IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. **CASE NO. SC02-803**

HENRY A. DAVIS

Appellee.
_____/

APPELLANT, STATE OF FLORIDA'S INITIAL BRIEF ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY

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TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record will be referred to as "TR", followed by the appropriate page number. The record on resentencing will be referred to as "RS" followed by a volume and page number. The post conviction record will be referred to as "PCR", followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

In January of 1990, Davis was tried on before the Honorable Tim Strickland, Circuit Judge, Polk County. Davis was convicted of the first degree murder of seventy-three year old Joyce Ezell, armed robbery and burglary. On July 16, 1992, this Court affirmed Davis' convictions, but remanded the case for resentencing after this Court struck the avoiding arrest aggravator and found the trial court erred in considering commission of the murder during the course of a burglary and pecuniary gain as two separate aggravating factors. Davis v. State, 604 So. 2d 794, 798 (Fla. 1992). On November 17, 1992,

the trial court again imposed the death penalty after re-weighing the aggravating and mitigating factors, finding the aggravating circumstances "substantially outweigh the mitigating circumstances." (RS-3, 442-447). The trial court's decision was affirmed by this Court on November 10, 1994. Davis v. State, 648 So. 2d 107 (Fla. 1995).

Davis filed an incomplete or "shell" motion for postconviction relief on March 14, 1997. Ultimately, Davis filed an amended motion for post-conviction relief on July 17, 2000. (PCR-2, 299-350). Judge Strickland recused himself based upon Davis' motion for recusal. The motion asserted that trial defense counsel, Dan Brawley, was married to Judge Susan Roberts who sits in the same Circuit as Judge Strickland. To avoid even the appearance of impropriety, Judge Strickland granted the motion to recuse. (PCR-3, 355-366). The Honorable Charles L. Brown, was appointed to preside over the post-conviction hearing held in April of 2001. The post-conviction court rejected Davis' guilt phase claims, but found that trial counsel was ineffective during the penalty phase, and ordered a new penalty phase. This timely appeal follows.

II. FACTS

A. Trial And Penalty Phase

On direct appeal, this Court provided the following summary

of facts:

> On the evening of March 18, 1987, the body of seventy-three year old Joyce Ezell was discovered in the foyer of her house just inside the front door. She had suffered twenty-one stab wounds. There were no signs of forced entry. Several items were missing from Ezell's home, including silver serving pieces, her purse and wallet, a pearl-handled pistol, some rare coins, jewelry, a ring belonging to her late husband, and her car. Davis was acquainted with Ezell because he had done yard work at her house with his stepfather.
>
> Ezell's neighbor, Harold Brown, told police officers that he saw a black man walk up to Ezell's door at approximately 7:15 a.m. March 18. Several days later, Brown identified Davis from a photographic lineup as the man he had seen.
>
> Ezell's car was discovered the day after the murder in a sink hole approximately five miles from her residence. Evidence indicated that at least three people had occupied the car recently. Silver serving pieces belonging to the victim were in the trunk. Davis's fingerprints were found on the power window control on the driver's side of the car and on several items recovered from the trunk of the vehicle. Fingerprints taken from inside the victim's house also matched Davis's fingerprints.
>
> John Johnson, an acquaintance of Davis's, testified that he took Davis to a pawn shop the morning after the murder so that Davis could pawn a ring and an old pistol. The description Johnson gave of the pistol matched the pistol missing from Ezell's house. The ring, which had belonged to Ezell's late husband, was recovered from the pawn shop.
>
> 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 was initially found incompetent to stand trial after he performed poorly on certain tests and indicated that he had no recall of events on the day of the murder. He was sent to Florida State Hospital where he was treated and evaluated for approximately nine months. Upon his release from the hospital, Davis was evaluated again, was found to be competent, and went to trial. After the conviction, the trial judge followed the jury's unanimous recommendation and imposed the death penalty for the murder.

Davis v. State, 604 So. 2d 795-604.

As for mitigation, this Court found, as follows:

With respect to mitigation, Davis presented evidence that he suffered from brain damage, perhaps as a result of a fall suffered four months before the murder. Two mental health experts testified that he was under the influence of an extreme mental or emotional disturbance at the time of the murder. The court found insufficient evidence in the record upon which the experts could base such an opinion. In addition, the defense experts opined that Davis's capacity to conform his conduct to the requirements of law was substantially impaired. With respect to this testimony, the trial judge found the following:

> [This] proposition is unsupported by any other evidence in the record. The facts reveal that after killing the victim, the Defendant methodically burglarized the home, wiped clean the murder weapon, loaded the car with stolen items, and took steps to hide the car. All of this indicates the Defendant clearly understood what he was doing, why he was doing it, and that it was

> unlawful. Thus recognizing the nature of his activities there is nothing to demonstrate that he could not conform his conduct to the requirements of the law.
>
> We note that the State presented substantial expert testimony to refute the mental health testimony presented by Davis. Two mental health experts testified that Davis's poor performance on neurological tests and his lack of recall were attributable to malingering. In particular, the psychologist who evaluated Davis during his stay at Florida State Hospital testified that there was no evidence that Davis had organic brain damage, that Davis had suffered no significant head injuries, and that he showed no signs of psychosis. According to her testimony, when Davis felt that he was being evaluated, he would start to exhibit memory problems. He showed no problems when he did not suspect that he was being evaluated. [note omitted].
>
> Even the defense experts acknowledged the possibility that Davis was malingering. Thus, there was competent and substantial evidence which supports the trial judge's findings on Davis' mental status.

Davis, 604 So. 2d at 798. Additional facts taken from the penalty phase are necessary for disposition of the present appeal.

During the penalty phase, trial defense counsel offered the testimony of Davis' mother, Barbara Stoudemire, and oldest sister, Alma Shepard. Ms. Stoudemire testified that Davis was born in Bartow and grew up in Lake Wales. (TR. 1300). Davis has had a nickname since he was a very young boy, "Sweetman." Id. Davis also lived with the family for about one year in 1970 or 1972 in Connecticut. (TR. 1301). They returned to Lake Wales where they have remained to the present day. (TR.

1301). Barbara Stoudemire testified that Davis' birth father was dead and that they had divorced in 1975. (TR. 1301-1302). Davis was only a little boy, her "baby," when they got divorced. (TR. 1302). After the divorce, Barbara married Mr. Stoudemire, known as Chaney, who testified earlier in the trial. (TR. 1302). They were still married at the time of trial. Id.

Barbara testified that in 1986 Davis received an injury to his head: "He was picking fruit and he fell out of a fruit tree and he injured his head." (TR. 1303). He was taken to Haines City Hospital and treated for the injury. (TR. 1303). He took medication after being released from the hospital. (TR. 1303). Davis' behavior changed after the head injury, his memory and quite a few things. (TR. 1304). At the time he was arrested, Davis was living with her and his stepfather. (TR. 1304). When asked if he was a good boy, Barbara replied: "Yes. Yes, sir."[1] (TR. 1304).

Davis graduated from High School in Lake Wales in 1982. (TR. 1306). She admitted that after Davis fell out of the tree she did not talk to any of the doctors. (TR. 1307). Barbara still thought Davis was a good boy. (TR. 1307).

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[1]On defense counsel's objection, the trial court prohibited the prosecutor from asking about Davis' felony arrests to test Barbara's opinion of Davis as a "good boy." (TR. 1304-1306).

Alma Shepard, Davis' older sister [27 at time of trial], testified that she and Davis grew up in Lake Wales Florida. (TR. 1308). She also lived for a time in Connecticut with the family. (TR. 1308-1309). When asked what Davis' life was like growing up in Lake Wales, Shepard replied: "Normal to me." (TR. 1309). She elaborated, testifying: "Well, he come from a broken home, if you want to say that, because my father was deceased and he was raised by his stepdad [James Stoudemire or Chaney]." (TR. 1309).

Alma was aware that Davis received a head injury when he fell out of a tree in 1986 or so. (TR. 1309-10). "He was picking fruit and he fell off the ladder, the ladder in the tree, in an orange grove and he fell." (TR. 1310). He was taken to the emergency room and treated at the Haines City hospital. (TR. 1310). She went to the emergency room and talked with the doctors. (TR. 1311). Alma testified that he did not seem normal after the injury: "Well, I told my mom I thought he did from the way he was - - he didn't act normal to me, I know the difference between a normal and abnormal person." (TR. 1311). He started acting like he had to convince the family that he loved them, asking them if they wanted things: "Just - - just things that make sure that he's making me happy." (TR. 1311-12).

Alma testified that she and other family members talked with two or three doctors, including Dr. McClane and Dr. Dee. (TR. 1212). Alma gave the doctors as much detail on the changes in Davis' behavior as she could recall after the fall. (TR. 1312). She saw Davis just about every other day before he was arrested. (TR. 1313). Davis was treated, X-Rays taken, then sent home the same day after the fall. (TR. 1313-14). Davis' behavior changed after that. The prosecutor inquired whether or not another reason could be given for the change in behavior, such as cocaine use. (TR. 1314). Ms. Shepard claimed not to know.[2] (TR. 1314).

Dr. Henry Dee testified that he was a clinical psychologist with a subspecialty in neuropsychology and child psychology. (TR. 1328). He has specialized training in neuropsychology and has examined and treated "'[t]housands of patients with head injuries. (TR. 1329). Frequently, medical doctors refer patients to a neuropsychologist to administer a battery of tests to determine brain damage or injury where the available medical

[2]Defense counsel moved for a mistrial by alleging the prosecutor injected an inflammatory matter into the penalty phase. (Tr. 1315). The prosecutor noted that he had a foundation to ask the question as a can fashioned into a pipe for smoking crack cocaine was found in the victim's car. (TR. 1315). As for the good faith basis for the question, the prosecutor stated that Mr. Davis was known in the law enforcement community as someone who used cocaine. (TR. 1322). Moreover, cocaine was found in the victim's car. (TR. 1322).

tests are inadequate or insufficient. (TR. 1332). A neuropsychological examination is an "exhaustive [nine hour] battery of tests that have been standardized for age, sex, level of education, et cetera, and it tests a broad variety of types of mental functions, such as various, very specific types of language function, memory and both verbal and nonverbal areas in both immediate and long-term memory. It tests a variety of visuospacial functions and perceptual functions, none of which are really tested very finely in a neurological examination." (TR. 1332).

Dr. Dee examined Davis on two occasions, the first time on January of 1988. (TR. 1332). At that time the issue was competency to stand trial. (TR. 1333). He examined prison record, prior hospital records, neurology records, "and an emergency room record from Heart of Florida Hospital in which Mr. Davis was examined because he had been attacked, kicked in the forehead and he told me later - - he filled in also struck on the head with brass knuckles on that occasion, the date that is –." (TR. 1333). He also examined the records of Dr. Rubin, a neurologist, who examined Davis one month after he fell out of the tree in 1986. (TR. 1333). Davis was complaining of continued problems with his vision. (TR. 1334). He considered those records in evaluating Davis. While the records do not

reveal the name of the medication he was given, Dr. Dee believes Davis was given Dilantin, “which is an antiseizure medication.” (TR. 1334). When Davis ran out of the medication, he started having seizures again and began taking the medication again. (TR. 1334-35). Dr. Dee described an epileptic seizure as a chemical storm in the brain that “makes the body jerk and convulse.” (TR. 1335). At the time of his first examination, Davis was not taking this medication. (Tr. 1336). In April of 1989, Davis was taking Thorazine, an antipsychotic medication, along with Tegretal, one of the “newer antisiezure medications.” (TR. 1336). These medications were prescribed for Davis by medical doctors from the Florida State Hospital. (TR. 1336-37).

Dr. Dee testified he first conducted an interview, followed by a battery of tests: “Now, the tests are rather exhaustive, they begin with the Weschler Adult Intelligence Scale...” (TR. 1338). Davis’ full scale score on the Weschler was 80. (TR. 1338). That would place him in a low percentile functioning, and, it was “mildly inconsistent with a person with a high school education, but it was not inconsistent with his premorbid educational status, I mean, occupational status. He had worked basically as a laborer and a yard man, and so I couldn’t really say that that represented any decline in general mental function

because I couldn't be sure." (TR. 1339). Dr. Dee testified that from previous testing, as a child, Davis "tested in the normal range and when he was somewhat older, he was in the low, average range, is just what you would consider this." (TR. 1339). The test did not show any sort of mental retardation. (TR. 1339).

The next test was the Denman Neuropsychology Memory Scale. It was a companion to the Weschler and allows you to compare IQ, based on long term and short term memory. (Tr. 1340). When first tested, Davis yielded a "full scale memory quotient of zero." (TR. 1340). "In other words, his memory was terribly impaired." (TR. 1340). He also administered the Bender Visual-Motor Gestalt test, which Dr. Dee testified was one of the most common screening tests used in neuropsychology. It is a test of immediate visual memory and Davis' performance was "grossly defective." (TR. 1340-41). Dr. Dee also administered a test that he was developing called "multilingual facial examination" which is a four part test of language function, that tests how well a person understands what is said to them and how "verbally affluent" they are. (TR. 1341). Again, on this test, Dr. Dee testified that Davis had "grave difficulties." Dr. Dee testified that often damage to the left hemisphere will disrupt verbal fluency. (TR. 1342).

Dr. Dee administered two personality tests, the MMPI, and a Sixteen Personality Factors Test. These tests are sophisticated and provide a better way to measure faking. (TR. 1343). Initially, Davis told Dr. Dee that he could remember nothing about the day fo the murder. (TR. 1343). At one point, Dr. Dee testified, Davis told him he was out picking watermelons that day. (TR. 1343). Next, he told a story about baby-sitting for someone that day, maybe his grandmother. (TR. 1344). Dr. Dee testified: "But these [stories] turned out not to be true when they were checked out and he just says he just doesn't know what he was doing." (TR. 1344). When asked to explain the different stories, Dr. Dee testified that after talking to one of the sisters, they said that Davis would frequently tell different versions of stories. Dr. Dee thought this could be an indication of confabulation. (TR. 1344). He is not sure that a patient who is severely memory impaired knows that they are confabulating. (TR. 1345). Davis also complained of headaches and blurred vision after the fall. (TR. 1345-46). Prison medical records indicated Davis complained of blurred vision. (TR. 1346).

Dr. Dee related various scores for tests and sub-tests which indicated Davis' oral language and verbal memory were severely impaired. (TR. 1346). Moreover, various motor skill

tests also showed impairment by scores that showed Davis was "grossly defective." (TR. 1346). Based upon Davis' scores, Dr. Dee found Davis incompetent to stand trial after administering the first battery of tests in January of 1988. (TR. 1347).

After the first examination, Davis was sent to the Florida Sate Hospital where he was placed on medication and presumably received treatment. (TR. 1347). He was returned to Polk County after the examiners found him competent. (TR. 1347). Dr. Dee examined Davis a second time in April of 1989. (TR. 1347). His examination was exactly the same. Davis' performance of the Denman did not change. Similarly, Davis' full scale IQ was exactly the same, 80. (TR. 1348). In April of 1989, Davis was clear about the charges and other criteria utilized to assess competence to stand trial. (TR. 1348). Davis claimed his memory was better and that he now had a different version of events. (TR. 1349). Davis now asserted that he went to Ms. Ezell's house with two other individuals, Johnson and Shepard, intending to ask her for work. Davis asserted that Shepard and Johnson must have murdered Ms. Ezell when he was out back. They all ransacked the house for valuables and Davis left in the victim's car. He was afraid of Johnson and Shepard as they threatened to harm him and his mother. (TR. 1349-51).

Dr. Dee acknowledged that it was possible some of Davis'

story was not true. (Tr. 1351). It was also possible some of the story might be true. (TR. 1352).

Dr. Dee concluded that Davis was brain damaged. Dr. Dee testified:

> Because of his performance on these tests. He did show significant improvement, and whether he was malingering the first time is open to question. Some people feel that maybe he was and maybe he was to a degree. But that's difficult for me to know with any certainty on the neuropsychological testing.
>
> I feel certain on the second occasion there was no malingering and he simply could not perform very well on certain of the tests, the ones that I have enumerated. And I don't think Mr. Davis is sufficiently sophisticated to know what to fake and not to fake on these tests to give an impression of brain damage, and I don't think he was trying to give that impression. I think he was doing his best.

(TR. 1355).

Dr. Dee testified that Davis was suffering from extreme mental or emotional disturbance at the time of the crime based upon his brain damage. Dr. Dee testified that one of the effects of cerebral damage is memory dysfunction "and increased impulsivity, which would be - - which is to say that it would make it more difficult for him in legal terms to mold his conduct according to the codes of the law." (TR. 1356). Dr. Dee believed that Davis' ability to conform his conduct to the requirements of the law was substantially impaired. Again, Dr. Dee testified that Davis was more likely to act "impulsively illegally" after sustaining his brain injury. (TR. 1357).

Dr. Dee testified that Davis' diagnosis is "organic brain syndrome with mixed features, or organic personality syndrome, you can call it either one." (TR. 1359). His conclusion was drawn based upon the neuropsychological testing and not the personality tests. The personality testing reveals two possible interpretations. "Either his is a man who is in extreme distress, or faking bad." (TR. 1357). The MMPI validity scales indicated he might well have been trying to make himself look worse off than he was: "Yeah, in terms of his personality function, yeah, make himself look crazy or something." (TR. 1381).

On cross-examination, Dr. Dee again acknowledged that Davis "told me he didn't remember anything about such a crime." (TR. 1360). When Dr. Dee examined Davis in early January he was in acute emotional distress, he was supposed to go to trial that week. (TR. 1363). Dr. Dee acknowledged that part of the reason Davis was distressed was that he was going to trial on the murder charge: "Perhaps. I'm sure that's part of it. I mean, I'm not sure that there weren't other reasons. too." (TR. 1363). Instead of going to trial, Davis went to Chattahoochee. (TR. 1363-64).

Dr. Dee examined Polk County jail medical records, medical records from Haines City, and Dr. Rubin, who found "no

observable neurological deficit in Mr. Davis." (TR. 1365). Dr. Rubin, according to Dr. Dee, administered a normal neurological examination consisting of testing reflexes, sensation, and the "rather cursory cognitive examination that I described earlier." (TR. 1365). Dr. Rubin also administered a CAT scan, but, Dr. Dee testified, "the fact that those did not demonstrate abnormality does not mean it does not exist." (TR. 1365). Dr. Dee testified that to be absolutely positive of brain damage, the only way to be "100 percent" certain is to conduct an autopsy on the brain. (TR. 1365-66). When asked about objective testing, Dr. Dee testified that the neuropsychological tests he administered are "standardized" tests and there is "very little subjective about it." (TR. 1367). The tests upon which his opinions are based have been empirically and medically validated. (TR. 1367).

Dr. Dee acknowledged that Davis told him he suffered a number of seizures when he did not take his medication. However, the jail records reviewed by Dr. Dee did not back that up. (TR. 1368). In the nine month period, no seizures were documented. Dr. Dee testified that "he may be lying about it, but then the seizures may have gone away." (TR. 1369). Although Davis had been prescribed Thorazine, Dr. Dee testified: "I don't believe he's ever been psychotic." (TR.

1370). It is commonly prescribed to keep people calm. (TR. 1370-71). Mr. Davis is not mentally retarded and his IQ of 80 is in line with the population you would expect to find in prison. (TR. 1371). With all Davis' stories, it is possible that he is confabulating, but it is also possible that "he's lying about every one of them." (TR. 1372). When Davis returned from Chatahoochee he saw the summary of the report which determined that Davis was a malingerer. (TR. 1373). Dr. Dee was advised that the mental health community should take into account "a strong possibility of malingering." (TR. 1373). And, now, Dr. Dee admitted, Mr. Davis has another story, in 1989, two years after the murder. (TR. 1373). As the prosecutor pointed out, a story that might explain his bloody fingerprint found in Mrs. Ezell's house. (TR. 1374).

Dr. Dee testified that he suspected part of Davis' dysfunction the first time he saw him was real and part was malingering. Dr Dee explained: "I have a suspicion Mr. Aguero [prosecutor], that probably a little bit of all of these things are part of the case, you know, that in the first instance there probably was some malingering, ok? But part of his dysfunction was quite real." (TR. 1376). When he returned from Chattahoochee, however, Dr. Dee testified Davis tried and was now not malingering. (TR. 1377). The prosecutor inquired

whether Davis' brain damage would change or get better over time. Dr. Dee responded that it would not, there was a slight possibility some part of the brain would recover, but there's also a possibility of dysfunction. (TR. 1377).

On re-direct, Dr. Dee stated that he was familiar with the Dr. Westby report, that he had read the summary, but that his conclusions are the same after reading that report. (TR. 1382).

Dr. Thomas McClane, testified that he specialized in forensic psychiatry and psychopharmocology. (TR. 1384). Dr. McClane examined Davis on three separate occasions. He spent something like a total of four and one-half hours examining Davis. (TR. 1388). In April of 1988, Dr. McClane found Davis incompetent to proceed. (TR. 1388). In April of 1989, he found Davis competent to proceed to trial. (TR. 1388). The November examination occurred in order to assess Davis' state of mind at the time of the offense and to assess any mitigating circumstances which might be present. (TR. 1389). Dr. McClane testified that on the first two examinations, Davis claimed not to recall anything about the offense. The last time he met him, in November of 1989, he repeated the last story he provided to Dr. Dee. (TR. 1389).

Dr. McClane testified that he relies on tests administered by neuropsychologists such as Dr. Dee, who has specialized

training in neuropsychology. (TR. 1391). He reviewed the tests provided by Dr. Dee and his conclusions which revealed that Davis suffered from sort of brain damage. (TR. 1389-90). Dr. McClane testified that he considered the Denman test an important test, "but primarily that's because of what Dr. Dee has taught me about the test. Not because of independent research on my own part in the area." (TR. 1391). Dr. McClane reviewed a "considerable amount of records" including medical records mentioned by Dr. Dee, "records of Dr. Zwingelberg and the records from the State Hospital." (TR. 1391). Dr. Dee also talked with two of Davis' sisters by phone, which was important in answering any question about brain damage. (TR. 1392).

Both sisters noticed behavioral changes in Davis after he fell out of a tree in November of 1986. (TR. 1392). He remained quiet much of the time, but sometimes it would appear he was in a daze. At other times he "would be irritable." (TR. 1392). Davis would tell different versions of stories and tell family members what they wanted to hear. (Tr. 1392). Davis would appear to believe in the things he was saying, which sounded like confabulation, telling something you believe is the truth, but erroneously. (TR. 1392-93).

Davis provided Dr. McClane with a history of minor head injuries, being dazed by playing ball in high school, being

beaten up severely in high school. Combined with the scores on Dr. Dee's tests, Dr. McClane testified he found sufficient evidence showing a probability of brain damage. (TR. 1393).

Davis was on two drugs at the time Dr. Dee saw him, Thorazine, which is an antipsychotic, and Tegretal. (TR. 1394). The amount prescribed was enough for most normal people to be put to sleep. (TR. 1394). It is normally prescribed for people that are psychotic. (TR. 1395). Tegretol is an anticonvulsant, which is used for people with various forms of epilepsy, for pain, and to treat people who are manic or manic depressive. (TR. 1396). Dr. McClane testified that he was not believe he was put on it for a "manic" problem, but stated that the results of an EEG at the state hospital along with his history provided a good basis for the medication. Dr. McClane explained:

> ...The I think they put him on the Tegretol probably because he had an abnormality on his electroencephlogram at the State Hospital and a history of head injury and manifestations of irritability and aggressiveness intermittently. And that syndrome suggests a behavioral disorder secondary to some kind of organic brain disease and there are a number of papers in the literature, although it's not accepted as a primary treatment, there are a number of papers in the literature supporting hte use of Tegretol for that kind of syndrome, and often the behavior gets better when you use an anticonvulsant like tha, or even Dilantin has similar effects which someone said he was on earlier. Placed on it by Dr. Rubin back when he fell on his head.

(TR. 1397).

Dr. McClane testified that Davis was under the influence of an extreme mental or emotional disturbance at the time of the crime. (TR. 1397). "Of course, whether it's extreme or not depends on whether you consider organic brain damage extreme. I think that he had organic brain damage and I think that's an extreme mental disturbance, but I suppose everyone would not agree with that." (TR. 1397). Dr. McClane also agreed with Dr. Dee's earlier testimony and his assessment of brain damage. (TR. 1398).

Although a person like Davis with brain damage may be more easily led into inappropriate behavior, he did "not really have an opinion as to whether he was under the - - under the substantial influence of someone else at the time." (TR. 1399). If Davis' latest version of events were true, then he was more likely than say the "average person" to be under the influence of someone else. (TR. 1399). Davis, in Dr. McClane's opinion, has a problem with "judgment." (TR. 1399). His low or borderline level of intelligence coupled with organic brain damage limited his ability to reason, to think rationally, and to control his impulses. (TR. 1400). Consequently, Dr. McClane testified that Davis' ability to conform his conduct to the requirements of the law was substantially diminished. Dr. McClane stated: "That speaks to the point I was mentioning

before about control of impulses." (TR. 1401).

Dr. McClane did not believe that Davis suffers from psychosis. (TR. 1408). However, Davis did claim to see delusions, telling Dr. McClain that he sees "little men three feet tall, this sort of thing." (TR. 1409). While that has the flavor of a "psychotic hallucination" such a claim has the flavor of a malingerer: "Those kinds of things occur much more often in malingered hallucinations than in actual ones." (TR. 1409).

Dr. McClane examined Davis on April 6, 1989. Davis saw Dr. Zwingelberg the next day. (TR. 1413). Dr. McClane didn't get the story about two other individuals involvement in the murder on April 6, 1989, but Davis provided that very story to Dr. Zwingelberg the next day. (TR. 1413). Dr. McClane believed that Dr. Zwingelberg was the first one to get Davis' fully elaborated version of events. (Tr. 1413). When Davis was first arrested he said he was in a watermelon patch, next, that he was babysitting, then, there was some guy that looked exactly like him who committed the crime, and then told Davis about it. Finally, Davis comes back from Chattahoochee with a story that two other guys committed the murder. (TR. 1414-15). Dr. McClane acknowledged that it was "possible" Davis was lying when he provided each of these stories. (TR. 1415). Dr. McClane

acknowledged that Davis was doing a lot of lying but that probably some of this was “confabulation.” (TR,. 1415). Davis attempted to explain his earlier stories were the result of people threatening to harm him and his family. (TR. 1415). Dr. McClane was aware that a neighbor saw only one person, Davis, go into Mrs. Ezell’s house the morning of her murder. (TR. 1415). Dr. McClane stated that he was only repeating Davis’ version of events for purposes of “completeness.” (TR. 1415).

Dr. McClane acknowledged that Thorazine is sometimes prescribed to control aggressiveness. (TR. 1416). Reading the report from the State Hospital, it mentions several episodes of aggressiveness, and Davis may have been left on the medicine for that reason: “[He] may have been in part left on it because of the - - some of the aggressive acts, threatening people and things like that.” (TR. 1416). And, Dr. McClane agreed that stabbing somebody 21 stimes indicates quite a bit of aggressiveness: “Of course, it does.” (TR. 1416). While Dr. McClane agreed that the underlying brain damage generally does not improve, behavior can change as it does with medication. (TR. 1417). However, Dr. McClain agreed that without medication Davis might act as aggressively as he did when he stabbed Mrs. Ezell. (TR. 1417-18).

If Davis had not worked for Mrs. Ezell for some six months,

the mere act of his taking the time and energy to go to the other side of Lake Wales would suggest that going to her house was not an impulsive act. (TR. 1419). But, Dr. McClane testified that he had no idea that if he stabbed her if it was an impulsive act or a "planned thing." (TR. 1419). Dr. McClain testified that he was only stating that he thinks Davis "has a problem controlling his impulses." (TR. 1419).

On rebuttal, the State called Dr. Lynn Westby. Dr. Westby testified that she specializes in clinical and forensic psychological practice. (Tr. 1425). Between 1976 and 1981 Dr. Westby worked as a Master's Level psychologist at the Lake Correctional Institution in Clermont. (TR. 1426). In that capacity, she conducted all the initial psychological screenings, evaluations for classification, as well as doing crisis intervention, one to one therapy and group therapy. (TR. 1427). After that, she completed her doctorate, finished in 1985 and interned at a VA Hospital in Virginia. (TR. 1427). She then began working at the Florida State Hospital in forensic service from 1985 through 1989. (TR. 1427). Dr. Westby was the senior supervising psychologist on her unit over three other psychologists, in charge of 100 patients at the Florida State Hospital. (TR. 1428). Dr. Westby had been accepted as an expert in nine different circuits in this state, probably

fifteen times. (TR. 1428-29).

As the supervising psychologist, Dr. Westby examined Davis when he first came to the hospital in July of 1988. (TR. 1429). Davis remained at the hospital for eight or nine months. (TR. 1430). During that period she would see Davis almost "daily." (TR. 1430). When Davis first arrived, he "said he couldn't remember much of anything, he thought he was still in the jail. He didn't remember having any charges so he didn't know why he'd be at the hospital. And he couldn't give us a real good history or anything." (TR. 1431).

The goal for Mr. Davis was to stabilize him, get him medicated, and get him to court to take care of the pending charges. (TR. 1431-32). Dr. Westby explained that Davis was put on Thorazine initially based upon his claims of little people chasing him around:

> We put him - - we initially put him on Thorazine beccuase he was complaining about little people chasing him around making threats and he was afraid other people were talking about him all the time and were going to hurt him so he constantly had to be on guard about that. And so as to help make him comfortable and try to diminish these symptoms, we put him on an antipsychotic medication and we had him evaluated eventually by a neurologist and other people of that persuasion.

(TR. 1432).

Neither Dr. Westby nor members of her staff developed any evidence that Davis suffered from organic brain damage. (TR.

1432). The neurologist was on contract to the hospital and conducted an EEG. Dr. Westby testified that "we sent him to the neurology clinic to see what they thought and we observed him 24 hours a day on the unit for eight months, between eight and nine months. And we did some neuropsychological testing while he was there." (TR. 1434). They administered the same type of tests as Dr. Dee, but Dr. Westby admitted she never heard of the Denman. (TR. 1434). The Weschler, Wayser, a neuropsych screening battery, Asphasia Screening Test, Trail Finding and Trail Making were all administered. (TR. 1434-35). The tests did not reveal consistent scores. On tests that Davis failed for Dr. Dee, he did fine on at the State Hospital, then comes back, and still can't do it for Dr. Dee. Dr. Westby testified that you don't get that kind of variation on tests if they have brain damage, "you don't see that kind of variability, if they got a deficit there, they've got a deficit there and it just doesn't come and go." (TR. 1435).

Dr. Westby testified that another thing that puzzled the doctors was that Davis claimed to have no memory from five years old on, total amnesia for his life, yet he gravitated toward all of the higher functioning patients. (TR. 1435). Davis stayed with the higher functioning patients the whole time at the State Hospital. This was significant in that using the yard test and

associating with higher functioning patients revealed: "...if you can't make a diagnosis any other way, you watch who they're hanging out with because the higher functioning patients don't want anything to do with the lower functioning patients." (TR. 1436). The lower functioning patients are unkempt, disheveled, and you can observe them listening to voices that aren't there and looking at something which isn't there. (TR. 1436). Davis did not exhibit any of those behaviors. (TR. 1436-37). Davis memory improved at the end of his stay at the hospital to the point of they say I did this and that, to know what the charges were. (TR. 1437).

Davis was marginally cooperative during testing: "...[I]f he felt he was being evaluated, then he would start doing his memory problem thing again. And so you're never sure whether you're getting a true evaluation, especially on the testing." (TR. 1437). Again, the lack of consistency on the deficits revealed by the tests militated against finding any known brain syndrome. Dr. Westby explained:

> We couldn't find any consistency in the deficits that he presented. If you're bad on something one time, if you're bad on it the next time, be bad on the time after that, you shouldn't be able to do it perfectly one time and not be able to do it at all the next time, and then back. He just forgot which tests he was taking, I think. And so it varied from one evaluator, and what you're looking for is convergence and we couldn't find anything that converged into a coherent clinical pattern that would indicate any kind

of known brain syndrome.

(TR. 1439).

Dr. Westby concluded: “Well, considering the charges that he was having - - that he had, we strongly suspected that he just didn’t want to get on with it right then and so he was fabricating these symptoms and memory deficits to keep from having to go to trial on his charges.” (Tr. 1439). She considered Davis a malingerer. (TR. 1439-40). Not only was he a malingerer, but Davis was good at it: “He’s good, it took us a long time.” (TR. 1440). While Davis claimed a history of head injuries, there was nothing like a coma or anything that required hospitalization. (TR. 1440). Although the family told them Davis had been having memory problems from the age of five, Dr. Westby testified that Davis’ school records did not support their claims: “We got the school records and that wasn’t the case.” (TR. 1440).

Dr. Westby acknowledged on cross-examination that, unlike the defense experts, she had never been called to testify as to the existence of statutory mitigating factors in a capital case. (TR. 1442-43). Dr. Westby also acknowledged that she has never worked in the neurological department of a hospital and had never authored any publications on neuropsycholgy. (Tr. 1448). Dr. Westby admitted she wrote a report within 3 days of Davis’

admission to the hospital, containing a preliminary diagnosis by Dr. Phillips, a psychiatrist. (TR. 1449). The primary diagnosis was paranoid schizophrenia, mental retardation, chronic substance abuse, borderline personality disorder with antisocial traits. (Tr. 1449).

Next, Brawley asked Dr. Westby about the EEG done by Dr. Vroom in August of 1988. Dr. Westby admitted that Dr. Vroom was a medical doctor and that he administered an EEG to Davis. (TR. 1450). Dr. Westby acknowledged that Dr. Vroom's report revealed an abnormal EEG "because of a mild to moderate dysrhythmia.[]" (Tr. 1450-51). Dr. Westby agreed that it was an "abnormal" EEG. (TR. 1451). Since she was not a neurologist, Dr. Westby could not answer a question about dysrhythmia well, stating that "it's not totally rhythmic." (TR. 1451). Brawley's cross-examination quoted from Dr. Vroom's report, "that he had shown abnormal EEG because of mild to moderate dysrhythmia, and this is nonspecific" which Dr. Westby agreed would corroborate a seizure disorder. (TR. 1452). Dr. Westby thought that Dr. Vroom's conclusion regarding a seizure disorder was based on faulty information from Davis, who claimed he had suicide attempts, who stated that he was on seizure medication and had seizures in the jail. (TR. 1452). Dr. Westby stated that none of that information was true. (TR. 1452). However, Dr. Westby

admitted under cross-examination that she was not qualified to discuss the results of the EEG and tell the jury what it meant. (TR. 1452-53).

Davis displayed aggressive behavior in the Florida State Hospital:

> ...there were quite a few incidents of aggressive behavior against the lower functioning patients. Threatening them if they didn't - - if they didn't turn over their canteen or their cigarettes, and one instance he went up and knocked on one of the lower functioning patients to the ground and he made verbal threats towards staff several times. We'd put him in his room or put him in the behavior isolation unit until he calmed down.

(TR. 1438).

Dr. Mark Zwingleberg testified that he is a clinical psychologist who has been qualified as an expert approximately twenty times a year for the five years preceding the trial in the Davis case. Dr. Zwingleberg examined Davis on four occasions relating to mental status at the time of the offense and competency to stand trial. (TR. 1470-71). Initially, Dr. Zwingleberg found Davis incompetent to stand trial and recommended that he be placed in the State Hospital. (TR. 1475). Davis first told Dr. Zwingleberg that he had no memory of the day of the crime and denied being near the victim's house the day that she was murdered. (TR. 1476). On a later examination Davis claimed that he was present with two other

individuals. (TR. 1477-78).

Dr. Zwingleberg testified that with brain loss or injury "within 12 to 18 months the vast majority of that has returned." (TR. 1480). You don't get huge fluctuations in terms of testing that you get in the immediate months or weeks after a brain injury. (TR. 1480). Dr. Zwingelberg testified that he reviewed tests administered by Dr. Kremper and Dr. Dee and noted that on some testing Davis performed well on but others he did not. On the Weschler Memory Scale, Dr. Kremper said that "there was some impaired memory but was generally commensurate with intellectual skills and reading level, which we're talking about kind of borderline range." (TR. 1483). "There was, however, some confabulation on both immediate and delayed recall." (TR. 1483). Davis was hard to diagnose, Dr. Dee sees him functioning in the "dull normal range intellectually, an IQ score of 80 which does not indicate an inability to understand what's going on around him." (TR. 1486). "On the Denman Neuropsychological Memory Scale, he gets a verbal memory quotient of 77, nonverbal 73, full scale 72. That's a borderline intellectual. That – - if that was a score of a child in school they would be in regular classes. They may be in basic classes and they may have - - be having difficulty in school, but they're expected to perform basically in regular classes. They're not in special

education classes with a score like that." (TR. 1486).

As to whether or not Davis suffers from brain damage, Dr. Zwingleberg testified it is not entirely clear. "There may have been a seizure disorder but just because somebody has a seizure disorder doesn't mean that that form of brain damage is going to result in them hurting somebody or that that's a mitigating factor." (TR. 1486-87). Dr. Zwingleberg's impression was that Davis provided a strong impression of malingering: "From the information from my tests, my evaluation sessions, I feel fairly strongly that there is a malingering aspect to his performance." (TR. 1487). As to aspects of Davis' personality, Dr. Zwingleberg testified that he believed Davis possesses an antisocial personality disorder. (TR. 1488).

Davis' various stories surrounding the murder suggest malingering, but, it was possible there were some elements of confabulation. However, the pattern is more susceptible to malingering: "I don't believe from the pattern and how it occurred and particularly the change from amnesia one moment to recalling the story the next moment, that doesn't seem like confabulation to me and there's other instances that kind of support that. So, I raise a doubt about the organic deficits of some of those concerns. It's possible that some of those could be part of the psychosis but again, I don't see that and they

all tended to be rather self-serving and directed toward the situation, and they became more sophisticated and descriptive of the events, the further time elapsed after the events." (TR. 1489).

On cross-examination, Dr. Zwingleberg again admitted that there was a possibility of brain impairment; however, it was not significant. Moreover, he testified: "I don't know that that necessarily means that that's - - there's a direct relationship between some brain dysfunction and a mitigating circumstance for the behaviors. Personality style is such that he also displays impulsiveness." (TR. 1490-91). Dr. Zwingleberg also admitted that he read a report from Dr. Westby noting a report from a medical doctor, Fred Vroom, which revealed an "abnormal EEG, because of mild to moderate dysrhythmia" which would corroborate "[a] seizure disorder." (TR. 1497). Dr. Zwingleberg testified that he was not an expert in interpreting those results, but noted that an EEG is a measure of brain waves, looking at "electrical function of the brain." (TR. 1497). Dr. Vroom, a medical expert, found that Davis had an abnomral EEG. (TR. 1498). Dr. Zwingleberg was also aware of a report from Dr. Colar in the neurology clinic, as stating that "the patients history, an[d] EEG would be consistent with an underlying convulsive disorder" and had evidence of "encephalopathy." (TR.

1499). When asked about encepalopathy, Dr. Zwingleberg testified that was an area more suited to a neuropsychologist. (TR. 1499). Under continued cross-examination by Brawley, Dr. Zwingelberg admitted there is "likely to be some" brain dysfunction. (TR. 1501).

B. <u>The Evidentiary Hearing</u>

i) Testimony of The Attorneys

Dan Brawley testified that he is attorney specializing in criminal law since starting out in the public defender's office trial division in 1976. (PCR-3, 427, 428). Brawley is a solo practitioner and remains on the court-appointed list for capital cases. (PCR-3, 426). He had tried a total of thirteen capital cases prior to accepting appointment for Henry Davis's case. (PCR-3, 440). By choice, Brawley testified that he no longer accepts death penalty cases. (PCR-3, 466). At the time of Davis's trial, Brawley testified that he gone to a number of seminars on capital litigation: "I tried to go to every capital case seminar that is offered, and I think I've been pretty successful in going to those." (PCR-3, 469). In fact, Brawley has been a speaker at a Florida Bar or Public Defender's Association seminar. (PCR-3, 469-70).

Brawley believed that he had adequate time to prepare Davis's case. (PCR-3, 427). He did not seek out co-counsel in

this case. Brawley was aware that by the mid 1980's Public Defender's Offices in Polk County appointed two attorneys in capital cases. Although he was sure it had happened, Brawley was not aware of a case where two private trial lawyers were appointed in Polk County. (PCR-3, 428). In January of 1990 it was not common practice to have two lawyers appointed to a capital case. (PCR-4, 524). In fact, of the small group of private lawyers in Polk County handling capital cases Brawley could not recall a single instance where those private attorneys had a second lawyer appointed as co-counsel. (PCR-4, 525). Indeed, in Polk County, Brawley has not been involved in a single capital case in which the State used more than one prosecutor to try the case. (PCR-4, 527).

Although he had acted as second chair in the Provenzano case (PCR-3, 435), he always felt comfortable being the sole lawyer in a capital case. Brawley testified:

> The reason is that that's the way I was brought up. When I started in practice in 1975– actuallly '76 in the trial division in the Public Defender's Office, the capital cases were all tried by [a] single attorney; whoever had the case tried that. And in those days Dennis Maloney was chief assistant, and he tried all the captial cases or most of them. He tried them all by himself. And I used to watch him try those cases and he did pretty well. And it just developed in my mind that one lawyer tries one case.

(PCR-3, 428).

Brawley was familiar with the concept of a mitigation specialist but did not use one in any of his prior capital cases. In fact, Brawley was not certain that one was available in Polk County at the time of trial in the Davis case. (PCR-3, 440). To the best of his knowledge, a mitigation specialist did not exist or was not available in Polk County in January of 1990. (PCR-4, 527-28). However, he did use an investigator, Leon Daniels, for the Davis case. (PCR-3, 440, 442). The investigator followed up leads in both the guilt and penalty phases. (PCR-3, 440-441). Brawley was not sure if he had Davis's school records or not. [Later, he testified that he did not have the school records: "I think that I did not." (PCR-7, 1025-26)]. He did not call any school teachers during the penalty phase and did not interview any teachers. (PCR-3, 443). However, he believes the family told him that Davis was in or had taken special education classes while in school. (PCR-3, 441). Further, Brawley had a report from a Dr. Zwengelberg written in 1988 that mentions that Davis was in special classes for a period of time but that he got a regular diploma. (PCR-4, 523). He was aware of it at the time and trusted that Dr. Dee would have reviewed that report. (PCR-4, 524).

While he did not go to family members' homes, Brawley testified that he "had a lot of contact with them, both by

telephone and personal interviews at the office." (PCR-3, 442). Brawley did not recall talking to any of Davis's employers. However, he did talk to Davis's step father who employed Davis in his business: "My recollection is that Henry did not have much of an employment history as far as 9:00 to 5:00 job-type things. He generally worked on a cash basis and worked with his dad." (PCR-3, 475).

Brawley received a large number of boxes from prior counsel Ron Toward containing his preparation for trial. Toward only discovered the conflict a few weeks from trial and his office was just down the hall from his own. (PCR-3, 463). Brawley read all of the material provided by Toward. (PCR-3, 464). Brawley testified that Toward was a good lawyer and Brawley made an independent judgement as to what additional work needed to be done or followup on what Toward had developed. (PCR-3, 464). Brawley also talked with the Public Defender who was originally assigned to the case, Mr. Dimmig. (PCR-7, 1030). The depositions had already been completed by the defense prior to the time he was appointed in 1989. (PCR-7, 1030).

Brawley testified he got this case when Davis was still in the State hospital after being found not competent to stand trial. (PCR-3, 433). He was confident that he read the reports of various doctors contained in prior counsel's file. He also

spent time in private conferences with doctors getting ready for the penalty phase. (PCR-3, 437). Brawley testified that "there was testimony that had brain damage, that he was minimally retarded, although that was disputed by the State. That information I had, and I made what I thought was good use as I could out of it." (PCR-3, 444).

Brawley recalled that the State used an expert during the penalty phase but did not recall her name. He did consider her testimony important, testifying: "Well, she testified in the penalty phase, so yes, it was important. Everybody that testifies in penalty phase is important." (PCR-3, 446). Brawley recalled that the State used her observations to rebut his experts' diagnosis of brain damage. (PCR-3, 446-47). He did not consider the state expert qualified to testify about brain damage. (PCR-3, 447).

Brawley has used both psychologists and psychiatrists as witnesses before. (PCR-3, 447). Psychiatrists rely on a clinical interview while psychologists rely heavily on various tests. Such testing administered by psychologists is a major tool in determining a person's mental status. (PCR-3, 448). In this case, Brawley relied upon Dr. Henry Dee, a clinical psychologist, who, according to Brawley: "[H]as taken extra training in the area of brain damage and medications and things

like that. He is a very good witness on that and can talk to you about that, I've used him for that purpose." (PCR-3, 448-49). Dr. Dee was the person he relied upon the most in this case. Dr. Dee was a forensic psychologist but also claimed he was an expert in neuropsychology. (PCR-4, 522). Dr. Dee holds himself out as an expert in that areas and does a lot of testing on capital and non-capital defendants. (PCR-4, 522). If Dr. Dee said he needed any additional material Brawley testified that he would have attempted to get that material. He had no specific recollection of any such request at the time of the evidentiary hearing. (PCR-4, 523).

After having his memory refreshed by the transcript, Brawley testified that on the subject of brain damage, Westby "eqivocated." (PCR-3, 451). "She felt that there was some minimal damage but that her own examination revealed an improvement, which was inconsistent with brain damage." (PCR-3, 451). Then reading the record the explanation given by Dr. Westby was the variances between the scores recorded by Dr. Dee and the State on the same test. With brain damage, you don't find that kind of variability When Dr. Dee gave him the test he fails, when the State gave him the same test Davis was "fine on it." "If they've got a deficit there, they've got a deficit there, and it doesn't just come and go." (PCR-3, 452).

Brawley testified that he utilized an expert mental health advisor to help him present the case, Dr. Kremper, from Bartow. (PCR-7, 1026). Brawley recalled having Dr. Dee testify and that Dr. Kemper was involved in examining Davis. However, after conferring with Dr. Kemper, Brawley decided against calling him to testify on Davis's behalf. (PCR-3, 456). Brawley believed that he was made aware by Dr. Dee of a conflict between his findings and those of Dr. Westby. (PCR-3, 461). Further, although he was not positive, Brawley believed that he talked to Dr. Dee about how he should cross-examine the State's expert. (PCR-7, 1044).

Brawley did not take Dr. Westby's deposition, testifying: "I had her report and I made the decision that I can deal with it at penalty phase." (PCR-3, 463). In his twenty six years of practice, Brawley testified that he has not had an expert change their mind on the witness stand and testify to something other than what they put in their report. (PCR-4, 531). Taking her deposition, in Brawley's opinion, would not have changed or altered the opinions expressed in the report. (PCR-4, 531-32).

Brawley believed that Davis was medicated in Chattahoochee with a psychotropic drug, but could not recall if he was when returned to Polk County for trial. (PCR-3, 457). Brawley had

no recollection of Dr. Vroom or Broom and his report, but in a deposition taken prior to the evidentiary hearing, Brawley thought that Vroom's EEG showed some abnormality. (PCR-3, 503). If however, the mental health reports from the state hospital indicated an EEG had been conducted, this information would have been passed along to Dr. Dee. (PCR-4, 532-33). Brawley testified that he had no knowledge now, but at the time of trial he was probably aware that an EEG had been conducted on Davis. (PCR-4, 554).

Brawley testified that while he did not recall specific documents turned over to Dr. Dee, Dr. Dee would get everything he possessed:

> ...I would have given him everything that I had at the time. Including Dr. Dee frequently wants police reports, depostions, things that I don't think that they seemed to me to be no reason of why he would want that, but I give him everything he wants. I generally go through the file, and anything that looks like the kind of thing that Henry wants to see I'll run a copy over or send my copy to him. That's just the way he operates and I've gotten used to that.

(PCR-4, 544). He was confident he turned over all of the material to Dr. Dee, testifying: "I know that because that's what I do and that's what I would have done. And I recall dealing with Henry many times on the phone and then on conferences in his office, and he had everything that I had." (PCR-4, 545).

Brawley did not recall the specific reason he did not recall Dr. Dee to rebut the State expert, he testified:

> Well, I think it might have been a bad strategic or tactical move to recall witnesses just to try to get the last word in. I might have run into objections and the jury might have got made at me for rehashing the same thing again in a kind of one upmanship. I thought that I had out of my witnesses what I needed to have to argue to the jury and what I needed them to hear.

(PCR-7, 1050).

In his investigation, Brawley talked to a number of family members but did not recall hearing anything about Davis being sexually abused. (PCR-3, 458-60). Brawley was certain that he talked to family members at the time of trial, but had no specific recollection of those conversations: "I remember talking to the sister, and I'm sure I did talk to the mother, but I don't have a specific recollection of any conversation –- of any particular conversation with Henry's mother." (PCR-7, 1023-24). When asked why he called family members during the penalty phase, Brawley testified they could talk about his head injury and "they could humanize Henry." (PCR-7, 1025). He did not recall any family member telling him that Davis was treated unfairly by his stepfather James Stoudemire. (PCR-7, 1025). When asked if he would have presented such information, Brawley stated that it would depend upon what that information consisted of before deciding whether or not to present it. (PCR-7, 1025).

Brawley remembered that Davis had a criminal history and had been in prison, but did not recall the particular offenses. (PCR-3, 460). Brawley also testified that he was confronted with a law abiding citizen, a neighbor of the victim, who identified Davis, one man, walk up to the victim's door prior to the murder. (PCR-7, 1050). Brawley testified: "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 "[l]ong enough to give a good description of him." (PCR-7, 1052). When asked if impeaching Brown on cross-cultural identifications might be a good idea, Brawley testified: "No. It was Henry Davis' fingerprints that were in the house and the car, that would have been chasing the wild hair and making myself look inconsistent or foolish in front of a jury trying to distract them from something that was pretty strongly proved in my opinion." (PCR-7, 1054).

When asked if at least one of Davis' statements appeared to suggest he was involved with two other people and had been in the house, Brawley testified:

> Well, I don't recall him giving me any particular 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 t the police and to the doctors.

(PCR-7, 1054). Brawley testified that the "bloody thumb print was not easy to get around." (PCR-7, 1056).

As for deciding whether or not to call witnesses, Brawley testified that he always considers the benefit of such evidence against losing final argument. (PCR-7, 1058). Lin Vent Jones and Reginald Shepard were deposed by Brawley prior to trial (PCR-7, 1058). Lin Vent Jones would not only impeach Brown's testimony, but also placed Davis at the murder scene. (PCR-7, 1059). 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).

When asked what evidence the State had to put Davis at the murder scene, Brawley recalled:

> They found a bloody fingerprint inside her house that was –- that belonged to Henry Davis. They found his fingerprint or prints in her car which was stolen, apparently, after she was murdered. They had the eyewitness of a man who lived across the street who knew Henry Davis because Henry and his father or stepfather had worked –- do lawn work in the area, who identified Henry Davis was the man he saw at Mrs. Ezell's approaching Mrs. Ezell's door shortly and before the time that she was killed.[3]

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[3]Brawley did not go to the crime scene. He reviewed crime scene photographs and testified that going to the victim's house would

(PCR-3, 507-08).

Brawley testified that Davis was not very helpful with the guilt phase, stating: "I recall that he said he didn't do it. And he was vague on everything else, and I was pretty much on my own." (PCR-3, 521). Brawley did not think that identification was a primary issue in this case, in part, because Davis's thumb print was found on the key tag in the cedar chest inside the victim's house. (PCR-4, 538). His fingerprints were also found all over her car and property in that car. (PCR-4, 538). Bibby testified he took Davis to a pawn shop. A ring taken from the murder victim's house, belonging to the murder victim's dead husband, was located in the pawn shop and introduced against Mr. Davis. (PCR-4, 538). The State tied up this information, showing that Davis pawned the ring taken from the murder victim the day after the murder. (PCR-4, 539).

On the manner he conducted voir dire in this case, Brawley testified he wanted to address the race issue up front in order to flush out any negative opinions which the panel might have in light of the fact Davis was black and the victim was a white female. (PCR-3, 475-76). Consequently, he told the jury that he was a white southerner and that although he was a proud of

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not be helpful given the fact he was appointed to the case some two and one-half years after the murder. (PCR-4, 529).

his heritage, that those in "the south do not have a perfect record on race" and that there were things about his heritage that he was "not proud of." (PCR-3, 476, 479). He wanted the jury to be honest and confront those feelings as he has confronted those racist feelings in himself. (PCR-3, 476). 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). He was ashamed to admit that sometimes he does not like black people and wanted the jury to recognize and confront such feelings. (PCR-3, 481-82). Knowing that he was employing an unusual strategy, he talked it over with Davis and Davis said: "'Well, a lot of times black people feel the same way.'" (PCR-3, 482). 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 simply the safe

approach and just ask the jury if they would bring back a verdict of guilty simply because Davis is black and 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 did not consider himself a racist. (PCR-4, 559-60).

The primary purpose of calling family members during the penalty phase was to humanize Davis before the jury and to talk about the head injury, "which would tie in with Dr. Dee and Dr. McClane." (PCR-7, 1025). Brawley testified that no member of Davis' family talked about Davis being mistreated by James Stoudemire: "No, no, I don't remember that." (PCR-7, 1025). If he had been told about abuse, he might have used such information; however, it would depend upon what he was told. (PCR-7, 1025). While he did not get school records, Brawley testified that he was familiar with Davis' mental health record and reviewed the reports: "I think I read them all." (PCR-7,

1026). And, again noted that he had the help of a mental health expert, Dr. Kremper, from Bartow. (PCR-7, 1026-27).

When asked about calling witnesses to rebut the indication that Davis was scratched during the attack, Brawley testified that there was no corroboration of the testimony from one state witness, Roberts. (PCR-7, 1027). Supposedly, Davis told Roberts that. The State did not tie that in to any other evidence such as skin under the victim's fingernails. (PCR-7, 1028). Brawley did recall talking to the stepfather, Stoudemire, who was in the lawn business. (PCR-7, 1028). He was in an awkward position as the one who introduced Davis to the murder victim and "didn't want to get really involved." (PCR-7, 1028).

Ronald N. Toward testified that he was appointed to represent Henry Davis. Prior to that, Davis had been represented by two lawyers from the Public Defender's Office but could not recall their names. (PCR-5, 799-800). Toward acknowledged that "it was standard practice" in Polk County for private attorneys to try capital cases on their own. (PCR-5, 808). His recollection of events at the time was very limited: "I have no independent recollection of having done anything on his behalf. The court file may reflect that I did. And my file on Mr. Davis, such as it may have been, was destroyed in 1996

when my office burned." (PCR-5, 800). He recalled that Brawley was appointed after him but did not recall meeting Brawley to discuss Davis's case. (Pcr-5, 802). He testified that he imagined that his input on any conversation about the case was limited, probably based upon police reports, but thought his input would have been limited. (PCR-5, 802). Toward admitted that he and Brawley shared office space in the same building. (PCR-5, 803). He recalled talking to Brawley about Davis, stating:

> I know that Mr. Brawley talked to me about Sweetman. My only recollection is that it was almost the same kind of conversation you would have with any attorney about –- the kind of what's happening or what your ideas might be or just, for lack of a better phrase, passing comments.

(PCR-5, 803).

On cross-examination, Toward acknowledged that he agreed to a trial date and that he withdrew only four weeks prior to trial. (PCR-5, 804-05). Toward acknowledged that four weeks before a death penalty trial he would not be unprepared. (PCR-5, 805). In fact, he would not set such a case for trial unless he's ready to try the case. (PCR-5, 806). Toward also acknowledged that if the public defenders had the case for a year or year and one-half and then withdrew, he could assume that most of the depositions had already been conducted. (PCR-5, 805). And, assuming all the depositions had been conducted,

Toward admitted that he would not go out and re-depose everybody unless there was something there that he needed to know and had to "fill in those blanks." (PCR-5, 805). Toward acknowledged that if he received a case from someone else with depositions and notes provided to him it would significantly cut down on his preparation time. (PCR-5, 806).

Howard Dimmig the Second, testified that he is currently general counsel for the Public Defender's Office in the Tenth Judicial Circuit. (PCR-6, 917). He possessed significant capital litigation experience, beginning in 1979 with the Public Defender's Office. He also had one capital case as an appointed counsel in private practice, Henry Davis. (PCR-6, 918). When he was appointed, the Public Defender's Office was typically appointing two attorneys on capital cases. (PCR-6, 918). Dimmig thought that two attorneys would have been beneficial in this case. (PCR-6, 919). When asked if he would have asked for a second attorney to be appointed if he remained on the case, Dimmig testified: "I would like to think that I would. I can't absolutely guarantee you that I would, because frankly, sometimes when you're in private practice money dictates some things." (PCR-6, 922).

Dimmig acknowledged that the prosecutor's office in the Tenth Circuit, which carries the burden of proof in capital

cases, only uses one attorney in capital cases. (PCR-6, 928). One of the reasons for that policy is perhaps limited resources. (PCR-6, 928). Dimmig acknowledged he had the case for a long period of time but did not ask for a second attorney. (PCR-6, 930-31). Dimmig admitted it was not standard practice in 1987 through 1990 for a second attorney to be appointed in a capital case. (PCR-6, 932).

Dimmig stated that only shortly before trial did he learn of the mental health issue after meeting with the family. (PCR-6, 931). When the prosecutor pointed out how he could say mental health issues were not significant where Davis had initially been found incompetent and was residing in a State Mental Health Hospital, Dimmig testified that his own confidential expert had not given him much hope for mental health mitigation. Dimmig testified: “Dr. Gary Ainsworth” [] “evaluated Mr. Davis , and based upon that I didn’t have a great deal of mental mitigation to go with.” (PCR-6, 931).

When Davis’ case came back for resentencing, Dimmig was with the public defender’s office and along with co-counsel, was appointed to represent Davis. (PCR-6, 923). He gathered all the records he could from the Florida State Hospital and noted a report on an abnormal EEG. He wanted further investigation and testing on that abnormality. (PCR-6, 924). He obtained an

expert to perform more sensitive testing. (PCR-6, 925). It was standard practice in the Tenth Circuit to develop all such leads. (PCR-6, 925). It was also important to gather all information possible including every piece of paper about a defendant, including all school records. He recalled the school records in this case mentioned SLD. (PCR-6, 925). He would certainly use such a record to rebut a claim that nothing is wrong with a defendant because he graduated from High School. (PCR-6, 926). On cross-examination, the prosecutor asked Dimmig if he had obtained school records in the year or so that he had the case. (PCR-6, 945, 948). Dimmig testified that he wasn't sure what he had but was sure "he attempted to get school records." (PCR-6, 945).

Dimmig admitted that even when he presents "all those things" to juries, defendants still get the death penalty: "Some do, yes." (PCR-6, 927). When he worked on Davis' case, Dimmig took notes. To the best of his recollection, he turned over his notes and his entire file to Mr. Toward when he was removed from the case. (PCR-6, 933-34). Dimmig did not recall talking to Brawley about the case. (PCR-6, 943). Before Dimmig had the case, two public defender's worked on Davis' case. (Pcr-6, 934). The previous attorneys, including Mr. Norgard and Mr. Toward were competent capital litigators. However, neither

Dimmig nor any other attorneys moved to suppress Davis' identification through a photopack. (PCR-6, 935-36). If he had recognized that as an issue he would certainly have pursued it. (PCR-6, 936).

Dimmig was familiar with the various stories Davis told about the day of the murder. He told the police he didn't remember what was going on that day and didn't know anything about the murder. (PCR-6, 938). Then, he changed his story and told the police that he was out picking watermelons. Finally, he said that he had been present at the scene of the murder but that three other individuals, two males and a female, were also present. (PCR-6, 939). Davis claimed that he did not arrive at Ms. Ezell's house with those other people. (PCR-6, 939). Two of the individuals were Bibby and Reginald Shepard. (PCR-6, 939). Dimmig was aware that the fingerprints sent for analysis revealed Davis' fingerprints at the murder scene and the victim's car but did not reveal Bibby's or Reginald Shepard's. (PCR-6, 939-40). Davis told Dimmig that he had gone to the victim's house on a number of occasions and was inside her house. (PCR-6, 940). When asked about Davis' explanation for his bloody thumb print on the key tag, Dimmig testified: "I do not recall him having an explanation for the thumb print on the key tag." (PCR-6, 940).

In preparation for the penalty phase, Dimmig went to Lake Wales to meet with the family members. In his experience, it was easier for people to open up and talk freely outside of the office environment. (PCR-6, 920-21). When Dimmig was reappointed he sought to present new evidence to the judge at the 1992 resentencing. (PCR-6, 940). He thought that the decision of the Florida Supreme Court would allow new evidence and he hoped to present Dr. Pineiro's report since there "had been some mental health testimony presented at the initial penalty phase []." (PCR-6, 940). Since the trial court did not allow new evidence, Dimmig made a series of new evidence proffers. (PCR-6, 941). During the proffers, the State did minimal if any cross-examination. (PCR-6, 941). Dimmig did not recall talking to Mr. Brawley, but did not dispute Brawley's billing record which reflected a six minute phone call. (PCR-6, 944). Dimmig did not think six minutes would have been enough to relay everything that he had done on Davis' case. (PCR-6, 944).

Dimmig claimed that the EEG test conducted by Dr. Pineiro would have been available in 1989 when Brawley represented Davis. (PCR-6, 945). He would also have wanted Davis' school record. (PCR-6, 945).

ii) Defense Experts Dee and McClane

Thomas McClane a psychiatrist, who testified on behalf of Davis during the penalty phase was again called by Davis to testify at the evidentiary hearing. (PCR-5, 762-63). Dr. McClane summarized his opinion at the time of Davis's penalty 1990 penalty phase:

> That he had borderline low intelligence with IQ of 80 at the highest and several recorded lower. That he had a history of head injuries, at least one that was substantiated by others, and his testimony (sic) that there were several other less severe head injuries. That he had a possible seizure disorder. I say possible, because I'm not sure anybody professional has ever observed one. But he was treated, diagnosed and treated as having a seizure disorder. And he had two abnormal elctro-encephalograms, which clearly indicates some type of brain damage.
>
> And it was my opinion that he had –- probably the best way to describe his behavioral problem was that he had a personality disorder with antisocial traits, dependent traits, impulsivity and irritability.
>
> And finally, that in his various statements and answers to questions with various examiners, part of the time he was telling the truth, part of the time he was malingering. And part of the time he was confabulating' which means filling in the gaps and believing what he's saying, but not necessarily accurately.

(PCR-5, 764-65).

Davis' various IQ scores over his life time were 68, 77, 80, 80, and 85. (PCR-5, 766). Dr. McClane testified that in 1990 he had some objective evidence of brain damage, from the report of the first EEG which showed some abnormality and neuropsychological tests. (PCR-5, 766-67). However, he was not

sure he had the abnormal EEG taken in 1988 at the time of his penalty phase testimony in 1990. (PCR-5, 769). He did recall seeing Dr. Vroom's report prior to his 1992 deposition. (PCR-5, 769). He also had access to an EEG conducted by Dr. Piniero prior to his deposition in 1992. It constituted the most objective evidence of "some kind of brain damage or impairment." (PCR-5, 770). Dr. Piniero's report was consistent with his opinion of Davis in that he concluded that Davis probably had a seizure disorder. (PCR-5, 770-71). When asked if he was provided Dr. Kohler's report, Dr. McClane testified initially that he was not certain. (PCR-5, 771). He stated that Dr. Kohler's report supported his opinion at the time of the 1992 proffered testimony. (PCR-5, 772). Dr. McClane testified, however: "It didn't add a lot. But there's another neurologist who believed that he had a seizure disorder. He relied in part on Dr. Vroom's, [] interpretation of the EEG at the state hospital."[4] (PCR-5, 772). Counsel for CCRC admitted that Dr. McClane's opinion would not change: "Well, his opinion wouldn't have been different just been stronger and he would have had objective support for" (PCR-5, 777).

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[4]The prosecutor objected to reference to any proffered material at the 1992 hearing, stating that he did not cross-examine the defense expert as he would because of the nature of the proceeding. In fact, no new evidence was allowed to be presented at the resentencing. (PCR-5, 773)

At the proffered deposition, Dr. McClane had the benefit of Dr. Vroom's report, Dr. Kohler's report and Dr. Piniero's report. His opinion did not change with the benefit of the reports, they simply "strengthened" his opinion with objective evidence that "unequivocally demonstrate some kind of brain abnormality." (PCR-5, 779). The EEG does not tell us exactly what is wrong with his brain, but "it means his brain is defective in some way." (PCR-5, 779). Dr. McClane believed that Dr. Vroom's report of an abnormal EEG would have been significant to rebut Dr. Westby's assertion that Davis had no brain damage. (PCR-5, 796). He also certainly hoped that he would have ordered another more sensitive EEG based upon Dr. Vroom's report. (PCR-5, 797).

In Dr. McClane's opinion, Davis was substantially impaired to conform his conduct to the requirements of the law back in 1987. (PCR-5, 781). He is also impaired much of the time, in that "one of his traits, personality traits, has been impulsivity which simply means difficulty controlling one's reactions to ones impulses." (PCR-5, 781). When asked if Davis was under the influence of extreme emotional disturbance at the time of the offense, Dr. McClane answered "yes." (PCR-5, 781). However, Dr. McClane qualified his answer by stating he gives a "liberal" interpretation of extreme, stating: "I tend to give it

a pretty liberal interpretation to think that anything that is objective brain damage fits my thought about an extreme condition." (PCR-5, 781). When asked if Davis was under the substantial influence of another person at the time of the offense, Dr. McClane testified he could make no such conclusion. (PCR-5, 782). He testified that he would have to believe what Davis told him and stated that he otherwise "would not have evidence for that." (PCR-5, 782).

On cross-examination, Dr. McClane again stated that Dr. Vroom's and Kohler's reports "strengthened" his "opinion about having brain damage of some kind." (PCR-5, 788). He told the jury during the penalty phase that Davis suffered from brain damage. (PCR-5, 788). There was no difference in his testimony, the EEG's supported and therefore strengthened his original conclusion. Id. Dr. McClane admitted that Davis' credibility is subject to doubt: "Clearly some time he is malingering." (PCR-5, 788-89). Consequently, when asked about someone else being involved or if his statements can be believed, Dr. McClane testified: ...That may be one of the times I simply don't know since I have no other information. And since it's since he either didn't recall or didn't tell me about that the first time I saw him, and since it's so self-serving, I have to consider the strong possibility that it could

be malingering." (PCR-5, 789).

Dr. McClane testified that he had two reports from the State Hospital at the time of the trial, dated December 13, 1988 and the other March 27th of 1999. (PCR-5, 789). Dr. Westby and the committee from the State Hospital initially found Davis incompetent. (PCR-5, 790). Also, he was aware that the committee, made up of a team which included a psychologist and psychiatrist, found Davis competent and a malingerer. (PCR-5, 791). Not only was Davis a malingerer, but the report concluded that "he was a very good malingerer." (PCR-5, 791). He attempted to take that factor into account in arriving at his opinions regarding Davis. (PCR-5, 792).

Davis told Dr. McClane he was at the woman's home on the day of the homicide. (PCR-5, 792). Dr. McClane was aware that in his past stories to various people, including mental health professionals, that he claimed he didn't have any memory of the homicide at all. (PCR-5, 792). In fact, Davis said that to Dr. McClane the first time he saw him. (PCR-5, 792). Dr. McClane was also aware that Davis claimed he was picking watermelons the day of the murder and that eventually he said he was there and saw the victim dead and touched her face. (PCR-5, 792-93). Ultimately, Davis told Dr. McClane that he was at the house with two other people and they pulled him inside and "she

was laying on the floor." (PCR-5, 793).

Dr. McClane did not think he was aware of the EEG that had been done prior to 1990 when Davis was in the State Hospital. (PCR-5, 794). He did not think that he suggested to Brawley or any one else that an EEG should be conducted on Davis. (PCR-5, 794). Dr. McClane was also familiar with Dr. Dee and his opinion at the time of trial that Davis suffered from brain damage. (PCR-5, 795). Dr. McClane was aware that Dr. Dee, a neuropsychologist, does "an awful lot of work" conducting psychological testing to prove brain damage as opposed to using an EEG. (PCR-5, 795). Further, Dr. McClane was aware that CAT scans are also used to document brain damage or injury. However, he said that they are useful in finding major damage but "unless there's a tumor or something like that" you are not going to find much on a CAT scan or MRI. (PCR-5, 797). He was aware based upon Dr. Westby's report that a CAT scan was conducted on Davis which revealed no objective signs of neurological damage. (PCR-5, 797).

Dr. Henry Dee, a neuropsychologist, testified that he did not recall testifying on behalf of Davis in January 1990, but read his testimony presented during the penalty phase. (PCR-5, 830). Dr. Dee claimed still not to have any independent recollection of testifying in this particular case. (PCR-5,

830). At the time of his testimony in 1990, Dr. Dee testified that he did his usual preparation:

> By then I had reviewed the materials supplied by the State Attorney's Office, that is to say, the discovery material, which it includes the investigation of the crime and statements of various witnesses. And I don't know, I suppose the available evidence, autopsy and so forth. And I had also interviewed and evaluated Henry Davis on two occasions, in January of 1988 and April of 1989. I had also reviewed the evaluations of numerous other people. These would have included a number of other evaluations by the Polk County School system, evaluatins by a Dr. McClane. I don't know if he was here earlier today, an evaluation by Dr. Zeigelberg, an evaluation by – - now, I'm getting the time sequence mixed up. I'm not sure whether Dr. Westby was in that particular time frame or not. But I also, around that time reviewed the evaluation testimony of a psychologist from the state hospital who evaluated him up there. That may have been after that particular hearing, I don't remember the date.

(PCR-5, 831).

Dr. Dee conducted extensive testing of Davis at the time of trial, testifying:

> In January of 1988 I administered the Wechsler Adult Intelligence Scale, the Denman-Nerve Psychology Scale, the Multilingual Aphasia Examination and a battery of tests we developed at the nuerosensory center, at the University of Iowa including the Visual Attention Test, finger localization, right left orientation, stereoagnosis. And as I recall there was some personality tests administered, those would have been the MMPI and the 16-PF.

(PCR-5, 832). He testified that in 1990 he diagnosed Davis with chronic brain syndrome which means "there's evidence of cerebral damage." (PCR-5, 833). He thought Davis suffered memory

impairment and that the “left cerebral hemisphere seemed to be more affected than the right.” (PCR-5, 833). He made this conclusion based upon a particular pattern of scores on the Weschler and Denman tests showing a difference between the memory function and intelligence. (PCR-5, 833).

Dr. Dee testified that he had Dr. Vroom’s EEG report. Dr. Dee testified that it was helpful, stating: “Well, yeah, I though it bolstered my opinion in a sentence. I would say that I didn’t need it to make a conclusion, but it certainly made me feel more confident when I say it.” (P-5, 834). It was a generalized report, but “that’s the nature of an EEG report, of course.” (PCR-5, 834). If he had seen Dr. Vroom’s report he thought that certainly he would have ordered a more sensitive EEG. (PCR-5, 835).

Dr. Vroom’s EEG would have been useful to rebut Dr. Westby’s testimony, if she had testified that Davis was not brain damaged. (PCR-5, 837). Brawley never asked him to testify on rebuttal. (PCR-5, 838).

Dr. Dee thought that Dr. Westby seemed to give some opinions that passed into the realm of neuropsychology. (PCR-5, 838-39). And, Dr. Westby did not know about the Denman test which is a test that a neuropsychologist should know about. (PCR-5, 839). As a clinical pscyhologist Dr. Westby would administer screening

instruments and then refer people to a neuropsychologist, if that "ought to be done." (PCR-5, 840). Dr. Dee testified that as a neuropsychologist, he had five more years of training. Dr. Westby was a clinical psychologist and a qualified expert: "I'm sure she's an eminently qualified psychologist, she's just not a neuropsychologist. (PCR-5, 856).

As for the "yard test," Dr. Dee testified that it simply constitutes observations of people when they are not in an office setting. It is an "anecdotal observation," not a test. (PCR-5, 841). The yard test did not mean that Davis was not suffering from brain damage, but Dr. Dee stated it was common for patients to generally seem more disturbed when they talk with their doctors when they are in the ward or any place else. (PCR-6, 862). Dr. Dee testified that the difficulty Davis showed reading and writing from a young age and continued differences in performance on verbal performance and IQ with the severe impairment of memory established chronic brain syndrome. Characteristics of this syndrome "would be increased impulsivity and memory impairment, which I think his biography shows abundance in both." (PCR-5, 843).

When asked about the possibility of malingering, Dr. Dee testified: "My impression is, you know, my best assessment of Henry Davis is that there was some malingering of the

psychiatric condition. That is malingering in the sense that he probably represented it being a bit worse than it actually was. But I think it was still there." (PCR-5, 844-45). But, he thought that Davis was not sophisticated enough to have known what to do "to present himself as this kind of brain syndrome." (PCR-5, 845). He recognized that he might have been malingering with other mental health professionals, but felt that he was not with him. (PCR-5, 845). He would have used Dr. Vroom's report in rebuttal with regard to cerebral damage. (PCR-5, 845).

On cross-examination, Dr. Dee sated that he heard Dr. Westby's testimony but did not recall if he had her report [Stat's Exhibit 1]. (PCR-5, 846). The prosecutor pointed out that Dr. Westby's report, available back in 1990, indicates that on August 25th, 1988 an EEG was done by Fred Q. Vroom, M.D., and that his impression was it was abnormal because of a mild to moderate dysrhythmia. (PCR-5, 847). The only difference is that they have now shown him the actual one paragraph report that Dr. Vroom himself wrote. (PCR-5, 847). Which simply duplicates what was contained in Dr. Westby's report. (PCR-5, 848). Further, Dr. Dee testified that he had read Brawley's cross-examination of Dr. Westby, and admitted that Brawley brought out the fact that the EEG was abnormal. (PCR-6, 859-60). So, as the prosecutor noted, the jury actually learned

that Davis had an abnormal EEG: “Apparently so.” (PCR-6, 860).

When later recalled to the stand, Dr. Dee testified that he used a formula to assess Davis’ mental or emotional age based upon his IQ score. (PCR-6, 951, 952). Based upon his IQ of about 75, Dr. Dee stated that Davis’ mental maturity could be assessed at “about 14-and-a-half and 15 years of age.” (PCR-6, 952). Dr. Dee admitted the formula based upon IQ isn’t used much after a mental or emotional age of 16. (PCR-6, 953). Dr. Dee admitted that “it’s kind of a difficult conception to think about, well, in terms of mental proceeds, what’s the difference between the mental age of 16 and 26, nobody really knows, you know.” (PCR-6, 953). After another year or so, Dr. Dee acknowledged that he might not even use that formula anymore, recognizing that it was a complicated concept: “...but it’s probably too complicated to go into.” (Pcr-6, 954).

iii) Lay Witnesses

Reginald Johnson, known as Bibby, testified as he did at trial that he took “Sweetman” to a pawn shop: “When Sweetman came to the house for me to take him to the pawn shop to pawn that ring, I don’t know whose on it was and didn’t care.” (PCR-3, 422). He testified that he knew both Davis and Shepard and that between the two of them he considered Shepard more dominant

or aggressive. (PCR-3, 416). He also knew that Shepard had a lock blade knife similar to the one shown in court as a state exhibit. (PCR-3, 416). However, Johnson acknowledged that the knife he observed Shepard with and the one he observed in court is a common kind of knife and that lots of people have them. (PCR-3, 421).

Johnson denied having anything to do with the offense in question, stating: “Man, I don’t know nothing about that woman car. I’m going to explain this to you one more time. Y’all, excuse me, but this is like I said. The part of me and Sweetman, when he came to the house, he asked me to carry him to the pawn shop, that’s where I took him. And as far as that, that was it. About that woman hair and that woman car, I don’t know nothing about that. I don’t know where you coming up with that for. I done told y’all.” (PCR-3, 416-17).

Ronald Kingry testified that he coached Davis, known as Sweetman, in track in high school. He considered Davis “mild mannered and easy going.” (PCR-4, 621). He never got into fights and was surprised to learn about his arrest for the instant murder. (PCR-4, 622). If contacted, Kingry would have testified at the time of trial as he did at the evidentiary hearing. (PCR-4, 622). While he did not consider Davis the brightest kid, he did not observe what he considered to be any

serious psychological problems. (PCR-4, 624-25).

Nathan Menton testified that he was an Assistant Principal at Lake Wales Senior High School. (PCR-6, 866). He met Davis when he was a student at Lake Wales High School and coached Davis in track. (PCR-6, 866-67). Mr. Menton stated that Davis was "a very honorable and behaviorable student when he was in high school." (PCR-6, 867). Davis was low key and his nickname "Sweetman" seemed to fit him. (PCR-6, 867). He would have testified at trial as he did at the evidentiary hearing had he been contacted. (PCR-6, 867-68).

Terry Barnes, an inmate at Polk Correctional, testified that he knew Davis because they "worked together" and he used to date a girl who lived a couple of houses from where he lived. (PCR-4, 676). He worked picking fruit with Davis and Shepard. Shepard and he wore gloves while Davis worked without them. (PCR-4, 677). He observed Shepard with a knife, with a folding blade maybe five or six inches long. (PCR-4, 678). Barnes gave CCRC the names of inmates that might be able to help Davis, like Willie Watson, who is incarcerated in the same jail with him. (PCR-5, 681). He and Watson talked about the case "on occasions we talked on and off about what he knew or what I knew and stuff." (PCR-5, 681). Barnes was serving a twenty-year sentence and did not know how many felony convictions he

possessed. (PCR-5, 682).

Davis called various incarcerated individuals who offered testimony that Reginald Shepard admitted killing the victim in this case. Willie Wilson, Cedric Christian, Earl Pride Jr, and Willie Watson, asserted that at one time or another before his death, Shepard admitted killing the victim. (PCR-4, 630; (PCR-5, 687-688, 709-10). All of these witnesses knew Davis and/or his family. (PCR-4, 628, 634; PCR-5, 687, 707). Each of the witnesses was presently incarcerated, and possessed multiple prior felony convictions. (PCR-4, 628; PCR-5, 685, 707). Two were presently serving life sentences. (PCR-5, 685; 707). They did not come forward with this information even several years after becoming aware that Shepard was dead, and, despite knowing that Davis had been sentenced to death. (PCR-5, 695, 714).

Lavonsky Riley, Davis's Aunt, testified that she lived in Kissimmee but came down to visit her sister some time after the Ezell murder. She happened to meet Shepard on Lincoln Avenue in Lake Wales when Shepard approached her and offered her $50.00 to drive him to Sunrise. (PCR-4, 657-59). It was nighttime and she drove Shepard to a house and when he returned from the house he had a bundle of clothes and some shoes. (PCR-4, 660). Although it was dark, she could see Shepard's shoes from the car

light and a streetlight. (PCR-4, 661). She noticed some stuff on his shoes and asked him about it, he replied that it was blood, explaining that he cut his foot.[5] (PCR-4, 661). After that, Shepard wanted to go to his mother's house in Hesperides. On the way, she stopped the car and Shepard threw out the bundle of clothes in an Orange grove. He claimed he did not need it anymore. (PCR-4, 662). After he got back in the car they returned to Lake Wales.[6] (PCR-4, 663).

Levent Jones testified that he was currently serving a two year and eight or nine month sentence in Seattle Washington and that "grew up" with Davis. (PCR-5, 723). Jones worked with Davis and Davis's step-father. (PCR-5, 732). One morning when he was supposed to cut Mrs. Ezell's yard[7] with Sweetman, Jones testified that instead he set an appointment to get his car fixed. (PCR-5, 725, 732). He passed by the victim's house and observed Davis, Shepard and Bibby in a light blue Grand Torino

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[5]The trial court allowed her to answer over a hearsay objection. (PCR-4, 661).

[6]Riley asserted that she told this story to Dimmig, whom she thought was Davis's lawyer, when he called a "family meeting" at the house belonging to Davis's mother. (PCR-4, 667, 673). She did not know when in relation to the victim's murder this occurred. (PCR-4, 669). She said her deposition was taken in 1990 by Mr. Brawley. (PCR-4, 672).

[7]At trial, Davis' stepfather, Chaney, testified that they had not cutting Ms. Ezell's lawn for five or six months. (TR. 798).

in Mrs. Ezell's parking lot. (PCR-5, 725). He blew his horn and Davis waved at him. (PCR-5, 725). Sometime later, the next day, he found out that Mrs. Ezell had been murdered. (PCR-5, 726).

Sheriff's Deputy Charles Riley, Junior, testified that he was involved in Davis's arrest. (PCR-5, 744). He talked with him for 20 minutes up to an hour. (PCR-5, 744). Although he did not presently recall, after having his memory refreshed it was apparent that he did not notice any injuries to Davis. (PCR-5, 745). During the time he talked with Davis, he continuously said he "didn't do it." (PCR-5, 746).

On cross-examination, the prosecutor brought out that not only did Davis deny doing it, but he also denied being in Ms. Ezell's house at all. (PCR-5, 746). Davis also denied ever being in her car. (PCR-5, 746). In fact, Davis told Deputy Riley that he was out picking watermelons on the day of the victim's murder. (PCR-5, 746).

Captain Edward Hendrix of the Hardee County Sheriff's Office, testified that in March of 1987 he was employed by the Lake Wales Police Department as a detective. (PCR-5, 747-48). He participated in bringing Davis in for questioning for the murder of Mrs. Ezell. (PCR-5, 748). Davis was arrested at his residence on Highlands Manor on an active warrant. (PCR-5,

754). He personally swore out the warrant affidavit on March 10, 1987. (PCR-5, 749). He did not recall seeing any scratches on Davis. (PCR-5, 749). As he recalled, he observed Davis about 48 hours after the murder of Mrs. Ezell. (PCR-5, 750).

Captain Hendrix was involved in the murder investigation and sent fingerprints to the FDLE crime lab for examination. (PCR-5, 752). He sent fingerprints of Davis along with Willis Johnson, Reginald Shepard, and others for comparison with the prints found in the victim's house and car. (PCR-5, 753). He never received a report which indicated that Reginald Shepard's or Willis Johnson's [Bibby] fingerprints were found on anything that "had to do with this case." (PCR-5, 753).

Cheryl Epps testified that Davis is her younger brother. (PCR-6, 955). She testified that Stoudemire made Davis and all the kids work in the groves. (Pcr-6, 955). They used to go out early and come home at 4:00 or 5:00. (Pcr-6, 955). Sometimes Davis would miss school to work in the groves. (PCR-6, 956). Davis had to work harder than the girls because he was a boy. (PCR-6, 956). Davis eventually did lawn work with Stoudemire, just about every day or so, beginning when he twelve or thirteen. (PCR-6, 956-57). A lot of times Stoudemire and Davis would argue over Davis not getting paid: "Sometimes he would give him like maybe $10 or so, but most of the time it was an

argument because he will say he tired of going to work and not getting paid." (PCR-6, 957).

Stoudemire was an alcoholic who would abuse her mother in front of the kids. (PCR-6, 959). One time, Stoudemire broke all of her mother's front teeth. (PCR-6, 959). They always argued about Stoudemire having to take care of the kids. (PCR-6, 960). Davis was not afraid for himself, but for the safety of his mother. (PCR-6, 961). After Mrs. Ezell was murdered but before Davis was arrested, Epps did not observe any scratches on his face. (PCR-6, 962). Davis was close to his cousin Jonathan who was shot to death. (PCR-6, 962). Davis was upset and became withdrawn after he was killed. (PCR-6, 963).

Epps testified that she was a guest assistant for Walt Disney World. (PCR-6, 966). She worked for Walt Disney World for ten years. (PCR-6, 966). She has another sister, Katrice Hatley, who is an accountant. (PCR-6, 966). And, another sister, Michelle, is a beautician. (PCR-6, 966). When asked why they grew up in the same household and turned out okay while Davis never even had a regular job, Epps testified: "Well, he did, he worked out in the groves and he worked - - did lawn work." (PCR-6, 966). He continued to work for Stoudemire even after graduating from High School. (PCR-6, 967). When Davis was in High School he went to school most of the time. He

received a regular diploma and was “an average student, he got C’s[].” (PCR-6, 967). However, she was aware that he had to take special classes, “Special Ed.” (Pcr-6, 973). Davis was an athlete in High School. Epps acknowledged that hard work did not hurt him any: “No.” (PCR-6, 968).

Although Stoudemire griped about providing for the kids, but he in fact did provide for every one of them. (PCR-6, 968). Stoudemire had to have the money from working in the groves and yard work in order to buy food, clothes, and send the kids to school. (PCR-6, 968). Stoudemire may have abused her mother but he did not abuse the kids. Davis was not afraid of him. (PCR-6, 968-69). Sometimes, Davis would get tired of working and talk back to Stoudemire. She observed Stoudemire hit Davis a couple of times. (PCR-6, 969). When Davis was an adult, Stoudemire paid Davis for doing yard work. (PCR-6, 969). Davis was close to graduating from High School when his cousin was shot. (PCR-6, 970). Robinson was one of Davis’ best friends. (Pcr-6, 970). When asked about Davis being easy to talk into things, Epps meant things like going to the mall or the store. (PCR-6, 971). She did not think it would be easy to talk him into killing someone: “No, not nothing like that.” (PCR-6, 971). Davis sometimes hung around with Red Shepard and Willis Johnson [Bibby]. (PCR-6, 971). The daughters got money from

their father's estate and used the money to pay for college. (PCR-6, 973). Davis also got money from their father's estate, but did not use the money for college. (PCR-6, 973).

Katrice Hadley testified that Davis is her brother and is eight years-older than she is. (PCR-5, 820). Hadley testified that her stepfather physically abused her mother. (PCR-5, 820). The abuse consisted of "fist fights." Hadley testified that Davis could see and hear the abuse and that it probably affected "all of us." (PCR-5, 821). Hadley testified that he stepfather was very mean to her brother. (PCR-5, 822). The stepfather would get Davis up early and put him to work and yell at him. (PCR-5, 822). Davis was very emotional and would cry. (PCR-5, 822). The stepfather, Stoudemire, died a "couple of years ago." (PCR-5, 825).

Davis took the shooting death of their cousin, Jonathan Robinson, very hard. (PCR-5, 822). When asked what kind of person who brother was, Hadley said that he was "very easy going" just a "good person." (PCR-5, 822). She did not recall Davis getting into trouble or fights in high school. Nor did she recall anyone not liking him because "he's the type of person everybody likes." (PCR-5, 826). Hadley did not recall seeing any scratches on Davis's face before he was arrested. (PCR-5, 823). Defense attorney Brawley never contacted her to

testify, but "was in college then" when Davis' case was in court.[8] (PCR-5, 823). If asked by defense counsel, however, she would have taken off from school and testified.[9] (PCR-5, 823).

Barbara Stoudemire testified that she was Davis' mother and that she did not observe any scratches on her son's face as David Robert claimed at trial. (PCR-6, 883). She was in the courtroom during trial but asserted that Brawley never asked her about the scratches on Davis' face. (PCR-6, 883). When asked why she didn't say anything to Brawley about the scratches, Barbara said she didn't because "he didn't ask me." (PCR-6, 895). Although Barbara said that she thought she could talk to Brawley at the time of trial, he never came out to meet with the family. (PCR-6, 897). Mr. Dimmig came out to meet with the family. (PCR-6, 897). Barbara and one her daughters testified during the penalty phase. (PCR-6, 898).

James Stoudemire, Henry's stepfather, did not treat Davis well: "Not good." (PCR-6, 884). When asked to explain this poor treatment, Stoudemire testified: "Well, when he - - he would make him do things. He would take him out in the grove

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[8]Hadley lived on campus and went to the University of Central Florida. (PCR-5, 824).

[9]Rochelle Oldham, another of Davis' sisters, similarly testified about the environment in the Stoudmire home. (PCR-6, 868-71).

and he would work, and when he came home he would make him go out there and wash the car or clean the yard. He wasn't really good to him." (Pcr-6, 884). Davis was nine or ten when James Stoudemire took him out to work in the groves. (PCR-6, 884). Stoudemire told Davis that he needed to "pay his way" at the age of nine or eleven. (PCR-6, 887). He missed school sometimes to work in the groves. (PCR-6, 885). Stoudemire would take the money Davis earned from working. (PCR-6, 885). To punish Davis, Stoudemire would make Davis work, "clean yards" and make him "wash cars." (PCR-6, 886). On one occasion, Stoudemire threatened to "knock him out" if Davis didn't do something Stoudemire asked him to. (Pcr-6, 886). Stoudemire treated her daughters in the same manner: "He didn't like none of my children." (PCR-6, 889). Barbara Stoudemire testified that her daughters were also forced to work: "They went out in the grove and yard, yes." (PCR-6, 889).

Barbara testified that she and Mr. Stoudemire divorced in 1992. (PCR-6, 891). He died some years later. (PCR-6, 891). Stoudemire would hit her sometimes with his fist and the children could hear it. (PCR-6, 887). On one occasion, Davis told Stoudmire not to hit her anymore. Stoudemire told Davis to get out before he hit him. (PCR-6, 887). Stoudemire would threaten to physically harm her. She was not sure if Davis

heard the threats or not. (PCR-6, 887-88). Davis was with his cousin when he was shot and it affected him "very bad." (PCR-6, 888).

When Davis was a little boy, his memory was "all right." His memory became worse later , when he was tired, when his dad would make him work, "stuff like that." (PCR-6, 887-88). Davis graduated from high school when he was 17 or 18 and arrested for the murder of Mrs. Ezell when he was 22. (PCR-6, 891). At the time of the murder he was 22 and still working for Stoudemire. (PCR-6, 892-93). He also did yard work for other people. (PCR-6, 897).

Alma Davis, two years older than Davis, testified that James Stoudemire was her stepfather. (PC-6, 976). He did not treat Davis well, "he worked him too bad all the time[]." (PCR-6, 976). Davis, liked the other kids, had to work in the Orange groves. (PCR-6, 976). He treated Davis differently because he was a boy, demanding more from him. (PCR-6, 977). Sometimes, Davis would miss school to work in the groves. Some days he would go to school, come home, then go to work in the groves. (PCR-6, 977). Davis was young and went with Stoudemire to work in other peoples' yards. (PCR-6, 978). Stoudemire was an alcholic and treated their mother bad, physically abusing her. (PCR-6, 978). He also called her bad names and threatened to

kill her. (PCR-6, 979).

Davis was in his late teens, maybe 17, when his cousin and friend, Jonathan, was killed. He cried but did not talk about it much, rocking and staring. (PCR-6, 980). Davis was kind and good hearted, a low key person. (Pcr-6, 980). He was easily led into things. (PCR-6, 980). Her brother had a poor memory and when he was young had to repeat a grade. (PCR-6, 981). He had to take special education classes and would sometimes "space out." (PCR-6, 981).

Richard Jones, a retired pathologist, conducted the examination of the murder victim, Joyce Ezell. (PCR-6, 1020). He did not recall his testimony, either at trial or his proffered testimony of 1992, but believed that he did not any defensive wounds on Mrs. Ezell's body. (PCR-6, 1020). He did not say beyond a reasonable doubt when Mrs. Ezell lost consciousness, "my findings indicated she bled to death, and I couldn't have said how long that took." (PCR-7, 1021). Mrs. Ezell might have lost consciousness from fainting or from a blow to the head. (PCR-7, 1021). Dr. Jones also testified that she could have just as easily been conscious until she bled to death. (PCR-7, 1021). There were no defensive wounds such as cuts on the forearms, however, Dr. Jones acknowledged that of the 21 stab stab wounds, 17 were to the back. (PCR-7, 1022).

Two stab wounds in the throat and two stab wounds on the right side of the neck, all the rest were in the back of head, back of the neck or top of her back. Id. Dr. Jones acknowledged that it would be difficult for a victim to have defensive wounds when you are attacked from behind. (PCR-7, 1022).

SUMMARY OF THE ARGUMENT

ISSUE The trial court erred in finding trial counsel provided ineffective assistance during the penalty phase. 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. That additional evidence might have been presented does not establish that counsel's performance was deficient. None of the evidence offered by collateral counsel during the evidentiary hearing constitutes compelling mitigation.

There is also no reasonable probability of a different result where the jury was exposed to significant mental health mitigation testimony and voted unanimously for death. The unanimous vote recognizes the gravity of the heinous, atrocious, and cruel manner in which Davis murdered the elderly victim in her own home for his own financial gain. A few more tidbits from Davis' past and largely cumulative mental health mitigation testimony would not tip the scale in Davis' favor.

ARGUMENT

ISSUE

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

The postconviction court erred in finding that Davis was entitled to a new penalty phase based upon counsel's failure to investigate Davis' background and present available mitigating evidence. The postconviction court failed to properly evaluate the evidence and appeared to simply grade counsel's performance, finding that something more or something different could have been done.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Reichmann,777 So. 2d 342 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

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 State notes that the postconviction court was not the court that heard the evidence presented at trial and during the penalty phase. As Judge Strickland noted before recusing himself:

> ...But now we are going to bring in a judge from circuit X who did not sit through the case, did not listen to the evidence along with the jury, did not sit through the bifurcate portion, and I doubt that any of this has been thoroughly discussed with Mr. Davis. We've just had a lawyer who said, golly, I've got an angle that I can get rid of this judge and maybe extend the time frame four or five months on the case.
>
> Well, what it means is three, four, five months from now judge X is going to conduct the hearing, and I hope that person will do and believe will do a conscientious job in that regard. But even if they order a bifurcated or resentencing hearing they will not have heard the entire trial. All they will hear is the aggravation that the state would put on and the mitigation. That may or may not be to Mr. Davis' benefit. Those are the obvious things...

(PCR-3, 364).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the

deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 116 S.Ct. 490 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

An unfortunate fact of litigating capital cases at the trial level is that defense counsel's performance will invariably be subject to extensive post-conviction inquiries and hindsight miasma. This Court has stated that ineffective assistance claims should be the exception, rather than the norm:

> Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. **A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.**

Clark v. State, 460 So. 2d 886, 890 (Fla. 1984)(quoting Downs v. State, 453 So. 2d 102 (Fla. 1984))(emphasis added). Unfortunately, despite this Court's admonition in 1984, it has become the rule, not the exception in capital cases.

With these principles in mind, the State submits that the circuit court erred when it ordered a new penalty phase after finding trial counsel constitutionally ineffective.

C. Trial Defense Counsel Was Not Ineffective In Failing To Present Additional Lay Witness Testimony

After hearing the evidence presented by the defense below, the trial court found that Brawley was deficient for failing to present additional lay witness testimony. The trial court stated, in part: "Brawley testified that he did not obtain

Davis' school records, never visited Davis' family or neighborhood, did not talk to his family members, coaches or friends." The postconviction court concluded that Brawley could have discovered those witnesses and presented that evidence through exercise of "reasonable diligence." (PCR-7, 1109).

The State disagrees with the postconviction court's characterization of Brawley's testimony. Contrary to the trial court's finding, Brawley did not testify that he failed to talk to any of Davis' family members. To the contrary, he testified that he talked with two family members, mentioning the mother and the oldest sister, Alma.[10] (PCR-3, 458-60; PCR-7, 1023-24, 1025). Indeed, he presented their testimony during the penalty phase. (TR. 1300-1315). Thus, the trial court's ruling rests at least in part, upon an erroneous factual finding.

The post-conviction court found that additional family members were available to testify as were school teachers. However, the post-conviction court failed to specify which non-statutory mitigators would have been established and submitted to the jury through such testimony. The thrust of the additional family members' testimony was that Davis had a "sweet disposition" and that the stepfather, Stoudemire, could be

[10]While he did not go to family members' homes, Brawley testified that he had a "lot of contact with them, both by telephone and personal interviews at the office." (PCR-3, 442).

verbally abusive to Davis and that Davis was forced to work in the fields at a very young age. Chaney did not physically abuse Davis, he did, however, abuse their mother in front of the kids.

Brawley testified that he did not recall ever being told about an abusive family environment. (PCR-7, 1025). When asked if he would have presented such information, Brawley stated that it would depend upon what that information consisted of before deciding whether or not to present it. (PCR-7, 1025). The lack of information about an abusive family environment cannot be reasonably attributed to Brawley. The most likely reason for the late revelation is that Stoudemire was alive at the time of the penalty phase and still married to Davis' mother. In fact, during trial, Stoudemire was called to testify by the State and acknowledged that Davis worked for him and that he worked on Ms. Ezell's lawn. Stoudemire had health impairments at the time of trial, testifying, that he had medical problems which prevented him from working: "Well, I got spinal fusion and two operations on my knees, so I can't work." (TR. 796-797).

At the time of the post-conviction hearing, Stoudemire and Davis' mother had been divorced, and, he was dead. No evidence suggests that Davis ever mentioned anything to Brawley about the allegedly abusive atmosphere which existed in the Stoudemire

home. No evidence suggested a family member mentioned to Brawley or his investigator at the time of trial anything about an abusive family environment. Nor, for that matter, does it appear any of the mental health professionals received a history of an abusive environment. Indeed, when asked during the penalty phase what Davis' growing up in Lake Wales was like, Alma Shepard, Davis' oldest sister, stated: "Normal to me" but did note that Davis came from a "broken home" because his father was deceased and Davis was raised by his step-dad. (TR. 1309).

Brawley should not be faulted for failing to uncover or present such evidence when such evidence was not reasonably available at the time of the penalty phase.[11] (PCR-7, 1025). In any case, even if Brawley can be faulted for failing to develop such mitigation, such evidence cannot be considered compelling non-statutory mitigation.

The effect of such testimony as a non-statutory mitigator is significantly diminished by the fact that Davis' sisters were also forced to work at a young age (PCR-6, 889), and, were also exposed to the violence inflicted upon their mother by Mr.

[11]Not even Dimmig apparently uncovered any evidence of abuse. His 1992 proffer which included Dr. Pineiro's report and Davis' school records did not include any additional family members' testimony.

Stoudemire. Despite being raised in the same environment[12], most of them went on to college and not one of them, apparently, chose to commit criminal acts, much less a murder, as Davis did. Morever, testimony regarding Davis as sweet and kind nature tended to contradict his experts' conclusion that Davis' brain damage made him impulsive, and more prone to a sudden violent outbursts. Finally, it was quite clear that the Ms. Ezell did not see Davis as a kind and "Sweetman," instead, he was a killer, who stabbed her 21 times, and, who, as she lay bleeding to death for thirty or so, rifled through her house and personal possessions for any thing of value.[13]

Brawley did call Davis' mother and oldest sister in an attempt to humanize Davis. They were called primarily to support the theme of his case in mitigation, to testify about changes in Davis which allegedly occurred after the head injury. (PCR-7, 1025). Thus, Brawley was focused on the most significant mitigation available in this case, the mental health mitigation testimony. The additional family members did not

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[12]Davis' mother, testified that Stoudemire did not like any of her children. (PCR-6, 889).

[13]Testimony about the impact the murder of his cousin had upon Davis is not clearly mitigating in nature. Certainly a prosecutor would note in rebuttal that Davis knew the damage and trauma a murder can have on a family, yet he nonetheless chose to murder Ms. Ezell.

testify about any significant abuse suffered by Davis. And, as one family member acknowledged, the hard work did not hurt him any. (PCR-6, 968). The simple fact that additional family members could have been called is of little consequence. See Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient").[14] Interestingly enough, despite his allegedly abusive nature, Davis chose to work with Stoudemire even after graduating from high school. (PCR-6, 967).

The postconviction court apparently believes, that by simply pointing out that something more or something different could have been done shows that counsel was ineffective. However, courts evaluating ineffective assistance claims do not grade lawyers' performances. Trial lawyers, always, could have done something more or something different. The issue is not what is prudent or appropriate, but what is constitutionally compelled. Burger v. Kemp, 483 U.S. 776 (1987); Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000). In Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999), the Eleventh Circuit addressed a similar allegation of ineffective assistance for failure of

[14]Some of the girls testified that Davis had to work harder because he was a boy. See e.g. PCR-6, 956.

trial counsel to discover and present family members in mitigation:

> Present counsel have proffered affidavits from Williams' father and sister which, if believed, indicate that they could have provided additional mitigating circumstance evidence if they had been called as witnesses. It is not surprising that they could have done so. Sitting *en banc*, we have observed that "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." *Waters*, 46 F.3d at 1513-14. **Such affidavits "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.** Id. at 1514. (emphasis added)

As for the failure to obtain school records or call Davis' High School teachers, Davis failed to show that any of this evidence amounted to significant mitigation. The jury was well aware that Davis had a low IQ. The report cards sought to be introduced show that Davis, although placed in some special learning disability classes, was an average to below average student. He did flunk a grade, but was capable of making A's and B's or F's and received a regular high school diploma. (RS-4, 561-69). Indeed, Dr. Westby reviewed the school records and noted that they contradicted family members who told the mental health professionals that Davis had memory problems from the age

of five: “We got the school records and that wasn’t the case.” (TR. 1440). Davis’ mental health experts did not testify that the school records were important or that they would change or alter their testimony in this case. In fact, Dr. Dee testified that he did have some records from the Polk County School system. Dr. Dee testified he did his usual work up in this case, including reviewing a number of evaluations “by the Polk County School System...” (PCR-5, 831). Consequently, counsel cannot be found constitutionally ineffective for failing to obtain those records.

B. Counsel Was Not Ineffective In Presenting Expert Mental Health Mitigation Testimony Or In Countering The State’s Evidence In Rebuttal

The trial court found that counsel was ineffective for failing to challenge the qualifications of one of the two experts’ called by the state and in failing to depose Dr. Westby prior to trial. In addition, the trial court found that counsel was ineffective in failing to present the existing EEG test result or retain an expert to conduct a more sensitive EEG test. Finally, the court found counsel ineffective for failing to present evidence that Davis, 22 at the time of the murder, had a lower mental or emotional age, based upon his low IQ. (PCR-7, 1112-1113). The postconviction court erred in finding counsel ineffective.

Brawley conducted a reasonable investigation into Davis' mental health background, read all of the numerous psychological reports (PCR-7, 1026), utilized a confidential mental health advisor (PCR-7, 1026-27), and, presented the testimony of two experts during the penalty phase. Both experts testified that in their opinions Davis was suffering from a severe to moderate emotional disturbance and that he was substantially impaired at the time of the murder. Even a cursory review of the penalty phase transcript reveals that Brawley effectively presented their testimony and conducted an effective cross-examination of the State's experts.

In this case, postconviction counsel presented the testimony of the same two experts called by trial defense counsel. The remarkable thing about this case is that their testimony did not change with the benefit of time and hindsight. Dr. Dee and Dr. McClane had the same opinion at the evidentiary hearing on the statutory mental mitigators that they had at the time of the penalty phase. (PCR-5, 777, 834, 848). See e.g. Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis

added). The most that can be said is that an EEG would strengthen or support their opinions that Davis suffered from some form of brain abnormality. (PCR-5, 779, 788, 834; PCR-6, 863-64). C.f. Downs v. State, 740 So. 2d 506 (Fla. 1999)("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted). It is apparent that trial counsel obtained and presented the testimony of the two most favorable defense experts available at the time of the penalty phase.[15]

Any attempt by Davis to rely upon this Court's decision in Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), would be misguided. In Hildwin the lower court found that counsel's performance was deficient in that trial counsel failed to unearth a large amount of mitigating evidence and was not even aware "of Hildwin's psychiatric hospitalizations and suicide attempts." 654 So. 2d at 109. This Court observed that post-conviction counsel offered two mental health experts who testified that both statutory mitigators applied and that the

[15]Even Mr. Dimmig testified that he was having a hard time developing mental health mitigation, his own confidential expert Dr. Gary Ainsworth advised him he did not have much to work with. Dimmig testified: "Dr. Gary Ainsworth []" "evaluated Mr. Davis, and based upon that I didn't have a great deal of mental health mitigation to work with." (PCR-6, 931).

trial court found this testimony "most persuasive and convincing." Id. at 110. n. 8. This Court found that counsel's defective performance warranted a new sentencing proceeding.

In this case, unlike Hildwin, the defense attorney did not fail to locate prior hospitalization or mental health records. In fact, the mental health experts who testified for the defense at trial reviewed a large number of records relating to the appellant. Counsel did not ignore mental health issues: Brawley utilized a mental health advisor and presented two experts in the penalty phase who testified to the existence of the statutory mental mitigators. Thus, unlike Hildwin, defense counsel in this case did not fail to investigate Davis' mental condition or to argue the existence of the statutory mental mitigators.

The primary thrust of the trial court's finding of deficiency centers on counsel's failure to present Dr. Vroom's report of an abnormal EEG and/or have a more sensitive EEG test conducted. While such a test might support their opinions, the test was clearly not necessary. As Dr. Dee testified: "I would say that I didn't need it to make a conclusion, but it certainly made me feel more confident when I say it." (PCR-5, 834, 779). The postconviction court must have been unfamiliar with the testimony presented during the original sentencing hearing. Dr.

McClane was clearly aware of Dr. Vroom's report and the abnormal EEG. Dr. McClane testified: "...I think they put him on the Tegretol probably **because he had an abnormality on his electroencephlogram** at the State Hospital and a history of head injury and manifestations of irritability and aggressiveness intermittently." (TR. 1397). Despite clearly knowing about the abnormal EEG at the time of the original penalty phase, Dr. McClane testified during the evidentiary hearing that he thought he would have ordered a more sensitive EEG based upon Dr. Vroom's report. (PCR-5, 797). To the contrary, even knowing about the abnormal EEG he made no such request of Brawley for a more sensitive test. (PCR-4, 523). Brawley cannot be faulted for failing to order a more sensitive EEG test when his own experts made no such recommendation to him. (PCR-6, 856). In any case, the jury was well aware at the time of the penalty phase that Dr. Vroom's EEG detected a mild to moderate abnormality.

The jury was made aware of the abnormal EEG not only through Dr. McClane, but also through Brawley's cross-examination of the State's experts. Dr. Westby acknowledged on cross-examination that Dr. Vroom was a medical doctor and that he administered an EEG to Davis in August of 1988. (TR. 1450). Dr. Westby also admitted that the EEG was abnormal "because of a mild to

moderate dysrhythmia.[]" (TR. 1450-51). Brawley then read from Dr. Vroom's report, "that he had shown abnormal EEG because of mild to moderate dysrhythmia, and this is nonspecific" which Dr. Westby agreed would corroborate a seizure disorder. (TR. 1452). Finally, Dr. Westby agreed that a doctor Colar noted that Davis' history and EEG would be consistent with an underlying "convulsive disorder." (TR. 1455).

Similarly, Brawley used the abnormal EEG to cross-examine Dr. Dr. Zwingleberg. Dr. Zwingleberg admitted that he read a report from Dr. Westby, noting a report from a medical doctor, Fred Vroom, which revealed an "abnormal EEG, because of mild to moderate dysrhythmia[.]" This would corroborate "[a] seizure disorder." (TR. 1497). Dr. Zwingleberg testified that he was not an expert in interpreting those results, but noted that an EEG is a measure of brain waves, looking at "electrical function of the brain." (TR. 1497). Consequently, he acknowledged under Brawley's questioning, that Dr. Vroom, a medical expert, found that Davis had an abnomral EEG. (TR. 1498). Dr. Zwingleberg was also aware of a report from Dr. Colar in the neurology clinic, as stating that "the patients history, an[d] EEG would be consistent with an underlying convulsive disorder," and had evidence of "encephalopathy." (TR. 1499). Therefore, this record establishes that both the jury and the trial court

learned of the abnormal EEG and the diagnosis of a convulsive disorder.

Brawley cannot be considered ineffective for failing to voir dire Dr. Westby on her qualifications. See Andrews v. Deland, 943 F.2d 1162, 1194-1195 (10th Cir. 1991) (the fact that counsel could have attempted to discredit the witness "through additional, or alternative, means," does not indicate that counsel's cross-examination was ineffective). Dr. Westby was the supervising psychologist at the Florida State Hospital and was the mental health expert most familiar with Davis. She observed Davis almost daily in the eight or nine months he resided at the hospital. (TR. 1430). She was, as even Dr. Dee acknowledged, an expert in her field: "I'm sure she's an eminently qualified psychologist, she's just not a neuropsychologist." (PCR-5, 856). Indeed, Dr. Westby was the senior supervising psychologist over three other psychologists and in charge of 100 patients at the Florida State Hospital. (TR. 1428-29).

Brawley effectively cross-examined Dr. Westby, getting her to admit that she was not a neuropsychologist and that she was limited in her ability to talk about specific brain abnormalities. (TR. 1448, 1451, 1452-53). The postconviction court made no specific findings with regard to the

qualifications of Dr. Westby, only noting that counsel failed to effectively conduct voir dire. Dr. Westby would not be prohibited from testifying had counsel conducted voir dire. Again, she was the expert most familiar with Davis and was certainly competent to talk about Davis' mental condition.

The postconviction court also apparently found Brawley ineffective for failing to depose Dr. Westby prior to trial. The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack."). Morever, the postconviction court did not state what evidence would have been gleaned from such a deposition or how such a failure had any impact upon the evidence presented during the penalty phase.

Brawley testified that he had Dr. Westby's report and made the decision that he could "deal with it at penalty phase." (PCR-3, 463). Based upon his years of experience with experts,

Brawley testified that taking her deposition would not have changed or altered the opinions expressed in her report. (PCR-4, 531-32). Brawley conducted an effective examination of Dr. Westby and was certainly well prepared for her testimony. Collateral counsel did not offer Dr. Westby as a witness at the evidentiary hearing and failed to establish that a deposition of her would have led to different evidence or testimony. Thus, counsel cannot be considered ineffective for failing to depose Dr. Westby. See LeCroy v. Dugger, 727 So. 2d 236, 240-241 (Fla. 1998) (noting summary denial was proper where motion failed to allege what unspecified evidence should have been developed or should have been used); Washington v. Watkins, 655 F.2d 1346, 1360-61 (5th Cir. 1981) (although a diligent counsel would have interviewed the State's two identification witnesses prior to trial, petitioner failed to show how such witness interviews would have changed the outcome of the trial).

Doctors Dee and McClane's testimony during the evidentiary hearing was largely cumulative to their testimony during the penalty phase. Dr. Dee was forced to admit that in his opinion, Davis was at least partially malingering with regard to the psychiatric condition. (PCR-5, 844-45). The same holds true for Dr. McClane, who found Davis was again, at least partially malingering his mental condition to appear worse than

he is: “Clearly some of the time he’s malingering.” (PCR-5, 788-89).

In sum, this is not a case where trial counsel ignored potential mental health issues. Brawley was an experienced capital litigator, familiar with the use of experts, and who had the benefit of a confidential mental health advisor, Dr. Kemper. He effectively presented the testimony of two experts who claimed that Davis was brain damaged and that both statutory mental health mitigators applied in this case. There was nothing Brawley failed to provide his experts that would have changed or materially altered their testimony. Moreover, Brawley effectively cross-examined the states’ rebuttal witnesses, getting one, Dr. Zwingleberg, to admit the possibility that Davis did suffer from some minimal brain damage.[16] (TR. 1501). Since both state experts at the time of the penalty phase were aware of the abnormal EEG and it did not change their opinions, very little if anything has changed from the original sentencing hearing. The only addition is that Dr. McClane and Dr. Dee now have another test to bolster their

[16]Dr. Zwingleberg admitted that there was a possibility of brain imairment, however, it was not significant. Moreover, he testified: “I don’t know that that necessarily means that that’s - - there’s a direct relationship between some brain dysfunction and a mitigating circumstance for the behaviors. Personality style is such that he also displays impulsiveness.” (TR. 1490-91).

original opinions.[17] A finding of ineffectiveness cannot hang on such a razor thin margin. See Strickland, at 689 (a finding of deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment."); Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000)("Court must indulge [the] strong presumption in favor of competence, the petitioner's burden of persuasion –- though the presumption is not insurmountable –- is a heavy one.")(citations omitted), cert. denied, 531 U.S. 1204 (2001).

C. The Post-Conviction Court Erred In Finding Prejudice

Even assuming, *arguendo*, that trial counsel was somehow deficient in presenting evidence during the penalty phase, the postconviction court erred in finding prejudice. Davis "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 122 S.Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695). During the penalty phase the

[17]Dr. Dee would add that Davis' mental age was less than his chronolgical age at the time of the offense based upon his IQ. However, he could not easily explain the formula and noted that in another year or so, when Davis turned 23, that formula would be of little value. (PCR-6, 951-54).

jury and trial court were exposed to the extensive testimony of Dr. Dee and Dr. McClane and their conclusions that both statutory mental mitigators applied. They were also aware of the abnormal EEG result obtained by Dr. Vroom. The jury and trial court heard from Davis' mother and oldest sister in an attempt by Brawley to "humanize" Davis and corroborate a history of head injuries. After hearing all of that testimony and the state's case in rebuttal, the jury voted 12-0 in favor of death. The trial court imposed the death penalty.

The mental health mitigation offered by collateral counsel was largely cumulative to evidence already presented at the time of sentencing. Moreover, nothing presented by collateral counsel provides any reason for this Court to conclude that the State's experts called in rebutal would change or alter their opinions. Dr. Westby and Dr. Zwingelberg were aware of the abnormal EEG at the time they testified. Even Doctors McClane and Dee were forced to acknowledge that Davis was at least partially malingering his symptoms. There is no reasonable basis to conclude a different result would obtain with the benefit of any additional mitigation developed during the penalty phase. This was not a close case.

Davis committed a brutal murder upon an elderly woman in her own home. Davis had last worked for Ms. Ezell some five or six

months prior to the murder. He gained entry to the home apparently without force, and, once the door was open, attacked Ms. Ezell with a knife, stabbing her twenty one times. Ms. Ezell did not die immediately, but lingered on for an extended period of time, as Davis rummaged throughout her home, taking anything of value. Ultimately, he left the home leaving Ms. Ezell dead, taking stolen valuables with him in the victim's car.

Of particular gravity, is that Davis committed the murder in a heinous, atrocious, and cruel manner. As found by the trial court:

> ...The proof demonstrates the victim was a 73 year old, 120 pound, 5 foot tall female who was stabbed 21 times. Further, it established that no one or combination of stab wounds killed the victim, but that she bled to death. While dying, she would have experienced conscious pain, and that her death could have taken up to an hour. The Court concludes from these facts that the Defendant's actions were extremely wicked and vile, and were designed to inflict a high degree of pain, utterly indifferent to the suffering of the victim and pitiless.

(TR. 1636). This Court has recognized that the HAC aggravator is among the most weighty aggravators in this State's capital sentencing calculus. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

The trial court that heard the evidence in the case rejected

Dr. Dee and McClane's testimony, primarily because it did not fit the facts of this case. In rejecting the statutory mitigators, the trial court stated:

Other than the solicited opinions of Defendant's experts that the Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired, the proposition is unsupported by any other evidence in the record. The facts reveal that after killing the victim, the Defendant methodically burglarized the home, wiped clean the murder weapon, loaded the car with stolen items, and took steps to hide the car. All of this indicates the Defendant clearly understood what he was doing, why he was doing it, and that it was unlawful. Thus recognizing the nature of his activities there is nothing to demonstrate that he could not conform his conduct to the requirements of the law. Further, the suggestion of brain damage is unsubstantiated by competent, credible evidence as well as any relationship such damage had to the Defendant's actions in the case. (TR. 1638). See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which

the opinion is based.")(citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)). Davis' criminal conduct shows deliberate, goal directed behavior, which is inconsistent with any finding that Davis was "substantially impaired." See Davis v. State, 604 So. 2d 794, 798 (Fla. 1992)(statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged impairment).

The facts of these offenses do not change over time. The unanimous jury verdict reflects the gravity of Davis' offenses. Adding one more tidbit from his past or one additional assertion of immaturity or impulsiveness from an expert will not change the equation. The postconviction court erred in concluding that another penalty phase was warranted based upon this record. Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991)(additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide a reasonable probability of life sentence if evidence had been presented); Porter v. State, 788 So. 2d 917 (Fla. 2001)(additional mitigation of history of alcohol abuse, abusive childhood, and defendant's military history would not make a difference in the sentence where the murders committed were "cold, calculated, and highly premeditated").

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Leslie Anne Scalley, Staff Attorney, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this ___ day of October, 2002.

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).

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COUNSEL FOR APPELLEE