IN THE SUPREME COURT OF FLORIDA

WALTER GALE STEINHORST,

Appellant,

v. CASE NO. 72,695

STATE OF FLORIDA,

Appellee.

_____/

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Walter Gale Steinhorst was convicted of four counts of first degree murder, receiving a sentence of death in three counts and a life sentence sentence on the fourth.

Steinhorst, an armed guard for a drug smuggling operation, participated in the kidnapping and murder of Harold Sims, Douglas Hood, Sheila McAdams and Sandra McAdams. The victims were transported to the "Goose Pasture" area near Perry, Florida and were disposed of on property leased by Steinhorst for running hogs. Steinhorst's guilt is not at issue. **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982). Steinhorst admitted to the murders to several witnesses.

Mr. Steinhorst's appeal from the denial of his motion for post-conviction relief sets forth three general arguments with sub-points where necessary. For the convenience of the Court, the State shall set out the facts in order as they relate to each argument:

FACTS: POINT I

Mr. Steinhorst's first argument actually raises three separate claims which are identifiable as "Hitchcock", "Caldwell" and "Enmund" claims.

(A) "Hitchcock" Claim

Although Justice Adkins, sitting as trial judge, gave the standard jury instruction condemned in **Hitchcock v. Dugger**, ____ U.S. ____, 95 L.Ed.2d 347 (1987), the record conclusively shows that Justice Adkins received and considered non-statutory

mitigating evidence. Indeed, despite the fact that his sentencing order tracked the statute (R 1571 et seq.), Justice Adkins prefaced the pronouncement with this statement:

> Although it is not a statutory ground of mitigation, I have considered the fine quality and character of your wife and her family and the circumstances under which you were living.

(R 1570-1571).

Justice Adkins received an extensive pre-sentence investigative report and many letters, some from public officials, offered on Mr. Steinhorst's behalf. (R 94-121).

Steinhorst's character, however, was not exemplary. He was able to join a dope smuggling conspiracy centered some 100 miles from his home. Sheriff James Scott of Jefferson County had long suspected Steinhorst of dope smuggling. (R 98). Steinhorst was dishonorably discharged from the army in 1951 and had served time in prison for automobile theft. (R 98-99). (These problems were all, of course, decades before this conviction).

A reading of the "PSI" shows that it was sympathetic to Steinhorst's financial and physical problems. The report suggested that the Court give strong consideration to the advisory jury's recommendations. (R 102).

(B) "Caldwell" Claim

As conceded by Mr. Steinhorst, the prosecutor correctly advised the advisory jury of its advisory function.

Defense counsel told the advisory jury that it was to "recommend" a sentence. (R 1374).

Mr. Steinhorst's brief does not fully quote what the prosecutor said. The **actual** quotation is:

> Let me say this and I think it is something that all of you should keep in mind. The burden is yours to make a recommendation **but there was some implication in that argument that you were to make the final decision.** Thank God in our system no one person makes the final decision to put this man to death. You are merely making a recommendation. The next cog in the wheel is Judge Adkins and he can refuse to accept your recommendation or he can make one himself or he can say I condone [sic] in the recommendation of the jury.
>
> This case then goes to a period of appeals. So, when we try to look at jurors and say "don't do it because this will always be on your conscience" that is not really true.

(R 1382-1383).

Defense counsel, after extensive **ad hominem** attacks upon the "state's lawyer" as a liar and a politician (see R 1414-1422), then argued:

> He said whatever you did would not really be that important, you're just making a recommendation and the whole system is involved and our laws call for it. You know, the same things that the mass murderers did in Germany and the same thing . . . Our laws call for it and we're told, we're carrying out orders. And it's easy to get lost in the system, easy to get lost because you're just recommending something that may or may not happen.
>
> But you have to consider and think in making this decision that you are the executioner, you have

to.

(R 1422).

The Court correctly advised the jury that it was making a recommendation. Then the Court told the jury to carefully "weigh and sift" the evidence because a "human life is at stake". (R 1430).

(C) "Enmund" Claim

Mr. Steinhorst's brief implies that Judge Turner had to read the trial transcripts to determine, **de novo**, Steinhorst's obvious guilt. This shall be discussed in the "argument" portion of the brief.

FACTS: POINTS II AND IV

The issue of whether police reports were discoverable under Fla.R.Crim.P. 3.220 shall be argued below.

FACTS: POINT III

The **Brady** issue will be discussed below.

FACTS: POINT V
(Ineffective Counsel)
References to the "3.850" hearing
shall be designated (Tr-).

Mr. Steinhorst, after alleging that counsel was deprived of discovery, "Brady" material and the names of key witnesses, accuses defense counsel of ineffectiveness for "failing to investigate" the case.

Mr. Davis defended Steinhorst both on the murders (in state court) **and** on the dope-smuggling charges (in federal court).

Indeed, Davis won Steinhorst an acquittal in federal court. (Tr 276).

Steinhorst was tried on the federal charges first, said **trial alone** consuming thirty days of Mr. Davis' "preparation time". During that period, Davis had to deal with the same witnesses as in this case and Davis obtained a wealth of information. Davis also attended the federal depositions.

Counsel's trial strategy focused upon the immunity granted to the co-defendants, the reputation of the victims and the "bickering" between the FBI, FDLE and the State's Attorney. (Tr 269).

Mr. Davis was aware of the inter-agency conflicts. (Tr 266). Davis had a strategic reason not to seek a change of venue. (Tr 266). Regarding exhibits (6) through (50), Davis did not say they "were evidence" or definitely would have been used. Davis was exposed to these reports in open court and did not have a chance to read, analyze or consider them. (Tr 270-271). Davis had extensive felony trial experience (Tr 272-275), including complex federal litigation.

Some co-defendants in the federal drug case were later immunized (Tr 279-280), but during the federal case Davis got to know these people and their lawyers well and worked with them. (Tr 280). All investigative information was "pooled". (Tr 281).

Davis knew that David Goodwin was present at the Sims murder but could not call him because Goodwin was under indictment. (Tr 289). Charlie Hughes was a fugitive (Tr 288) and Davis knew that Vines had made statements (Tr 288) and what Vines had said. (Tr 296).

Davis did participate in some depositions though he did not take any himself (prior to the murder trial). (Tr 298). Davis already had Vines' and Eppersons' federal testimony. (Tr 298). Davis had other federal testimony at his disposal as well. (Tr 298 et seq.). Davis thought Capo was a co-defendant until the day of trial, (Tr 302) and that his deposition **could not** be taken.

When questioned about the value of exhibits (6) through (50), Davis repeatedly declined to attribute specific value, stating only that they "might" have supported "alternate theories" or "might" have shown "propensity" on the part of some witnesses to act in a manner other than indicated by the actual evidence. (See Tr 303, 308, 310-312). Although Davis said these exhibits would have "helped" in cross examining David Capo (Tr 311) or Hood (Tr 312), Davis already had the general information and "theory of impeachment" supported by the reports. (Tr 312).

Davis let slip, despite abvious hostility to the State, that he had **two investigators** (Tr 314) working on this case.

Davis conceded that exhibits (6) through (50) were **not** evidence (Tr 338) though they might have been useful. In sum, Davis investigated the case but felt deprived of additional information due to State action. Davis never conceded "ineffectiveness".

SUMMARY OF ARGUMENT

The trial judge's order denying post-conviction relief is supported both by the trial record and the record from the collateral evidentiary hearing.

As to Claim I, "**Lockett**" was not violated because Justice Adkins specifically considered (and even delineated) non-statutory mitigating evidence. The "**Caldwell**" claim is procedurally barred and factually baseless. The "**Enmund**" claim is factually baseless.

As to Claims II and IV, Fla.R.Crim.P. 3.220 was not violated.

As to Claim III, there was no **Brady** violation because no exculpatory evidence was suppressed, if it even existed. In any event, the **Bagley** test cannot be met by **Steinhorst.**

As to Claim V, the attack upon trial counsel is neither supported by the facts or the law.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON STEINHORST'S "HITCHCOCK", "CALDWELL" AND "ENMUND" CLAIMS.

(A) "Hitchcock" Claim

In **Lockett v. Ohio**, 438 U.S. 586, 606-607 (1978), the Supreme Court discussed Florida's capital sentencing law as follows:

> Although the Florida statute approved in **Proffitt** contained a list of mitigating factors, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.

In an explanatory footnote, the Court said:

> The opinion of Justices Stewart, Powell, and Stevens in **Proffitt** noted that the Florida statute "provides that '[a]ggravating circumstances shall be **limited** to . . . [eight specified factors]' and that there was 'no such limiting language introducing the list of statutory mitigating factors'.

In its subsequent decision in **Hitchcock v. Dugger**, ____ U.S. ____, 95 L.Ed.2d 347 (1987), the Supreme Court held that the Florida standard jury instruction **was capable** of being construed as limiting the judge's or the jury's ability to consider non-statutory mitigating evidence. The Court went on to note that some Florida judges were interpreting the law as restrictive and others as non-restrictive. Then the Court held:

> Because our examination of the sentencing proceedings actually conducted in this case convinces

> us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was the requirement of Florida law.

Id.

In describing the available defenses, the Court did not discuss procedural default (although "failure to consider non-statutory mitigating evidence", the essence of a "Hitchcock" claim, had already been argued for years (since **Proffitt**) and was **not** a "new law" claim), but it did recognize that any error could be harmless if, in the Court's words "it had no effect on the jury **or** the judge". **Id.**

The Supreme Court made its determination by examining the record, without requiring a hearing or the live testimony of the trial judge.

Mr. Steinhorst alleges, disingenuously, that the State could not prove "harmless error" from the record despite the fact that Justice Adkins, on the record, specifically stated that he considered specific non-statutory mitigating evidence and even identified the evidence as "non-statutory mitigating evidence". Under Steinhorst's theory, the word of a Florida Supreme Court Justice is no good and cannot be accepted from a verbatim transcript. This, we suggest, is absurd.

The State's burden of "reasonable doubt" does not require the elimination of "all" doubt, "fanciful" doubt or paranoid delusions about what the trial judge "really thought" despite his record pronouncements. Justice Adkins affirmatively stated that he considered this evidence and that is what he did, period.

Justice Adkins was clearly aware of his right to review non-statutory mitigating evidence. In addition to his decision in **Songer v. State**, 365 So.2d 696 (Fla. 1978). Adkins had recognized the propriety of this evidence in **Washington v. State**, 362 So.2d 658 (Fla. 1978); **Buckrem v. State**, 355 So.2d 111 (Fla. 1978); **McCaskill v. State**, 344 So.2d 1276 (Fla. 1977); **Chambers v. State**, 339 So.2d 204 (Fla. 1976); **Meeks v. State**, 336 So.2d 1142 (Fla. 1976); **Messer v. State**, 330 So.2d 137 (Fla. 1976) and **Halliwell v. State**, 323 So.2d 557 (Fla. 1976).

This Court has found "harmless" **Hitchcock** error in a number of cases in which the trial judge did not testify, see **White v. Dugger**, 13 F.L.W. 62 (Fla. 1988); **Tafero v. Dugger**, 13 F.L.W. 161 (Fla. 1988); **Demps v. Dugger**, 514 So.2d 1092 (Fla. 1987); **DeLap v. Dugger**, 513 So.2d 659 (Fla. 1987). Here, while the trial judge did not testify at the "3.850" hearing, his affirmative statement is a matter of record and was known to Judge Turner. That satisfies the "reasonable doubt" standard, unless, somehow, it is "reasonable" to assume that a Justice of the Florida Supreme Court lied.

Although Justice Adkins affirmatively considered the evidence regarding Steinhorst's family and finances, it must be noted that the evidence in this case, "rebutted" or not, does not help this dope-smuggling butcher of teenage girls.

Steinhorst's brief repeatedly mentions the fact that the victims' bodies were found "over 100 miles from the scene of the smuggling operation". What the brief fails to mention is that the bodies were dumped on and leased by Steinhorst for running

hogs. Perhaps Steinhorst would have us believe that out of the entire state of Florida, some smugglers, operating 100 miles away, just happened to pick this location.

Steinhorst would also have us believe he was an innocent, law abiding citizen with no history or knowledge of dope smuggling. Sure, and perhaps the others picked him at random from a phone book to serve as an armed guard? That contention defies common sense.

Steinhorsts' guilt has been established beyond a reasonable doubt. The fact that he was a "nice guy"[1] does not excuse mass murder, nor does it offset the valid aggravating factors of (1) murder while engaged in kidnapping, (2) heinous, atrocious and cruel murder.

Steinhorst, in a classic "try the victim if you cannot defend yourself" ploy, attempts to attack the victims as some sort of "gang" that was going to steal Steinhorst's dope. Again, the story is illogical if not absurd. First, it is unrealistic to assume that a gang of smugglers armed with powerful weapons would be "attacked" by four people and one gun. Second, two of the four "attackers" were unarmed teenage girls. Third, their approach to the smuggling operation demonstrated no stealth or planning at all. They just drove up in a truck.

Finally, three of the victims were transported (alive) to Steinhorst's sinkhole, executed, weighted with blocks and submerged, all in Steinhorst's armed presence (if not at his

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[1] The Court did find as a mitigating factor Steinhorst's lack of a "significant" criminal record.

hand). Thus, the evidence at trial supported beyond any reasonable doubt the propriety of the death penalty.

Finally, if Justice Adkins' sentencing order tracked the Florida statute, that does not prove "**Lockett**" error. All that proves is he followed the "outine" suggested by law.[2] Since Justice Adkins said he considered non-statutory mitigating evidence, we must reasonably assume that he did. Thus, beyond any **reasonable** doubt, any **Hitchcock** error was harmless.

(B) "**Caldwell**" Error

The Appellant's claim of error under **Caldwell v. Mississippi**, 472 U.S. 320 (1985), is procedurally barred. **Jones v. Dugger**, 13 F.L.W. ____ (Fla. November 10, 1988); **Tafero v. Dugger**, 13 F.L.W. 161 (Fla. 1988).

Caldwell is irrelevant to Florida law and does not, in any event, qualify as "new law". **Foster v. Dugger**, 518 So.2d 901 (Fla. 1987); **Banda v. State**, 13 F.L.W. 451 (Fla. 1988); **Cave v. State**, 13 F.L.W. 455 (Fla. 1988); **Preston v. State**, 13 F.L.W. 341 (Fla. 1988).

Mr. Steinhorst's reliance upon the Eleventh Circuit's decisions misapplying **Caldwell** to Florida betrays a lack of understanding of the relationship between the states and the lower federal courts. Florida, not the Eleventh Circuit, interprets Florida law. **Gryger v Burke**, ____ U.S. ____ (19). Indeed, federal interpretations of state law are simply advisory

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[2] Even the federal courts will not assume **Lockett** error just because the record is silent or because the sentencer did not list the "non-statutory evidence" it considered. **Johnson v. Wainwright**, 806 F.2d 1479 (11th Cir. 1986); **Funchess v. Wainwright**, 772 F.2d 683 (11th Cir. 1985).

and are not binding. **Pennzoil v. Texaco**, ____ U.S. ____, 95 L.Ed.2d 1 (1987).

The Appellant tries to circumvent this rule through talismanic invocation of the Eighth Amendment. This approach failed in **Spaziano v. Florida**, 468 U.S. 447 (1984), when the Supreme Court refused to review Florida's application of its "**Tedder**" rule to Spaziano. As **Strickland v. Washington**, 466 U.S. 688 (1984), makes clear, while a "constitutional tag" can be attached to virtually any claim of error, not every error actually qualifies as constitutional error.

More to the point, however, is **California v. Ramos**, 463 U.S. 992 (1983), a case which **Caldwell** refused to overturn. In **Ramos**, the defense complained that jurors should not be told that any life sentence imposed by them could be commuted to provide for either parole or pardon. Ramos complained that this instruction tended to push the jury towards a death sentence due to fear he would get back on the street.

In upholding this instruction, the Court held that there is no constitutional prohibition against advising jurors of the consequences of their verdict. Noting various state rules which prohibit advising juries of the possibility of appellate relief, the Court characterized these restrictions as matters of state law, providing protection "greater" than that required by the Constitution. [Note: Caldwell got relief because the jury was misled, not because the prospect of appeal was mentioned].

This is why the so-called "**Caldwell**" issue qualifies as one of state law. There is no federal constitutional right to

withhold the truth from the jury, period. Florida's decision that **Caldwell** does not apply is based upon a state court interpretation of the **accuracy** of the court's depiction of state law.

Steinhorst's jury was not misled.[3] More important, Steinhorst did not preserve any "error" by objecting or raising the issue on direct appeal. The claim was properly rejected as procedurally barred and, in addition, is facially meritless.

(C) "**Enmund**" Claim

Justice Adkins' order did not identify the actual "triggerman", but **Enmund v. Florida**, 458 U.S. 782 (1982); **Cabana v. Bullock**, 474 U.S. 376 (1986) and **Tison v. Arizona**, ____ U.S. ____, 95 L.Ed.2d 127 (1987), do require such a finding to justify a death sentence. For that reason, Mr. Steinhorst's complaint that Judge Turner "failed to read the trial transcript and make **de novo** findings of guilt" rings hollow.

Enmund can be satisfied even by an appellate decision finding that a non-triggerman was an active participant in the events leading to the murder and that the murder was forseeaable.

Steinhorst was found to be an active participant. Even if he did not "force" Sims' death[4], he certainly participated in the kidnapping and execution of the other three as well as the sinking of their bodies.

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[3] If anyone misled the jury it was Steinhorst's lawyer, who told the jury it was the final sentencer "in fact" and that the jurors would be no better than "Nazis, following orders" if they believed the State's representation of their advisory role.

[4] Steinhorst did not get a death sentence for Sims' death.

Judge Turner pointed out the existence of **Enmund-Cabana** findings in Justice Adkins' order and this Court's decision in **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982).

Steinhorst's **Enmund** claim is baseless and, frankly, probably not even serious.

ARGUMENT

POINTS II AND IV

THE TRIAL COURT DID NOT ERR IN RULING THAT FLA.R.CRIM.P. 3.220 WAS NOT VIOLATED BY THE NON-DELIVERY OF DEFENSE EXHIBITS (6)-(50)

The second and fourth points on appeal present a detailed example of a recent, and we suggest abusive, anti-death bar tactic: The abuse of Chapter 119, Florida Statutes (1980) as belated "criminal discovery."

Chapter 119 provides that the Public Records Act does not exist either as a substitute for or supplement to criminal discovery as allowed by Fla.R.Crim.P. 3.220. Furthermore, all records, reports or files prepared prior to January of 1979 are exempt from disclosure **even under** the Act.

Steinhorst, on collateral attack, presented FDLE with a Chapter 119 demand which resulted in the procurement of non-discoverable materials including, serendipitously, "exempt" pre-1979 materials. These materials were police investigative reports which included the thoughts and impressions of the officers and unattested symopses of what various "witnesses" allegedly said. No relevant "statements" are included in the exhibits.

Steinhorst confesses that the State did turn over actual witness interviews. (Brief, page 38).

Mr. Steinhorst's lack of understanding of Florida law cannot serve as a basis for relief. Prior to 1980, Fla.R.Crim.P. 3.220 specifically exempted from the State's discovery obligation any and all police reports which did not contain verbatim witness statements, attested to by the speaker.

Even as amended, the rule only provides for and obligation to produce:

> (iii) Any written or recorded **statements** and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.[5]

At the time of Steinhorst's trial, Florida law did not require or even allow "carte blanche" defense discovery of all police reports. **State v. Dumas**, 363 So.2d 568 (Fla. 3rd DCA 1978); **State v. Latimore**, 284 So.2d 423 (Fla. 3rd DCA 1973).

In **Lockhart v. State**, 384 So.2d 289 (Fla. 4th DCA 1980), the court upheld the **Dumas** approach and compared the Rule itself to the federal "Jencks Act" (18 U.S.C. 3500, also Fed.R.Crim.P. 16). **Lockhart** also held:

> It is significant that none of the officers who testified were eyewitnesses, and none used his report while on the witness stand, although all testified that they had refreshed their recollection of reading their reports at various times before trial. It is well established that defense counsel has no right to demand or inspect a written memorandum or report, for cross examination purposes, when that memorandum or report is not used by the witness while on the witness stand.

Supra, at 291-292.[6]

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[5] **Dumas, supra**, defines "statement" precisely as either a sworn and attested statement or a verbatim, or contemporaneously recorded or transcribed statement.

[6] This also refutes Mr. Davis' bald assertions that he could have used these reports to impeach state witnesses.

In **State v. Love**, 393 So.2d 66 (Fla. 3rd DCA 1981), the court went so far as to hold that it was error for a trial court to order production of police reports containing only the officer's summarized statements of witnesses.

The State was under no duty to disclose every investigative report to the defense, nor was it required to "scour" its reports for "bits and pieces" of information that might help the defense. **Johnson v. State**, 427 So.2d 1029 (Fla. 1st DCA 1983).[7]

In claim four, Steinhorst names 24 "witnesses" who allegedly were not revealed. The list is a mere compilation of every name contained in the improperly procured Chapter 119 materials. Steinhorst wildy speculates how arcane, hearsay, comments "might" have helped if fluffed up enough, but this rambling speculation cannot show that these people would have exonerated him for killing the three kids, whom he executed and dumped at Goose Pasture. Even **if** the kids came to steal his dope, Steinhorst had no right to kidnap and execute them - as he apparently alleges now.

Steinhorst had the burden of proving how each unnamed witness would have provided **material** testimony that would have

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[7] In Appendix 3, for example, Appellant gleefully locates an apparent, undisclosed "quotation" from Bobby Joe Vines; to-wit: "The sun came up". (Brief, page 2, Appendix "C"). How this shocking revelation turned the entire course of the murder trial, unfortunately, is not explained. Every other cited comment is a police officer's report of someone else's conversations. While words such as "stated", "reported" or "advised" are used these hearsay reports are not sworn to by the declarant, attested to, or contemporaneous recordings or transcriptions. In fact, most of the "statements" went to the habits and appearance of the victims and not to the crime. None of the reports bear upon Steinhorst or his participation in the murders at bar.

affected the outcome of the trial. **Johnson v. State, id.** As Johnson makes clear:

> The rules are not designed to provide a procedural escape hatch on appeal for avoidance of the jury's verdict absent a showing of prejudice or harm to the defendant. **Ivester v. State**, 398 So.2d 926, 931 (Fla. 1st DCA 1981); **Holman v. State**, 347 So.2d 832, 834 (Fla. 3rd DCA 1977); **Ludwick v. State**, 336 So.2d 701, 702 (Fla. 4th DCA 1976).

Id., at 1032.

In sum, Steinhorst has not shown a right to discovery, an ability to use these reports at trial or the materiality of the reports or the "unnamed" witnesses contained therein (other than character assassination of the victims).

ARGUMENT

POINT III

THE TRIAL COURT DID NOT ERR IN FINDING NO ERROR UNDER **BRADY V. MARYLAND**, 373 U.S. 83 (1963)

Mr. Steinhorst's grasp of **Brady** is perhaps more limited than suspected below.

Brady does not compel prosecutors to serve as roving investigators for the defense, nor does it require them to evaluate every scrap of data they receive for its possible value to the defense, nor does it compel production of "character assassination" evidence immaterial to the guilt of the accused. (Even bad people get murdered). Furthermore, **Brady** does not compel disclosure of evidence already available to the defense.

Brady prohibits the **suppression** of evidence favorable to the accused. The evidence must be "material", meaning that its loss altered the outcome of the trial in all reasonable probability. See **United States v. Bagley**, 473 U.S. 668 (1985); see also **United States v. Agurs**, 426 U.S. 733 (1976).

Nothing cited by Mr. Steinhorst creates a "reasonable probability" that Steinhorst did not kidnap and execute these kids (whether they came to "rip off his dope" or not). Especially since Steinhorst, whether he admits it now or not, admitted to "disposing of" the three (living) intruders. **Steinhorst v. State, supra**, at 335.

Finally, we must not forget that Steinhorst and his confederates went through a lengthy federal trial on the drug charges and had the benefit of both that trial and that

investigation prior to this trial. Davis had this information from other sources.

While Davis displayed fealty to is client and was more than willing to say that he "wished" he had the reports in question and that he could have used them, that does not satisfy **Brady** or **Bagley**. [The third party hearsay reports of police officers are not "evidence" in any event]. The highly speculative dissertations in Steinhorst's brief do not serve as "proof" of a **Brady** violation.

Defense counsel already knew Bobby Joe Vines had a "deal". The fact that Vines denied knowing anything before receiving immunity is not unusual or necessarily damaging. At most, it was refutable impeachment evidence already known to the defense.

Jacquelyn Smith was called merely to identify the victims. Her "impeachment" over the "dating" issue is irrelevant.

Chris Goodwin received immunity to testify. He never placed his "good character" at issue and character evidence about him was again collateral, if not irrelevant, to the issues at trial. Goodwin's alleged "prior inconsistent statements" did not relate to the murders - whether he was helping Steinhorst import dope or, as alleged, Sims "rip it off".

Larry Seaborn's alleged statement that he once saw one of the victim's brandish a gun "while drunk" is not "character evidence" as alleged but is mere "prior incident" evidence.

Ms. Yates testimony that Sims was "very drunk" on January 23, 1977 (the night of the murder), flies squarely in the face of the "conspiracy to steal drugs" theory propounded vociferously by

Steinhorst. Now, I guess, we are to believe that Hood and Sims, in addition to being insufficiently armed and in the company of two young girls were **also** drunk! But of course, at page 63 we are treated to the theory that Hood and Sims were **also**, while drunk and ripping off drugs, detaining the McAdams girls against their will!

This wildly speculative and attenuated concoction of defense theories does not satisfy **Brady** or **Bagley**. Relief was properly denied.

ARGUMENT

POINT V

THE TRIAL COURT DID NOT ERR IN REJECTING THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

No matter the amount of smoke spewed by the defense, the evidence at trial established Steinhorst's guilt beyond any reasonable doubt.

Steinhorst's counsel, Mr. Davis, stands accused of incompetence for only one reason: assaults upon counsel are **de rigeur** even though **Strickland v. Washington**, 466 U.S. 668 (1984) condemns this mindless attack upon every losing atatorney in every capital case.

Mr. Davis represented Steinhorst in this case and in the related federal drug case. Davis thoroughly investigated both cases. Davis did not take extensive depositions because he did not have to and because in some instances he could not. Davis had two investigators working on the case and "pooled" information with the co-defendants. Davis was not given exhibits (6) through (50) by the State and, as **State v. Love, supra**, demonstrates, he could not have gotten them even by court order! Steinhorst's attack is clearly made in bad faith.

This case is the very kind of abusive **Strickland** claim condemned in **Burger v. Kemp**, 483 U.S. ____, 97 L.Ed.2d 638 (1987).

Had Steinhorst researched the law, he would have known:

(1) Strategic decisions are not "second-guessed", even if "wrong" or "professionally unreasonable". **Strickland, supra;**

Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981); **Adams v. Wainwright**, 709 F.2d 1443 (11th Cir. 1983); **Palmes v. Wainwright**, 725 F.2d 1511 (11th Cir. 1984).

(2) Counsel's performance must be judged from **his** shoes **at that time**, not be hindsight and a fortuitous abuse of Chapter 119. See **Winfrey v. Maggio**, 664 F.2d 550 (5th Cir. 1980).

(3) Counsel is not "ineffective" for failing to call every available witness, run down every possible lead, take depositions or for conducting a "street investigation". **Foster v. Dugger**, 823 F.2d 402 (11th Cir. 1987); **Strickland v. Foster**, 707 F.2d 1339 (11th Cir. 1983), **amended**, 707 F.2d 1352, **cert. denied**, 466 U.S. 993 (1983); **Tucker v. Kemp**, 776 F.2d 1487 (11th Cir. 1985).

Steinhorst's arguments directly contradict his **Brady** arguments. For example, he now concedes that defense counsel knew of and had access to information about the alleged connection between Goodwin, Hood and Sims.

Steinhorst alleges that "formal depositions" were required under the Sixth Amendment. If this were true, the federal system would permit defense counsel to take said depositions in criminal cases as a matter of right. The federal system does not, and the decision not to take depositions - even if wrong - due to the results of unofficial investigation is not "ineffectiveness". See **Foster, supra**, and **Strickland v. Foster, supra.**

Finally, let us recall that the "incompetent" Mr. Davis **won** Steinhorst's "drug case" in federal court.

The attack upon defense counsel is wholly untenable.

CONCLUSION

Mr. Steinhorst was not entitled to relief under Rule 3.850.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Larry Helm Spalding, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301; and to Mr. Stephen D. Alexander, Esq., FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, One New York Plaza, New York, New York 10004, this 22 day of November, 1988.

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OF COUNSEL