IN THE SUPREME COURT OF FLORIDA

WALTER GALE STEINHORST, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 72,695 (Circ. No. 77-708)

APPELLANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF REVERSAL OF THE TRIAL COURT'S DENIAL OF RELIEF UNDER FLA. R. CRIM. P. 3.850

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PRELIMINARY STATEMENT

Assuming that the State's answering brief in this case represents the strongest possible opposition to Mr. Steinhorst's case on appeal, it is clear that Mr. Steinhorst is entitled to the relief he seeks. The State concedes that Judge Turner never read the record or even had it available to him before denying Mr. Steinhorst's request to vacate his death sentences. State's Brief at 14. Although the State tries desperately to justify this unconstitutional omission, there is simply no way to justify a decision in a capital case made under such circumstances especially where, as here, the judge hearing the 3.850 motion was not the original trial judge.

Regarding its substantive presentation, the State seems to feel that rhetorical expression of its own pro-death penalty sentiment and its own conviction that Mr. Steinhorst is guilty are viable substitutes for cogent legal argument supported by case law and citations to the record. Moreover, the State feels free -- or, rather, compelled -- to distort the record[1] and cast doubt on the integrity of Mr. Steinhorst's current counsel. Rather than trying to disprove the arguments made in Mr. Steinhorst's brief on appeal, which are carefully based on the record, the State simply asserts that these

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1. For example, there is absolutely no mention anywhere in the record of "Goose Pasture," nor is there even any suggestion of the victims' being disposed of on land leased by Appellant.

arguments are utterly illogical, ridiculous and "probably not even serious." By failing, like Judge Turner, to evaluate objectively the 43 interviews which it witheld from Mr. Steinhorst's counsel at the time of the the trial and by resorting to exaggerated epithets to express its antipathy toward appellant, the State has completely failed to rebut Mr. Steinhorst's case. A reading of the record and Mr. Steinhorst's initial brief will make it clear to this Court that Mr. Steinhorst is entitled to a new trial and/or a new sentencing hearing.

SUPPLEMENTARY STATEMENT OF FACTS

The Attorney General's "Statement of the Case and Facts" is inaccurate and misleading. First, it is purely disingenuous for the State to claim that Mr. Steinhorst's guilt is not at issue. Second, there is no support whatsoever in the record for the statement that the victims "were disposed of on property leased by Steinhorst for running hogs" -- and the State does not even purport to cite to any part of the record. Third, it is not a fact that "Steinhorst admitted to the murders to several witnesses." State's Brief at 1. As counsel for Appellant has stressed several times in its papers, to find that Appellant admitted to the murders presupposes the credibility of the immunized co-conspirators who testified to that effect; and the evidence presented at the 3.850 hearing casts considerable doubt on the credibility of those witnesses.

ARGUMENT

I. THE STATE HAS FAILED TO REBUT APPELLANT'S ARGUMENTS WHICH DEMONSTRATE MR. STEINHORST'S ENTITLEMENT TO RESENTENCING BEFORE A NEWLY EMPANELED JURY

As demonstrated in Appellant's initial brief and unrebutted by the State's stormy but insubstantial response, it is plain that Mr. Steinhorst is entitled to a new sentencing hearing because of numerous errors of constitutional proportions. The errors involve violations of the basic principles of Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985) and Enmund v. Florida, 458 U.S. 782 (1982).

A. THE STATE HAS FAILED TO DEMONSTRATE THAT THE CLEAR LOCKETT/HITCHCOCK ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

The State concedes Hitchcock error in this case (R. at 571), but contends that it was harmless because Justice Adkins considered nonstatutory mitigating evidence in sentencing Mr. Steinhorst. However, the State contends no Lockett error occurred -- again because Justice Adkins supposedly considered nonstatutory mitigating evidence. Thus, it is clear that, even under the State's own tortured distinction between Hitchcock and Lockett error, in Mr. Steinhorst's case, one issue is crucial to both determinations: did Justice Adkins actually consider and weigh all relevant nonstatutory mitigating evidence, knowing that nonstatutory mitigating evidence not only must be presented to, but also considered by, the sentencer?

As noted in Appellant's initial brief, among the elements to be considered in determining whether a Hitchcock error is harmless beyond a reasonable doubt is whether the trial judge, despite giving the flawed, restrictive instruction to the jury, was actually aware that nonstatutory mitigating evidence is to be considered in capital sentencing. See, e.g., Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988); Morgan v. State, 515 So. 2d 975 (Fla. 1987), cert. denied, 108 S. Ct. 2024 (1988).[2]

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2. Despite the focus of recent caselaw on the trial judge's view of the law concerning nonstatutory mitigating evidence, a trial court's correct awareness of the law is woefully insufficient to "cure" either a jury's ignorance thereof or its belief that any such evidence cannot be considered in making its sentencing recommendation. Indeed, as this Court has observed:

> The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

Messer v. State, 330 So. 2d 137, 142 (Fla. 1976). This is precisely why the fact that Justice Adkins had been presented with the presentence investigation report and letters on Mr. Steinhorst's behalf, a fact highly touted by the State in its brief (State's Brief at 2), is beside the point. Mr. Steinhorst's jury performed its sentencing function blind, benefitting from neither the presentence

Footnote Continued

1. The Record Is at Best Ambiguous Concerning Justice Adkins' Awareness of the Law With Respect to Nonstatutory Mitigating Evidence and the State Has Failed to Support Its Argument to the Contrary

Appellant contends that the disputed remarks made by Justice Adkins in sentencing Mr. Steinhorst[3] show that he felt "obligated" to comply with the statute and render his judgment based solely on "the facts and circumstances as in accordance with the aggravating and mitigating circumstances as set forth in the statute" and thus did not factor any nonstatutory mitigating evidence into his sentencing determination. In characteristically chameleonic fashion, the

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2. Footnote Continued From Previous Page

investigation report and letters nor the nonstatutory mitigating evidence introduced ten years later at the 3.850 hearing. Surely, the legislative intent of Section 921.141, Florida Statutes, is as clear now as it was when this Court decided Messer and requires the same result: resentencing.

3. Justice Adkins' remarks in sentencing Mr. Steinhorst are these:

> 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.
>
> The whole matter has given me great concern and I am, of course, obligated to make a reasonable judgment based on the facts and circumstances as in accordance with the aggravating and mitigating circumstances as set forth in the statute.

T. Tr. at 1570-71 (emphasis added).

State has assumed the extreme and rigid position that the remarks could not be clearer in demonstrating that Justice Adkins weighed, considered and included nonstatutory mitigating factors in determining Mr. Steinhorst's sentence. State's Brief at 12. This position is belied by the State's acknowledgment at the 3.850 hearing of a wider latitude of interpretation with respect to the remarks. R. at 422. At the very least, the remarks are ambiguous, as Mr. Menser's comment confirms.[4]

Appellant's contention is simply this: in the face of such acknowledged ambiguity, without the introduction of further evidence to support its interpretation of Justice Adkins' remarks the State has failed to prove beyond a reasonable doubt that Justice Adkins was aware of his obligation to base his sentence on all mitigating evidence, not merely upon such factors as are enumerated in the statute.

Even more important, because trial counsel reasonably believed that he could not present nonstatutory mitigating evidence, the presentence investigation report only contained a hint of the abundant nonstatutory mitigating evidence available to Mr. Steinhorst. In no way can it be said that Justice Adkins was presented with and considered <u>all</u> of the

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4. Appellant is extremely distressed by the State's repeated characterization of his position as impugning the integrity of Justice Adkins. Appellant does not doubt that Justice Adkins meant what he said. What he meant is at issue, not his veracity.

nonstatutory mitigating evidence Mr. Steinhorst had available to him. Moreover, Mr. Steinhorst's jury made its determination without the benefit of any nonstatutory mitigating evidence.

2. The State Has Failed to Excuse the Absence of Evidence Supporting Its Interpretation of Justice Adkins' Remarks, Thus Rendering Impossible a Finding of Harmlessness Beyond a Reasonable Doubt

In its brief, the State takes pains to rebut an argument not put forth by Appellant. See State's Brief at 10. Mr. Steinhorst does not suggest, as the State wishes this Court to believe, that harmless error cannot be proven beyond a reasonable doubt in the absence of testimony at the 3.850 hearing by the trial judge concerning his deliberations in sentencing a defendant to death. No such mechanical test is urged upon this Court. Rather, Appellant argues that the State has failed to meet its burden in this case to prove beyond a reasonable doubt that the error was harmless.

The instant case differs from cases cited by the State where a finding of harmless Hitchcock error was made without benefit at the 3.850 hearing of testimony of the trial judge or introduction of other evidence concerning the sentencer's awareness of Lockett's requirements.[5] First, unlike

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5. See White v. Dugger, 523 So. 2d 140 (Fla.), cert. denied, 109 S. Ct. 184 (1988); Tafero v. Dugger, 520 So. 2d 287 (Fla. 1988); Demps v. Dugger, 514 So. 2d 1092 (Fla. 1987); and Delap v. Dugger, 513 So. 2d 659 (Fla. 1987) cited in State's Brief at 10.

Mr. Steinhorst's case, most of the cases cited by the State involved sentencing proceedings which took place after this Court's December 1978 decision in Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Songer left no doubt that nonstatutory mitigating evidence was to be considered by the sentencer. It is completely reasonable for this Court to presume that trial judges presiding over capital sentencing proceedings occurring after December 1978 were aware of the law. Moreover, in all of the cases cited by the State, either independent record evidence demonstrated the trial judge's knowledge of the law or this Court's finding of harmlessness rested upon a determination that even if the sentencer had been precluded from considering the nonstatutory mitigating evidence, the evidence was insufficient to have altered the outcome.[6]

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6. Specifically, in White the nonstatutory mitigating evidence was held to be incapable of altering the death sentence. 523 So. 2d at 141. Clearly the trial judge's testimony or other evidence of his awareness of the state of the law was not required for a determination on such grounds. Similarly, in Tafero this Court found that the four aggravating circumstances coupled with the lack of statutory mitigating evidence and the weakness of the nonstatutory mitigating evidence rendered the lack of consideration of that evidence harmless. 520 So. 2d at 289. Again, evidence concerning the trial judge's awareness of the state of the law was unnecessary to such a determination. In Demps the record is absolutely clear in demonstrating the trial judge's knowledge of the law ("[t]he case law on it boils down to not only the mitigating factors enumerated in the statute, but any relevant information that would go to mitigation,"). 514 So. 2d at 1094. Finally, in Delap, as this Court noted, the prosecutor himself pointed out to the judge that the defendant was "not limited to the enumerated mitigating circumstances." 513 So. 2d at 660.

Here also the State contends the error was harmless because it finds incredible the possibility that the nonstatutory mitigating evidence introduced at the 3.850 hearing could have altered the sentence.[7] However, the State does not rebut Appellant's nonstatutory mitigating evidence, nor does it demonstrate how it is beyond a reasonable doubt that such evidence, described in detail in Appellant's initial brief (pp. 25-28), would have had no impact upon the sentence when the vote for death was not unanimous, but was 10-2, and when so much nonstatutory mitigating evidence is available. The burden to prove harmlessness of the error beyond a reasonable doubt is on the State. See Chapman v. California, 386 U.S. 18, 24 (1967). The State's bombastic assertions, which belittle the nonstatutory mitigating evidence and distort and exaggerate the facts of the Sandy Creek incident, are no substitute for evidence. This is particularly true here where the trial judge found a statutory mitigating circumstance -- no significant prior criminal history. As discussed more fully in Appellant's initial brief (pp. 20-22), decisions of this Court

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7. In fact, the State implies that the record contained enough adverse information -- that Mr. Steinhorst had gone AWOL and had stolen a car -- to outweigh the nonstatutory mitigating evidence. State's Brief at 2. Typically, the State failed to note Mr. Steinhorst engaged in this uncharacteristic behavior -- at age 19 -- because his father was ill and Mr. Steinhorst was desperate to see him. The State also failed to disclose that this incident occurred 26 years before the time of his arrest and that Mr. Steinhorst otherwise had a completely unblemished record.

clearly demonstrate that the combination of a Hitchcock violation and a finding of a nonstatutory mitigating factor renders it impossible for a reviewing court to conclude beyond a reasonable doubt that the failure to consider the nonstatutory mitigating evidence was harmless. Once again, the State has failed to sustain its burden.

Moreover, the additional "evidence" (i.e., certain of this Court's decisions in which Justice Adkins concurred) cited by the State to bolster its baseless contention that Justice Adkins "was clearly aware of his right to review nonstatutory mitigating evidence" (State's Brief at 10) utterly fails to provide the promised support. For example, it is true that in Washington v. State, 362 So. 2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979), a lengthy per curiam opinion considering numerous issues raised on direct appeal of multiple death sentences, this Court noted in the penultimate paragraph:

> Appellant argues finally that the trial judge erred in not considering in mitigation the fact that the defendant voluntarily surrendered to the authorities, confessed and ultimately pleaded guilty to all charges. While we do not foreclose consideration of such factors in mitigation in an appropriate case, we do not believe the appellant's actions are compelling here.

362 So. 2d at 667. However, the State fails to note that Washington was decided on September 7, 1978 -- a full month after Justice Adkins had sentenced Walter Steinhorst to death and a full four months after the sentencing hearing. Combined with the indirect and tangential nature of this Court's treatment of the issue and the fact that this Court's per

curiam opinion rejected Washington's claim of error on this point, this fact renders Washington utterly irrelevant.

Similarly, Justice Adkins' concurrence in the opinions in Messer v. State, 330 So. 2d 137 (Fla. 1976), cert. denied, 431 U.S. 925 (1977) and Halliwell v. State, 323 So. 2d 557 (Fla. 1975) cited by the State does not prove anything about his state of mind concerning the admissibility of nonstatutory mitigating evidence because those decisions preceded Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), in which Justice Adkins also concurred. Cooper held:

> [T]he Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

336 So. 2d at 1139. (footnote omitted).

Finally, 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); and Meeks v. State, 336 So. 2d 1142 (Fla. 1976), which the State cites on its behalf, do not discuss any nonstatutory mitigating factors.

Thus, once again, the State's spirited but empty arguments, which are devoid of record support, have failed to carry the State's burden of proving the clear error harmless beyond a reasonable doubt.

B. REMARKS OF THE TRIAL JUDGE AND PROSECUTOR CLEARLY VIOLATED CALDWELL V. MISSISSIPPI BY MISLEADING THE JURY CONCERNING ITS ROLE IN SENTENCING MR. STEINHORST

Contrary to Appellee's "Statement of Facts" (State's Brief at 2), Appellant most assuredly does not concede Mr. Steinhorst's jury was correctly advised of its function during the sentencing phase. As extensively set forth in Appellant's initial brief, the jury was repeatedly misled by the prosecutor into incorrectly believing its role to be of diminished importance. See Appellant's initial brief at 32-34. Justice Adkins did nothing to correct this misimpression. In fact, he reinforced it by using the exact words of the trial judge in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), which the Eleventh Circuit held required resentencing of Mann. The State gleefully quotes Mr. Steinhorst's trial counsel's remarks to the jury, presumably to show that the jury was exposed to the view that their determination did have significance, however, it is not defense counsel, but only the trial judge -- a figure whom the jury can regard as impartial -- who can "cure" the misimpression left by the prosecutor. See, e.g., Mann, 844 F.2d at 1456. That misimpression was not corrected by Justice Adkins' use of the standard instructions calling for the jury to "weigh and sift" the evidence because a "human life is at stake." Those instructions did not even implicitly correct Leo Jones' glaring mischaracterization of the jury's role because the two can be considered entirely consistent with one another.

In any event, a resolution of the controversy over the applicability of Caldwell to the Florida sentencing scheme may well come this term from the United States Supreme Court in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 108 S. Ct. 1106 (1988), which was argued November 1, 1988. Appellant thus respectfully renews his request that this Court stay its decision upon this issue, unless mooted by the granting of relief to Mr. Steinhorst on other grounds, pending the United States Supreme Court's decision in Adams.

C. THE STATE HAS FAILED TO REBUT APPELLANT'S CLAIM UNDER ENMUND V. FLORIDA

Even if the State were correct in its assertion that an appellate court can make the requisite Enmund findings, even the State could not plausibly assert that an appellate court could legitimately do so without reading the record. Moreover, in this case, even merely reading the record would not have enabled Judge Turner to make the credibility findings which were crucial to assessing the testimony of David Capo, the primary incriminating evidence in this regard. This case is precisely like that envisioned by the United States Supreme Court when it cautioned:

> [T]he question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on the credibility determinations that could not be accurately made by an appellate court on the basis of a paper record.

Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986).

II. THE STATE HAS FAILED TO SHOW THAT THE COURT BELOW WAS CORRECT IN HOLDING THAT DEFENSE EXHIBITS 6-50 WERE NOT SUBJECT TO DISCOVERY UNDER FLA. R. CRIM. P. 3.220

The State opens its response to Appellant's 3.220 and Brady v. Maryland, 373 U.S. 83 (1963), arguments by characterizing those arguments as examples of "a recent and ... abusive, anti-death bar tactic." State's Brief at 16. This is purely vindictive: it can in no way be "abusive" to assert in good faith violations of a client's constitutional rights.

For its substantive showing, the State then embarks upon an extensive attempt to demonstrate that Mr. Steinhorst was not entitled to receive in the first place the materials which are the subject of his 3.220 and Brady claims. But it undermines its own argument, and concedes the validity of Appellant's position, when it says, "Steinhorst confesses that the State did turn over actual witness interviews." State's brief at 16. What Appellant "confessed" is that in response to the discovery request filed by Mr. Davis, the State Attorney "turned over, without any objection whatsoever, 25 interviews (Defense Exhibits 51-76) which are identical in origin, format and style to the withheld interviews," but which, critically -- and certainly not coincidentally -- contained only information which supported the State's case or which was utterly innocuous.[8] Appellant's initial brief at 38.

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8. The state in its Response to Discovery (Defense Exhibit 77) indicated that it had discoverable witness statements,

Footnote Continued

If either the State or Judge Turner had bothered to examine the materials which they so blithely assert were not subject to discovery and those which were in fact turned over by the State at the time, they would have seen that except for the specific information contained therein, there is absolutely no difference between the two groups of statements except for their content. The "witness statements" which Leo Jones recognized as being subject to discovery were no more verbatim or "attested to" than those which he witheld. The State has put forth absolutely no explanation as to why Mr. Jones would have given Mr. Steinhorst anything for free, so to speak. Rather, there could be no clearer proof of Mr. Steinhorst's claim that Defense Exhibits 6-50 were subject to discovery under both Brady and the Florida rules.

III. THE STATE HAS FAILED TO REBUT APPELLANT'S CLAIM THAT THE STATE'S PROVISION OF AN INCOMPLETE LIST OF NAMES VIOLATED FLA. R. CRIM. P. 3.220

The State implies that to show that a violation of Fla. R. Crim. P. 3.220 occurred, Mr. Steinhorst must show that the witnesses whose names were not provided by Mr. Jones to Mr. Davis "would have exonerated him." No law or precedent requires Mr. Steinhorst to make that showing. What Mr.

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8. Footnote Continued From Previous Page

> however, it then chose to turn over only those favorable to the State's case, which, as noted above, cannot be distinguished in any way from those which were withheld.

Steinhorst is required to show is that the witholding of evidence "resulted in harm or prejudice to the defendant," Richardson v. State, 246 So. 2d 771, 774-5 (Fla. 1971) -- and Appellant's initial brief does just that. The State further implies that this claim has no merit because Defense Exhibits 6-50 were "improperly procured."[9] Again, the State misses the point: since Leo Jones released over twenty virtually identical statements, it is indisputable that Defense Exhibits 6-50 were in fact required to be turned over, and the failure to do so gave rise to the concurrent violation of Fla. R. Crim. P. 3.220(a)(1)(i).

IV. THE STATE HAS FAILED TO REBUT APPELLANT'S ARGUMENT THAT THE FAILURE TO TURN OVER DEFENSE EXHIBITS 6-50 VIOLATED BRADY v. MARYLAND

The State clearly prefers to mischaracterize Mr. Steinhorst's Brady claim than to address its merits, and to maintain in the face of testimony to the contrary that all of the material contained in Defense Exhibits 6-50 was available to Cliff Davis prior to Mr. Steinhorst's trial.

First, the State denies the materiality of Defense Exhibits 6-50 as mere "'character assassination' evidence immaterial to the guilt of the accused," which it attempts to buttress by the silly statement that "[e]ven bad people get

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9. Not only was there nothing improper about Appellant's request to the FDLE under the Public Records Act, Chapter 119, Florida Statutes, but Appellee never raised this issue below and thus is precluded from raising it now.

murdered." State's Brief at 20. This approach completely misses the point. Although it happens that the evidence which comprises the basis for Mr. Steinhorst's Brady claim involves the victims, what makes that evidence Brady material is its impact on the credibility of the testimony which constituted the State's entire case against Mr. Steinhorst.

Second, the State insists on arguing that Mr. Davis had the information contained in Defense Exhibits 6-50 during or as a result of his representation of Mr. Steinhorst in the federal drug trial. This assertion finds no support in the record. Rather, as counsel for Appellant pointed out in its initial brief, Mr. Davis testified that he did not have that information and that when he tried to investigate the Sandy Creek incident, no one would speak to him. It is also worth noting that the kind of evidence which Appellant submits is contained in Defense Exhibits 6-50 would have had no bearing whatsoever on the federal drug smuggling case, and therefore there was no reason for Mr. Davis even to seek it out.

In arguing that the material concerning Bobby Joe Vines was irrelevant, the State again misses the point that Defense Exhibits 6 through 10 would have provided Mr. Davis with four prior inconsistent statements. Appellant's initial brief at 48. This potential use of the witheld material in aggregate -- which this Court must assume Mr. Davis would have made -- is more significant than the actual content of each inconsistent statement. And once again, Mr. Davis testified explicitly that he did not know the nature of Vines's "sliding

scale" deal until he saw Defense Exhibits 8 and 9 ten years after the trial. R. at 51.

With respect to Jacquelyn Schmidt, the State does not dispute that Mr. Davis could have used Defense Exhibit 41 to impeach her -- but, incredibly, it characterizes this as "irrelevant," thereby confirming Appellant's suspicions that the State pays little if any attention to the evidentiary rules. State's Brief at 21. It makes no difference why Jacquelyn Schmidt was called: the fact is that she lied on the stand, and had Mr. Davis been able to impeach her along with Vines and Chris Goodwin, he surely would have raised a reasonable doubt in the jury's minds as to the credibility of the State's witnesses.

In asserting that Chris Goodwin "never placed his 'good character' at issue" (State's Brief at 21), the State ignores the fact that the prior inconsistent statements which Goodwin had given all related to his own involvement in and knowledge about the drug smuggling operation. For Mr. Davis to bring this out would not have required Mr. Goodwin's character to be placed in issue. And whether the substance of his statements was "collateral" does not detract from the fact that he was one of several witnesses whose testimony comprised the State's entire case.

More incredible still is the State's attempt to play down the impact of the statement made by Larry Seaborn in Defense Exhibit 13, which was witheld by the prosecutor. State's Brief at 21. Mr. Seaborn did not tell the FDLE that he

"once" saw Doug Hood with a gun. Mr. Seaborn told the FDLE that on the night of the murders, he saw Doug Hood brandishing a loaded .357 -- the same kind of gun which killed all four victims. How much more relevant could this information be in light of the fact that the murder weapon was never found? This far transcends any importance this statement might have had as "character evidence."

The State's disparagement of the statements given by Linda Jean Yates is, "frankly," mystifying. The State implies that it is for some reason preposterous to theorize that Harold Sims and Doug Hood were drunk while they were in the company of the McAdams sisters and setting out to rip off the smuggling operation. On the contrary, Appellant submits that if they were drunk they were much more likely to believe that they could succeed in such a risky operation. Appellant further submits that there is no inconsistency in assuming that Hood and Sims, "while drunk and ripping off drugs," were "detaining the McAdams girls against their will." State's Brief at 22. In any event, whether two or more theories are inconsistent is itself irrelevant. What is at issue here is the State's precluding Mr. Davis from arguing any credible theory in his client's defense. The fact that the witheld Defense Exhibits support more than one theory only compounds the initial violation which the State Attorney committed in failing to turn over those interviews while providing utterly innocuous ones.

Obviously the State could not dispute Appellant's comparison between the present case and Arango v. State, 497

So. 2d 1161 (Fla. 1986). That analogy, combined with the fact that Leo Jones actually turned over Defense Exhibits 51-76, demonstrate unequivocally that Mr. Steinhorst was entitled to have Defense Exhibits 6-50. As set out in detail in Appellant's initial brief, the evidence contained in those interviews renders the State's deceptive action and omission a violation of Brady v. Maryland.

V. THE STATE HAS FAILED TO SHOW THAT THE COURT BELOW WAS CORRECT IN REJECTING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE

As with Appellant's other arguments, the State mischaracterizes Appellant's ineffective assistance of counsel arguments as inconsistent instead of opposing them. The crux of the issue here is that, as Mr. Davis himself testified, given the content of Defense Exhibits 6-50, if Mr. Davis knew of the existence of those exhibits at the time of Mr. Steinhorst's trial, he was ineffective for failing to use them in his client's defense. By purporting to find that Mr. Davis was aware of all the information contained in Defense Exhibits 6-50 without finding that he actually used any of it (R. at 784), Judge Turner made the finding necessary to support Mr. Steinhorst's position. Clearly, an unrefuted[10] admission of

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10. The State offered no testimony at the 3.850 hearing, thus Mr. Davis's is the only testimony regarding the manner in which the information could and should have been used in order to meet constitutional requirements for effective assistance of counsel.

ineffectiveness supported by a detailed recitation of how the information could and should have been used, together with its effect on the outcome, meets the test set forth in Strickland v. Washington, 466 U.S. 668 (1984), for ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Appellant Walter Gale Steinhorst respectfully requests this Court to reverse the lower court's order and to vacate Mr. Steinhorst's conviction and sentence.

Dated: New York, New York
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Respectfully submitted,

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