IN THE SUPREME COURT OF FLORIDA

JOHNNIE HOSKINS,

Case No. SC05-28

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

CROSS-REPLY BRIEF OF APPELLEE

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ADMISSION OF THE PET SCAN EVIDENCE WAS IMPROPER

In 1997, this Court remanded this case using the following explicit language:

> we must remand this case for the limited purpose of having the trial judge order that a PET-scan be conducted on Hoskins' as requested by Dr. Krop. After the PET-scan is conducted, the trial judge shall hold a limited evidentiary hearing for the purpose of determining whether the PET-scan shows an abnormality and, if so, **whether the results of the PET-scan cause Dr. Krop to change his trial testimony**. The trial judge's review must be limited to a determination of whether **Dr. Krop's testimony would change**; the judge will not have the discretion to evaluate the effect of that change in testimony on the jury's recommendation. If the trial judge finds that **Dr. Krop's testimony would change** solely because of the PET-scan results, then we have determined that a new penalty phase proceeding is required

Hoskins v. State, 702 So. 2d 202, 210 (Fla. 1997) (emphasis added). In the final paragraph of the majority opinion, this Court again stated:

> we remand this cause for the limited purpose of having the trial judge order that a PET-scan be conducted on Hoskins as requested by Dr. Krop. After the PET-scan is conducted, the trial judge shall conduct an evidentiary hearing for the purpose of determining whether the PET-scan shows an abnormality and, if so, whether the results of the PET-scan **cause Dr. Krop to change** his trial testimony.

Hoskins v. State, 702 So. 2d at 210-211 (emphasis added).[1] While Hoskins attempts to modify this Court's explicit language to make the issue whether Krop's opinion would be "more definitive" with the PET scan results, the portions of the decision set out above demonstrate that his attempt to rewrite this Court's decision is baseless.[2]

COLLATERAL ISSUES

The circumstances under which the PET scan was conducted give rise to various concerns. The State recognizes that this Court, in its 1997 decision, found that the fact that Dr. Krop is not a physician was irrelevant. However, the State respectfully suggests that that decision should be revisited in light of the record that now exists. The fact is that Dr. Krop could not, on his own, either order a PET scan or conduct one himself. Because the PET scan is a medical test, it must be ordered by a **physician**, who has presumably determined that the procedure is medically indicated. The State suggests that it is not prudent for attorneys and courts to make medical decisions.

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[1] In *Robinson v. State*, this Court described its holding as being "that if the court found that the expert's opinion changed based solely on the PET scan results, Hoskins was to be afforded a new penalty phase proceeding." *Robinson v. State*, 761 So. 2d 269, 275 (Fla. 1999).

[2] Hoskins says that "[c]ontrary to the state's assertion, the issue was never whether Dr. Krop might 'change' his testimony." *Answer Brief*, at 3. This Court's decision does not support that interpretation.

Moreover, in this case, it appears that the physician who administered the PET scan to Hoskins is not licensed to practice medicine in the State of Florida, even though there is no colorable argument that a PET scan is not a medical procedure. On its face, this appears to be the unlicensed practice of medicine. And, to further complicate the issue, the State suggests that the events in this case are at the least very close to amounting to medical experimentation on a prisoner which has been conducted without following the proper (and accepted) guidelines.

In addition, the State suggests that this Court has been led into creating a situation that was not apparent when this case was decided in 1997. As innocuous and routine as the request for transport to a PET scan facility appeared, the true facts are that this Court was placed in the position of acting as a physician when it ordered that the PET scan be conducted.[3] Respectfully, that is not, and should not be, the function of this Court (or of the trial courts). The State suggests that it is wholly inappropriate for anyone other than a physician to "order" a medical test. Stated in different terms, it is unlikely that a Florida Court would enter an order directing a

[3] A motion to transport a defendant for PET scan should be in some fashion supported by a medical doctor's opinion that the procedure is necessary, and such should be set out by affidavit or developed through live testimony.

physician to perform a heart catheterization or a colonoscopy -- the PET scan is no different, and there is no reason that it should be regarded differently.

RESPONSE TO STANDARD OF REVIEW

Florida law is well settled that a *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), issue is reviewed *de novo. See, Brim v. State*, 695 So. 2d 268, 275 (Fla. 1997). Hoskins' claim to the contrary is incorrect. In an attempt to avoid *de novo* review, Hoskins relies on an out-of-context quotation from the State's brief for the proposition that the State "concedes" that the use to which the PET scan was put in this case "falls within the realm of general acceptance in the scientific community." *Answer Brief*, at 4. That attempt to re-write the State's brief (just as Hoskins has attempted to re-write this Court's prior decision) is an apparent effort to fabricate a non-existent "concession" so as to avoid close review of the PET scan issue.[4]

THE STATE'S OBJECTION TO THE PET SCAN TESTIMONY WAS PRESERVED

[4] As the State's *Initial Brief* made clear, there is no dispute that the PET scan is a valid medical procedure that is highly useful in certain circumstances. The issue, as the State has argued all along, is that the use of the PET scan to predict future behavior (such as violence) does **not** satisfy *Frye.* That is what Hoskins sought to use the PET scan for, and that is what is subject to this Court's review, not whether the PET scan is a generally accepted procedure in an Alzheimer's case.

On pages 5-7 of his brief, Hoskins argues that the State did not preserve its objection to the PET scan testimony. In support of his position, Hoskins relies on decisions from 1978 and 1986, with no mention being made of the amendment to § 90.104(1)(b) which took effect on July 1, 2003.[5] The *Evidence Code* provides that:

> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

§ 90.104, *Fla. Stat*. (2006). *See, In re: Amendments to the Florida Evidence Code -- Section 90.104,* 914 So. 2d 940 (Fla. 2005). The trial court's ruling after the *Frye* hearing is certainly a "definitive ruling" admitting the PET scan testimony, and it makes no sense to argue, as Hoskins does, that the State did not preserve its objection to the admission of the testimony concerning the PET scan. The law is squarely to the contrary.[6] Hoskins' argument has no legal basis.

HOSKINS DID NOT CARRY HIS BURDEN OF PROOF

As the proponent of the PET scan evidence, Hoskins had the burden of demonstrating that the PET scan, **as he sought to use it**, was generally recognized in the scientific community. *Brim*

[5] Hoskins trial took place in 2004.

[6] The State *could* have made another *Frye* objection at the time of trial (*Collier v. State*, 857 So. 2d 943, 945 (Fla. 4th DCA 2003)), but the *Evidence Code,* as discussed above, does not require it.

v. State, 695 So. 2d 268, 273 (Fla. 1997). In an effort to carry this burden, Hoskins presented the testimony of two experts -- Dr. Joseph Wu and Dr. Frank Wood. According to Hoskins, that testimony is sufficient to establish that the use to which he put the PET scan in this case (that a particular scan pattern is predictive of violent behavior) is generally accepted in the relevant scientific community. However, that "proof" falls far short of what the law requires. This Court has held:

> A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness's application of these principles is untested and lacks indicia of acceptability. [FN13]
>
> > [FN13] This is particularly true if the expert has a personal stake in the new theory or is prone to an institutional bias. *See generally People v. Young*, 425 Mich. 470, 391 N.W.2d 270 (Mich. 1986); D.H. Kaye, *Science in Evidence* 85 (1997).

Ramirez v. State, 810 So. 2d 836, 844 (Fla. 2001). Both Dr. Wu and Dr. Wood frequently testify about PET scan results in death penalty cases -- both apparently testify exclusively for the defense, and neither can be considered an independent or impartial expert.[7] *See, State v. Thompkins*, 891 So. 2d 1151, 1152

[7] The following are cases that can be identified as ones in which Dr. Wood or Dr. Wu testified. This listing is not exhaustive. *Philmore v. State/McDonough*, 2006 Fla. LEXIS 1254 (Fla. June 15, 2006)(Dr. Wood); *Trotter v. State*, 31 Fla. L. Weekly S332 (Fla. May 26, 2006) (Dr. Wood); *Schoenwetter v. State,* 31 Fla. L. Weekly S261 (Fla. Apr. 27, 2006)(Dr. Wu)*; Snelgrove v. State,* 921 So. 2d 560 (Fla. 2006)(Dr. Wu); *Clemons v. State*, 2005 Ala.

(Fla. 4th DCA 2005). Despite Hoskins' claim that he carried his burden of proof, the fact remains that he attempted to do so with witnesses who have a financial stake in continuing to testify about PET scans in capital cases. That is insufficient to establish that the PET scan testimony offered in this case has been generally accepted by anyone other than Hoskins' experts.[8] The lower court was wrong when it found that the PET scan, as used in this case, satisfied *Frye*.[9]

THIS COURT SHOULD DECIDE THE PET SCAN ISSUE

Crim. App. LEXIS 128 (Ala. Crim. App. June 24, 2005)(Dr. Wu); *Lindhag v. Dep't of Natural Res*., 123 P. 3d 948 (Alaska 2005) (Dr. Wu); *Smart v. Molinario*, 83 P. 3rd 1284 (Mont. 2004) (Dr. Wu); *People v. Protsman*, 105 Cal. Rptr. 2d 819 (Cal. Ct. App. 2001) (Dr. Wu); *Johnston v. State*, 841 So. 2d 349, 354 (Fla. 2002) (Dr. Wood); *Penney v. Praxair, Inc*., 116 F.3d 330 (8th Cir. 1997) (Dr. Wu). In *Trotter, Schoenwetter,* and *Snelgrove*, the experts are not identified by name in this Court's decision. The State requests that this Court take judicial notice of its records, which demonstrate that these experts testified as indicated. Presumably, one or both of these experts have testified in other cases in which they are also not identified by name.

[8] Hoskins never addresses the fundamental issues raised by the State -- that the comparison of Hoskins' scan to various "normals" was improper because the comparison could not legitimately be made for various technical reasons, and that the scientific community did not accept the notion that a particular PET scan pattern was predictive of violent behavior.

[9] Hoskins' claim that the State's argument goes to the weight rather than the admissibility of the PET scan overlooks that the specific testimony about what the PET scan results showed did not satisfy *Frye*.

On pages 10-11 of his brief, Hoskins argues that any error in the admission of the PET scan was harmless because the jury recommended, and the trial court imposed, a sentence of death. However, that argument overlooks the fact that the State has few opportunities to appeal from an adverse ruling, and, had Hoskins received a sentence of life in prison, the State would have been prejudiced beyond remedy because there would be no right to appeal. Hoskins' argument, in its most basic terms, is that because the State obtained a death sentence, any error was harmless and should not be reviewed, notwithstanding the fact that another jury in another case may well be persuaded to recommend a life sentence by the flawed PET scan evidence. The flaw with Hoskins' argument is that it strips this Court of any opportunity to correct the evidentiary error committed by the lower court. In a very real sense, this issue is one that is capable of repetition but evading review unless this Court addresses it in this case.[10]

FRYE APPLIES TO THE PENALTY PHASE

On pages 11-12 of his brief, Hoskins argues that, because the PET scan testimony was admitted during the penalty phase only, it (or any other evidence the defense wanted to offer)

[10] Based on no more than the frequency with which Drs. Wu and Wood testify about the PET scan in capital cases, the issue seems to repeat itself frequently, to say the least. Because that is so, the State suggests that the issue needs to be settled.

could not have been excluded for any reason. Hoskins overlooks the relevance limitation contained in §921.141(1), and ignores the basic premise that evidence that is unreliable (like the PET scan in this case) is not relevant in the same way that residual doubt or the sentencing wishes of the victim's family are not relevant to the sentencing decision. *Reynolds v. State*, 31 Fla. L. Weekly S318, 325 (Fla. May 18, 2006); *Ibar v. State*, 31 Fla. L. Weekly S 149, 155 (Fla. May 9, 2006); *Perez v. State*, 919 So. 2d 347, 376-377 (Fla. 2005*)(new penalty phase granted on other grounds). Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Mills v. Maryland*, 486 U.S. 367 (1988) do not stand for the proposition that the rules of evidence are wholly meaningless at the penalty phase of a capital trial.[11]

WOULD THE PET SCAN BE ADMISSIBLE IF THE STATE SOUGHT TO OFFER THE SAME EVIDENCE?

Hoskins claims that a certain PET scan pattern is predictive of violent behavior, and that he has established the

[11] Under Hoskins' theory, a defendant would be constitutionally entitled to introduce, for example, evidence that an individual had placed his hands on the defendant's head and determined that, based upon the observed pattern of cranial bumps (*i.e.* phrenology), the defendant will not commit another violent crime. Or, that because of a different pattern, the defendant is predisposed to violence (which is ironically what he is using the PET scan to do in this case.) As extreme as this example is, it is what Hoskins is asking this Court to hold. Hoskins' use of the PET scan is no different from the "cutting-edge" theories of previous centuries. Scientific understanding of the human brain has not progressed to the point that Hoskins would have this Court believe.

general scientific acceptance of this theory. Assuming *arguendo* that that testimony is in fact admissible, it raises the question of whether such testimony would be admissible if the State was the proponent of it. If it is true that a certain PET scan pattern demonstrates a propensity for violence, that evidence would be relevant, for example, to rebut a claim that either of the mental state mitigating circumstances was present. Likewise, that evidence could well be relevant to a claim that the defendant has no prior history of violent behavior or that the defendant will not be a management problem if sentenced to life without parole. Since the Constitution neither requires one-sidedness in favor of the defendant nor provides a different set of rules for capital defendants, the rule which Hoskins is asking this Court to announce would make the PET scan equally admissible by either party. Hoskins cannot have it both ways -- if the PET scan as used in this case is admissible at all, it is admissible for all purposes, not just when it "helps" the defendant.[12]

Finally, assuming Hoskins is right and the PET scan is admissible to predict violent behavior, it is a short step to a science fiction scenario in which violence is anticipatorily predicted and "prevented." Would a physician who observed the

[12] On a related matter, under Hoskins' view of the issue, the State would be entitled (just as the defense is) to an order from the Circuit Court that the PET scan be conducted.

"violence pattern" in a routine PET scan be obligated to inform law enforcement, and would a "failure to warn" cause of action lie against the physician if the patient committed a violent crime in the future? Could an inmate convicted of a violent crime (or any crime for that matter) be required to submit to a PET scan as a condition of release, and could release be denied if the PET scan showed the "violence pattern"? While these scenarios may seem far-fetched, they are nothing more than the logical extension of the argument Hoskins has made. The danger lies in presuming that the PET scan can reveal such things when the brain itself is only beginning to be understood.

CONCLUSION

WHEREFORE, for the reasons set out above, the State submits that the trial court erred when it admitted the PET scan results in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by HAND DELIVERY to: **Christopher S. Quarles,** 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32114 on this _____ day of June, 2006.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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