IN THE SUPREME COURT OF FLORIDA

Case No. SC04-54

ROBERT EUGENE HENDRIX,

APPELLANT,

V.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

Harry Brody
Fl. Bar No. 0977860

BRODY & HAZEN, PA
1804 Miccosukkee Commons Dr.
Suite 200
P.O. Box 16515
Tallahassee, Florida 32317

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Appellant appeals the circuit court's denial of his post-conviction motion to vacate his convictions and sentences and for a new trial prosecuted pursuant to Rule 3.850, Fl. R. Crim. P.

The prior proceedings in this case which are referred to herein will be identified by the following citations:

R. Record on Direct Appeal;

PCR. Post-Conviction Record;

T. Transcript of Evidentiary Hearing;

O. Hearing Court's Order Denying Relief; and

TT. Trial Transcript.

REQUEST FOR ORAL ARGUMENT

Because of the gravity of the Constitutional claims asserted herein and because this a case in which the sanction of death has been imposed, Appellant respectfully requests that oral argument be held by counsel for the parties before this Court.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

1. PROCEDURAL HISTORY

On September 19, 1990, the grand jury in Lake County, Florida indicted Mr. Hendrix for two counts of first-degree, premeditated murder, for two counts of conspiracy to commit first-degree murder, and for armed burglary. (R. 3249-3250) Mr. Hendrix was, after a trial by jury, convicted as charged. (R. 3835-3849)

The jury, in the penalty-phase of the trial, recommended the sanction of death on both murder convictions. (R. 3737-3738)

On November 4, 1991, the court sentenced Mr. Hendrix to death on both murder convictions. (R. 3851-3858)

In support of its death sentence for the death of Elmer Scott, the court found five aggravating factors: that the murder was cold, calculated, and premeditated, that the murder was committed to disrupt or hinder the lawful exercise of a governmental function or enforcement of laws; that the murder was committed in the commission of a burglary; that the murder was especially heinous, atrocious, or cruel; and that Mr. Hendrix was convicted of a contemporaneous murder.

Similarly, in support of the death sentence for the murder of Mrs. Scott, the court found the same five aggravating factors. Further, although finding no statutory mitigating factors, the court found some non-statutory mitigating circumstances, including problems in his family

history and in his juvenile history, a close relationship with his mother and sisters, and the life sentence given co-defendant and witness, Denise Turbyville. (R. 3851-58)

On direct appeal, the Florida Supreme Court upheld the convictions and sentences. Hendrix v. State, 637 So. 2d 916 (Fla. 1994) Subsequently, the United States Supreme Court denied a timely filed Petition for Writ of Certiorari. Hendrix v. Florida, 115 S. Ct. 520 (1994).

Mr. Hendrix timely filed his Motion For Post-Conviction Relief, and amendments thereto, pursuant to Florida Rule of Criminal Procedure 3850. Judge Lockett, who had been the trial judge, denied some issues without a hearing and granted an evidentiary on other issues, and, because Judge Lockett left the bench prior to the evidentiary hearing, Judge Hill presided over the evidentiary hearing and, by Order dated December 11, 2003, denied relief on the claims of the motion.

Mr. Hendrix now appeals the lower court's Order denying his motion for post-conviction relief and an Order denying his request to take depositions.

2. THE LOWER COURT'S ORDERS

Mr. Hendrix appeals these orders of the lower court:

A. *Order Denying Discovery*

The lower court erred in refusing to allow Mr. Hendrix to take the deposition of Judge Lockett and others regarding Judge Lockett's neutrality and knowledge of facts outside the

record.

B. The Final Order

Judge Lockett orally granted Mr. Hendrix was granted an evidentiary hearing on the following claims, and, subsequently, Judge Hill, after Judge Lockett left the bench suddenly a few days before a hearing was set to be held, continued the hearing and issued a written order memorializing the previous pronouncement :

- ineffective assistance of counsel in the penalty phase for failing to present evidence of defendant's history of drug and alcohol use and his drug and alcohol use at the time of the crime;

-ineffective assistance of counsel in the guilt and penalty phases for counsel's failure to cross-examine witness and to present expert witnesses regarding mental-health mitigators and presented other lay and expert testimony, including a pathologist, that would have mitigated against both premeditation or heightened premeditation and the existence of the HAC aggravators;

-a Brady violation by the state for failing to disclose that an important witness had, in fact, been a confidential agent of the Fifth Circuit's drug task force;

-the fact that the defendant had been shackled such that the jury was aware of or could have been aware of the fact he was shackled and thus been improperly influenced by the message which such shackling sends to the jury that the State considers him a dangerous man who needs to be

chained even before any evidence is presented, and the subliminal message of his jiggling chains was sent to the jury for the duration the trial, improperly causing them to consider evidence outside the record and to improperly influenced by the message that only chains can keep the defendant from reaching even them and without such restraints the defendant would be prone to go on a rampage; and

-the trial attorneys failed to properly impeach the medical examiner's testimony as that testimony supported finding the statutory HAC aggravator in both killings.

The lower court denied Appellant relief on these claims. Further, the Order does not address the contention, argued in the written closing but not plead in the 3.850 motion, that the trial judge was not neutral and detached, as due process requires, but, as well as having previously counseled the co-defendant, also had knowledge outside the record regarding the witness who is the subject of the Brady violation.

3. SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

The following testimony was elicited at the evidentiary hearing:

A. Ellen Barfield

At the hearing, the defendant called Ellen Barfield to testify. (T. 6) Ms. Barfield testified that she Robert Hendrix as far back as 1985 when he was 16 and she was 25. (T. 7)

She and Mr. Hendrix were friend who did cocaine and smoke

marijuana with him at least every other day, and she saw him use drugs and did drugs with him from the time he was sixteen until he was twenty-three. (T. 8)

Almost every time she saw him he was drinking and using drugs (T.9) She also saw Robert use acid, and recalls an incident in a bar later during which he had a flashback from the use of acid. (T. 9-10)

When Robert returned from prison in Lancaster, Robert had lost some of his happiness and friendliness, according to Barfield's observations. (T. 10) He didn't like talking about his introduction into prison. (T. 10-11)

After Robert's return from prison, she continued to use drugs with him, and, in fact, on the weekend prior to this crime, on a Monday, Barfield was with Robert at a bar, drinking to intoxication. (T. 11) In keeping with their usual practices, they would have also smoke marijuana. (T. 11)

In conclusion, Ms. Barfield noted that Mr. Hendrix had always been good to her and that she couldn't picture him any other way. (T. 12) She also recalled that Mr. Hendrix had used Methamphetimines and Ecstasy, and basically did the whole gamut of drugs that were available to him. (T. 13) At times, she used drugs with him. (T. 13)

Ellen Barfield confirmed that she would have testified for the defense at trial but that she was never spoken to by Mr. Hendrix's attorneys. (T.18)

B. Doris Hendrix

Doris Hendrix, Robert Hendrix's mother, testified that Robert's father was over-bearing and violent when Robert was a teen. (T. 20)

She also testified to the devastating loss Robert suffered when his older brother died in a car wreck at the age of sixteen, and how Robert felt that he too would die young. (T.21)

Robert began to stay out with friends all night, using drugs beginning in his early teens. (T.22) Robert became glassy-eyed and his emotions slowed down, as though everything was smooth and things didn't bother him. (T. 22)

He started getting in trouble and was put in a STOP Camp and then in Lancaster Prison, where he very young, maybe fifteen, and afraid. (T. 22-23)

Mrs. Hendrix further testified that Bobby was diagnosed with a learning disability in the last year of elementary school, but in Junior High he felt out of place getting help and started skipping school. (T.23) He never did receive treatment for his disability. (T. 24)

Mrs. Hendrix recalled a head injury Robert suffered during a bike accident and the time he was hit in the head with a board or something when he was staying with his sister Linda in Houston. (T. 24)

Robert told Mrs. Hendrix that he was using marijuana at an early age. (T. 31) She noticed the increase in drug use

as he got older, and, in fact, he had lived at home and she had seen his condition up to two weeks before the crime. (T.32) She testified that, “He was on something, I’m not sure what it was.” (T. 31)

Finally, Mrs. Hendrix testified that on the weekend before the crime she saw Mr. Hendrix at the house a couple times and that he was “high.” (T3. 5) She could tell by his eyes and his actions-- “he just acted like he was kind of in a hurry and relaxed, too, in different ways.” (T3. 5)

C. Doris Ann Hendrix

Doris Ann Hendrix, Robert’s older sister, recalled when Robert began using drugs in his teens (T. 34) They talked about drugs, but the thing that bothered Robert the most was the volatile, abusive relationship with Robert’s father. (T. 35)

Doris Ann characterized the father as a “rageaholic...” (T. 35) Anything could set him off and the children had to walk on eggshells. (T.35) Robert’s father frequently berated him in public, there was constant verbal abuse which could still, when he was seventeen, reduce Robert to tears. (T. 36)

And there was extremely violent physical abuse beginning when the boys were young, with belts, and proceeding to the use of fists in what Doris Ann could only compare to a bar brawl. (T. 37) Doris Ann witnesses these many, many beating,

which were common. (T. 37)

Robert could not understand what set his father off, or why some small thing would set him off, and fear permeated the household. (T.37-38)

Doris Ann also witnessed Robert's drug use, and she noticed that the stint at Lancaster Prison bothered him. (T.38)

She witnessed the beating Robert took when a Texas neighbor beat him in the head with a golf club, leaving a big knot on Robert's head. (T. 39) Similarly, she was able to describe the welts and bruises his father's beatings left on Robert. (T. 40)

Had she been contacted or asked at the time of trial, she would have testified at trial as she testified at the hearing. (T. 40)

On cross-examination, Doris Ann confirmed that she had suffered emotional problems and damage and pain from the brutality of her father. (T. 48) She described hearing the sound of yelling and of hitting and Bobby begging the father to stop. (T. 49)

On re-direct, she clarified that it was the father's mood, not something the children did, that caused the father to go off on them. (T.51)

D. Chris Vincent

Chris Vincent testified at the evidentiary hearing that he grew up with Robert as kids who lived close-by. (T. 54)

Around age fourteen, they began to drink together and doing drugs like mushrooms and marijuana. (T. 55)

Had he been contacted, Mr. Vincent would have testified at Bobbie's trial, and Vincent would have been able to provide testimony of Bobby's daily and long-standing and progressive drug us from the early teens until the time of the crime. (T. 56)

They did "lots of stuff... all kinds of things together." (T. 56) At such times, Bobby would be off his chain, or crazy. (T.56)

E. Kenneth Scott Adair

Kenneth Scott Adair testified at the evidentiary hearing that he met bobby when they were about 13 and that he heard Bobby complain of his father's whippings and beatings. (T. 63-64)

Adair was also with Bobby when they crashed a car into a tree. (T. 64)

They smoked a lot of marijuana in junior high and had a few beers later on. (T. 65)

He also knew Denise Turbyville to use pretty much any drugs that she could get her hands on. (T. 65-66) Denise told him about Robert's use of acid, and told him that she and Bobby were using drugs together up until the time of the crime. (T. 66)

Scott Adair would have testified at Mr. Hendrix's trial as he did at the evidentiary hearing had he been asked. (T.

67)

F. ***Scott Richardson***

Scott Richardson testified at the evidentiary hearing that he grew up near Robert Hendrix and knew him his whole life. (T. 72) They started experimenting with drugs together as young boys on bikes. (T. 73) They used hash, marijuana, and cocaine. (T. 74) Sometimes they'd drink. (T. 74)

Later, after they'd drifted apart a bit, Richardson bumped into Hendrix, who told him that he that he'd tried smoking coke and shooting it. (T. 75)

Richardson was not contacted by Hendrix's counsel but would have testified at the trial had he been asked to.

G. Michael Craft

Michael Craft met Robert Hendrix when they were ten, eleven, or twelve. (T. 80) They drank hard liquor when they were thirteen or fourteen. (T. 81)

He heard Bobby had graduated to cocaine use by 1988 or 1989. (T. 82)

Craft was never contacted by Hendrix's defense team at trial but would have testified had he been asked. (T. 82)

H. Matthew Smith

Matthew Smith testified at the evidentiary hearing that Robert Maples introduced him to Robert Hendrix around 1989 or 1990 and that they had a drug use and sales relationship. (T. 84-85)

At that time, Mr. Hendrix had a serious coke habit, probably costing him five hundred dollars a day. (T. 85)

Hendrix and Maples would obtain marijuana from Smith and trade it for coke. (T. 85) This went for three months (T. 85), and Hendrix was injecting the cocaine at this time. (T. 86)

Matthew Smith would have testified at Hendrix's trial had he been contacted. (T. 86-87)

Smith also added that Mr. Hendrix was part of the generation in Apopka that got hit by explosion of crack and cocaine availability in the eighties. (T. 87) He described Mr. Hendrix as "wired for sound" and "a very serious drug abuser" who "shot the cocaine." (T. 94) Smith added, convincingly, "I mean, I've seen it, I know what it is, I know what it does, I know what the characteristics are." (T. 94)

I. Randle Davis

Randle Davis testified at the evidentiary hearing that he knew Hendrix when they were growing up. (T. 96-97)

At the age of fifteen or sixteen, they began using and selling drugs in the same crowd, and they did "pretty much everything," alcohol, marijuana, acid, cocaine, and "stuff like that." (T. 97) They did whatever was available. (T. 97)

Davis didn't recall being contacted about testifying at Robert's trial but would have if he'd been asked. (T. 98) Davis added that Bobby was "closed to himself" and kept a lot to himself. (T. 99)

He recalled seeing Robert crying about his family circumstance at home and that he never cared to go home at all to the point of sleeping in his car. (T. 99)

Bobby didn't appear to be violent around him. (T. 101)

J. Noel Griffin

Noel Griffin testified that he is an FDLE special agent and that in 1985 he was employed as an investigator with the Fifth

Circuit Office of State Attorney's Narcotics task Force as a commander. (T. 103) Bill Gross and Rick Ridgeway were prosecutors in the state attorney's office at that time. (T. 104)

As a commander on the task force from roughly 1986 through 1989, the task force employed Roger LaForce as a confidential informant or cooperating witness. (T.104-105) LaForce received substantial assistance from the state because of his work. (T. 106)

The Fifth Circuit Task Force was disbanded in 1989, but Griffin continued to work with Mr. Gross's office making cases in Sumter County.

Further, La Force might have called Griffin from jail during the time La Force was acting as a snitch in Hendrix's case. (T. 112) La Force couldn't recall. (T.112)

LaForce did identify that Judge Lockett was the judge on La Force's case when he entered his plea agreement after receiving "substantial assistance" because of his informant activities for the task force. (T. 113)

In another plea agreement, also in Lake County, La Force identifies the language on the agreement "T-A-S-K, drug and residential program as part of sentence" which the state attorney's office had included on the plea agreement. (T.114)

LaForce testified that he would communicate with the State Attorney and defense counsel to determine whether to

testify at the plea hearings. (T.115)

A representative of the State Attorney's Office sat on the Task Force Board of Directors and served as the chief investigator. (T. 115)

K. Bill Gross

Prosecutor Bill Gross testified at the evidentiary hearing that he could not recall if he reviewed La Force's legal records before he testified at the trial. (T. 121)

Gross indicated that conceivably Griffin could have gotten in touch with one of the detectives who would have contacted Gross and that, one way or another, Gross learned that La Force had information he obtained while in jail with Hendrix. (T. 122)

Gross testified that to the best of his recollection he had no knowledge that La Force had been a confidential informant. (T. 123) Gross did state he would have run the criminal history, though. (T. 122) Gross added that he thinks he would have disclosed this information but equivocated because he didn't know the law as well at the time of trial. (T.124) Today, he understands that the information about La Force that was not disclosed would be relevant impeachment evidence. (T. 124)

L. Joanne Zeller

Joanne Zeller, a State's witness, conceded that her daughter, Denise Turbeyville, used drugs as a teenager and dropped out of school when she was fifteen. (T. 131)

She was also aware that both Robert Hendrix and Denise

smoked marijuana. (T. 132)

M. *Dr. Lipman*

Dr. Jonathan Lipman testified that he a neuropharmacologist (T. 5) and was admitted by the Court to testify as an expert witness in the field of neuro-pharmacology. (T2. 25)

Dr. Lipman interviewed Robert Hendrix, and reviewed voluminous records, including the drug-use testimony of the witnesses who had testified thus far in the hearing. (T2. 25) Dr. Lipman reviewed the history of Mr. Hendrix drug use. (T2. 27)

Mr. Hendrix used alcohol for the first time at the age of nine or ten and had begun to smoke marijuana regularly by the age of twelve. (T2. 27) At that age, he also began using pharmaceutical drugs, particularly Percodan, Oxicodone, Valium, Quaaludes, and a variety of opiates. (T2. 27)

Hendrix used angel dust, or PCP, phencyclidine, a dissociative anesthetic, with street names of “peace” and “space,” and used as a veterinary anesthetic. (T2. 27)

Thus, by age thirteen, Mr. Hendrix was using and abusing a wide range of drugs and alcohol, primarily depressants and opiates. T2. 28) By age sixteen, he graduated to cocaine and, over the next two years, he went through the typical escalation pattern, from snorting, to smoking, to injecting cocaine. (T2. 28)

Importantly, Mr. Hendrix would use the drug Valium to

mitigate the adverse effects of cocaine, which include complete paranoia, anxiousness, panic, and fear. (T2. 29) These effects are delusions and paranoid projections. Mr. Hendrix manifested these delusions. (T2. 31)

Mr. Hendrix went on cocaine “runs” during which he went without food and sleep for days and weeks, so he took Valium to avoid some of the psychological consequences of withdrawal. (T2. 32)

Mr. Hendrix also used the drugs at the same time injecting both cocaine and Valum, or “speed-balling,” which more dangerous than using cocaine alone. (T2. 32) So Mr. Hendrix’s Valium use began when he was 13 and continued until his arrest on the charges in this case.

When he doing cocaine from sixteen to eighteen he would take the Valium to come down off the coke, then in subsequent years he took the Valium with alcohol, a mixture which has a profound reaction. (T2. 32-33) Taken together, alcohol and valium are profoundly more intoxicating than either of them alone. (T2. 33) In fact, prior to the murders, Mr. Hendrix reported symptoms consistent with the abuse of both of these drugs. (T2. 33)

Up to the time of the crimes Mr. Hendrix was a serious alcohol abuser and abused in this way the biochemically damaging effect actually outlasts the presence of the drug, and further, the damage thus sustained is cumulative. (T2. 35)

Valium, particularly when used with alcohol, is different in that it has a very long half-life which is even further lengthened when used in conjunction with alcohol, and the half-life of valium can last for twenty-four to thirty-six hours, then the quarter-life lasts an additional twenty-four to thirty-six hours, and this cyclical diminishment continues by halves for a very long time. (T2. 36-37)

Dr. Lipton explicates benzodiazepine rage (Valium is a benzodiazepine). (T2. 38) In Dr. Lipman's expert opinion, Mr. Hendrix's cognitive approach to people that he felt were hurting him was that he would hurt them first before they had a chance to hurt him. (T2. 39)

The effect of the Valium was to unleash and disinhibit the behavior that was responsive to such paranoid projections. (T2. 39) This would explain the seething rage Mr. Hendrix reported at the time of the crimes, a really obsessive and furious, growing overwhelming anger. (T2. 39)

Dr. Lipman described the brain and developmental damage done by the use of drugs at an age as young as Mr. Hendrix's when he began drinking and substance abuse. (T2. 41) Further, the years of cocaine abuse causes persistent changes in brain function, particularly to the temporal and the frontal lobes of the brain. (T2. 41) Alcohol also causes brain damage. (T2. 42) Dr. Lipman testified that the combination of drugs Mr. Hendrix reported he had taken in the days preceding the crime would have been "substantially

impairing" and that Mr. Hendrix was acting under the duress of an "extreme disturbance", as those terms are used in the statute governing mental-health mitigation, at the time the crime was committed. (T2. 51, 88-90)

Finally, Dr. Lipman testified that "goal-oriented behavior" can be explained by preservation and dishinibition, particularly where frontal lobe brain damage is present. (T2. 89) Dr. Lipman affirmed that he could have testified similarly at trial as did at the evidentiary hearing. (T2. 72)

N. Dr. Crown

Dr. Barry Crown testified as an expert neuropsychologist. (T2. 100). He described the extensive battery of tests that he conducted on Mr. Hendrix to support his conclusion that Mr. Hendrix suffers from brain damage to the frontal areas of the brain. (T2. 101-102)

He testified unequivocally that in his opinion Mr. Hendrix suffered from substantial impairment and extreme disturbance, as those terms are used in the Florida statutes' mental-health mitigation provisions. (T2. 111)

He also discounted the effect of so-called "goal-oriented behavior" on his opinion. (T2. 120)

Dr. Crown could and would have testified at trial, had he been consulted, that both statutory mental-health mitigators applied. (T2. 125)

He further opined that Mr. Hendrix early drug and alcohol

abuse could have caused the brain damage he described, either as an element of the causation or the actual causation. (T2. 125)

Mr. Hendrix drug and alcohol abuse “very likely” caused the brain damage. (T2. 126)

O. Dr. Willey

Dr. Edward Willey testified as an expert forensic pathologist. (T2. 136)

In his opinion, Mr. Scott could have been rendered unconscious immediately, or almost immediately and that he probably became unconscious fairly rapidly. (T2. 137-138)

He also disagreed with the trial testimony of Dr. Leal that blows to the back of Mr. Scott’s head would not have caused him to lose consciousness immediately. (T2. 138) In his opinion, it is certainly possible that Mr. Scott was rendered immediately unconscious. (T2. 139) Dr. Willey further could have contested Dr. Leal’s testimony that Mrs. Scott’s wounds were defensive and that an opinion that the wounds were defensive would be speculation. (T2. 140)

Dr. Willey also testified that Mrs. Scott could have been rendered immediately unconscious. (T2. 140)

Further, Dr. Willey disputed Dr. Leal’s testimony that Mrs. Scott bled to death, and instead indicated that he thought the transected airpipe was the cause of death. (T2. 142)

Regarding Mr. Scott’s cause of death, Dr. Willey

repudiates Dr. Leal’s trial testimony that Mr. Scott died from a scalp laceration. (T2. 142) While Dr. Leal’s opinion was that Mr. Scott was incapacitated first, Dr. Willey indicated that there is really no way to definitively tell. (T2. 143)

Finally, he explained why photographs are not dispositive evidence of blood loss and that the amount of blood loss is commonly overestimated. (T2. 144)

P. *Jerry Lockett*

Judge Lockett testified that Mr. Hendrix was shackled during his trial pursuant to the same procedure used then in every trial. (T3. 7)

There were shackles placed on both sides of the defendant's table. (T3. 7) Every time the defendant was brought into the courtroom, the courtroom was cleared except for court personnel and defendant would be brought in in leg irons and handcuffs.(T3. 8) The handcuffs would be removed after the leg irons were attached to the shackle-holders under the table. (T3. 8)

Every felony defendant in custody was treated exactly the same. (T3. 8) Every defendant in Judge Lockett's court who came for a jury trial would be shackled to the table. (T3. 9)

Q. *Arthur Newcombe*

Mr. Newcombe was one of the bailiff's in charge of Mr. Hendrix's trial. (T3. 17)

On cross-examination, he admitted that he did not know what the jurors saw or didn't see regarding shackles. (T3. 24) Also, he conceded that he did not know what the jurors heard regarding the movement of the chains. (T3. 24) However, he testified that the shackles make noise which could be heard in the courtroom. (T3. 24)

He confirmed that the defendant was shackled as a matter of procedure and not because of any escape or jail allegations

specific to him. (T3. 25) He added that snitch information from one inmate regarding another is pretty common. (T3. 26)

Finally, Mr. Newcombe agreed that it is possible that the jurors in the jury box might be able to hear the shackles. (T3. 31)

R. Michael Graves

Mr. Graves represented Denise Turbyville. (T3. 33) He testified that the shackles on defendants could be heard in the courtroom if the defendant made an abrupt movement. (T3. 34)

S. Denise Turbyville

Mr. Hendrix girlfriend at the time of the crimes, Ms. Turbyville confirmed that Mr. Hendrix drank and did drugs during their relationship, which lasted for a year preceding the crimes. (T3. 44-45)

She said he smoked marijuana constantly and drank deeply when they went out. (T3. 45) She also recalled them doing acid. (T3. 46) She could not remember if she and Robert went to a bar on the Saturday night before the crimes because it happened some time ago, but she didn't doubt it. (T3. 46) Ms. Turbyville also confirmed that Ellen Barfield knew Robert well. (T3. 47)

Ms. Turbyville knew Robert had used cocaine but didn't really ask about the details. (T3. 47)

Ms. Turbyville confirmed that her drug use became a problem for her at the time and agreed that Robert's was a problem for him as he got high from the time he got up until the time he went to bed. (T3. 49) She also conceded that Robert could have doing prescription drugs or other drugs that she was not aware of during their time together and that she wasn't interested in doing any drugs except marijuana. (T3. 50)

T. Dr. McLaren

Dr. McLaren was hired by the state as an expert witness in forensic psychology. (T3. 68-69) He testified that in his opinion the statutory mental-health mitigators would not have applied. (T3. 99-102)

Dr. McLaren conceded, however, that Mr. Hendrix statements regarding his use of Valium could be true. (T3. 104) He also recognized that Ms. Turbeyville might want to help the prosecution in the hopes of getting better treatment in custody. (T3. 105) In his experience, Dr. Mclaren stated that it would not be unusual for her to want to help the prosecution. (T3. 106)

Dr. McLaren did find Mr. Hendrix credible and believable during his interviews. (T3. 109) Dr. McLaren also acknowledged that he had not read the testimony of Dr. Lipman or Dr. Crown. (T3. 112)

Dr. McLaren certainly did not think that there was much

chance that Mr. Hendrix would have said that he was taking Valium because Hendrix anticipated asserting Benzodiazepam Rage in mitigation. (T3. 113)

Finally, McLaren wouldn't quarrel with Dr. Crown's findings regarding brain dysfunction, learning disabilities, head injuries and significant substance abuse. (T3. 120)

Dr. McLaren concluded by opining that he felt that in death cases in Florida that the judge is the ultimate person who decides whether statutory mental-health mitigators apply. (T3. 123)

McLaren doubted that Hendrix had made up his statements to doctors regarding his use of Valium. (T3. 126-127)

U. Michelle Morley

Ms. Morley was Denise Turbeyville's first lawyer.

She testified that in the courtroom she could hear the clanging of the chains as a defendant walked to the defense table. (T3. 134)

During testimony she hadn't noticed clanging as she would have been focused on the witness. (T3. 134)

V. Donald S. Eisenberg

Mr. Eisenberg was hired by Tom Turner as an investigator. (T4. 20) This case was the first death case in Florida that he had investigated and he had not done any.28 penalty phase work in any state previously. (T4. 21)

Mr. Eisenberg's bill reflected the investigation that

he performed. (T4. 23) Thus, his investigation of guilt and penalty issues consisted of a one-hour conference with Turner on June 14, 1991 a half an hour telephone conference with Mrs. Hendrix on June 20, 1991, a twelve minute follow-up telephone conference with Mr. Hendrix on June 25, 1991, one-hour and thirty six minutes reviewing Turner's files on June 27, 1991, a twelve-minute call with Mr. Hendrix on July 2, 1991, a two and a half hour trip to Lake County for an initial client conference on July 3, 1991, an 18 minute phone call with Mrs. Hendrix on July 8, 1991, a telephone conference at Chris Wood's home, a telephone conference at Lisa Allen's home, "Tony Drennan work," a fifty-six minute interview with Lisa Allen, a call with Linda Hendrix a call to the Stop Camp and Lancaster Prison, three calls to HRS Apopka, a telephone conference "Dozier", a telephone conference with Turner, and a 2.9 hour conference with Linda on August 30, 1991. (T4. 23-44).

There is an entry for two hours and six minutes on September 5, 1991 for calls with Drennan, Doris, and Linda, and on September 6, 1991, an hour and 15 minutes is billed for the transcription. (T4. 36-39)

There is billing for trial assistance from September 9 through September 11 for 36 hours for sitting in court through the guilt phase. (T4. 37) On September twelfth, there is another billing for trial assistance and one for trial assistance on September sixteen. (T4. 39)

Thus, the billing statement and the transcriptions reflect all the work done in investigation of the case and are in evidence as State's Composite Exhibit 1. (T4. 57)

There was no investigation into physical or emotional abuse by the father, little or no exploration of the depth of the drug use and alcohol abuse, such that the totality of the penalty phase investigation consisted of getting the statements, transcribing them, and passing them along to Turner, obtaining transcripts from school and prison, and getting documents to the doctors who did testify (T4. 56)

Eisenberg agreed that physical abuse from the father or in the household would have been mitigation to present to the jury. (T4.58) Further, drug and alcohol abuse is mitigation he would be looking for. (T4. 58) Also, good character evidence and a troubled childhood would be desirable mitigation. (T4 58) Mr. Eisenberg and Mr. Turner did limit their investigation because of any statements made by Mr. Hendrix. (T4. 59-60) Turner did not indicate that there was mitigation he did want to put on before the jury: Eisenberg was to find it and Turner would use it. (T4. 63)

W. Thomas W. Turner

Mr. Turner had previously pled two death penalty case prior to representing Mr. Hendrix. (T4. 97) Settling these two cases without trial were the extent of Turner's capital experience. (T4. 98)

During his first stint as a US Attorney he handled white-collar prosecutions. (T4. 98-99) Mr. Eisenberg's job was to find mitigation. (T4. 102)

Mr. Hendrix's parents paid Turner a flat fee of ten or fifteen thousand dollars, and the State paid Eisenberg's expenses. (T4 103) Actually, the fee may have been twenty or twenty-five thousand dollars. (T4. 104)

In July or August, 1991, Turner took steps to return the US Attorney's Office while he was working on Hendrix. (T4. 106) In fact, Turner left the case before the sentencing but after doing the penalty phase. (T4. 107).

Turner admits that he conceded the HAC aggravator. (T4. 108-109) His sole plan was to argue the system had failed Robert.

Turner actually filed a motion with the trial court asking to be relieved of responsibility of presenting penalty phase evidence. (T4. 110) That motion was denied on August 9th, and not much was done prior to that even though trial was to start in a few weeks. (T4. 111) In fact, Mr. Eisenberg worked on "investigation" about an hour in the preceding two months. (T4. 111)

Turner acknowledged that he understood that he had an obligation to develop mitigation regardless of the defendant's ultimate decision regarding waiver. (T4. 113) Turner further admitted that he was trying to educate himself as he went. (T4. 1140)

Part of the reason that a continuance was not sought after the guilt phase was the fact that Turner had already committed to return to the US Attorney Office before the end of the trial. (T4. 115) Turner states that the guilt phase was well prepared for, and cannot recall if they had a discussion about trying to get a continuance before the penalty phase. (T4. 115)

Although he concedes it was done very quickly, he decided the defense had done everything it could do. (T4. 116)

No consideration was given to pursue any further expert forensic psychological or neuropharmalogical testimony after

Krop interviewed Hendrix or to supply Krop with sufficient investigation material or information to establish non-statutory and statutory mitigation. (T4. 116)

Turner would have wanted to pursue evidence and witnesses regarding drug and alcohol abuse. (T4. 124)

Despite the judge ruling that the defense had to do a penalty phase and the little time and little work done preparing, and despite Turner leaving in the middle of the trial, Turner testified that he didn't seek a continuance because he felt they were ready. (T4. 125) However, subsequently, Mr. Turner states that they may well have continued the case if he hadn't been going to the state attorney's office. (T4. 130)

He would certainly have used evidence of brain damage. (T4. 147)

SUMMARY OF THE ARGUMENTS

1(a). The lower court erred in failing to rule on his argument in written closing that evidence presented at the evidentiary hearing established that the trial judge had possessed information outside the record during the time of trial regarding the witness, Roger LaForce, who is the subject of the Brady claim, and that disclosure, particularly when considered with the claim of conflict raised at trial and on direct review, established that Appellant's due process rights had been improperly abridged in that he was denied his right

to a neutral judge and was convicted and sentenced by a judge who had knowledge of a witness that was outside the record and that was not disclosed.

1(b). The lower court erred in denying Appellant's motion to take the deposition of Judge Lockett, his law partner, and Denise Turbeyville.

2. The lower court erred in denying Mr. Hendrix relief on his claim that his shackling during the trial, where the judge made no specific finding regarding the necessity to physically restrain him and the least restrictive means of means of addressing the problem, violated his rights to the presumption of innocence, to consult with counsel, to confront witnesses, and, generally, to a fair trial and due process.

3. The lower court ered in denying Mr. Hendrix relief on his claims that he received ineffective assistance of counsel in both the guilt phase and penalty phase of his trial.

4. The lower court erred in denying Mr. Hendrix relief on his claim that the state with-held Brady material.

STANDARD OF REVIEW

The constitutional arguments advanced in Argument I of this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996) and Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I

THE LOWER COURT ERRED IN FAILING TO RULE ON APPELLANT'S ARGUMENT THAT EVIDENCE DISCOVERED DURING THE EVIDENTIARY HEARING, CONSIDERED WITH RECORD EVIDENCE OF A CONFLICT, ESTABLISHED THAT THE TRIAL JUDGE HAD INFORMATION OUTSIDE THE RECORD, VIOLATING APPELLANT'S DUE PROCESS RIGHTS

Although the issue of Judge Lockett's conflict was litigated during the trial while Judge Lockett remained on the bench, and was raised on direct appeal, the evidentiary hearing has exposed new evidence of Judge Locket's conflict in presiding over this case. Documentary evidence now establishes that Judge Lockett also presided over the plea agreement involving witness La Force, the subject of the Brady claim (Argument IV).

Like the state, the trial judge failed to advise the Defendant that he had knowledge of La Force's activities as a confidential informant for the Fifth Circuit Drug Task Force. FDLE agent Noel Griffin testified that Judge Lockett was the judge presiding over a case against Mr. LaForce when LaForce entered a plea and received "substantial assistance" from the state because of his activities as a special informant for the Drug Task Force. Thus, Judge Lockett had apparently been advised of LaForce's activities with the Drug Task Force in accepting at least one plea from La Force.

Nevertheless, neither the prosecution nor Judge Lockett

disclosed this clear Brady material to the defense, nor was it

disclosed when the issue of Judge Lockett's representation of the co-defendant was contested while Judge Lockett presided.

Because the lower court denied Appellant the right to take Mr. Lockett's deposition, or the depositions of others who might have knowledge of the full scope of Judge Lockett's conflicts, Judge Lockett still has not been examined as to the precise and complete nature of conflicts or knowledge he had regarding, first Turbeyville, and, now, LaForce. However, it is now clear that not only did Judge Lockett, then a private lawyer, have some manner of consultation with witness Turbeyville, but that he also had at least constructive knowledge of Brady material regarding witness LaForce.

It is, perhaps, axiomatic that, pursuant to the due process clauses of the Amendments to the Constitution, that criminal prosecutions, including post-conviction proceedings, must comport with prevailing notions of fundamental fairness. Tefteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996)

Further, fundamental fairness requires that the presiding judge be neutral and detached. Sparks v. State, 740 So. 2d 33 (1st DCA 1999) (judge not neutral who points out impeachment to state) Similarly, actions by court or argument by the prosecutor can violate the defendant's right to a fair trial. See, Pollack v. State, 818 So. 2d 654 (3rd DCA 2002); State v. Gates, 826 So. 2d 1064 (2nd DCA 2002); Chandler v. Moore, 240 F. 3d 907 (11th Cir. 2001); Wright v. State, 857 So. 2d 861 (Fla.

2003); Valdes v. State, 626 So. 2d 1316 (Fla. 1993); and Walton v. State, 621 So. 2d 1133 (Fla. 1993).

It is now clear from the post-conviction record that Judge Lockett had knowledge of a key witness but did not disclose that knowledge, compounding the malignant effect of his previous conflict and further undermining the confidence in the outcome of this case and establishing that the defendant's right to an impartial judge has been seriously abridged in a Constitutionally offense manner, entitling him to a new trial before a conflict-free judiciary.

To the extent that counsel should have learned of the documents disclosing the relationship between Lockett and LaForce as well as the relationship between Lockett and the testifying co-defendant, that failure constitutes ineffective assistance of counsel, and the prejudice is clear in that fundamental principles of Constitutional justice require not only an impartial judge but also a judge who does not have the appearance of impropriety.

To the extent that the state should have disclosed the document, Appellant's prejudice from the state's breach of Brady includes, besides the impeachment information, further information that Judge Lockett may have been privy to information outside the record regarding LaForce. Thus, the lower court erred in limiting its prejudice analysis to the impeachment value of the information. We now see that the undisclosed material may also call into question the fairness

of the tribunal and Appellant's right to a fair trial before a neutral and detached judge.

It is not proper for a judge to possess or gather extra-record information about a case. Gardener v. Florida, 430 U.S. 349 (1977) Nor can the judge otherwise obtain information that violates the defendant's right to due process. See, Porter v. State, 400 So. 2d 5 (Fla. 1981); Consalvov. State, 697 So. 2d 805 (Fla. 1996); and Lockhart v. State, 655 So. 2d 69 (Fla. 1995).

It is indisputable that the record now supports Appellant's argument that Judge Lockett should not have presided over this capital trial. He had consulted with the co-defendant, who was the most important witness, to some extent, and he had sentenced La Force after hearing from the state how LaForce had helped the state as an informant for the state attorney's drug task force. On the stand LaForce denied he had a deal to testify, and the state did not turn over evidence that the trial attorney could have used for valuable impeachment. Now, Appellant learns the court was, at least constructively, aware of the suppressed information too.

Under Lewis v. State, 656 So. 2d 1248 (Fla. 1994), appellant should have been allowed to depose former judge Lockett, but the lower court denied his motion. Further, at several times in the hearing, the state leapt up to object when any query seemed to approach the Lockett question.

Then, during the hearing, the information that Judge Lockett knew about the LaForce work for the state prior to trial and, like the state, did not disclose the information, which the lower court found should have been disclosed.

If this Court does not feel it has a sufficient record or claim to rule on the due process implications of whether Judge Lockett had extra-record information or labored under a conflict such that Appellant was denied due process in a fair trial, Appellant would ask the Court to remand the case to the circuit court and give him the opportunity to take the deposition of Judge Lockett and determine the full extent of his conflicts or appearances of conflict. The Lower court erred in denying his motion to take the deposition of the trial judge and, Appellant contends, in failing to address Appellant's argument regarding the new information of a conflict for the trial judge.

Certainly, confidence in impartiality of the judiciary is not promoted when a trial judge, in this most serious of all cases, a case in which the state is seeking the sanction of death, consults with a key witness and co-defendant as a private lawyer, then goes on the bench and presides over the trial, then, during the trial, presides over the testimony of a witness who has a long record as a snitch working for the state attorney and that information is not disclosed to the defense for impeachment. See, Fla. Code Jud. Conduct, Canon 1, 2A

ARGUMENT II

ROUTINE SHACKLING OF DEFENDANTS AND THE ROUTINE SHACKLING OF MR. HENDRIX, WHERE THE DEFENDANT'S MOVEMENTS CLANGED THE CHAINS SUCH THAT THEY COULD BE HEARD BY THE JURY AND THROUGHOUT THE COURTROOM DENIED MR. HENDRIX OF HIS RIGHT TO A FAIR TRIAL

A trial court has reasonable discretion to determine when to physically retrain a criminal defendant. United States v. Mayes, 158 F. 3d 1215, 1255 (11th Cir. 1998) However, important Constitutional rights are implicated when the defendant is restrained during a jury trial. U.S. v. Durham, 287 F. 3d 1297 (11th Cir. 2002)

The defendant's right to be present, right to confront witnesses, right to effective assistance of counsel, and the presumption of innocence, as well as fundamental due process rights are all burdened by the court's actions in physically restraining a defendant. U.S. v. Novation, 271 F. 3d 968 (11th Cir. 2001); Israel v. State, 837 So. 2d 381 (Fla. 2002); Asay v. Moore, 828 So. 2d 985 (Fla. 2001); Muhammed v. State, 782 So. 2d 343 (Fla. 2001); and Fla. Const., sect. 16(a).

Further, any state action which diminishes the presumption of innocence raises due process concerns. U.S. v. Durham, 219 F. Supp. 2d 1234 (USDC Northern District of Fla. 2001) Importantly, perhaps dispositively, to justify the restraint of the defendant at trial the court must make specific findings to justify the restraint and demonstrate that the restrain is the least burdensome available.

Durham, 287 F. 3d at 1308 (new trial where no such findings made so court to carefully scrutinize the action) Thereafter, the burden shifts to the state to prove that, where defendant's due process rights, which are fundamental rights, have been thus burdened, such burdens were harmless beyond a reasonable doubt. Id. Otherwise, the conviction is tainted and reversal is required. Id.; Profitt v. Washington, 685 F. 2d 1227, 1260 n. 49 (11th Cir. 1982)

The courts havelong held that physical restraints should be used as rarely as possible. Allen v. Montgomery, 728 F. 2d 1409, 1413 (11th Cir. 1984) (handcuffs); Zygaldo v. Wainwright, 720 F. 2d 1221, 1223 (11th Cir. 1983) (shackles should rarely be employed as a security device)

The Supreme Court has held that the presumption of innocence is an integral part of a defendant's right to a fair trial. Estelle v. Williams, 425 U.S. 501, 503; 96 S. Ct. 1691; 48 L.Ed. 2d 126 (1976) The presence of shackles and other physical restraints on the defendant tend to erode the presumption of innocence. Mayes, 158 F. 3d at 1225. Of course, the trial judge is responsible for the safe, reasonable, orderly progress of trial, and shackling the defendant may occasionally be the only way to achieve this goal. U.S. v. Theriault, 531 F. 2d 281, 284 (5th Cir. 1976) (adopted by 11th upon split of circuits).

The Supreme Court recognizes that the jury's feelings about the defendant might be significantly impacted by the

jury's knowledge that the court deems it necessary to shackle the defendant. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed. 2d 353 (1970) The insidious nature and effect of shackles on a jury is not mitigated by visibility. Zygaldo, 720 F. 2d at 1223.

Shackles and other restraints may make the defendant reluctant to move, making consultations with counsel impossible, thus significantly affecting trial strategy. Allen, 397 U.S., at 344.

Because of the fundamental nature of the rights burdened and the coercive effect on a jury, shackles may be used in a trial only after specific, reviewable findings by the trial court that, first, the shackles are absolutely necessary to further an essential state interest, and, secondly, the trial court considered the least
prejudicial method of restraint and made a determination that the least restrictive measure could be employed. Elledge v. Dugger, 823 F. 2d 1439, 1451 (11th Cir. 1987), withdrawn in part, 833 F. 2d 250 (11th Cir. 1987) This determination must be placed on the record. Theriault, 531 F. 2d at 285.

As the court noted in Elledge, "The single major analytic thrust of all guilt-innocence phase cases is... whether the defendant's right to a presumption of innocence was infringed by the security measures of the trial court."
Elledge, 843 F. 2d at 1454.

Finally, as the court in Zygaldo, *supra,* noted visibility, or lack thereof, is not the issue. For instance, where a jury realizes a hidden device is being used, the device may be even more prejudicial because of the very surreptitious nature of the concealment, suggesting the defendant needs unique precautions, or that the juror is not being told of his true dangerousness. See, State v. Fleigler, 91 Wash. App. 236, 955 P. 2d 872, 874 (1998).

The fact that the defendant is represented by counsel cure the prejudice presumed from an unjustiified infringement of the defendant's due process rights. Novation, *supra.* Further, the defendant is not required to prove what issues were not raised or issues presented because of the restraint. Id. at 1000. Rather, the state must prove that the infringement was minimal, such as, in the case of a brief absence from the courtroom, that the absence was *brief.* U.S. v. Boyd, 131 F. 3d 951, 953-54 (11th Cir. 1997); U.S. v. Harris, 908 F. 2d 728, 739 (11th Cir. 1986); and Hall v. Wainwright, 805 F. 2d 945, 947-8 (11th Cir. 1986).

However, where the defendant's inability to participate meaningfully throughout the trial is implicated, there is almost a *de facto* presumption that the state cannot prove that the defense was not harmed. Durham, *supra*.

Further, where the trial court did not articulate a rationale for the decision to use the specific, least intrusive restraint, the reviewing court's "careful scrutiny"

cannot be met. Id. at 1311 Interestingly, in Durham, as in the instant case, there were some vague hearsay comments about a vague escape, or a sharpened vent, or handcuff key. Also, as in the instant case as well, no weighing options or evaluating what, if anything was needed to be done, and certainly no judiciousness at all was utilized by the trial court.

In the instant case the hearing judge said the shackles were "necessary." This finding, however, is not supported by the record. In fact, Judge Lockett explained why Mr. Hendrix was shackled: in Judge Lockett's Courtroom in 1991 all defendants on trial were shackled.

As Judge Lockett testified, worthless-check defendants right up to murder defendants were all shackled. Apparently steps were taken so the jury couldn't see the shackles, although it is difficult to give much credibility to testimony that over 19 years no juror ever saw a shackle, leg-iron, or hand-chain.

In fact, however the leg shackled were clearly audible if the defendant moved, and Michael Graves even cautioned his clients to remain still. Another lawyer common to the courtroom, Ms. Morley, Turbeyville's attorney, after Lockett, testified that she could hear the chains.

By 1991, the practice of shackling, particularly in such a callous, careless, and routine manner, had been thoroughly and expressly disapproved of. Elledge v. Dugger, *supra* (at

no time was there any showing that the shackling was necessary to further an essential state interest.... and the trial court never polled the jurors to determine if any of them would be prejudiced by the
fact the defendant was under restraints); see also, Woodard v. Perrin, 692 F.2 220, 221 (!st Cir. 1982).

The court further gave no cautionary instruction nor in any way acknowledged the infringement on the presumption of innocence. See, Billups v. Garrison, 718 F.2d 665,668 (4th Cir. 1983); Commonwealth v. Brown, 364 Mass.471, 305 N.E.2d 830, 834 (Mass. 1973).

The trial court could not have been more explicit in telling the jurors that this is a dangerous man capable of the crimes for which he is charged. Further, the message sent about the life or death decision is equally unsubtle.

Suffice it to say that the Court's statement that no one had ever seen the chains in 19 years seems as incredible as it would be to say that, hearing the chains clang every time Appellant moved reminded the jury repeatedly, not just for a glimpse, that Appellant's presumption of innocence had been stripped away without acknowledgment from the court that there could be a problem with routine shackling and with shackling in a trial at which the death penalty is sought, when no effort has been made to determine, even, whether such shackling was necessary. Unfortunately, having the lower court say it was while still not presenting a basis for the

finding except the few Durham-like rumors floating around the jail.

To the extent counsel failed to object to the shackling, to request the court to poll the jurors, or to propose cautionary instructions, counsel rendered ineffective assistance of counsel, as routine shackling was not proper and the prejudice must be presumed where the court itself, as in Cronic, *supra,* denies due process be actions which are coercive and inculpatory but which do not address a specific problem.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON HIS CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

At the evidentiary hearing, Appellant presented evidence substantiating his claims that he received ineffective assistance of counsel and was thereby prejudiced in the outcome of both the guilt-phase and the penalty-phase of his trial. The lower court failed to properly apply the Strictland standard to the record as it now stands.

The familiar two-pronged test is: (1) deficient performance by counsel and (2) prejudice. Strickland v. Washington, 466 U.S. 668 (1984) To establish prejudice, the defendant must show that counsel's errors deprived him of a fair trial, the results of which are therefor no reliable. Strickland, *supra;* Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Rose v. State, 675 So. 2d 567 (Fla. 1996)

The standard of review of the lower court's order affords deference to the trial court's factual findings as long as those findings are supported by competent substantial evidence. McAllen v. State, 827 So. 948, 954 (Fla. 2002);

Blanco v. State, 702 So. 2d 948, 954 (Fla. 1997). Thus, ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See, Rose, *supra.* This requires an independent review of the trial court's legal conclusions, while giving deference to it factual findings. State v. Reichmann, 777 So. 2d 342, 350 (Fla. 2000).

A. Guilt-Phase

Regarding Appellant's guilt-phase claims for which he granted a hearing, the failure to object to the relevance of Juan Perez's testimony that he saw a man leave the crime-scene, though he didn't say it was the defendant, and the failure to properly impeach LaForce, the lower court fails to consider how counsel could have used these opportunities to show the jury the actual weakness of the state's case.

Regarding LaForce, the lower court, in considering the Brady claim, correctly noted that Roger LaForce had testified at the trial as a jail-house snitch. He testified that he heard Appellant make statements about the murders to the effect that Hendrix allegedly said that he made sure that the police would only have a circumstantial case and that he, Hendrix, had tried to make the murders look like a revenge killing because Mrs. Scott was an informant for the Sheriff's Office. This testimony, which is notable for the irony that LaForce is, at that time, concealing his own career as a jail-

house snitch and informant, while accusing Hendrix of using Mrs. Scott's similar status as a diversion. Also, similarly, LaForce is voicing what must have been a prosecutorial concern: there is no direct evidence putting Mr. Hendrix at the crime scene. In a strong case, a witness with LaForce's baggage would have no place. It is, then ironic indeed, and probably a comment on LaForce's credibility, that his testimony highlights the two things that must have concerned the prosecution at the time of trial: circumstantial evidence and the fact the primary inculpatory witnesses, LaForce and Turbyville, are testifying to get deals.

So LaForce's testimony, from the prosecution's viewpoint, was important, and attorney Turner acknowledged that he would have wanted the information about his long history of being an informant to impeach him.

The lower court's conclusion, which addresses only the prejudice prong, erroneously concludes that the facts that he was in jail and admitted to wanting a deal rendered counsel's failure to obtain the much stronger impeachment evidence harmless, or non-prejudicial. This analysis fails to consider the impact of what he did provide to the prosecution: direct evidence of culpability.

Further, with Turbeyville and LaForce compromised by their own deal-making, the testimony of Juan Perez becomes very important. That is why it was essential for trial

counsel to keep his testimony out of the record. Unless Perez was identifying the defendant as the man leaving the house, his testimony was irrelevant. The lower court seems to excuse counsel from knowing what this witness was going to say prior to his testifying by reading more into his repartee with the judge than the reality of the record will support.

In sum, the lower court has noted the correct facts but it has analyzed the guilt-phase claims too narrowly. More importantly, counsel failed to properly investigate the witnesses, particularly LaForce, who had been a confidential informant for the Fifth Circuit for years, as well as a drug addict and career criminal. Counsel also might have shown, by proper investigation of the records, that Judge Lockett knowledge of LaForce's plea agreements where officers vouched for him in other proceedings as a snitch in their case.

With this information, the prosecution's case would have unraveled because all the witnesses would have been snitches and the extent of the state's complicity in coming with covert confessions would have been obvious the to the jury.

Counsel failed to show the link between Judge Lockett and the prosecution to a witness the state was instead able to use to provide non-circumstantial evidence for a case that was almost exclusively composed of circumstantial evidence.

B. The Penalty-Phase

In the penalty-phase, where the defense overlooks available mitigation, the court considers whether the mitigation overlooked would have changed the outcome of the defendant's sentence in light of the evidence. Robinson v. State, 707 So. 2d 688 (Fla. 1998); Breedlove v. State, 692 So. 2d 874 (Fla. 1997); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989); Routly v. State, 590 So. 2d 397, 401 (Fla. 1991).

Further, counsel's ineffectiveness can taint the defendant's rights pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). (entitling a criminal defendant to expert psychiatric assistance when state makes issue of mental state relevant to proceedings.) (The lower court denied this "Ake" claim, and Appellant is arguing it as part of IAC claim in that he contends counsel did not provide proper records to or retain proper experts, as will set out hereafter.)

Counsel was also ineffective in failing to investigate lay witnesses regarding non-statutory mitigation, including the defendant's long history of drug and alcohol abuse, the physical and psychological abuse he suffered, the head traumas and the brain damage he endured, friends who never saw him violent, and generally presented the real man to the jury through the people that knew him as a boy and teen.

Further, an effective investigation would have revealed

that the defendant’s drug use at the time of the crime could have prevented any finding of premeditation, and required a verdict of second degree murder.

Counsel never did articulate a strategy in the guilt phase, although 90 per cent of their time and attention was dedicated to the guilt phase, unless counsel’s contention that by agreeing with the jury that crime is horrific and by that winning their confidence was intended as a trial strategy.

As Mr. Hendrix has shown, he could have presented the testimony of Dr. Lipman and Dr. Crown and presented evidence upon a jury could soundly base a verdict other than premeditated murder.

Presenting a supported and logical alternate view of the facts would seem a minimum requirement and the idea that, I’ll just get the jury to like by agreeing with the worst things the prosecution says, would seem a complete abdication of the attorney’s responsibility to the client.

The lay and expert witness testimony of drug use, physical and mental violence, brain damage, and alcoholism is unrefuted. Numerous witnesses, all from the area, all childhood friends, many known to the sisters or parents, were not looked for and were not talked to.

In fact counsel was so concerned about getting to his new job in a timely fashion that he actually filed a motion with the court asking the court to relieve him of penalty phase responsibility, and it was not until the motion was denied a

few weeks before trial that any penalty-phase investigation was done. Counsel testified that, after the guilt-phase, he may not have moved for a continuance to investigate because he was going to a new job. After the guilt-phase, he did not attend the sentencing hearing or continue the investigation. He attended the penalty-phase
trial.

Prior to trial, an investigator worked on mitigation about an hour, according to billing records in evidence. The reality is that the penalty-phase investigation consisted of a few phone-calls. Numerous witnesses, who could have instructed the jury and court on the real story of the man whose life was in their hands, were never contacted. Leads in the little transcribed data they did have were not pursued.

Counsel should have provided experts such as Dr. Lipman and Dr. Crown in the guilt-phase to contest premeditation, and absolutely should have used such testimony in the penalty phase to establish the two statutory mental-health mitigators, which are among the most important mitigation that can be presented.

Even before discarding Krop, counsel should have provided him with sufficient investigatory information so that he would have a full picture of Mr. Hendrix's life and of the sad, poignant trajectory that began when, at nine, after his deeply loved brother died in a car crash, he began to use substances, drugs and alcohol, to seek refuge and respite from the

eggshell-floors and paperthin-walls in the place his sister called their “house of fear.”

Counsel, without contest or rebuttal, let Dr. Leal create a crime seen more horrific than Dr. Willey now describes. Dr. Willey could have challenged the opinion that death or un-consciousness was not instantaneous for both victims and put in context the exaggerated amount of blood.

Such testimony would have put the applicability of HAC in question, just as the testimony of Dr. Lipman and Crown effectively, with the full facts of a proper investigation at their disposal, call into the question the applicability of the other aggravators. As it was, none of the aggravators were contested, the HAC's were conceded, and the prior violent felonies were offered needlessly.

Considered cumulatively, the amount of available mitigation not presented, but readily available cannot be summarily dismissed as the product of mere Monday-morning quarterbacks scrounging the HRS dumpsters. The only reason of record that trial counsel were not prepared for the penalty-phase, did not conduct adequate investigation, did not present even a small fraction of the available mitigation, and challenged none of the aggravators was that counsel did not prepare a penalty-phase case. Apparently, the strategy was that the system had failed Robert, so even providing free aggravators, like the prior no violent felony aggravators, could fit under that umbrella. The lower court, apparently defending the work done, scant as it may be, has overlooked the extensive mitigation, readily available, not presented. Counsel conceded more could have been done, when he testified that he probably would have gotten a continuance to develop the mitigation if he was not taking a new job. He had taken the case shortly before trial, and simply did not have adequate time. These are the

real reasons the mitigation was neglected, but they do involve adversarial testing, and they were simply not adequate in this case.

In sum, Strickland v. Washington, 466 U.S. 668 (1984), forthrightly states the underpinning rationale of the effectiveness and prejudice prongs: defense counsel is obligated to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. That did not happen in this case, particularly in the penalty-phase, and Mr. Hendrix is entitled to a new trial.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON HIS CLAIM THAT THE STATE WITH-HELD OR FAILED TO DISCLOSE BRADY MATERIAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS

In order to establish a Brady violation, appellant must prove that the evidence at issue is favorable as either exculpatory or impeachment evidence, that the evidence was suppressed, either willfully or inadvertently, and prejudice ensued. Way v. State, 760 So. 2d 903, 910 (Fla. 2000); Stickler v. Green, 527 U.S. 263, 281-282 (1999); Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001).

For Brady purposes, in order to constitute prejudice, the information must have been material. Strickler, 527 U.S. at 282 Furthermore, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Jones v. State, 709 So. 2d 512 (Fla. 1998); Cardona v. State, 826 So. 2d 968 (Fla. 2002) (materiality of impeachment evidence with-held requires new trial); U.S. v. Bagley, 473 U.S. 667, 682 (1985).

Thus, to establish a Brady violation, Appellant must have shown that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Jones, 709 So. 2d at 519.

The cumulative effect of the suppressed evidence is considered when the court makes the materiality determination. Way, 760 So. 2d at 913. In other words, the net effect of the evidence must be assessed. Id.

This Court must defer, in evaluating this claim, to the factual findings made by the lower court to the extent that they are supported by competent substantial evidence, but must conduct a *de novo* review of the application of those facts to the law. Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999); Rogers v. State, 782 So. 2d 373, 376 (Fla. 2001).

In the instant case, the lower court found that the state suppressed impeachment evidence. The lower court erred, however, in concluding that there was no prejudice. Appellate argues that there is, in fact, a reasonable probability that, had the evidence to impeach LaForce been disclosed, there would have been a different result in the verdicts. Certainly, that probability is sufficient to undermine confidence in the outcome.

The lower court's factual findings are correct. The question is whether the state possessed exculpatory information that it did not provide to the defendant, Young v. State, 739 So 2 553 (FLA. 1999), and there is no doubt that the records of LaForce's co-operation were in the possession of the state. This information could have been used for impeachment and presented through cross-examination. See Kyles v. Whitley, 514 U.S. 419, 446 (1995). Even prosecutor Gross

conceded at the evidentiary hearing that he should have turned over information and documents regarding witness LaForce's extended service to the Drug Task Force as a confidential informant.

Further, the record now shows that the court itself should have made its connection to La Force known.

La Force's testimony regarding alleged inculpatory statements made could have been undercut by cross-examination on his long career as a snitch and police informant. Further, the information from La Force may have had to pass through Gross through his former commander.

In a prosecution that is based upon snitch testimony and deals cut or desired by the prosecution, a jury, learning the true nature and zero credibility of a witness who is important because of the alleged inculpatory statements he hears in jail would realize that the entire case had been built of testimony the state bought with promises of deals.

La Force could then also have been used to show the jury that such deals do in fact take place and are in fact promised, though the witnesses may deny they've been offered anything. The jury may have even seen that Judge Locket himself had dealt with such deals from the bench himself.

In sum, La Force's testimony provided direct evidence allegedly from Hendrix's own mouth of purported calculation and premeditation and, as such,surely had an impact on both phases of the trial. The prosecution thought the evidence

important enough to present and argue, and it would be disingenuous of the state to now argue it was unimportant. The hearing judge, who was not the trial judge, has too easily dismissed the credibility of LaForce because he was in jail and because he admitted he wanted a deal. To deny the latter would have truly been incredible, and the prosecution, which had used LaForce many times did not seem bothered by his frequent visits to the jail.

Alternatively, the credible substantial evidence supports a finding that LaForce was, in fact, believed because he provided some actual connection to Hendrix in a case with a lot of circumstantial speculation but very little evidence directly connecting Mr. Hendrix to the crime itself. Evidence undercutting snitch evidence in general would also have inured to Appellant's benefit by discrediting Turbeyville, who had her own deal. Thus, a review and consideration of the entire record will convince this Court that Appellant did suffer prejudice from the state's improper action and therefor is entitled to a new trial.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Appellant, Robert Hendrix, urges this Court to vacate his sentences and order a new trial based on the foregoing and the entire record of this case, the evidence presented, and the argument rendered herein.

CERTIFICATE OF FONT SIZE AND TYPE

Counsel certifies that a true copy of this brief has been reproduced in a 12-point courier type, a font which is not proportionally spaced.

CERTIFICATE OF SERVICE

The below-signed counsel for the Appellant hereby certifies that he has, on this _____ day of _____, 2004, served copies of the foregoing brief to Barbara C. Davis, Assistant Attorney General, 444 Seabreeze Blvd., 5th floor, Daytona Beach, FL 32118 by U.S. mail.

_____
Harry Brody
Fla. Bar No. 0977860

BRODY & HAZEN, P.A.
Attorneys at Law
1804 Miccosukee Commons Dr.
Ste. 200
PO Box 16515
Tallahassee, FL 32317
Attorney for Appellant