IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-54

ROBERT EUGENE HENDRIX

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF APPELLEE

COUNSEL FOR APPELLEE
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STATEMENT OF THE CASE

Appellant was charged with two counts of premeditated murder, two counts of conspiracy to commit murder, and armed burglary after Elmer Scott and his wife were found dead on August 27, 1990. A jury convicted Appellant as charged and unanimously recommended death for each murder. The trial judge imposed the death penalty for each, finding five aggravating circumstances[1] and several nonstatutory mitigating circumstances[2] that applied to each murder. Appellant was sentenced to thirty-year terms on each of the

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[1] FN1. The judge found in the case of each murder that the crime:

(1) had been committed in a cold, calculated, and premeditated manner;
(2) was committed to avoid lawful arrest;
(3) was committed in the course of an armed burglary;
(4) was committed in an especially heinous, atrocious, or cruel manner; and
(5) that the defendant had been convicted of a prior capital felony.

[2] The judge found the following as nonstatutory mitigating circumstances:

> The Defendant's family history, juvenile history, and close relationship with his mother and sisters, as well as the sentence of his co-defendant herein, Alma Denise Turbyville, to seventy-five (75) years in the Department of Corrections as a result of her plea negotiated with the State in return for her cooperation herein, give rise to non-statutory mitigating circumstances, which have been given weight by this court.

conspiracy convictions and life on the armed burglary conviction.

Hendrix raised nine (9) claims on direct appeal:

> 1. The trial court erred in denying Hendrix's motion to disqualify the judge;
>
> 2. The trial court erred in denying his motion to strike the jury panel on the grounds that the selection process resulted in under-representation of African-Americans;
>
> 3. The trial court erred in denying his motions for mistrial on the basis of various comments made by the prosecutor during opening and closing;
>
> 4. The trial court erred in denying his motion for mistrial based on the prejudicial effect of the emotional outburst by the victim's father;
>
> 5. The trial court erred in allowing admission of inflammatory and irrelevant photos of the victim;
>
> 6. The trial court erred in denying his motion for judgment of acquittal on the conspiracy counts;
>
> 7. The trial court erred in refusing to give limiting instructions on the aggravating circumstances of heinous, atrocious or cruel, and cold, calculated, and premeditated;
>
> 8. Florida's death penalty statute is unconstitutional because the Florida Supreme Court's interpretation and application of the aggravating factor of cold, calculated, and premeditated as set forth in Florida Statutes has resulted in an arbitrary and capricious application of the death penalty; and
>
> 9. The aggravating factor of heinous, atrocious, or cruel is unconstitutionally vague.

The State raised one issue on cross-appeal: The trial court erred in refusing to allow the State to present as an aggravating factor the fact that Hendrix had a prior conviction for a violent felony as a juvenile. *Hendrix v. State,* 637 So. 2d 916, 918 (Fla. 1994). This Court affirmed the first-degree murder convictions and death penalties, the armed burglary conviction and life sentence and one conspiracy conviction and thirty-year sentence. The Court reversed the second conspiracy conviction and vacated the corresponding thirty-year sentence. *Hendrix*, 637 So. 2d at 921.

Appellant filed a Petition for Writ of Certiorari in the United States Supreme Court. Relief was denied on November 14, 1994. *Hendrix v. Florida*, 513 U.S. 1004 (1994).

Appellant filed a Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend on February 29, 1996 (R 1-62). The gist of the motion was that CCRC was underfunded and unable to file an appropriate pleading. After a series of motions, Appellant's Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend ("Amended Motion to Vacate") was filed on August 24, 1998 (R 503-669). The motion raised twenty-five (25) claims as follows:

CLAIM I

MR. HENDRIX IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING TO FULLY INVESTIGATE AND PREPARE HIS POST CONVICTION PLEADINGS IN VIOLATION OF ARTICLE 1, SECTION 9 AND HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, THE SPIRIT AND INTENT OF 28 U.S.C . 2254 AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND *SPALDING V. DUGGER*.

CLAIM II

COUNSEL FOR MR. HENDRIX HAS NOT RECEIVED AND/OR REVIEWED ALL OF THE RECORDS FROM STATE AGENCIES AND OTHER SOURCES THAT COULD HAVE SOME EFFECT UPON MR. HENDRIX'S CASE. AS A RESULT, COUNSEL IS UNABLE TO PROPERLY (1) INVESTIGATE THIS CASE; AND (2) PREPARE THIS MOTION AND OTHERWISE LITIGATE MR. HENDRIX'S CLAIMS. THIS CLAIM ARISES PURSUANT TO CHAPTER 119 OF THE FLORIDA STATUTES AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

RULE 3.851 OF THE RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES MR. HENDRIX TO FILE HIS POSTCONVICTION MOTION WITHIN ONE YEAR AFTER HIS CONVICTIONS AND SENTENCES BECOME FINAL, VIOLATES MR. HENDRIX RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THIS RULE ALSO DENIES MR. HENDRIX THE EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS OF THE STATE OF FLORIDA AND THE UNITED STATES, AS WELL AS, HIS RIGHT TO PETITION FOR A WRIT OF HABEAS CORPUS.

CLAIM IV

THE OUTCOME OF MR. HENDRIX'S GUILT/INNOCENCE AND SENTENCING PHASES WAS MATERIALLY UNRELIABLE DUE TO THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, PREJUDICIAL ACTS OR OMISSIONS OF TRIAL COUNSEL, IMPROPER RULINGS OF THE TRIAL COURT,

IMPROPER STATE CONDUCT, AND/OR ALL OF THE FOREGOING, IN VIOLATION OF MR. HENDRIX'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM V

MR. HENDRIX'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WERE VIOLATED WHEN THE TRIAL COURT FAILED TO EXCUSE JURORS FOR CAUSE FOLLOWING A DEFENSE CHALLENGE.

CLAIM VI

IT WAS UNCONSTITUTIONAL FOR THE TRIAL COURT TO FIND AS AN AGGRAVATING CIRCUMSTANCE THAT MR. HENDRIX HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER FELONY INVOLVING THE USE OF OR THREAT OF VIOLENCE TO A PERSON.

CLAIM VII

THE JURY INSTRUCTIONS AND PROSECUTOR'S ARGUMENT UNCONSTITUTIONALLY SHIFTED THE BURDEN TO MR. HENDRIX TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE.

CLAIM VIII

IT WAS UNCONSTITUTIONAL FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE AND FOR THE JURY TO HEAR AND CONSIDER NON-STATUTORY AGGRAVATING EVIDENCE.

CLAIM IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. IT ALSO VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

CLAIM X

MR. HENDRIX'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XI

MR. HENDRIX DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

CLAIM XII

MR. HENDRIX DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

CLAIM XIII

MR. HENDRIX DID NOT RECEIVE MENTAL HEALTH ASSISTANCE AS CONTEMPLATED BY *AKE V. OKLAHOMA*, 470 U.S. 68 (1985), IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIV

MR. HENDRIX DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XV

THE TRIAL COURT AND PROSECUTOR UNCONSTITUTIONALLY MISLEAD THE JURY AS TO ITS SENSE OF RESPONSIBILITY TOWARDS THE SENTENCING OF MR. HENDRIX.

CLAIM XVI

THE TRIAL COURT ERRED WHEN IT DID NOT DEFINE THE WORDS, "REASONABLE DOUBT" DURING THE PENALTY PHASE. THE ERROR VIOLATED MR. HENDRIX'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XVII

MR. HENDRIX'S COUNSEL IS PROHIBITED FROM INTERVIEWING JURORS TO DETERMINE WHETHER JUROR MISCONDUCT CREATES CAUSE FOR RELIEF. MR. HENDRIX'S RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED.

CLAIM XVIII

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR AND INSTRUCTION ARE UNCONSTITUTIONALLY VAGUE. MR. HENDRIX'S JURY WAS IMPROPERLY INSTRUCTED ON THIS AGGRAVATING CIRCUMSTANCE.

CLAIM XIX

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT WERE WITHIN THE PROVINCE OF THE COURT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XX

MR. HENDRIX WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THIS COURT DID NOT FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXI

MR. HENDRIX WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD.

CLAIM XXII

FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER. FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

CLAIM XXIII

THE STATE OF FLORIDA FAILS TO AFFORD MR. HENDRIX A CLEMENCY REVIEW PROCESS WHICH COMPORTS WITH DUE PROCESS. THE PROCESS OF CLEMENCY REVIEW IN FLORIDA VIOLATES MR. HENDRIX FOURTEENTH AND EIGHTH AMENDMENT RIGHTS.

CLAIM XXIV

MR. HENDRIX WAS DEPRIVED OF HIS RIGHT 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, WHEN HE WAS IMPROPERLY SHACKLED DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL.

CLAIM XXV

MR. HENDRIX'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State responded (R[3] 671-709). Judge Lockett denied relief on Claims III, VI, VII, VIII, IX, X XVI, XVII, XVIII,

[3]"R" is this record, "TT" is trial transcript of prior record.

XIX and XXI (R 989-990). On February 4, 2000, after an oral request to amend the Amended Motion to Vacate, Judge Lockett granted the motion (R 1013). On March 10, 2000, Appellant filed a "Written Argument Regarding 3.850 Motion" which was actually a motion for rehearing on the November 23, 1999, order. In the "Written Argument," Appellant asked the trial judge to defer ruling on the claims which had been denied until after the evidentiary hearing (R 1014-1015).

Judge Lockett entered an order December 8, 2001, allowing an evidentiary hearing on Claims IV (paragraphs 2, 3 & 4) and XII (paragraphs 2A, 2C, 2E, 2F, 2G, 2I and 3). The judge recognized that Claims III, VI, VII, VIII, IX, X XVI, XVII, XVIII, XIX, and XXI had previously been denied. Additionally, Claims I, V and XXII were denied. The court deferred ruling on Claims IV(paragraphs 6-9), XI, XII (paragraphs 2B, 2D, 2H, 2J, 2K, and 2L), XIII, XIV, XV, XX, XXIII, and XXV as requested by Appellant (R 1043). That order was then amended to add Claim XXIV to the claims which required an evidentiary hearing (R 1047-1048). Appellant moved to interview jurors: Judge Lockett denied the motion (R 1066-1069, 1086). Appellant also requested a new *Huff* hearing and an order allowing the deposition of Judge Lockett and the co-defendant's attorneys. The basis of this motion was that

Judge Lockett had resigned and Judge Law had been assigned to the case (R 1115-1132). On June 11, 2002, Appellant moved to disqualify Judge Law (R 1160-1169). The order was granted (R 1170) and Judge Hill was assigned to the case (R 1172). Judge Hill allowed Appellant to depose Judge Lockett only on the issue of whether Appellant's shackles were visible (R 1183). Judge Hill also expanded the scope of the evidentiary hearing to add Claims XI, XII (paragraphs 2B, 2D, 4 and 4A), XIII and XIV. Claim II was denied as moot. On May 16, 2003, Appellant filed a Supplemental Motion to Vacate Judgments of Conviction and Sentences based on *Ring v. Arizona*, 536 U.S. 584 (2002) (R 1435-1452). The State responded to the supplemental motion (R 1489-1509).

Judge Hill held the evidentiary hearing December 2, 2002, March 25, 2003, and May 29-30, 2003, on Claims IV (paragraphs 2-4), XI, XII (paragraphs 2B, 2D, 4 and 4A), XIII, XIV and XXIV[4]. By order dated December 11, 2003, Judge Hill denied relief as follows:

Claim I was legally insufficient;

Claim II was moot;

Claim III had no merit;

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[4] Additionally, the court had deferred ruling on several claims until after the evidentiary hearing.

Claim IV (paragraphs 2-4) were afforded an evidentiary hearing and failed for lack of proof;

Claim IV (paragraphs 5 and 9) were moot; **Claim IV** (paragraphs 6-8) were procedurally barred;

Claim V was procedurally barred, the ineffective assistance portion had no merit;

Claims VI/X[5], VII, VIII, IX, XIII, XVI, XVII, XVIII, XIX, XX, were procedurally barred and had no merit;

Claims XI, XII and XIV were afforded an evidentiary hearing and denied for lack of proof;

Claims XV, XXII, XXIII, and XXV had no merit;

Claim XXI was procedurally barred;

Claim XXIV was afforded an evidentiary hearing and denied for lack of proof.

(R 1644-1667). The order was accompanied by exhibits 1-13 which included transcript excerpts, an order on pre-trial motions and the sentencing order (R 1668-1880). Appellant now appeals the order denying the Motion to Vacate (R 1881).

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[5] The court held these two claims encompassed the same issue.

STATEMENT OF THE FACTS

This court summarized the relevant facts in *Hendrix v. State*, 637 So. 2d 916, 918 (Fla. 1994):

> The defendant, Robert Hendrix, broke into a house with his cousin, Elmer Scott. Scott was caught and entered into a plea agreement with the State wherein he would plead no contest to a reduced charge of simple burglary, adjudication would be withheld, and he would serve two years' community control. As a condition of the plea, Scott agreed to testify truthfully against Hendrix. Based on Scott's deposition, Hendrix was arrested and charged with armed burglary of the dwelling. The State offered a plea agreement to Hendrix wherein he would receive four years' imprisonment and five years' probation. The court date was set for August 28, 1990.
>
> Hendrix did not want to accept a plea and told several friends prior to his court date that he was going to kill Scott to keep him from testifying. Hendrix discussed with his live-in girlfriend, Denise Turbyville, various plans to kill Scott. Hendrix also tried to secure from a number of people a "throw-away" pistol that could not be traced to him. On August 27, 1990, the day before his court date, he came home with a handgun, attempted to construct a silencer for it, and test-fired it.
>
> At some time after 11 p.m. that night, he told Denise to get ready, that they were going to Scott's. He had a mask, gloves, and hat. She drove to the vicinity of Scott's mobile home, dropped him off, drove to the county line, and pulled over to wait. Denise heard a number of shots and then several minutes later Hendrix got in the car, saying "Don't look, just go." When they arrived home, they did not turn on the lights. Hendrix took a shower and burned his clothes out back. He gave Denise an account of the murders: He shot Elmer Scott in the head, and when Elmer's wife, Michelle, tried to fight him, he slashed her throat with a knife. He then hit Elmer over the head with the gun butt and

slashed his throat "for insurance." As he shot Elmer, he swore-- "I'll see you in hell!"

Hendrix was arrested and tried for the crimes. The medical examiner testified that each victim had been shot, bludgeoned, and stabbed. Several witnesses, including Denise, testified that Hendrix admitted committing the murders to silence Scott. He was convicted of two counts of premeditated first-degree murder, two counts of conspiracy to commit murder, and one count of armed burglary.

EVIDENTIARY HEARING FACTS

A. MITIGATION EVIDENCE

The first group of defense witnesses involved Appellant's drug usage during the days preceding the murder. Ellen (Cutting) Barfield had known Appellant since he was 16 years old and she was 25 years old (R 2533). They used drugs together every other day; specifically, cocaine and marijuana, until Appellant was arrested at age 23 (R 2534). Appellant mostly used marijuana. He also drank alcohol (R 2535). He may have used Methamphetamine and Ecstasy (R 2538). Barfield remembered one incident in which Appellant started laughing and said he was having a flashback from taking LSD (R 2536). Appellant would laugh and get giggly. Barfield never knew him to become violent after taking drugs or alcohol (R 2539). At one point, Appellant went to Lancaster prison. He did not like to talk about that (R 2536-37). Barfield was with Appellant the weekend before the murder. They all got drunk and may have used marijuana (R 2537). That was Friday night, and the murder occurred late Monday night, 72 hours later (R 2540). Barfield had planned to go out with Appellant the night of the murder, but he cancelled so he could spend the night with Denise (R 2541-42). After his arrest, Appellant told

Barfield he would try to avoid her having to testify for him (R 2541). Barfield had two prior felony convictions (R 2540).

Appellant was born in 1966 (R 2551). Appellant's mother, Doris Hendrix, knew Appellant as a "pretty good boy, but he didn't like school." Appellant's father was overbearing to the point it became violent a couple times (R 2546). When the father found out Appellant was skipping school, there was a commotion and he was rough with Appellant (R 2546). The father was not abusive except for the one instance in which they felt something needed to be done about Appellant skipping school (R 2555). Appellant sustained no noticeable injuries and was not taken to a hospital (R 2556).

Appellant's older brother was killed in a car accident at age 16. Appellant took it really hard. They were very close (R 2547). Doris was aware of Appellant's drug use beginning in the early teens (R 2548). When Appellant started getting in trouble, he was put in a STOP camp. He later went to prison around age 15 (R 2548). Appellant was never violent. He did, however, have a learning disability (R 2549). Appellant did not want to be in a special learning class, so he started skipping school (R 2549). The only head injuries were once during a bike accident and once in Texas after a man accused Appellant of breaking into his house and hit him in

the head with a board (R 2550). Doris had no personal knowledge of the Texas incident (R 2554). Appellant may have broken his arm in the bike accident – he was taken to the hospital for X-rays (R 2558). Appellant's sister, Linda, knew more about the Texas incident (R 2555).

Appellant worked for Fountain Construction for approximately one year before the murder (R 2552, 2573). Appellant did not want his family to have to testify for him (R 2551). Doris considered Appellant of average intelligence. He wrote letters to her and likes to read westerns and mystery novels (R 2553). Doris would sent Appellant novels in prison (R 2553). Appellant got his GED at Marianna while in prison (R 2554).

Doris Hendrix saw Appellant on the days prior to going to court on the burglary charge (in which Elmer Scott was going to testify) (R 2829). Appellant acted "like he was kind of high on something." Doris had seen Appellant in that condition before – he acted in a hurry, but relaxed at the same time (R 2830). Doris did not see Appellant the night of the murders (R 2831).

Appellant's older sister, Doris Ann Hendrix, talked to Appellant about his drug use when he was 15 (R 2560). They used to talk about "different experiences he had and things,

you know, we just talked like you would talk about your life" (R 2561). Appellant's mother was loving, caring and nurturing (R 2577). Appellant's relationship with his father bothered him. The relationship was volatile, at times abusive (R 2561). Doris Ann described the father as a "rage-aholic." You would never know what would set him off (R 2561). Appellant tried to stay out of his way. Doris Ann remembered one time at the mall during which Appellant started crying because of the father's verbal abuse. Appellant was 17 years old (R 2562). The father would spank the two brothers when they were young, mainly with a belt (R 2563). Doris Ann and Linda were also spanked with a belt (R 2572, 73). Doris Ann was aware of Appellant's marijuana use which was regular, but probably not daily (R 2564). She knew of an incident in which a neighbor hit Appellant in the head with a metal golf club which caused a big knot (R 2565). The incident did not cause Appellant to go to the hospital (R 2568). Appellant was 20-22 years old at the time. Doris Ann did not see the incident which occurred near Linda's house (R 2560). She relied on Appellant's report (R 2567). Appellant left Texas because he was afraid he would be arrested for the burglary (R 2568). Before that, he worked at Wendy's (R 2573). Chris Vincent grew up with Appellant. They met when Vincent was around age

14 (R 2580). Appellant was two years older than Vincent (R 2587). They would steal moonshine from their parents and drink it together (R 2580). They used marijuana and "shroooms" together. Vincent did not recall using cocaine with Appellant (R 2581). The drug use was almost daily. They would both be "off the chain", i.e., "crazy, just didn't care." (R 2582). Vincent never participated in crimes with Appellant (R 2583). Vincent had been convicted of felonies "a bunch of times." (R 2584). The last time Vincent saw Appellant was the day before the murder when they had a few drinks together (R 2586).

Kenneth Adair was in junior high school with Appellant and they would skip school together (R 2589). Appellant said his father was very strict and "whipped him a lot." Adair believed this because Appellant skipped a lot of school and got into mischief. One day when they were skipping school, they stole Appellant's father's truck, ran off the road, jumped a ditch, and hit a large oak tree. They got out of the vehicle and ran (R 2590). Appellant didn't have any apparent injuries (R 2594). Vincent and Appellant smoked a lot of marijuana during junior high school. Vincent heard that Appellant was using cocaine in later years (R 2591). Denise

Turbyville, Appellant's girlfriend, told Vincent they partied, got high, and used "acid." (R 2592).

From the age of 10 to 16, Appellant lived next door to Scott Richardson. They started experimenting with drugs together (R 2598). They would smoke pot and even smoked hash one time (R 2603). Vincent was "pretty sure" they tried cocaine one time (R 2599, 2603). They were not much into alcohol, although they did drink some Vodka a friend stole from his father (R 2600). Richardson heard that Appellant was injecting cocaine (R 2601). Richardson had been to prison five times and had no idea how many felonies he had (R 2604).

Michael Craft also drank moonshine with Appellant when they were 13 or 14. There was a bunch of kids that would skip school and drink moonshine. He never used drugs with Appellant and was not aware of Appellant using drugs (R 2607). He heard Appellant used cocaine, though (R 2608). Matt Smith, a drug dealer, described Appellant as having "a pretty serious coke habit." He would spend about $500.00 per day on cocaine. Appellant would trade things he had "acquired" such as rings and jewelry (R 2618) for marijuana, which Vincent assumed he traded for cocaine (R 2611, 2619). This occurred for approximately three months (R 2611). As far as Smith knew, Appellant was injecting cocaine (R 2612). He appeared to be

"wired for sound." (R 2618). In other words, Appellant would be really loud and hard to deal with (R 2620). Smith went to prison for dealing drugs in 1995 (R 2614). He had moved from Apopka in 1990 and had no further contact with Appellant (R 2616-17). Craft had thirteen felony drug convictions (R 2615). Another teen friend, Randle Davis, met Appellant through doing drugs (R 2623). They used marijuana, acid, cocaine, and sometimes drank alcohol (R 2623). The last time Randle saw Appellant, he was around 17 years old, or in 1985 (R 2524, 2627). Appellant was a very shallow person but was not violent. He never wanted to go home and sometimes slept in his car (R 2625).

The co-defendant, Alma Denise Turbyville, lived with Appellant for approximately one year before the murder. Appellant sometimes drank heavily (R 2873). Turbyville would not drink when they were together because she would drive. Turbyville did not remember Appellant ever blacking out (R 2870). She did use marijuana and acid with Appellant. They would smoke marijuana from the time they got up until the time they went to bed (R 2871). Appellant never used cocaine or Valium during the time they lived together (R 2876), but she heard he had used cocaine (R 2872). Appellant was able to function, go to work, and drive a car even though they smoked

marijuana (R 2878). Appellant operated heavy equipment at Fountain Construction in Orlando (R 2878). Appellant and Turbyville lived with her mother, Joanne Zeller, during the period before the murder (R 2655). Zeller believed Appellant was of at least average intelligence. She never saw any indication he was high on drugs. Appellant was always polite and never violent (R 2656). Zeller was aware that Turbyville and Appellant smoked marijuana, but they never did it in her house (R 2658). Appellant did not drink alcohol around her (R 2935).

B. CONFIDENTIAL INFORMANT - ROGER LaFORCE

Noel Griffin was an investigator with the State Attorney's Office when Appellant's case was tried (R 2629). He was familiar with Roger LaForce, a confidential informant, as a cooperating defendant (R 2630, 2631). Griffin was not involved in Appellant's case and had never talked to the prosecutor about the case (R 2633). LaForce ended his stint as an informant some time in 1988 (R 2636). He ultimately became a witness in Appellant's case; however, Griffin never told the prosecutors that LaForce had previously been a confidential informant when Griffin was on a drug task force (R 2637-38). Griffin had no contact with LaForce after he pled in February 1988 (R 2642). Griffin never asked the

prosecutors in this case to give LaForce any benefit because he had previously been used as a cooperative defendant (R 2642).

William Gross was one of the prosecutors at trial. Gross met LaForce when he became a witness in Appellant's case. He had no knowledge LaForce had been used previously as a confidential informant (R 2645-46). There were over 100 witnesses in the case, and Gross did not recall whether he checked into LaForce's background (R 2646). Gross was unaware Judge Lockett had previously sentenced LaForce (R 2647). Michael Graves, the attorney for co-defendant Turbyville, did not mention that he represented LaForce at one time (R 2647).

C. MENTAL HEALTH AND DRUG TESTIMONY

Appellant presented the testimony of three mental health experts: Dr. Jonathan Lipman, Dr. Barry Crown, and Dr. Edward Willey. Dr. Lipman is a neuropharmacologist, which deals with the effects of drugs on nerve, brain and behavior (R 2679). He is not a psychologist and holds no degree or license in psychology (R 2681). He is not a physician or pharmacist (R 2683, 2684). He has degrees in biochemistry and biology. There is no licensure in pharmacology (R 2684). Dr. Lipman has a certification in neuropharmacology (R 2685). He did not hold himself out to be a mental health expert. His only

expertise was to evaluate the effect of drugs on a person's mental state (R 2588). A federal judge refused to allow Dr. Lipman to testify in areas of psychology; however, Dr. Lipman believed she was wrong because "that's what I do for a living." (R 2692-94). Dr. Lipman was accepted as an expert in neuropharmacology (R 2698).

Dr. Lipman reviewed the testimony of the people who testified earlier in the evidentiary hearing (R 2699). He reviewed psychological reports, interviews from family members, hospital records, DOC records, school records, and the trial testimony of Dr. Pascowicz (R 2699). According to investigation notes in 1990 and 1991, Appellant used alcohol at age 9 or 10. He began smoking marijuana and using pharmaceuticals such as Percodan, Oxycodone, Valium and Quaaludes at age 12. Appellant started stealing drugs from people's houses at age 13, the same year he started using phencyclidine. He used LSD beginning at age 15 (R 2700). Appellant graduated to cocaine use at age 16 and engaged in the typical pattern or snorting, smoking and injecting (R 2701). Valium was used to mitigate the adverse effects of cocaine. Cocaine use ultimately creates a state of paranoia and anxiety. A person might believe they are followed by an assailant, will see shadows which disappear and are plagued by

delusions (R 2702-03). For example, Appellant believed at one time he was under surveillance by police when it was actually the headrests from a car he saw (R 2703). Continuous use of cocaine becomes psychologically painful, so a person takes the drug to avoid pain, not to get high (R 2704).

Appellant began using Valium at age 13. Until he was 18, he would use cocaine and Valium separately;[6] however, in later years he used Valium and alcohol (R 2705). Using Valium and cocaine alternatively causes a drunk and tranquilizing state. Blackouts may result (R 2706). Appellant was also quite a serious alcohol abuser (R 2707). Using Valium and alcohol creates a state of intoxication. Valium carries a warning not to drink alcohol (2710). Valium plus alcohol disinhibits and can unleash anti-social behavior or inappropriate sexual conduct (R 2722). Appellant's use of marijuana and alcohol could be disabling – more so when the two are used together (R 2713). Cocaine injection or heavy use can cause persistent changes in brain function and the temporal and frontal lobes can be affected (R 2714). People with frontal lobe damage are more impulsive (R 2722).

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[6] If valium had been used in combination with cocaine it would be called "speedballing."

Valium use can produce rage (R 2711). Appellant described a "seething rage" before the murder which he described as "I was agitated as hell. I get agitated just thinking about this idiot now." (R 2712).[7] The time reference was the "weeks before the killing" and Appellant said that:

> In the weeks before the killing, I was drinking and smoking and I still went to work[8] and I was getting madder and madder by the day, more and more agitated because he is going to send me to the chain-gang again, because the punk didn't want to do it by himself. I got so damn mad, I get agitated just thinking about it.

(R 2748). Enraged people can plan (R 2723).

Appellant had acquired a "throw-away" gun and built a silencer to muffle the sound. He even tested the silencer (R 2753). He procured gloves to wear at the crime scene so he wouldn't leave fingerprints (R 2743). A T-shirt was used to cover his face (R 2743). After the murder, Appellant burned

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[7] Appellant denied involvement with the murder and the trial judge sustained objections to Dr. Lipman's testimony regarding mental state at the time of the murder (R 2719, 2725). Dr. Lipman could only testify that "these drugs are substantially impairing," not that Appellant was substantially impaired (R 2724). Intoxication due to combined Diazepam and alcohol "is a substantial impairment" (R 2761). The State's objection to testimony regarding extreme emotional disturbance was sustained since Dr. Lipman could not assess Appellant's mental state at the time of the crime (R 2725).

[8] Appellant operated heavy equipment such as bulldozers (R 2738-39).

his bloody clothes and tried to burn the .22 casings (R 2754-55). In Dr. Lipman's opinion, Valium and alcohol would not prevent such planning (R 2757). Appellant may have been in a continuous Benzodiazepine rage which caused the obsessive thinking (R 2757). It is easier to engage in goal directed behavior when a person is disinhibited (R 2751). As Dr. Lipman concluded:

> I can tell you that at the time of the murder, based on what information I have, he was under the influence of these drugs. What he will not tell you is that he was murdering someone at that time.

(R 2759). Lipman could not describe the pharmacological effects relating to the offense if Appellant would not reveal his behavior at the time (R 2763).

Dr. Lipman saw Appellant one time – February 11, 2003 (R 2727). The only "test" Dr. Lipman conducted was to ask Appellant questions from the "Clinical Analysis Questionaire" (R 2715). Those questions showed Appellant is a loner, not sociable, and engages in abstract thinking. He is certainly not mentally retarded, in fact Dr. Lipman described Appellant as "quite cunning" (R 2716, 2741). Appellant had a substantial criminal history. He found the best time of day to steal was during the day because people were away from their homes (R 2742). Appellant would steal money to buy marijuana and drugs from homes (R 2742). He devised an

elaborate scheme to scam rent-to-own stores by using pay phone numbers at which his friends were stationed (R 2744). When the store would call for the employer, landlord or other reference, Appellant's friends would provide the information. Appellant would then have approved credit and leave the store with items he would never pay for (R 2744).

The reports of Dr. Tell and Dr. Pascowicz found Appellant's IQ to be 98 (R 2740). Appellant's vocabulary and grammar were good (R 2740). Dr. Lipman spoke to Dr. Crown the night before the evidentiary hearing. He never reviewed Dr. Crown's raw data from tests conducted in 1996 (R 2727-29). Dr. Lipman produced a 25-page report on his findings (R 2732, State Exhibit #1).

Dr. Crown was qualified as an expert in the area of neuropsychology for the purpose of administering neurological tests (R 2773). He saw Appellant February 20, 1996, seven years after the murder, and administered the Reitan Indiana Aphasia Screening Test, Trail Making test, Simple Digit Modalities Test, Rey Osterreith Complex Figure Test, Verbal Fluency test, GFW Auditory Selective Attention Test, Shipley Institute of Living Scale, and the Draw A Person test (R 2773, 2789). He was with Appellant a total of three hours (R 2791).

Crown admitted the appropriate time to conduct psychological tests would have been in 1990 (R 2790).

According to Dr. Crown, the tests showed Appellant had brain function problems in the anterior area of the brain which were bilateral. The frontal areas control reasoning, judgment, and impulsivity (R 2774). The tests also showed Appellant fell in the average to low-average IQ Range (R 2776). However, the intellectual efficiency was that of someone 9 years, 9 months old, and the stored information was at the 16-year old level (R 2776-77). Appellant left school at the age of 16 even though he ultimately obtained a GED (R 2777). Dr. Crown reviewed the test results and concluded that Appellant has a mental defect which leaves him "substantially impaired." (R 2782). Appellant was also under the influence of extreme mental or emotional disturbance at the time of the murders (R 2783). Further, his capacity to appreciate the criminality of his conduct or conform that conduct to the requirements of law was substantially impaired (R 2783).

Dr. Crown admitted that the scoring on some of the tests is subjective (R 2793). He had not reviewed Dr. Lipman's report. Crown had spoken with Lipman, but on a superficial level (R 2795). Crown said Appellant could not think abstractly, while Lipman said he could. Dr. Crown did not

think he needed to explain the discrepancy (R 2796). Dr. Crown conceded that when the tests were considered together, the final opinion was that Appellant was mildly impaired as to brain status (R 2797). The drug and alcohol abuse starting at an early age could cause brain impairment (R 2798). It is possible to be brain damaged but still have a high IQ (R 2801).

The State expert, Dr. Harry McClaren, forensic psychologist, reviewed Appellant's disciplinary records from Department of Corrections, medical records, school records, evidentiary hearing testimony from December 2002, police reports, sentencing order, trial record, report of Dr. Tell, interview notes and deposition of Dr. Lipman, deposition of Dr. Crown, and the Supreme Court opinion (R 2895-96). He spoke to Turbyville by telephone (R 2897). On May 15th, he examined Appellant at Union Correctional for 5 ½ hours regarding past history, social background, and conducted a mental status examination. He conducted psychometric testing – the Minnesota Multiphasic Personalty Inventory 2 ("MMPI-2") (R 2898). The MMPI-2 tests psychopathology and personality. It gives an objective assessment of the individual (R 2899).

Appellant tended to minimize personal shortcomings. There was significant psychopathology consistent with a

personality disorder (R 2899). Three scales were elevated, the highest being the psychopathic deviant scale. This scale overlaps today with what is called antisocial personality disorder. The paranoia scale was outside normal limits (R 2900). The MMPI test showed a person not concerned with the consequences of behavior, a person who was impulsive, manipulative and the kind that would commit senseless, poorly planned and executed crimes (R 2901). Appellant readily admitted conduct disorder (a precursor to antisocial personality disorder) before the age of 15 (R 2903).

Appellant is not psychotic, does not suffer from anxiety or depression, and was articulate, friendly, and had a good sense of humor. He talked about his early life and the death of his brother when Appellant was 8 years old. Appellant referred to his brother as a "pothead" which would be odd if he were suffering profoundly from his death (R 2904). Appellant is an intelligent, non-psychotic person in no particular distress. He was able to remember details of his past, even to the detail of the pharmaceutical company that makes Darvocet. Appellant started using drugs at a young age. He started drinking alcohol around age 8-10 and smoked marijuana beginning at age 12-13 (R 2905). By age 13, Appellant was introduced to other drugs such as Valium,

Percocet, and Dilaudid which he bought from people by committing burglaries. The principal drugs used were cannabis, alcohol and Valium.[9] All information regarding drug use was derived from Appellant's self-report (R 2906). Appellant said Turbyville could verify the drug use, but when McClaren interviewed Turbyville by phone, she said "that she did not know of him doing this and if she had, she would have gotten some for herself." (R 2906-07).

All drug use except Valium was corroborated (R 2954). Appellant told McClaren that Turbyville would not know about his Valium consumption because one time when he was using it, he fell asleep during oral sex and she got upset (R 2907). Turbyville denied the event (R 2709). The dealer that supposedly knew about Appellant's Valium habit was dead (R 2708). McClaren talked to Turbyville between the two times he saw Appellant at the prison (R 2908). He also spoke with Turbyville's mother, Joanne Zeller (R 2910). Appellant told Zeller a day or two before the murder: "Wouldn't it be a shame if Elmer didn't show up" (to testify in the burglary case) (R 2911).

[9]Valium is a "minor tranquilizer" which is frequently prescribed (R 2909).

At McClaren's second interview of Appellant on May 23, he conducted the Milan Clinical Multiactual Inventory ("MCMI"), a newer version than the MMPI (R 2911, 2914). He also conducted the WAIS-III which showed a verbal score of 99, performance score of 91 and full scale score of 96. This placed Appellant in the average range (R 2912). All testing was consistent with the other testing (R 2913, 2915). The MCMI showed no malingering. There were three elevated scales: antisocial, schizoid personality disorder, and drug dependence (R 2915). Appellant did not admit the murder and said he had been resigned to going to jail for the burglary. He was going to accept the plea bargain and had even quit his job in anticipation of going to jail (R 2918).

Appellant described one amnesic episode when he was taking LSD and mushrooms. He did not pass out. To the contrary, he prided himself on being able to drink a lot without passing out. Appellant denied mixing alcohol and Valium (R 2919). In Dr. McClaren's opinion, the facts did not show a "benezodiazepine rage" situation (R2920). In fact, McClaren questioned whether such a thing as "benezodiazepine rage" exists (R 2924). Appellant procured gloves, made a silencer, covered his face, was dropped off a distance from the scene, made a phone call to get Elmer out of the bathroom,

killed the male before the female, slit Elmer's throat to make sure he was dead, disposed of the gun, found his way back to the getaway car, and burned his clothing (R 2920-2921). Appellant's behavior was goal-oriented, not disorganized (R 2923). Appellant was not under the influence of extreme emotional disturbance (R 2925). He denied involvement, he was not disturbed and he was resigned to going to jail for the burglary (R 2926). He had the capacity to appreciate the criminality of his acts and was not substantially impaired (R 2927).

Dr. McClaren's diagnosis was Antisocial Personality Disorder and cannabis and alcohol dependence (R 2927). He did not disagree with Dr. Crown that there could be some mild degree of brain damage. The WAIS-III indicated this and it could be possible if Appellant had a learning disability as a child plus a head injury plus substance abuse (R 2945).

Dr. McClaren spoke with Sgt. Young and Lisa Wiley, a death row psychologist classified as "psychological specialist," at the prison (R 2943). Appellant had refused any psychological services at the prison but had not been a problem. Wiley did not perceive Appellant as having any substantial mental difficulties that required her services. The prison records also showed Appellant did not require

mental health care (R 2902). McClaren also verified a list of Appellant's goal-oriented behavior by reading the trial record (R 2896).

D. AGGRAVATING CIRCUMSTANCES

Dr. Willey, physician and pathologist, had been a medical examiner in Jacksonville for four years at one point. He is currently a consultant (R 2808). He was qualified as an expert in the field of forensic pathology (R 2809). Dr. Willey had reviewed Dr. Leal's testimony from Appellant's trial regarding consciousness of the victims (R 2809). Elmer Scott's two wounds, cuts that transected the carotid arteries, were capable of rendering him unconscious immediately and causing death very rapidly. Dr. Willey did not know whether the gunshot wound to the head would cause unconsciousness (R 2810). Dr. Willey took issue with Dr. Leal's finding that blows to the back of the head would not cause immediate unconsciousness. However, Dr. Leal "may well be right" (R 2812). Willey then testified that "although it is possible for the head injuries to have caused impaired consciousness, I don't know that they did." (R 2813). Dr. Willey disagreed with Dr. Leal's opinion that Elmer Scott died of a scalp laceration. There were two more significant wounds to the carotid arteries which would have rendered death more swiftly.

Willey agreed with Dr. Leal that the severity of the injuries would have quickly rendered Elmer Scott incapacitated (R 2815). Notwithstanding, it was possible Mr. Scott could have "run about in the trailer after he was shot in the head with that .22 caliber firearm for some time before he actually went down." (R 2819). The bullet did not enter the cranial cavity (R 2818).

The cause of Michelle Scott's death was blunt trauma, multiple stab and cut wounds and three gunshot wounds (R 2814). Willey did not have crime scene photographs. He had some photocopies which were not very satisfactory (R 2816). He had no idea how much blood Mrs. Scott lost (R 2817). If there was bloodshed around Mrs. Scott, that would indicate she moved about the room and did not lose consciousness immediately. Dr. Leal believed Scott bled to death; however, Willey felt there would have been more blood in the abdominal cavity it that were true (R 2814). It would have been important to look at crime scene photographs to determine whether Mrs. Scott bled to death (R 2819). The wound to the neck which cut the windpipe was a "serious problem" which interfered with breathing. If loss of air were the cause of death, it would take a number of minutes (R 2814). Willey thought the opinion that there were defensive wounds on Michelle Scott's hands

was speculation (R 2812-13). Dr. Leal would classify them "just wounds" (R 2813). Dr. Willey did not read the trial testimony of Denise Turbyville (R 2820).

In Dr. Willey's opinion, any errors Dr. Leal made were harmless (R 2817).

E. SHACKLES

Judge Lockett, the trial judge, testified that Appellant was shackled during trial in the same procedure used in every trial (R 2832). When a defendant was brought in, the courtroom would be cleared except court personnel. The handcuffs were removed after the leg irons were attached to the shackle holders at the table. A defendant was never handcuffed in the presence of the jury. The jury could not see the leg irons (R 2833). There was a partition between the defense table and the jury. As a precaution, a partition was also placed on the prosecutor's table (R 2836). Appellant was treated no differently from any other defendant (R 2834). The jurors could not see Appellant as he entered or left the courtroom (R 2837). Judge Lockett vaguely remembered that Appellant had weapons at the jail and there was talk about an escape (R 2835).

Lt. Newcombe was the bailiff during Appellant's trial. He was the Deputy Bureau Commander and worked his entire

career in Court Services. (R 2841). Judge Lockett made it clear that no juror should see a defendant in shackles. When a defendant was brought into the courtroom, his legs would be shackled and his hands cuffed (R 2842). Jurors would never see a defendant in shackles – they would not be in the courtroom but in the separate, secured jury room (R 2843). The jury entered the jury room through a separate entrance (R 2854). Once the defendant was seated, the handcuffs would be removed and the feet shackled to an anchor by the floor (R 2843). There were facades in front of both counsel tables to prevent the jury from seeing under the tables (R 2844). The prosecution's table was closer to the jury box than the defense table (R 2853). Newcombe was aware Appellant was an escape risk and had a weapon at the jail (R 2845). Lt. Bass found a homemade shank in Appellant's cell on June 27, 1991, two and one-half months before the trial (2846). Appellant and another inmate also attempted to make a shank in order to obtain an officer's keys in order to escape (R 2847).

Michael Graves and Michelle Morley were the attorneys for Denise Turbyville. Graves sat in the courtroom during Appellant's trial (R 2858). Appellant was shackled during the trial. The custom in Lake County at the time was to place a facade in front of counsel table to hide the shackles. Graves

did not recall ever hearing Appellant's shackles rattle (R 2849). Generally, you could hear the chains if a defendant made an abrupt movement (2859). Graves did not have any conversation with Judge Lockett about the shackling (R 2862). When both he and Ms. Morley were appointed to Turbyville, Graves assumed it was a death penalty case even though the State had not announced it was seeking the death penalty (R 2864). Morley knew the shackling policy in the courthouse (R 2958). You could hear the chains when a defendant was brought in, but she never heard them after that (R 2949). She did not attend Appellant's trial (R 2959).

Turbyville testified at Appellant's trial and never observed shackles (R 2869).

F. INEFFECTIVE ASSISTANCE OF COUNSEL

Donald Eisenberg practiced law for over thirty years but was president of an investigation firm at the time of Appellant's trial (R 2970). Eisenberg considered himself as part of Hendrix' defense team (R 2984). He worked on Appellant's case with two defense lawyers, and sat at defense counsels' table during the trial (R 2971-72). Appellant admitted the crimes and told Eisenberg he wanted to die if convicted (R 2974). Appellant had described "in detail, graphically, exactly what he had done." (R 2983). Appellant

"was very honest with [Eisenberg] in everything he said" (R 3027). Appellant did not want to put forth a defense. Nevertheless, Eisenberg interviewed witnesses regardless of Hendrix' feelings (R 2975). Eisenberg did not recall Hendrix mentioning the use of Valium, but he did mention other drugs (R 2977). Appellant said he had a close, loving family and he started using drugs in junior high (R 3012). He said he had a learning disability and also attended the Dozier School for Boys (R 3013). Controversy existed over whether Appellant had a learning disability (R 3014).

Eisenberg described defense attorney Tom Turner as "extremely aggressive" (R 2983). Although Eisenberg had not worked on a death penalty case except for Appellant's, Turner worked closely with him (R 2986, 3003). He found the mitigation to the best of his ability and communicated with Turner (R 3025).

Thomas Turner, currently a Ninth Circuit Court Judge, was one of Appellant's trial attorneys. (R 3030, 3032). He handled two other capital cases that were resolved through plea bargains in 1987-88 (R 3032, 3063). He was offered a position as a Federal prosecutor when Hendrix' trial was finished. (R 3032). Hendrix knew Turner was returning to the U.S.

Attorney's Office, but still wanted him to try the case (R 3079).

Turner did not participate in Hendrix' case after the penalty phase was completed (R 3033). Ed Kirkland, co-counsel on this case, had quite a bit more experience even though Turner was lead counsel (R 3035). Turner also consulted with Donald West, an expert on capital cases (R 3036). Turner had an "extensive discussion" with Don West regarding aggravating factors and filed a number of motions and a number of jury instructions, many of which were denied (R 3066). Hendrix' parents paid between $10,000 to 25,000 for his defense along with expenses paid by the State (R3067, 3068). Hendrix was a "pleasure to work with because he was so up front and honest with me" (R 3070). Before being convicted, Hendrix said he would "rather die than go to prison" (R 3089). Hendrix believed "he had pulled it off carefully enough that they wouldn't be able to prove he did it" (R 3102).

Through consultation with the Public Defender's office, Turner learned that Hendrix had been examined by Dr. Krop (R 3036). Dr. Krop could not provide any helpful information; there was no "psychiatric defense in this case" (R 3037). Appellant was "very up front with Dr. Krop" and "up front with [Turner] as to what happened ..." Dr. Krop was an experienced

forensic psychologist. He had a "reputation for being defense oriented ... one place you would often start as a defense lawyer if you were looking for a favorable psychiatric opinion" (R 3037).

Appellant relayed that he committed the murders and the reasons for committing them (R 3038). Hendrix thought his cousin, Elmer Scott, (the male victim) should "take it like a man . . . he got caught . . . should have taken his punishment and left Mr. Hendrix out of it." (Referring to the burglary they committed togther.) Hendrix met with Scott, warned him not to testify against him, and told him he would kill him if he did testify against him. Scott did not take him seriously. Scott had "made a deal ... was going to honor the deal ... testify against him (Hendrix)... therefore he decided that he would commit the murder." Hendrix made "extensive plans to commit the murder ... locate weapon ...went to some lengths to make a silencer out of it ..." (R 3039). His girlfriend drove him to the residence. He shot both Scott and his wife, and stabbed both. He made sure there was no physical evidence left behind. Hendrix also relayed this story to Dr. Krop. (R 3040). Counsel made a strategic decision not to call Dr. Krop (R 3041). Hendrix wanted an acquittal, "did not want a defense to the death penalty ... preferred the electric chair to life in

prison" (R 3041). By not calling Dr. Krop, the jury would not hear Hendrix' rendition of the crime as relayed to Dr. Krop (R 3041). Turner did not consider sending Hendrix to anyone other than Dr. Krop even though there was no financial restriction on the hiring of experts (R 3080, 3081).

Turner was not present for the sentencing hearing (R 3099). He did not talk to a neuropharmacologist, psychiatrist, or expert in drug use regarding this case (R 3108). He did not want to present evidence "excusing the crime" (R 3114). "There was not going to be any sympathy for him whatsoever" based on his opinion of this case, on "discussions with Don West ... Don Eisenberg ...Ed Kirkland ... general knowledge of reading about other cases ... my knowledge and the reputation of the jurors of Lake County ..." (R 3115, 3117). Hendrix told him he was not under influence of drugs at the time (R 3119). His experience with this jury was consistent with his preconceived notions (R 3123). He limited questions to Hendrix's father after his father broke down on the stand and he conferenced with his client (R 3124).

Ultimately, Hendrix authorized his counsel to present a defense (R 3043). Dr. Tell had examined Hendrix when he was a juvenile. It was counsel's strategy to show Hendrix had "a lot of problems and was crying out for help and help had been

recommended for him (at age 16) to control anti-social behavior and anger management ... that help was never provided" (R 3047). Dr. Paskewicz also examined Hendrix (R3048). The defense also presented evidence as to Hendrix' relationship with his father and physical abuse that he suffered (R 3048).

Hendrix used drugs prior to the crimes but not on the day of the murders (R 3049). There was no mention of prior drug use to the jurors because it would have alienated them (R 3049). Hendrix chose not to testify on his own behalf (R 3051). He was clear-minded and remembered "excruciating details about what happened before and the steps taken after to cover up the crime" (R 3055). A strategic decision to present evidence of prior crimes was presented as "these were not violent crimes ... doing certain things. ... should have gotten help ... didn't get it ..." (R 3058). Turner admitted Hendrix's crimes were "atrocious and heinous" in order to have credibility with the jury. He "conceded the obvious" (R 3059). He "had to make decisions"and "didn't have a lot of material to work with" (R 3060). Turner conceded the HAC aggravator "because the evidence was very, very clear that it was an extremely brutal murder" (R 3071). He tried to win the case by

creating reasonable doubt (R 3073). Hendrix had specifically instructed his family not to cooperate (R 3074).

Turner believed the defense presented evidence and arguments to the penalty phase jury to obtain a recommendation of a life sentence (R 3089).

SUMMARY OF THE ARGUMENT

Point I: The issue of Judge Lockett's impartiality was decided on direct appeal and is procedurally barred. Raising a new version of the issue will not resuscitate the claim. Hendrix's argument that the judge had a *Brady* responsibility to the defendant has no merit. Neither does the State have "constructive knowledge" of what a trial judge knows. This issue was neither raised in the Motion to Vacate nor ruled on by the collateral trial judge. It is not properly before this court.

Point II: The issue whether Appellant was inappropriately shackled is procedurally barred. The issue has no merit. Hendrix was an escape risk and found with a homemade shank in his jail cell two-and-a-half months before the trial. Every witness at the evidentiary hearing testified that the defendant's hands would not be handcuffed, but his legs will be shackled to the floor and covered from view by the jury. The defendant was not moved during the time the jury was in the room. Raising this claim as ineffective assistance of counsel does not breathe life into the claim.

Point III: Hendrix raised several claims of ineffective assistance of counsel. Most of the claims are insufficiently pled on direct appeal. Counsel was not ineffective for

failing to object to Juan Perez's testimony which had no relevance, and thus creates no prejudice. Counsel was not ineffective for failing to impeach LaForce. Counsel posed numerous objections, was overruled on most, and did elicit testimony that LaForce was gleaning knowledge from Hendrix so that he could make a deal with the State Attorney. Ultimately, LaForce's charges were either reduced or he did time served. Counsel was not ineffective in the penalty phase investigation. Hendrix prevented contact with witnesses. Counsel made a strategic decision not to present negative testimony of drug use and that Hendrix would burglarize to support his habit. Counsel did consult with Dr. Krop, who advised them he could not be of assistance. Hendrix described the murders to Dr. Krop in "cold, clear detail". Counsel made a strategic decision not to present this testimony to a jury. Counsel did present testimony from two experts and family members to establish mitigation. The testimony now presented by Hendrix does not establish statutory mitigation at the time of the crime. Hendrix denied involvement to the current experts who, therefore, cannot make an assessment of the statutory mitigators. Even if the current experts had testified, it would not have changed the outcome. The testimony of the medical examiner presented at the evidentiary

was speculative and would not have affected the aggravating circumstance of heinous, atrocious.

Point IV: Further impeachment information on LaForce would not have changed the outcome of the trial. This was a double homicide in which Hendrix purchased items to conceal his identity, disposed of evidence, murdered a witness to keep him from testifying, and killed two people in a heinous and cruel manner. Defense counsel did bring out impeachment evidence that self-serving LaForce was trying to make a deal with the State, that his goal was to elicit information at the jail, and that he ultimately received lenient sentences. The additional information would not have changed the outcome, and Hendrix has failed to establish the three prongs of a *Brady* claim.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR BY FAILING TO RULE ON THE ISSUE OF WHETHER JUDGE LOCKETT WAS BIASED; THIS ISSUE IS PROCEDURALLY BARRED

Hendrix concedes that Judge Lockett's conflict was raised on direct appeal, but claims "the evidentiary hearing has exposed new evidence of Judge Lockett's conflict" (Initial Brief at 30). This new evidence is that Judge Lockett presided over a plea hearing involving Roger LaForce, a witness against Hendrix. Hendrix claims the fact Judge Lockett took a plea on one of LaForce's cases and was aware LaForce was a confidential informant somehow compromised his partiality and created a conflict because LaForce testified in Hendrix' case. Hendrix claims Judge Lockett had a responsibility to "advise the Defendant that he had knowledge of LaForce's activities as a confidential informant" (Initial Brief at 30).

Hendrix attempts to raise this issue on appeal under the theory that the collateral trial judge should have allowed a deposition of Judge Lockett to explore the Turbyville conflict, an issue which is clearly procedurally barred. Had the deposition been allowed, Hendrix reasons he would have

exposed the additional conflict of Judge Lockett insofar as LaForce being a confidential informant.

First, this issue was not raised in the Motion to Vacate and was not ruled on by the collateral trial judge. Therefore, the issue is procedurally barred from review. Second, this issue is procedurally barred because this court ruled on the Turbyville conflict on direct appeal, stating:

> Hendrix first claims that the judge erred in refusing to recuse himself. After Hendrix's live-in girlfriend, Denise, was arrested for her part in the crimes, she was subpoenaed to testify before the grand jury. The night before she was to testify, Denise told her lawyer, Ms. Morley, new information concerning the crime. Ms. Morley was uncertain how to advise her client concerning the grand jury investigation, so she consulted with Jerry Lockett, a lawyer in private practice. She told Lockett everything that Denise had told her, and Lockett told her that if he were Denise's lawyer he would not let her testify. Ms. Morley accepted this advice and advised Denise not to testify. (Notwithstanding this advice, Denise did eventually testify.)
>
> When it became apparent that the State might seek the death penalty against Denise, Ms. Morley again went to Lockett to see if he would be her associate on Denise's case. Lockett expressed interest. By the time the court considered the appointment, however, Lockett was a candidate for circuit court judge and the court declined to appoint him. Lockett later became trial judge on the present case and defense counsel filed a motion for disqualification of the judge, claiming that Lockett's prior connection with Denise created a conflict, or appearance of conflict, of interest since Denise was to be a major witness in the Hendrix trial. Judge Lockett held a hearing on the motion and Ms. Morley testified, giving her account of events. The judge accepted the factual allegations as true, but ruled the motion

legally insufficient. Denise eventually testified against Hendrix in the present trial.

Hendrix claims that the judge erred in refusing to recuse himself in violation of section 38.02, Florida Statutes (1989), [FN4] and Canon 3(C) of the Florida Code of Judicial Conduct. [FN5] He does not claim, nor has he ever claimed, that the judge was biased in any way ("We are not alleging bias. We are not alleging anything improper...."), nor does he point to a single instance in the entire proceeding wherein the judge displayed partiality. Rather, he claims only that there was an "appearance" of conflict of interest. The record, however, fails to show that an improper interest of any kind--or appearance of such interest--was present. It is uncontroverted that the judge never represented Denise, never met her, never spoke to her, that he discussed the matter with Ms. Morley for only several minutes, and was not paid for his advice. Further, at one point in the trial, defense counsel asked the judge to read the grand jury minutes, and this included Denise's entire testimony before that body. Neither the statute nor rule were violated. *Cf. Walton v. State*, 481 So. 2d 1197 (Fla. 1985) (Defendant failed to show bias where trial judge presided over co-perpetrator's trial wherein additional evidence inculpating defendant was adduced.).

> FN4. Section 38.02, Florida Statutes (1989) provides in relevant part:
>
> 38.02 Suggestion of disqualification; grounds; proceedings on suggestion and effect.--In any cause in any of the courts of this state any party to said cause ... may at any time before final judgment ... show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to the judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by

> consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause....
>
> FN5. Canon 3(C) of the Florida Code of Judicial Conduct provides in relevant part:
>
> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (c) he knows that he individually or as a fiduciary, or his spouse or minor
> child residing in his household, has a financial interest in the subject matter in controversy ...
> (d) he or his spouse ...
> (i) is a party to the proceeding ...
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Hendrix further claims that by refusing to recuse himself the judge violated the due process principles articulated in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). There, the jury returned a verdict of guilty of first-degree murder against Gardner and recommended life imprisonment. The judge nevertheless overrode

> the jury recommendation and imposed death, explaining in his sentencing order that he was taking into account a presentence investigation report (PSI) that was unavailable to the jury. The United States Supreme Court vacated the death sentence for two reasons: The judge failed to give the defense an opportunity to explain the information contained in the PSI; and the complete PSI had not been made a part of the record for the Florida Supreme Court to review on appeal.
>
> The present case differs from *Gardner* in several key respects. First, while the judge in *Gardner* expressly said in his sentencing order that the nonrecord evidence played a role in his decision to impose death, the judge here said just the opposite--that his findings were based solely on proof presented "during the guilt and penalty phase of the trial." Second, while the jury there recommended life and the judge overrode that recommendation based in part on the nonrecord evidence, here the jury recommended death unanimously for each murder and the judge complied. And third, while only a single aggravating factor supported the death penalty in *Gardner*, five aggravators for each of two murders are applicable here. We find *Gardner* inapposite.

Hendrix v. State, 637 So. 2d 916, 919 -920 (Fla. 1994).

Third, this issue makes no sense. A trial judge has no responsibility of disclosure to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* applies to the prosecution withholding potentially exculpatory evidence from the defense. If Hendrix's theory were viable, a trial judge would be saddled with the Herculean feat of informing defense counsel of potentially exculpatory information about State witnesses garnered from unrelated cases before the judge. A

trial judge is neither an agent of the prosecution nor an investigator for the defense. As Hendrix points out, a presiding judge must be neutral and detached (Initial Brief at 31). This issue has no merit.

Hendrix also claims trial counsel was ineffective for failing to learn that Judge Lockett had a "relationship" with both LaForce and Turbyville. As previously stated, the conflict issue regarding Turbyville is procedurally barred. Raising the issue under the guise of ineffective assistance of counsel cannot circumvent the procedural bar. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). Moreover, Florida law does not allow the use of a different argument to relitigate issues that were raised or decided on direct appeal. *Turner v. Dugger*, 614 So. 2d 1075 (Fla. 1992); *Quince v. State*, 477 So. 2d 535 (Fla. 1985). As to LaForce, this claim repeats Point IV herein. As such, those arguments will be addressed in Point IV.

Hendrix last argues the State should have disclosed that "Judge Lockett may have been privy to information outside the record regarding LaForce." Again, this argument makes no sense. Hendrix does not explain how the State is responsible for knowing the information a judge knows or how that becomes *Brady* evidence. Merely invoking the magic word "Brady" does

not create an issue. Hendrix has failed to show the State should have knowledge of what a trial judge knows during an unrelated plea colloquy or that the State has a duty to disclose that information even if they had it.

The real crux of this issue is Hendrix's circular argument that he was denied the right to depose Judge Lockett on the Turbyville conflict issue, the LaForce plea shows that the judge had a conflict, and therefore, Hendrix should be allowed to depose the judge on the Turbyville conflict issue. The Turbyville conflict issue was decided on direct appeal. The LaForce argument has no merit and bootstrapping this allegation onto the Turbyville issue does not require ordering a deposition to explore an issue which is procedurally barred.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE SHACKLES ISSUE; THIS ISSUE IS PROCEDURALLY BARRED

Hendrix claims he was inappropriately shackled during trial. His best evidence is that Mr. Graves cautioned his clients (not Appellant) to remain still, and that Ms. Turbyville's lawyer said she could hear the chains (Initial Brief at 40-41). First, this issue is procedurally barred and should have been raised on direct appeal. Second, the testimony of Ms. Turbyville's lawyer, a defense lawyer, was that she has heard chains before, not that she heard Hendrix's chains.

Third, this issue has no merit. The testimony at the evidentiary hearing was the following:

Judge Lockett, the trial judge, testified that Appellant was shackled during trial in the same procedure used in every trial (R 2832). When a defendant was brought in, the courtroom would be cleared except court personnel. The handcuffs were removed after the leg irons were attached to the shackle holders at the table. A defendant was never handcuffed in the presence of the jury. The jury could not see the leg irons (R 2833). There was a partition between the defense table and the jury. As a precaution, a partition was also placed on the prosecutor's table (R 2836). Appellant was

treated no differently from any other defendant (R 2834). The jurors could not see Appellant as he entered or left the courtroom (R 2837). Judge Lockett vaguely remembered that Appellant had weapons at the jail and there was talk about an escape (R 2835).

Lt. Newcombe was the bailiff during Appellant's trial. He was the Deputy Bureau Commander and worked his entire career in Court Services. (R 2841). Judge Lockett made it clear that no juror should see a defendant in shackles. When a defendant was brought into the courtroom, his legs would be shackled and his hands cuffed (R 2842). Jurors would never see a defendant in shackles – they would not be in the courtroom but in the separate, secured jury room (R 2843). The jury entered the jury room through a separate entrance (R 2854). Once the defendant was seated, the handcuffs would be removed and the feet shackled to an anchor by the floor (R 2843). There were facades in front of both counsel tables to prevent the jury from seeing under the tables (R 2844). The prosecution's table was closer to the jury box than the defense table (R 2853). Newcombe was aware Appellant was an escape risk and had a weapon at the jail (R 2845). Lt. Bass found a homemade shank in Appellant's cell on June 27, 1991, two and one-half months before the trial (2846). Appellant

and another inmate also attempted to make a shank in order to obtain an officer's keys in order to escape (R 2847).

Michael Graves and Michelle Morley were the attorneys for Denise Turbyville. Graves sat in the courtroom during Appellant's trial (R 2858). Appellant was shackled during the trial. The custom in Lake County at the time was to place a facade in front of counsel table to hide the shackles. Graves did not recall ever hearing Appellant's shackles rattle (R 2849). Generally, you could hear the chains if a defendant made an abrupt movement (2859). Graves did not have any conversation with Judge Lockett about the shackling (R 2862). When both he and Ms. Morley were appointed to Turbyville, Graves assumed it was a death penalty case even though the State had not announced it was seeking the death penalty (R 2864). Morley knew the shackling policy in the courthouse (R 2958). You could hear the chains when a defendant was brought in, but she never heard them after that (R 2949). She did not attend Appellant's trial (R 2959).

Turbyville testified at Appellant's trial and never observed shackles (R 2869).

Hendrix has failed to demonstrate the jury was even aware of the use of security devices or that he was denied a fair trial. As a general rule, a defendant in a criminal trial has

the right to appear before the jury free from physical restraints, such as shackles or leg and waist restraints. *See Illinois v. Allen*, 397 U.S. 337, 344 (1970). Restraining a defendant with shackles in view of the jury may adversely impact on an accused's presumption of innocence. *See Diaz v. State*, 513 So. 2d 1045, 1047 (Fla.1987); *Elledge v.State*, 408 So. 2d 1021, 1022 (Fla.1981). However, a criminal defendant's right to be free of physical restraints is not absolute: "[U]nder some circumstances, shackling 'is necessary for the safe, reasonable and orderly progress of trial.' " *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir. 1998) (quoting *United States v. Theriault*, 531 F.2d 281, 284 (5th Cir. 1976)). "Courtroom security is a competing interest that may, at times, 'outweigh[ ] a defendant's right to stand before the jury untainted by physical reminders of his status as an accused.' " *Mayes*, 158 F.3d at 1225 (quoting *Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir.1984)). Shackling is a permissible tool to be exercised in the sound discretion of the trial judge when circumstances involving the security and safety of the proceeding warrant it. *See Bryant v. State*, 785 So. 2d 422, 428 (Fla. 2001), *Derrick v. State*, 581 So. 2d 31, 35 (Fla.1991); *Correll v. Dugger*, 558 So. 2d 422

(Fla.1990); *Stewart v. State*, 549 So. 2d 171 (Fla.1989). Lt. Newcombe testified that Hendrix was an escape risk and had been found with a homemade shank in his jail cell two months before trial.

Hendrix alleges counsel was ineffective in attempt to avoid the procedural bar. Hendrix has not satisfied the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Hendrix must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688-89, 694 (1984).

The collateral trial judge findings included:

> **Claim XXIV: Mr. Hendrix was deprived of his right to due process when he was improperly shackled during the guilt and penalty phases of his trial.**
>
> The Court granted the Defendant an evidentiary hearing on this issue although the issue is one that should have been raised on appeal. Further, the allegations in the claim are conclusory as to the alleged prejudice enuring to the Defendant as no factual allegation was made that any member of the jury actually saw the Defendant's shackles.
>
> At the evidentiary hearing Judge Lockett, the Judge who presided over the trial, and Art Newcombe, the bailiff, in charge of security during the Defendant's trial, as well as the testimony of various attorneys and even a witness who was present

> at the trial all testified that the jury would not have been able to see Mr. Hendrix's shackles. Further, Mr. Newcombe testified that he was aware, prior to trial from the deputies at the Lake County Jail, that a shank made from an air conditioning louver was found in the Defendant's cell approximately two and a half months before the trial. He also said that about a month after finding the shank, Mr. Hendrix asked on of the cleanup men at the jail to get him a louvered slat from an air conditioning unit. The Defendant had also been implicated in an escape plot with another prisoner; just three weeks before trial.
>
> The Court finds that the shackling of Mr. Hendrix was necessary in this case, and that no prejudice has been demonstrated by the Defendant because of his shackling. The Defendant was seated behind counsel table where his feet would be shackled to the table by an anchor near the floor. The table has a floor length facade on the front and both sides.
>
> Florida courts have found a sufficient showing of. necessity to support the use of physical restraints on a defendant where there is a history or threat of escape, or a demonstrated propensity for violence. See, *Jackson v. State*, 698 So. 2d 1299, 1303 (Fla. 4th DCA 1997). If restraint devices were necessary, measures could have been taken to reduce the prejudicial impact. See *Dufour v. State*, 495 So. 2d 154,162 (FIa.1986) (approving the use of shackles, after a finding of necessity, where a table was used to reduce the visibility of the shackles); *Diaz v. State,* 513 So. 2d 1045, 1047 (Fla.1987) (approving shackling of defendant where trial court suggested that jury's view of shackles be obstructed by defendant "keeping his pants leg pulled down" or by placing a box or briefcase in front of his feet, and defendant refused to hide shackles).
>
> Miller v. State, 852 So. 2d 904, 905-906 (Fla. 4th DCA 2003). For the foregoing reasons, this claim is denied.

(R 1665-1666). There is no error in the judge’s findings.

POINT III

TRIAL COUNSEL WAS NOT INEFFECTIVE AT EITHER THE GUILT OR PENALTY PHASE

Hendrix claims trial counsel was deficient for:

(1) Failing to object to the relevance of Juan Perez' testimony;

(2) Failing to property impeach LaForce;

(3) Failing to show the link between Judge Lockett and a State witness

(4) Failing to investigate lay witness testimony for the penalty phase;

(5) Failing to investigate Appellant's drug use at the time of the murders;

(6) Failing to provide experts such as Dr. Lipman and Dr. Crown;

(7) Failing to establish statutory mitigating factors;

(8) Failing to provide sufficient information to Dr. Krop; and

(9) Failing to hire an independent medical examiner to challenge the heinous, atrocious aggravator.

The trial judge made lengthy findings on these issues which will be addressed in the order raised in the Initial Brief on appeal.

(1) Failing to object to the relevance of Juan Perez' testimony.

The allegations regarding Juan Perez are made in a vacuum and not sufficient for this court to review. Hendrix alleges counsel was ineffective for failing to object to Perez' testimony "that he saw a man leave the crime-scene, though he didn't say it was the defendant." (Initial Brief at 44). Hendrix argues that "unless Perez was identifying the defendant as the man leaving the house, his testimony was irrelevant." (Initial Brief at 46). The trial judge held:

> In his amended motion, the Defendant alleges trial counsel was ineffective for not objecting, on relevance grounds, during Juan Perez's testimony when evidence was offered that the witness could describe someone who left the victim's trailer yet never offered testimony that the person was the Defendant. Mr. Perez testified at the trial that he had ". . . seen this guy, heavyset, blond hair, beard. He was wearing some pants, a button shirt. He also was wearing a cap." (Trial Transcript at pg. 2064 attached as Exhibit 2.) However, Mr. Perez never identified the Defendant. After Mr. Perez' direct testimony, Judge Turner asked, "Okay, I just wanted to make sure I wasn't asleep, this witness did not identify my client; is that right?" The Court responded that he did not. (Trial Transcript at pg. 2077 attached as Exhibit 3.)
>
> During the evidentiary hearing, Judge Turner stated that Mr. Perez' identification was not particularly matched to Mr. Hendrix, and that creating reasonable doubt was the aim of the of the defense. He also testified that he did not think Mr. Perez' credibility was very good and that the defense could use this to its favor. No testimony or evidence was offered as to what prejudice the Defendant may have

> incurred because of counsel's failure to object on relevancy grounds.
>
> It is unlikely, that even without a positive identification, an objection on relevancy would have been sustained. Mr. Perez offered a description of a blond male leaving the victims' trailer just after he heard shouting, bangs and screams coming from the trailer. Based on Judge Turner's testimony, allowing the testimony furthered his trial strategy. Finally, the Defendant has failed to show any resulting prejudice that would satisfy the second prong of *Strickland*. For all of these reasons, the issue must be denied.

(R 1651). The trial judge's ruling is correct. Counsel made a strategic choice in how he dealt with a State witness. In any case, this claim was insufficiently pled both at the trial level and on appeal.

(2) Failing to property impeach LaForce.

Hendrix fails to inform this court how counsel was ineffective in impeaching LaForce. He argues merely that the State failed to disclose evidence surrounding LaForce and that LaForce's testimony was important (Initial Brief at 44). This claim is insufficiently pled as an ineffectiveness claim. The trial judge found on this issue:

> As to Mr. LaForce's testimony, even assuming arguendo, counsel was ineffective for failing to discover that Mr. LaForce had been a cooperating defendant, the Defendant has failed to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Specifically, the jury was already aware that Mr. LaForce was in jail with

> Mr. Hendrix, and that he hoped he would get a deal for testifying.

(R 1652). From the Amended Motion to Vacate, it appears Hendrix' complaints focus on counsel failing to object to LaForce's testimony when hearsay evidence was offered (TT[10] 1165-1169, 1175, Motion to Vacate at 36, R 538). The record from the original trial shows that when LaForce testified, defense counsel objected on the basis of hearsay when LaForce was asked about his wife knowing Elmer Scott (TT 1165). After conferring with Appellant, defense counsel requested a limiting instruction (TT 1167). The judge instructed the jury that LaForce would be allowed to testify about things his wife told him, but the jury could not consider the testimony for the proof of the matter asserted (TT 1168). LaForce's testimony was that Elmer Scott kept asking his wife out on a date and she told him to "get lost." (TT 1169). LaForce later was arrested for probation violation from dealing cannabis. He was also charged with escape (TT 1170). When LaForce met appellant in jail, the former had long hair, a mustache and was real rough looking because he had been "on the run a couple months from the law." (TT 1172). Appellant told LaForce he was in jail for two counts of murder and "he made

[10]"R" indicates the record for this appeal. "TT" indicates the trial transcript from the original trial.

sure there was only circumstantial evidence." (TT 1174). LaForce's wife later told him Elmer Scott had been killed (TT 1175). During subsequent conversations between LaForce and Appellant, they discovered they had a mutual friend. They talked about a lot of things (TT 1176). During the discussion of Glenn Hurley as a mutual acquaintance, defense counsel posed two objections as to leading (TT 1177). Appellant told LaForce that Elmer Scott was shot once (nothing was said about being stabbed) and that Scott's wife, who was an informant for the Sherriff's Office, was shot three times and stabbed thirteen times (TT 1178). Apparently, when Appellant hit Scott in the back of the head with the gun, the trigger stuck into the back of the head (TT 1180). Appellant told LaForce that Scott was going to testify against him and he would go to prison. Appellant said he "couldn't let that happen" and "he couldn't go back to prison." (TT 1178). Appellant told LaForce about some of the evidence in the case, such as a bloody palm print and some tennis shoes that were found (TT 1180). Appellant did not tell LaForce what he did with the gun, but he did say he bought it in Apopka for $20.00 (TT 1181).

LaForce contacted the Office of the State Attorney and gave them a taped statement (TT 1182). He asked the State for

a deal, but the prosecutor said "no" (TT 1182). When asked whether he was being paid to testify against Appellant, LaForce replied that he was losing money by being there (TT 1183). LaForce's travel expenses were paid and he was visiting grandparents while he was in Florida at the State's expense (TT 1183-1184). LaForce admitted that as soon as Appellant told him the information, he called the State Attorney (TT 1186). LaForce was facing the possibility of eleven years in jail for his pending charges (TT 1189). He did not want to go back to jail (TT 1189-90). LaForce's wife had read the newspapers about the murders and relayed some details to him (TT 1196, 1197). The prosecutor, Mr. Gross, went over LaForce's transcript with him and clarified whether the female victim was stabbed 13 or 30 times[11] (TT 1216). The State Attorney never charged LaForce with escape (TT 1202). He was ultimately charged with misdemeanor resisting arrest (TT 1203). Laforce also made a deal on his probation violation for 30 days time served (TT 1204). On LaForce's Orange County case, he received a year and a day in prison (TT 1206). He ended up doing a month at reception, a month at Lake Correctional and was presentely on six months controlled

[11]Counsel moved for a mistrial at this point because it was a violation of the rule of sequestration (TT 1217).

release (TT 1216). When asked whether “This wasn’t your first offense, was it?”, the State objected (TT 1206). The parties discussed another case in which LaForce obtained a “withhold”, or withhold of adjudication (TT 1207). Counsel was instructed not to go any further with the questioning regarding the withheld conviction (TT 1208). LaForce would call Mr. Gross, the prosecutor, when he got new information from Appellant (TT 1212). LaForce’s trial testimony differed from that the night before at a deposition (TT 1214, 1215). LaForce had even talked to Noel Griffin about his case (TT 1222).

Whatever Hendrix’ complaint is with defense counsel, it is not sufficiently pled on appeal for this court to review. What was pled in the Motion to Vacate likewise does not require relief, since the record shows defense counsel did object to hearsay. If Hendrix is alleging counsel was deficient for failing to cross-examine about other cases, counsel was clearly precluded from doing so by the court’s ruling on prior offenses. Counsel did elicit testimony that Laforce was trying to get a deal by extracting information from Hendrix. Laforce charges were either reduced or he got time served. The jury was quite aware of Laforce's self-interest.

(3) Failing to show the link between Judge Lockett and a State witness.

This claim re-plows the ground from Point I above, is insufficiently pled to state a claim, and has no merit. There was no "relationship" between Judge Lockett and "a witness", whether Turbyville (which was raised on direct appeal and is procedurally barred) or LaForce, a defendant from whom the judge accepted a plea.

(4) Failing to investigate lay witness testimony for the penalty phase.

Hendrix claims there were lay witnesses available to establish non-statutory mitigting factors such as drug/alcohol abuse, physical and psychological abuse, head trauma and brain damage, non-violence, and "the real man" he was (Initial Brief at 47-48). The State first questions the value of lay witness testimony on brain damage. Next, the State notes that this issue was not presented in this version to the trial court. The issue presented to the trial court was that counsel failed to present evidence of Hendrix's long-standing substance abuse and/or how that abuse affected his actions and mental state, and failed to present expert testimony on how substance abuse established the statutory mitigating circumstances (Motion to Vacate at 45, R 547). The claim on appeal is merged with the

next four sub-claims: (**5) Failing to investigate Appellant's drug use at the time of the murders; (6) Failing to provide experts such as Dr. Lipman and Dr. Crown; (7) Failing to establish statutory mitigating factors;** and **(8) Failing to provide sufficient information to Dr. Krop.**

The collateral trial judge found:

> Claim XII contains numerous sub-parts, a collection of second guesses formulated by post conviction counsel By previous order the Court granted an evidentiary hearing on all paragraphs except 2H, 2J, 2K and 2L. The Court agreed to reserve ruling on these issues until all evidence was presented. After having heard the evidence presented, the Court recognizes that many of allegations of ineffective assistance are simply the result of post conviction counsel, acting as a Monday morning quarterback with the invaluable aid of hindsight, disagreeing with the strategies of trial counsel. As set forth in *Chandler v. State*, 848 so. 2d 1031, 1041 (Fla. 2003):
>
> > Even though collateral counsel disagrees with trial counsel's strategy for dealing with the Williams Rule evidence, this disagreement does not place trial counsel's decision on how to deal with the evidence outside the realm of reasonably effective assistance of counsel. *See Occhicone v. State*, 768 So. 2d 037. 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions."). Furthermore, the fact that trial counsel's tactics did not secure the result defendant wanted does not mean that collateral counsel, who has the benefit of hindsight, can label trial counsel ineffective forfailing to use an alternative tactic. *Strickland, 466* U.S. at

> 689. 104 S.Ct. 2052 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); see also *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight ...."). This Court has repeatedly stated that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone,* 768 So. 2d at 1048: see *Shere v. State* 742 So. 2d 215, 220 (Fla. 1999); *State v. Bolender,* 503 So. 2d 1247, 1250 (Fla. 1987).

. . . .

Not surprisingly, post conviction counsel avers in paragraphs 2(E) and 2(F) allege counsel was ineffective, on the one hand, for not offering mental health testimony, and ineffective, on the other hand, for the mental health testimony he did secure. 2(E) alleges that trial counsel was ineffective for failing to retain the services of a mental health expert for purposes of evaluating Mr. Hendrix as to the applicability of the statutory mental health mitigating circumstances. 2(F) alleges the testimony that offered by Dr. Tell and Dr. Paskewicz at the penalty phase amounted to presenting nonstatutory aggravating circumstances without offering evidence as to any meaningful degree as to the reason or explanation for the personality characteristics the doctors described. Paragraph 2(G) alleges ineffective assistance of counsel for waiving the statutory mitigating circumstance, " 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," without the having a

qualified mental health expert make that determination. Also, paragraph 3, inclusive of subparts, alleges counsel failed to introduce evidence of Mr. Hendrix's long-standing substance abuse and/or how that evidence supports the mental statutory mitigators. The allegations and facts at hand are strikingly similar to those set forth *Banks v. State*, 842 So. 2d 788 (Fla. 2003).

In *Banks*, the defendant alleged that his trial counsel was ineffective for failing to retain a mental-health expert to evaluate possible statutory and nonstatutory mitigating evidence which was available for presentation to the sentencing judge and jury. *Id*. at 790. The defendant argued that counsel failed to seek the assistance of a mental health expert in order to explain the potential mitigating evidence concerning beatings he received from his father, as well as the defendant's abuse of alcohol. *Id*. At the evidentiary hearing the defendant presented the testimony of two experts. Id. Dr. Larson opined the defendant dealt with his past physical abuse by abusing alcohol. *Id*. The doctor did concede that this type of evidence if presented to a jury could backfire leaving a jury With the impression the defendant was a dangerous individual. *Id*. Dr. Partyka testified that he believed. alcohol played a major role in the murders because the consumption of alcohol affected Banks' inhibitions allowing a release of anger concerning how he had been treated as a child. *Id*. at 791. Dr. Partyka admitted that the degree of intoxication was based upon self-reporting and that he was unaware of testimony of witness who said the defendant did not exhibit any signs of intoxication on the night of the murder. *Id.*

In *Banks*, the defendant also claimed that Seliger, his trial counsel, failed to consult mental health experts, though the record clearly refuted this. *Id*. When counsel came on the case, a mental health expert had already been assigned and, after consulting with this expert, counsel decided not to call the expert at trial as he had rendered an unfavorable opinion. *Id*. Counsel also investigated

school records, military records, employment records, and medical records, as well as interviewing Banks' family members. *Id*. Counsel testified that even though he was aware of the child abuse, his experience with Gadsen County juries was that the child abuse strategy would be ineffectual. *Id*.

Banks' trial counsel testified at the evidentiary hearing that he did not remember the defendanthaving a documented history of alcoholism. *Id*. In fact, the testimony offered at trial was that Banks had been drinking near the time of the murders, but that the Banks displayed no visible signs of drunkenness. *Id*. at 792. The Florida Supreme court noted in the opinion on direct appeal that the circumstances of the crimes themselves demonstrated that they were committed in a purposeful manner. *Id*. citing ***Banks v. State***, 700 So. 2d 368. The Court noted that Banks' argument that counsel was ineffective for failing to consult a mental health expert regarding the role alcohol played in the murders was primarily on Dr. Partyka and Dr. Larson's testimonies.. "With regard to expert opinion testimony, this Court has stated: 'Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking." *Id*. at 791-792 citing ***Walls v. State***, 641 So. 2d 381, 390-91 (Fla. 1994). The Court found that Banks had failed to demonstrate that counsel's strategy for the penalty phase was deficient so the defendant was not entitled to relief on the issue.

The instant case is like ***Banks*** in that trial counsel herein also consulted with a mental health expert, Dr. Krop, a forensic psychologist. Dr. Krop interviewed the Defendant after his arrest. According to trial counsel, when he consulted with Dr. Krop, the doctor told him that during his interview with Mr. Hendrix, Mr. Hendrix disclosed, in cold, clear detail, how and why he had murdered the victims. Dr. Krop advised counsel that these were cold, calculated acts that were not the result of any mental defect; that Mr. Hendrix was in clear command of his faculties at the time of the

offenses; and that Mr. Hendrix made a clear, conscious decision to kill because he did not want to go back to prison. Interestingly, the jury reached the same conclusions as Dr. Krop, and these good folks did so without the advantage for going to medical school. Further, Dr. Krop indicated he could offer no professional opinion that would be. helpful. The recitation of the events of the murders as told to Dr. Krop comported with the description and admission the Defendant had made to trial counsel. Like the trial attorney in ***Banks***, Judge Turner wisely made a strategic decision not to call Dr. Krop at trial. The Supreme Court has denied defendants relief where counsel consulted with a mental health expert, but made a strategic decision not to present such evidence. ***Rose v. State***, 617 So. 2d 291, 294 (Fla. 1993)(ineffective assistance of counsel claim denied where a psychologist determined the defendant had an antisocial personality disorder, but not an organic brain disorder, and counsel conduct no further investigation).

Instead of presenting evidence to mitigate the actual commission of the crime, counsel presented the testimony of Dr. Tell and Dr. Paskewicz. Their testimony is the basis of claim 2(F). Dr. Tell had examined Mr. Hendrix some years before the offenses. When Mr. Hendrix sixteen, was referred to Dr. Tell from the Department of Health and Rehabilitative Services. Dr. Tell determined that Mr. Hendrix was of average intelligence and had a "passive-aggressive personality disorder, that means that he has lots of anger and lots of aggression but he doesn't express it real directly, instead very indirectly. He's impulsive based upon those findings. He acts outs. He tries to get people angry. He was fragile emotionally. He has a poor self image and real strong feelings of inferiority." (Trial Transcript pp. 2634-2657at. pg. 2645 attached as Exhibit 5). The doctor considered the death of the Defendant's brother as a contributing factor to this behavior. He also testified that the Defendant was fearful of his father and the father admitted to taking out frustrations against the Defendant inappropriately. This, too, contributed to the

behavior. Dr. Tell stated that he recommended the family become involved in intensive family psycho-therapy, and that he thought it would help as the two therapy sessions he conducted had been productive.

Trial counsel testified at the evidentiary hearing that the thrust of the penalty phase was to show the Defendant had problems and was crying out for help, and help had been recommended for him at the younger age of sixteen by Dr. Tell, but was never provided to him. Judge Turner said he was trying to show that, once guilt had been established, that the Defendant did not deserve to be executed because, had he gotten the help that he was crying out for and was actually recommended, that the crimes probably would not have happened.

In order to bolster Dr. Tell's analysis, Dr. Paskewicz was also called to testify during the Defendant's penalty phase. Defense counsel had this doctor review Dr. Tell's psychological evaluation, the Defendant's school records, and interview the Defendant. Dr. Paskewicz agreed with Dr. Tell's analysis, but placed much more emphasis on the Defendant being beaten or abused by his father than any effect from the brother dying for the explanation of the Defendant's anger. The doctor affirmed Dr. Tell's recommendation that the family seek treatment was appropriate, and confirmed that this had not occurred in the years since Dr. Tell examined the Defendant. (Trial Transcript at 2659-2671 attached as Exhibit 6). The record refutes present counsel's allegations that these two doctors, Dr. Tell and Dr. Paskewicz, failed to offer reasons for the Defendant's passive aggressive personality as shown in Exhibit 5 and 6.

Collateral counsel faults trial counsel for not presenting evidence that Mr. Hendrix was substantially impaired and acting under extreme disturbance as contemplated in Florida Statute §921.141, by showing Mr. Hendrix's has some brain damage and the combined effect of his abuse of alcohol and diazepam with the frontal lobe damage created a condition referred to as Benzodiazepine

rage. To support this theory, Dr.Lipman, a neuropharmacologist, and Dr. Crown, a licensed psychologist, were called at the evidentiary hearing. Dr. Lipman testified that using alcohol and diazepam, or more potently, a combination of the two, can produce disinhibiting effects. A subject, like Mr.Hendrix, who also has frontal lobe damage, (as determined by Dr. Crown) tends to be more impulsive and perservating, and the drugs magnify this effect. Dr. Lipman testified that Mr. Hendrix was one of the anomaly subjects that exhibit a seething rage when taking the diazepam rather than the tranquil, calming effect for which it is therapeutically prescribed. In his expert opinion, Dr. Lipman offered that a Benzodiazepine rage is substantially impairing. However, the doctor further testified that Mr. Hendrix did not admit committing the murders to him, so that he could not make the final link as to the whether or not Mr. Hendrix was substantially impaired such that he did not recognize the criminality of his actions at the time of the offenses. Dr. Lipman also testified that the Benzodiazepine rage would work to create a condition that the Defendant would have been under extreme mental disturbance. On cross examination Dr. Lipman stated that his information as to the Defendant's abuse of Valium was self reported. Much like the doctor in *Banks*, Dr. Lipman was unaware that Denise Turbyville,the Defendant's live-in girlfriend and means of transportation to and from the victims' home on the night of the murder, testified at the evidentiary hearing' she had no knowledge of Mr. Hendrix using Valium during the thirteen months she was with him prior to the murders. She had testified during the trial that she and the Defendant had smoked marijuana earlier on the day of the murders, but that it did not affect her by 11:00 that night. (Trial Transcript at p. 1538 attached as Exhibit 7).

Dr. Crown testified regarding the Defendant's alleged brain damage. Dr. Crown examined the Defendant seven years after the offenses and determined that the Defendant was afflicted with frontal lobe damage. This type of damage, according to Dr. Crown, causes impaired executive functioning. Executive functioning involves reasoning, judgment,

impulsivity and control of impulsivity. It also involves conceptual flexibility or the ability to shift smoothly from one concept to another. It was Dr. Crown's opinion that not only was Mr. Hendrix suffering from frontal lobe damage at the time of the interview, (seven years after the murder) but that nothing indicated newly inflicted trauma, so the Defendant was suffering from the frontal lobe damage at the time of the murders. Dr. Crown opined that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders and that his ability to conform his conduct to the requirements of the law was substantially impaired at the time of the murders. Compare this to the Defendant's cold, detailed description of the planning and execution of these murders he made to Dr. Krop.

There was no indication that Mr. Hendrix's self-reported abuse of diazepam was made known to trial counsel before or during the penalty phase. Further, Mr. Hendrix had been examined by one psychologist several years before the murder, and two more psychologists saw him between the time of the murders and trial. There is no evidence that these evaluations ignored any clear indications of mental health problems or brain damage. "This case is similar to *Jones*, where the defendant had been examined prior to trial by a mental health expert who gave an unfavorable diagnosis. As we concluded in *Jones*, the first evaluation is not rendered less than competent 'simply because appellant has been able to provide testimony to conflict' with the first evaluation."' *Asay v. State*, 769 So. 2d 974, 985-86 (Fla. 2000) quoting *Jones v. State,* 732 So. 2d 313, 320 (Fla. 1999). As quoted in *Banks*, the new opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. Herein, only one doctor has determined Mr. Hendrix suffers from frontal lobe damage, and his examination took place seven years after the murders. The neuropharmacologist based his opinion on the Defendant's self reported drug use. There is

nothing in the record to corroborate the use of diazepam on the night of the murders.

Finally, Judge Turner, while unaware of the Defendant's Valium use, was aware the Defendant had a history of other drug use. When asked if he made a decision about whether to present that evidence to the jury, he stated, "The decision was that Lake County jurors, being very conservative, I did not feel that they would - that to bring up prior drug use would probably alienate them more towards the Defendant, as opposed to make them favorably disposed toward him... In listening to his explanation of what he did and why he did it, it was clear to me that it wasn't caused by the drugs, that his judgment wasn't impaired by drugs. He had poor judgment, obviously, but that it was a very well-thought out, calculated decision and I didn't think that we would get anywhere, that we would lose ground as opposed to gain ground by presenting evidence of drug use and trying to justify that as a basis for the homicide."

Based upon the foregoing, the Court finds counsel was not ineffective for failing to retain the services of a mental health expert to testify to Mr. Hendrix' brain damage and drug and alcohol abuse. Further, counsel was not ineffective for presenting the testimony of Dr. Tell at trial: These were strategic decisions, made upon thorough investigation and within the norm of professional standards. Finally, even if the new opinion evidence had been presented as the Defendant now wishes, the Court does not find that the new testimony would have in anyway changed the result In this case in light of the "[v]ast evidence adduced showing that the murders were executed with heightened planning and premeditation." *Hendrix v. State*, 637 So. 2d 916, 920 (Fla. 1994). Accordingly, both claims XII 2(E) ; XII 2(F); XII 2(G); and XII paragraph 3, are denied.

(R 1652-53, 1654-58)[12] These findings are supported by the record and show that counsel was not ineffective.

(9) Failing to hire an independent medical examiner to challenge the heinous, atrocious aggravator.

Hendrix' last claim of ineffective assistance counsel alleges that Dr. Willey, who testified at the evidentiary hearing,

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[12] The trial judge made further findings on the abuse issue; however, the argument raised below has not been raised on appeal. Those further findings included:

> Paragraph 2(J) generally alleges that counsel was ineffective for not placing any blame upon Mr. Hendrix's parents in light of the evidence of regular physical, emotional and mental abuse endured by Mr. Hendrix during his childhood and adolescent years.
>
> . . . . .
>
> The record reflects that not only did counsel elicit testimony about the alleged abuse suffered by the Defendant through doctors Tell and Paskewicz, as previously cited, but the Defendant's sister, Doris Ann Hendrix, testified about the atmosphere at home, and beatings she recalled Mr. Hendrix receiving at the hands of his father. (Trial Transcript at pp. 2671-2682 attached as Exhibit 9). The Defendant's father was called to testify, but his testimony broke down to tears and a recess was taken. During the recess, counsel spoke with his client, and upon return to the courtroom, their decision was to limit the remainder of the family testimony. (Trial Transcript pp. 2684-2686 attached as Exhibit 10). Notably, the Defendant's mother did not testify. During the evidentiary hearing Judge Turner testified that the Defendant was adamant about not subjecting his mother to testify. The record reflects that the jury was well aware of the conditions in the Hendrix' home, and the testimony presented by the defense at the evidentiary hearing was merely cumulative on this point and could not have possibly changed the balance of aggravating and mitigating circumstances. Additionally, it was the Defendant's decision not to develop this testimony further at the penalty phase. Accordingly, Paragraphs XII 2(J) and XII 3 are denied. (R 1659-60).

"could have challenged the opinion that death or unconsciousness was not instantaneous for both victims." (Initial Brief at 50). The collateral trial judge found:

> The next issue, set forth in paragraph 2(B), alleges that counsel was ineffective for not retaining the services of a forensic expert to challenge the associate medical examiner's testimony as to how the murders occurred. The Defendant called Dr. Edward Willey, a forensic pathologist and past medical examiner, to testify at the evidentiary hearing. According to the Defendant's expert regarding the medical examiner's trial testimony as to whether or not Mr. Scott remained conscious for any length of time, "I don't know what his [the assistant medical examiner's] thoughts to the matter were, I simply, from the information that he recorded, can't arrive at the same conclusion. He may well be right, I just don't know that." As to the wounds on victim Michelle Scott's hands, the medical examiner classified them as defensive wounds. Dr. Willey stated that would implies how the wounds were inflicted and would be speculation, albeit reasonable speculation. As to the actual mechanism of Elmer Scott's death, Dr. Willey disagreed with the medical examiner's conclusions: However, in his own words, Dr. Willey stated that any errors in the medical examiner's conclusions would be viewed by him as harmless errors, errors that do not make much difference. Based upon the evidence presented, the Court concludes the Defendant has neither demonstrated that counsel was ineffective, nor that he was prejudiced by the alleged omission. This issue, too, is denied.

(R 1653).

The original sentencing order of the trial judge in finding the aggravating circumstance of heinous, atrocious and cruel outlined the facts of the murders as follows:

> d. While in the home, the defendant fired his pistol six times, emptying the cylinder. One (1) shot struck Mr. Scott in the head and traveled into his mouth, but did not render him unconscious. Three shots struck Mrs. Scott, two (20 in the head, and one(1) in the leg. None of these shots rendered Mrs. Scott unconscious.
>
> e. Being unsuccessful in his shooting attempts, the defendant struck Mr. Scott repeatedly in the head with the empty pistol with such force that the pistol broke. The defendant also cut Mr. Scott's throat. Further, the defendant, having also not killed Mrs. Scott with his gunshots, stabbed her some thirty-one (31) times while she attempted to ward off his fatal thrusts.
>
> f. During the shooting of the victims each was aware of the shooting and impending death of the other. Likewise, Mrs. Scott was aware of the bludgeoning of her husband, and her own impending death.

(TT 3852-53). Each of these fact findings is supported by the record on direct appeal. The testimony of Dr. Willey at the evidentiary hearing was inconclusive at best. Not only was counsel not deficient for failing to challenge Dr. Leal's testimony at trial, but there is no probability that Dr. Willey's testimony would have changed the outcome in this case.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE *BRADY* CLAIM

In this issue, Hendrix argues that the fact LaForce had served as a confidential informant for the State from 1986 - 1989 was valuable impeachment evidence that should have been disclosed. The collateral trial judge found:

> During the guilt phase of the Defendant's trial, the State presented the testimony of a jailhouse snitch. This witness, Roger LaForce, was privy to certain statements about the murders, made by the Defendant, including an admission that the Defendant had made sure the police would only have a circumstantial case, and that he had tried to make the murders look like a revenge killing because the wife was an informant for the Sheriffs office.
>
> The Defendant's post conviction claim is that the State failed to provide him with exculpatory or impeachment evidence when it failed to disclose that Roger LaForce had a history as a confidential informant and was given favorable treatment in exchange for his testimony. To the extent the claim alleges that Mr. LaForce was treated favorably or given anything in exchange for his testimony at the Defendant's trial, this is refuted by the record. The transcript reflects Mr. LaForce did not receive anything in exchange for testifying. (See, trial transcript at pp. 1164 and 1182 attached hereto as Exhibit 1). No evidence was presented at the evidentiary hearing to contradict this. However, it does appear that Mr. LaForce had previously been involved with the State attorney's office as a cooperating defendant.
>
> Noel Griffin, a special agent with the Florida Department of Law Enforcement, testified that from 1986 until 1989 he headed a narcotics task force in Lake and Sumter Counties. Sometime during that period, the task force had made a case against Roger

LaForce, and in the hope of substantial assistance with his own case, Mr. LaForce agreed to assist the task force with additional investigations. Mr. Griffin did not know to what extent, if any, the Mr. LaForce actually received assistance with his case. He could not recall on how many cases Mr. LaForce cooperated, and had no recollection of telling the prosecutors in the Defendant's case that Mr. LaForce was a cooperating defendant. Mr. Griffin further testified that once Mr. LaForce had been sentenced, his relationship with law enforcement would have ended. The records show that Mr. LaForce was arrested in 1987 and sentenced in February of 1988. The Defendant was arrested in August of 1990, and his trial commenced in September of 1991.

The prosecutor, Bill Gross, was also called to testify during the evidentiary hearing. It was the prosecutor's testimony that he did not know that Mr. LaForce had ever been an informant, or cooperating defendant, when Mr. LaForce testified at the Defendant's trial. The prosecutor only became aware of the fact during the post conviction proceedings when Mr. Hendrix's counsel made the allegations.

> The Florida Supreme Court recently held:
>
> > The United States Supreme Court has recently provided the following three prong analysis for determining the merits of a *Brady* violation claim:
> >
> > > [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.
> >
> > *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). With regard to the third prong, the Court emphasized that prejudice is measured by

> determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. At 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley* , 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See*. *State v. Riechmann*, 777 So. 2d 342, 362 (Fla. 2000); *Sireci v. State*, 773 So. 2d 34 (Fla. 2000); *Haliburton v. State*, 691 So. 2d 466, 470 (Fla. 1997). *Carroll v. State*, 815 So. 2d 601 619 (Fla. 2002).
>
> Herein, information regarding Roger LaForce's prior cooperation with the Lake County drug task force should have been disclosed as impeachment evidence favorable to the Defendant. However, in the context of the entire record, this information would not likely have put the case "in such a different light as to undermine confidence in the verdict." Mr. LaForce testified that he was receiving nothing and gained nothing from testifying in the Defendant's trial. That he had previously received some benefit for cooperating with law enforcement may have been used to impeach Mr. LaForce's testimony, but even without the defense being aware of this information, Mr. LaForce admitted he hoped the State attorney's office would cut him a deal for coming forward with the information. (See, Exhibit 1.)
>
> The Defendant has not demonstrated that he is entitled to any relief on this claim.

(R 1646-47).

Trial counsel did impeach Laforce with the fact he was trying to make a deal with the state by providing information from Hendrix. Several objections were overruled, and counsel was precluded from exploring certain areas.

There was no prejudice from the additional impeachment evidence. This case involved a double homicide which Hendrix carefully planned to eliminate a witness. He purchased items to conceal his identity and disposed of evidence. Both murders were committed in a heinous and cruel manner.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State respectfully requests this Honorable Court affirm the trial court order and deny postconviction relief.

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: Harry P. Brody, Brody and Hazen, P. A., P. O. 16515, Tallahassee, Florida 32317 on this _____ day of September, 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.

Attorney for Appellee