiro's report regarding the more sensitive EEG, the State did not cross-examine the doctor during the original proffer and objected to its consideration by the post-conviction court. Nonetheless, the circuit court did accept Dr. Pineiro's report as evidence of what might have been available to counsel. (PCR-5, 773). The fact remains that neither the lower court nor this Court has the benefit of the State's cross-examination, which, of course, is critical to testing the credibility and weight of such evidence.

provides no support for Davis' argument on appeal. In Ragsdale, this Court noted that the penalty phase "was not subjected to meaningful adversarial testing" and that defense counsel "essentially rendered no assistance to Ragsdale" during the penalty phase. Ragsdale, 798 So. 2d at 716. This Court noted a large amount of evidence could have been introduced through family members relating to a severe history of child abuse, neglect, and impoverishment. "The Ragsdale brothers were frequently beaten by their father with fists, tree limbs, straps, hangers, hoses, walking canes, boards, and the like, until bruises were left and blood was drawn. Id. at 717. The father even fired a pistol twice at Ragsdale. Without advancing past the seventh grade, Ragsdale ran away from home at the age of fifteen or sixteen.

In addition, defense counsel in Ragsdale presented no mental health evidence during the penalty phase, whereas collateral counsel procured and presented an expert to testify that Ragsdale was psychotic at the time of the offenses and that the statutory mental mitigators applied. The doctor also offered a list of non-statutory mitigators, including "organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability." Ragsdale, 798 So. 2d at

718. This Court noted that even the State mental health expert could have provided some useful mitigation.

Here, defense counsel did not ignore mental health issues, he presented the testimony of two experts who rendered opinions that Davis was brain damaged and that the mental status mitigators applied. Further, the quantity and quality of the non-statutory mitigation from lay witnesses available in Ragsdale was much more compelling than that developed by collateral counsel *sub judice.* It must be remembered Brawley testified that at the time of trial [when Stoudemire was alive] no family member mentioned that Stoudemire treated Davis unfairly. (PCR-7, 1025). See Chandler v. U.S., 218 F.3d 1305, 1318 (11th Cir. 2000) ("reasonableness of counsel's acts (including what investigations are reasonable) depends 'critically' upon information supplied by the [petitioner] or 'the [petitioner's] own statements or actions.'")(quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)). Assuming for a moment, that evidence of an abusive environment was even available to Brawley, Davis was not physically abused but was made to work for his stepfather at a young age with his other siblings.[2]

[2]Although Stoudemire had on occasion struck Davis, Davis was not afraid of Stoudemire. (PCR-6, 968-969).

Williams v. Taylor, 529 U.S. 362 (2000), provides no support for Davis' position on appeal. In Williams, the majority of defense counsel's closing was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life. In Williams, trial counsel failed to present any testimony regarding early childhood abuse, nor any evidence regarding borderline mental retardation. Id. at 370. Trial counsel did not introduce documents regarding his childhood abuse because counsel incorrectly thought that state law barred access to such records. Trial counsel failed to introduce those portions of the State's expert's opinion that Williams would not pose a future danger if he were kept in a structured environment which would have rebutted the State's future dangerousness argument. Id. at 370-71.

By contrast, in this case defense counsel vigorously argued against the death penalty. Counsel presented two mental health experts who provided favorable testimony and two family members to corroborate Davis' history of head injury and to humanize Davis in the eyes of the jury. Collateral counsel's efforts developing additional aspects of mitigation or expanding on the mitigation counsel originally presented to the jury do not establish deficient performance. Brawley's performance in this case exceeded those in other cases where counsel has been deemed

constitutionally adequate.

For example, in Ferguson v. State, 593 So. 2d 508, 510-511 (Fla. 1992), counsel's interviewing the defendant and family members, and reviewing psychiatric reports, then putting the mother on as the only witness, was sufficient. See also Jones v. State, 732 So. 2d 313, 316-318 (Fla. 1999) (counsel spoke with three family members that were not interested in helping the defendant, and presented a mental health expert but did not establish the statutory mental mitigation); Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991) (decision to make impassioned argument for life and not to investigate family background not deficient).

Strickland teaches that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-691. Thus, it is necessary to look at the investigation that was actually conducted, rather than simply seeing the fruits of a later investigation, to determine the reasonableness of the investigating attorney's performance. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996) (in evaluating competence of counsel, must examine counsel's actual performance in preparation for penalty phase, as well as reasons advanced for

performance). The investigation described by Brawley below was more extensive than those in Ferguson, Jones, and Francis, all of which were deemed to be reasonable. Brawley knew to investigate Davis' background and talk to family members in order to develop penalty phase evidence. Far from ignoring mental health issues, Brawley presented extensive testimony from Dr. Dee and Dr. McClane who rendered opinions that the mental status mitigators applied.

As recognized by the trial court [addressing a separate claim], Brawley was an experienced and well respected advocate in the community. The trial court observed:

> Dan Brawley is one of the most experienced criminal trial attorneys in the Tenth Judicial Circuit. He has practiced in Polk County since the mid-1970's. Prior to representing Davis he had participated in more than a dozen capital cases as sole trial counsel. Brawley has attended numerous seminars on capital cases and was even a speaker at one such educational event.
>
> ...

(PCR-7, 1102-03). The presumption of effectiveness is even more difficult to overcome when addressing the conduct of an experienced advocate like Brawley. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir 2000), *en banc*, ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.") (citing Provenzano v. Singletary, 148 F.3d 1327,

1332 (11th Cir. 1998).

The State has not found, and Davis has not cited any comparable case, where counsel, having presented two mental health experts [providing extremely favorable testimony], along with two family members, has been found constitutionally deficient. In any case, assuming Davis has established deficient performance, he has not carried his burden of showing prejudice.

What Davis and the circuit court fail to realize is that most of the mental health evidence presented during the evidentiary hearing was cumulative to that presented by defense counsel below. The experts called by Davis had the same favorable opinions they offered during the original penalty phase: Davis suffered from brain damage and the statutory mental mitigators applied.[3] The only difference was that the EEG confirmed or strengthened their opinion that Davis was brain damaged. However, any contention that Davis' experts were

[3]In fact, Dr. Pineiro's testimony was somewhat less favorable than the testimony presented by Doctors Dee and McClane. He was reluctant to say that Davis was "substantially impaired" at the time of the offense. (Pineiro Proffer at 15). "I don't know in this particular event," I can say "this man did have elements that will diminish his responsibility, meaning he had a brain dysfunction, an encephalopathy, a learning disability, at best a borderline intelligence." (Pineiro Proffer at 15-16). Dr. Pineiro did not testify that Davis' brain dysfunction would rise to the level of a statutory mitigator.

unaware of important information--the EEG mentioned in Dr. Vroom's report--is false. (Davis' Brief at 17-18). In fact, one of his experts, Dr. McClane, was clearly aware of the abnormal EEG at the time he testified for Davis during the penalty phase. Dr. McClane testified: "...I think they put him on the Tegretol probably **because he had an abnormality on his electroencephalogram** at the State Hospital and a history of head injury and manifestations of irritability and aggressiveness intermittently." (TR. 1396-97). Despite his awareness of the abnormal EEG, there was no testimony offered below to suggest Dr. McClane recommended Brawley obtain a second more sensitive EEG.[4]

In any case, the jury was clearly aware of the abnormal EEG at the time of the trial. Brawley used this fact to argue that Davis was brain damaged in closing:

> Now, after this Mr. Davis was seen on August 25th, 1988 by a Dr. Broom (phonetic) who performed a medical - - this is a medical doctor, performed a medical test called an EEG. The EEG was abnormal because of a mild to moderate dysrhythmia. Now, Dr. Westby tells us that she put that in her report, and when I asked her what an EEG was she did tell us, well, that's where they put the electrodes up to your brain, up to your

[4]Dr. McClane's assertion that he "hoped" he would have ordered another more sensitive EEG if he had been aware of an abnormal result on Dr. Vroom's initial EEG is highly suspect. (PCR-5, 797). Dr. McClane was clearly aware of the abnormal result obtained by Dr. Vroom at the time of the penalty phase. (TR. 1397).

> head. But it turns out she doesn't know what the EEG is for. The Dr. Broom who gave the EEG told Dr. Westby or put it in the notes, put in Henry's file, that there was a mild - - there was an abnormal EEG and a mild to moderate dysrhythmia. Dr. Westby doesn't know what dysrhythmia is. Now, I don't either but it's not my field, and I didn't write a report saying that this man is [sic] nothing wrong with him and he's faking.
>
> And if you recall, she told us an absolutely incredible statement, that she doesn't know what it means but she's going to go home and look it up in her book so she can find out what it means. Dr. Zwingelberg at least told us that an EEG measures brain waves, and Dr. Broom found an abnormal EEG, abnormal brain waves. Something is wrong in this boy's brain.
>
> Another doctor, a medical doctor again, saw Henry Davis at the state hospital, a Dr. Koehler from the neurology clinic. The patient's history and EEG would be consistent with an underlying convulsive - - underlying convulsive disorder. He has evidence of encephalopathy - - maybe that's the word Dr. Westby was going to look up and, you know, she's got the book to do it.

(TR. 1573-76). See Glock v. Moore, 195 F.3d 625, 636 (11th Cir. 1999) (concluding that the petitioner could not show prejudice because much of the new evidence is merely repetitive and cumulative to that which was presented at trial). The jury was clearly aware of the convulsive disorder and abnormal EEG.

Doctors Dee's and McClane's opinions, favorable to Davis at the time of his trial, remain unchanged. The fact that his own experts now claim the EEG would have strengthened their testimony is of no consequence. What would have been persuasive, perhaps, is if the experts called by the State would

have changed their opinions. No such evidence was offered by Davis. We must presume that Dr. Westby and Dr. Zwingelberg's testimony that Davis was a malingerer and suffered no significant brain damage remains unchanged. (TR. 1487). And, while Davis might have suffered a seizure disorder, Dr. Zwingelberg testified, it "doesn't mean that sort of brain damage is going to result in them hurting somebody or that that's a mitigating factor." (TR. 1487). Dr. Zwingelberg felt that Davis qualified for a diagnosis of antisocial personality disorder. (TR. 1487-88). In other words, Dr. Zwingelberg, while agreeing it was possible that Davis suffered from some brain dysfunction, noted that "[p]ersonality style is such that he also displays impulsiveness." (TR. 1490).

In addition, the reasons the trial court originally rejected those opinions remain valid. Davis was not substantially impaired, he was functioning all too well in order to execute his criminal plan, targeting the elderly victim [he and his stepfather had previously cut her lawn], stealing items of value, and leaving the house by taking her car, which, he later abandoned. The only "new" mental status item developed consisted of Dr. Dee's lone opinion that the statutory age mitigator applied based upon Davis' age and IQ at the time of the offense. However, Dr. Dee had difficulty explaining his

formula and was vigorously challenged on cross-examination by the prosecutor. Moreover, the jury was well aware of Davis' age and low IQ at the time of trial and defense counsel repeatedly referred to Davis as a "young" man in closing argument. (TR. 1580, 1587, 1590).

The additional family members offered very little in the way of compelling non-statutory mitigation. Davis, like his sisters, was forced to work for Stoudemire at a young age picking fruit. Stoudemire was abusive to their mother. However, he always put food on the table and they had clothes for school. (PCR-6, 968). Collateral counsel **did not** uncover a history of severe abuse. Davis chose to work for Stoudemire after graduating from high school and was paid for his work. (PCR-6, 969). In addition, the impact of such testimony is diluted by the fact that Davis' sisters did not grow up to be murderers or criminals despite being raised in the same family atmosphere. With the luxury of a large amount of time [in this case, more than a year], and the ability to focus upon portions of a made record, it is almost always possible for collateral counsel to present additional mitigation evidence.[5] See

[5]A potential problem with Davis' character witnesses is that they tended to contradict the testimony of his experts. The experts testified that due to brain damage Davis meets the criteria of the statutory mental mitigators, extreme emotional disturbance and capacity to conform his conduct are substantially impaired.

Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999) (Such affidavits from family members "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

Davis has apparently identified a deficiency in counsel's failure to obtain and present the jury with Davis' school records. Davis' school records do show that he was in some special education classes. However, Davis was also in regular classes and was capable of making B's, C's or D's and F's. (PCR-6, 967-73). The jury in this case, through Brawley's efforts, were well aware of Davis' relatively low IQ. It was not, as Davis argues, the fact that Davis received a regular diploma which allowed the prosecutor to argue that little weight should be given Davis' low IQ, rather, it was the fact that Davis' IQ was similar to what you would expect to find from those in prison. The prosecutor argued, in part:

> ...But in any event even if that's true [brain damage], so what? We're not going to put him to death because he's got minimal brain damage. What's the death penalty for? I asked Dr. Dee, how does his intelligence level compare to other folks in prison? Whoa, about the same, Mr. Aguero. We don't have a lot

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In accordance with their judgment, Davis has a history of acting out impulsively.

of bright people in prison, do we, Dr. Dee?...

(TR. 1556). The school records, if mitigating in any way, certainly did not constitute significant mitigation.

In Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998), the jury recommended death by a vote of seven to five. The trial court found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP), along with the statutory mitigator of no significant criminal history. The judge had not found any nonstatutory mitigation, despite trial testimony of Rutherford's positive character traits and military service in Vietnam. Testimony was presented at the post-conviction evidentiary hearing that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. Yet this Court unanimously concluded that the additional mitigation evidence presented at the postconviction hearing would not have led to the imposition of a life sentence due to the presence of the three substantial aggravating circumstances. 727 So. 2d at 226. See also Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable

probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

As in Rutherford above, collateral counsel simply has not produced the quantity nor quality of evidence to establish a reasonable probability of a different result. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result").

CROSS-APPEAL

I.

WHETHER THE CIRCUIT COURT ERRED IN DENYING DAVIS' GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

Davis asserts the lower court erred in denying his various guilt phase ineffective assistance of counsel claims. The State disagrees. The trial court's ruling is supported by the record and should be affirmed by this Court on appeal.

A. Counsel's Alleged Failure to Investigate Davis' Claims of Innocence

As noted in the State's initial brief, ineffective assistance of counsel claims present a mixed question of law and fact subject to *de novo* review, "while giving deference to the trial court's factual findings." State v. Reichmann, 777 So. 2d 342 (Fla. 2000). The circuit court denied this claim below, stating:

> Davis claims that Brawley was ineffective by failing to investigate and present available evidence that Reginald Shepard killed the victim. Davis relies on the testimony of Levonskie Riley, Alma Shepard, Lenvent Jones, Jerry Bonds and Cedric Christian to support his claim.
>
> Levonskie Riley testified that Reginald Shepard paid him fifty dollars to drive to Shepard's apartment where he picked up a t-shirt, jeans, and shoes. One shoe was covered in what appeared to be blood. Riley drove Shepard to an orange grove where he disposed of the bundle. Riley, who recently suffered a stroke, cannot remember the date of the incident. Riley told Davis' previous attorney, Rex Dimmig about this and

gave a pretrial deposition to Brawley concerning the incident. Brawley did not call Riley to testify at trial.

Lenvent Jones testified that on the day of the murder he saw Davis getting out of the car. Brawley talked to him but did not call him to testify at trial.

Alma Shepard is Davis' sister. She testified that she saw Shepard the night Davis was arrested. He denied committing the murder and told her that Davis didn't commit the murder either. He said he knew for a fact that Davis didn't do it. She observed that when she saw Shepard he was dirty, smelly and sweaty and had been hiding in an orange grove.

Jerry Bonds testified that the knife used in the murder was "very similar" to the knife Reginald Shepard carried in his pocket. Bonds is an inmate at Polk County Correctional Institute and has "less than" ten felony convictions.

Cedric Christian testified that Shepard always carried a knife. He identified the murder weapon as the knife Shepard carried.

This claim alleges ineffective assistance of counsel and does not allege newly discovered evidence. The Court's analysis is therefore confined to the ineffective assistance aspect of Davis' claim.

Neither Levonskie Riley, Lenvent Jones, Alma Shepard, Jerry Bonds or Cedric Christian testified to any direct knowledge of Reginald Shepard's involvement in the murder.

Levonskie Riley's story was known prior to trial by Rex Dimmig and Dan Brawley. He was deposed by Brawley prior to trial. Brawley directed his investigator to look into Riley's story and come (sic) to the conclusion that he could not use Riley as a witness.

Lenvent Jones' testimony would have served only to corroborate the testimony of Harold Brown placing Davis at the crime scene. John Johnson and Reginald Shepard were deposed prior to trial and both denied any involvement in the murder. Alma Shepard could only confirm Shepard's denial of committing the murder.

Jerry Bonds' testimony concerning the knife was not conclusive. The knife according to Bonds was "very similar." It is doubtful Bond's testimony, if

> admitted, would carry any weight. On the other hand, Ceric Christian identified the murder weapon as definitely belonging to Shepard. This testimony carries with it very little indication of believability or trustworthiness. Christian's version of events surrounding Shepard's jailhouse admissions conflict with that of Willie Watson. He further testified that he saw Shepard on the street in 1995 or 1996. Reginald Shepard died in July 1995, thus casting doubt on Christian's testimony in this regard.
>
> 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 in both 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. This claim is therefore DENIED.

(PCR-7, 1104-1106).

In support of his contention that counsel failed to investigate and present evidence that Shepard killed the victim in this case, Davis asserts that he told three of the four examining doctors that Shepard was present during the murder along with John Johnson. (Davis's Brief at 35). The fact Davis denied committing the murder to mental health professionals does not constitute relevant evidence and certainly does not suggest counsel was ineffective. Of course, Davis fails to mention that his "story" has repeatedly changed depending on the time he made the statement and who he was talking to. Moreover, none of his various assertions were made in court, either at trial or during

the evidentiary hearing below. Indeed, Davis even told differing stories to the defense experts called on his behalf. His own experts acknowledged that some times Davis is malingering. Dr. McClane testified that Davis' last story [two people committed the murder while he was out back] which conflicted with an earlier one he provided, was "so self-serving, I have to consider the **strong possibility that it could be malingering.**" (PCR-5, 789)(emphasis added).

Collateral counsel attempts to avoid the deleterious fact that Davis provided different stories about his involvement by claiming that the last one was provided only after he was "restored" to competency. However, a fair reading of the record reveals that Davis was never truly incompetent to proceed. Although initially found incompetent to stand trial, Davis was treated and observed at the State mental health hospital. After his stay at the State hospital, the experts, including a psychologist and a psychiatrist, concluded that Davis was competent and a malingerer. Not only was Davis a "malingerer," but they concluded "he was a very good malingerer." (TR. 1440; PCR-5 791).

According to Dr. Dee, Davis initially said he had no memory of the day of the murder. (TR. 1343). At another point, he told Dr. Dee that he was out picking watermelons the day of the

murder. (TR. 1343). Next, Davis told a story about babysitting for someone, maybe his grandmother. (TR. 1344). When those stories were checked out and presumably proved false, Davis then returned to he did not know "what he was doing." (TR. 1344). Ultimately, when his memory "improved," he related the story about Shepard and Davis committing the murder while he was out back. (TR. 1349-51).

The other defense expert, Dr. McClane, was also aware of the various stories provided by Davis. (TR. 1389). Dr. McClane testified that when Davis was first arrested he said he was in a watermelon patch, next he was babysitting, then some guy who looked just like him committed the crime, and told Davis about it. Finally, Davis comes back after being found competent and says that two other guys committed the murder.[6] (TR. 1414-15).

Davis also provided different stories to the police shortly after the murder. Davis denied killing the victim. In fact, Davis denied having been in Mrs. Ezell's house at all. (PCR-5, 746). Davis also denied ever having been in the victim's car. (PCR-5, 746). Davis told Deputy Riley he was out picking

[6]Davis also provided various versions to Dr. Mark Zwingelberg, called in rebuttal by the State: Davis' story evolved from no memory of the day of the crime and complete denial of being near the victim's house the day she was murdered to claiming he was present with two other individuals at the time of the murder. (TR. 1477-78).

watermelons on the day Mrs. Ezell was murdered. (PCR-5, 746). As this Court noted on direct appeal, Davis' stories seemed to evolve:

> Davis was arrested on March 20, 1987. He denied committing the murder and said that he had not been in the victim's house or car. He initially said that he had been picking watermelons on the day of the murder but later said that he had been babysitting. A few days after his arrest, Davis told officers that the day before the murder, a black man who looked exactly like him showed him a weapon similar to an ice pick and said that he was going to rob Ezell. Davis said that he saw the man the day after the murder and the man asked him if he heard what happened. Davis also told the officers that he had seen Ezell at the post office on the day before the murder and he offered to go to her house to put up groceries. He said that he went to her house, put up groceries, then locked her car and left.

Davis v. State, 604 So. 2d 794, 796 (Fla. 1992).

What post-conviction counsel is now offering is the final variation of Davis' many stories. But, again, Davis' various assertions of innocence, none made in court under oath, do not in any way suggest that defense counsel provided ineffective assistance. Davis did not pursue an insanity defense and his self-serving statements to the experts do not constitute admissible evidence.[7]

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[7]Courts are generally reluctant to let a non-testifying party admit hearsay statements through an expert. See generally Holsworth v State, 522 So. 2d 1297 (Fla. 1988) (expert testimony as to effect of intoxicants on a defendant's mind is inadmissible absent some proof of ingestion other than defendant's hearsay statements to the expert); United States v.

The various stories Davis provided to law enforcement simply show that counsel was faced with a daunting task in defending Davis. Moreover, Davis' stories conflicted with the overwhelming physical evidence connecting him to the victim's murder.

Defense counsel first asserts that Lenvent Jones should have been called to testify in support of a theory that Shepard and Johnson committed the murder. Lenvent Jones allegedly observed Davis, Shepard, and Johnson, in a car in the victim's driveway on the day of the murder. Jones, who worked with Davis providing lawn care, claimed that Davis had told him earlier he had a job to cut Ms. Ezell's lawn that day. Defense counsel investigated the story provided by Jones and he was deposed along with Reginald Shepard. (PCR-7, 1058).

Jones's testimony about seeing Davis, along with Shepard and Bibby [Johnson] getting out of a car at Ms. Ezell's on the day

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Palmer, 91 F.3d 156 (9th Cir. 1996) ("Finally, if the district court had admitted these declarations, it would in effect have allowed Palmer to testify to his innocence without subjecting himself to cross-examination." (citing Palmer v. Illinois, 484 U.S. 400, 412 (1988) ("[E]ven the defendant may not testify without being subjected to cross-examination."); Smithson v. V.M.S. Realty, Inc., 536 So. 2d 260, 262 (Fla. 3d DCA 1988) (In suit to recover for wrongful death caused by murder and robbery in defendant's theatre, it was error to permit defendant's expert to testify regarding the explanations and motives of those who caused the death, stating: "A witness may not serve merely as a conduit for the presentation of inadmissible evidence.").

of the murder would be contradicted by Ms. Ezell's neighbor, Mr. Brown. Mr. Brown only observed one man, Davis, approach Ms. Ezell's door on the morning she was murdered.[8] (TR. 707).

Brawley testified that he must consider the benefit of such potential evidence against losing closing argument. (PCR-7, 1058). Moreover, he did not think that Lenvent Jones' testimony was as credible as Mr. Brown's and did not want to risk the possibility of alienating the jury. Brawley testified:

> ...And I would also have to weigh whether my witness was as believable as Mr. Brown. And if not, then I might have failed on both - - in both respects and I wouldn't have impeached Mr. Brown and I would have placed my client at the scene, and possibly have the jury thinking I was producing a bogus, a nonsense wild hair type of argument.

(PCR-7, 1059). The trial court's finding that Brawley made a reasonable tactical decision not to use this testimony is

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[8]As Mr. Brown last observed Davis he was standing at Ms. Ezell's front door before leaving to take his daughter to school. Mr. Brown testified: "And he walked up to the door and I watched him stand there for a while, and I thought it's too early in the morning, she's just not going to answer the door. But I suppose I stood there for ten, 15 seconds, and he was still standing there, and I went on in the house." (TR. 707). When he came back out to take his daughter to school [about fifteen minutes later], Brown looked over to Ms. Ezell's but did not see anybody. (TR. 714-715). This is highly significant as the murder occurred in the morning before the housekeeper arrived. Moreover, Ms. Ezell was murdered just inside the front door of her house.

supported by the record.[9] See Valle v. State, 778 So. 2d 960 (Fla. 2001) ("This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.") (citing Shere v. State, 742 So. 2d 215, 220 (Fla. 1999)).

As for Davis' assertion that Lenvent Jones could have testified about blood on Shepard's clothing, this testimony would not be admissible at trial. Jones did not observe any blood on Shepard's clothing. (PCR-5, 727). He simply repeated the statement allegedly made by Shepard's brother, asking Jones about who his brother had been fighting. What Shepard's brother allegedly said to Jones [blood on his clothing], constitutes inadmissible hearsay. Brawley cannot be considered deficient for failing to offer inadmissible evidence.

As for Levonskie Riley, Davis' Uncle, Brawley learned about this potential witness prior to trial. He allegedly drove Shepard around and observed Shepard wearing bloody shoes. Riley was with Shepard when he threw away some clothing. (PCR-7, 1028-29). Brawley had his investigator look into it but could not find any corroboration. (PCR-7, 1028-29). Moreover, Riley

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[9]The other person allegedly observed with Davis by Jones was Johnson. He testified during the evidentiary hearing and denied having anything to do with the victim's murder.

was difficult to pin down as to when this ride happened in relation to the murder of Ms. Ezell. Riley lived in Kissimmee but came to visit his sister sometime after Ms. Ezell had been murdered. (PCR-4, 657-59).

As the trial court noted, Riley had no "direct knowledge" of Shepard's alleged participation in the murder of Ms. Ezell. Failure to call Riley as a witness could not be considered deficient performance. Riley was easily impeached by the State as to when this allegedly occurred in relation to the murder. (PCR-4, 668-69). Moreover, Riley's testimony about bloody shoes was not linked to any physical evidence at the crime scene, such as bloody footprints leading away from the scene or in the victims' car, which might have corroborated his story. Indeed, the absence of such evidence clearly undercuts Riley's credibility.

Davis' allegation that his counsel was ineffective for failing to call his sister Alma Davis as a witness is also without merit. Alma Davis allegedly had a conversation with Shepard shortly after Davis was arrested for Ms. Ezell's murder. However, anything Shepard said to Davis constituted inadmissible hearsay. Shepard denied killing Ms. Ezell. Also, Shepard generally attempted to assure Ms. Davis that her brother did not commit the murder. In doing so, he did not in anyway admit that

he, not Davis, had committed the murder. Consequently, Shepard did not make a declaration against his own interest. See Smith v. State, 746 So. 2d 1162, 1167 (Fla. 1st DCA 1999) ("A party who offers to introduce a statement on the ground that it is a declaration against penal interest must show: (1) the declarant is unavailable as a witness, 2) the statement so far tends to subject the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless he or she believed it to be true, and 3) the statement is corroborated by circumstances that clearly indicate its trustworthiness.")(citations omitted).

Davis has offered no legal foundation for this Court to conclude that Shepard's hearsay statements were relevant and admissible. Nor was the so-called "rumor" that Ms. Davis heard, that Shepard killed Ms. Ezell, admissible evidence. Once again, defense counsel cannot be faulted for failing to offer inadmissible evidence.

The trial court properly found that defense counsel was not ineffective in failing to present testimony that Shepard carried a knife. The circuit court found the one witness, Cedric Christian, who identified the knife found in the victim's home as Red Shepard's, was not credible. It was the circuit court's province to determine the credibility of Mr. Christian. Porter

v. State, 788 So. 2d 917, 923 (Fla. 2001). The reasons for doubting Christian's credibility will be discussed in more detail under Issue III of this brief, infra.

Another witness who observed Shepard with a knife resembling the murder weapon admitted that it was a common type of knife and that lots of people have them. (PCR-3, 421). Failure to offer such evidence cannot be considered deficient performance. Moreover, given the lack of any credible evidence that Shepard committed the murder in this case, it also falls far short of establishing prejudice.

B. Failure to Impeach David Robert's Testimony

Next, Davis asserts that counsel was ineffective for failing to impeach State witness David Roberts' testimony that an old lady scratched him. The trial court rejected this claim below, stating:

> Davis argues that David Roberts' assertion that he saw scratches on Davis' face shortly after the murder was the only evidence directly connecting Davis to the murder. Brawley should have presented numerous witnesses who would have testified that Davis' face bore no scratches and by not doing so, Brawley's representation was deficient according to Davis.
>
> If Roberts' testimony concerning scratches was successfully impeached, the State would be left with only circumstantial evidence to prove Davis committed the murder Davis claims. He argues the only direct evidence against him would be a prejudicial photo-pak ID and Davis' fingerprints on the victim's personal property.
>
> The State argues that Brawley did attempt to impeach Roberts' testimony concerning the scratches.

> He also tried to impeach statements allegedly made by Davis. Brawley pointed out to the jury during closing argument that not one witness corroborated Roberts' testimony concerning the scratches.
>
> Davis is incorrect that the only other evidence directly connecting him to the murder was the photo-pak ID and his fingerprints on items of the victim's property. Davis' bloody fingerprint was found on a key tag in the victim's house. His fingerprints were found in the victim's stolen car, as well as property found in the trunk. He pawned some of the victim's property immediately after the murder. He was observed at the victim's house shortly before the murder.
>
> The record shows that 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 had 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 witness had testified about seeing any scratches on Davis face.

(PCR-7, 1106-07).

Aside from observing scratches, the remaining portions of Roberts' testimony were either undisputed, Davis knew where the car had been abandoned [Davis' fingerprints in the car and on stolen items found in the trunk] or favorable [Davis suggesting he was with other people and didn't mean for it to happen]. Brawley testified that the State offered only one witness to testify that Davis had scratches on his face and that his testimony was not corroborated and unreliable.[10] (PCR-7, 1027).

[10]A possible explanation for Roberts' observation of scratches comes from the medical examiner's testimony. Even a medical

Brawley addressed this issue in closing argument, stating:

> ...Now, almost three years after the fact, he's coming in and telling us while we were in the car, Henry was saying something about the killing and we didn't mean for it to happen, and all this. When he's asked about it over two years ago, he says he never said anything. Never said anything to us. And he tries to explain that by saying, they called me down there as a witness so I just told them what they wanted to hear.
>
> Well, is he telling us what the Prosecutor wants him to say? What the Prosecutor wants to hear? And more important about him, remember that little bit of testimony he tells us about the scratches around Henry's eye, the scabs were starting to form and he could see them, and he says, what happened to you, and he says that Henry says something like, old lady scratched me, which he took to be a girlfriend.
>
> This was on the 19th, as I recall. Remember, I believe that the evidence is that Ms. Ezell was killed on the 18th, which is Wednesday, this is a Thursday, Thursday, Thursday night, Henry is arrested the following morning in the early hours of the morning, I believe 2:00 a.m. This is a couple of hours after this fellow says that he stumbled out of a pool hall and then gave Henry Davis a ride.
>
> Why is it that not one of the three police officers who interviewed Henry Davis and who sat in a room with him with the light on looking at him, asking him the questions, why is it –- why is it that a single one of them, not one of them told us about any - - any scratches on his face.
>
> I suggest to you that as to this fellow, you can't believe anything he told you and you shouldn't rely on it.

(TR. 1143-44).

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examiner has difficulty determining whether areas of dried blood constitute cast off drops of blood or are in reality scratches. (TR. 901, 902). Captain Hendrix testified he observed no scratches on Davis some 48 hours after the murder. (PCR-5, 750). Roberts observed Davis before that time. If the marks around Davis' eyes were dried blood, they obviously could have been washed off prior to the officers observing Davis.

Contrary to Davis' assertion, Roberts was not a critical witness and failure of counsel to call witnesses to contradict him on a rather minor point [scratches] would not have been worth losing the "sandwich" argument.[11] (PCR-7, 1028). See Occhicone v. State, 768 So. 2d 1037 (Fla. 2000) (noting that one valid tactical consideration in deciding whether or not to present evidence is to preserve the right to first and last closing). As noted below, overwhelming evidence connected Davis to the murder.[12] Brawley's failure to call witnesses to impeach Roberts testimony does not undermine confidence in the outcome of Davis' trial.

C. Counsel's Failure to File a Motion To Suppress Mr. Brown's Identification Of Davis

The circuit court denied Davis' claim that Brawley was ineffective for failing to file a motion to suppress the photo-

[11]Brawley testified that a defense attorney is always confronted with weighing the value of evidence against losing closing argument: "If it's good stuff and you want to use it then use it. But if it's a close question you have to make that call about whether the final argument is more important than a piece of evidence that might be less important." (PCR-7, 660).

[12]Davis mentions that his jeans were tested and revealed no evidence of blood. However, this fact does not in any way suggest he was innocent of the murder. (Davis' Brief at 44). The jeans were recovered from Davis' residence with other clothes that were brought in to the police station in a suitcase. (TR. 943). Neither post-conviction counsel nor the serologist have any idea if Davis wore those jeans on the day Davis murdered Ms. Ezell. (TR. 1023).

pak identification. The circuit court held:

> ...The State responds that there was no legal basis to suppress the photo-pak and that Harold Brown made a positive in-court identification of Davis.
>
> The Court finds that Brawley did not file a motion to suppress the photo-pak because he felt that ethically he had no legal grounds to do so. This decision is supported by the testimony of Davis' prior trial counsel Rex Dimmig, Esq. and Ron Toward, Esq. Both Dimmig and Toward support Brawley's decision.
>
> Nevertheless, Brawley did not object at trial to the introduction of the photo-pak. Brawley went on to explain that identity was not really an issue. Davis' bloody fingerprint, having been found on a key tag in the victim's house, 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. This Claim is DENIED.

(PCR-7, 1107-08).

As the circuit court noted below, none of the various attorneys assigned to Davis' case prior to Mr. Brawley filed a motion to suppress Mr. Brown's identification of Davis. Brawley testified that he had no legal basis to argue that the photo-pak was unduly suggestive. Brawley testified:

> My recollection about the photopack is there was no, no issue that justified a Motion to Suppress. It seems like I objected to it in trial, and it's just one of those things that you do to get that, to get that on the record. But the photopack was pretty good as I recall. I mean, the figures were - - the faces were pretty similar. And the biggest problem with Mr. Brown's testimony was his description of the man he saw, and it was an uncanny description of Henry Davis. That was one of the sections of transcripts I read, we got to reread, and it described Henry Davis to T. And then later identified the photograph and identified Henry at trial.

(PCR-7, 1029-30).

Davis has offered no evidence to suggest that a Motion to Suppress would have been granted. Indeed, even a cursory examination of the photo-pak reveals that it was a fair array. (State's Exhibit #62). Davis concludes his argument on this issue by suggesting that without the photo-pak, Mr. "Brown could have easily seen any other slender African American male who happened to be at the victim's house, including Reginald Shepard." (Davis' Brief at 48). This assertion is not based upon any evidence in the record. Brown identified Davis, not just any slender African American male. Moreover, Davis did not offer a picture of Mr. Shepard during the evidentiary hearing or even attempt to call Mr. Brown to challenge his identification. Further, the physical evidence leaves absolutely no doubt that Davis was in the victim's house at the time of the murder. Mr. Brown's identification of Davis was corroborated by Davis' fingerprints found in the victim's home [including a bloody fingerprint in the victim's bedroom], Davis' fingerprints in the victim's stolen car, and, Davis' fingerprints on items taken from the home.

D. Counsel's Alleged Conflict Of Interest Based Upon Race

Davis finally contends that Brawley was a racist and that he allowed race to play a factor in his representation. Davis'

allegation is completely devoid of merit.

The circuit court denied this claim below, stating:

> Davis claims that his trial counsel, Dan Brawley, Esq., is a racist and that Brawley's personal hatred of African Americans inhibited his ability to effectively represent Davis. Brawley's statements during voire dire and his closing argument in the penalty phase in which he discussed his southern heritage and his feelings towards blacks demonstrate Brawley's racism Davis argues. Because of Brawley's prejudice toward blacks he failed to properly investigate Davis' case and provide adequate legal representation.
>
> The State of Florida argues that Brawley is not a racist and his statements during voir dire and penalty closing were a strategic decision which Brawley fully discussed with Davis and of which Davis approved prior to trial.
>
> The Court finds no evidence in this record that Dan Brawley, Esq. is a racist. Brawley explained his tactical decisions to address the issue of race during voir dire. He explained his approach to this issue with Davis and his client approved the tactic. Dan Brawley is one of the most experienced criminal trial attorneys in the Tenth Judicial Circuit. He has practiced in Polk County since the mid-1970's. Prior to representing Davis he had participated in more than a dozen capital cases as sole trial counsel. Brawley has attended numerous seminars on capital cases and was even a speaker at one such educational event.
>
> 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. This claim is therefore DENIED.

(PCR-7, 1102-03).

Brawley wanted to address the race issue up front in voir dire in order to flush out any negative racial views the panel

might have in light of the fact Davis was black and the victim was a white female. (PCR-3, 475-76). Brawley explained:

> I think that, you know, it was important. I thought that then and I think now it's important to get this out on the table. Too often we've been asked the safe questions and get the safe answers and everybody is on the same page, apparently. But underneath people are starting to think about race questions in an unattractive way. And in a way that is harmful, and I want to get at that kind of thing.

(PCR-3, 477). Brawley testified why he talked about this strategy with Davis: "It was important to me that my client understand what I was doing. I didn't want to have a problem in the courtroom by surprising him. But I also wanted him to understand what I was doing and why I was doing it, so I talked to him about it. And the response that he gave me is what I testified to." (PCR-4, 538).

Brawley testified that he could have taken the safe approach and just ask the jury if they would bring back a verdict of guilty simply because Davis is black and was accused of killing a white woman. (PCR-3, 482-83). Brawley acknowledged that it was new ground for him to cover in voir dire, but testified: "It was an extreme case, it was a very bad case on the facts. I knew that I would some day be dealing with why I did what I did and what I had said in picking the jury..." (PCR-3, 485). Even if jurors did not reveal racist feelings in voir dire, Brawley hoped that he "raised their consciousness at least enough that

the race issue might not be a factor in the verdict." (PCR-3, 493). Brawley certainly pursued a reasonable strategy in selecting the jury under the facts of this case. Brawley's comments were clearly designed to ferret out racist feelings on the jury and to ensure that race would play no part in the jury's consideration of the case.

Davis asserts, without any evidentiary support, that Brawley's failure to challenge the photo-pak was based on racism. This is a preposterous contention. Apparently, none of the various attorneys assigned to Davis' case thought the photo-pak was unduly suggestive. And, even now, post-conviction counsel has offered no legitimate basis to suppress Mr. Brown's photo-pak identification of Davis. Simply ascribing a racial motive to some asserted deficiency of counsel does not establish that counsel was a racist. The comments Davis attributes to Brawley to suggest he was a racist were in fact made as part of a calculated tactical decision to unearth racist attitudes from the jurors. As the trial court noted, this was a tactic Brawley used after consulting with Davis.[13] E. Davis' Failure To

[13]As for not going to Davis' neighborhood to talk to his family members, the State notes that much investigation had already occurred prior to Brawley's appointment. (PCR-3, 463-64; PCR-7, 1030). Brawley utilized an investigator to follow up on any leads to assist in the guilt and penalty phases. (PCR-3, 440-41). Brawley testified that he did talk with some members of Davis' family. (PCR-7, 1023-24).

Establish Prejudice

Assuming, *arguendo,* Davis has shown some deficiency on the part of counsel, he has completely failed to establish prejudice based upon any of the asserted deficiencies. As noted above, Davis' version of events has evolved over time. When asked about what Davis told him, Brawley testified:

> Well, I don't recall him giving me any statement that was consistent or inconsistent. He was aside from the fact I didn't do this, Henry was vague about what happened, and did not - - just did not deal with the fact that he had given different statements to the police and to the doctors.

(PCR-7, 1054). Davis apparently never provided a coherent story or theory for Brawley to work with. The statements Davis now relies upon are apparently the latest version of events Davis told to mental health professionals.

Dr. Dee and Dr. McClane testified that Davis' final story was that Shepard and Johnson committed the murder while he was out back. However, as noted briefly above, Davis' self-serving statements to the doctors would not be admissible in the guilt phase. Thus, the evidence Davis claims counsel should have provided to corroborate a theory that Shepard and Johnson committed the murder, would have been presented in a vacuum; that is, with no testimony connecting Shepard to the crime. That collateral counsel now suggests Brawley was ineffective for

failing to call potential witnesses in an effort to support Davis' latest version of events must be viewed in the context of the compelling evidence available to the State and the fact that Davis' evidence to support such a theory is extremely tenuous.

Overwhelming evidence established Davis, and not Shepard or Johnson, committed the murder of Ms. Ezell. Davis' brief conspicuously avoids any discussion of the evidence introduced against him at trial. Davis had not worked cutting Ms. Ezell's yard for some six months prior to the murder.[14] (TR. 798). A neighbor, Mr. Brown, observed Davis at the victim's door on the day of her murder, alone. Mr. Brown did not simply get a fleeting glimpse of Davis. Mr. Brown provided a solid identification of Davis:

> Well, I was standing about halfway between my house and the drive - - and the road, and this man came down the road on the opposite side of the road and looked right at me and I looked at him, and he made sort of a greeting type gesture to me and said something that I couldn't quite hear, but I said good morning to him and – and watched him go on down the road and turn into Ms. Ezell's driveway.
>
> ...
>
> And he walked up to the door and I watched him stand there for a while, and I thought it's too early in the morning, she's just not going to answer the door. But I suppose I stood there for ten, 15 seconds, and he was still standing there, and I went

[14]Stoudemire testified that Davis helped him with Ms. Ezell's lawn and that Davis knew the victim. (TR. 799).

on in the house.

(TR. 707). Mr. Brown identified Davis from a police photo-pak shortly after Ms. Ezell's body was found.[15] (TR. 714). Brown's testimony established that Davis arrived at Ms. Ezell's home alone, by walking there.

Of course, the most compelling evidence of Davis' guilt were the numerous fingerprints he left behind which tie him to the murder, burglary of the house, and theft of the victim's car. Most damaging, was Davis' bloody fingerprint found on the cedar chest inside the victim's bedroom. The same bedroom where the murder weapon, a knife, was found under the bed. As Brawley testified: The "bloody thumb print was not easy to get around." (PCR-7, 1056). Davis' fingerprints were also found in the victim's stolen car, one on the driver's side window control. This print establishes that Davis drove the victim's car away from the murder scene. Davis' fingerprints were found on several items taken from Ms. Ezell's home at the time of the murder and found in the trunk of her abandoned car.

Mr. Johnson [Bibby] testified that Davis showed up at his house shortly after the murder and asked for a ride to a pawn shop. Davis had a pearl handled revolver and a ring, which

[15]No one has ever suggested that Mr. Brown had a motive to falsely identify Mr. Davis as the individual he observed walk up to the victim's door on the day of her murder.

Johnson held. Davis told Johnson he got the gun from his stepfather, Chaney [Stoudemire]. Davis paid Johnson $5.00 cash and $5.00 in gas for taking him to the pawn shop. (TR. 745-48).

Johnson's testimony was corroborated by his sister, Viola Johnson, and wife, Willie Marie Johnson, who testified that Davis came to their house shortly after the murder to seek a ride from Johnson. They each observed Davis in possession of the pearl handled revolver.[16] (TR. 777; 781-83). A pearl handled revolver was taken from the victim's house but has never been recovered.

Ms. Ezell's late husband's ring was included among the items taken from her home. (TR. 811-12, 1031-42, 1091-93). The missing ring was recovered from the pawn shop where Johnson told the police he had taken Davis to sell the ring and gun. (TR. 773-73, 928-33).

In contrast to the compelling and uncontradicted physical evidence of Davis' guilt, no physical evidence links either Johnson or Reginald Shepard to the victim's house, the victim's car, or any items taken from the house.[17] As Captain Hendrix testified, Willis Johnson and Shepard's fingerprints were sent

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[16]Viola Johnson called Detective Hendrix and told him that her brother had information relating to the murder of Mrs. Ezell. (TR. 927).

off for analysis but he never received any information to suggest that their fingerprints were found on anything that "had to do with this case." (PCR-5, 753). The speculative and, in some cases, suspect testimony Davis contends should have been offered would not have led to a different result at trial. Based upon this record, Davis has not satisfied either the deficiency or prejudice prongs of Strickland.

II.

WHETHER THE CIRCUIT COURT ERRED IN REJECTING DAVIS' CLAIMS THAT DEFENSE COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF HIS TRIAL?

Although the circuit court did find counsel ineffective for failing to present additional mitigating evidence during Davis' penalty phase proceeding, Davis asserts that other meritorious allegations of ineffective assistance were improperly rejected. The State disagrees.

A. Counsel's Alleged Failure To Challenge The Heinous, Atrocious, And Cruel Aggravator

Davis asserts that the circuit court erred in rejecting his claim that counsel was ineffective for failing to challenge the heinous, atrocious, and cruel aggravator. The circuit court found the claim procedurally barred as the aggravator was challenged at trial and on direct appeal. (PCR-7, 1111); See

Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985) ("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."); Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997). Nonetheless, even assuming the issue of counsel's effectiveness was not procedurally barred, it nonetheless, lacks any merit.

The record reflects that Brawley did challenge the sufficiency of the evidence to support this aggravator, pointing out it was at least "possible" Ms. Ezell was rendered unconscious almost immediately after being attacked. (TR. 1297-99). However, Davis asserts, as he did above, that counsel was ineffective for failing to impeach Roberts' testimony about having observed scratches on Davis' face. Assuming, for a moment, counsel was ineffective for failing to call witnesses to impeach Roberts on this point, it is clear that Davis suffered no prejudice as a result. Under any view of the available facts, this was a heinous, atrocious, and cruel murder.

The five foot and 120 pound Ms. Ezell lived thirty to sixty minutes before finally bleeding to death from the 21 stab wounds inflicted by Davis. (TR. 895-96; 1296). It was difficult to say how long it took her to lose consciousness, but the medical examiner testified, "let's say, 30 minutes to perhaps an hour or

longer." (TR. 1296). During any period of consciousness, Ms. Ezell would have been able to feel pain. (TR. 1296). The medical examiner thought that blood loss would have eventually caused Ms. Ezell to lose consciousness. (TR. 1287). The medical examiner did find evidence of a blunt trauma injury. He found little evidence of it externally but did find a hemorrhage on the surface of the brain. (TR. 1297). It was possible that the brain injury caused her to lose consciousness, but he thought it "unlikely." (TR. 1298). Brawley brought out through cross-examination that it was at least "possible" Ms. Ezell fainted and lost consciousness immediately after the attack began. (TR. 1298-99).

The photographs suggest that Ms. Ezell was standing and facing Davis when he first attacked her. Ultimately she ended up face down where additional stab wounds were inflicted on her. The stab wounds and the likely sequence in which they were inflicted indicates that Ms. Ezell was aware that she was being attacked and either turned to flee or in an effort to avoid the blows turned her head, ending up face down on the floor of her home. (State's Exhibits 6, 7, and 8). There were two stab wounds to the throat and two on the right side of the victim's neck, the remainder of the 21 stab wounds were to the back, back

of the neck or to her back.[18] (PCR-7, 1022). Thus, the lack of defensive wounds is not surprising. As the medical examiner acknowledged below, you would not expect to find defensive wounds when your attacker is behind you. (PCR-7, 1022).

None of the 21 stab wounds suffered by Ms. Ezell hit a major organ or major artery.[19] (TR. 896). The wounds caused nerve damage and hemorrhage:

> Well, there was hemorrhage in the tract of the knife wounds, however, there were as we just discussed, there were no areas in which the stab wounds had penetrated a major organ so the damage was all to the tissues underneath the skin, the muscles and the blood vessels and nerves and whatever tissues are under the skin in those areas.

(TR. 896). The medical examiner testified that Ms. Ezell's wounds would have caused her pain. (TR. 1296). This Court has repeatedly affirmed the trial court's finding of HAC where, as in this case, the victim suffered numerous stab wounds. See Francis v. State, 808 So. 2d 110, 135 (Fla. 2001) ("The HAC aggravator has been consistently upheld where, as occurred in

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[18]The medical examiner had not reviewed his testimony prior to the evidentiary hearing and was obviously much more familiar with the facts at the time of his trial testimony.

[19]Even the medical examiner testified sometimes it is difficult to tell the difference between "blood splatters or perhaps superficial abrasions, that is scratches." (TR. 901). From photographs of Ms. Ezell, the medical examiner had a hard time determining the difference: "They may be scratches or blood splatters." (TR. 902).

this case, the victims were repeatedly stabbed.") (citing Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998); Brown v. State, 721 So. 2d 274, 277 (Fla. 1998); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993)).

In this case, the basis for upholding HAC is just as strong without Roberts' testimony where it took the victim thirty to sixty minutes to die from blood loss. See Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997) (upholding HAC even though the medical examiner testified the victim was probably conscious only thirty to sixty seconds after being attacked); Peavy v. State, 442 So. 2d 200, 202, 203 (Fla. 1983) (upholding HAC where the victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds). Consequently, defense counsel cannot have been ineffective for failing to impeach Roberts' testimony. Moreover, any additional cross-examination questions to the medical examiner would not have changed the facts upon which the HAC aggravator was found. Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial").

B. Whether Defense Counsel Was Ineffective In Failing To Present Evidence That Johnson And Shepard Were At The Victim's Home At The Time Of The Murder And That Shepard

Murdered The Victim

Davis reasserts his guilt phase claim by asserting that counsel was ineffective during the penalty phase for failing to present evidence which suggested Shepard and Johnson participated in the burglary and that Shepard murdered the victim. The State disagrees. There was no credible evidence available to counsel which could have established that Johnson or Shepard were present at the victim's house, much less that they murdered the victim.[20]

The trial court rejected this claim below, stating, for the same reasons it rejected the guilt phase claims. Essentially, there was no credible evidence available to suggest that Shepard and Johnson killed the victim. The State relies upon the trial court's order and the analysis provided above under Issue I. However, the State notes that Davis adds an assertion that if only counsel had procured and presented such evidence, his experts would have a basis to conclude that Davis acted under the influence or domination of another individual at the time of the murder. (Davis' Brief at 68-70). This allegation is

[20]As Brawley testified during the evidentiary hearing below: "Well, the testimony from Mr. Brown was totally inconsistent with the theory that Henry and two others were sitting in a car outside Mrs. Ezell's house." (PCR-7, 1052). Brawley testified that Mr. Brown observed Davis "long enough to give a good description of him." (PCR-7, 1052).

completely devoid of merit.

Davis did not present such evidence during the evidentiary hearing through his own experts. If collateral counsel possessed evidence upon which his experts could find Davis was under the influence or domination of another individual at the time of the murder, he was obligated to present it. Collateral counsel failed to do so. Based upon this record, Davis has not shown that his experts could testify that he was under anyone's domination or control at the time he committed the murder. The most Dr. Dee could say is, that given his relatively low IQ, "it's difficult to imagine him being a leader in a group, certainly he was a follower." (PCR-5, 844). His experts never so much as ventured a guess much less an opinion on whether or not Davis was under any one's control or influence at the time of the murder. Indeed, when asked if Davis was under the influence of another individual at the time of the murder, Dr. McClane testified **during the evidentiary hearing,** that he could make no such conclusion. (PCR-5, 782). See Spencer v. State, 28 Fla. L. weekly S35 (Fla. January 9, 2003) ("Reversible error cannot be predicated upon such conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). Although retained to testify on his behalf, Dr. Dee and Dr. McClane clearly had their

doubts about Davis' credibility.[21] (PCR-5, 788-89).

Moreover, had counsel presented such tenuous evidence, the force and effect of his own experts' testimony would have been diminished. Counsel's theme during the penalty phase was to show that Davis was brain damaged and that this brain damage altered his personality and made him more impulsive. Consequently, in an effort to mitigate Davis' crimes, his experts found that based upon his brain damage both statutory mental mitigators applied at the time Davis committed the murder. Dr. Dee testified that due to "left hemispheric impairment and impulsivity that would so manifest in his behavior throughout his life I think." (PCR-5, 844). Presenting a "wild hare" type of argument, that Davis did not commit the murder, to the jury which had just convicted him, would only have diminished the force and effect of the expert testimony in mitigation.[22]

III.

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[21]Dr. Dee testified: "Clearly some time he is malingering." (PCR-5, 788-89). "I think at times he probably did [malinger] with regard to the psychiatric symptoms." (PCR-7, 857). However, he did not think Davis was sophisticated enough to fake the neuropsychological test results. (PCR-5, 857).

[22]The State notes also that at the time of trial Shepard was very much alive and denied having anything to do with the murder of Ms. Ezell.

WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT DAVIS' "NEWLY DISCOVERED EVIDENCE" IN THE FORM OF THIRD PARTY HEARSAY WAS NOT CREDIBLE AND THEREFORE NOT ADMISSIBLE?

Davis next asserts that newly discovered evidence would rebut the State's evidence establishing that Davis murdered the victim, burglarized her home, and stole her car. However, the newly discovered "evidence" in the form of hearsay statements from the long dead Reginald Shepard would not even be admissible at trial. Consequently, it cannot be said that such evidence would probably result in an acquittal on retrial.

In Ventura v. State, 794 So. 2d 553, 570 (Fla. 2001), this Court observed that in order for evidence to be considered newly discovered and sufficient to set aside a conviction, two requirements must be met: 1) "the evidence '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 [of it] by the use of due diligence;'" and 2) "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." (quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). However, since the newly discovered "evidence" consists of hearsay statements of a long dead witness, the preliminary question must be whether or not such evidence would even be admissible. See

Sims v. State, 754 So. 2d 657, 660 (Fla. 2000) ("Assuming the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial.").

The trial court concluded that the hearsay statements attributed to Reginald Shepard would not be admissible. A ruling on the admissibility of evidence should be reviewed for an abuse of discretion. See Grim v. State, 27 Fla. L. Weekly S805 (Fla. October 3, 2002) (stating that the trial court did not abuse its discretion in refusing to admit hearsay testimony under *Chambers*, where, unlike *Chambers,* the statement's reliability was not clearly established). "Under this standard, the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court." Overton v. State, 801 So. 2d 877, 896 (Fla. 2001)(citing Huff v. State, 569 So. 2d 1247 (Fla. 1990)). Moreover, an appellate court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

The circuit court below, having heard the testimony,

rendered a detailed order, finding the hearsay statements offered by Davis were simply not credible. The circuit court found as follows:

> Davis claims to have newly discovered evidence that Reginald Shepard told a number of people that he, not Davis, had killed the victim in this case.
>
> According to Davis this information was not known at the time of trial and could not have been known because Shepard's alleged statements were made post-trial. This new evidence, if presented to a new jury, would probably produce an acquittal on re-trial, or would result in a life sentence at a new penalty phase hearing Davis argues.
>
> Davis further asserts that this newly discovered evidence should be admissible at re-trial or re-sentencing as an exception to the rule against hearsay under Florida Statute 90.804 (2)(c). The new evidence is relevant, exculpates Davis, the declarent [sic] is unavailable and corroborating circumstances show the trustworthiness of the evidence Davis Claims.
>
> The State counters that Davis' newly discovered evidence would not be admissible at re-trial or re-sentencing because it is inadmissible hearsay and is based upon untrustworthy testimony.
>
> Assuming arguendo that Davis has satisfied the requirements of the newly discovered evidence rule as set out in Jones v. State, 591 So.2d 911 (Fla. 1991) he must still establish that the new evidence would be admissible as an exception to F.S. 90.804 (2)(c).
>
> Davis' newly discovered evidence consists of the evidentiary hearing testimony of Willie Watson, Earl Pride, Jr.[,] Willie Wilson, Cedric Christian and Taurus Scott. A summary of the testimony of each of the witnesses is set out above but will be more closely analyzed by the Court under this Claim.
>
> Willie Watson is an inmate in the Department of Corrections. He is presently serving a 55-year sentence and has 36 prior felony convictions. He knows both Davis and Reginald Shepard from the street in Lake Wales. In late 1990 or early 1991 he, Shepard and Cedric Christian were together in the Polk County Jail. Shepard stated that he, not Davis, killed the victim. Shepard said "that lady that they accused

‘Sweetman’ of killing, I killed her”. Shepard didn’t say anything else about the crime at that time. They were in a P-Dorm cell bragging about things they used to do when Shepard made this statement and Shepard never gave any details about the crime. He never said anything about pawning the victim’s jewelry. In the 90 days that Watson was in a cell with Shepard he did see Shepard reading the bible, but they never talked about religion. Shepard never said that he was trying “to get right with the Lord”.

In August of 1991 Watson saw Shepard on the street in Lake Wales and Shepard said he wasn’t switching places with Davis. Then in late 1993 or early 1994 when Watson and Shepard were in the Orlando Reception Center Shepard again said “I did it” and that he wasn’t going to switch places with Davis. Watson testified that he never told anyone about Shepard’s statements because he was afraid of Shepard. He didn’t care if Davis had been sitting on death row for ten years.

Cedric Christian testified that he, Reginald Shepard and another guy were in the same Polk County Jail cell sometime in 1990. Shepard said that he wanted to get his life “right with the Lord” and confess his sins because an innocent man was getting punished for something he did. Shepard wrote a letter to his mother and gave it to Christian to deliver when he was released from jail. Christian never delivered the letter because he was “young and scared”. Shepard told Christian that he went to the victim’s house to get some money for gas, and while high on heroin he killed her with his knife. Shepard said he pawned her jewelry in Port St. Lucie. He said that Davis was not present at the crime scene. Christian could not remember the exact date of his conversation with Shepard stating that it took place in the early 1990’s.

Christian later saw Shepard on the street in 1995 or 1996. Shepard asked if he had delivered the letter to his mother and Christian said yes he had. Christian said he never told anyone about Shepard’s statement because “he didn’t want nothing to do with it”.

Earl Pride, Jr. is an inmate at Avon Park Correctional Institution where he is serving a life sentence for murder. Around the first or middle part

of 1994 he was in the Polk County Jail with Reginald Shepard. Shepard was waiting to begin serving a Federal Prison sentence. Most of the inmates in Pride's dorm were from Lake Wales. He and Shepard had a lot of conversations and Reginald knew he was dying from AIDS. In one of their talks Pride said "Man, that's fucked up what you did to Sweetman, man". Shepard responded "Fuck that nigger. Fuck that nigger". Shepard never told Pride that he had anything to do with killing the victim. Later the same day Shepard said he was going to "straighten that".

Willie Wilson is incarcerated at Marion Correction Institution were [sic] he's serving a life sentence with a 15-year minimum mandatory term. Wilson has ten or twelve prior felony convictions. Davis and Wilson grew up together, went to school and played football in high school.

Sometime in 1992 Wilson and Reginald Shepard were together in the Polk County Jail. They were alone in a day-room when Shepard told Wilson that he was suffering because of all the things he'd done. Wilson asked him if he killed that lady? Shepard said "no". Asked a second time Shepard said "yeah". Shepard said he was afraid to do anything about it. The conversation ended when someone came into the day-room. Wilson didn't tell anyone about Shepard's remarks because he had just came [sic] off the street and was on drugs and was selfish.

Taurus Scott lives in Winter Haven and is Davis' son. Scott is 16 years-old. He testified that when he was nine or ten years old Reginald Shepard had a conflict with Scott's little sister. Shepard made the statement that he would kill Scott "like he did that white lady". Shepard didn't mention the lady's name.

In examining the foregoing testimony to determine if it would be admissible at a re-trial or re-sentencing this Court must consider all the circumstances surrounding each of the witnesses testimony. At the heart of the issue of trustworthiness of the proffered testimony is a determination of the credibility of each of the witnesses. One factor the Court can take into account is prior felony convictions. Willie Watson is serving a 55-year prison sentence with 36 prior felony convictions. Willie Wilson is serving a life sentence

with 10 to 12 prior felony convictions. Earl Pride, Jr. is presently serving a life sentence for murder. Cedric Christian has been the county jail and in prison for violating probation. The criminal histories of these individuals certainly gives [sic] this Court concern for their ability to offer truthful, trustworthy or believable testimony.

Another factor the Court considers is the reasonableness of the witness testimony viewed in light of common sense. All of the witnesses, except Scott, sat on their stories for eight to ten years. They never told a soul what Shepard had told them. The reasons given for the delay ranges [sic] from "I was afraid of Shepard" to "I was selfish". The witnesses' explanations are not reasonable.

Conflicts in the witnesses testimony is another factor the Court has considered. Willie Watson was in the same cell with Shepard and Christian in the early 90's. They were all friends having grown-up in the same small town. Christian's version puts he, Shepard and "another guy" in the same cell in the early 90's. Watson says they were all 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 jewelry in Port St. Lucie and that Davis was not at the scene of the crime. Evidence of Davis' thumb print in the victim's house establishes that Davis was clearly at the scene. Christian further maintains that he talked to Shepard on the street in 1995 or 1996. Christian could not have talked to Shepard in 1995 or 1996. Shepard went to jail in April 1994 and died in Federal Prison in July 1995.

Willie Wilson's testimony is uncorroborated. His alleged conversation with Shepard took place with no one present sometime in 1992. According to Wilson, Shepard at first denied then admitted the killing.

Earl Pride, Jr. talked with Shepard in 1994. Shepard never admitted the murder to Pride. Pride's testimony consisted of his opinion or interpretation of Shepard's statements.

Taurus Scott's testimony is also not credible. He also waited nearly ten years to come forward. He had

> ample opportunity to tell his story to Davis' trial lawyers but didn't do so. His interest in this case is obvious.
>
> It is interesting to note that Shepard's deposition was taken on November 29, 1989. He denied under oath any involvement in the murder. Over the next few years, according to Davis' witnesses, Shepard's conscience underwent many changes. On occasion, he expressed remorse over Davis' plight and at other times he could have cared less about Davis. Shepard allegedly wrote a letter to his mother about Davis yet he never told his own mother, that he killed anyone. Shepard never relayed anything about the murder to anyone except his inmate friends from Lake Wales. It would seem to this Court that telling any cell-mate that you committed a murder would run the very great risk of that information being passed on to the authorities. Yet according to Davis' witnesses Shepard freely admitted the murder to them.
>
> 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 unreliable. 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.
>
> This claim is therefore DENIED.

(PCR-7, 1116-22).

The instant case is similar to the inmate confessions found insufficiently reliable for admission as substantive evidence in Jones v. State, 709 So. 2d 512, 523 (Fla. 1998). There, as in this case, the defendant procured a number of inmate witnesses to testify about a third party's confession to committing the murder for which the defendant had been sentenced to death.

This Court rejected the defendant's argument that the alleged confessions should be admitted as substantive evidence, stating:

> ...Moreover, unlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness. The fact that more inmates have come forward does not necessarily render the confessions trustworthy. [note omitted]. The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in *Chambers*, or to his own counsel or the police shortly after the crime, see, e.g. *Wilkerson v. Turner*, 693 F.2d 121 (11th Cir. 1982); *United States ex. rel. Gooch v. McViar,* 953 F. Supp. 1001 (N.D. Ill. 1997), but were made to a variety of inmates with whom Schofield served prison time.
>
> All of the statements were allegedly made after Jones had been sentenced to death; in many cases more than a decade elapsed before the inmate came forward until after Jones' most recent death warrant was signed, waiting anywhere from four to fifteen years to report their information.
>
> Except for Schofield's former girlfriend, the witnesses were all prison inmates with extensive felony records. However, it is not their felony records alone that cast doubt on the witness' credibility. Judge Soud's observations in his 1992 order, wherein he analyzed the reasons the confessions were not particularly reliable, are equally valid here even in light of the testimony of the additional witnesses. Like the witnesses in 1992, the witnesses who testified at the most recent hearing spoke only in general terms of Schofield's possible involvement in the murder of Officer Szafranski. No witness testified to any unique details surrounding the murder. In fact none of the witnesses related specific details of the crime...

Jones, 709 So. 2d at 525.

In this case, as in Jones, virtually all the witnesses were multiple convicted felons, two are serving life sentences. And,

like Jones, each waited years after hearing the so-called confessions to come forward with this information. Indeed, none of them came forward with this information until years after Shepard's death.[23] None of the witnesses came forward to authorities, only defense investigators or to a fellow inmate, an acquaintance/friend of Davis', who was apparently lining up witnesses for Davis. (PCR-4, 634; PCR-5, 681). As the trial court made detailed and supported findings below, the State will not extensively discuss each witnesses testimony. It is uniquely the province of the circuit court below to determine witness credibility. See Johnson v. State, 769 So. 2d 990, 999 (Fla. 2000) ("This Court will not substitute its judgment for that of the trial court on issues of credibility.")(citing Demps). However, the State will make some observations in an attempt to rebut the defense claim that this so- called "newly discovered" evidence is reliable or corroborated. Far from showing "corroborating circumstances" to clearly establish the reliability of the hearsay statements, the record reveals the statements are neither credible nor corroborated. Fla. Stat. 90.804(2)(c)(2000).

Davis maintains that the witnesses' confessions were similar

[23]Obviously, fear of Shepard and his potential retribution should substantially diminish after his death.

and, although the witnesses were felons and prisoners, these are the people that Shepard allegedly associated with. The witnesses generally did have some things in common, extensive criminal records, long prison sentences, all knew Davis and or his family, and, all failed to come forward with this information to the authorities even years after Shepard's death. Each witness conveniently implicated only Reginald Shepard, not the living Johnson, who, according to Davis' last story to the defense doctors, allegedly committed the crime along with Shepard.[24] Moreover, each witness generally provided a simple, yet complete exoneration of Davis. Shepard killed the "old lady" that Davis was accused of killing. See Sims, 754 So. 2d at 660 (noting that while the two affidavits apparently describe the same conversation, neither account was "specific," agreeing with the lower court that they were not sufficiently corroborated and lack the indicia of trustworthiness to be admitted). None of Shepard's alleged confessions mentioned that

[24]Johnson who testified during the evidentiary hearing, denied that he had anything to do with Ms. Ezell's murder or the burglary of her home. (PCR-3, 416-417). Notwithstanding Davis' latest story to the defense doctors, no physical or testimonial evidence links Johnson to the murder. Lenvent Jones allegedly observed Johnson, Davis, and Shepard getting out of Shepard's car the morning of the victim's murder. However, this testimony was contradicted by Mr. Brown who observed a lone black male, he identified as Davis, walk past his house and up the victim's driveway to her front door.

Davis was present, much less what his role was in the murder, burglary, and theft of the victim's car.[25] In fact, the only witness who Shepard allegedly provided details to, Cedric Christian, is contradicted by the physical evidence, the testimony of Ms. Ezell's neighbor, Mr. Brown, and, Davis' own witness, Lenvent Jones.[26]

Cedric Christian testified that when he was a juvenile, he and Shepard were incarcerated together. In a fit of religious zeal, a guilt ridden Shepard confessed to killing the old lady for which "Sweetman" is on death row. Christian said that not only did Shepard confess, but that he provided details. Shepard allegedly ran out of gas while on heroin and went to the lady's house riding a bicycle, carrying a gas can. (PCR-4, 588). He went to the house to get "some money, to get some gas." (PCR-4, 574). Shepard told Christian that the lady mistook him for Davis. The lady "went making a lot of noise" and Shepard kept her quiet so the neighbors wouldn't hear.[27] (PCR-574). Shepard claimed that he did it alone and that "this guy here" pointing

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[25]We may surmise from this that Davis and his friends are aware of the concept of felony murder.

[26]Recall that Lenvent Jones testified he observed Shepard, Johnson, and Davis in the victim's driveway, getting out of Shepard's car, on the day of the murder.

[27]Christian threw in another juicy detail by asserting Ms. Ezell told Shepard "y'all look alike." (PCR-4, 574).

to Davis, wasn't "present at all." (PCR-4, 587).

Of course, it is beyond any question that Davis was in the victim's home at the time of her murder. His bloody thumb print in the victim's master bedroom, among other prints, tells us for certain that he was in the victim's home and participated in the murder, burglary, and theft of her car. Moreover, Mr. Brown identified Davis as the individual he observed walking alone up to the door of Ms. Ezell's house. It is significant that Shepard allegedly told Christian that he rode up to the victim's house on a bicycle, carrying a gas can. However, Mr. Brown testified that the individual he observed, Davis, was walking, and did not have anything in his hand. Brown testified: "He wasn't carrying anything." (TR. 714). Aside from Christian waiting some five years after Shepard died to divulge this information, and, the fact that his story conflicts with that of Willie Watson who allegedly heard the "confession" at the same time as he did in prison, none of the "facts" provided by Christian match either the eyewitness testimony of Mr. Brown or the physical evidence found at the crime scene.[28]

Christian also claimed that Shepard told him he pawned the

[28]Although Christian claims that he was friends with Shepard and not Davis, he was from Lake Wales and testified that he knew Davis' family from the area: "I know his peoples around there[]". (PCR-4, 584).

victim's property in "Port Saint Lucy;" however, the defense never provided any evidence to corroborate this aspect of his story. Collateral counsel's assertion that it is "entirely possible" that Shepard pawned some items in Port Saint Lucie does not constitute evidence and does not corroborate Christian's story. (Davis' Brief at 89). The only jewelry recovered was from the Dundee pawn shop where Davis pawned Ms. Ezell's late husband's ring. The ring was normally kept in a cedar chest in the victim's bedroom, coincidentally, the same chest on whose key tag Davis' bloody thumb print was found. (TR. 741). While the fact of Davis' presence and participation in the murder is proven by physical evidence and corroborated by his possession of property stolen from the victim's home, no evidence corroborates the stories of Shepard's participation in the victim's murder, the burglary of her home, or, the theft of her car. To put it charitably, Christian's testimony, like the other friends and felons Davis has produced, is highly suspect.[29]

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[29]Of course, when Shepard confessed, Christian said he had his bible out and it was part of his attempt to get right with the lord. The inmate who was allegedly present and heard Shepard confess at the same time, had a remarkably different recollection. Watson said that it "was a little brag thing, who's doing what and what." (PCR-4, 636). Christian was present at the time, but Watson never heard Shepard say he wanted to get this off his chest and get right with the lord. (PCR-4, 640). Nor did Watson hear the details provided by Christian, he only allegedly said "I killed the woman. (PCR-4, 641). Christian's testimony proves the old adage that a

Davis asserts that Earl Pride, who Shepard allegedly confessed to, did "not know Henry Davis" and that his testimony is therefore more worthy of belief. (Davis' Brief at 80). However, Pride, who is serving a life sentence at the age of twenty five for first degree murder and armed robbery (PCR-5, 701-02), testified that he did know two of Davis' children, "Ray and Taurus." (PCR-5, 703). Also, he knew Davis enough to allegedly start a conversation with Shepard, stating, that "was fucked up what you did to Sweetman." (PCR-5, 683). Obviously, Pride did know Davis and his family to some extent. Pride was concerned enough to ask Shepard about the murder; but, apparently, not concerned enough to tell anyone about the alleged confession until years after Shepard had died. Pride's testimony is simply not credible. See Sliney v. State, 699 So. 2d 662, 670 (Fla. 1997) (rejecting claim that hearsay statements should have been admitted under *Chambers* because it was critical to his defense, noting that in *Chambers* the "court held that such third party confessions should "have been admitted because the statements' reliability was clearly established" and that Sliney had not made the requisite showing of reliability).

The State objects to consideration of the affidavit of Elton

"story" is best kept simple. Christian's details about what Shepard allegedly told him do not withstand scrutiny.

Peterson, apparently an individual incarcerated at the same jail where the other inmates were housed prior to testifying on Davis' behalf. The State has had no opportunity to cross-examine Mr. Peterson and does not in any way accept the affidavit, prepared and procured by collateral counsel, as evidence which can be considered on appeal for any purpose. The lower court did not have an opportunity to observe this witness and made no mention of him in its order denying post-conviction relief. It is apparent that the lower court refused to consider the affidavit. Since the State in no way stipulates to consideration of the affidavit or accepts as accurate the information contained therein, it would be improper for this Court to consider it on appeal.[30] See Routly v. State, 590 So. 2d 397, 404 n. 5 (Fla. 1991) ("Absent stipulation or some other legal basis, we cannot see how the affidavits can be argued as substantive evidence...").

Contrary to collateral counsel's assertion, crime scene evidence does not "corroborate[] Shepard's confessions." (Davis' Brief at 82). Collateral counsel's assertion that the lack of fingerprints on the knife and absence of Shepard's fingerprints in the home is in fact, evidence of his

[30]Of course, the State asks this Court to disregard that portion of Davis' brief which discusses the affidavit. (Davis' Brief at 76-77).

participation in the murder is patently ludicrous. The knife was evidently wiped clean on the victim's curtain.[31] (TR. 924). The lack of "evidence" does not, as Davis apparently asserts, constitute corroboration. In the same room where the knife was found, a detective testified: "It appeared that someone had wiped something bloody down this drape and the drape had stuck together as the blood dried and coagulated." (TR. 924). The absence of Shepard's or, for that matter, Johnson's fingerprints on anything related to the victim, her house, or the stolen property, contradicts these so-called confessions.

Similarly, Davis is grasping at straws when he cites Evelyn Credit's testimony to argue that the alleged hearsay statements were reliable. (Davis' Brief at 81). Ms. Credit, despite collateral counsel's best efforts, did not provide any testimony of value to Davis. Ms. Credit testified that Shepard and his mother were talking together in a closet around the time of the murder. However, she could not hear their conversation: "No. The only thing I know he was there in that closet with his mama. And they was in there talking. That's all I could hear. He was saying something about mama something. I don't know exactly what it was, but he was talking to his mother." (PCR-6, 878).

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[31]In none of the alleged confessions did Shepard assert he wore gloves.

What she heard was "Mama, yes, that's what mama." (PCR-6, 882). The rest she was presuming: "Yeah I'm presuming." (PCR-6, 882).

We certainly cannot infer anything from Ms. Credit's testimony. In fact, we do not need to infer anything from Ms. Credit's testimony. Shepard's mother, Celestein, did testify during the hearing and Shepard never told her he committed Ms. Ezell's murder. (PCR-4, 617). Nor had Ms. Shepard heard from anyone that she knew that Shepard had admitted or acknowledged that he was responsible for her death. (PCR-4, 618). In fact, she was sorry Shepard was not alive to defend himself. (PCR-4, 606, 609).

Davis again asserts that this was a bloody crime and that the pants he wore during the murder had no blood on them. However, we have no idea if the pants, brought in apparently by Davis' mother, were the jeans Davis wore when he committed the murder. All we know is that a pair of jeans allegedly owned by Davis, were brought in and examined. We have no way of knowing if those were the pants Davis wore during the murder, or, whether they had been washed before the examination.[32] (TR. 943,

[32]Again, no credible or admissible evidence suggests Shepard had blood on his clothes after the murder. Lenvent Jones testified that Shepard's brother asked him who he had been fighting, because he [Shepard's brother] presumed or heard, that Shepard had blood on him. Jones did not see blood on Shepard and anything about what he allegedly heard Shepard's brother say would constitute inadmissible hearsay. Davis' Uncle, Levonskie

1023).

Even assuming, *arguendo*, the hearsay confessions of the now long dead Shepard possessed sufficient guarantees of trustworthiness for admission, there is no reasonable probability of a different result at trial or sentencing. As discussed above, overwhelming evidence established that Davis murdered the victim, burglarized her home, stole her car, and pawned a ring belonging to Ms. Ezell immediately after the murder. The fingerprint evidence remains unchallenged. This uncontradicted evidence along with the uncontradicted eyewitness identification of Davis establish his guilt beyond any doubt. The alleged confessions of Shepard, testified to by individuals with long prison sentences and multiple felony convictions, purportedly exonerating Davis from any guilt or association with the crimes, simply cannot be reconciled with the physical evidence. Even if these confessions were admissible, the result of the trial and sentencing phase would remain unchanged.

Any argument that this so-called newly discovered evidence would require reevaluation of Davis' death sentence in light of

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Riley, who testified he observed Shepard with a blood soaked shoe, lacked any physical corroboration. For example, Davis cannot point to bloody footprints leading away from the scene or found in the victim's car. Moreover, Riley could not state with any certainty when he observed the bloody shoes in relation to the murder of Ms. Ezell.

Enmund v. Florida, 458 U.S. 782 (1982), is without merit. As discussed above, there is no credible evidence available to suggest that anyone other than Davis committed the murder. Moreover, in Franqui v. State, 804 So. 2d 1185, 1206 n. 12 (Fla. 2001), this Court observed: "In *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held that a finding of major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement for consistency with the Eighth Amendment." Davis' bloody fingerprint in the victim's master bedroom [the location where the murder weapon was discarded], the fact he stole items from the home while the victim lay bleeding to death, the fact he stole the victim's car and pawned Ms. Ezell's ring and gun, satisfies the major participation and indifference requirement, even **assuming** [straining credulity to the breaking point] Shepard, or Johnson, participated in the crimes.

In sum, the circuit court had the opportunity to hear and observe the witnesses testify below. The court wrote a detailed order which concluded that these alleged confessions were not credible. The court found that the alleged hearsay statements of the long dead Shepard were unreliable and inadmissible for any purpose. The court stated: "The evidence, because of the

patent unreliability, would not be admissible in either Davis' guilt or penalty phase proceedings." Since the "newly discovered" evidence consists of inadmissible testimony, there can be "reasonable probability" of a different result at trial. Again, a determination of witness credibility is a matter uniquely within the province of the circuit court. Porter v. State, 788 So. 2d 917, 923 (Fla. 2001); Stephens v. State, 748 So. 2d 1028, 1034-35 (Fla. 1999). Davis has offered nothing on appeal to suggest that the circuit court's findings are arbitrary and require reversal by this Court.

IV.

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS' CLAIMS THAT PROSECUTORIAL MISCONDUCT TAINTED HIS TRIAL?

Davis next makes various allegations of prosecutorial misconduct. Davis asserts that the prosecutorial misconduct tainted his guilt and penalty phases. The State disagrees.

First, Davis argues that in presenting David Roberts' testimony about observing scratches or dried blood around Davis' eyes the prosecutor was knowingly presenting false testimony. The trial court was correct in noting that Davis presented no evidence to support his claim. Although he presented witnesses who did not observe scratches around Davis' eyes, the remaining

parts of Roberts' testimony are largely corroborated. Moreover, it is possible, that Roberts' observed dried blood around Davis' eyes, and the wounds were not from scratches as Davis apparently told Roberts. (TR. 901-902). He presented no evidence to suggest the prosecutor was aware that this portion of Roberts' testimony was false.

To the extent Davis argues Brawley was ineffective for failing to object to this evidence, the State notes that the only mention of ineffectiveness in defense counsel's motion under Claim IV of his Motion for Post-Conviction Relief, was as follows: "Counsel was Ineffective for Not objecting." (PCR-2, 194). As Davis failed to articulate in his motion either the deficiency or prejudice prongs of Strickland, the State questions whether or not any allegation of ineffective assistance is preserved for review. In any case, as noted above, at trial, defense counsel argued that there was no testimony to corroborate Roberts' observation of scratches and that his testimony was therefore not worthy of belief. Davis has not demonstrated either the deficiency or prejudice prongs under Strickland.

Next, Davis takes isolated portions of the prosecutor's closing argument in the penalty phase, lumps them together, and asserts that he was denied a fair penalty phase. Davis claims

that the prosecutor made arguments to the jury which impermissibly asked the jury to render a verdict based upon retribution or emotion. (Davis' Brief at 92). However, these comments appear and the record and should have been raised, if at all, on direct appeal. See Spencer v. State, 28 Fla. L. Weekly S35 (Fla. January 9, 2003) ("We conclude that Spencer's substantive claims of prosecutorial misconduct could and should have been raised on direct appeal and thus are procedurally barred from consideration in a post-conviction motion.")(citing Smith v. State, 445 So. 2d 323, 325 (Fla. 1983)) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). See also Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). To the extent Davis raises an allegation of ineffective assistance, Davis presented no evidence to support his claim below. Davis did not ask defense counsel about his failure to object to the comments in question. Davis' cryptic contention that counsel was ineffective for failing to object, should not operate to excuse the clear procedural bar to his claims. In any case, it is clear that the comments in question did not render Davis' penalty phase unfair or unreliable.

Davis contends that asking for "justice" and pointing out

that Davis was the judge, jury and executioner, were improper prosecutorial comments. The prosecutor's comments were not improper or inflammatory. Davis did in fact, decide, when, how, and where Mrs. Ezell would die. The simple observation that Mrs. Ezell was dead because Davis decided she would die, was not highly inflammatory or prejudicial. See generally Davis v. State, 698 So. 2d 1182, 1190-1191 (Fla.), cert. denied, 522 U.S. 1127 (1997) ("Nor do we agree with the contention that the prosecutor's characterization of the crime and its perpetrator as 'vicious' and 'brutal' was improper argument in view of the evidence in the case.").

The prosecutor's request for "justice" did not improperly suggest that the jury had a civic duty to return a death sentence. Indeed, it is was the assistant state attorney's job to seek justice by asking the jurors to impose the death penalty in this case. See Davis v. Kemp, 829 F.2d 1522, 1529-1530 (11th Cir. 1987), cert. denied, 485 U.S. 929 (1988) (rejecting a claim that the prosecutor impermissibly appealed to the jury's sense of duty to return a death recommendation, noting "[i]t certainly was not improper to argue that the jury should return a verdict of death in this particular case."). The prosecutor's comments, part of a larger discussion of the evidence, did not exceed the outer bounds of acceptable argument. In fact, the defense

counsel asked for a recommendation that would serve "justice" in asking for a life recommendation. (TR. 1589-90). Trial defense counsel argued: "Give both these families justice. They will be satisfied. They'll accept it in time, if not right away." (TR. 1589). Consequently, the record reflects that the defense counsel chose to address the prosecutor's "justice" comments in closing. See Anderson v. State, 467 So. 2d 781, 787 (Fla. 3d DCA 1985) (noting that experienced defense attorneys "contend that inflammatory-type arguments often boomerang against the prosecutor in the eyes of the jury, **and are best handled in rebuttal** or by ignoring the arguments altogether.")(emphasis added).

The prosecutor's observation that "every benefit is going to be given the defendant, every benefit," was not incorrect or improper.[33] The prosecutor was simply explaining the higher standard of proof required for the State to prove aggravating circumstances as opposed to the defense burden of establishing mitigating circumstances. (TR. 1537-38). The prosecutor's argument was not at all improper. His statement did not misstate the law as Davis' alleges on appeal.

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[33]Brawley addressed the State's argument: "...And Mr. Aguero has said that I will claim that the law favors life. It does seem that there are at least four, maybe five, if you break them down a different way, reasons why that is true." (TR. 1580).

Next, Davis asserts that the prosecutor improperly called the defense expert's test "stupid" and that the mental health experts probably had "everybody bored to tears." (Davis' Brief at 92). Davis offers little argument and no case law to support his assertion of prosecutorial misconduct. In describing the mental health testimony the prosecutor certainly did use colorful terms. However, the comments, taken in context, were not improper or inflammatory.

As to the boring testimony comment, the prosecutor was referring to his own mental health experts, as well as the defendant's. The prosecutor stated: "We sat and probably all got bored to tears yesterday all day long listening to four psychiatrists and psychologists." [two called by the defense, two by the State]. (TR. 1545). The prosecutor then discussed and attempted to condense the testimony down to a coherent observation: "...Mr Davis might suffer from some minimal brain damage." (TR. 1545). Contained within a valid discussion of the evidence, the prosecutor's comment should not be considered improper. The comment was not inflammatory, it was truthful commentary.

While the prosecutor did, without objection, refer to a defense expert's test as "stupid," this isolated comment was contained in a larger discussion of the evidence offered by the

defense experts. The prosecutor argued, in part:

> ...Now, you all could spend eight months watching Mr. Davis and you would know a heck of a lot more about Mr. Davis than any doctor that gave him two hours worth of tests. So she gives them her opinion and they don't like it. Well, that doesn't fit with my tests. Yeah, fine, Doc, but your tests say that this guy shouldn't be hanging around with the most high level inmates in this blood place and yet he is. So how valid is your stupid test?
>
> He took advantage of all the lower functioning inmates. He fought with them. He lied. What did we learn? I'll tell you what we learned yesterday. We learned yesterday, everyone of us, now knows two good words for liar. Confabulators are liars and malingerers are liars. So now when we go to our next cocktail party we can impress all the people by saying that they're confabulators and malingerers and they won't know that you're calling them liars. But that's what Mr. Davis is, he's a liar. He lied to everybody he ever talked to, everybody...

(TR. 1547-48). The prosecutor's discussion of the evidence, again, while perhaps colorful, was not prejudicial or inflammatory.

Davis next asserts the prosecutor improperly made race an issue by noting in the penalty phase argument that Mr. Brown observed Davis because he was a "black fellow" in a well to do white neighborhood. This argument was not at all improper. The prosecutor was simply commenting on the evidence introduced at trial relating to Davis' identification by Mr. Brown and countering any defense contention that other individuals were involved in the crimes. This was not an attempt to interject race into the trial in an inflammatory or improper manner. The

comment was not inflammatory, the prosecutor was simply observing that Mr. Brown observed a single black man, Davis, walk up to Ms. Ezell's door: "...And don't you think Mr. Brown would have seen two other black guys in that neighborhood or the car sitting out in front of Ms. Ezell's residence." (TR. 1549-50). Moreover, the defense counsel, in keeping with his earlier discussion during voir dire, asked the jurors in his own closing "to be especially vigilant" in ensuring that race would play no part in their decision. (TR. 1588).

In ruling on the one preserved allegation of error, the trial court noted the argument was "more of a technical and unemotional nature in which the prosecutor continued to stress the rules and that he did not want emotional decisions, that he wanted them to weigh the aggravating, mitigating circumstances, and I am satisfied that that is true, that the argument basically lacked emotionalism and was an appeal to them following the rules." (TR. 1562). Thus, the trial court, addressing the overall tenor of the prosecutor's argument, found that it lacked "emotionalism."

In conclusion, the State notes that few prosecutors have the luxury of a well thought out script to utilize during closing argument. Given the dynamics of a trial and closing argument in particular, mistakes and misstatements can and do occur. By

their very nature, these cases are emotional, they necessarily involve the unnecessary and untimely death of a human being through the criminal act or acts of a defendant.[34] Addressing a claim a "plain error" in the prosecutor's closing argument, the Supreme Court in United States v. Young, 470 U.S. 1 (1985) stated:

> These standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." Gedgers v. United States, 425 U.S. 80, 86, 47 L.Ed.2d 592, 96 S.Ct. 1330 (1976). It should come as no surprise that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." Dunlop v. United States, 165 U.S. 486, 498, 41 L.Ed. 799, 17 S.Ct. 375 (1897). [footnote omitted]. (Discussing ABA Standards for Criminal Justice.)

None of the allegations of prosecutorial misconduct, either alone or in combination, had any prejudicial impact upon the

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[34]Indeed, in the one word comment acknowledged by the prosecutor as improper at trial [golden rule], he apologized, stating, in part:

> ...I write notes, I look at them occasionally, and I basically try to make an argument flow as I talk so that I don't get stuck and look like an idiot. There was no plan on my part to use a particular word. I am extremely vigilant and well aware of the rules, and I think that the fact that one word was said bears that out. I mean if I slipped, then I slipped. But to say that I intended to do it when it was done once in an hour long argument is just inconsistent.

(TR. 1563).

jury's decision in this case. Davis committed a horrendous murder of an elderly woman in her own home for his own limited financial gain. The same result would obtain without the comments at issue here.

V.

WHETHER THE CIRCUIT PROPERLY FOUND THE FOLLOWING CLAIMS PROCEDURALLY BARRED?

Davis next asserts that the lower court improperly found the following claims to be procedurally barred: 1) Automatic Aggravator, 2) Improper Burden Shifting, 3) Denigration of Jury's Verdict (Caldwell[35]) and, 4) Bar Rules precluding juror interviews. Although Davis recognizes that this Court has consistently held that these claims have no merit, he contends that since he has recast them as ineffective assistance of counsel claims, the trial court erred in denying them as procedurally barred. This Court has made it clear that claims of ineffective assistance of counsel should not be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal. State v. Riechmann, 777 So. 2d 342, 366 (Fla. 2000); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As the following will establish, the trial court

[35]Caldwell v. Mississippi, 472 U.S. 320 (1985).

properly denied the claims as procedurally barred and the ineffective assistance of counsel claim regarding the failure to assert the foregoing as error, is without merit.

Whether or not a claim is procedurally barred is reviewed *de novo*. West v. State, 790 So. 2d 513, 514 (5th DCA 2001) (stating that a finding of a procedural bar is reviewed *de novo* citing, Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999)). See also Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (stating that whether a petitioner is procedurally barred from raising particular claims is a mixed question of law and fact that we review de novo); Greer v. Mitchell, 264 F.3d 663, 673 (6th Cir. 2001) (stating that whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law that we review de novo); Johnson v. Cain, 215 F.3d 489, 494 (5th Cir. 2000) (reviewing de novo district court's determination that the claim was not barred procedurally). Similarly, the question of whether counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), is reviewed *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel.)

A. Automatic Aggravator; Burden Shifting and Caldwell

This Court has consistently upheld lower court findings that

the instant claims are not appropriate for collateral review and, therefore, are procedurally barred. Thompson v. State, 796 So. 2d 511 (Fla. 2001) (rejecting burden shifting and automatic aggravator claims as barred); Waterhouse v. State, 792 So. 2d 1176, 1196 (Fla. 2001) (automatic aggravator claim procedurally barred and without merit); Atwater v. State, 788 So. 2d 223, 238 (Fla. 2001) (automatic aggravating circumstances claim procedurally barred as a direct appeal issue); Arbelaez v. State, 775 So. 2d 909, 915-916 (Fla. 2000); Owen v. State, 773 So. 2d 510, 515 (Fla. 2000) (rejecting burden shifting claim as barred and holding that Caldwell errors cannot be raised on collateral review); Gaskin v. State, 737 So. 2d 509, 520 (Fla. 1999) (*Caldwell* claim barred and without merit.) The trial court's procedural bar findings should be affirmed as Davis has not provided any basis for this Court to overrule the lower court's conclusion that these claims are procedurally barred, beyond making the unsupported and conclusory assertion that counsel's failure to raise the claims constituted ineffective assistance of counsel. As previously noted, this Court has made it clear that claims of ineffective assistance of counsel should not be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal. State v. Riechmann, 777 So. 2d 342, 366 (Fla. 2000)

Moreover, where as here, the merits of the claims have been rejected, this Court has held that the failure to raise them could not support a claim of ineffective assistance of counsel. Thompson, at 522 n.5., citing to Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995) (finding ineffective assistance of counsel claim based on counsel's failure to object to jury instruction that allegedly shifted burden to defense to establish that mitigators outweighed aggravators to be without merit as a matter of law) and Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998) (rejecting argument that the murder in the course of a felony aggravator is an invalid, automatic aggravator). See also Thomas v. State, 2003 WL 193743, 28 Fla. L. Weekly S106 (Fla. January 30, 2003) (counsel cannot be termed ineffective for failing to object to a standard jury instruction which has not been invalidated at the time of a defendant's sentencing); Accord Floyd v. State, 808 So. 2d 175, 193 (Fla. 2002).

B. Rules Prohibiting Juror Interviews

Finally, with regard to Davis' claim that counsel is unconstitutionally prohibited from interviewing jurors based on Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar. This claim was rejected as procedurally barred for failure to raise it on direct appeal. Davis asserts that it was improper to deny

the claim as barred since a "postconviction investigation could not occur during the trial or direct appeal, this issue could only be raised in postconviction." (Answer brief of Cross-Appellant at 98) Davis, however, fails to offer any explanation as to why juror interviews were necessary beyond a blanket desire to "investigate." Under these circumstances, this Court in Johnson v. State, 804 So. 2d 1218, 1224-1225 (Fla. 2001), rejected an this claim, stating:

> In issue three Johnson asserts that rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar conflicts with his constitutional rights to a fair trial and effective assistance of counsel. Rule 4-3.5(d)(4) prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule provides that the lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist." Id. Before conducting such an interview, the lawyer must file a notice of intention to interview setting forth the names of the jurors to be interviewed and deliver copies of the notice to the trial judge and opposing counsel a reasonable time before the interview.
>
> Johnson claims that this rule impermissibly prevented his attorney from investigating possible juror misconduct. The trial court denied relief on this claim on several grounds, finding that (1) Johnson has no right to effective assistance of postconviction counsel; (2) even if the rule is unconstitutional, Johnson would not be entitled to question the jurors absent some cause to believe that juror misconduct had occurred, which Johnson did not show; and (3) the claim was untimely and procedurally barred as it could have been raised before and in fact was raised to some degree in Johnson's first postconviction motion.

> As explained by this Court in *Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97, 100 (Fla.1991), juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. This standard was formulated "in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it." *Id*.
>
> In *Arbelaez v. State*, 775 So. 2d 909 (Fla.2000), this Court concluded that no evidentiary hearing was required on a claim of juror misconduct which amounted to a complaint "about a defendant's inability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned." Id. at 920. We find Johnson's claim involves such a "fishing expedition." During his first postconviction motion proceedings, Johnson was permitted to interview the jury foreman. On appeal, this Court ruled that the foreman's testimony was inadmissible because it inhered in the verdict and related to jury deliberations. See Johnson, 593 So. 2d at 210. Thus, the trial court properly denied this claim without an evidentiary hearing because it is without merit and procedurally barred.

Id at 1224-1225. Accord Vining v. State, 827 So. 2d 201, 216 (Fla. 2002).

Davis seeks to embark upon the type of "fishing expedition" condemned by this Court in Johnson. Based on the foregoing, the State urges this Court to affirm the procedural bar findings and deny relief on these claims.

VI.

WHETHER A COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED DAVIS OF A FAIR AND RELIABLE TRIAL AND PENALTY PHASE?

Davis finally asserts that a combination of errors rendered his trial and penalty phase unfair and unreliable. (Davis' Brief at 98-99). Davis asserted a catch all claim below, but offered no facts or specific argument. (PCR-2, 219). As no facts or specific claims of error were offered in support of Davis' claim that a combination of alleged errors rendered his trial fundamentally unfair, summary denial on this point was proper. Engle v. Dugger, 576 So. 2d 696, 700, 702 (Fla. 1991); Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988). To the extent he adds to his argument by mentioning specific claims, his argument is barred on appeal. Davis failed to present this specific argument to the trial court below.

Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein, as it is contingent upon Davis demonstrating error in at least two of the other claims presented on appeal. For the reasons previously discussed, he has not done so. Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (where claims were either meritless or procedurally barred, there was no cumulative effect to consider) and Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996) (no cumulative error where all issues which were not barred were

meritless.) Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively.

The State takes issue with Davis' claim that "new evidence clearly establishes that Mr. Davis has been convicted of, and sentenced to death for a murder that he did not commit." (Davis' Brief at 99). The "newly discovered" hearsay statements of the long dead Shepard do not establish that Davis is innocent. To the contrary, the testimony of Davis' friends, prisoners and repeat felons, were not worthy of belief. Moreover, the newly discovered evidence was contradicted by undisputed proof of Davis' guilt. Davis' fingerprints in the victim's home, including a bloody thumb print in the victim's master bedroom, along with prints in the victim's stolen car, and items stolen from the home remain unchallenged and unexplained by Davis.[36] This evidence, combined with the uncontradicted eye witness identification of Davis walking up to the victim's door on the morning she was murdered and the corroboration of Davis pawning a ring and gun belonging to the victim, leaves no doubt about his guilt. [not to mention the

[36]There remains no innocent explanation for the fingerprint evidence. Davis' final story, while clearly attempting to explain away his fingerprints, was only told through the defense doctors and constitutes inadmissible hearsay [at least for the guilt phase].

various lies Davis told before finally settling on his present theory]. Davis was properly found guilty at trial and nothing he has offered during the post-conviction process has cast doubt upon his guilt.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to overturn the lower court's granting of a new penalty phase but affirm the denial of post-conviction relief in all other respects.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
(813) 281-5501 (Fax)

COUNSEL FOR APPELLANT/CROSS-APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Regular Mail to Leslie Anne Scalley and Kevin T. Beck, Assistant CCRC-M, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of May, 2003.

CERTIFICATE OF FONT COMPLIANCE

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

_____

COUNSEL FOR APPELLANT/CROSS-APPELLEE