IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-803

STATE OF FLORIDA,

Appellant,

v.

HENRY A. DAVIS,

Appellee.

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

REPLY BRIEF OF THE CROSS-APPELLANT

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POINT OF CLARIFICATION

In its reply, the Cross-Appellee claims that the state objected to the circuit court's consideration of Dr. Pinero's deposition as evidence in the evidentiary hearing (Reply brief at 5, note 1). This statement is false and has absolutely no basis in the record. The portion of the record the Cross-Appellee cites for the objection does not refer to Dr. Pinero's deposition. Rather, the objection refers to Dr. McClane's proffered testimony (PCR5 773). In fact, the state stipulated to the admission of Dr. Pinero's deposition as evidence that "the testing that Dr. Pinero did in 1992, an EEG with nasopharyngeal leads, was available and could have been done prior to Davis' trial in 1990." (Supplemental record at 20). As the state stipulated to the admission of the proffered testimony, it is binding upon the state. See Welch v. Gray Moss Bondholders Corp., 175 So.2d 529 (Fla.1937); Troup v. Bird, 53 So.2d 717 (Fla.1951); Gunn Plumbing, Inc. v. Diana Bank, 252 So.2d 1 (Fla.1971); Codie v. State, 313 So.2d 754 (Fla.1975); Heck v. M.H., 627 So.2d 1325 (Fla.3d DCA 1993).

ARGUMENT I

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. DAVIS WAS NOT DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE

PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

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

The Cross-Appellee implies that counsel testified at the evidentiary hearing that he made a strategic decision not to present evidence that would provide a basis for his theory of defense – that Mr. Davis may have been present but someone else had committed the murder – in order to retain the last closing argument (State's brief at 24). In fact, counsel never testified that he made such a strategic decision. When asked by the circuit court: "In this case can you recall specifically whether that [losing last closing argument] was one of the considerations or is that something that's just always is a consideration?", counsel replied: "It's always a consideration." (PCR V7 1058).

The Cross-Appellee argues that counsel made a reasonable strategic decision not to present Lenvent Jones' testimony because he felt it was not as credible as Mr. Brown's identification (State's brief at 24-25). This justification is flawed. Mr. Jones could have seen Reginald Shepard, John Johnson, and Mr. Davis at the victim's house

anytime before or after Brown saw the person at the victim's door.

As the circuit court noted: "Brawley's theory of defense was not to deny Davis' presence at the scene of the crime. As Brawley testified, he tried to convince the jury that Davis may have been present but someone else had committed the murder." (PCRV7 1106). To implement this strategy, counsel elicited testimony from the FDLE finger print expert that he had not compared John Johnson's prints to those found in the house (PR V6 1055). The state then recalled the expert who, after comparing prints over the weekend, testified that John Johnson's prints were not found in the house (PR V6 1068-76). At that point, counsel's theory of defense was destroyed; counsel was left with virtually nothing to support his theory of the case. Lenvent Jones' testimony would have provided the support counsel needed to pursue that theory. Counsel's failure to subject the state's case to an adversarial testing was deficient performance that prejudiced Mr. Davis.

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

The Cross-Appellee attempts to persuade this Court that David Roberts testimony about the scratches was not false by offering conjecture that the scratches "starting to scab up with blood, hard blood on them" were "cast off drops of blood" that "could have been washed off prior to [Captain Hendrix and deputy Riley]

observing Davis." (PR. V. 5, 977) (State's brief at 29 n.10). Not only is such speculation improper and refuted by Roberts' detailed description of the scratches ("starting to scab up with blood, hard blood on them"), the idea is ridiculous. The murder occurred on a *Wednesday* morning, and Roberts testified that he saw Mr. Davis late *Thursday* night (PR V4 692; V5 976). The state presented no witnesses to testify that Mr. Davis wandered around town with blood splatters around his eyes for nearly two days. Additionally, several of the witnesses who testified at the evidentiary hearing that Mr. Davis was not scratched saw Mr. Davis Wednesday afternoon and Thursday evening, before Roberts saw Mr. Davis.

The Cross-Appellee's argument, "Roberts was not a critical witness and failure of counsel to call witnesses to contradict him on a minor point [scratches] would not have been worth losing the sandwich argument", fails for a number of reasons (State's brief at 30). First, the state considered Roberts a critical witness; the state forced Roberts to testify one day after he had surgery and even though he could not dress in proper courtroom attire (PR V4 692). Other than testimony about the scratches and the conversation that developed from discussing the scratches, Roberts offered no other information. The scratches were the only reason for his testimony. Neither were the scratches a "minor" point. If Roberts had not asked how Mr. Davis got the scratches, there would have been absolutely no reason for Mr. Davis to reply that an

old lady scratched him, "they didn't intend to do it" and he "don't know why it happened", and point out where he took the victim's Cadillac (PR. V. 5, 977-79). Moreover, counsel never testified that he did not impeach Roberts in order to avoid "losing the sandwich argument". The Cross-Appellee can not and did not cite to any portion of the postconviction record for that proposition. Counsel could have easily impeached Roberts through credible state witnesses without "losing the sandwich argument". The state called both Hendrix and Riley during its case, and both law enforcement officers were asked, on direct and cross-examination, about the circumstances of Mr. Davis' arrest and interrogation (PR V5 908-9, 914, 945, 954, 959-60).

Counsel's failure to impeach, through simple cross-examination of state witnesses, testimony that the state clearly considered so "critical" that they subpoenaed an injured man to testify was clearly deficient performance that undermines confidence in the outcome.

C. Counsel's failure to file a motion to suppress, seek suppression, and effectively impeach Harold Brown's identification of Henry Davis was deficient performance, and Henry Davis' conviction is the resulting prejudice.

The Cross-Appellee's argument that counsel's failure to challenge Brown's identification was not ineffective assistance of counsel because "the physical evidence

leaves absolutely no doubt that Davis was in the victim's house at the time of the murder", does not consider counsel's theory of defense (State's brief at 33). Counsel's guilt phase strategy was "not to deny Davis' presence at the scene of the crime", but to "convince the jury that Davis may have been present but someone else had committed the murder." (PCRV7 1106). As convincing the jury that Mr. Davis may have been present but someone else had committed the murder was counsel's strategy, counsel was obligated to zealously implement it. Brown's identification placed Mr. Davis at the victim's house *alone*, contradicting that theory.

The police used an unnecessarily suggestive procedure to obtain the identification. The identification was based on Brown's observation, from a distance of about 150 feet, of a black male with "medium" black skin the color of a "Hershey bar", "reasonably tall and slender and had a narrow face, and hair fairly tall on top of his head, but not protruding on the sides... I don't think it covered his ears", and which occurred after Brown failed to identify a suspect from a several books of photographs the police showed him at the police station (PR V4 710). Brown identified Mr. Davis only when the police brought six photographs to Mr. Brown's house (PR V4 710). There was a substantial likelihood of irreparable misidentification based upon this suggestive procedure. Brown saw the suspect from a distance of 150 feet, and was watching his dog at the same time (PR V4 706-9). Though at trial

Brown testified that Mr. Davis might have worked in his yard, he did not recognize the person he saw as Henry Davis at the time he saw the suspect or during the first round of photograph viewing at the police station (PR V4 713). From the photograph, a two dimensional head shot, there was no way Brown could determine whether Mr. Davis was "reasonably tall and slender". Only after the police brought the photopack, in which only Henry Davis wore the hairstyle Brown described, did Brown identify the person he saw as Mr. Davis. The procedures used in the out-of -court identification were unnecessarily suggestive and prejudiced Mr. Davis. See Grant v. State, 390 So.2d 341, 343 (Fla.1980).

ARGUMENT II

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

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

The Cross-Appellee cites several cases as support for its assertion that counsel's failure to subject this aggravator to an adversarial testing was not ineffective assistance. The basis of the Cross-Appellee's argument is that HAC applies to every stabbing case, regardless of the victim's state of mind. However, as noted in the initial cross-appeal, this aggravator applies only when the state proves ***beyond a reasonable doubt*** that the victim is aware of the circumstances of the murder, and those circumstances set the murder apart from an ordinary murder, so that it is ***especially*** heinous, atrocious or cruel. Mahn v. State, 714 So.2d 391 (Fla. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996); Hansbough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987). Each case Appellee cites has facts which evidence that the victim was aware of the murder, that set the case apart from the ordinary murder, and is distinguishable from Mr. Davis'.

In Francis v. State, 808 So.2d 110, 135 (Fla.2001), this Court upheld HAC because the victims were aware of the stabbing: "In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtably experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate."

Id. at 135. In Guzman v. State, 721 So.2d 1155, 1159 (Fla.1998), the blood spatter evidence and a defensive wound established that the victim was conscious for at least part of the attack. In Brown v. State, 721 So.2d 274, 277 (Fla.1998), experts testified that the evidence proved that the victim was conscious and struggled during the attack. In Atwater v. State, 626 So.2d 1325, 1329 (Fla.1993), the victim was beat before he was stabbed. In Rolling v. State, 695 So.2d278, 296 (Fla.1997), the victim had many defensive wounds, and "Rolling told police he stabbed Ms. Larson and put duct tape over her mouth to muffle her cries. He explained that he continued to stab her as she fought and tried to fend off his blows." Id. The death sentence in Peavy v. State, 442 So.2d 200, 202, 203 (Fla.1983), was reversed, and Peavy is currently serving a life sentence.

The mere fact that this was a stabbing case did not eliminate counsel's obligation to subject the case to an adversarial testing. The Cross-Appellee argues that the evidence presented indicates that the victim was conscious and aware during the attack, however, unlike the cases the Cross-Appellee cited, the Cross-Appellee can point to no proof. Instead, the Cross-Appellee offers conjecture: "The photographs ***suggest***"; "The stab wounds and the ***likely*** sequence in which they were inflicted ***indicates*** that Ms. Ezell was aware" (State's brief at 42)(emphasis added). Mere conjecture is not proof beyond a reasonable doubt. In order to establish this

aggravator, the state had to ***prove beyond a reasonable doubt***: "Heinous", meaning that the crime was ***extremely*** wicked or ***shockingly*** evil; "Atrocious", meaning ***outrageously*** wicked or vile; "Cruel", meaning designed to inflict a high degree of pain with ***utter*** indifference to, or even enjoyment of, the suffering of others; and that the crime was accompanied by ***additional acts*** which prove the crime was conscienceless, pitiless, ***and unnecessarily torturous*** to the victim. See Florida Standard Jury Instruction for 921.141(5)(d)(8). With merely a few questions of the witnesses presented at the penalty phase, counsel could have elicited evidence sufficient to establish a reasonable doubt. The victim had no defensive wounds, the medical examiner could not determine how long she was conscious, but "she might very well have lost consciousness because of fainting when attacked, or she did have evidence of a blow to the head, she could have lost consciousness from that also", indicating that the victim was not aware so that the crime was not unnecessarily torturous (PCRV7 1020-22). Likewise, had counsel easily impeached Roberts' testimony that Henry was scratched, counsel would also have impeached Roberts' statement that Henry admitted an old lady scratched him, also indicating that the victim was not aware so that the crime was not unnecessarily torturous (PR. V. 5, 977).

B. Counsel's failure to investigate and establish that Reginald Shepard and John Johnson were at the victim's house and that

Reginald Shepard actually killed the victim was deficient performance, and Henry Davis' death sentence is the resulting prejudice.

The Cross-Appellee argues that the theory of a third party at the victim's house who actually committed the murder is something invented during postconviction and that had counsel presented evidence of this "the force and effect of [counsel's] own expert's testimony would have been diminished. Counsel's theme during the penalty phase was to show that Davis was brain damaged and that his brain damage altered his personality and made him more impulsive." (State's brief at 46). However, this argument is completely refuted by the record. As the circuit court noted: "Brawley's theory of defense was not to deny Davis' presence at the scene of the crime. As Brawley testified, he tried to convince the jury that Davis may have been present but someone else had committed the murder." (PCRV7 1106). Counsel pursued this theory through his mental health experts: "Do you have an opinion as to whether or not Henry Davis acted under extreme duress or under the substantial domination of another person?" (PR 1398-99). This theory is consistent with the mental health mitigation counsel did present:

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

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

A. Yes. Yes.

(PR 1398-99).

Trial counsel chose to pursue this theory throughout the guilt and penalty phases of Mr. Davis' trial. Prior to adopting that strategy, counsel was obligated to investigate it. Strickland, 466 U.S. at 690-91. Counsel violated this obligation, made this decision without investigation and, consequently, did not uncover facts which would have supported this theory and evidence which could have established mitigating evidence. "The persuasive force of [what evidence counsel did present] was undermined substantially by the manner in which it was presented". Hendricks v. Calderon, 864 F.Supp. 929, 947 (N.D.Cal. 1994).

ARGUMENT III

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

A. Admissibility

1. Admissibility At The Guilt Phase

The Cross-Appellee argues that the confessions are not admissible and this "case is similar to the inmate confessions found insufficiently reliable for admission as substantive evidence in Jones v. State, 709 So.2d 512, 523 (Fla.1998)." (State's brief at 53). In fact, Jones is inapplicable. In Jones, Florida Statute 90.804(2) did not apply; the confessions at issue were not admissible because the person who made the declarations against interest was alive. Id. at 523-25 ("Unlike Chambers, where the oral confessions were not allowed for any purpose at the original trial, in this last evidentiary hearing, Judge Johnson considered the confessions as impeachment evidence because Schofield testified.").

The confessions at issue in this case are clearly admissible under the Florida Statute 90.804(2)(c) exception to the rule against hearsay, and the circuit court erred, as a matter of law, in holding that they would not be admissible at a new trial. As this Court noted in Carpenter v. State, 785 So.2d 1182 (Fla.2001), "the credibility of an in-court witness who is testifying to an out-of-court declaration against penal interest is not a matter that the trial court should consider in determining whether to admit the testimony concerning the out-of-court statement." Carpenter, 785 So.2d at 1203. In determining that the confessions were not admissible under the statement against interest exception to the rule against hearsay, the circuit court based its decision on the credibility of the in-court witnesses. Beginning its analysis of whether the testimony

presented at the evidentiary hearing was admissible and thus, newly discovered evidence, the circuit court stated:

> In examining the foregoing testimony to determine if it would be admissible at a re-trial or re-sentencing this Court must consider the circumstances surrounding each of the witness testimony. **At the heart of the issue of trustworthiness of the proffered testimony is a determination of the credibility of each of the witnesses. One factor the Court can take into account is prior felony convictions. . . . The testimony of Watson, Christian, Pride, Wilson and Scott is not trustworthy nor believable when viewed in total context. The conflicts in their testimony render their evidence unreliable. The Court declines to address whether the witnesses' testimony constitutes newly discovered evidence since the evidence offered is not admissible as an exception to F.S. 90.804 (2) (c). The evidence, because of the patent unreliability, would not be admissible in either Davis' guilty or penalty phase proceedings.**

(PCRV7 1116-22)(emphasis added). The court also considered that "[a]ll of the witnesses, except Scott, sat on their stories for eight to ten years" and "conflicts in the witnesses [sic] testimony". While these types of factors *might* be proper to consider when determining whether statements against penal interest are reliable under Chambers, the circuit court erred in considering them in the 90.804(2)(c) analysis.[1]

[1]Appellee and the circuit court faulted the newly discovered confessions because the people to whom Shepard confessed were convicted felons. This position is inconsistent with the State's theories of prosecution in other capital cases and Florida law. The State repeatedly urges, and this Court accepts, testimony of convicted felons regarding jailhouse confessions as evidence proving

In Carpenter, this Court reversed a conviction and death sentence because a trial court improperly concluded that a codefendant's statements against interest were not admissible because of the questionable credibility of the in-court-witnesses. Carpenter, at 1203-4. In so doing, this Court noted "it is the jury's duty to assess the credibility of the in-court witness who is testifying about the out-of-court statement." Id. This Court further held that the out-of-court statements were consistent with other evidence presented at the trial so they were admissible. Id. The out-of-court statements in this case too had the corroboration required under the Florida statute.

In Barker v. State, 336 So.2d 364 (1976), this Court held that a statement which tended to expose a person to criminal liability was a statement against interest and therefore, an exception to the rule against hearsay. In 1977, the legislature codified that exception, adding the requirement that "corroborating circumstances show the trustworthiness of the statement". Fla. Stat. § 90.804(2)c). Regarding the somewhat similar exception in the Federal Rules of Evidence, writers have noted that the corroboration required to exclude a statement against interest from the rule against

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the first-degree murder convictions and death sentences beyond a reasonable doubt. See Happ v. State, 596 So.2d 991 (Fla.1992); Dailey v. State, 594 So.2d 254 (Fla.1991); Brown v. Wainwright, 785 F.2d 1457 (11th Cir.1986). However, the state urges this Court not to accept the exact same kind of evidence as that sufficient to "generate a reasonable doubt of the guilt of the defendant" and which would probably produce an acquittal or life sentence on retrial. State v. Hawkins, 260 N.W. 2d 150, 158-59 (Minn. 1977).

hearsay is not the same as that required to corroborate a substantive offense. "Rather, it is only required that the court determine clearly that a reasonable person could believe that the statement might have been made in good faith." Lacy v. Mississippi, 700 So.2d 602, 607 (Miss.1997) quoting Jack B. Weinstein and Margaret A Berger, Weinstein's Federal Evidence § 804.06[5][b] (2ded.1997). Federal courts have interpreted this as "merely requiring the defendant to show some evidence in support of the allegations contained in the confessions", not that if "any evidence inconsistent with the confession existed, then there was no corroboration". United States v. McVicar, 953 F.Supp. 1001, 1010 (N.D.Ill.1997) quoting United States v. Barrett, 539 F.2d 244, 253 (1st Cir.1976). Sufficiency of corroborating evidence is determined by the totality of the circumstances. Sufficiency can be established by disparities in evidence, questionable reliability of evidence, and a lack of evidence. See IIllinois v. Anderson, 684 N.E.2d 845, 860-61 (Ill.App.3d 1997).

The Florida Statute however, does not carry that high of a burden. The Federal Rule states that a statement against penal interest is inadmissible if offered to exculpate the accused "unless corroborating circumstances *clearly* indicate the trustworthiness of the statement". Fed. R. Evid. 804(b)(3) (Emphasis added). The Florida Statute differs: a statement against penal interest is inadmissible if offered to exculpate the accused "unless corroborating circumstances indicate the trustworthiness of the statement". Fla. Stat. § 90.804(2)(c). The Florida legislature omitted the adverb

"clearly". Thus, the defendant's burden to show corroborating circumstances under Florida law is even lower than the burden under the corresponding Federal Rule of Evidence.

Given the fundamental nature of the rights at issue, this lesser burden should be construed in Mr. Davis' favor. See State v. Winters, 346 So.2d 991, 993 (Fla.1977)("Penal statutes must be strictly construed in favor of the accused where there is doubt as to their meaning"). As the Third Circuit Court of Appeals noted:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission.

Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d Dist.Ct.App. 1982). This is particularly relevant in death penalty cases like Mr. Davis', as this Court has noted:

> [T]rial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

Guzman v. State, 644 So.2d 966, 1000 (Fla.1996).

As extensively discussed in the initial brief, Shepard's confessions are corroborated by the lack of evidence the state presented at trial and the evidence presented at the evidentiary hearing. Crime scene evidence and lack of evidence also corroborates Shepard's confessions. The state found no prints on the knife found at

the victim's house, however, Mr. Davis left prints in the house and on some of the stolen property (PR. V. 6 1036, 1042, 1055). Had Mr. Davis used the knife, he probably would have left his finger prints on it as well. The clothing the state claimed Dr. Davis wore the day of the crime showed no trace of blood and the police found no other bloody clothes (PR. V. 4, 851,V. 5, 1022). Detective Hendrix testified that the condition of the victim's car clearly indicated that it carried at least three people after it was stolen (PR. V. 5 942). Moreover, Henry Davis' fingerprints were found on only four of the more than fifteen stolen items found in the trunk of the victim's car (PR. V. 5 810-824; V. 6 1050-53). If Henry Davis was the only burglar, his prints should have been on all of the items as well as the knife. The morning Joyce Ezell was killed, Lenvent Jones saw Henry Davis, John Johnson, and Reginald Shepard in Johnson's car in the victim's driveway (PCRV5 725-26). That night, Shepard's brother saw Shepard with blood all over his clothes and assumed Shepard had been fighting (PCRV5 727-28). Levonsky Riley's testimony about Shepard disposing of bloody clothes, Alma Davis' testimony that Shepard was hiding in orange groves the night Henry was arrested, and the fact that Shepard owned a knife identical to the knife the state claimed was the murder weapon further corroborate the confessions (PCR V3 415; V4 575, 592-94, 658-59, 660-62, 673, 679-80; V5 742; V6 982-83, 1011). Jail records confirm that the people to whom Shepard confessed were incarcerated with Shepard (PCR V6 1011-18). Moreover, the out-of-court statements are corroborated

by the sheer number of them which, at the time, would have allowed the state to charge Shepard with first degree murder. See Chambers v. Mississippi, 410 U.S. 284, 299-300 (1973). Given the totality of the circumstances, the confessions would clearly be admissible at a new trial under both Florida Statute 90.804(2)(c) and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Florida Constitution.

2. Admissibility at the Penalty Phase

Citing absolutely no legal authority to support the position, the Cross-Appellee asserts that the newly discovered evidence would not be admissible at the penalty phase. Not only does the Cross-Appellee ignore Florida Statute 921.141(1) ("Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.") and this Court: "the exclusionary rules of evidence, including the rule barring use of hearsay statements are inapplicable in the penalty phase of a capital trial.", the Cross-Appellee overlooks the Eighth and Fourteenth Amendments to the United States Constitution. Fla. Stat, §921.141(1) (1979); Garcia v. State, 622 So.2d 1325, 1329 (Fla.1993).

In Green v. Georgia, 442 U.S. 95 (1979), the United States Supreme Court held that the exclusion of testimony in a similar situation violated due process of law. In Green, the state of Georgia tried two people, separately, for murder of the same

victim. In its case against the first defendant, the state presented a witness who testified that the first defendant confessed to him that he killed the victim. After Green was convicted, he attempted to present the same witness during his penalty phase. The trial court ruled it was inadmissible hearsay. The United States Supreme Court reversed the case, holding that Green's Eighth and Fourteenth Amendment rights were violated. "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case, the exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978)(plurality opinion); *id.*, at 613-16, 98 S.Ct.at 2969-2970 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability." Id. at 97.

B. The Newly Discovered Evidence Would Probably Produce A Different Result

1. At The Guilt Phase

In determining whether the newly discovered evidence would probably produce an acquittal at retrial, this Court must consider the evidence adduced at trial and whether there is a probability that the cumulative effect of the new evidence, from the point of view of its possible effect on the jury, might raise in one juror a reasonable doubt that Henry Davis murdered the victim. See Kyles v. Whitley, 514 U.S. 419, at

434 (1995); Chambers v. Mississippi, 410 U.S. 284, 299-300 (1973); Green v. Georgia, 442 U.S. 95 (1979) . "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant." State v. Hawkins, 260 N.W. 2d 150, 158-59 (Minn. 1977).

The Cross-Appellee's assertion that "overwhelming evidence established that Davis murdered the victim" is wrong (State's brief at 63). Though one eye witness and fingerprints linked Henry Davis to the crime scene and the burglary, absolutely no evidence linked him to the actual murder. The state *did not* connect Henry Davis to the murder weapon, the state *did not* find evidence of blood on Henry's clothes or person, the state *did not* present any eyewitnesses to the murder, and no one, *other than Reginald Shepard*, has confessed. Given the lack of evidence in the state's case and Reginald Shepard's nine separate confessions, there is a reasonable probability that at least one juror would conclude that the state did not prove--beyond a reasonable doubt-- that Henry Davis murdered the victim.

2. At the Penalty Phase

For the same reasons discussed above, given the lack of evidence in the state's case, Reginald Shepard's nine separate confessions, and the extensive mitigation that could be presented at a new penalty phase, there is a reasonable probability that the cumulative effect of the new evidence, from the point of view of its possible effect on the jury, might raise in one juror a reasonable doubt that the state did not prove--

beyond a reasonable doubt-- that the death sentence is appropriate. Kyles v. Whitley, 514 U.S. 419, at 434 (1995); Chambers v. Mississippi, 410 U.S. 284, 299-300 (1973); Green v. Georgia, 442 U.S. 95 (1979) .

ARGUMENT IV

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

The Cross-Appellee argues, "[a]s no facts or specific claims of error were offered in support of Davis' claim that a combination of alleged errors rendered his trial fundamentally unfair [in the 3.850], summary denial on this point was proper", and "[t]o the extent he adds to his argument by mentioning specific claims, his argument is barred on appeal" (State's brief at 79). This argument is ridiculous. The cumulative error analysis could not occur until the errors were proven in the evidentiary hearing. See Atwater v. State, 788 So.2d 223, 235 (Fla.2001)(Parriente, J. concurring in part and dissenting in part).

The evidentiary hearing revealed that Mr. Davis' trial was riddled with error including the false testimony of David Roberts, counsel's failure to investigate and present available evidence that Henry Davis was not alone at the victim's house and that Reginald Shepard likely killed the victim, counsel's failure to challenge an

identification based on a prejudicial photopack which was designed to mark Henry Davis, and counsel's failure to effectively challenge the state's burden in establishing the heinous, atrocious, or cruel aggravator. This, with the prosecutor's admitted Golden Rule violation and the circuit court's finding of ineffective assistance of counsel at the penalty phase, proves that Mr. Davis did not receive the fundamentally fair capital trial and penalty phase to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See State v. Gunsby, 670 So.2d 920 (Fla.1996).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of June, 2003.

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CERTIFICATE OF COMPLIANCE

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

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