IN THE SUPREME COURT OF FLORIDA

ADAM W. DAVIS,

Appellant,

v. CASE NO. SC06-1444

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of postconviction relief sought by a capital defendant pursuant to Florida Rule of Criminal Procedure 3.851. Appellant Adam Davis was convicted and sentenced to death for the 1998 murder of Vicki Robinson. In its opinion affirming the conviction and sentence, this Court described the facts of this case as follows:

> The evidence presented during Davis's trial revealed the following facts surrounding this case. Prior to June 26, 1998, Davis had been seeing Valessa Robinson, then fifteen years old, for about nine months. Valessa was a troubled teen who had repeatedly run away from home and lived with her mother, Vicki Robinson, who was divorced. In 1997, Ms. Robinson had Valessa evaluated pursuant to the *Baker Act*.
>
> On June 26, 1998, Davis, then nineteen years old, spent the day running errands with Valessa, Ms. Robinson, and Davis's friend, Jon Whispel. Later that evening, Ms. Robinson had dinner at her house with a friend, Jim Englert. At approximately 11:20 p.m., Davis, Valessa, and Whispel arrived at Ms. Robinson's home. Upon entering, the trio went straight to Valessa's bedroom. Shortly thereafter, Mr. Englert decided to go home, and he inquired if Davis and Whispel needed a ride home. Davis and Whispel declined the offer. They subsequently left on their bicycles and went to Denny's Restaurant, located at Stall Road and Dale Mabry in Tampa. Valessa later snuck out of her house and met Davis and Whispel at Denny's.
>
> Upon Valessa's arrival, the three left Denny's to acquire LSD. They consumed the acid, returned to Denny's, and pondered what they wanted to do next. As they sat at the table, Valessa stated that the three should kill her mother. Although Whispel at first thought Valessa was joking, Davis and Valessa began to discuss ways in which they could kill Ms. Robinson. Davis ultimately suggested that they inject Ms.

Robinson with enough heroin to cause an overdose.

The three left Denny's and headed back to Ms. Robinson's house. When they arrived, they stayed outside for a while to ensure that they did not awaken Ms. Robinson. Whispel and Valessa then went inside the house and opened the garage door. Upon returning to the outside, they waited again to ensure Ms. Robinson did not awaken. Valessa then opened the keyless entry to her mother's van and retrieved the set of spare keys. Davis put the car into neutral, and Valessa and Whispel pushed the car out into the street so as not to awake Ms. Robinson.

Davis then drove the trio to a friend's house to purchase the heroin. While inside his friend's house, Davis told his friend that he was looking for enough heroin to kill someone and make it look like an accident. Although Davis was unable to obtain any heroin, he did purchase a syringe.

Davis, Whispel, and Valessa returned to Ms. Robinson's home and parked several houses down the street to avoid waking Ms. Robinson. Once inside the home, Davis suggested that Valessa get some bleach and a glass so that they could inject Ms. Robinson with bleach and an air bubble using the syringe he had purchased. Valessa complied. Davis then filled the syringe with bleach and air, grabbed his folding knife, and he and Valessa headed to Ms. Robinson's bedroom. A few minutes later, Davis and Valessa returned, stating that Ms. Robinson had awakened. Davis put the syringe and the bottle of bleach in Valessa's closet and put his knife on Valessa's dresser. Ms. Robinson knocked on the door and told Valessa to get her sleeping bag and come into her room. Davis handed Valessa her sleeping bag, and Davis followed Ms. Robinson into the hall.

Davis put Ms. Robinson into a "sleeper" hold, attempting to render her unconscious. He then asked for the syringe. Because Valessa did not know where Davis had put the syringe, Davis told Valessa to hold her mother down while he retrieved it. Davis then returned and injected Ms. Robinson with the bleach-filled syringe. While this was happening, Whispel testified that Ms. Robinson was fighting to get up and asking what they were doing to her. A few minutes later, Davis stated that the bleach was not working. At that time, Whispel brought Davis the knife and said

"use this." Whispel then returned to Valessa's bedroom. When Davis and Valessa returned to Valessa's bedroom, Davis was holding the knife limply in his left hand, and Whispel noticed blood on Davis's hands and on the knife. Valessa did not appear to have blood on her hands.

Shortly thereafter, the three heard moaning from the kitchen, where the incident had occurred, and Davis commented that Ms. Robinson would not die. Davis then grabbed the knife and left the room. Davis later told Whispel that he stabbed Ms. Robinson two more times and tried to break her neck.

A few hours later, Davis, Whispel, and Valessa cleaned the kitchen with bleach and towels. Davis put Ms. Robinson into a trash can that he had retrieved from the garage. The three loaded Ms. Robinson's van with the towels, the trash can, shovels and a hoe, and drove to a wooded area near Ms. Robinson's home to bury Ms. Robinson. While digging the hole, however, they hit rough terrain, so they instead concealed the trash can with some foliage, planning to come back later.

The three eventually returned to Ms. Robinson's house and obtained Ms. Robinson's credit cards, cash, and ATM card because Valessa knew the personal identification number. Davis, Whispel, and Valessa spent the next three days in Ybor City, using Ms. Robinson's money to get tattoos and stay at motels. They also went to Home Depot and purchased twenty bags of concrete, a bucket, and a trash can, with the intention of dumping the body in a nearby canal.

During the time that the three were in Ybor City, Mr. Englert reported that Ms. Robinson was missing. Davis subsequently learned from a friend that he and Valessa were on the news, so the three decided to go to Phoenix, Arizona. Because they needed to leave quickly, they did not complete their plans with regard to Ms. Robinson's body.

Davis, Whispel, and Valessa remained on or near Interstate 10 during their trip and continued to use Ms. Robinson's ATM card. Upon being notified by the police that Ms. Robinson was missing, Ms. Robinson's credit union began to track the card's usage, as opposed to closing her account. The three were ultimately traced to near Pecos County, Texas, where, after a high-speed chase, they were apprehended.

Valessa was taken to a juvenile detention center near Midland, Texas, and Whispel and Davis were taken to Fort Stockton.

Lieutenant John Marsicano and Detective James Iverson, who had been investigating the case in Hillsborough County, arrived in Texas early in the morning on July 3, 1998, the day after Davis, Whispel, and Valessa had been arrested. Because Valessa was being detained closer to the airport, the officers questioned her first. They then drove to Fort Stockton to question Whispel and Davis. In Fort Stockton, the officers first interviewed Whispel. Davis was subsequently questioned around 5:30 a.m. The officers spoke with Davis for approximately eight to ten minutes. The officers then administered Davis's Miranda warnings, n1 obtained a signed written waiver of rights form, and had Davis draw a map indicating where Ms. Robinson's body could be found. At that time, the officers turned on their tape recorder and recorded a confession from Davis. During his confession, Davis described how the murder was planned and committed, including how he had stabbed Ms. Robinson. He also described their activities following Ms. Robinson's death.

> n1 *Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).*

A jury convicted Davis of first-degree murder, grand theft, and grand theft of an automobile. The trial court subsequently conducted the penalty phase of Davis's trial, during which both sides presented evidence. The jury recommended by a seven-to-five vote that Davis be sentenced to death. The trial court followed the jury's recommendation and imposed a death sentence, finding and weighing three aggravating factors, n2 one statutory mitigating factor, n3 and four nonstatutory mitigating factors. n4 State v. Davis, No. 98-11873 (Fla. 13th Cir. Ct. order filed Dec. 17, 1999) (sentencing order).

> n2 The aggravating factors were: (1) the crime was committed while Davis was on felony probation; (2) the crime was heinous, atrocious, or cruel; and (3) the crime was committed in a

> cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> n3 The statutory mitigating factor was the defendant's age at the time of the crime (little weight).
>
> n4 The nonstatutory mitigating factors were: (1) Davis was under the influence of LSD at the time of the offense (some weight); (2) Davis had no prior convictions for assaultive behavior (some weight); (3) Davis had a deprived childhood and suffered hardships during his youth (some weight); and (4) Davis is a skilled writer and artist and can be expected to make a contribution to the prison community by sharing his knowledge, skills, and experience (some weight).

Davis v. State, 859 So. 2d 465, 468-70 (Fla. 2003).

On February 1, 2005, Davis filed a motion for postconviction relief pursuant to Rule 3.851 (V2/24-97). The State filed a response (V7/1049-92), and a case management conference was held on Nov. 8, 2005.[1] An evidentiary hearing was granted on seven claims and was thereafter conducted on Feb. 8-9, 2006, and April 20-21, 2006 (V14/T1-V17/T522).[2]

At the hearing, Davis presented testimony from his two trial attorneys, Chuck Traina and Rick Terrana; Assistant State Attorney Pam Bondi; Hillsborough County Sheriff's Capt. John Mariscano and Sgt. James Iverson; and two mental health

[1] The transcript from the case management conference, and the court's order following the conference, are not included in the record on appeal.

[2] The record pagination starts over with the evidentiary hearing transcript in Volume 14; references to the transcripts filed below will cite to the volume, followed by a T# designating a page.

professionals, Dr. Robert Smith and Dr. Janice Stevenson. The State presented testimony from the defense mental health expert at trial, Dr. Michael Gamache.

Chuck Traina was appointed to represent Davis as guilt phase counsel in 1998; co-counsel Rick Terrana was appointed to handle the penalty phase (V15/T79-80, 82). Traina had left the public defender's office in 1994, where he served as chief of the capital division (V15/T76). He was experienced in both phases of capital trials, having defended more than ten capital defendants (V15/T77-78). He testified that the primary theory of defense in this case was that co-defendant Valessa Robinson was responsible for Mrs. Robinson's death (V15/T85).

Traina was aware of a possible voluntary intoxication defense based on Davis's use of LSD prior to the murder (V15/T85-88). He brought out testimony about the LSD use and secured a voluntary intoxication instruction for the jury (V15/T85; DA. V13/1201, 1254-55).[3] It was not his primary defense but he wanted to be able to give the jury other options (V15/T110).

Traina noted voluntary intoxication is a very demanding defense and generally not persuasive, as the intoxication must be so severe that specific intent is negated (V15/T99-100). He

[3] Record citations with a "DA." designation refer to the record from the direct appeal, Florida Supreme Court Case No. SC00-313.

declined to pursue it as a primary defense for a number of reasons (V15/T101). Traina had many conversations with Davis and Davis was able to relate specific details of the offense, providing an extensive description of everything that had happened (V15/T101-04). Given Davis's acute awareness of the events, a voluntary intoxication defense would not be realistic (V15/T99, 104). Traina noted that if an expert is retained and then bases his opinion on facts which are inconsistent with information available from other sources, the defense can backfire (V15/T102). There is also a concern that the State can obtain a defendant's statements to an expert once the expert is listed as a witness and deposed (V15/T135-36). Traina testified that, if he were to try this case over, he would still not use an expert to support a voluntary intoxication defense (V15/T104).

As part of his representation, Traina litigated a motion to suppress Davis's post-arrest statements (V15/T89; DA V3/233-331). The thrust of the motion was that, under the totality of the circumstances, Davis's confession was coerced (V15/T91, 95). Traina asserted at trial that Davis was young, far from home, had been deprived of sleep, had been roughed up at the arrest, and had consumed LSD about fifteen hours prior to the interview; also the police had used a technique where they built rapport and heard incriminating statements prior to obtaining the

Miranda waiver (V15/T90-95). Traina believed the combination of these factors required suppression (V15/T93). However, Traina acknowledged that Davis's conduct on the tape recording of the confession -- interacting with the detectives, responding to questions, supplying details and failing to comment about his condition -- all undermined the motion to suppress (V15/T106).

Traina was aware that Davis only attended school through the ninth grade but never felt that Davis had a diminished capacity to understand his rights or that Davis was incompetent (V15/T94, 97).

Traina testified that the only expert retained by the defense was Dr. Gamache (V15/T96). Gamache was retained primarily for the penalty phase and was not specifically retained for either the motion to suppress or the voluntary intoxication defense (V15/T96). However, Traina was confident that the defense talked to Dr. Gamache about these issues (V15/T108-09). Although Traina has used experts on these issues in the past, he does not automatically hire an expert in every case but determines whether an expert may be needed on a case-by-case basis (V15/T98).

Traina was aware of the post-arrest statements that Valessa Robinson had made; he felt that she was responsible for the murder and wanted the jury to hear her statements (V15/T113-14). He attempted to bring them in through the detectives, Iverson

and Marsicano, but the judge did not allow it (V15/T116). Prior to trial, Davis believed that Valessa would testify for him as a defense witness (V15/T116). Valessa was also charged with first degree murder at that time (V15/T117). Closer to trial, Traina spoke with Valessa's attorney, Deanne Athan, and Athan told Traina that Valessa no longer cared for Davis and would not testify for him (V15/T116-17). Athan advised Traina that she would not allow Valessa to testify under any circumstances, that Valessa would invoke her right to silence (V15/T117). Athan also told Traina that if Valessa did testify, her testimony would be adverse to Davis and not consistent with his defense (V15/T126).

Traina prepared a subpoena for Valessa, but did not have it served, based on his conversation with Athan (V15/T117). He felt that he established Valessa's unavailability as she was charged with the same crime and her attorney had represented that she would not testify (V15/T119-20). He offered several arguments at a bench conference in an attempt to get Valessa's statements admitted, but he was not successful (V15/T121-22). One problem was that Traina did not have any corroborative evidence to support admission as a statement against interest (V15/T121, 127-28).

Penalty phase counsel Rick Terrana was also a very experienced capital defender, having handled twelve to fifteen

guilt phase trials and seven to ten penalty phase trials (V15/T141). He has "won" every penalty phase he has tried, except for Davis, which he "lost" by the slimmest of margins (V15/T176).

Terrana testified that he routinely employs an expert as a starting point for any penalty phase and he retained Dr. Gamache for that role early in this case (V15/T143). Terrana used Diana Fernandez as an investigator; she secured numerous records, maybe 100 different documents, including school records, disciplinary records, etc. (V15/T149-50). All of the records were provided to Gamache and Terrana and Gamache consulted many times (V15/T150-52). Terrana's practice is to use lengthy questionnaires, one for the expert, one for the investigator, outlining what they needed to do and what they needed to look for in general terms (V15/T150). He would have done that in this case with Gamache and Fernandez (V15/T150).[4]

Terrana testified that the penalty theme in this case emphasized these were kids, doing a lot of acid. While there was a careful plan to kill Mrs. Robinson, it was hatched by Valessa; Davis was just a happy-go-lucky kid in love, under her spell (V15/T148). He had evidence to support putting the blame on Valessa (V15/T148).

[4] Terrana no longer had his trial file, which was lost after being delivered to CCRC by appellate counsel (V15/T157, 196).

Terrana had used Dr. Gamache on almost every death case he had handled (V15/T152-53). Gamache is very experienced and had testified probably hundreds of times; Gamache was absolutely ready to testify in this case (V15/T155). Terrana would not review particular questions he intended to ask with Gamache because such preparation can expose the State to those communications when the expert is deposed (V15/T152-54). In fact, Gamache had been deposed the night before he testified here and Terrana recalled that they were trying to avoid having to disclose anything that would hurt Davis's case (V15/T154-55). As Terrana and Gamache had a history of working together, Terrana knew that Gamache would be aware of where they were going; they met seven times and discussed the case extensively (V15/T153-54). Although Terrana did not have specific recall of the conversations, they would be typical discussions about the theme of the case, what the expert could offer in support, and whether the aggravators could be rebutted (V15/T153-55).

Terrana acknowledged that his philosophy in presenting mitigation may differ from other defense attorneys, in that Terrana did not believe it was necessary for the jury to hear every bit of information available on a defendant (V15/T175-78). Although he recognized the importance of thoroughly investigating all aspects of a defendant's life and providing all information available to the defense expert, he only

presents to the jury those portions of a defendant's life which he believes to be significant (V15/T177-79). His approach was developed from watching some of the best, most senior public defenders try capital cases in the late 1980s, and seeing defendant after defendant get death (V15/T175-76). While in some cases it may be relevant for the jury to hear about "every little thing that ever happened," to a defendant, he does not believe juries are impressed by hearing that a defendant was traumatized because he fell off his bike when he was six or witnessed his mother get bit by a dog (V15/T176-79). Instead, his general approach is to develop a theme questioning, "why kill this guy? How will society benefit?" (V15/T176-77). Anything he may uncover in his mitigation investigation which supports that theme, he will use (V15/T177). While other attorneys may disagree with his strategy, he will keep using it because it has been successful in every penalty phase he has tried, except this one (V15/T176-78).

Terrana could not recall, without his missing file, what information he had discovered about Davis and his family, but he had much more information than what was presented to the jury (V15/T169, 173-74, 180). He may or may not present evidence that a defendant's parents were using drugs, it would depend on the nature of the evidence (V15/T180-81). He makes such decisions on a case-by-case basis, sometimes in the heat of

trial, based on his gut reaction and his observations of the jury (V15/T182). He recalled in this case one juror, the one that ended up as foreman, had taken off his glasses and looked at Davis in disgust when Davis broke down and cried during the penalty phase; Terrana knew then they had a problem (V15/T182-83). He testified that that incident led him to be glad he tried this case as he did, and not as collateral counsel suggests (V15/T182).

Terrana tried to rebut the aggravating factors of HAC and CCP through argument rather than evidence (V15/T185). He did not use Dr. Gamache to rebut these, although they may have discussed the issue, as they had in the past, and Terrana knew Gamache was familiar with the aggravators and had been used to rebut them in other cases (V15/T185-86). The main problem with using Gamache in this capacity at the Davis trial is that Gamache had given a deposition the night before he testified, and had related "bone-chilling" testimony that had come straight from Davis's mouth (V15/T187). Had he used Gamache to explore Davis's state of mind, the State would have been able to bring out all of Davis's statements to Gamache on cross-examination (V15/T187-88). If that had happened, there was "no doubt" in Terrana's mind that the jury recommendation would have been unanimous for death, with the alternate upset that they couldn't vote too (V15/T188-89). Davis's own statements established a

very well thought out, careful plan; his ability to remember all of the specifics before, during, and after the offense would have destroyed any defense argument that Davis was under the influence (V15/T189). While the LSD use was an important theme in both guilt and penalty, to have exposed Gamache to have to repeat Davis's statements would have been crazy (V15/T189). It would have proven the aggravator beyond any reasonable doubt or any doubt at all, so he intentionally stayed as far from that as he could, and restricted Gamache to only testify about Davis's background, childhood and family life (V15/T190).

Terrana did not believe that offering Valessa's confession at the penalty phase would have been helpful to the defense at that point (V15/T187, 191-92). He was aware that hearsay was admissible, to an extent, and he would have tried to admit her confession if he felt it would be helpful (V15/T191-92). Also, he would never send investigators out to find witnesses, and put them on the stand without talking to them first and knowing what they would say (V15/T197).

Sgt. James Iverson and Capt. John Marsicano both testified about the circumstances of Davis's confession. Iverson is an experienced detective that had been trained in interviewing suspects (V16/T209-10, 215, 245). In this case, he followed his usual routine of introducing himself and trying to build a rapport before advising Davis of his Miranda rights (V16/T211-

16). Iverson confirmed that he was not trying to subvert Miranda and that he testified truthfully in all respects at the hearing on the motion to suppress (V16/T235-36).

Marsicano is also a veteran detective, has served as a manager in the training bureau and was supervisor of the homicide section at the time of Davis's arrest (V16/T247-51, 260). He noted that, prior to reading Davis his Miranda rights, they told Davis that they had already spoken to Valessa Robinson and Jon Whispel; Davis did not believe them, so they played a portion of Valessa's interview so Davis could hear her talking to them (V16/T256-57).

Assistant State Attorney Pam Bondi has been a prosecutor in Hillsborough County for fifteen years (V16/T319-20). She testified that she would never suggest to a detective that they should lie on the stand, or present testimony she believed to be perjured (V16/T333-35). She noted that the State had gone to great effort to be consistent in the Davis and Robinson trials, presenting Whispel's testimony in both trials (V16/340, 346, 349-51).

Dr. Robert Smith is a clinical psychologist and subspecialist in addictive disorders; he teaches at Case Western Reserve University (V14/T6). He offered his opinion in this case that Davis's ingestion of LSD "significantly impaired his ability to form the intent to commit murder" and also

"significantly impaired" his ability to knowingly waive his Miranda rights, as well as his ability to conform his conduct to the requirements of law (V14/T9-10). Smith noted that LSD is a hallucinogen that impairs the central nervous system and affects perception, emotions, and behavior (V14/T11). Emotions are exaggerated and perceptions are distorted; for example, a person under the influence may "hear colors" (V14/T11). Although Smith repeatedly observed that LSD "does not impair an individual's ability to make a plan, to act purposefully," the problem is that the plan is the result of distorted perceptions and thought processes influenced by the drug and inappropriate thinking (V14/T23, 24). Therefore the plan would not be well thought out or well executed (V14/T24). Because of the drug, Davis would have been more susceptible to Valessa's idea to kill her mother (V14/T23). Smith concluded that, since it was irrational and unrealistic for these defendants to think that they could get away with this murder, the murder could not have been cold, calculated and premeditated (V14/T25).

Smith clarified that he was not testifying that LSD affected Davis's ability to waive his Miranda rights in this case, but that it is a factor which should be considered in combination with the other factors existing in this case, including lack of sleep and Davis being a "young person not very knowledgeable about how all this is going to work" (V14/T20-22). Smith stated

that the affects of LSD usually last approximately twelve hours, and his understanding was that Davis's post-arrest statements were made about twelve hours after he had ingested LSD (V14/T18, 21).

According to Smith, a person under the influence of LSD will not act or appear to be impaired, and will still be able to recall great details about their experiences under the influence (V14/T13). Smith could not identify any particular perceptual distortion that Davis experienced based on his LSD use in this case (V14/T43-44).

Dr. Janice Stevenson is a licensed psychologist that works with traumatized kids and families in Maryland (V17/361). She diagnosed Davis with Pervasive Development Disorder, Post Traumatic Stress Disorder, and Attention Deficit Hyperactivity Disorder (V17/T371, 393-94). These conditions left him vulnerable to dependent intimate relationships and fearful of being alone and abandoned (V17/T371). Stevenson reviewed Davis's childhood development extensively, and determined that there had been global failure, through poor parenting and the schools' failure to identify him as being at risk (V17/T454). Although this was Stevenson's first experience with a Florida death penalty case, she was confident that additional mitigating factors should have been applied, including extreme disturbance, based on his personality disorders; substantial impairment,

based on his drug use and lack of sleep; under the domination of another person, based on Valessa's influence, his fear of being alone, and his fear of abandonment; and age, based on his being emotionally younger than 19 (V17/T442-43, 450, 452, 506).

Dr. Stevenson had read an article which led her to believe that an individual that consumed LSD would be under the influence of that drug for three days (V17/T444). Due to that information, she believed that his LSD use, in combination with other factors, rendered Davis too mentally compromised to voluntarily waive his Miranda rights (V17/T434-35).

Dr. Stevenson did not talk to Davis about what happened on the night of the murder, but she characterized this crime as impulsive, random, and spontaneous (V17/T403-04, 491-92, 495). His disorders contributed to the crime because the pervasive personality disorder would make Davis vulnerable to the fear of losing Valessa and her love and impair his ability to handle social interaction; that and the ADHD would cause poor impulse control and would contribute to his general drug use (V17/T371, 404, 420, 453, 467, 471, 489).

State witness Dr. Michael Gamache is a psychologist licensed in Florida for over twenty years (V16/T265). He has testified as an expert in death penalty cases at least ten to twenty times (V16/T268). He was retained in this case by attorney Rick Terrana and testified as a defense witness in penalty phase

(V16/T268-70).

In preparing for his testimony, Dr. Gamache reviewed numerous records, spoke with Davis's relative, Carol Elliott, and met with Davis three times (V16/T271-73, 286). He first met with Davis on January 7, 1999, and conducted a psychosocial history interview, a mental status exam, and a diagnostic interview (V16/T273-74). At his second meeting, on August 3, 1999, he had follow-up questions and discussion, and administered the Personality Assessment Inventory (V16/T274). The results of the PAI were "problematic," because the built-in validity measures indicated that the scores were not valid; Davis was trying to grossly exaggerate mental health problems (V16/T276). Gamache discussed these results with Terrana (V16/T277). Up to this point, Gamache had not discussed the facts of the offense with Davis (V16/T277). At the third meeting, on October 28, 1999, they talked about the crimes in great detail (V16/T277).

Dr. Gamache had previously worked with Terrana on capital cases and was familiar with Terrana's style; they discussed Terrana's approach in this case and how he intended to use Gamache as a witness (V16/T269-70, 278). Gamache recalled they had a couple of conversations about Terrana's particular concerns and his legal strategy (V16/T279). In talking about the specific mitigators related to mental illness, they

discussed the fact that Davis had no history of a mental illness diagnosis or treatment (V16/T279-80). They also discussed the invalid test results and recognized that if they pursued mental health mitigation, they would have to reveal that the test results were invalid because Davis was not being candid (V16/T280). Close to trial, Terrana advised Gamache that Terrana was primarily looking for information about Davis's background and history (V16/T280). Gamache was also asked to prepare an opinion as to whether Davis would be dangerous or violent if sentenced to life in prison; Gamache was able to reach a favorable conclusion on that question based on the psychological data available (V16/T280-81).

Dr. Gamache was aware that Davis had been using illegal drugs on the day of the murder; when he related to Terrana what Davis had told him about Davis's drug use, Terrana's reaction was that would not help them in mitigation (V16/T281-82). Davis admitted that he had a history of very heavy drug use, having used nearly every illicit drug; he was addicted to or dependent on cocaine, LSD, crystal methamphetamine, and alcohol at one time or another, and had also used heroin, marijuana, crack, opium, and GHB (V16/T283-84). He was also dealing drugs, selling LSD to support his habit, as well as stealing (V16/T282, 285). Terrana was aware of all of this (V16/T282).

Gamache recalled that prior to giving his deposition,

Terrana had made general statements such as this doesn't look good, this is problematic, this may be something we want to focus on (V16/T305). At the deposition was the first Gamache really heard about what issues Terrana intended to explore; Terrana had not provided questions or specific direction to that point (V16/T302). Following the deposition, Terrana emphasized the direction he wanted to go (V16/T302). Terrana indicated that he wanted jurors to understand that Davis was not a beast, he wanted jurors to hear things about Davis's background and history that they may feel sympathetic about, and he wanted them to understand what would be expected if Davis were sentenced to life (V16/T303).

Following the hearing, the court entered an extensive order denying all relief (V7/1123-57). This appeal follows.

SUMMARY OF THE ARGUMENT

All of the claims presented in this appeal were litigated at the evidentiary hearing conducted below. As to each claim, the trial court outlined factual findings to explain the denial of the issue presented; all of the factual findings are supported by competent, substantial evidence. As no procedural or substantive error has been shown with regard to the factual findings entered or the application of the relevant legal principles by the lower court, no relief is warranted and this Court must affirm the order entered below denying postconviction relief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PREMISED ON THE FAILURE TO PRESENT EXPERT TESTIMONY AT THE HEARING ON THE MOTION TO SUPPRESS DAVIS'S STATEMENTS.

Davis initially asserts that he was denied the effective assistance of counsel at his 1999 capital trial when his attorneys failed to present expert testimony at the hearing on the motion to suppress Davis's post-arrest statements. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Prior to trial, Davis's attorneys litigated a motion to suppress Davis's post-arrest statements (V3/233-331; DA. V15/1446-1542). According to the motion, Davis's statements were inadmissible because his constitutional rights were violated when Hillsborough sheriff's detectives interviewed him after his arrest in Texas. After a hearing, the trial court denied the motion, finding that Davis was not suffering from any cognitive defect or sleep deprivation which interfered with his ability to understand and waive his constitutional rights (V3/329; DA. V15/1540). The issue was presented in the direct

appeal and this Court upheld the ruling. Davis, 859 So. 2d at 471-72.

In his postconviction motion, Davis contended that his trial attorneys had performed deficiently in litigating the suppression motion, because they failed to present an expert to testify that Davis's LSD use had negated Davis's ability to know and understand his rights, thus making his statements involuntary. Davis also asserted that expert testimony should have been presented to establish that, due to his general mental health and his being a "young and mentally tortured individual," Davis could not fully comprehend his rights.

The court below outlined the testimony presented on this issue, and thereafter denied this claim as follows:

> The record supports the conclusion that Mr. Traina's performance in not calling an expert for Defendant's motion to suppress was not deficient, and that the decision was reasonable under the circumstances. The experts' testimony presented at the evidentiary hearing fails to support the argument that Mr. Traina's decision to not have an expert for his motion to suppress was deficient. Dr. Smith testified that Defendant could have had perceptual distortions that could have affected his ability to understand Miranda warnings; however, he could not explain those distortions. Additionally, Dr. Smith testified that sleep deprivation could have significantly diminished Defendant's ability to knowingly waive his rights; however, Dr. Smith admitted that he did not know how much sleep Defendant had had. Dr. Smith also testified that the effects of LSD generally last for twelve hours, but law enforcement interviewed Defendant approximately fifteen hours after his arrest. Unless Defendant

> consumed LSD while in police custody, he would no longer have felt the effects of LSD when law enforcement interviewed him. Dr. Stevenson testified that Defendant was at the "mercy of his impulses and his emotions and unable to make a clear and conscious decision" and that he made his confession "so that he wouldn't be alone." However, the fear of being alone does not negate one's ability to comprehend and knowingly waive Miranda rights.
>
> Additionally, the Court finds that even if Mr. Traina's performance was deficient, Defendant has failed to show that he was prejudiced. If Davis's confession had been suppressed, there is no reasonable probability that the results of Defendant's trial would have been different. See Wainwright v. State, 896 So. 2d 695, 700 (Fla. 2004) (finding that there was no prejudice where there was no reasonable probability that the result would have been different due to evidence presented other than confession). At Defendant's trial, the State presented the testimony of codefendant, Jon Whispel, who was present during Vicki Robinson's murder. (See November 3, 1999 transcript, V. 7, pp. 834-941, attached). Additionally, Leanna Hayes, an inmate who was transported back to Florida with Defendant after his arrest, testified at Defendant's trial that while they were being transported, he told her he had "'cut her up' meaning the lady he killed." (See November 4, 1999 transcript, V. 9, p. 1160, attached).
>
> The Court finds Defendant has failed to show how counsel performed deficiently or how counsel's allegedly deficient performance affected the outcome of the proceedings. As such, Defendant is not entitled to relief as to Claim I.

(V7/1130-31). A review of the record demonstrates the propriety of this ruling.

Trial counsel Traina explored the circumstances of Davis's confession and litigated an argument for suppression based on the facts as outlined by his client (V15/T89-93; DA. V3/514-516, V15/1446-1540). Traina testified that his communications with

Davis did not give him any basis to believe that Davis had a diminished capacity to understand, and he reasonably felt from listening to the tape of the confession, that Davis's conduct, his interactions with the officers, being responsive, providing details regarding the offense, and failing to make any comments about his condition, all undermined an argument of involuntariness (V15/T94, 106). In fact, Davis himself testified at the suppression hearing that he "had no problem understanding what was going on in there" when his rights were being explained to him (V3/313; DA. V15/1524). There has been no showing that Traina had any reason to suspect that Davis could not understand the Miranda rights, which Davis acknowledged and waived both orally and in writing (DA. V15/1467-72; V19/1736-37). North Carolina v. Butler, 441 U.S. 369, 373 (1979) (express written waiver provides strong proof of validity).

Dr. Gamache, the retained defense mental health expert, had discussed the circumstances of Davis's confession with Davis, and Davis admitted to Gamache that he spoke with the police in order to protect his girlfriend, Valessa (V3/388). Traina was sure that either he or Terrana had explored this issue with Dr. Gamache (V15/T108-09). Davis had provided a detailed account of the facts to Gamache, and counsel was concerned that exposing Gamache to cross examination would provide the State with additional incriminating evidence (V15/T134-36). On these

facts, counsel's failure to present expert testimony which contradicted his client's sworn testimony was not unreasonable. See [Mark] Davis v. State, 915 So. 2d 95, 123 (Fla. 2005) (no showing of ineffective assistance of counsel for failing to file a motion to suppress statements where counsel testified, based on his assessment at the time, there were no issues worthy of a motion).

Davis offered no testimony at the hearing to establish that all reasonable attorneys litigating a motion to suppress statements faced with the facts of this case would present expert testimony to support the motion. In addition, the expert testimony presented at the evidentiary hearing fails to support a conclusion of deficient performance or any possible prejudice.

Dr. Smith initially testified that, in his opinion, Davis had consumed LSD prior to making his statement to the police, and that the drug "significantly impaired his ability to knowingly waive his rights before making a statement" (V14/T10). However, in explaining his opinion, Smith stated that he was not testifying that the LSD affected Davis's ability to waive his right to remain silent; rather, he stated only that the drug use was a factor that should be considered in determining whether Davis could voluntarily waive his rights (V14/T21). Curiously, Smith was not asked to provide a statement as to

whether Davis could or did voluntarily waive his Miranda rights in this case (V14/T65).

According to Smith, Davis had ingested the drug about twelve hours before speaking with law enforcement, and the effects of the drug typically lasted about twelve hours (V14/T18, 21). The record, including Davis's testimony at the suppression hearing, supports the trial court's finding that it was actually about fifteen hours, outside the time frame Davis would still be under the influence according to Dr. Smith, who specialized in addictive disorders (V3/310, V14/T20; DA. V3/514-516; V15/1480, 1521). Davis, 859 So. 2d at 472 (noting Davis had been in custody approximately fifteen hours before meeting with detectives). Smith was also under the impression that Davis had been awake for twelve hours, tripping on LSD, and sleeping "for a brief period" before being awakened to speak with the officers (V14/T21-22, 41). However, at the suppression hearing, Davis testified that he had been sleeping the whole time he had been in his cell, from about 2:30 in the afternoon until Tampa detectives woke him up after 5:00 the following morning (V3/310; DA. V15/1521). In denying the motion to suppress, the trial court found that Davis was not sleep deprived (V3/329; DA. V15/1540). Thus, if anything, Smith's testimony would have diminished the weight of Davis's suppression hearing testimony about having ingested the drugs.

Smith's testimony was not constitutionally compelled; rather, the admonishment for consideration of the effects of Davis's LSD "trip" was unnecessary, as the lower court did in fact consider the drug use as one of several factors allegedly impacting the voluntariness of the confession (DA. V15/1535-40). Of course, Smith repeatedly acknowledged that the LSD use would not affect Davis's ability to plan or act purposefully (V14/T12, 23-24), but he characterized any subsequent behavior as impaired because it would be influenced by the perceptual distortions caused by the LSD. Given the LSD use, he considered Davis's decision to waive Miranda to be "impaired," notwithstanding his inability to identify any particular distortion which may have affected Davis's thinking or influenced Davis's ability to understand his rights (V14/T20-21, 35-36, 43). Dr. Smith's testimony does not suggest any error or impropriety in the prior conclusion that Davis understood and voluntarily waived his rights.

Although Davis also asserts that a mental health expert could testify about Davis's "general mental health," neither Dr. Smith nor Dr. Stevenson specifically addressed Davis's mental functioning as it related to this issue, and his appellate brief only discusses impairment due to the LSD use. Smith specialized in addictive disorders and focused primarily on Davis's LSD use; he conducted a psychological interview and tested Davis with

drug screening exams (V14/T6-8). He stated that he did not have sufficient information to assess any possible "mental illness," but noted that Davis's records demonstrate an average IQ and average cognitive functioning (V14/T32, 39). Stevenson diagnosed Davis with a developmental disorder, attention-deficit disorder, and stress disorder, but did not explain whether or how these deficiencies affected Davis's ability to understand or voluntarily or waive his rights (V17/T434-35).

No prejudice can be discerned because, even if the expert testimony presented below had been offered at the suppression hearing, it would not have provided a basis to grant the motion. In order to prevent the State from admitting Davis's confession, the defense would have had to establish that Davis's desire to remain silent was overborne through police coercion. Colorado v. Connelly, 479 U.S. 157, 167 (1986). Dr. Smith testified that Davis's LSD use would not be apparent to the officers, and Dr. Stevenson testified that Davis's developmental disorder would be difficult for a lay person to recognize (V14/T35, V17/T466). Thus, there is no suggestion that the police were taking advantage of Davis's vulnerability, and no indication of the necessary police misconduct required for suppression under Connelly. As previously noted, Davis's own testimony at the suppression hearing refutes the suggestion that his prior drug use, or any combination of other factors,

rendered his confession involuntary. Specifically, Davis affirmed that he understood what was going on when his rights were being explained to him (V3/311, 313; DA. V15/1522, 1524). He described the LSD used shortly before his arrest as "paper acid," which is "more visual … your mind is distorted a little bit, not much" (V3/316; DA. V15/1527). In addition, Davis had admitted to Dr. Gamache that Davis spoke to law enforcement in order to protect Valessa (V3/388). In light of these facts, the postconviction expert testimony on this point would not have compelled the suppression of Davis's statements.

Davis has not demonstrated that the failure to offer expert testimony at the suppression hearing was objectively unreasonable. In addition, he has not acknowledged or addressed the trial court's finding that the result of his trial would not have been different even if an expert had been presented at the suppression hearing. In this case, the State presented direct evidence from Jon Whispel, an eyewitness to many of the events relating to Vicki's murder, in addition to other direct and circumstantial evidence placing Davis at the crime scene and related areas, using Vicki's ATM card, and fleeing in her van with Valessa and Whispel; Davis also made additional incriminating statements. See Wainwright v. State, 896 So. 2d 695, 700 (Fla. 2004) (no prejudice could be demonstrated for allegation of ineffective assistance of counsel for failing to

litigate motion to suppress where evidence other than confession showed result of proceeding would not be different); Mansfield v. State, 758 So. 2d 636, 644-45 (Fla. 2000) (finding error in admitting confession harmless where it was "not the centerpiece of the State's case"). Therefore, counsel cannot be deemed ineffective for failing to offer expert testimony at the pretrial suppression hearing, and the denial of this claim must be upheld.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIMS THAT HIS POST-ARREST STATEMENTS WERE INADMISSIBLE AND THAT THE PROSECUTOR KNOWINGLY PRESENTED FALSE TESTIMONY AT THE SUPPRESSION HEARING.

Davis's next issue also relates to the litigation of the motion to suppress his post-arrest statements. In this claim, Davis asserts that his statements were inadmissible under Missouri v. Seibert, 542 U.S. 600 (2004), and that the State violated Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois, 360 U.S. 264 (1959), by knowingly presenting false testimony at the suppression hearing prior to trial. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033.

To the extent that Davis now challenges his statements as inadmissible under Seibert, this claim is procedurally barred. The admissibility of Davis's confession was challenged prior to trial and on appeal. The defense argued that Davis was not acting voluntarily when he waived his Miranda rights and confessed to killing Vicki Robinson; the trial court rejected that claim and this Court affirmed its ruling. Davis, 859 So. 2d at 471-72. Because this issue was denied on the merits at

trial and on appeal, it is now procedurally barred. Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005). The voluntariness of a confession is an issue to be litigated at trial and on direct appeal; it is not subject to postconviction consideration. Johnson v. State, 903 So. 2d 888, 898 (Fla. 2005).

Davis claims, however, that the subsequently decided Seibert case requires reconsideration of this issue. According to Davis, Seibert establishes that Davis's confession was not voluntary but only provided in response to an illegal, "question-first" police technique designed to circumvent the restrictions on police interrogations mandated in Miranda v. Arizona, 384 U.S. 436 (1966).

The Seibert case offers no basis for reconsideration of the suppression issue. The admissibility of Davis' confession turns on the law in effect at the time of his trial and direct appeal, and is not subject to further review simply because another Fifth Amendment case has been handed down from the United States Supreme Court. Despite Davis's argument to the contrary, Seibert is not subject to retroactive application in Florida. Such retroactivity must be determined under Witt v. State, 387 So. 2d 922 (Fla. 1980).

In considering retroactivity, it is important to compare Solem v. Stumes, 465 U.S. 638 (1984), where the United States

Supreme Court rejected retroactive application of Edwards v. Arizona, 451 U.S. 477 (1981). Solem was decided when the United States Supreme Court applied the same test for retroactivity as that set forth in Witt. See generally, Stovall v. Denno, 388 U.S. 293 (1967) (considerations include the purpose served by the new decision; the extent of reliance on the old law; and the effect that retroactive application would have on the administration of justice). Employing that analysis, the Solem court concluded that Edwards, a case which, like Seibert, clarifies application of Miranda, should not be applied retroactively.

In State v. LeCroy, 461 So. 2d 88, 92 (Fla. 1984), this Court declined to even apply Edwards to the direct appeal before it. The court reasoned that, because retroactive application would not deter further police misconduct, the purposes of the exclusionary rule would not be served by retroactive application. For this reason as well as the analysis applied in Solem, Seibert is not subject to retroactive application and cannot be used as a basis to reconsider the previous rejection of Davis's confession claim.

The court below did not rule on the question of retroactivity but determined that, even if applicable, Seibert would not compel relief. The court also determined that no

Giglio violation had been demonstrated in this case:

Siebert Violation

Defendant argues that "Detective Iverson and Deputy [Marsicano] utilized the question-first strategy. Detective Iverson testified that this is the procedure he uses in most cases, (App. 1-2, p. 12) and that he did all three in the exact same way." (See Motion, p. 14, attached). Defendant cites the following testimony in support of his argument:

Q: Is there any strategy decision or procedure you were following in that case to avoid doing that? [giving Miranda warnings]
A. No, sir, I just didn't think it was necessary during that initial time. If I was going to use what he said at that point in time against him, you know, then I probably would have needed to do that.
Q. So it was never your intention to use the initial portion of the interview then?
A. That's correct.

(See Motion, p. 20, attached). Defendant then asserts that "[t]his testimony is fundamentally untrue as highlighted in the Supreme Court's decision. When asked directly by counsel whether the question-first practice was 'strategy decision or procedure,' Detective Iverson gave misleading information." (See Motion, p. 20, attached).

Although the United States Supreme Court had not yet decided Seibert at the time of Defendant's direct appeal, Defendant argues that it should apply retroactively. However, even if Seibert applied retroactively, it does not entitle Defendant to relief. In Seibert, the United States Supreme Court stated that "[t]he threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Seibert, 542 U.S. at 610. The Florida Supreme Court considered the voluntariness of Defendant's confession on direct appeal and concluded that,

> the circumstances surrounding Davis's warned confession properly "cured" the condition that rendered the unwarned statement inadmissible. Elstad, 470 U.S. at 311. The officers in this case carefully read Davis his Miranda rights, explaining each section of the waiver form, clearly reading aloud and explaining each right, and confirming after each right that Davis understood. The officers asked Davis to confirm that the officers did not threaten Davis or promise anything in exchange for his statement and thereafter obtained a signed, written waiver of rights. Only after this signed written waiver was obtained did Davis fully explain his involvement in the crime. The officers in no way attempted to downplay the significance of Davis's Miranda rights.

Davis, 859 So. 2d at 472. Based on the Florida Supreme Court's reasoning under Elstad, which was the law in effect at the time of Defendant's direct appeal, analysis under Seibert would render the same result. It is reasonable to find that the warnings Defendant received functioned "effectively" as Miranda requires.

Additionally, in his motion, Defendant argues that Detective Iverson's testimony was "fundamentally untrue" and "misleading;" however, Defendant fails to establish this. At the evidentiary hearing, Detective Iverson testified that when interviewing someone, he routinely does not give Miranda warnings at the beginning of the conversation so he can establish rapport with the individual. (See April 20, 2006 transcript, pp. 12-15, attached). Detective Iverson further testified that he did not use a "question first" technique in Defendant's case to avoid giving Miranda rights. (See April 20, 2006 transcript, p. 32, attached). The Court notes that at the evidentiary hearing, when asked whether the question-first procedure was a technique, Detective Iverson responded that "if you want to call it that, yes, sir." Defendant's postconviction counsel then stated, "Okay. I guess to make it easier, then let's go ahead and

call it a technique." (See April 20, 2006 transcript, p. 16, attached). However, the testimony elicited at the evidentiary hearing fails to support Defendant's claim that Detective Iverson's prior testimony is untrue or misleading.

Gi1io and Napue Violations

To establish a Giglio violation, one must show that "(1) some testimony at trial was false; (2) the prosecutor knew that the testimony was false; and (3) the testimony was material." Suggs v. State, 923 So. 2d 419, 426 (Fla. 2005) (citing Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996)). Defendant has failed to establish a Giglio violation because he has failed to show that testimony presented at trial was false and that the prosecutor knew the testimony was false. As previously addressed, Defendant has failed to show that Detective Iverson gave false testimony. The following colloquy took place between Defendant's postconviction counsel and Assistant State Attorney, Pam Bondi, at Defendant's evidentiary hearing:

Q. Now, have you ever had an occasion - - you may not remember, but have you ever had an occasion where it appears from the motion that there may have been a violation of Miranda but somehow the motion went forward and you had to explain this to the officer?
A. I don't understand what you're saying. If I felt there was a violation of Miranda, I wouldn't go forward on a motion, if that's what you're implying.
Q. Right.
A. I would never ever, ever put on testimony from any police officer nor any deputy who I felt wasn't honest.
Q. Well, no. I'm not saying honest. Let's just say that, you know, doesn't have to be dishonest, but if a deputy or police officer violated Miranda and that's what shook out either in the depositions and police reports, I mean, would you just drop the case or would you go forward and explain to the officer, I think, you know, this is the kind of close one or there may have been a violation. Let's see what shakes out?
A. I don't recall ever having to do that, at least on a serious case that I was involved in. More when you're in misdemeanor I think dealing with younger

> police officers and younger deputies you have some issues, especially search and seizure issues, and then you know, you either drop the case or you explain to the Court what your issues are. But, again, you would never call a witness unless you didn't think it affected the outcome of your case. You know - - you would always put them on and have them tell the truth.
> Q. Right. And I'm not saying that you put anyone on to not tell the truth. Have you ever had an occasion where it looks like the defense may prevail in a motion to suppress on the Miranda or suppress statements that may have been coerced?
> A. Oh, probably. Sure. Probably. Probably. And just the reason I said that before was because your motion clearly says that we knowingly put on perjured testimony. And that's absolutely not the case.
> Q. Okay. Just - - I understand what's in the motion. It's different from my question and I just want to make sure that's clear. When you're discussing these motions with law enforcement officers, do you have an occasion to - - to tell them this is what the state of the law or this is what the law is, this is what they're claiming, I think this would be your strongest point in testimony and these are irrelevant? Do you ever have discussions like that?
> A. I would never tell an officer what to say. No.
> Q. Okay. Generally then, how do you prepare or how would you prepare an officer for his testimony?
> A. Again, I would show them the motion and discuss the questions that I felt were relevant and planned on asking them. (See April 20, 2006 transcript, pp. 129-131, attached).
>
> Defendant has failed to prove that the State knowingly presented false testimony at trial. As such, Defendant is not entitled to relief as to Claim II.

(V7/1131-35).

A review of the record again confirms the propriety of this ruling. Testimony presented at the pretrial suppression hearing indicated that Det. Iverson and Lt. Marsicano interviewed Davis at the Pecos County Jail on July 3, 1999, at about 5:15 a.m.

Tampa time (DA. V15/1451-52, 1458). Davis, Jon Whispel, and Valessa Robinson had been arrested the previous day and Davis had been sleeping in his cell when Iverson and Marsicano arrived (DA. V15/1480, 1510). The officers had spoken with Valessa and Whispel prior to speaking with Davis, and felt that the case was a homicide at that point although it was still being investigated as a missing persons report (DA. V15/1451, 1456).

Iverson testified at the suppression hearing that he did not immediately read Davis his constitutional rights, as Iverson wanted to establish a rapport with Davis initially and did not intend to use any preliminary conversation against Davis (DA. V15/1457-59, 1464). According to Iverson, this was his standard practice when possible, as his style was to get someone comfortable and at ease before breaching a difficult subject (DA. V15/1457-58, 1465). This pre-interview lasted about eight to ten minutes; Davis was asked questions and admitted his involvement in Robinson's murder at that time, but the State made no attempt to admit these statements at the trial (DA. V15/1459, 1466, 1529).

Thereafter, Iverson and Marsicano advised Davis of his rights, and Davis voluntarily signed a written consent to interview form (DA. V15/1466-69, 1481, 1507). Iverson described, at the suppression hearing, how he explained the rights individually to Davis, and that Davis understood and

acknowledged his rights (DA. V15/1469-72). Davis never asked for an attorney or requested that the interview be stopped at any time (DA. V15/1475, 1507-08, 1522). Both Iverson and Marsicano testified that Davis was coherent and alert, and that he did not seem to be injured or under the influence of drugs; he never appeared to have any problems understanding what was happening (DA. V15/1460-64, 1507-08).

After waiving his rights, Davis agreed to provide a map to help the officers locate Robinson's body (DA. V15/1476). He drew the map and agreed to allow the officers to tape record his statement (DA. V15/1476, 1489-1500). He then repeated his involvement in plotting and carrying out Mrs. Robinson's death (DA. V15/1489-1500).

The veracity of this testimony was confirmed at the postconviction evidentiary hearing. Sgt. Iverson testified and affirmed that he was not employing a "question-first" technique in order to avoid Miranda when interviewing the suspects in this case (V16/T235-36). Rather, the officers were establishing a rapport with Davis, which does not automatically taint later statements given post-Miranda (V16/T215-16, T244). See Wencel v. State, 737 So. 2d 630 (Fla. 4th DCA 1999). That testimony was unrebutted and unimpeached, and provided sufficient evidence for the court below to reject Davis's claim that Iverson lied on this point. Even if that unequivocal testimony were discounted,

there is no basis to suggest that the prosecutor could have known of any such training or intentionally elicited perjury. The prosecutor was not even the one questioning Iverson at the suppression hearing. Finally, even if the detectives had been trained to use an improper technique, it would not have changed the result of the suppression hearing or affected the jury verdict. As Seibert had not been decided at that time, such testimony would not have mandated suppression of Davis's confession.

Davis argues that testimony acknowledging an intentional "question first" strategy for purposes of avoiding Miranda would show this case is more like Ramirez v. State, 739 So. 2d 568 (Fla. 1999), but Ramirez was distinguished following the suppression hearing because 1) Ramirez was a juvenile, interrogated at a juvenile facility; and 2) Ramirez did not execute a written waiver of his Miranda rights (DA. V15/1540). The similarity that Ramirez had incriminated himself to some degree prior to being advised of his Miranda rights was recognized at the time of the suppression hearing and therefore the result of the suppression hearing would be the same.

In order to establish a Giglio violation, Davis must show: 1) false testimony was presented at trial; 2) the prosecutor knew the testimony was false; and 3) the false testimony affected the jury's verdict. See Suggs v. State, 923 So. 2d 419

(Fla. 2005). The court below correctly identified these elements, and determined that Davis did not prove any one of these elements, let alone all three. The testimony which he alleges to be false was offered in response to defense questioning at a pretrial suppression hearing. Due process affords less protection at that stage, and Davis has not provided any authority applying Giglio to a pretrial hearing. United States v. Raddatz, 447 U.S. 667, 679 (1980); Parker v. State, 904 So. 2d 370, 382 (Fla. 2005). More importantly, the suppression hearing testimony in this case was not false, and the prosecution had no reason to suspect that it was.

As the court below ruled, a review of Seibert establishes that this Court correctly resolved this issue in Davis's direct appeal. In Seibert, a divided Court determined that an intentional police strategy of questioning a witness until incriminating statements are made, and then administering Miranda warnings, may render any subsequent statements involuntary and inadmissible. The key inquiry, as described by four of the justices in the majority, is whether a reasonable person would understand the warnings as conveying that the suspect retained a choice about speaking with law enforcement. See 542 U.S. at 615-17. Justice Kennedy, providing the fifth vote for the majority, advocated a different approach that focuses on the subjective intent of the police and whether the

"two-stage interrogation" was intentionally used to undermine the efficacy of the Miranda warnings. See 542 U.S. at 618-22. This Court's prior analysis of this claim was perfectly consistent with Seibert, by focusing on the effectiveness of the warnings given to Davis in light of the fact that he had already incriminated himself by the time the warnings were given. Because the suppression of Davis's confession would not be compelled by Seibert, no postconviction relief is warranted. See generally, United States v. Terry, 400 F.3d 575 (8th Cir. 2005) (applying Seibert); State v. Holmes, 278 Kan. 603, 608-609 (Kan. 2004) (same).

Davis did not offer any evidence or testimony to support his claim of false testimony, he relies entirely on Seibert to suggest that the detectives in this case were lying. However, a reading of the Seibert decision fails to reveal any basis to brand Iverson's testimony as false. Simply because the officer in Seibert, a member of the Rolla, Missouri police force, was trained to secure incriminating statements before giving a suspect his Miranda warnings does not mean that Iverson lied at the suppression hearing. In fact, Seibert recognized that not all law enforcement agencies train their officers to conduct interrogations using a "question-first" technique. See 542 U.S. at 610, n. 2 (contrasting interrogation techniques from various law enforcement manuals and noting that "[m]ost police manuals

do not advocate the question-first tactic"). Seibert does not suggest any Giglio violation in Davis's case, and given the lack of specific testimony or evidence to establish that the prosecutor knowingly presented false testimony from Det. Iverson, no relief can be granted on this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PREMISED ON THE FAILURE TO PRESENT EXPERT TESTIMONY ON THE DEFENSE OF VOLUNTARY INTOXICATION.

Davis also claims that his attorneys were constitutionally ineffective for failing to present expert testimony in support of a voluntary intoxication defense. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033.

The court below quoted extensively from testimony presented on this issue (V7/135-39), and thereafter denied this claim as follows:

> At the evidentiary hearing, Dr. Smith repeatedly testified that Defendant's LSD ingestion would not negate his ability to plan or act purposefully. (See February 8, 2006 transcript, pp. 12, 23-24, attached). Dr. Smith testified that Defendant's actions would be based on "distorted perceptions." (See February 8, 2006 transcript, pp. 22, 38, attached). However, Dr. Smith could not testify as to what the distortions would be or give any specific information about the distortions. (See February 8, 2006 transcript, p. 43, attached).
>
> Trial counsel's performance in presenting the voluntary intoxication defense was not deficient. Trial counsel's testimony at the evidentiary hearing establishes that given the problems with the plausibility of the defense, counsel presented the defense as best he could. Trial counsel questioned the State's witnesses about Defendant's LSD use on the night of the murder. Additionally, he argued voluntary intoxication during closing argument and even received

a voluntary intoxication jury instruction. Because Defendant relayed the details of the crime to trial counsel in great detail, trial counsel thought it would be "false" or "untrue" for him to submit to an expert that Defendant could not relate what had happened. Additionally, trial counsel testified that if he had retained an expert, he was concerned that the State would learn damaging information about Defendant when the State deposed the expert. Trial counsel made a tactical decision to present the defense of voluntary intoxication to the jury; however, trial counsel was not deficient by not hiring an expert to establish the defense. The record supports the conclusion that trial counsel made a strategic decision not to call an expert to testify about the voluntary intoxication defense and that the decision was reasonable under the circumstances. Furthermore, Dr. Smith's testimony that Defendant's LSD use would not affect Defendant's ability to plan and act purposefully would have negated the voluntary intoxication defense that trial counsel was able to present to the jury. Thus, it cannot be said that trial counsel's performance was deficient.

Additionally, the Court finds that even if trial counsel's performance was deficient, Defendant has failed to show that he was prejudiced. The voluntary intoxication defense was presented to the jury, yet there was evidence that invalidated the defense. Defendant confessed to the crime and recalled details. At Defendant's trial, the State presented the testimony of codefendant, Jon Whispel, who was present during Vicki Robinson's murder. (See November 3, 1999 transcript, V. 7, pp. 834-941, attached). Additionally, Leanna Hayes, an inmate who was transported back to Florida with Defendant after his arrest, testified at Defendant's trial that while they were being transported, he told her he had "cut her up' meaning the lady he killed." (See November 4, 1999 transcript, V. 9, p. 1160, attached). Therefore, Defendant has not shown that he was prejudiced.

The Court finds Defendant has failed to show how counsel performed deficiently or how counsel's allegedly deficient performance affected the outcome of the proceedings. As such, Defendant is not entitled to relief as to Claim III.

(V7/1140-41).

Once again, a review of the record demonstrates the propriety of this ruling. At the evidentiary hearing, trial counsel Chuck Traina testified that the primary defense was that Valesssa Robinson was the one responsible for her mother's murder, and Davis's only involvement was in helping Valessa "after the fact" (V15/T85-86). However, Traina was able to suggest that Davis's drug use also affected his ability to premeditate the murder (V15/T85). To that end, he elicited testimony from Jon Whispel regarding the consumption of LSD by all of the defendants on the night of the murder, and had Whispel detail the effect on him personally (V15/T85, 111). He also secured the giving of a jury instruction for voluntary intoxication (V15/T110-11). As Traina realized, he did not have facts available to support the defense (V15/T99, 101-05). Davis was able to recall and describe the actions taken that night in furtherance of the plan to kill in great detail, making the defense difficult (V15/T101-05). Traina is an experienced capital defender, and testified that he was aware of the defense, but does not consider it very persuasive (V15/T86, 98-99). Another concern was, if he used an expert, the State would be able to take their deposition, which could backfire on the defense (V15/T102, 134-35).

The trial transcript corroborates Traina's testimony. The

defense asserted primarily that Davis's involvement was minimal and did not justify a first degree murder conviction. A lack of premeditation was urged consistently in both opening and closing statements, relying on the evidence of substance abuse as well as other factors (DA. V11/804-08; V13/1204-12). Traina cross examined Jon Whispel extensively regarding the use of LSD on the night of the murder, exploring the distorted perceptions Whispel experienced, and secured the appropriate jury instruction (DA. V11/892-95, 899, 902-09, 920, 925; V13/1254-55).

Although Davis now faults counsel for failing to present expert testimony to further the voluntary intoxication defense, he has failed to demonstrate that any such testimony was necessary or available. At the evidentiary hearing, Dr. Smith was the only expert to directly address Davis's ability to premeditate. The frivolity of a voluntary intoxication defense is demonstrated in Dr. Smith's testimony. Smith repeatedly acknowledged that Davis's LSD use would not negate his ability to plan or act purposefully (V14/T12, 23-24). Smith felt that the particular planning in this case did not amount to premeditation because there was no "rational" plan, only one was based on perceptions distorted by drug use (V14/T23-24). However, he was not able to identify any particular distortion or misperception that played a factor in the commission of this crime, despite acknowledging that LSD users would be able to

recall and identify such elements of a particular "trip" (V14/T13, 43).

Of course, Florida's definition of premeditation does not include an element of rationality. The genesis behind the plan is a factor of motive, not premeditation. The fact that Dr. Smith believed the plan to murder Mrs. Robinson was not well thought out or executed would not preclude a finding of premeditation, which is fully supported by the evidence. Any characterization of this murder as impulsive or spontaneous is not well taken. Premeditation can be formed in a moment, and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994); Asay v. State, 580 So. 2d 610, 612 (Fla. 1991). However, the premeditation in this case was not brief or fleeting, but was extensive and resolute.

Testimony at trial revealed that, once the plan to kill was discussed at Denny's Restaurant, Davis and his accomplices went to great lengths to see that the goal was accomplished. The initial design called for injecting the victim with heroin, in order to suggest an accidental overdose (DA. V11/841). A number of steps were taken, including returning to the Robinson home, sneaking the family van out of the garage, then driving to a friend's house in order to purchase heroin and a syringe (DA.

V11/841-43). This plan was thwarted when they could not get the heroin, and a new plan, using the needle to inject bleach, was adopted (DA. V11/843-46). Back at the Robinson house, Davis, Valessa, and Whispel stayed in Valessa's room, gathering and preparing their weapons (DA. V11/845-46). After filling the needle with bleach, Davis and Valessa took the needle and a pocketknife, but returned to the room when Mrs. Robinson woke unexpectedly and surprised them (DA. V11/847). She followed them back to Valessa's room and instructed her daughter to get a sleeping bag and go to another room (DA. V11/847-48). Davis followed Mrs. Robinson out, then grabbed her in a choke-hold and wrestled her to the ground (DA. V11/848-49). Davis called for the others to bring him the needle, then for Valessa to hold her mother down so he could find the needle (DA. V11/849-50). Davis tried to inject the needle into Mrs. Robinson's neck, emptying out the bleach -- but after a few minutes told the others that it wasn't working (DA. V11/851-52). Whispel took the pocketknife to them and returned to Valessa's room (DA. V11/852). Davis had blood on his hands and was holding the knife when he and Valessa returned to her room (DA. V11/852-53). Davis cleaned up and they all sat around smoking a cigarette, but the ordeal was not over (DA. V11/853). When he heard Mrs. Robinson moaning, Davis remarked, "the bitch won't die," and left again with the knife (DA. V11/853). He told Whispel that

he had stabbed Mrs. Robinson and also tried to break her neck (DA. V11/853-54). As these facts show, the defendants did not just intend to kill Mrs. Robinson, they were determined to do so.

It is well established that, at the time of Davis's trial, voluntary intoxication was an affirmative defense, requiring a defendant to present evidence of intoxication at the time of the offense sufficient to establish that the defendant was unable to form the necessary intent. Dufour v. State, 905 So. 2d 42, 52 (Fla. 2005); Henry v. State, 862 So. 2d 679, 683 (Fla. 2003). In this case, the jury was fully instructed on the defense of voluntary intoxication "by use of drugs," concluding, "Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of performing the premeditated design to kill or you have a reasonable doubt about it, you should find the defendant not guilty of murder in the first degree" (DA. V13/1254-55). Dr. Smith's testimony that Davis would have been able to formulate a plan and act purposefully would have defeated the voluntary intoxication defense which counsel was able to place before the jury through Whispel's testimony.

Many cases recognize that trial counsel have great discretion and significant leeway in deciding whether or how to present evidence of drug use or voluntary intoxication.

Whitfield v. State, 923 So. 2d 375 (Fla. 2005); Dufour, 905 So. 2d at 52; Jones v. State, 855 So. 2d 611, 616 (Fla. 2003). In addition, a number of decisions uphold counsel's strategic decision against adoption of a voluntary intoxication defense which is not viable, as in this case. Pace v. State, 854 So. 2d 167, 177 (Fla. 2003) (finding counsel reasonably rejected intoxication defense based on information available, including defendant's confession to defense investigator showing clear recall of facts and deliberate behavior); Damren v. State, 838 So. 2d 512, 517 (Fla. 2003) (noting defendant's clear memory of events would have compromised a voluntary intoxication defense); Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001) (noting counsel's determination that defense was not viable based on defendant's ability to recall facts of this crime and his admission that he planned to rob and shoot victims); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000); Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992).

Davis has not cited any cases finding trial counsel ineffective due to the failure to pursue or adequately present a voluntary intoxication defense. Although he cites Reaves v. State, 826 So. 2d 932 (Fla. 2002), as presenting facts "somewhat similar to the case at bar," (Appellant's Initial Brief, p. 50), in Reaves, this Court merely remanded for an evidentiary hearing on the issue. Following the remand, this Court affirmed the

trial court's determination that no ineffectiveness had been demonstrated. Reaves v. State, 942 So. 2d 874, 878-881 (Fla. 2006). As Davis was granted an evidentiary hearing on this claim, Reaves provides no basis for further relief.

In this case, Traina testified that Davis's ability to recall the events leading up to the murder, including the extensive planning and deliberate behavior, was one factor keeping him from relying exclusively upon a voluntary intoxication defense (V15/T99-104). He also expressed concern about making an expert available for the State to depose, in light of the detailed admissions Davis had provided to Dr. Gamache (V15/T102, 134-36). As the above cited cases establish, his strategy was reasonable and does not support a finding of deficient attorney performance. In addition, even if some deficiency is presumed, Davis cannot show prejudice since the testimony presented at the evidentiary hearing failed to establish a viable voluntary intoxication defense.

In Foster v. State, 929 So. 2d 524 (Fla. 2006), this Court upheld the denial of a claim of ineffective assistance of counsel based on the failure to present a voluntary intoxication defense. As in the instant case, the trial attorney in Foster had asserted a lack of premeditation in opening and closing statements, elicited testimony relating to drug and alcohol use prior to the murders, and secured a voluntary intoxication

instruction for the jury. The postconviction court determined that counsel made a tactical decision to emphasize that the murders were not premeditated, while also trying to provide the jury with evidence of voluntary intoxication. The instant case is similar and compels the same conclusion.

On the facts of this case, no claim of ineffective assistance of counsel is available based on the way Traina presented the voluntary intoxication defense to the jury. As Davis has not established any deficient performance or prejudice, his claim of ineffectiveness must be denied.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM OF INEFFECTIVE ASSISTANCE PRESMIED ON THE FAILURE TO INTRODUCE THE STATEMENTS OF VALESSA ROBINSON AT DAVIS'S TRIAL.

Davis next contends that his attorneys were constitutionally ineffective for failing to lay a proper predicate for the introduction of statements by co-defendant Valessa Robinson during Davis's capital trial. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033.

The court below denied this claim as follows:

> As to Claim V, Defendant argues that counsel provided ineffective assistance of counsel when he failed to introduce the statements of Valessa Robinson in accordance with Florida Statutes Sections 90.804(2)(c) and 90.804(l)(a) [n6] in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Defendant argues that to establish the predicate to admit Valessa Robinson's statement, counsel would have had to establish that Valessa Robinson was unavailable as a witness.
>
> > [n6] Florida Statutes Section 90.804(1)(a) provides that unavailability means that the declarant, "[i]s exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement."
>
> At the evidentiary hearing, Mr. Traina testified that Valessa Robinson's trial counsel, "Deanne [Athan] told me that Valessa had changed her position. She no

longer wished to testify on behalf of Adam. In fact, didn't care for him anymore, wouldn't do that. She also said to me that she would not, under any circumstances, allow her client to do that. I mean, her client would assert her Fifth Amendment privilege to not speak. After all, she was being charged with first degree murder, also." (See February 8, 2006 transcript, p. 46, attached). Mr. Traina also testified that he "communicated with her [Valessa Robinson's] attorney who informed me that she would not do that [testify]. She would assert her fifth amendment privileges and not testify if called. And she also indicated to me that if she did ever testify, it certainly wouldn't be something that would be consistent with our defense. It would be adverse to Adam Davis." (See February 8, 2006 transcript, p. 55, attached). Additionally, Mr. Traina testified that he had no corroborative information to have the statement admitted. (See February 8, 2006 transcript, pp. 56-57, attached). Florida Statutes Section 90.804(2) provides for hearsay exceptions where the witness is unavailable. Florida Statutes Section 90.804(2)(c) specifically provides that,

> (c) Statement against interest.--A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Mr. Traina made a strategic decision not to subpoena Valessa Robinson to testify at Defendant's trial and that decision was reasonable under the circumstances. Additionally, trial counsel testified that he had no corroborative information to have Valessa Robinson's statement admitted into evidence, which Florida Statutes Section 90.804(2)(c) requires.

> Thus, trial counsel's decision did not amount to ineffective assistance of counsel. As such, Defendant is not entitled to relief as to Claim V.

(V7/1143-44).

Davis has failed to establish that his attorneys were constitutionally deficient for failing to successfully introduce statements made by co-defendant Valessa Robinson into evidence at his trial. Although Davis suggests that his attorneys were deficient because they failed to establish that Valessa was unavailable as a witness, these statements were not excluded under the mistaken belief that Valessa was available as a witness. Rather, they were excluded because there were no, and are no, corroborating circumstances which show the trustworthiness of her statements. Trial counsel correctly recognized that the only way Valessa's statements could have been admitted would be to establish, through independent corroborating circumstances, the trustworthiness of Valessa's statements (V15/T121, 127-28, 133). See § 90.804(2)(C), Fla. Stat. Traina testified that he was not aware of any such corroboration, and Davis has not identified any in postconviction (V15/T127-28).

At the evidentiary hearing, Traina agreed that the defense would have liked to have been able to present testimony directly from Valessa accepting responsibility for Vicki's murder (V15/T112-14). Up until the morning of trial, Davis was

convinced that Valessa would come and testify for him (V15/T116). However, Valessa was not available as a witness given her own circumstances, in jail and waiting for her trial on the same charges (V15/116-17, 119-20). Traina had discussed the issue with Valessa's attorney, Deanne Athan, and accepted Athan's representation that Valessa would not be willing to testify (V15/T116-17). In addition, Traina knew that the relationship between Davis and Valessa had changed, and they were no longer corresponding through letters (V15/T117, 130). Athan further advised Traina that, if Valessa were called as a trial witness, she may not invoke the Fifth Amendment but might actually testify in a manner contrary to the defense theory, further bolstering the State's case against Davis (V15/T126, 130). Traina's strategic decision against subpoenaing Valessa under these circumstances was eminently reasonable (V15/T117-19, 126).

This claim is affirmatively refuted by the trial transcript, as well as Traina's testimony regarding his strategy in attempting to place this evidence before the jury. The trial court's finding of no deficient performance is fully supported by the evidence. In addition, any possible deficiency could not result in prejudice, in light of the overwhelming evidence against Davis and the dubious probative value of Valessa's statements, which did not fully exculpate Davis. The denial of

relief on this issue must be upheld.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM THAT HE WAS DENIED DUE PROCESS BY THE STATE'S ACTIONS IN CHANGING THE THEORY OF PROSECUTION BETWEEN DAVIS'S TRIAL AND THAT OF CO-DEFENDANT VALESSA ROBINSON.

Davis next claims that he is entitled to a new trial because the State violated due process by shifting its theory of prosecution between his trial and the later trial of Valessa Robinson. Davis asserts an inconsistent theories/due process violation occurred because the State took the position in his trial that he was the one to actually stab Vicki Robinson, but then in Valessa's later trial for the same murder, the State admitted Valessa's statements indicating that she had been the one to stab her mother. According to Davis, using inconsistent evidence violated due process under Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) and Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997)(en banc), vacated on other grounds, 523 U.S. 538 (1998). This claim fails factually and legally.

This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033. The court below denied this claim as follows:

> As to Claim VI, Defendant argues that his rights to due process were violated when the State alternated between theories of prosecution when trying his case and the case of his codefendant rendering his trial

> fundamentally unfair. Defendant asserts that in Valessa Robinson's trial, the State presented the theory that she planned her mother's murder and that she stabbed her mother.
>
> However, a review of the State's opening and closing statement in Valessa Robinson's trial, as well as the direct examination of Jon Whispel in Valessa Robinson's trial, reveals that the State never argued that Valessa Robinson stabbed her mother. Rather, during Valessa Robinson's trial, the State maintained that Adam Davis had actually stabbed Vicki Robinson. (See Valessa Robinson transcripts, pp. 735-750; 874-1030; 1804-1808, attached). Therefore, the State did not alternate between inconsistent theories of prosecution. As such, Defendant is not entitled to relief as to Claim VI.

(V7/1144-45).

A review of the record demonstrates the propriety of the court's factual finding that there was no shift of prosecutorial theory between the Davis and Robinson trials. In fact, all of the evidence presented refuted this claim factually. At the evidentiary hearing, Assistant State Attorney Pam Bondi testified that, in preparing the prosecutions against Davis, Valessa, and Whispel, the State was careful to avoid taking inconsistent positions (V16/T349-51). Although each defendant's confession was admitted in their own trial, Jon Whispel's testimony was consistent and identified Davis as the actual stabber (V8/1369-V9/1481, V11/1902-V13/2307).

The Valessa Robinson trial transcript reflects that the State prosecuted Valessa as a principal, and continued to maintain that Davis had been the one to stab Vicki Robinson

(V11/1867-82, V13/2308-2313, 2380-2412). Although it is true that the State admitted Robinson's confession at her trial, the State's theory of the crime was outlined in opening and closing statements and by Whispel's testimony which, as noted above, was entirely consistent in both trials.

The fact that the State admitted Robinson's confession at Robinson's trial, in which she took responsibility for stabbing her mother, does not establish her statements as the State's theory of prosecution, or suggest that any due process violation occurred. However, even if the State had endorsed a different theory of events as alleged, no due process violation could be found.

The United States Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (J. Thomas, concurring). Defendant Stumpf had pled guilty to aggravated murder and one of three capital murder specifications, charges arising from an armed robbery in which two people were shot, and one of the victims died. At a penalty hearing, Stumpf asserted in mitigation that his accomplice, a man named Wesley, had fired the shot that killed the victim that died, and that Stumpf's role in the crime was minor. The State had countered that Stumpf had fired the fatal shot and was the principal offender

in the murder. The State also urged, alternatively, that the death penalty was appropriate because the facts demonstrated that Stumpf acted with the intent to cause death, even if he did not fire the fatal shot. The sentencers concluded Stumpf was the principal offender and imposed a death sentence. At Wesley's later trial, the State presented evidence that Wesley had admitted firing the fatal shot. Wesley countered that the State had taken a contrary position with Stumpf, and received a life sentence. Stumpf then sought relief, asserting that the State's endorsement of Wesley's confession cast doubt on his conviction and sentence. The Sixth Circuit agreed, finding Stumpf's conviction could not stand because the State had secured convictions for Stumpf and Wesley for the same crime, using inconsistent theories. However, the United States Supreme Court reversed as to this holding, finding that the identity of the triggerman was immaterial to the conviction and therefore the prosecutorial inconsistency on that point did not require voiding Stumpf's plea. 545 U.S. at 187-88.

In United States v. Dickerson, 248 F.3d 1036, 1043-44 (11th Cir. 2001), the Eleventh Circuit considered a due process claim premised on inconsistent prosecutorial theories. The court determined that due process was only implicated by inconsistent theories when the State was required to change theories in order to pursue the later prosecution. For example, in cases such as

Thompson, the inconsistency in the subsequent prosecution was essential because the government could not have prosecuted the second defendant at all under the prosecutorial theory espoused at the first defendant's trial. Because Dickerson could have been prosecuted as a conspirator under the theory even as asserted in his codefendant's earlier trial, the change of argument was not undertaken in order to allow the later prosecution and therefore due process was not implicated. Dickerson, 248 F.3d at 1044. Similarly, in the instant case, both Davis and Valessa could be prosecuted under the principal theory regardless of which defendant actually stabbed Vicki Robinson, and therefore due process is not offended by any alleged shift of prosecutorial theory relating to which defendant actually stabbed Vicki. See also Loi Van Nguyen v. Lindsey, 232 F.3d 1236, 1237 (9th Cir. 2000) (State's change of position as to who fired the initial shot did not violate due process, where theory of prosecution was voluntary mutual combat, rendering issue of who shot first irrelevant; prosecutor's arguments were consistent with the evidence presented in both trials, and there was no showing that prosecutor had falsified information or acted in bad faith).

As this claim fails both factually and legally, this Court must affirm the denial of relief.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PREMISED ON THE FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE IN THE PENALTY PHASE.

Davis also contends that he was denied the effective assistance of counsel in the penalty phase of his capital trial. Specifically, Davis asserts that his trial attorney, Rick Terrana, failed to investigate and present mitigating evidence. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033.

The court below quoted extensively from the postconviction testimony presented on this issue, and thereafter denied this claim as follows:

> As to Claim VII, Defendant argues that his counsel provided ineffective assistance of counsel when he failed to ensure that his client received a proper mental health examination in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Further, counsel provided ineffective assistance of counsel when he failed to conduct a proper investigation into potential mitigation and failed to present the mitigation in a proper way in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Defendant argues that penalty phase counsel, Rick Terrana, failed to investigate important mitigation, failed to prepare witnesses, and failed to adequately

present important mitigation testimony. Additionally, Defendant argues that Dr. Michael Gamache, a psychologist, should have been used during the penalty phase to establish statutory and non-statutory mitigation. Defendant also states that he has secured witnesses who could testify regarding many relevant facts that could have been brought out during the penalty phase.

At the evidentiary hearing, penalty phase counsel, Mr. Terrana, testified that his "general theme is not to let the jury know everything that ever happened to Adam Davis;" rather, his "approach in most cases and as it was in his case is more of, why kill him? Why do you kill this young man? Does it do you any good? Does it make us any better as a society to kill him? Okay. We have one person dead. Now you're gonna kill another person." (See February 9, 2006 transcript, p. 38, attached).

Additionally, Mr. Terrana testified that this technique usually works for him and Defendant's case was "the first one that I had lost by the slimmest of margins [a vote of seven to five for death]." (See February 9, 2006 transcript, p. 38, attached). When specifically questioned about mitigating evidence, Mr. Terrana stated that, "[j]ust because I have a 1,000 pages of mitigating evidence doesn't mean that myself or any other lawyer should necessarily present a 1,000 pages of mitigating evidence to a jury." (See February 9, 2006 transcript, pp. 40-41, attached).

At the evidentiary hearing, Mr. Terrana testified that he retained Dr. Gamache, a psychologist, for the penalty phase of Defendant's case. (See February 9, 2006 transcript, p. 11, attached). When asked whether he discussed with Dr. Gamache what his testimony would be, Mr. Terrana stated that,

A. I'm hesitating before I answer; and I'll tell you why, Mr. Cannon. Because I read your motion; and in your motion, I read where you allege on behalf of the defendant that I was ineffective because I never specifically went over the questions to be asked to Dr.
Gomache [n7] prior to his testifying. And now you're asking me essentially the same thing. And I guess I don't know what your experience is, if any, in handling death penalty cases on a trial level; but

there are a lot of things that are based on common-sense strategy, strategizing and based on experience and on gut reaction. And one of those is the use of experts and how you communicate with experts.

> [n7] The Court notes that Dr. Gamache's name is spelled incorrectly throughout the evidentiary hearing transcripts.

I used Dr. Gomache, I'm going to stick my neck out and say on almost every death penalty case, penalty phase, death penalty case that I've handled. Dr. Gomache has had, I don't know, hundreds of opportunities to testify in this courthouse. He has vast experience. And I have enough experience and wherewithal to know that if I start discussing things in particular with Dr. Gomache, if I start laying out questions for him to study, if I start having consultations with him and the client how we're going to ask questions, how he's going to answer them, then that exposes him to disclosure of those communications when, in fact, he's deposed as he almost always is prior to testifying in the penalty phase.

So there are certain things from a common sense strategy standpoint that are best left unsaid. I don't need to sit down and tell Dr. Gomache, here's what I'm going to ask you. Dr. Gomache has enough experience, and he's qualified to the point where he knows what I'm going to ask him. We've done it before. You know, we've played this game before. And, again, for me to sit down with him and lay out all these things, you know, causes us to have to disclose those or at least the potential's there to have to disclose those at some later time. And that hurts nobody but the young man sitting over there.

So did I go over specific questions I was going to ask Dr. Gomache in this case? No. Was there any doubt in my mind or Dr. Gomache's mind that he knew where we were going with this thing? No.

Q. Was there at any time any discussion between you and Dr. Gomache regarding what thoughts he had about the case?

A. Sure. Many discussions in that regard. Many discussions regarding the theme of this case where I asked him what do we have here? You know, tell me what you can offer. You know, do we have this? Do we

have that? Can we rebut this, can we rebut that? What aggravators do you think, you know, we have a chance - - I mean, those are common conversations with penalty-phase experts that you have.

(See February 9, 2006 transcript, pp. 14-16, attached).

When asked whether Dr. Gamache was ready to testify and give a deposition prior to the start of trial, Mr. Terrana testified that,

A. Absolutely. Absolutely. If you read Dr. Gomache's depo, it's an 80-plus-page depo where it's very obvious from the get-go that he is extremely obstinate. He's extremely non-cooperative, and he's doing everything he can throughout the depo not to disclose all of those things which he knows could hurt the defendant but which unfortunately he had to disclose because of the adverse ruling we received from Judge Holloway. That's a perfect example of his preparedness, and that's a perfect example of why we don't go over things specifically in terms of questions I'm going ask [sic] him and that type of stuff.
(See February 9, 2006 transcript, p. 17, attached).

When asked whether he recalled the procedures he used to obtain records and locate witnesses, Mr. Terrana testified that,

A. I can tell you what I do as a matter of course. I have a lengthy questionnaire, I guess you could call it. I have one that I use for experts, and I have one that I use for investigators. And it's basically an outline directing them what to do, what to find, what to look for in the most general of terms. And then that's defined down to specific names, persons, documents, as we discover what they are.
Q. Okay.
A. So I would have given her one of those things. I would have given Dr. Gomache, I'm sure, one of those things.
Q. You, in fact, did receive a lot of records?
A. Yeah. I was looking through some notes that you gave me from Dr. Gomache. All kinds of records we had

here. I mean, there's, you know, looks like close to maybe 100 documents, school records and disciplinary records and all kind of records.

(See February 9, 2006 transcript, p.12, attached).

At the evidentiary hearing, Dr. Gamache testified that he met with Defendant on three occasions during which time he administered the Personality Assessment Inventory, which is a psychological test, conducted a mental status examination, and performed a diagnostic clinical interview. (See April 20, 2006 transcript, pp. 69-70, attached). Dr. Gamache also testified that Mr. Terrana wanted to relay to the jury that Defendant was not a "beast." (See April 20, 2006 transcript, pp. 99, 101, attached). The following colloquy took place at the evidentiary hearing:

Q. Did you at the time of this trial have the kind of relationship with Mr. Traina [n8] where you would feel comfortable discussing with him your opinions about your findings and he might share with you legal strategy or some of his concerns about the case?

> [n8] Although the transcript states, "Mr. Traina," it is clear from the context of the testimony that Dr. Gamache is referring to Rick Terrana instead of Charles Traina.

A. Well, I could not say with any certainty how much he might share with me his legal strategies. Every attorney is different. They each have different styles and that I've certainly done cases with Rick [Terrana] before and was familiar with his style. And I'm sure that we probably did talk in this case a little bit about what his approach was going to be. Now that I think - - now that I'm responding to the question, I'm recalling that I know we did have some conversation at some point about what his approach was going to be and how he intended to use me.

Q. Would you have felt comfortable if you felt like you didn't have enough information to make - - to make your opinions or you needed more information, would you have felt comfortable asking the defense attorney for that sort of information? Or would you have just taken on your own to try and go gather information on your own?

A. I'd never hesitate in asking an attorney for additional information if I feel like I need it. I don't necessarily always get that, but I never hesitate in asking for it or telling them why I think that I need it.
Q. Do you remember if that was an issue in this case at all?
A. Not that I recall, no.
Q. You said that you did recall speaking about possible strategy and concerns with presenting a mental health mitigation defense. Can you relate to the Court what you
recall about that? What particular concerns may have been expressed to you from Mr. Traina [n9] about focusing on mental heath in this case?

> [n9] Although the transcript states, "Mr. Traina," it is clear from the context of the testimony that Dr. Gamache is referring to Rick Terrana instead of Charles Traina.

A. To the best of my recollection there were at least a couple of conversations that related to that issue. One of them occurred at some point after I had done the psychological testing. Because at some point as Mr. Terrana and I talked about this and we talked about, you know, for example, specific statutory mitigators related to mental illnesses, I shared with him the fact that we had a case in Mr. Davis' circumstance where he had never before been diagnosed or treated specifically for mental illnesses. Certainly not as an adult. So there was no documentation really that we could rely on where he had been previously diagnosed and treated for a mental health problem.

And that secondly, we had this real dilemma with the objective measures they'd tried to use to supplement what he told me clinically where it came back as invalid. And that if we went down the path of, you know, mental health as mitigation, I was going to have to be honest and truthful about the results of this testing.

So that was - - at some point there was a conversation that I recall that related to that. And at another point, I believe much closer to the actual penalty phase and actual testimony, I remember - - I

suppose what you would refer to as some sharing of strategy and that Mr. Terrana told me that what he wanted - - the way that he wanted to use me was to simply get out some things, get on the record some things about - - that I had learned about Adam's background and history. And in particular, to focus in on the idea - - on whether or not I had an opinion that Adam could adjust successfully in - - to life in prison and whether or not he would represent a danger in terms of violent or even homicidal behavior if he was a life prison inmate. And I was instructed by him to prepare for - - I was asked by him, did I have an opinion about that? And I told him that I did. I was able to formulate an opinion based on the psychological data that I had that it was generally favorable toward that issue and he told me to be prepared to respond to that.

(See April 20, 2006 transcript, pp. 74-77, attached).

During the penalty phase of Defendant's trial, Dr. Gamache testified about various phases of Defendant's life. (See November 5, 1999 transcript, V. 10, pp. 1325-30, attached). Dr. Gamache testified that Defendant's mother abused drugs and left him with family members when he was a small child, his father and step-mother raised him, and that he was described by others as caring and compassionate. (See November 5, 1999 transcript, V. 10, pp. 1325-26, 1330, attached). Additionally, Dr. Gamache testified about Defendant's devastating loss of his father when Defendant was thirteen years old. (See November 5, 1999 transcript, V. 10, P. 1328, attached).

Dr. Smith did not disagree with Dr. Gamache's testimony, and he testified that Dr. Gamache's testimony regarding LSD was accurate. (See February 8, 2006 transcript, p. 27, attached). Although Dr. Stevenson did not agree with all of Dr. Gamache's conclusions and she felt they were inadequate, she only based her opinion on a review of his deposition and trial testimony. She did not review Dr. Gamache's actions or the results from his psychological assessment. (See April 21, 2006 transcript, pp. 73-74, 127-131, attached).

Several of Defendant's relatives including Carolyn Clark, Carol Elliot, and Tamara Elliot also testified

> on behalf of Defendant during the penalty phase of his trial. Additionally, Patricia Duffy and Richard Barren testified on behalf of Defendant. (See November 5, 1999 transcript, V. 10, pp. 13 16-1366, attached). Mr. Terrana could not remember speaking to specific witnesses and his files in this case were lost through no fault of his own. (See February 8, 2006 transcript pp. 11-12, attached). However, during the penalty phase, Mr. Terrana elicited positive testimony about Defendant through the above-mentioned witnesses.
>
> The testimony elicited during the evidentiary hearing fails to support that Mr. Terrana was ineffective for failing to investigate mitigation and prepare witnesses. Dr. Gamache testified that he spoke with Mr. Terrana on several occasions and that had he needed additional information from Mr. Terrana, he would have requested it. Although Mr. Terrana did not discuss specific questions with Dr. Gamache, Mr. Terrana's decision was a strategic one. Dr. Gamache's testimony fails to support the argument that he should have been used to establish statutory and non-statutory mitigators. Additionally, Mr. Terrana was not ineffective for failing to prepare Dr. Gamache or using him to establish statutory and non-statutory mitigators. Mr. Terrana called five additional witnesses to testify on Defendant's behalf. Defendant also states that he has secured witnesses who could testify regarding many relevant facts that could have been brought out during the penalty phase; however, the fact that Defendant's postconviction counsel presented two experts with "more favorable" reports during Defendant's evidentiary hearing does not render Mr. Terrana's performance deficient. See Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). As such, Defendant is not entitled to relief as to Claim VII.

(V7/1145-51). A review of the record demonstrates that the court's findings are fully supported by the testimony presented at the hearing.

Penalty phase counsel Rick Terrana testified unequivocally

that, although he was aware of much of the potential mitigation identified in postconviction, he strategically determined not to present such evidence (V15/T175-79). Terrana is an experienced capital litigator, having represented a couple dozen defendants in first degree murder cases (V15/T141). At the time of Davis's trial, he had investigated and presented seven to ten penalty phase trials, and secured life recommendations in every one (V15/T141, 176). As of the time of his postconviction testimony, the Davis jury's seven-to-five recommendation remained the only penalty phase he had tried with an adverse result (V15/T176).

Terrana acknowledged that some capital attorneys approach mitigation with the idea that any and all aspects of a defendant's life should be presented to the jury (V15/T175-76, 179). Having observed many experienced capital litigators employ such a strategy unsuccessfully, he has adopted his own approach of tailoring mitigation to a particular penalty theme, stressing that the defendant is a decent person, and that the death penalty is unwarranted and will not benefit society (V15/T175-76).

The defense mental health expert, Dr. Gamache, confirmed that the failure to present statutory mental health mitigation in this case resulted from a reasonable strategic decision. When Dr. Gamache evaluated Davis, he administered a personality

assessment which reflected that Davis was malingering (V16/T276, 281). Gamache had a number of consultations with Terrana, and recalled that Terrana had remarked that some of Gamache's observations would not benefit the defense case; rather, Terrana wanted to generate sympathy for Davis, and convince the jury that Davis was not a beast (V16/T303, 305).

The trial transcript also supports the postconviction testimony. At the penalty phase, counsel used Dr. Gamache to explore distinct phases of Davis's life (DA. V14/1325-30). The jury heard, through Gamache and corroborated by family and friends, that Davis had been neglected by his young mother; raised by his father and step-mother; was helpful, kind, and generous. At the vulnerable age of 13 he learned that his step-mother was not his real mother, and shortly after that suffered a devastating loss when his father was killed in a motorcycle accident (DA. V14/27-28). Gamache also related that Davis was not psychotic and would be productive and functional in prison if given a life sentence (DA. V14/1331-32).

Trial counsel have great discretion in determining whether and how to present mental health evidence. Jones v. State, 928 So. 2d 1178 (Fla. 2006). Although Terrana felt his approach was not considered "mainstream," numerous cases have upheld the reasonableness of a mitigation strategy which focuses on humanizing the defendant rather than presenting available mental

health or substance abuse evidence that necessarily exposes the jury to negative information about the defendant. See Jones; Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005) (noting counsel cannot be deemed ineffective for failing to present evidence that would open the door to damaging cross-examination or rebuttal evidence that would counter any value that might be gained from the evidence); Pace, 854 So. 2d at 173-74 (rejecting claim of ineffectiveness asserting counsel should have presented evidence of defendant's illegal crack cocaine use); Banks v. State, 842 So. 2d 788 (Fla. 2003) (no ineffective assistance where counsel consulted mental health expert and decided on strategy against presenting mental health evidence after considering his options); Gaskin v. State, 822 So. 2d 1243, 1249 (Fla. 2002); Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (noting strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected; where counsel was aware of defendant's personality disorder and purported alcoholism, but chose to focus on lay testimony regarding positive character traits, meager upbringing, and involvement in Vietnam, no deficient performance was shown).

In addition, many cases have recognized that the presentation of more favorable mental health testimony in postconviction does not render counsel's investigation into

mitigation ineffective. Pace, 854 So. 2d at 175; Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 504 (Fla. 2003); Asay, 769 So. 2d at 985-86; Pietri v. State, 885 So. 2d 245, 261 (Fla. 2004) (no ineffective assistance where counsel made reasonable efforts to secure a mental health expert to examine the defendant for mitigation purposes); Jones v. State, 732 So. 2d 313, 320 (Fla. 1999); see also, Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (noting that, "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorable for him does not demonstrate that counsel was ineffective for failing to produce that expert at trial"). No deficiency or prejudice has been shown with regard to counsel's investigation or Gamache's evaluation of Davis's mental heath at the time of trial, and accordingly this claim must be denied.

The Sixth Amendment does not require counsel to present all available mitigating evidence in the penalty phase of a capital trial in order to be deemed to have performed reasonably. To the extent that Davis suggests this is necessary pursuant to ABA guidelines and Wiggins v. Smith, 539 U.S. 510 (2003), his claim must be rejected. No case holds that the Constitution compels the presentation of all possible mitigating evidence. In Wiggins, the attorney had not investigated sufficiently to make a reasonable decision about what evidence to present. See

Rutherford v. Crosby, 385 F.3d 1300, 1315 (11th Cir. 2004) (rejecting ineffectiveness based on failure to present mitigating evidence, and distinguishing Wiggins, noting that the new mitigation in Wiggins was not counterproductive or inconsistent with the other mitigation offered while Rutherford's mitigation "would have come with a price"). No cases interpret the Sixth Amendment as foreclosing counsel's ability to make reasonable strategic decisions limiting the presentation of mitigating evidence. To the contrary, many cases recognize that an attorney has an obligation to make an appropriate decision about what evidence to present or not present. See Housel v. Head, 238 F.3d 1289, 1296 (11th Cir. 2001) (in rejecting similar claim of ineffectiveness, court notes reasonableness of counsel's decision against focusing on intoxication and substance abuse in mitigation); White v. Singletary, 972 F.2d 1218, 1225-26 (11th Cir. 1992) (acknowledging reasonableness of decision not to dwell on intoxication as mitigation).

The Jones case presented facts similar to those in the instant case. See 928 So. 2d at 1183-86. Trial counsel was accused of incompetence for failing to present evidence from the trial defense expert, Dr. Miller. Counsel had consulted with Miller, but declined to present him as a witness. At the postconviction hearing, Miller testified that Jones had a

"compulsive personality," which causes primitive emotions to surface, resulting in destructive behavior and unpredictable and violent acts. Miller described "stressors," such as Jones's financial problems, difficulty finding employment, and separation from his wife and daughters, and conflict over a used car purchase (leading to the commission of the crime) which had substantially impacted Jones. Miller characterized the crimes as "emotionally reactive" rather than "logically planned." The Florida Supreme Court characterized this testimony as "unconvincing," noting Miller "was not persuasive and, even worse, could have damaged Jones's chances for a life sentence."

In the instant case, trial counsel Terrana testified unequivocally that he would not have presented the additional mitigation outlined in the postconviction motion. This decision was not uninformed; Terrana had secured the services of Dr. Gamache before he was even officially appointed on the case. Prior to trial, the defense acknowledged that statutory mental mitigation was available, and identified Dr. Gamache and a Dr. Frank Woods as potential expert witnesses (DA. V2/350-351). The extensive consultations related in Gamache's postconviction testimony demonstrate that Terrana fulfilled his obligation to explore possible mental health mitigation. Jones, 928 So. 2d at 1186 (finding trial counsel's retaining Dr. Miller complied with duty to investigate mental mitigation); Johnson, 921 So. 2d at

500. Terrana employed an investigator, obtained school records and other relevant documents, and explored mitigation through family members and friends. Unfortunately, litigation of this issue was hampered by the loss of Terrana's file, and his inability to recall specific details of the investigation. However, it is clear Terrana was aware of the mitigation available and determined to use only that which he felt could benefit the defense and further the penalty phase strategy of generating sympathy for Davis. Clearly, the decision to limit Gamache to being a source of background and family information -- avoiding the harmful testimony that Davis was an accomplished drug abuser, stealing and selling drugs to support his own habit, and that he tried to manipulate his own expert -- was objectively reasonable.

To the extent Davis may claim that Dr. Gamache was hampered by Terrana's ineffectiveness in failing to provide Gamache with necessary background material, the record clearly refutes any such suggestion. Neither Dr. Smith nor Dr. Stevenson identified any material which should have been provided to or reviewed by Dr. Gamache. In fact, this Court can compare the material provided to the postconviction experts with that provided to Dr. Gamache, since much of the material was admitted into evidence at the penalty phase as Def. Ex. 1 and State Ex. 1. Dr. Smith did not express any disagreement with Dr. Gamache's deposition

or trial testimony, and affirmatively acknowledged that Gamache's testimony was correct and accurate regarding LSD (V14/T27).

There was no testimony presented at the evidentiary hearing to support the allegation that counsel should have presented additional testimony from family members in mitigation. No such lay witnesses testified at the hearing below, so there has been no showing that any other family members were even available. To the extent that Davis may suggest, from Dr. Stevenson's testimony, that there were instances of abuse by Davis's stepmother, Donna, there has been no showing that Davis alerted counsel or Dr. Gamache to any such evidence. Counsel cannot be deemed ineffective for failing to uncover and present testimony about child abuse which the defendant never disclosed. Van Poyck v. Sec'y, Department of Corrections, 290 F.3d 1318, 1325 (11th Cir. 2002).

Finally, any potential deficiency in trial counsel's performance could not possibly have prejudiced Davis. This was an egregious case, clearly deserving of the ultimate punishment. The heinous, atrocious or cruel and the cold, calculated, and premeditated aggravating factors are considered two of the weightiest factors in the capital balancing equation. See Larkins v. State, 739 So. 2d 90, 92-95 (Fla. 1999). The trial court expressly weighed Davis's age, background, drug use, lack

of violent criminal history, situational stressors from learning that his stepmother was not his real mother and his father's death, artistic skills, appropriate courtroom behavior, and the disparate sentences for his co-defendants in mitigation (DA. V4/640-642).

The additional mitigation offered in postconviction through Dr. Smith and Dr. Stevenson was not compelling, and adds nothing significant to the mitigation already weighed by the court at sentencing. Dr. Smith focused on the affects of Davis's illegal drug use, which the jury knew about and counsel did not want to emphasize. Dr. Stevenson's discussion of Davis's alleged developmental disorder and post-traumatic stress disorder would not have shifted the balance of aggravating and mitigating factors. Dr. Stevenson, in particular, was not a persuasive witness; she was confused on the facts and displayed an unprofessional demeanor (compare V17/T416-17 and V17/T448-453, conflicts regarding Davis's absence from school; V17/T442, stating no statutory mitigation was found at trial; V17/T412, 431, stating Davis's parents were "crappy" role models who's parenting skills "sucked"). The disorders she diagnosed do not significantly reduce Davis's moral culpability for this crime, showing only that Davis has poor impulse control, is vulnerable to intimate relationships and a fear of abandonment, and communicates more through actions than words (V17/T371, 404,

420, 453, 467, 489-90). In fact, many defendants on death row have difficulty managing social situations and demonstrate poor impulse control. Finally, Stevenson's testimony would be inconsistent with the defense theme of showing that Davis could be a productive prisoner if given a life sentence, since she believed that he was destined by the early years of his life to act impulsively and aggressively (V17/T372, 489, 511-12). As in Jones, much of her testimony would have been counterproductive and could have, as Terrana felt, damaged Davis's chances for a life sentence.

Although the jury recommendation for death was close, this does not compel a finding that the result would have been different had counsel presented Dr. Smith and Dr. Stevenson at the penalty phase. This is particularly true, given Terrana's observation about the look of disgust on the jury foreman's face when Davis broke down and cried during the penalty phase (V15/T182-83). On the facts of this case, the seven-to-five recommendation is an indication of the effectiveness of counsel's representation. Compare Mungin v. State, 932 So. 2d 986, 1002-03 (Fla. 2006) (rejecting similar IAC claim in case with 7-5 jury recommendation for death); Miller v. State, 926 So. 2d 1243, 1253 (Fla. 2006) (rejecting similar IAC claim, noting counsel's overall strategy, "actually resulted in five votes by the jury against the death penalty in a case that

involved a brutal beating"); Suggs, 923 So. 2d at 419; Pace, 854 So. 2d at 173-74.

As Davis has failed to establish either deficient performance or prejudice in the representation by penalty phase counsel Rick Terrana, this Court must affirm the denial of this claim.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PREMISED ON THE FAILURE TO ADEQUATELY REBUT THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

Davis's final claim also challenges the adequacy of his attorney in the penalty phase. In this issue, Davis claims that Terrana failed to adequately rebut the aggravating factor that Mrs. Robinson's murder was committed in a cold, calculated and premeditated manner. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens, 748 So. 2d at 1033.

The court below denied this claim as follows:

> As to Claim IX, Defendant argues that his counsel provided ineffective assistance of counsel when he failed to ensure that his client received a proper mental health examination to rebut the State's introduction of the cold, calculated and premeditated aggravator in violation of the Sixth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.
>
> At the evidentiary hearing, Mr. Terrana testified that,
>
> A. I don't think it [having Valessa Robinson's confession admitted] would have been helpful at all, no. See, here was the problem in this case, Mr. Cannon, as far as your questions about Gomache rebutting aggravators. The problem is on the evening before he testified, Gomache was deposed. Now, I fought tooth and nail with Judge Holloway to prevent Gomache from being deposed, number one, at that late hour. Number two, specifically from allowing the

State attorney to ask the questions that they wanted to ask him. Okay.

Unfortunately Judge - - and Judge Holloway remained on duty throughout that night to answer any questions we had that came up during the depo. And in fact, I think she was called upon on one if not more than one occasion during the depo where I said, wait a minute, he ain't answering that until we can - - okay. Gomache was present when we had those arguments with Holloway. So he knew this was going to be a contentious deposition anyway.

Unfortunately, Judge Holloway instructed him - - or I should say, did not grant my relief and allowed the State to delve into all these areas of inquiry. Okay. As a result, Dr. Gomache gave an 80-some page deposition, okay, at least 20 or 30 pages of which are some of the most bone-chilling testimony from my client to him that you've ever heard.

So to put him on the stand now, Dr. Gomache, and ask him, do we have CCP here? Was this cold? Was this calculated? Was this premeditated? Was there a prearranged plan? Okay. Was this done with heightened premeditation? Did LSD affect his ability to form the heightened level of premeditation required for CCP? Would have allowed Shirley Williams [one of the prosecutors] to cross-examine - - cross-examine him on these 30 pages of testimony that I'm referring to. If that would have happened, there's no doubt in my mind, and there should be no doubt in your mind or anyone else's, that the vote would have been 12-0 for death. And you may even had the alternate upset that they couldn't cast a vote for death. That would have been suicide.

If you read Dr. Gomache's depo, you understand what I'm talking about. That's the problem that Chuck Traina had with the first phase of this case, and that's the problem I had with the second phase, is Adam's own statements. Okay. His own statements suggest a very, very-well-thought-out, careful plan - - his ability to remember way before and way after as well as to remember all the specifics, okay, wasn't gonna cut it in front of this jury coming back and saying, you know, he was under the influence.

Now, was that important? Yeah. It was the theme throughout the trial, the LSD use. But am I gonna expose him to Dr. Gomache on the stand being cross-

examined on this depo? Be crazy to do that. That would be ineffective assistance of counsel. Dr. Gomache would have got butchered. He'd have to divulge - - because there's no privilege that applies, as you know, at that point. He would have had to divulge everything that he says in his depo about what Adam told him about this crime. I mean, if that wouldn't have established these - - these aggravators beyond any reasonable doubt - - beyond any doubt at all then I don't know what would have.

So did I ask him about those? Absolutely not. I stayed as far away from that as I could. But I tailored my - - I tailored my comments and I tailored my arguments not to completely discount the fact that this young man was doing LSD and had done all the LSD he did. And in fact, I asked for certain mitigators that I wasn't given. And I think I was given maybe one in that regard concerning drug use. And whether or not I was given it, I know I argued it to the jury that they should consider his LSD use for whatever it's worth. So that's my answer to that question.

(See February 9, 2006 transcript, pp. 49-52, attached).

At the evidentiary hearing, Dr. Smith testified that because of Defendant's LSD consumption, he did not think the cold, calculated, and premeditated aggravator would apply. (See February 8, 2006 transcript, pp. 23, 57, attached). However, Dr. Smith testified that he had not testified in any capital cases in Florida. (See February 8, 2006 transcript pp. 32-33, attached).

Mr. Terrana did not fail to ensure that his client received a proper mental health examination to rebut the State's introduction of the cold, calculated and premeditated aggravator. His decision not to question Dr. Gamache about the aggravating factor was a strategic one. Additionally, Defendant has failed to show prejudice. The Florida Supreme Court has upheld the CCP aggravating factor in cases where there has been substantial impairment. Owen v. State, 862 So. 2d 687, 690-91 (Fla. 2003). Therefore, Dr. Smith's testimony would not have produced a different outcome. As such, Defendant is not entitled to relief as to Claim IX.

(V7/1153-54). Once again, a review of the record demonstrates the propriety of this ruling.

At the hearing, Rick Terrana testified that he did not recall whether he specifically explored the ability to rebut CCP with Dr. Gamache, but that he was aware of this avenue of attacking the State's case in aggravation and had discussed such a tactic with Gamache in the past, and may have discussed it in this case as well (V15/T185-86). However, Terrana did not believe that Davis's ingestion of LSD negated the CCP factor in this case, based on what Davis had related about the crime (V15/T186-87). He did not feel it was necessary to use Gamache for that purpose, noting that the State had not presented any additional evidence to support HAC or CCP in the penalty phase, but simply relied on the guilt phase evidence to establish these aggravators (V15/T187). Moreover, having Gamache address the CCP factor would have opened the door to letting the State cross examine Gamache about Davis's extensive, detailed narrative about the crime (V15/T187-88). Such a tactic, in Terrana's opinion, "would have been suicide" and led to a unanimous jury recommendation for death (V15/T189).

In Jones, this Court considered a claim that counsel should have called a mental health expert to rebut the CCP aggravating factor. See 928 So. 2d at 1183-84. Although trial counsel had consulted a mental health expert, Dr. Miller, prior to trial,

and Miller had diagnosed Jones with a compulsive personality disorder, counsel had not specifically discussed Jones's mental state at the time of the crime or the possibility of rebutting the CCP aggravator with Miller. However, the Court concluded that counsel made a strategic decision against using Dr. Miller as an expert to rebut CCP. The Court noted that counsel wanted to avoid opening the door to damaging cross examination and rebuttal; counsel decided to focus on humanizing the defendant through lay witnesses; and Miller's testimony would have been inconsistent with other testimony presented. These facts supported the circuit court's rejection of Jones's claim of ineffective counsel, and compel the same result in the instant case.

Even if deficient performance could be found in this case, Davis has not shown any possible prejudice. Dr. Smith's testimony would not have persuaded the sentencers to reject the CCP factor in this case. Smith stated that he did not think the cold, calculated, and premeditated aggravating factor would apply, due to Davis being under the influence of LSD (V14/T23, 57). According to Smith, the cognitive impairment caused by the drug use would preclude a finding of cold, rational behavior. Under this theory, CCP could never be upheld where the defendant presented evidence of any mental impairment or a drug-influenced thought processing. Smith, who had no experience applying the

aggravating and mitigating factors set forth in Florida's death penalty statute, was understandably mistaken in his opinion.

Many cases have upheld the application of the CCP aggravating factor even when statutory mitigation such as an extreme disturbance or substantial impairment has been found. Owen v. State, 862 So. 2d 687, 690-91 (Fla. 2003); Lott v. State, 695 So. 2d 1239, 1242 (Fla. 1997). In fact, this Court has directly rejected the suggestion that the finding of mental impairment precludes a finding of CCP. In Owen, this Court held specifically that "Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive." The Court quoted from Evans v. State, 800 So. 2d 182, 193 (Fla. 2001), that "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation."

Even without the CCP aggravator, this would be a strong death case, with two other aggravating factors -- HAC and felony probation. As Terrana made an appropriate strategic decision against using Dr. Gamache to rebut the CCP aggravating factor in this case, and there has been no showing that the factor would not apply even if such expert testimony were available, there can be no deficient performance or prejudice with regard to this

issue. Therefore, this claim must be denied.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Peter Cannon, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, 33619 this _____ day of June, 2007.

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).

Respectfully submitted,

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