IN THE SUPREME COURT OF FLORIDA

JERMAINE FOSTER,

Appellant, **CASE NO. SC03-1331**

v.

STATE OF FLORIDA,

Appellee,
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
COURT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On March 4, 1993, Appellant was indicted on the following charges relating to an incident which occurred November 29, 1992:

(1) First degree murder, victim Anthony Faiella;
(2) First degree murder, victim Anthony Clifton;
(3) Attempted first degree murder, victim Michael Rentas;
(4) Kidnaping, victim Anthony Faiella;
(5) Kidnaping, victim Anthony Clifton
(6) Kidnaping, victim Michael Rentas;
(7) Kidnaping, victim Tammy George.

(R 1-4). Appellant was convicted as charged. After a penalty phase, the jury recommended the death penalty by a vote of 12-0. Appellant appealed, raising the following issues:

(1) the death penalty is disproportionate;

(2) the trial court improperly balanced the aggravators against the mitigators;

(3) the trial court erred in denying defendant's motion for mistrial based on the wrongful admission of hearsay evidence over defense objection;

(4) the trial court erred by allowing witnesses to testify about other crimes or bad acts;

(5) the trial court erred in excusing a juror for cause over defense objection;

(6) the trial court erred in instructing the jury that it could consider whether the murder was heinous, atrocious, or cruel;

(7) the trial court erred in refusing to strike jurors for cause;

> (8) the trial court erred in finding that the murders were committed in a cold, calculated, and premeditated manner;
>
> (9) the trial court erred in overruling objections to the introduction of racial prejudice into the proceedings;
>
> (10) the trial court erred in considering separately that the murder was for pecuniary gain and that the murder occurred during the course of a kidnapping;
>
> (11) a new trial is warranted because of prosecutorial misconduct; and
>
> (12) section 921.141, Florida Statutes (1993), is unconstitutional.

Foster v. State, 679 So.2d 747 (Fla. 1996). The Florida Supreme Court upheld the convictions and death sentence. The Petition for Writ of Certiorari was denied by the United Stated States Supreme Court on March 17, 1997.

On January 15, 1998, Appellant filed a Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend (R 29-77). The motion was a "shell" motion which alleged the Office of Capital Collateral Review was unable to file a complete motion due to lack of funding and inability to access public records. A second Motion to Vacate Judgment of Conviction and Sentence was filed June 1, 2000, raising the following claims:

> (1) Mr. Foster was denied the effective assistance of Counsel, pretrial, and at the guilt phase of his trial, in violation of the Sixth, Eighth and

Fourteenth Amendments, counsel failed to adequately investigate and prepare the defense case and challenge the state's case. The court and state rendered counsel ineffective. As a result, the convictions herein are not reliable.

(2) Mr. Foster was denied his right to the effective assistance of counsel and mental health experts during the guilty phase of his capital case when critical information regarding Mr. Foster's mental state was not provided to the jury, all in violation of Mr. Foster's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

(3) Mr. Foster's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of a fundamentally fair trial as guaranteed under the Sixth, Eighth ans Fourteenth Amendments.

(4) Mr. Foster's counsel was ineffective by counsel's failure to object to and thereby not preserving for appeal the trial court's finding that the murders were committed in a cold calculated and pre-meditated manner without a pretense of moral or legal justification.

(5) Mr. Foster's sentence of death is premised upon fundamental error because the jury received inadequate or improper guidance concerning the aggravating circumstances to be considered. Florida's statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments.

(6) Mr. Foster was denied his right to a fair and impartial jury by prejudicial pretrial publicity, by the lack of an adequate change of venue and by events in this courtroom during trial hereby rendering trial counsel ineffective and therefore, the trial court erred.

> (7) The penalty phase jury instructions unconstitutionally shifted the burden to Mr. Foster to prove that death was an inappropriate penalty.
>
> (8) The jury's recommendation of death was tainted by the state and court's failure to instruct the jury regarding the statutory mitigating circumstances that the crime was committed while Mr. Foster was under the influence of extreme mental or emotional disturbance, thereby rendering his counsel ineffective.

A Supplemental Motion to Vacate Judgment of Conviction and Sentence was filed September 25, 2000, raising the following additional points:

> (1) Mr. Foster was denied the effective assistance of Counsel, pretrial, and at the guilt phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments, counsel fail to fully investigate and prepare by a defense of voluntary intoxication as it effected Mr. Foster's mental disability and lack of mental capacity to commit and appreciate the consequences of his actions.

(R 418-421). An evidentiary hearing was set for November 30, 2000. Appellant moved to continue the hearing twice: once because counsel was having hip replacement surgery (R 428), and, after the hearing was re-scheduled for March 28-30, 2001, because counsel was unable to prepare for hearing because of physical therapy after the surgery (R 437). On January 23, 2002, Appellant filed a Motion for Leave to Amend, stating that Janet Vogelsang met with Appellant's attorneys in 1993, during which time one attorney made a racial slur (R 448). Furthermore, the attorneys were not interested in the visual

aids she prepared for trial (R 449). The motion was denied (R 453-464).

An evidentiary hearing was held January 30-February 1, 2002 (R 450-452, 629-1003). The Motion to Vacate was denied on July 8, 2002 (R 514-542). Appellant filed a Motion for Rehearing on July 22, 2002 (R 543-546). The motion was denied on July 30, 2003[1] (R 616-622).

[1]Although the Index to the record states the date of the order as “June 3, 2003", the actual order is dated June 20, 2003, and the file stamp is June 30, 2003 (R 616-618).

STATEMENT OF THE FACTS

The factual findings of the Florida Supreme Court include:

> On the morning of November 28, 1993, Gerard Booker came to the trailer shared by Foster and Leondra Henderson and stated he wanted to recoup his recent gambling losses by committing robberies. The trio proceeded to Auburndale to a place called "The Hill." Armed with a .38 caliber handgun, a 9 millimeter handgun, and an Uzi- type automatic weapon, Foster and Booker, who were joined by Alf Catholic, approached three unknown men who were selling drugs from their truck. After forcing the victims to remove their clothing and lie on the ground, Foster, Catholic, and Booker stole the victims' cash, jewelry, crack cocaine, and red Ford pickup truck. Henderson then joined the group, and they concealed the stolen truck for future use.
>
> Foster and Catholic returned to The Hill and sold some of the stolen drugs; however, the proceeds of the robbery were not sufficient to cover Booker's gambling losses. The group of Foster, Catholic, Booker, and Henderson agreed to find a local drug dealer and rob him. Then they retrieved the stolen red truck and loaded the guns from the earlier robbery into it. When the group was unable to locate their intended victim, they drove to Osceola County to visit a girlfriend of Catholic and to find other victims to rob.
>
> At the girlfriend's house, the group decided to accompany the girlfriend and some of her friends to the Palms Bar in St. Cloud. Catholic and Foster rode in the car driven by Catholic's girlfriend, and Henderson and Booker followed in the stolen red truck. Both drivers stopped their vehicles in route to the bar, and Catholic's girlfriend bought some liquor. Testimony revealed that Foster and Catholic drank liquor and smoked marijuana during the trip. Then the two drivers pulled over so the girlfriend could buy some gas. It was determined at that time that there were problems with the truck's fan belt, which had caused the truck to overheat and smoke during the trip. Booker stated that they would have

to steal another car in which to return home that night.

Once at the Palms Bar, Foster and Catholic drank liquor, and Foster played a video game and danced. After a while, the group went outside, and Booker detailed a plan to rob the entire bar. Foster told Booker the plan was "crazy" because it was unknown what "those boys got in there." As the group headed back into the bar, Henderson noticed a black Nissan Pathfinder that was in the parking lot. Henderson determined that Anthony Faiella and Mike Rentas had come to the bar in that vehicle. In fact, Faiella and Rentas came to the bar to meet Anthony Clifton, who was with Tammy George. Henderson pointed out Faiella, Rentas, and Clifton to Booker as possible victims to rob of their money and their vehicle. The group decided upon a plan to follow the potential victims when they left the bar in the Pathfinder. Foster told Henderson, Booker, and Catholic that if the victims did not have any money, he was going to kill them.

At around 1:30 a.m., Faiella, Rentas, Clifton, and George left the bar in the Pathfinder. The other group followed them in the red truck. Catholic was driving the truck and rammed into the back of the Pathfinder to get that vehicle to stop. When the victims stopped and got out of the Pathfinder to inspect the damage, the group in the red truck took out their weapons and demanded money from the occupants of the Pathfinder. After the victims stated that they did not have any money, the victims were forced to return to the Pathfinder. Booker drove the Pathfinder, and Henderson held the victims at gunpoint from the passenger seat. The others followed in the red truck.

On the outskirts of Kissimmee, the red truck again began experiencing mechanical problems. Catholic turned off the main highway and drove a short distance into a vacant field; Booker and the victims followed in the Pathfinder. All four of the victims were ordered out of the Pathfinder, and Tammy George was separated from the three male victims. The group again demanded money from the male victims. When

> these victims did not produce any, they were ordered to remove their clothes, and Foster had the men place their underwear and hands on their heads and lie face down on the ground.
>
> At this point, Foster, from a position beside and to the rear of Anthony Clifton, shot Clifton in the back of the head, killing him. Foster then approached Rentas and fired at his head. The bullet hit him in the hand, and Rentas pretended to be dead. Foster next walked to Faiella and shot him in the head, killing him. After this, Foster approached George as if to kill her, but Booker talked him out of it. The group then left in the Pathfinder and unsuccessfully tried to dispose of it by driving it into a lake. All four of the assailants were apprehended within days.

Foster v. State, 679 So.2d 747, 750-751 (Fla. 1996).

EVIDENTIARY HEARING EVIDENCE

I. EXPERT TESTIMONY ON MENTAL HEALTH ISSUES

At the evidentiary hearing January 30 - February 1, 2002, Appellant presented the testimony of Dr. Henry Dee and Dr. Jonathan Lipman.

Dr. Dee, clinical neuropsychologist, first spoke to Appellant's attorneys in December, 1993. The attorneys sent him lots of background materials (R 696). Dee lost the materials and his notes of the discussions he had with Appellant's attorneys (R 715). Phone records showed that Dee also spoke with the attorneys on January 11, 19, 20, 25 and 27 (R 714). The attorneys sent Dee copies of medical records, school records and other documents on January 11 and 12, 1994

(R 716,722). The guilt phase of Appellant's trial started February 8 (R 718). Dee did not see Appellant until eight days before he testified at the penalty phase on February 25 (R 712). He did not remember being asked to look into addiction or voluntary intoxication, the latter being a defense in the guilt phase (R 697-698). Dee had never testified on voluntary intoxication as it related to diminished capacity (R 700).[2] Dee never suggested a toxicologist to the attorneys (R 712). Dee knew there were drugs used "but that's just sort of inexpert hearsay testimony, I can't rely on that." (R 712). If Appellant had been taking drugs and drinking alcohol, coupled with his mental impairments, it would have been easier to kill the victims (R 713). Dee testified at trial about the effects of cocaine withdrawal (R 713). If he had seen anything in the medical records or documents to suggest an insanity or diminished capacity defense, he would have contacted the attorneys (R 718-19). However, if intoxication is raised without corroboration, the defense is not used (R 719). There was nothing in Dee's notes about Appellant using cocaine the night of the murders; however, Dee thought he recalled

[2]Dr. Dee testified in Bottoson one week before Appellant's trial (R 694).

Appellant saying something about it (R 721). Dee's notes indicated Appellant sold the cocaine they stole from the men in the red truck, but smoked marijuana (R 721).

Dr. Dee conducted the WAIS-R on Appellant and concluded he had an IQ of 75 (R 700, 705). The verbal was 74 and the performance 78 (R 724). Dee did not conduct the Vineland test because he didn't think it "would be particularly useful because I had the information I needed." (R 725). Appellant did not have a job for a substantial period of time, he did not finish school, and he was not really "functioning literal." (R 725). Appellant had a lot of cultural deprivation, so it was a difficult call. He was still very young and had been subject to very bad influence (R 725). Dee was reluctant to decide finally whether Appellant was mentally retarded (R 725). The IQ was low enough to "consider" mental retardation; however, there was a question as to the age factor (R 705, 706). Therefore, the best Dee could opine was that Appellant was mildly retarded or borderline (R 706). Dee later stated he assessed Appellant as "sort of a borderline level." (R 724). When asked whether a person with an IQ of 75 may *not* be retarded, Dee replied "Oh, yes, yes, Certainly." (R 723). Just because a person can't count change quickly does not mean he is retarded (R 723). Dee believed Appellant

always depended on others (R 706). He believed Appellant had poor memory function (R 707). In complex figure recognition, he scored significantly above average (R 707). The MMPI did not show any mental aberration like being psychotic(R 731). Appellant was edgy and suspicious, but not psychotic (R 731). Dee had some reservations about Appellant's answers on personality tests (R 708). Some indications of adaptive functioning are ability to drive and take care of a car and ability to recognize danger (R 727).

Dee was aware of the intercept of a conversation between Booker and Appellant (R 728). Appellant told Booker he was in his "right mind" and was not talking without a lawyer. He also said he was aware of the situation he was in and knew that being high could be used as a defense (R 730). Dee believed Appellant knew right from wrong (R 737). The process of saying he had to shoot the victims because Henderson called his name shows awareness of being identified, arrested and sent to jail (R 737). Appellant had a significant degree of mental impairment (R 739). Dee did not know whether that could have been raised as a defense in the guilt phase (R 739-40). It is very common to blame objectionable behavior on being intoxicated, even among people with low IQ's (R 741).

Dr. Lipman, neuropharmacologist, reviewed materials in preparation for the evidentiary hearing (R 753). He did not interview or examine Appellant (R 755). Based on his review of the documents, Dr. Lipman believed Appellant was impaired at the time of the murders (R 756). Appellant's IQ was not significant to the impairment, but the organic brain damage was (R 757). The reason Appellant had a low IQ was because of the brain damage. The relevance to pharmacology is that drugs cause impairments and Appellant's functioning was already impaired (R 757). Lipman was not aware of any tests in which a mentally retarded person was given drugs (R 758).

People who drink alcohol tend to be impulsive. Marijuana potentiates the effect of alcohol, making the person more disabled. Adding cocaine has a tendency to provoke violence (R 759). An extrapolation of the alcohol consumed indicated a blood alcohol content ("BAC") of .204 at the time of the murders (R 760). Lipman assumed three 6-ounce cups of 80-proof liquor drank 30 minutes apart. He assumed the crime occurred two hours after the last cup. Since Appellant is a regular drinker, his volume of distribution would expand (R 761). After receiving more information from defense counsel, Lipman recalculated his assumptions to .218 BAC (R 762). The new information doubled the amount of alcohol consumed during

a much shorter period of time (R 764). The alcohol and drugs would have produced organic toxicity, a state of brain impairment due to poisoning (R 765). In an extreme state, it can rise to the level of insanity (R 770). In a less extreme case, it can erode the necessary intent for certain crimes (R 770). There was no information in the record to support an insanity defense; however, a voluntary intoxication defense could have been raised (R 771). Lipman did not talk to Appellant or Dr. Dee about data (R 774). His entire assumption was based on information from Catholic and that Appellant was doing cocaine (R 777). The depositions of Booker and Catholic were important to his assumption (R 779). If that information was not available, it would make his decision less valuable (R 779). Booker provided information regarding cocaine and type of liquor. Catholic provided six cups and the timing (R 779). Without the depositions of Catholic and Booker, Lipman's ability to render a decision would be severely hampered (R 780). Impairment is different for different people (R 780). In fact, the effect in the general population of consuming marijuana and alcohol is an anti-violent effect (R 781). Evidence of cocaine usage was essential to the equation of intoxication by three drugs.

However, Appellant would still have a BAC of .220 without the cocaine (R 782).

Appellant's statements at the time of the murders would be important in assessing his level of impairment (R 785). Appellant's statement about not robbing the bar because there could be weapons inside would show cognitive functioning. Recalling the reason for executing the victims would show cognitive functioning (R 786). There were statements from Booker or Catholic regarding Appellant hearing voices. This would show a psychosis (R 972). A person like Appellant who is "borderline retarded" would be more susceptible to the suggestions of others (R 793). Alcohol would increase the likelihood of compliance (R 794). Lipman was aware Appellant disagreed with Booker about robbing the club (R 794).

II. CO-DEFENDANT TESTIMONY

Appellant testified and presented testimony from co-defendants Leondre Henderson, Gerard Booker, and Alf Catholic. The trial judge also took judicial notice of the depositions of Booker, Catholic and Henderson (R 745-746).

Leondre Henderson pled to the murder charges and received a 25-year minimum mandatory sentence. As part of the sentence agreement, he would testify against Appellant (R 649). Henderson left home to go live with Appellant (R 650).

Appellant had been living on his own supporting himself by selling drugs (R 674). Appellant looked out for Henderson and showed him the street life. Appellant showed him how to make a living and cared for him (R 674). They sold cocaine (R 655). Appellant was relatively successful, with a home and car (R 674). Henderson had been living with Appellant about a year by the time the murders took place (R 675). He knew Appellant since they were kids. Appellant was easy going and brave. He had a tendency to be protective of friends (R 679). Corey and Chris also lived with Appellant at one time, and Appellant was protective of them (R 688-89).

When Appellant drank or used drugs, he would sit back and watch people, just be laid back (R 656, 672). He was not more aggressive when doing drugs (R 690); however, there was one time Appellant acted aggressively after Henderson accused him of giving drugs to Henderson's girlfriend (R 691). Appellant did not use cocaine on a regular basis (R 677). Henderson only remembered seeing Appellant use cocaine one time (R 678). Henderson was not with Appellant the entire day of the murders. During the time they were together, they smoked one joint of marijuana (R 659). Henderson did not see Appellant do any cocaine (R 662). He did not recall Appellant drinking any alcohol at Gwen's house in Kissimmee (R 667). Before they

went to the club, they bought a bottle of Christian Brothers (R 668). At the club, they shot pool. Appellant was fine physically (R 671).

Henderson's recollection of the reason Appellant shot the victims was that Henderson called Appellant by his name or by "J" (R 672). After the murders, they went to a club in Auburndale. Appellant used cocaine after the murders. Before the murders, there was brandy available (R 680). Recapping the events of the day, Henderson did not recall whether Appellant smoked marijuana at Alf's house or at the club (R 681-682). Booker had the idea to rob the club, but Appellant said "we can't rob this club because you don't know what these people got in there." (R 682). Booker did not tell people what to do and Henderson did not think of him as the "leader" (R 689). Henderson suggested they rob the men in the black Pathfinder (R 683). Booker and Henderson rode with the victims in the black Pathfinder and Appellant was in the red truck (R 687). Foster was the one that told the victims to lay on the ground (R 684). Everyone except Appellant got into the black Pathfinder because the red truck they stole earlier had engine problems. Henderson yelled to Appellant "J, man, let's go." (R 686). Appellant shot the three victims and got

in the truck. He told Henderson he had to shoot the victims because Henderson said his name (R 687).

Alf Catholic knew Appellant from the street before the murders (R 796). They grew up together and were friends who would see each other on a day-to-day basis (R 796). Appellant took Henderson in because he was "wild and young" (R 810). Appellant took care of Henderson, but Henderson had to make a living (R 811). Appellant provided food for everyone in the house (R 812). Appellant sold drugs on "The Hill" (R 797). On the day of the murders, Catholic saw Appellant around 10:00 a.m. He got in Appellant's area and they smoked some marijuana (R 799). Before Catholic left around 6:00 p.m., Appellant and others shared 10-12 joints (R 801). They went to Catholic's house and smoked more marijuana and ate pizza (R 802). Catholic did not recall Appellant using any cocaine; however he did remember cocaine being at the house (R 802, 809). He did not see Appellant snorting cocaine, but the latter went into the bathroom (R 810). Catholic did not want to discuss the robberies of drug dealers on The Hill because he had a *pro se* appeal pending (R 803).

Appellant started using cocaine when they went to the bar (R 807). They smoked marijuana as they drove around (R 814). There was no cocaine used at Gwen's house (R 815). They

purchased a ½ gallon jug of Christian Brothers brandy, together with ice and coke (R 815). There were six people in the car drinking from little 8-ounce clear cups. The cups would have more alcohol than coke (R 816). They did not empty the bottle (R 817). They were allowed to bring their cups into the club. Instead of buying drinks, they would walk out to the car, pour another drink, and go back into the club (R 818). Appellant may have had three drinks on the ride to the club and two more while at the club (R 818). Because of the passage of time, Catholic "couldn't say exactly what [Appellant] did." (R 823). They ran out of Coke and ice, so started drinking straight brandy (R 819). They did not smoke marijuana in the club. Appellant may have snorted some cocaine in the bathroom (R 819). Catholic saw Appellant go into the bathroom with cocaine, but did not see him use it because he "can't see through walls" (R 824). From the time Appellant snorted cocaine to the time they arrived in the field where the victims were shot was about ten minutes (R 820). In Catholic's opinion, Appellant was intoxicated (R 821). Catholic had a joint trial with Appellant and was not available to testify at trial (R 825-26).

Booker also grew up with Appellant (R 828). He did not know whether Appellant was using drugs the morning of the

murders (R 833). Henderson and Appellant were always together (R 833). They were younger than Booker, so they ran with different crowds (R 834). Around 1:00 p.m. on the day of the murders, Booker noticed some men were selling drugs on "our street." (R 834). Booker got Henderson and Appellant, then went to rob the drug dealers. They got money and drugs. Henderson took the truck (R 834). They split up the drugs and decided to go rob some more drug dealers (R 835). Appellant would smoke pot all day, but Booker did not know whether he used cocaine (R 838). Appellant is a "weed head" and smokes constantly (R 838). Booker did not see Appellant use cocaine until they were in a club the night of the murders (R 836). Booker thought it was Catholic who said it was too big a chance to rob the club (R 839). According to Booker, he was in control because he was older and had been on the street before Appellant. Appellant would have to follow Booker: Booker would not follow Appellant (R 840). When they left the club, Booker and Henderson were in the Pathfinder, Catholic and Appellant were in the truck (R 841). Booker considered himself the "anointed leader" because he had the "mentality." (R 842).

Henderson said Booker's name at the murder scene and caused the victims to be shot (R 842). Henderson stripped the

victims to see what they had on them. Booker told Appellant to "go ahead and do 'em." When asked whether Booker ordered Appellant to shoot the victims, Booker answered: "Tell me how you want it." (R 843). When asked whether ordering Appellant to shoot the victims was a fair characterization, Booker said "Well, no, that's why I let him." (R 844). Booker knew the tape recorder was in the FBI car when he was in the car with Appellant. He did not know whether Appellant knew or not (R 846). Booker thought Appellant told law enforcement where to find him in order to save Henderson[3] (R 846). Appellant tried to blame everything on Booker (R 847). Booker was not more violent than Appellant: he was the most responsible (R 848).

III. TRIAL COUNSEL: DON SMALLWOOD AND NICK KELLY

The State presented testimony from Tammy George, the black female who was released from the murder scene; Don Smallwood and Nick Kelly, trial counsel; and Gary Phillips, private investigator. Don Smallwood graduated from Cumberland Law School in 1982. He and Nick Kelly practiced at the State Attorney Office in Osceola County, went into private practice with Mr. Hand, then opened their own law firm (R 865-866). Smallwood and Kelly were defense counsel in the Dusty Ray Spencer case in 1989 or 1990 (R 867-868). Spencer had issues

[3]Henderson's street name is "Manny Boy."

dealing with voluntary intoxication and long years of drug abuse (R 868).[4] Dr. Lipman and Dr. Dee were defense experts in the Spencer penalty phase (R 870).

The attorneys kept track of the time spent on Appellant's case (R 872, State Exhibits #4 and #5). They hired an investigator, Gary Phillips, who also kept track of his time and activities (R 873, State Exhibit #6). Smallwood and Kelly hired experts and sent them Appellant's personal, family and school records (R 874). They kept track of phone calls to the experts (R 874, State Exhibit #1). Federal Express shipments of Appellant's records were recorded (R 874, State Exhibit #3). Smallwood and Kelly attended the federal trial in 1993 without billing for their time. They wanted to glean as much information as they could from the other trial (R 900). Even if Appellant were convicted of felony murder in State court, the hope was the attorneys could save him from the death penalty by disallowing proof of aggravating circumstances (R 901).

Smallwood and Kelly decided that Smallwood would be responsible for the guilt phase and Kelly the penalty phase (R 876, 929). The attorneys tried to develop defenses not only for the guilt phase, but also for the penalty phase. They met

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[4]*Spencer v. State*, 645 So. 2d 377 (Fla. 1994).

with Appellant's family for four hours as early as March and family and childhood friends for twelve hours in April, 1993 (R 877). The attorneys spent another seven hours with family in June and had a one-and-one-half hour conversation with Appellant's mother in July (R 879). The picture the attorneys obtained from family was that Appellant had a tough childhood. He was left alone with younger brothers and sisters. He would have to sell drugs to be able to get food to feed the family (R 879). Appellant's mother was a drug addict and the aunt was more of the maternal figure. Appellant was good at Pop Warner football, but had some trouble in school (R 880). In sum, Appellant had an imbalanced childhood.

Smallwood and Kelly discussed whether there was any legal defense in the guilt phase (R 880). They first met with Appellant for two-and-a-half hours in March, 1993, within one week of being appointed to the case (R 880). They met with Appellant a total of eight hours in March (R 881). Appellant was able to give a clear recitation of what occurred the night of the murders (R 882). He was also able to clarify everyone's nicknames and roles in the murder (R 883). Appellant had a clear recollection of the events (R 884). He said he had to kill the victims because they could identify their assailants, and Henderson called out Booker's name (R

885). Smallwood and Kelly asked Appellant how much he had to drink and smoke. Appellant told them he smoked some marijuana and drank some liquor. He said he did not go into the club in St. Cloud (R 886). The only time Appellant mentioned cocaine was that he told a cousin he killed the victims because he was high on cocaine. However, the attorneys could not "nail down" when or where he took cocaine.

The co-defendants were not available for interviews (R 887, 933). Henderson eventually became a State witness and was available for a deposition (R 933). They took depositions of the girls accompanying Appellant to the club, but there was nothing helpful insofar as an intoxication defense (R 888).

Smallwood and Kelly met with Appellant continuously before the trial (R 888-90). Appellant appeared to understand what the attorneys told him and the significance of the trial. He helped the attorneys occasionally; for example, when a deponent made a statement. (R 889). Kelly considered retardation, but Appellant's ability to remember the events was very clear (R 932-933).

After interviews with Appellant and the family, Smallwood and Kelly started looking for a neuropsychological expert (R 891). There was no basis to use an addictionologist or neuropharmacologist; otherwise, they would have used Dr.

Lipman as they did in the Spencer case (R 891). Kelly didn't use Lipman because there was not enough of a pattern of addiction, plus the audiotape of the conversation in the police car made intoxication appear to be a fabrication (R 936 State Exhibit #7). Appellant's family never described habitual drug use (R 940). The only facts Appellant gave the attorneys about alcohol consumption was that he consumed some liquor after visiting the liquor store that evening (R 892). Calling Appellant as a witness was not an option to establish consumption because Appellant stated quite clearly that he shot the victims because Henderson called out Booker's name (R 893-94). That testimony would automatically establish the avoid-arrest aggravator (R 894). Second, Appellant had been talking with Booker in the back of a police car about blaming the murders on intoxication (R 894, 934). Appellant had never been in court and would have faced cross-examination by a seasoned prosecutor (R 896).

Co-defendant Henderson was a State witness and could establish that Appellant was the shooter (R 896). Appellant's testimony would have "shot holes" in the case (R 896). Michael Rentas, the victim who survived, told police Appellant said "You're first, smart ass" before he shot the first victim (R 897). It would have been devastating to allow Appellant to

be cross-examined about that statement (R 897). Additionally, Appellant gave a statement to police that the attorneys did not want contradicted by testimony he might give on the stand (R 898). The statement would have shown the murders to be spontaneous, not premeditated (R 898). Smallwood and Kelly used the statements of co-defendants to establish that drugs and alcohol were used that day. Other than Henderson, however, they did not have access to the co-defendants (R 899). Appellant never told the attorneys Booker ordered him to kill the victims (R 917).

After investigation, the attorneys decided to use Dr. Dee and Ms. Vogelsang as experts (R 902). Once they decided on the experts, Kelly did most of the work on the penalty phase (R 903). Smallwood met Dr. Dee one time and was present when Ms. Vogelsang met with Kelly (R 903). Both experts were brought in prior to the guilt phase (R 903). Dr. Dee was phoned on December 23, 1993, and materials were mailed to him January 11, 1994 (R 948). Trial began February 8, 1994 (R 949). Dr. Dee received the documents 28 days before the guilt phase; however, he did not conduct his examination of Appellant until two weeks after the guilt phase (R 942).[5] Neither expert suggested retardation as a possible guilt phase

[5]The penalty phase was March 21-25, 1994.

defense (R 903). Based on what Smallwood knew, there was no basis for a retardation defense in the guilt phase (R 903). Appellant was fully aware of what was going on and he gave a complete statement to the police (R 904).

The law at the time was *Chestnut*, which held diminished capacity is not admissible (R 904). Smallwood tried to argue a voluntary intoxication defense to the jury (R 919). He argued that this was a robbery like the one that afternoon and that there was no intent for any one to be killed (R 920). However, he made a tactical decision not to use an expert in the guilt phase (R 922). Smallwood did not believe there was enough evidence to have an expert testify (R 926). There was no basis to believe Appellant was not competent at the time of the murder or at the time of trial (R 924).

IV. OTHER STATE WITNESSES

Tammy George was at the Palms Bar (also called "The Bottom") with the victims when they were kidnaped by Appellant and his friends (R 854). Appellant shot the victims after kicking one of them (R 859). Appellant was going to shoot her, too, but Booker said they should just leave her there (R 859). She did not hear Henderson say anyone's name (R 862).

Gary Phillips, private investigator, worked with Smallwood and Kelly on the Spencer case (R 956). He was familiar with Dr. Lipman, who also worked on Spencer (R 956). Smallwood and Kelly retained Phillips December 3, 1993, to work with them on Appellant's case. There had been an investigator, Ed Bartell, working with the attorneys prior to Phillips, but Bartell had health problems and was unable to continue (R 957). The guilt phase of trial was February 8, 1994 (R 961). Prior to that time, Phillips met with a mitigation expert, reviewed the file, traveled to Auburndale to conduct interviews with Appellant's family and acquired backgrounds records (R 961). It was very difficult to obtain HRS records (R 968). Phillips conducted significant background work before the guilt phase even though his role was to assist primarily with developing mitigation (R 962, 958). If anything had arisen that might have been considered a guilt-phase issue, he would have told the attorneys (R 962). Dr. Dee asked Phillips to administer the MMPI to Appellant (R 958). Appellant appeared to have some mental health issues and it took him an extended amount to time to complete the exam (R 959).

V. APPELLANT'S TESTIMONY

Appellant was 19 years old at the time of the murders (R 974). He only met with the attorneys two or three times. The meetings would be no more than two hours. He never met with them for eight hours. Appellant also met with psychologists and social workers. Those meetings were longer than the meetings with the attorneys (R 975). Appellant was unaware of voluntary intoxication as a defense. He never discussed intoxication with his attorneys. The attorneys never told him being drunk or high was a defense (R 976, 988). Appellant never waived the defense (R 976). The first time he heard about the intoxication defense was from collateral counsel (R 976). Appellant admitted being at his trial where the voluntary intoxication defense was raised (R 987). However, he was confused at trial (R 990).

Appellant was able to recount the date he was arrested and recall the attorneys first visit during which he told them about his alcohol and drug use (R 977, 979). The attorneys never asked whether he was drunk or on drugs (R 980). They did not tell him about voluntary intoxication, what Henderson would testify about, or what his friends and family said when interviewed (R 988) Appellant could call the attorneys when he needed to talk to them (R 987). Appellant recalled that he did not meet with Dr. Dee or Ms. Vogelsang until after the

guilt phase (R 978). He discussed his alcohol and drug abuse with them (R 979).

Appellant used cocaine right after they robbed the drugs dealers of their truck (R 980-81). They took rock cocaine from the drug dealers, but Appellant does not do rock cocaine. He would use powder cocaine on the weekends (R 981). He would smoke approximately one ounce of marijuana every day. He got the money to buy marijuana from selling crack cocaine (R 982).

Appellant "looked out" for Henderson. He wouldn't say he took care of him (R 982). At first Appellant provided food and clothing for Henderson, but there came a point where Henderson had to hold his own (R 983). It was a few months before Henderson got the gist of "what the deal was on the streets." (R 893). When they stayed in hotels, Appellant would pay (R 985). When Appellant made the statement in the FBI car, he was high. That is why the attorneys moved to suppress his statement (R 986).

SUMMARY OF THE ARGUMENT

Point I: Trial counsel was not ineffective for failing to raise a diminished capacity/voluntary intoxication defense. Counsel did raise voluntary intoxication and received a jury instruction on that defense. The prevailing Florida law at the time was that "diminished capacity" evidence was not admissible. The facts and Appellant's confession show he had the requisite mental state not only to commit first-degree murder but also to establish the murder was cold, calculated and premeditated. The testimony presented at the evidentiary hearing was cumulative to that at trial, the testimony of the two co-defendants regarding intoxication was not available at the time of trial.

Point II: This issue is procedurally barred. Mental retardation was raised in Claim II on direct appeal as supporting statutory mitigating factors. Atkins v. Virginia, 536 U.S. 304 (2002), is not retroactive. Appellant has not satisfied any burden with regard to demonstrating he meets the definition of mentally retarded found in the Section 921.137, Florida Statues (2001) and the DSM-IV-TR. There is no evidence of onset of retardation before age 18, nor is there evidence of deficient adaptive functioning. Appellant relied solely on his full IQ score of 75. The cut-off to consider

retardation is IQ of 70. An additional evidentiary hearing was not required on this issue. All facts on which appellant relies were already explored at the evidentiary hearing.

Point III: This issue is procedurally barred as outside the one-year time limitation of Rule 3.850. The trial judge did not abuse his discretion in denying the motion to amend the postconviction motion. This is not "newly discovered evidence." The information which is the subject of this amended point was known to Janet Vogelsang in 1993. This motion is a successive motion and is barred. Collateral counsel could have discovered the statement through due diligence. In any case, collateral counsel failed to proffer the evidence so the issue is not preserved for appellate review.

ARGUMENT

I. WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO ESTABLISH A VOLUNTARY INTOXICATION DEFENSE WHICH, COUPLED WITH DIMINISHED CAPACITY, WOULD SHOW A LACK OF THE REQUISITE INTENT TO COMMIT FIRST-DEGREE MURDER

This claim was raised in Appellant's supplemental motion. The trial court denied the claim, acknowledging *Bias v. State*, 653 So.2d 380 (Fla. 1995). The trial judge found claim had no merit for several reasons:

> (1) *Bias* was decided well after Appellant's trial and trial counsel followed *Chestnut v. State*, 538 So.2d 820 (Fla. 1989), the law at the time (R 533);
>
> (2) trial counsel did pursue a voluntary intoxication defense and the jury was instructed on voluntary intoxication (R 534-535);
>
> (3) Appellant could remember the details of the robberies and murders, articulated his reasons for killing the victims, and never indicated he was intoxicated (R 535-536);
>
> (4) trial counsel made a strategical decision that Appellant should not testify as to alcohol and drug consumption because the State had a tape recording in which Appellant and the co-defendant discussing raising a voluntary intoxication defense (R 537);
>
> (5) co-defendants Booker and Catholic were not available to testify at trial (R 540); (Appellant acknowledges this, but claims the fact these witnesses are now available is "newly discovered evidence." (Initial Brief at 9))
>
> (6) Appellant gave only limited information to trial counsel (R 540); and

(7) Appellant’s actions the night of the murder contradicted intoxication (R 540).

The trial judge found not only that counsel was not deficient, but also that there was no prejudice (R 541).

The evidence presented at trial and Appellant’s account of the events of the evening in his confession contradict the claim he did not have the requisite mental state to commit premeditated murder. Appellant was arrested on December 1st. He was read his Miranda rights (TT[6] 2680). He advised that he understood them and appeared to understand them. He did not appear to be under the influence of any alcohol or drugs. He was not promised anything, threatened or coerced (TT 2681). A summary of Appellant's statement made at the Polk County Sheriff's Office was read into the record as follows:

Appellant indicated that on November 28, 1992, he was wearing dark blue or blue black jeans, a black sweatshirt with a hood, green Reebok sneakers, a red, white and blue New York Giants baseball cap and fruit gloves with rubber-like lumps to prevent leaving fingerprints. He learned three black males riding in a red truck from West Palm were trying to sell dope. Appellant got a handgun and went there. He participated in

[6]“TT” indicates the cite is from the original trial transcript. Cites to the present record on appeal are "R." Cites to the Original penalty phase are "PP."

the $28.00 robbery of the three males (TT 2782). Some dope and the red Ford truck were also taken. After dark he rode in the truck to Haines City to rob dope dealers. None could be located as everyone was at a football game in Tampa. He drove by one dealer's house named Sam and the residence of Sam's mother. Had Sam been home he would have robbed him. He then rode in the truck to Kissimmee to the projects. By the time he got there the engine was smoking. He had armed himself with a Uzi in Polk County but when he got to Kissimmee he carried a 9mm handgun. He met some girls and rode with them to a club called St. Cloud. When they got to the club the truck was smoking again (TT 2783).

Appellant stayed at the club about two hours. He saw four people, three white boys and a black girl get into a Nissan Pathfinder outside of the bar. He had never seen them before. He believed the males had a lot of money. He waited in the red truck until they left in the Pathfinder. He followed the Pathfinder from the bar. The red truck struck the back of the Pathfinder. Some of the people got out of the Pathfinder to check for damages, after which, the people got into the Pathfinder. Both vehicles stopped in a field after the red truck again developed mechanical problems. The black female was crying and asked him if she was going to be left in

the field. He told her she could not go with him. He did not know her (TT 2784). The white males were laying on the ground naked with their drawers on their head. Appellant initially stated he did not shoot the males and claimed he walked away from the people and the truck toward the main road, just to be walking, when he heard three gunshots. He got in the Pathfinder and went to Polk County. When asked where he had been riding after the Pathfinder had been taken and the victims were still in the Pathfinder, Appellant repeatedly denied having been a passenger in the Pathfinder with the victims. He emphatically stated he had been a passenger in the red Ford truck. He then acknowledged that he had participated in robbing the males.

Appellant then admitted that he was the one who shot and killed the two males. He stated he was the only one who shot the three males. He did not shoot the girl because she was a female and black. He stated that he used a 9mm handgun in the shooting. Appellant continued to deny having been a passenger in the Pathfinder with the victims after he had admitted to being the person who had shot each of the male victims. Appellant stated "That's all I did. That's all. I just pulled the trigger." (TT 2785-86).

There was other evidence of planning and premeditation in addition to Appellant's statement. Before the shootings, Appellant announced to Catholic he was "going to do it." (TT 2093). Appellant was quite aware of what he had done and announced to friend shortly after the shootings that "I fucked up." (TT 2718-19) Appellant's activities the entire evening showed a level of awareness which contradicts the lack-of-mental-state argument. When Booker first went to Appellant's trailer, Appellant said he would help Booker and went to get some pump shotguns (TT 1993). Booker, Henderson and Appellant went to rob people in order to re-pay Booker's debt (TT 1989). They successfully robbed some drug dealers and stole a truck (TT 2008-2017). Stolen equipment was loaded into Appellant's car (TT 2010). Appellant and Catholic sold the cocaine stolen from the victims (TT 2024). They then decided to rob some more people (TT 2026).

Appellant and Booker purchased gloves for the robbery (TT 2033). They discussed a plan to rob three men at the Palms Bar (TT 2064). Appellant showed some reservation because he did not know what the men "got", i.e., whether they were carrying weapons. Appellant stated that if the men didn't have money, he was going to kill them (TT 2064). It was Appellant who called one victim a "smart ass" (TT 2079).

It was Appellant who told the victims "Ya'll ain't got no money; put your drawers on your head." Appellant said "Man, I got to kill them – man, they ain't got no money" (TT 2084). Appellant told the victims to lay down (TT 2082). Then he shot the victims in the head (TT 2753-2754, 2083). As they were leaving the scene, Appellant repeated that he had to kill the victims because they had no money (TT 2349). Appellant advised the co-defendants not to tell anyone what happened (TT 2596). He told Corey Lisbon he "Fucked up and you ain't going to see me around for awhile." (TT 2596). Appellant then planned to flee to Georgia (TT 2597).

There was no case law available to Defendant's trial attorneys which would have authorized introduction of evidence of diminished mental capacity, even in the context of a voluntary intoxication defense[7]. Donald Smallwood, the defense attorney who focused on representing Defendant in the guilt phase, testified that at the time of the trial he was not aware of any case law to support such a strategy. (R 868-869). The performance of a defense attorney must be judged by the professional standards in effect <u>at the time the attorney represented the defendant.</u> The failure to present a novel

[7]The voluntary intoxication defense was eliminated as an affirmative defense. ***See*** § 775.051, Fla. Stat. (1999), effective October 1, 1999.

legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing does not constitute ineffective assistance of legal counsel. *See Steinhorst v. Wainwright*, 477 So. 2d 537, 540 (Fla. 1985).

Leondre Henderson was the only available source for evidence to support a voluntary intoxication defense. Co-Defendants Booker and Catholic were not available to the defense. Both testified that at the time of Mr. Foster's trial, they had pending charges and had exercised their right to remain silent. (R 825, 847). Defendant himself was not available to the defense. Defendant's attorneys wisely decided that Defendant could not be called to testify on his own behalf. Unfortunately, as Mr. Henderson's hearing testimony demonstrated, he was a poor source of evidence to show that Defendant was under the influence of psychotropic drugs at the time of the shootings. At the evidentiary hearing Henderson testified that he did not see Defendant using cocaine until after the shootings. (R 680). In fact, Henderson, who lived with Defendant, did not see Defendant use cocaine in the four months leading up to the shootings.(R 677-680). Although Henderson knew that he and Defendant had smoked marijuana on the day of the shootings, he was not clear on exactly how much was used. Henderson could not recall if

Defendant had smoked marijuana at Catholic's house that day (R 666) nor could he recall if Defendant used marijuana at the girls' home where he and the other Co-defendants went on the night of the murders. (R 662). Henderson also could not recall Defendant smoking marijuana at the club, just before the shootings. (R 671). Henderson did testify that Defendant was in the car with the girls on the way from their home to a club, and that there was brandy in that vehicle. (R 668). Henderson's testimony at the evidentiary hearing was cumulative to his trial testimony.

At the guilt phase, as to marijuana, Henderson only testified that Catholic had told him that "they were badding it"(meaning smoking a lot of marijuana) on the way from the girls house to the bar. (TT 2165). However Henderson was in another vehicle, so he did not know if, or how much Defendant drank or smoked on the way to the club. Henderson also did not testify at the hearing how much, if any, brandy was used by Defendant at the club (TT 2056). Defendant did not demonstrate at the evidentiary hearing that Mr. Henderson was a good source of evidence to support a voluntary intoxication defense.

It is significant that Dr. Johnathan Lipman, the toxicologist Defendant called at the hearing, did not mention

Mr. Henderson as a source of the information he used to make his calculations. He mentioned Catholic and Booker. (R 762-763). Lipman conceded that if the information from Booker and Catholic had been unavailable to him, this would have impaired his ability to form the opinion he expressed at the evidentiary hearing. (R 780). Lipman also conceded that his ultimate conclusion about Defendant depended upon the supposition that he used cocaine before the shootings. (R 782).

Defendant failed at the hearing to show that Lipman could have been of any value if he had been called. Lipman's conclusions were founded on evidence which defendant's trial attorneys did not have available to present. It is illogical to hold Defendant's trial attorney's responsible for failing to call an expert who whose testimony would have depended on evidence which was not available at the time of the trial.

Dr. Dee was also not a good source of information about drug use. First, the evidence of Defendant's drug use which Dee attempted to introduce at the penalty phase hearing was objected to as hearsay. (PP 337). The judge then instructed the jury that Dee's testimony was not to be considered as valid evidence of the fact that Defendant had actually used drugs on the day of the shootings. (PP 340 - 41). If Dee had

been called at the guilt phase, it is likely that the same thing would have happened at that point, or that Dee would not have been allowed to testify at all. Second, Dee testified that Defendant told him that he had not used any cocaine on the day of the crime. (PP 369). Dee relied on second-hand information from the defense investigator to conclude that Defendant had used cocaine. (PP 370). Dee testified at the penalty phase that Defendant had told him that he drank "3 cups" of alcohol in the hours leading up to the shootings, but at that time Dee was unsure how many ounces that referred to. (PP 375). Dee also testified that in his opinion Defendant was habituated to the consumption of alcohol, and that it would take more alcohol to have an effect on a person habituated to alcohol. (PP 420). In contrast to the "three cups" amount relied upon by Dr. Dee, Henderson had testified at the guilt phase trial that he had seen Defendant drinking a cup of brandy with coca-cola once after the group arrived at the Palms Bar, and once later when they went out for another cup. (TT 2056 -57). However , Henderson later agreed that Defendant had only consumed "a full glass" of the Brandy. (TT 2166). Per Henderson, It was just after or while consuming this second cup that Defendant cautioned Booker that it would not be wise to rob the bar because "we don't know what those

boys got in there." (TT 2059). This indication of wise counsel was hardly evidence to show that Defendant's cognitive abilities had been compromised.

It is evident that the slim evidence of Defendant's consumption of psychotropic substances led the trial court to find that at the time of the shootings Defendant was only "to some extent under the influence of drugs and alcohol during the murders." Significantly, the trial court did not find that the statutory mitigator, that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime, had been proved. Clearly, the paucity of evidence showing that Defendant was under the influence of drugs and alcohol led the Court to discount the statutory mitigator relating to Defendant's mental state <u>at the time of the crime</u>. The Court failed to find this mitigator even though Dee had opined that there was sufficient evidence to support it. (PP 344-45).

If there was insufficient underlying evidence to prove this mitigator, there clearly would not have been sufficient evidence to prove voluntary intoxication either, even with supporting expert testimony. The voluntary intoxication defense required that the jury find that Defendant was so intoxicated that he was incapable of forming a premeditated

design to kill, or of forming the intent to commit the underlying crimes of robbery and kidnaping. (TT 3059 - 56). That was a higher degree of proof than that necessary to prove the statutory mitigator of extreme mental or emotional disturbance at the time of the crime. Even if Dee and Lipman had been called at the guilt phase there was insufficient evidence available to them to support a voluntary intoxication defense. There is no reasonable probability that a different outcome could have been obtained if they had been called at the guilt phase. Therefore, Appellant has failed to show that the failure to call Drs. Dee and/or Lipman prejudiced the case.

Appellant's trial attorney, Donald Smallwood, testified that Appellant had a clear recollection of the events of the day and night the murder occurred. (R 882). Appellant also told Smallwood that the victims had been murdered because Booker feared that they might have overheard Henderson call him by his first name. (R 885). This same reason for shooting the three victims also was confirmed by the hearing testimony of Mr. Booker (R 842). Booker testified that he was not worried that Tammy George had heard his name called because she was so drunk. (R 843). Indeed she was drunk, so drunk that when she arrived at the police station after the murders

the officers there did not believe her. (R 861) Dr. Dee also confirmed that Appellant told him that the victims were shot because they might have heard Booker's name called. (R 735).

Appellant's clear recollection of the details of the shootings, and his articulation of a reason for shooting the victims were both compelling reasons not to call him. Both would have contradicted the voluntary intoxication defense which was presented.

Finally, calling Appellant might well have provoked the introduction of the transcript of Appellant's intercepted conversation with Gerard Booker (State's Exhibit # 7). If Appellant had been impeached with this document, the jury could well have concluded that Defendant knew that he could mitigate his culpability by claiming to be intoxicated at the time of the offense, and that he thus had a motive to malinger in Dee's clinical interview and testing. Mr. Smallwood testified that he was aware of the intercept, and did not want it to come into evidence because he was afraid that admission of the intercept into evidence would have damaged the credibility of the voluntary intoxication defense. (R 892).

The exhibits admitted at the evidentiary hearing, the testimony of Mr. Smallwood and Mr. Kelley, the testimony of

Gary Phillips, and the testimony of Dr. Dee all make it clear that there was considerable background work with Appellant's friends and family, investigation of school records, and interviews and consultations with Appellant himself prior to the guilt phase trial. His attorneys' decision on how to proceed was only made after they had informed themselves about Appellant, his background, and the circumstances of the shootings. Appellant's attorneys were also completely familiar with the details of presenting a neuropharmacologist. Shortly before undertaking representation of Mr. Foster, Smallwood and Kelley had defended Dusty Ray Spencer in a first degree murder case, and had utilized the services of Dr. Lipman. (R 869-870). Gary Phillips, the defense investigator, had worked on many, many first degree murder cases, and it appeared to him that all of the investigative assignments given him were, based on his experience, appropriate given what he came to know about the facts of Mr. Foster's case. (R 958).

Appellant failed to demonstrate any significant omission in the efforts which his defense team made to inform themselves about facts which might have further supported either a voluntary intoxication or diminished capacity defense.

New evidence which was unavailable at the time of the trial shows that Appellant was not mentally retarded. This is an important fact, because even if a diminished capacity defense were allowed now, it appears that the full facts would not support such a defense on retrial. Dr. Dee testified at the hearing that even a person of low I.Q. is only considered mentally disabled if he has poor adaptive behavior skills. (R 724). Dee conceded that being able to care for other persons is an indication of higher functioning adaptive behavior. (R 725). It certainly was clear from the testimony of Henderson, that Appellant was the person who took care of him. Alf Catholic also testified to this fact, (R 809). As mentioned above, Appellant was also capable of exercising some degree of wisdom. According to Henderson, Appellant cautioned against robbing the bar. Clearly Appellant supported himself, and was able to take in Henderson and get him oriented to supporting himself. The evidence admitted at the hearing proved that they lived in this way successfully for over a year. It is clear that Foster understood why he was shooting the victims, and was able to relate this reason back to both his attorneys and to Dr. Dee. This absolutely contradicts the argument that Appellant was so impaired that he was unable to form specific intent to kill the victims. On retrial, the evidence that Appellant shot the victims so that

they could not identify Booker would undoubtedly be used to support the additional aggravating factor that the murders were committed for the purpose of avoiding or preventing a lawful arrest. Appellant's trial attorneys were able to prevent this factor from being argued at Appellant's trial.

In *Spencer*, this Court held counsel was not deficient for failing to present a hybrid voluntary intoxication/diminished capacity defense:

> While not specifically addressed by the lower court, we conclude that the evidence of Spencer's "dissociative state" would not have been admissible during the guilt phase of the trial. "[E]vidence of most mental conditions is simply too misleading to be allowed in the guilt phase." *Dillbeck v. State,* 643 So.2d 1027, 1029 (Fla. 1994). While evidence of voluntary intoxication and of other commonly understood conditions that are beyond one's control, such as epilepsy, are admissible in cases involving specific intent, *see id.; see also Bunney v. State,* 603 So.2d 1270 (Fla. 1992); *Gurganus v. State,* 451 So.2d 817, 822-23 (Fla. 1984) ("When specific intent is an element of the crime charged, evidence of voluntary intoxication ... is relevant."), there are limitations regarding the admissibility of evidence of mental disease or defect within the defense of voluntary intoxication. *See State v. Bias,* 653 So.2d 380, 382-83 (Fla.1995). As this Court explained in *Bias,* such limitations are required "to ensure that the defense of voluntary intoxication is not utilized as a label for what in reality is a defense based upon the doctrine of diminished capacity." *Id.* Further, "[w]e continue to adhere to the rule that expert evidence of

> diminished capacity is inadmissible on the issue of mens rea." *Id.*

Spencer v. State, 842 So.2d 52, 63 (Fla. 2003). Likewise, in *Henry v. State*, 862 So.2d 679 (Fla. 2003), this Court held that the claim failed because the voluntary intoxication defense was unsupported by the evidence and the diminished capacity defense was inadmissible. In the present case, the jury rejected the voluntary intoxication evidence. Appellant has failed to establish that his trial attorneys rendered ineffective assistance by omitting to introduce evidence of diminished mental capacity in the context of voluntary intoxication at the guilt phase. There was no case law in existence at the time to authorize such a defense, the witnesses available to the defense attorneys did not show significant use of alcohol or psychotropic substances close in time to the crime, and even if the case were to be retried, evidence now available shows that Appellant shot the victims for the specific purpose of eliminating them as witnesses, and that he knew what he was doing.

Appellant has failed to show prejudice. He confessed to the crime, there were two eye-witnesses, Tammy George and Michael Rentas, and the co-defendants have testified under oath about Appellant shooting the victims because Booker could

be identified. Appellant made statements before the shootings that he was going to kill the victims if they had no money.

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR REHEARING BASED ON *RING V. ARIZONA* AND *ATKINS V. VIRGINIA*.

A. The *Ring* claim.

Procedural bar. Appellant claims the trial court erred in failing to re-open the evidentiary hearing after *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) was decided. The *Ring* claim that is the subject of this appeal could have been, but was not, raised at trial or on direct appeal. Appellant did not raise a direct appeal claim which can in any fashion be construed as a challenge to the constitutionality of Florida's capital sentencing scheme sufficient to preserve the *Apprendi/Ring* claim at issue in this proceeding. Claims similar in substance to the claim raised by Appellant have been raised in numerous Florida cases dating back to the 1970s. The issue in *Ring* (which is merely an extension of *Apprendi*) is by no means new or novel. That claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). The basis for a claim that the sentence imposed in this case violated Appellant's right to a jury trial has been available since he was notified of the State’s intent to

seek the death penalty. There is nothing magical about an *Apprendi* claim, and, despite the pretensions of Appellant's brief, *Ring* is nothing more than the application of *Apprendi* to capital cases. There is no justification for a departure by this Court from application of the well-settled State procedural bar rules, which this Court reaffirmed in *F.B. v. State*, 852 So. 2d 226 (Fla. 2003).

Merits. Appellant claims he is mentally retarded based soley on his IQ and that the threshhold point for mental retardation per *Atkins* is an IQ of 75 (Initial Brief at 26). The DSM-IV-TR sets the absolute cut-off for mild mental retardation at 70. *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, 2000, p. 41. The DSM-IV-TR discusses "borderline intellectual functioning" as a category that can be used for an IQ in the "71-84 range." *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, 2000, p. 740. This issue has no merit. In *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002), *cert. denied,* 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore,* 831 So.2d 143 (Fla.), *cert. denied,* 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), this court settled the *Ring* issue. Subsequently, the Florida Supreme Court has rejected postconviction challenges to section 921.141 based on *Apprendi*

and *Ring. See, e.g., Wright v. State,* 857 So.2d 861 (Fla. 2003), *cert. denied*, 2004 WL 180282 (U.S. March 29, 2004); *Jones v. State,* 855 So.2d 611, 616 (Fla. 2003); *Chandler v. State,* 848 So.2d 1031, 1034 n. 4 (Fla. 2003). In addition, the aggravating circumstances of the contemporaneous murder and during-a-kidnap exempt this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty. *See Duest v. State,* 855 So.2d 33, 52 (Fla. 2003).

The Florida Supreme Court has denied relief on the *Ring* issue approximately fifty times.[8] Appellant has made no

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[8]*See Robinson v. State*, 865 So. 2d 1259 (Fla. 2004), *cert. denied*, 124 S.Ct. 1197 (2004); *Smith v. State*, 29 Fla. L. Weekly S41 (Fla. Jan 29, 2004); *Parker v. State*, 29 Fla. L. Weekly S27 (Fla. Jan 22, 2004); *Davis v. State*, 2003 WL 22722316, 28 Fla. L. Weekly S835 (Fla. Nov 20, 2003); *Guzman v. State*, 28 Fla. L. Weekly 5829 (Fla. Nov 20, 2003); *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003); *Owen v. State*, 862 So.2d 687 (Fla. Oct 23, 2003); *Johnston v. State*, 863 So.2d 271, (Fla. 2003); *Cummings-El v. State*, 863 So.2d 246 (Fla. 2003); *Henry v. State*, 862 So.2d 679, (Fla. 2003); *Anderson v. State*, 863 So.2d 169, (Fla. 2003); *Davis v. State*, 859 So.2d 465 (Fla. Sep 11, 2003); *Stewart v. State*, 28 Fla. L. Weekly S700, (Fla. Sept. 11, 2003); *Rivera v. State*, 859 So.2d 495(Fla. 2003); *Jones v. State*, 855 So.2d 611 (Fla. 2003); *Conde v. State*, 860 So.2d 930(Fla. 2003); *McCoy v. State*, 853 So.2d 396, (Fla. 2003); *Owen v. Crosby*, 854 So.2d 182 (Fla. 2003); *Fennie v. State*, 855 So.2d 597 (Fla. 2003); *Caballero v. State*, 851 So.2d 655(Fla. 2003); *Belcher v. State*, 851 So.2d 678 (Fla. 2003); *Allen v. State*, 854 So.2d 1255, (Fla. 2003); *Nelson v. State*, 850 So.2d 514 (Fla. 2003); *Wright v. State*, 857 So.2d 861 (Fla. 2003); *Blackwelder v. State*, 851 So.2d 650 (Fla. 2003); *Duest v. State*, 855 So.2d 33 (Fla. 2003); *Cooper v. State*, 856 So.2d 969 (Fla. 2003); *Hodges v. State*, 28 Fla. L. Weekly 5475 (Fla. 2003); *Pace v. State*, 854 So.2d 167 (Fla. 2003); *Chandler v. State*, 848 So.2d 1031 (Fla. 2003); *Butler v. State*, 842 So.2d 817 (Fla. 2003); *Harris v. State*, 843 So.2d 856 (Fla. 2003); *Lawrence v. State*, 846 So.2d 440 (Fla. 2003); *Banks v. State*, 842 So.2d 788 (Fla. 2003); *Grim v. State*, 841 So.2d 455 (Fla. 2003); *State v. Coney*, 845 So.2d 120 (Fla. 2003); *King v. State*, 840 So.2d 1047 (Fla. 2003); *Lugo v. State*, 845 So.2d 74 (Fla. 2003); *Jones v. State*,845 So.2d 55 (Fla. 2003); *Kormondy v. State*,845 So.2d 41 (Fla. 2003); *Doorbal v. State*, 837 So.2d 940 (Fla. 2003); *Conahan v. State*, 844 So.2d 629 (Fla. Jan. 16, 2003); *Cole v. State*, 841 So.2d 409 (Fla. 2003); *Spencer v. State*,842 So.2d 52 (Fla. 2003); *Porter v. Crosby*, 840 So.2d 981 (Fla. 2003); *Lucas v. State*, (Fla. 2003); *Fotopoulos v. State*, 838 So.2d 381 (Fla. 2002); *Bruno v. Moore*, 838 So.2d 485 (Fla. 2002); *Marquard v. State*, 850 So.2d 417 (Fla. 2002); *Chavez v. State*, 832 So. 2d 730 (2002).

argument which would change this court's prior decisions.

B. The *Atkins* claim.

Competency. Appellant also claims the evidentiary hearing should have been reopened after *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided because "mental evaluation testimony would have and could have established that JERMAINE FOSTER was not competent at the time of the murders" (Initial Brief at 18). *Atkins* deals with mental retardation, not competency at the time of the murder. To the extent this argument may address Claim II from the Motion to Vacate, the trial judge made detailed findings on whether trial counsel was ineffective for failing to raise competency (R 522-524). Trial counsel testified there was no reason to believe Appellant was not competent (R 523). If Appellant is now trying to raise competency to proceed as a non-effective assistance claim, the competency issue is procedurally barred because it should have been raised on direct appeal. *See Johnston v. Dugger,* 583 So.2d 657, 659 (Fla. 1991). *See also See Kennedy v. State,* 547 So.2d 912 (Fla. 1989)(claim that counsel was ineffective for failing to properly inform the court-appointed experts of Appellant's history of mental illness is insufficient to overcome the procedural bar). Furthermore, this claim is without merit. Defense counsel

testified there was no reason to question competency. Appellant has not shown that he was prejudiced by counsel's alleged failure raise competency. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984); *Patton v. State*, 784 So.2d 380, 393 (Fla. 2000).

Procedural bar. Appellant next argues that he is mentally retarded and cannot be executed. This issue was before this Court on direct appeal as statutory and non-statutory mitigation, not as an *Atkins* claim. This Court held:

> [w]e address Foster's claim that the trial court failed to find the statutory mental mitigator of extreme mental or emotional disturbance and other nonstatutory mitigation. During the penalty phase, Foster presented expert testimony that he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. Foster claims that since this expert testimony was uncontroverted, the trial court should have found this statutory mitigator. Additionally, Foster claims that the trial court should have found the nonstatutory mitigators that he came from an abused background; was mentally retarded; had a deprived childhood and poor upbringing; has organic brain damage; and is an alcoholic and was under the influence of alcohol at the time of the homicide.
>
> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. *Preston v. State*, 607 So.2d 404 (Fla.1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993). Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. See *Provenzano v. State*, 497 So.2d 1177 (Fla.1986),

> *cert. denied*, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. *See Wuornos v. State*, 644 So.2d 1000, 1010 (Fla.1994), *cert. denied*, 514 U.S. 1069, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. *Provenzano*, 497 So.2d at 1184.

In the sentencing order, the trial court found the following with regard to mitigating evidence:

> The Court finds in mitigation the Defendant Foster suffered an abusive childhood. He was subject to physical and mental abuse, deprived of proper nurturing and guidance, and was repeatedly exposed to the physical abuse of his mother by her live-in boyfriend. He often failed to receive proper nutrition and clothing.
>
> Expert testimony established that the Defendant suffers some organic brain damage, is mildly mentally retarded, and has a low IQ. Given the long duration and extent of his drug and alcohol use the Court concludes he suffers from a substance abuse problem and testimony showed he was to some extent under the influence of drugs and alcohol during the murders.
>
> All of these mitigating factors lead this Court to find as a statutory mitigator that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The Court finds no other statutory mitigators established. Specifically the Court does not find the murders were

> committed while the Defendant was under the influence of extreme mental or emotional disturbance as contended by the defense.
>
> We conclude that the trial court considered all of the evidence presented, and it was not a palpable abuse of discretion for the trial court to refuse to find the statutory mitigator of extreme emotional disturbance. This mitigating circumstance has been defined as "less than insanity, but more emotion than the average man, however inflamed." *Duncan v. State*, 619 So.2d 279, 283 (Fla.), *cert. denied*, 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993), (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)). It is clear from the sentencing order that the trial court gave some weight to nonstatutory mitigation; however, the trial court did not find that it rose to the level of this statutory mitigator. Accordingly, we find that the trial court did not abuse its discretion in finding that this mitigator was not established.
>
> We further note that the sentencing order shows that the trial court found and weighed the nonstatutory mitigating evidence that Foster contends should have been found. Deciding the weight given to a mitigating circumstance is within the discretion of the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. *See Dougan v. State*, 595 So.2d 1 (Fla.), *cert. denied*, 506 U.S. 942, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992). We find no reversible error.

Foster v. State, 679 So.2d 747, 756 (Fla. 1996).

As the Florida Supreme Court decision illustrates, the mental retardation evidence was before the court during the 1994 trial. As such, this issue is procedurally barred. The issue could have been raised any time after the decision in

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to re-open evidentiary hearing. Appellant argues that his failure to raise the *Atkins* issue until after the trial judge rendered his July 1, 2002, order because section 921.137, was not retroactive. (Initial Brief at 29). However, since *"Atkins* is clearly retroactive" according to Appellant, the trial judge should have re-opened the evidentiary hearing and withdrawn his order.

Even if the *Atkins* issue is not procedurally barred, there is absolutely no excuse for failing to raise the mental retardation claim after section 921.137 became effective on July 1, 2001. In fact, the issue of the retroactivity of §921.137 is pending before this court in several cases. *See Miller v. State*, Case No. SC01-837; *Burns v. State*, Case No. SC01-166; *Floyd v. State*, Case No. SC02-2295; *Thomas v. State*, Case No. SC00-1092. The mental retardation claim could have been raised before the January 31, 2002, evidentiary hearing. The United States Supreme Court granted certiorari review of *Atkins* on September 25, 2001. *Atkins v. Virginia,* 533 U.S. 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001). During the pendency of Appellant's evidentiary hearing this court decided *Bottoson v. State,* 813 So.2d 31, 33-34 (Fla. 2002). Yet

Appellant waited to raise this issue until after the trial judge denied relief.

Retroactivity. There is nothing in *Atkins* to suggest retroactive application. Neither Section 921.137, Florida Statutes (2001), nor *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), require a retroactive application to Appellant's case in that he has not satisfied any burden with regard to demonstrating he meets the definition of mentally retarded found in the statutes and the DSM-IV-TR.

Merits. The DSM-IV-TR2 (Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition - Text Revision), provides that mental retardation is:

> (a) significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test
>
> (b) concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by cultural groups), in at least two of the following areas: communications, self care, home living, social/ interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety, and
>
> (c) the onset is before age eighteen years.

Section 921.137 defines mental retardation as:

> the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age

18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection[9].

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[9] The Department of Children and Family Services adopted Rule 65B-4.032 on January 13, 2004, as follows:

65B-4.032. Determination of Mental Retardation in Capital Felony Cases: Intelligence; Tests to Be Administered.

(1) When a defendant convicted of a capital felony is suspected of having or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.
(a) The Stanford-Binet Intelligence Scale.
(b) Wechsler Intelligence Scale.
(2) Notwithstanding this rule, the court, pursuant to subsection 921.137(4), Florida Statutes, is authorized to consider the findings of the court appointed experts or any other expert utilizing individually administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials. The results of the evaluations submitted to the court shall be accompanied by the published validity and reliability

Under both Florida law and the DSM-IV-TR, Appellant is not mentally retarded. At the penalty phase in 1994, Appellant presented the testimony of two experts. Janet Vogelsang, a clinical social worker performed a psychosocial assessment on Jermaine Foster (PP 107;111). She found several risk factors present that would diminish the ability to develop and gain skills for dealing with life, relationships or culture: family violence; abandonment by the father; hunger; being on the streets somewhat from eight years old, consistently by age twelve; no ongoing medical care; no help in learning basic life skills; corruption by a parent; some intellectual impairment; psychological and emotional battering; constant threat of violence; exposure to weapons and drugs; and extensive intellectual incapacity across three generations in the family (PP 116-117). She opined that Foster was affected by the history of family violence and drug addiction from the time he was a very small child (PP 117). She could find no indication that there had been any intervention on behalf of Foster despite the fact that society funds organizations and institutions to do so (PP 119). No one supported him or helped him to compensate for the many deficits he had (PP 120). The accumulation of risk factors

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data for the examination.

created a child who could not possibly meet normal developmental milestones to become a productive member of society. With the number of risk factors it would be expected that the child would either be victimized or victimize someone else (PP 120).

School records indicated Foster was sixteen years old in the eighth grade, disruptive in school and administratively passed to the ninth grade. There were no notations in the records from any teachers indicating any suspicion Foster was mentally disabled, retarded or needed special learning (PP 131). The only thing known from school records is that Foster was disruptive and disrespectful of his teachers (PP 132). The medical records do not reflect any ongoing physical problems with Foster. Nothing in the records indicate he was malnourished or underfed (PP 133). There are people who have had similar environments who have not committed crimes (PP 135).

Dr. Dee testified at the penalty phase that he administered the Wechsler Adult Intelligence Scale, revised edition (PP 319). He found Foster's IQ to be 75, combined with adaptive dysfunction, illiteracy and lack of formal employment, the IQ meets the criteria for mental retardation (PP 320-321). The Denman Memory Scale indicated a comparable quotient of seventy-five (PP 322). This would suggest

involvement of the lower mesial surfaces of the temporal lobe (PP 325). His performance was severely defective on tests of line and facial orientation (PP 326). These together would indicate involvement of the right cerebral hemisphere consistent with an impression of brain damage on the other tests and with his performance on the personality test (PP 327). The results of the M.M.P.I. indicated he was not psychotic. He is an extremely suspicious person, almost paranoid (PP 329). He is emotionally unstable. He suffers from organic affective syndrome, i.e. emotional instability based on inadequate brain functioning (PP 330). He scored as high as possible on the Psychotherapy Checklist, Revised Edition which predicts dangerousness. He's very unpredictable and probably dangerous. A person who scored as high as he did if released back into society will typically be incarcerated in less than two years for another violent crime (PP 331). He had an elevated M.M.P.I. scale for addictive tendencies. Dr. Dee testified that Foster told him he ingested drugs and alcohol during the twenty-four hours prior to the crime (PP 336). There was no testimony, however, from any witness that Foster had used cocaine. When asked if Foster was under extreme mental or emotional disturbance at the time of the murders Dr. Dee opined that Foster's judgment was impaired (PP 345). Dr. Dee contemplated why in the middle of the night

someone had to kill someone to steal a car and indicated "The only sense I can make out of this is that we have a boy here and he's essentially just a boy who is not very smart." He further opined "He's got a mental age equivalent to about a fourteen or fifteen-year old, who's drug addicted. About the only thing he can do to earn money is sell drugs because he's not very smart and he's in with a group of very bad people." (PP 345). Dr. Dee opined that Foster got edgy and paranoid based on Foster's self-reporting of drinking three cups of alcohol after robbing the drug dealers, smoking marijuana and taking cocaine (PP 346-347). Foster told Dr. Dee the only thing he could remember was that he started shooting when his co-defendants Leondra Henderson and Gerard Booker started calling each other by their Christian names. Although Dr. Dee recognized this had to do with the possibility of Foster being identified as one of the robbers, he felt such action "consistent with this agitated sense of paranoia" (PP 347). He attributed this state to withdrawal of cocaine because "nothing else really makes any sense to me." (PP 348). Dr. Dee concluded that Foster's capacity to appreciate the criminality of his conduct was impaired due to his organic personality syndrome and resulting socially defective judgment and complicated by the use of intoxicants (PP 349).

On cross-examination Dr. Dee indicated that the areas in which Foster scored below an acceptable level were general fund of information, arithmetic reasoning and general understanding of the reason for social rules and mores. He scored an average level on immediate digit memory (PP 360). In the area of abstract thinking he scored in the sixteenth percentile, well above many of his other scores (PP 361). His overall performance I.Q. was seventy-eight and verbal seventy-four. Until about eighteen months ago the I.Q. level that was considered retarded was seventy, not seventy-five, based on I.Q. alone. Then the American Association of Mental Deficiency decided to consider not only I.Q. but "adaptive functioning," as well, such as literacy, employability, etc. So a person with Foster's I.Q. may not be retarded if his life is otherwise adapted (PP 363-364). Dr. Dee has seen people with I.Q.s of sixty-nine function independently and quite well in society. No one knew they were retarded (PP 365). The Adult History Intake Form in which Dr. Dee wrote down Foster's responses indicates Foster told him he smoked marijuana in the morning and afternoon of the murders and drank alcohol but does not reference the use of cocaine at all. Dr. Dee admitted Foster never told him he had consumed cocaine. He saw the McAndrews Scale was elevated (PP 369). He had the investigator who Foster supposedly trusts ask him if he was

using cocaine. The investigator told him Foster said he was using cocaine at the lounge where they went to play video games. He had not read the testimony of the people who were with Foster that night (PP 370). His opinion would only be minimally changed if there was no evidence of cocaine use by Foster as Foster was still paranoid during the interview even without the added factor of cocaine withdrawal. His opinion was that Foster was under the influence of extreme mental or emotional disturbance and that the capacity to conform his conduct to the requirements of law was substantially impaired, since it was substantially impaired in his normal state (PP 374). The fact Foster only drank four ounces of liquor prior to the crimes would also not change his opinion since Foster's basic capacity is already impaired (PP 376). Dr. Dee indicated that if Foster made a decision sometime before the crimes to kill the victims the murders would not be an impulsive act (PP 381).

On the personality questionnaire, the PDQ-R, Foster answered true to the statements "I like to frighten people," "I deliberately hurt other people," "I have enjoyed humiliating other people," "I like to watch people suffer," and "Violence fascinates me." (PP 413-415). Dr. Dee indicated those answers were inconsistent with the tests which indicate Foster is not conscienceless but apprehensive and guilt-prone.

But Dr. Dee admitted it is possible such answers mean what they say (PP 416). Not only was the evidence at the evidentiary hearing cumulative to that at the trial, but Appellant's presentation on both occasions fell short on all three prongs required for mental retardation: (1) IQ of 70 or below; (2) onset before age 18; and (3) deficit in adaptive behavior. Appellant's IQ was 75, there was no evidence in the school or medical records of mental retardation, and his adaptive functioning was not deficient. Appellant lived on his own and even "took in" Henderson. He had a car. He sold drugs for a living. He helped plan and execute two robberies. He also executed two victims after going to buy gloves and a ski mask, carrying a gun to the scene, and stating he was going to kill them if they had no money. He managed to shoot two men in the head while under stress and in a dark field. He only missed Renta's head because he had underwear over his head and was shot in the hand which was holding his head. Appellant was cognizant of what he had done and told others not to tell anyone. He made plans to dispose of his gun and flee to Georgia.

The similarities between *Bottoson* and the present case are striking. Dr. Dee's testimony was rejected in *Bottoson* as follows:

On appeal, Bottoson first claims that he is mentally retarded and that his execution would violate the Eighth Amendment. [FN2] After hearing the testimony of three mental health experts who evaluated Bottoson's mental condition, the trial court found that Bottoson was not mentally retarded.

> FN2. Bottoson points out that the U.S. Supreme Court has granted certiorari in *Atkins v. Virginia,* 533 U.S. 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001), to decide whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment. In *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court rejected a similar claim.

We do not reach the merits of whether Bottoson's execution would violate the Eighth Amendment or whether section 921.137, Florida Statutes (2001), dealing with the execution of the mentally retarded is unconstitutional as applied, because we conclude that the trial court's finding of no mental retardation is supported by the record and evidence presented at the evidentiary hearing. *See Watts v. State,* 593 So.2d 198, 204 (Fla. 1992) (stating that even if the defendant's premise was correct that it was cruel and unusual to execute mentally retarded persons, he would not be entitled to its benefits because two out of three mental health experts found that he was not mentally retarded and the defense psychologist found him to be only mildly retarded); *Carter v. State,* 576 So.2d 1291, 1294 (Fla. 1989) (stating that the evidence that the defendant was mentally retarded was "so minimal as to render the *Penry* issue irrelevant").

The trial court determined that there was essentially a three-part test for determining mental retardation and that Bottoson failed to prove retardation under that test. While the trial court found that Bottoson did not meet the first prong of the test for evaluating mental retardation based on the fact that his IQ tests consistently indicated that he was not mentally retarded, the court also

> evaluated the evidence as to whether Bottoson had significant deficiencies in adaptive behavior, another requirement for a finding of retardation. In the order denying relief, the trial court discussed Dr. Greg Pritchard's use of the Vineland test to evaluate adaptive behavior and noted that the test took into account the fact that Bottoson was institutionalized. Dr. Pritchard concluded that Bottoson did not have significant deficiencies in adaptive behavior. The court stated: "The court finds Dr. Pritchard's testimony credible and accepts this explanation." [FN3] Hence, the trial court found that Bottoson was not mentally retarded because the evidence demonstrated that he failed to meet two out of the three requirements of the test for evaluating mental retardation. Since the evidence supports the trial court's findings we find no error and affirm this determination.
>
> > FN3. The trial court also pointed out that Dr. Henry Dee was the only expert to opine that Bottoson was mentally retarded. The court found Dr. Dee's testimony not credible because Dr. Dee's opinion was "unacceptably vague in light of the objective evidence." We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions.
>
> *See Porter v. State*, 788 So.2d 917, 923 (Fla. 2001) (giving deference to the trial court's acceptance of one mental health expert's opinion over another expert's opinion and stating "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact"). *See also Stephens v. State,* 748 So.2d 1028, 1034-35 (Fla. 1999).

Bottoson v. State, 813 So.2d 31, 33-34 (Fla. 2002).

The trial judge in this case held that appellant did not meet the criteria for mental retardation. That appellant adaptive functioning was not deficient, and that the issue of

mental retardation was fully explored at the evidentiary hearing. Therefore, there was no reason to re-hear the issue (R 620-621). The denial of the motion for rehearing was not an abuse of discretion.

III. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO AMEND THE MOTION TO VACATE WITH A CLAIM ALLEGING RACIAL PREJUDICE OF TRIAL COUNSEL

Appellant's last claim is that the trial judge erred by disallowing an amended point to be filed one week before the evidentiary hearing. The "shell" Motion to Vacate was filed January 16, 1998; the Amended Motion to Vacate on June 1, 2000; the Supplemental Motion to Vacate on September 25, 2000. The evidentiary hearing was set for January 30, 2002. On January 23, 2002, Appellant requested leave to file for Rule 3.851 relief based on comments trial counsel made in 1993 to Janet Vogelsang. As the trial judge held, the issue was time-barred by Rule 3.851 and Rule 3.850 (R 465). Not only did the amendment violate the one-year period prescribed by Rule 3.851 and Rule 3.850, but it also violated the provisions of Rule 3.851(f)(4) that a motion may only be amended "up to 30 days before the evidentiary hearing upon motion and good cause shown."

The Motion for Rehearing is actually a successive Motion to Vacate and is untimely under Rule of Criminal Procedure 3.850 the motion is untimely, successive, and an abuse of procedure which should be summarily denied. To the extent that the motion attempts to raise a claim that is based on "new evidence," Appellant cannot establish the due diligence

component of Rule 3.850(b)(1), and, because of that failure, is not entitled to an evidentiary hearing on that issue, either. *See, Fla. R. Crim. P.* 3.850(f); *Mills v. State,* 684 So. 2d 801 (Fla. 1996); *Bolender v. State,* 658 So. 2d 82 (Fla. 1995); *Zeigler v. State,* 632 So. 2d 48 (Fla. 1993); *Foster v. State,* 614 So. 2d 455 (Fla. 1992). Further, the "new evidence" claims are not based on "evidence," but rather are based upon matters that have been available, through the exercise of diligence, for many years. Such inadmissible "evidence" does not establish anything, and does not allow Appellant to avoid Rule 3.850's successive petition bar.

Appellant claims trial counsel's statement to Vogelsang in 1993 is "newly discovered evidence" (Initial Brief at 37). Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Torres-Arboleda v. Dugger,* 636 So. 2d 1321, 1324-25 (Fla. 1994). Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State,* 591 So. 2d 911, 915

(Fla. 1991). To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916.

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. *See Johnson v. Singletary,* 647 So. 2d 106, 110-11 (Fla. 1994); *cf. Bain v. State,* 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. *See Williamson v. Dugger,* 651 So. 2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. *See State v. Spaziano,* 692 So. 2d 174, 177 (Fla. 1997); *Williamson,* 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998). Whether trial counsel made a comment to social worker Vogelsang about the

likelihood of a jury sentencing Appellant to death would not change the guilty verdict and sentence of death.

To the extent that Appellant claims that the claims contained in the motion could not have been raised within the time limitations contained in Rule 3.850 because he has only now obtained the information upon which those claims are based, that claim has no factual basis. Vogelsang has been available at all relevant times, and, because that is true, Appellant cannot invoke his failure to discover anything as a basis to avoid the preclusive effect of Rule 3.850's time limitation on the bringing of successive claims. *See, Zeigler, supra; Zeigler v. State,* 654 So. 2d 1162 (Fla. 1995); *Agan v. State,* 560 So. 2d 222 (Fla. 1990); *Demps v. State,* 515 So. 2d 196 (Fla. 1987). Appellant cannot demonstrate "due diligence" under any definition of that term. Appellant's motion is time-barred, and relief should be denied on that basis.

The allegation is insufficient to warrant an evidentiary hearing. Appellant makes conclusory allegations that trial counsel made a racial slur. He insinuates racial bias affected counsel to the extent he was ineffective. The defendant bears the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). A mere conclusory allegation is wholly insufficient on which to base

a claim for relief. *See id.*; *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

In any case, Appellant failed to proffer the evidence he relies on for this point. This issue is not preserved for appellate review. *Blackwood v. State,* 777 So.2d 399, 410-411 (Fla. 2000); *See Lucas v. State,* 568 So. 2d 18, 22 (Fla. 1990) ("A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence."); *Jacobs v. Wainwright,* 450 So. 2d 200, 201 (Fla. 1984) ("The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture."). The failure to do so, therefore, prevents appellate review of the excluded items. *See Lucas,* 568 So. 2d at 22; *see also Finney v. State,* 660 So. 2d 674, 684 (Fla. 1995) ("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result.").

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Honorable Court affirm the trial court order denying relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee has been furnished by U. S. Mail, to: **Frank J. Bankowitz, Esq.**, 126 East Jefferson Street, Orlando, Florida 32801 on this ____ day of April, 2004.

_____
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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Attorney for Appellee