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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Hoskins was convicted of first-degree murder and other crimes on March 21, 1994. (R990). On November 4, 1994, after a sentencing proceeding conducted in accordance with Florida law, Hoskins was sentenced to death. (R990-1). Hoskins appealed, and, in 1997, this Court affirmed his various convictions and remanded the case with instructions that a PET-scan be conducted and that, after the completion of that procedure, the Circuit court should conduct a hearing to determine if the PET-scan showed some abnormality in Hoskins' brain and whether those results would cause Hoskins' penalty phase mental state expert (Dr. Harry Krop) to change his testimony. *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997); (R991). That hearing was conducted, and this Court ultimately vacated the sentence of death and remanded the case for a new penalty phase proceeding. *Hoskins v. State*, 735 So. 2d 1281 (Fla. 1999); (R991). The State filed a motion for a determination of the admissibility of the evidence under *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) -- the Circuit Court issued its order overruling the State's *Frye* objection on April 6, 2001. (R992). More than three years later, on July 19, 2004, the new penalty phase proceeding began. (R992).

STATEMENT OF THE FACTS[1]

Bob Sarver, currently the Undersheriff for the Brevard County Sheriff's Office, was a detective with the Melbourne Police Department in 1992, and investigated major crime offenses.[2] (R631-32). In October 1992, Sarver was assigned to manage the investigation of the murder of eighty-year-old, Dorothy Berger. (R632-33). Hoskins was Berger's neighbor. (R633-34, 635). Berger was last seen alive on October 17. (R635). On October 18, at approximately 10:00 p.m., a 911 call was placed by another neighbor, Mrs. Thomas, who indicated that Berger's " ... door was open, lights were on inside the home, her car was missing ... she was nowhere to be seen or found ..." (R635-36). Upon arriving, Sarver was told that Berger's headboard was moved a portion of the way from the wall, her car was missing but her purse was located in the bedroom. Blood was located on the sheets. (R638). FDLE conducted "DNA-type testing" and determined the blood stains belonged to Berger. (R644). Her yard and driveway were also searched. (R648). The only blood located on the premises was located in Berger's bedroom. (R649). The DNA

[1] Cites to the record on appeal are designated by "R" for the resentencing/penalty phase. Cites to the supplemental record on appeal are designated "SR" (the supplemental record/*Frye* Hearing).

[2]The Undersheriff is "second in command." (R631).

analysis also confirmed the presence of semen on the bed sheet that matched the defendant, Hoskins. (R649).

A “visible-to-the-eye footprint” was located near the bed in Berger’s bedroom. (R652). After Hoskins had been taken into custody, his clothes were collected. Sarver conducted a visual inspection of Hoskins’ shoes and found the shoe print from Berger’s bedroom and Hoskins’ shoe “were very consistent in both size and design.” (R652-53).

After determining that Berger’s car was missing, and no other cars were kept at her home, a “Regional Endangered Person Report” was issued. The report was eventually issued to the southeastern region of the United States. (R653-54). As a result, the car was located during a traffic stop in Cordele, Georgia. (R655). Hoskins was found in the vehicle by himself. (R656). His parents lived approximately ten miles from this town. (R655-56).

Sarver went to Georgia and inspected the car. The exterior of the vehicle was “pretty unremarkable” but the trunk had “several areas that had a deep purplish color to it ... appeared to be blood ...” (R657-58). One stain was approximately a foot and a half in diameter; dirt and leaves were also located inside the trunk. (R658). The blood had soaked through the mat inside the trunk to the actual metal of the trunk floor. (R659).

Through DNA testing, the blood was identified as Dorothy Berger's. (R659-60).

Sarver spoke with Hoskins' father, Rufus Jones (sic). (R667). Jones (sic) said his son had arrived at his house at 5:00 a.m. on October 18 and was driving a car that "seemed unusual for him to have." Jones (sic) described the car to Sarver who determined the car fit the description of Berger's missing car. (R667, 668).

Sarver also spoke with James Hoskins, the defendant's brother. James told him he had seen the vehicle his brother Johnnie had been driving, and there was "an area around the driver's side wheel well that ... appeared to be dripping blood." (R668). Johnnie told his brother he had driven over a possum. (R669). James Hoskins identified Berger's car as the one driven by his brother. (R669).

Sarver spoke with Johnnie Mae Hoskins, the defendant's mother. When her son had arrived at her home on October 18, he borrowed a shovel and then left for a short time. He returned and subsequently changed his clothes. (R670).

On October 21, 1992, Dorothy Berger's body was discovered in a very remote area near Cordele, Georgia, approximately one mile from Hoskins' parents' home. (R670, 675). A group of investigators, along with Hoskins and his father, went to a location which Hoskins pointed out himself. (R671). There,

Berger was found buried in a shallow grave. The Georgia Bureau of Investigation was contacted and Berger's body was excavated. (R672). Berger was bound and gagged, wearing nightclothes. (R674). She was wrapped in a white sheet, placed in a body bag, and taken to the medical examiner's office in Atlanta, Georgia. (R675).

During the autopsy, vaginal swabs were obtained. FDLE conducted DNA testing. The swabs matched the semen of the defendant, Johnnie Hoskins. (R676).

Sarver conducted a search of the residence where Hoskins' had been staying near Berger's home. A spool of plastic white cord, consistent with the bindings used on Berger, was found on the back porch. (R677).

On cross-examination, Sarver said Hoskins had minor abrasions on his hands when he first saw him in Georgia. (R681).

Dr. Kris Sperry, chief medical examiner for the State of Georgia, performed the autopsy on Dorothy Berger. (R690, 695-96). Berger had a "unique" laceration on the left side of her scalp that was different than the other lacerations on her face and head. She was struck several times with a blunt, narrow weapon. (R705). In addition, there were "a number of bruises scattered about her face ... a larger bruise ... in front of the left ear ... a lot of bruising around both of the eyes ... bruising distributed about the facial surfaces." (R706). There

was a lot of bruising in the area above and below the placement of the gag over her mouth. (R706). Berger was alive when the gag was placed around her mouth due to evidence of the bruising. (R707). There were injuries inside of her mouth due to the pressure of her lips against her teeth. (R708). The gag was so tight, Dr. Sperry could not get a finger underneath it.[3] It would have been " ... impossible, to speak, to yell, to say anything." (R710). By being gagged, it was "more difficult to breath ... one of the most intense anxiety-producing feelings ... a human being can really sustain ... it heightens the feelings of fear and heightens the sensation of pain ..." (R714). The contusions and bruises were consistent with "being beaten by fists and struck multiple times ..." (R715). She would not have been unconscious when she received these facial injuries. (R716-17, 718). The ligatures were very tight on her wrists. (R752). He could not get his finger underneath the loops around either wrist; " ... they would have been very painful and uncomfortable." The circulation to her hands would have been cut off; her arms and hands would have experienced muscle spasms. (R752). The deep laceration at the top of her head may have been caused by a shovel or "something like that or very, very similar

[3] Ms. Berger's wrists were tied tightly behind her back. (R752). The binding left a groove in her wrists. (R752). The cord used to tie Ms. Berger up was consistent with cord found at Hoskins' house. (R679).

..." She was alive when she was hit with that weapon. (R718). All of these injuries could have been spread over a course of many hours. (R720, 753).

Mrs. Berger also had injuries on the left side and back of her head. A laceration behind her ear was indicative of the same type of injury as the top of her scalp, on the left forehead area. (R724). There was "scattered bruising all over her face ... bruising down on the front of the neck and on the side of the neck as well." These bruises were caused by "blows from a fist, from knuckles and a closed fist." During this beating, Berger was alive. (R728). While still alive, she received a deep laceration on the top of her head, "down to her skull," caused by "something similar to a shovel." (R730). Many of her ribs were broken, "with the assailant on top ... and kneeling down with the knee on the chest while the strangulation is being effected." (R741, 742).[4] Various bruises, hemorrhaging and broken cartilage inside of Berger's neck indicated she was manually strangled to death. (R736-37).

Dr. Sperry said a person will lose consciousness very quickly, depending on "how hard and how much squeezing of these blood vessels is being carried out ... up to thirty seconds, but they have to continue to squeeze, though, for a period of at

[4] An elderly woman's bones will be thinner and fracture more readily than a younger woman. (R811).

least three to four minutes, because that's how long it takes the brain ultimately to die ..." (R738).

Mrs. Berger had defensive wounds on various parts of her body. (R755).[5] In addition, she had injuries to her genital area which were indicative of "a penetrating injury into the vaginal area, a forceable sexual penetration." (R772, 773). Vaginal swabs procured during the autopsy revealed the presence of sperm. (R775). Because this was a "violent sexual assault," Berger experienced "very, very, severe" psychological pain. (R775). Prior to her murder, Berger was in "very excellent health." (R779).

On cross-examination, Dr. Sperry said the injury on the top of Berger's head might have rendered her unconscious. (R782). If unconscious, he did not know if she would have regained consciousness after this injury. If she remained unconscious, she would not have felt pain during the subsequent blows she received. (R783). He could not say whether or not she was conscious when the gag was applied or if the gag was applied after she received her head injuries. (R785). In addition, he could not say when the ligature to her wrists was applied. It was his opinion that Berger had been manually strangled and not buried alive. (R790). He said, "She was clearly alive for a

[5] Although the defensive wounds could have occurred from a fall, it was "highly improbable." (R821).

significant period of time after sustaining all of the lacerations, contusions, abrasions ...” (R792). The head injuries, more than likely, occurred contemporaneously. (R815).

The sexual assault and the strangulation with the chest injuries are two different episodes that occurred “wildly apart.” (R824). The relatively small amount of blood found at the crime scene compared to blood dripping from the victim’s car is consistent with many of the victim’s injuries being inflicted after she was taken from her house. (R748; 815-16; 826-27).

Linda Peacock is Dorothy Berger’s niece. (R853). Her aunt was “a strong and independent lady ... always giggling ... kind and generous ...always there when anyone needed her.” (R853). Berger never had any children but Peacock and her brother “were very close to her ... she would help take care of us while our parents worked.” Peacock said, “She is very missed by me and many others, and we will always love her.” (R854).

Dr. Joseph Wu, M.D., studies neuropsychological disorders through brain imaging. (R893). Wu examined PET scan images conducted on Hoskins. (R900). In his opinion, Hoskins, “shows a pattern which is described as hypofrontality … pattern of activity in the frontal lobe compared to other areas of the brain … is low compared to those of typical normal controls.” (R902). Dr. Wu explained the frontal lobe area helps “to regulate and inhibit the expression of aggression ... If there

is a problem in the frontal lobe area, people are more likely to have some kind of difficulty controlling their aggression." Hoskins has a "significant impairment in the frontal lobe." (R903).

Hoskins had a history of motor vehicle accidents that resulted in head traumas and learning disabilities. (R922). Dr. Wu believes Hoskins' "frontal lobe abnormality" was present when he was a child and was exacerbated by the subsequent head traumas he suffered. (R926). The frontal lobe abnormality manifested prior to 1992. Hoskins' brain function is "very abnormal." (R927).

On cross-examination, Dr. Wu said he never conducted any tests on Hoskins, and only reviewed those conducted by Dr. Woods. (R931). He has been called to "verify" Dr. Wood's findings on several occasions. (R934).

A person with frontal lobe damage, whether mild or severe, can still plan. (R943). Not all persons with frontal lobe damage are violent criminals. (R947).

Dr. Frank Wood, a licensed psychologist in North Carolina, is a professor of neurology and neuropsychology at Wake Forest University Medical School. (R972, 974). His research is "focused on understanding brain function and brain dysfunction ... specifically targeted toward several conditions ... stroke and ... major psychopathology such as schizophrenia or depression."

In addition, he studies developmental disorders that include learning disabilities. (R973). Dr. Wood created “a reliable and usable normal data base that describes what the range of normal variation in the brain function is and ... what kinds of brain findings ... brain imaging measurements would be considered outside the normal range.” He used PET scans and MRI results to create this data base. (R978).

After reviewing written reports conducted by others, including a neuropsychological exam conducted by Dr. Krop, Dr. Wood conducted a PET scan on Hoskins. (R986). He explained, “[A PET scan is] a scan you take after injecting what’s the equivalent of radioactive sugar into the brain and body ... inject it into the bloodstream and it goes all into the body.” (R987). After forty minutes, a patient is put into a scanner and is scanned for radioactive emissions to see “how much of this radioactive sugar is still deposited in the brain and other body tissues.” (R987). Areas that contain a lot of sugar “had to take it up because they were spending energy and the cells needed more and more energy to keep doing their work.” (R988). Hoskins was very cooperative during the scan and complied with the directions given by Dr. Wood. (R990).

Subsequent to the test, Dr. Wood compared Hoskins’ PET scan results to the “normal reference data base.” (R992). Dr. Wood compared the resolution of the scanner at Jacksonville Memorial

(where Hoskins' test was performed) with the scanner at Wake Forest (where the "normal" scans were done). After finding that the scanner at Jacksonville was "only slightly" less resolute, he concluded that the findings in Jacksonville would be "somewhat less sharp by whatever amount less the resolution is" and would make adjustments. (R993).

It was difficult to print images from the scanner in Jacksonville so it was necessary to take photographs of the screen instead. (R997). Based on the PET scan images and other factors,[6] Dr. Wood opined that Hoskins' "brain is abnormal in the degree to which the front half or the frontal lobes are active ... the front half of the brain is underactive with respect to the back half of the brain against normal reference groups ..." (R1000, 1010).

Hoskins' school records reflected poor aptitude in arithmetic skills and low intelligence. He was considered for "special placement in ... an educable mentally-retarded class ..." (R1028).

[6]Dr. Wood reviewed a report prepared by Dr. Rudolph Geer, a nuclear medicine physician, a report by Dr. Gary Weiss, who conducted an EEG study, and Hoskins' school records. (R1020, 1021, 1023).

Hoskins' PET scan was conducted in 1998, but Dr. Wood believes Hoskins' brain abnormality existed prior to the 1992 murder of Mrs. Berger. (R1031).[7]

The consequences of a person with frontal lobe dysfunction experience "poor judgment, lack of restraint, and immaturity." (R1033). Hoskins' case was "very rare" due to "EEG evidence of incoherence ... the frontal lobe findings ... the history of some impulsive and hard-to-explain behavior, and the [PET] scan." (R1034).

On cross-examination, Dr. Wood said he did not conduct a psychiatric interview with Hoskins nor did he get a family medical history or conduct any neuropsychological tests prior to the PET scan. (R1038). He does not know what Hoskins' daily activities entail and has never interviewed him. (R1064).

Dr. Harry Krop, a psychologist, conducted a neuropsychological assessment on Hoskins in 1993. (R1100, 1106).[8] He assessed his overall intellectual ability and neurological functioning with regard to any impairment. (R1136). He reviewed school records, police reports and documents, and a deposition of Dr. Gary Weiss, a neurologist. (R1138). School records

[7]There was no indication of any head trauma between 1992 and 1998. (R1032).

[8]In addition, he evaluated him in 1994, 1998, and 2003. (R1108). The 2003 evaluation supported his original diagnosis of frontal lobe impairment. (R1114).

indicated that Hoskins did very poorly in school and was recommended for an "EMR" class, an "educable mentally retarded" class. His IQ score was 71 at that time. (R1139). A psychological report, at age fourteen, indicated brain damage. (R1140). At age twenty-nine, his IQ had improved to 84. (R1140-41).

Further, "in talking with Mr. Hoskins, it's apparent that he is not mentally retarded." (R1141). Hoskins' impairment is in the frontal lobe. (R1144).

On cross-examination, Dr. Krop said Hoskins has a **mild** abnormality.[9] Hoskins' actions in murdering Mrs. Berger, **which he confessed to Krop**, indicated planning. (R1170, 1173 1182). Dr. Krop opined that Mrs. Berger would have been "extremely fearful and scared" after having been raped, bound, gagged, and driven over three hundred miles from her home. (R1186).

Hoskins' frustration with his victim (when using her phone), and his estrangement from his girlfriend, contributed to his violent actions (rape and beating) and are indicative of frontal lobe impairment. His subsequent actions (putting his victim in the trunk and driving her over three hundred miles away) indicated he knew what he did was wrong and was trying to avoid detection and cover up for his crime. (R1189). Further,

[9]This is in contrast to Dr. Wu's testimony that Hoskins' brain is "very abnormal."

Hoskins did not kill Berger "because he's brain damaged, I'm saying that because of the frontal lobe impairment I believe that significantly contributed to his actions and his pattern of behavior on the day in question." The frontal lobe damage relates to the choices he made. (R1190).

The 1994 videotaped testimony of Pearl Booker was played for the jury. (R1198). Hoskins was in seventh grade when she was a counselor at his school. (R1200). Hoskins was struggling academically and, after she reviewed his history, test scores, and other available information, she determined "he did not have the skills that he needed to be able to do ... regular work as other kids did." (R1210-11). She referred him to the Special Education Unit for assessment and Hoskins was given a battery of test administered by the school psychologist. (R1211). Tests indicated Hoskins' full scale IQ was 71. (R1212). Hoskins was to be place in a class designated for educationally mentally retarded children. (R1214). He attended these classes through the tenth grade when he dropped out of school. (R1219).

On cross-examination, Booker agreed that some of the testing procedures utilized in the past may have had a "racial bias" built into the test. (R1221). Due to cultural bias, some children may have been designated mentally retarded or deficient when, in fact, they were not. She did not think this applied to Hoskins as his low scores indicated a problem. (R1223).

Sammie Hoskins is the appellant's younger brother. (R1246). Johnnie taught him how to drive and do farm work. Their house was very cold in the winter, very hot in the summer. After Johnnie moved out, he would still contribute money to the household, "to make sure ... we had something to eat at home." (R1247).

Johnnie was very loving toward his entire family. (R1249).

Jesse Balanks is Hoskins' uncle. (R1257). He lived close to Johnnie while growing up and they farmed together. (R1257). Johnnie got along well with his family, although he argued with his father sometimes. (R1259).[10]

Johnnie Mae Hoskins, defendant's mother, said he was not a problem child, he worked on farms and was paid well. (R1264, 1266). He contributed to the family financially, and helped take care of the family pets. (R1267).

Rufus Hoskins, the defendant's brother, said Johnnie "was kind of like a father figure to us." He taught his siblings many things and was not violent. They all had a very loving relationship. (R1270-71, 1272). Johnnie also had a good relationship with his father. However, Johnnie would intervene when their father became drunk and violent and would "try to calm things down." (R1273-74). Johnnie dropped out of school to work and help the family out financially. (R1276).

[10]Hoskins' father drank and argued with Hoskins' mother. (R1259).

Bob Sarver (Undersheriff) was recalled by the State. (R1419). None of the clothes line used to bind the victim had been found anywhere other than the house Hoskins had been staying in. (R677, 1419, 1421).

Karen Palladino, currently the Director of Administrative Support Services with Brevard County Schools, formerly worked with disadvantaged and minority children, as well as special education children. (R1422-23). Palladino said studies have reflected racial bias in the language sections of IQ testing conducted in the 1970's. "Disadvantaged students may not have had the experiences that more advantaged students would have had ... may not have had the resources in the home, may not have had books in the home." (R1425). In reviewing Hoskins' school records, Palladino said, "There's very little in this record that indicates he's (Hoskins) definitely a hyperactive child ... the behaviors don't stand out. A lot looks like a student experiencing academic difficulty from a disadvantaged environment; not real interested in school, having more problems with math than other areas, and usually obeyed authorities, cooperative during the evaluation." (R1429).

Palladino indicated that a person suffering from frontal lobe impairment would be "up and down" emotionally, and would show "anger bursts, not being able to show affection ... zoning

out, not having good relationships with people ...withdrawn from relationships." (R1434).

On cross-examination, Palladino agreed Hoskins school scores were all in the borderline range of intelligence. (R1438).

Dr. Helen Mayberg, M.D., a professor of psychiatry and neurology at Emory University, researches brain imaging technologies, specifically PET scans. (R1448-49). Dr. Mayberg described frontal lobe syndrome as " ... a personality change, your intelligence is fine, your ability to do all of the planning and all of the things that go on in the other parts of the frontal lobe are preserved, but suddenly you're impulsive, you pop off, you don't like something, you start screaming, you become reactive with little provocation and then settle right back down. And people have trouble planning in advance, they have trouble assessing ... the consequences of a decision ...their ability to deliberate and plan and on may of the other tests are fine." (R1459-61).

The analysis of a PET scan is conducted by comparing the scan of the subject's brain to a "normal database." (R1454). Because PET scan machines are different, the "normals" must be re-done when a new or different machine is used. (R1454-55). As Dr. Mayberg put it, "the idea is to compare apples to apples and not apples to bananas." (R1456). For the comparison of a

subject's scan to the "normals" to be valid (and for it to mean anything), it must be from the same scanner and the data must have been acquired using an identical protocol. (R1455). Hoskins' neurological exam (on the PET scan) was normal as were the results from a CT scan and an EEG. (R1494). Results from a "quantitative" EEG (conducted by Dr. Weiss) indicated a result that was "mildly abnormal." (R1494).[11] However, Hoskins' actions were not those of a person who suffers from a frontal lobe abnormality. (R1496).

In Hoskin's PET scan, one side of the visual cortex showed up as a "hot spot," which means that the metabolic rate was highest in that specific region of his brain. (R1479). Dr. Mayberg did not have enough information to determine why this occurred, but did know that one side of the visual cortex would not be "activated" (***i.e.***, showing increased metabolism) if Hoskins was following the instructions given to him for the administration of the test. (R1480-81). For the purposes of evaluation the metabolic rate of the various parts of Hoskins' brain, the relative intensity of the different areas is "scaled" relative to the "hottest" spot, which, in this case, was the visual cortex.[12] (R1482). The scale of metabolic activity is

[11] A "quantitative" EEG is different from a "regular" EEG.

[12] There was an equally hot spot in Hoskins' eye **muscles**, which, of course, are not his brain at all. (R1485).

scaled by the scanner's computer in proportion to the hottest spot, which in this case was the visual cortex and the eye muscles. (R1584). The picture of Hoskins' frontal lobe metabolic activity produced by the scanner is always going to be dependent on the hot spot in the eyes because that scale is produced based upon the "hottest pixel" in the scan. (R1485-86).[13]

Hoskins' expert, Wood, did not scan Hoskins on the machine that he used to generate his "normals," nor did he follow the procedure that he used in generating his database of "normal" scans. (R1487). Wood did not assess Hoskins' orbital frontal cortex as he did in the case of his "normal" group. (R1493). Wood did not attempt to reproduce the method he used in developing his "normal" group when he conducted Hoskins' scan, and has inadequate data on Hoskins to compare him to the "normals." (R1511).[14] The scanner used on Hoskins cannot do the same things that the scanner used to generate the "normals" can do. (R1511-12). Finally, Wood did not use the "hottest pixel" as

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[13] The State suggests that with an understanding of how the PET scanner determines the relative levels of metabolic activity in the brain, it is apparent that if one area is exceptionally active and the scanner evaluates the other areas in proportion to that active area, the other areas may be artificially depressed.

[14] The "normal" scans were done in North Carolina at Wake Forest University using s Siemens scanner. (SR 181, 671). Hoskins' scan was done in Jacksonville on a Positron scanner that is primarily used to conduct **cardiac** PET scans. (SR 40, 671).

the starting point for scaling purposes in any of the "normals" -- he **only used that method in this case**. (R1517). Not only was Hoskins' scan done on a different scanner using a different protocol from the one used to develop the "normals," but the scan of Hoskins' brain was also scaled in a totally different way. (R1517).

On cross-examination, Dr. Mayberg said that her research deals with "PET scanning, functional MRI scanning, structural MRI scanning, depression, Parkinson's disease, and post traumatic stress." (R1501). It was her opinion that Dr. Wood's conclusions were not supported by the findings. (R1519).

On July 28, 2004, the jury returned an advisory sentence of death by a vote of eleven to one. (R1702). Hoskins was sentenced to death on November 12, 2004. (R990). In its sentencing order, the trial court found the following aggravating factors:

> (1) the murder was committed during the course of a robbery, sexual battery or kidnapping;
>
> (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest;
>
> (3) the murder was especially heinous, atrocious, or cruel.

(R999-1015). The sentencing court found no statutory mitigation, but did find various non-statutory mitigators. (R1015-1028).

SUMMARY OF THE ARGUMENT

The Circuit Court properly evaluated the reasons given by

the State for a peremptory challenge which the defense alleged was "racially motivated." The conclusion by the trial court, which turns primarily on the credibility of the reasons given, is not clearly erroneous.

The trial court did not abuse its discretion in not allowing the defense to exhibit a photograph of the deceased victim to the jury during *voir dire*.

The trial court did not abuse its discretion in not giving a special jury instruction immediately prior to the testimony of the single victim impact witness. The jury was properly instructed at the close of the case, and Hoskins submitted no authority to the trial court which supported the giving of the instruction at some other time.

The trial court did not abuse its discretion in refusing to give Hoskins' "special requested jury instructions." This Court has repeatedly held that the standard jury instructions are adequate.

The trial court followed Florida law in sentencing Hoskins to death. Competent substantial evidence exists to support the aggravating circumstances found by the sentencing court, and that Court did not abuse its discretion in the assignment of weight to the various mitigation offered by Hoskins. The aggravating factors were properly found, and Hoskins' death sentence is proportional.

Hoskins' claim that his death sentence is unconstitutional under *Ring v. Arizona* fails because his death sentence is supported by his convictions for robbery, sexual battery and kidnapping, which form the basis for the during the course of a felony aggravator. Moreover, the claim that the Florida sentencing scheme violates *Ring* has been repeatedly rejected by this Court.

The trial court erroneously overruled the State's *Frye* objection to the admission of testimony concerning the PET scan. While the scan itself was apparently administered correctly, the comparison of Hoskins' scan to certain "normals" was not conducted properly, but was, instead, done in a manner that does not meet with general scientific acceptance. Testimony about the scan should not have been admitted. Likewise, the trial court improperly allowed hearsay testimony under the "learned treatise" exception. Florida law is long-settled that a learned treatise cannot be used as substantive evidence, and the trial court erred in ruling to the contrary.

ARGUMENT

I. THE JURY SELECTION ISSUE

On pages 25-38 of his *Initial Brief,* Hoskins argues that the prosecutor impermissibly used a peremptory challenge to remove an African-American from the venire. Under settled Florida law, a trial court's denial of a challenge to a peremptory strike is reviewed under the clearly erroneous standard. *Melbourne v. State*, 679 So. 2d 759, 764-65 (Fla. 1996) (stating that the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous); *Rodriguez v. State*, 753 So. 2d 29, 41 (Fla. 2000) (reaffirming that, because the validity of a peremptory challenge turns primarily on an assessment of credibility, the trial court will be affirmed on appeal unless it is clearly erroneous). The trial court properly applied that standard, and there is no basis for reversal.

When defense counsel objected to the peremptory challenge at issue (prospective juror Harp), the State gave the following reasons for that challenge:

> Judge, the reason on Miss Harp, she indicated her godson, who she indicated some bit of closeness, serving a long-term prison sentence, it was for a violent felony. She also indicated a number of other family members and friends who had been convicted, have been to prison.

> Just the total number of them causes us concern when we're here on a sentencing proceeding. It's on that basis, Your Honor, we would move to strike her.

(R504). After the pertinent portion of *voir dire* was read back, the State went on to argue:

> Judge, what Defense Counsel has done in opposition and argument against this is pick out particulars who had one person and the number of them shoplifting, the DUI, the one's [sic] we've already addressed. You know, that's much lower magnitude than, first of all, somebody's who's been to prison for a crime of violence and somebody as close as a godson.
>
> And not only in addition to that, as Miss Harp indicated she has a number of family, friends, and family members in addition to the godson, so we're not talking about one person, to her it's a number, and she's got one in prison, she's close to in prison, for a violent felony.
>
> When you put everything together, there's no one else that's even close to that, nobody else has more than a single person who's still on the panel, no one else that's even close to her, and it's for that basis -- it's certainly race neutral. We're here for sentencing and she's got obviously a number of family members and friends who have been sentenced that causes us some concerns and it's a valid use of a peremptory strike.

(R513). In ruling on defense counsel's objection, the trial court stated:

> Well, certainly the proffered reasons are neutral and reasonable. I don't think that somebody else has got somebody else somewhere who's been arrested or another family member or friend that's been convicted of a crime and therefore this is not neutral and not reasonable, I think you've got to look at the overall picture.
>
> Certainly the answers given by Mrs. Harp support the reasons proffered for the neutrality of the challenge and, you know, I just -- I can't find that the reasons

> given are pretextual; they're not, they're real. And if there's to be anything left of peremptory challenges, and I believe there is, that once the Court determines that the reasons proffered are both neutral and reasonable, which I've determined, and that the answers given in *Voir Dire* support those reasons, which they do, the Court Reporter has just read it back and confirmed it, and once the Court finds that the reasons are not pretextual as an excuse to excuse the juror for racial reasons, I think it's appropriate that the challenge be allowed and that the objection to the challenge be overruled.
>
> Had that same challenge been made of any other member of the venire who testified identically to Ms. harp, without regard to black or white or Hispanic or any other kind of group, male, female, whatever, old, young, it would have passed muster with absolutely no problem; I don't see why it should be any different here.

(R510-13). The trial court properly applied settled Florida law and found that the State's reasons for the peremptory challenge were not pretextual, but rather were genuine. That is the decision that the trial court must make in evaluating an objection to a peremptory challenge, and the trial court committed no error. *Floyd v. State*, 850 So. 2d 383, 394-95 (Fla. 2002); *Farina (Anthony) v. State*, 801 So. 2d 44, 50 (Fla. 2001); *Smith v. State*, 699 So. 2d 629, 636-37 (Fla. 1997) (rev'd on other grounds). There is no basis for relief.

II. THE "LIMITATION ON *VOIR DIRE*" CLAIM

On pages 39-45 of his *Initial Brief*, Hoskins argues that he should have been allowed to use an autopsy photograph of the victim (which was already in evidence from the guilt stage)

during *voir dire* of the jury panel. Apparently, counsel wanted to ask the prospective jurors if they would sentence Hoskins to death based on the photograph alone. (R164). The State did not object, but voiced a concern that it would be inappropriate to confront the venire with the photograph without an explanation of it from a witness. R163). The State correctly noted that the issue was within the discretion of the trial court (R163) -- settled Florida law holds that whether a trial judge should have allowed interrogation of jurors on specific subjects is reviewed under the abuse of discretion standard. *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997). The scope and content of *voir dire* will not be disturbed on appeal absent an abuse of discretion. *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998). The trial court did not abuse its discretion, and there is no basis for reversal.

Florida law is well-settled that the trial court has broad discretion in controlling the conduct of *voir dire*. *Vining v. State*, 637 So. 2d 921, 926 (Fla. 1994). In this case, as the record (and the arguments in Hoskins' *Initial Brief*) make clear, the parties conducted extensive *voir dire* -- moreover, the prospective jurors were questioned at length about the effect on "gruesome" photographs on their impartiality. *See, Initial Brief*, at 42-44 (setting out questioning). Under the facts of this case, the trial court did not abuse its discretion in not

allowing the use of photographs during *voir dire. Vining, supra.* There is no basis for reversal.

III. THE DENIAL OF THE LIMITING INSTRUCTION

On pages 46-51 of his *Initial Brief*, Hoskins argues that he is entitled to relief because the trial court denied his special requested jury instruction concerning the consideration of victim impact evidence. The issue is not that the "victim impact instruction" was not given -– it was given along with the rest of the jury instructions. (R1660). Instead, Hoskins' claim is that the instruction was given at the wrong time. Under settled Florida law, the standard of review applied to a decision to give or withhold a jury instruction is whether the trial court abused its discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that a trial court has wide discretion in instructing the jury). There is no reason that the issue contained in this case should be reviewed under a different standard.

There is no claim that the jury was not properly instructed –- the standard jury instruction was given at the close of the penalty phase.[15] In *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000),

[15] The instruction given to the jury was the one that was approved in *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995), *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), and *Farina v. State*, 801 So. 2d 44, 52-53 (Fla. 2001).

this Court approved the following jury instruction on victim impact evidence:

> Now you have heard evidence that concerns the uniqueness of Danny Parrish as an individual human being and the resultant loss to the community's members by the victim's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

Id. at 1132. In so holding, we rejected the appellant's claim that this instruction failed to give the jury adequate guidance in how to consider the evidence and also gave undue influence to the victim impact evidence by calling it to the jury's attention. *See id*. Rather, we concluded that this instruction "mirrors this Court's explanation of the boundaries of victim impact evidence and the language in the victim impact evidence statute." *Id*. (footnote omitted).

Rimmer v. State, 825 So. 2d 304, 330-331 (Fla. 2002). *See also, Bowles v. State*, 804 So. 2d 1173, 1177 (Fla. 2001) (“Bowles' eighth claim, concerning the victim impact evidence jury instruction, is without merit because the trial court properly instructed that, while the jury was allowed to hear victim impact evidence, it could not be considered as an aggravating circumstance in sentencing Bowles.”).

There is no case law that requires the jury to be instructed when victim impact evidence is received, and **Hoskins’**

counsel conceded at trial that he had no such authority for his requested instruction. (R 834). Hoskins did not make the §90.107 argument in the trial court, and has not preserved that claim for review. The trial court should not be placed in error for giving the jury instructions approved by this Court. In any event, the victim impact testimony consisted of less than **two pages** of testimony -- the jury instruction is only slightly shorter than the total amount of testimony. Even if it might have been preferable in some way to give the instruction when the victim impact witness testified, Hoskins suffered no prejudice.[16] There is no basis for relief, and Hoskins' death sentence should not be disturbed.

IV. THE "SPECIAL REQUESTED JURY INSTRUCTIONS" CLAIM

On pages 52-55 of his *Initial Brief*, Hoskins argues that the trial court committed reversible error when it denied his various "special requested jury instructions." As discussed in Claim III, above, the standard of review applied to the decision not to give a jury instruction is whether the trial court abused its discretion. *James, supra.* For the reasons set out below, there is no error.

[16] In view of the facts of this murder, there is no way that the two pages of victim impact testimony convinced the jury that Hoskins should be sentenced to death. Hoskins' own actions earned him that sentence.

Hoskins requested modified jury instructions on the following matters:

1. the available aggravating circumstances;
2. the weighing of aggravators and mitigators;
3. the heinous, atrocious or cruel aggravator;
4. the lack of need for unanimity in finding mitigation;
5. the definition of mitigation;
6. the instruction on "mental impairment" as mitigation; and
7. the instruction given when a case is remanded for resentencing.

Each of these issues are foreclosed as a matter of settled Florida law, and have been rejected by this Court numerous times -- the standard jury instructions are correct, and were properly given in this case. *Floyd v. State*, 850 So. 2d 383, 400-401 (Fla. 2002); *Darling v. State*, 808 So. 2d 145, 162-63 (Fla. 2002); *Card v. State*, 803 So. 2d 613, 624 (Fla. 2001); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997); *Ferrell v. State*, 653 So. 2d 367, 370 (Fla. 1995). Hoskins' jury instruction claim has no legal basis, and all relief should be denied.

V. THE "IMPROPER DEATH SENTENCE" CLAIM

On pages 56-80 of his *Initial Brief*, Hoskins argues that his death sentence is improper because the trial court "found improper aggravating circumstances, gave the aggravators

excessive weight, failed to consider (or unfittingly gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors." *Initial Brief*, at 56. Whether an aggravating circumstance exists is a factual finding reviewed under the competent substantial evidence standard. In *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), this Court held that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt –- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997). *See also, Pearce v. State*, 880 So. 2d 561, 574-75 (Fla. 2004).

The first subclaim contained in Hoskins' brief is that the trial court improperly gave little weight or no weight to various proffered mitigation. However, contrary to Hoskins' theory, neither the Constitution nor this Court's precedents require that specific weight be given to specific claimed "mitigation." Mitigation is, of course, in the eye of the beholder, *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983), and that is why this Court has recognized that the trial courts

are in the best position to assess the weight to be given to specific evidence in a particular case. That decision, under the precedent of this Court, is within the sound discretion of the trial court. *Boyd v. State*, 910 So. 2d 167, 193 (Fla. 2005); *Stephens v. State*, 787 So. 2d 747, 761 (Fla. 2001); *Foster v. State*, 679 So. 2d 747, 755 (Fla. 1996). This Court will sustain the weight given to a mitigator absent an abuse of discretion. *Anderson v. State*, 863 So. 2d 169, 178 (Fla. 2003). Hoskins' brief is based on nothing more than his disagreement with the assessment of his proposed mitigation -– that is not a basis for reversal under long-settled Florida law.

The second subclaim contained in Hoskins' brief is that the trial court erred in not finding "the two statutory mental mitigators." *Initial Brief*, at 62.[17] In discussing the mental mitigators,[18] the trial court stated:

This Court is well aware of the guidelines set forth

[17] On page 63 of his brief, Hoskins suggests that trial counsel was ineffective with respect to Hoskins' confession to his mental state expert, Dr. Krop. The record indicates that counsel was well aware that Hoskins had admitted his crime during his 1998 evaluation. (R1124). The "surprise" seems to have been that Krop had evaluated Hoskins again in 2003. (R1109). That information was withheld from the State until the time of trial. (R1109).

[18] Krop testified that the "full EEG [given Hoskins] is normal and the quantitative EEG is abnormal." (R1144). He had no explanation for those results. (R1144). In any event, Krop testified that Hoskins has only a "mild abnormality." (R1170). Hoskins did not murder Ms. Berger because he has "brain damage." (R1181).

in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990); for addressing mitigating circumstances. This Court must expressly evaluate in this Order each mitigating circumstance proposed by the Defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature, *i.e.* may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Rogers v. State* 511 So. 2d 526 (Fla. 1988). This Court must find as a mitigating circumstance each proposed factor that is mitigating in nature (a question of law) and has been reasonably established by the greater weight of the evidence (a question of fact). *Campbell* refers to *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) to broadly define a mitigating circumstance as any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death." 571 So. 2d at 419, n. 4.

This Court must then weigh the aggravating circumstances against the mitigating circumstances and must expressly consider each established mitigating circumstance.

Campbell held in part that a mitigating factor once found cannot be dismissed as having no weight. In *Globe v. State,* 877 So. 2d 663 (Fla. 2004), the Florida Supreme Court recognized that there may be circumstances where the evidence supports the finding of a mitigating circumstance but it is appropriate for the sentencing judge to assign no weight to it for reasons or circumstances unique to that particular case; to this extent the Court receded from *Campbell*. The relative weight to be assigned each mitigating circumstance is within the province of this Court based upon sufficient competent evidence in the record. This Court will now apply these guidelines. As agreed by counsel at the *Spencer* hearing, this Court will discuss each mitigating circumstance proposed by the Defendant in the itemized format in which they were submitted to the jury.

(1) THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS UNDER THE

INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. ' 92l.14l(6)(b), *Fla. Stat*.

Defendant asserts that he has a hypofrontal lobe abnormality which has caused him to suffer a reduced ability to control impulsive behavior, and this was a factor in his inability to control his behavior of the date of the murder.

The Defendant presented the testimony of Dr. Joseph Wu, Dr. Frank Wood, and Dr. Harry Krop. The testimony of Dr. Wu and Dr. Wood concerned the administration and interpretation of the PET-scan performed in 1998; their testimony was predicate testimony for Dr. Krop and was rebutted by the testimony of Dr. Mayberg. Their testimony enabled Dr. Krop to testify about his utilization of the PET-scan results in formulating his opinions. Dr. Krop's involvement with the Defendant and with this case dates back to 1993. He first evaluated the Defendant on October 18, 1993, and thereafter saw him twice in 1994, once in 1998, and a final time on July 29, 2003. He had the police reports, all of the Defendant's relevant records and the relevant depositions taken in this case. He consulted with Dr. Weiss who did a neurological evaluation of the Defendant. He reviewed the PET-scan report and consulted with Dr. Wood. He conducted clinical interviews of the Defendant and gave the Defendant a battery of neurological tests in 1993 and a more sophisticated battery of neurological tests in 2003. In 1993, he diagnosed the Defendant as having a hypofrontal lobe abnormality and his diagnosis remains basically the same today. The PET-scan done in 1998 and the. additional testing done in 2003 added support to his diagnosis but really did not change his diagnosis in any way.

This Court finds that the Defendant does have a hypofrontal lobe abnormality; this Court further finds that hypofrontal lobe abnormality can result in a reduced ability to control 'impulsive behavior. This Court further finds that the Defendant's hypofrontal lobe abnormality has existed since long before October 1992, and probably existed prior to his being in the seventh grade as vaguely alluded to in his school records. These findings do not address the questions necessary to analyze this mitigating circumstance:

(1) Is the Defendant's condition an extreme mental or emotional disturbance? (2) Was he under the influence of it when he murdered Dorothy Berger? If either of these questions is negatively answered, then, this mitigating circumstance is not established. This Court finds that both questions must be negatively answered.

Absent some trauma or disease process, the Defendant's hypofrontal lobe abnormality is a static organic condition. Even though the condition exists, all the evidence indicates that it is not a mental or emotional disturbance, much less an extreme mental or emotional disturbance. Pearl Booker, a school counselor who worked with the Defendant in the seventh grade, testified that her own recollection was that the Defendant had no disciplinary problems in elementary school, that in middle school he was very quiet and not a troublemaker, and that this is supported by the school records. His family members testified that he loved pets, that he was like a father figure to his brothers, that he loved all of his family members, that he always gave half his earnings to the family, and that he taught his brothers how to fish, how to ride a bike, how to be a good basketball player, and how to farm and operate farm equipment. When there were. physical confrontations between his mother and father, the Defendant would step in between them to protect his mother. This is hardly a description of one given to violent episodes or any other manner of emotional disturbance. It is hardly a description of one suffering from a reduced ability to control impulsive behavior.

Dr: Krop tested the Defendant in 2003 and diagnosed the same abnormality as he had diagnosed in 1993. Chief Assistant Public Defender J. Randall Moore, Esquire, represented the Defendant from the start of this case until early in 2004. He testified on the Defendant's behalf at the *Spencer* hearing. He said the Defendant was originally a difficult, hostile, and angry client who had a chip on his shoulder, but after this case was remanded in 1997 Mr. Moore made an unannounced visit to the Defendant on death row. He found a changed person who he described as calm, mellow and pleasant who no longer acted as if he had a

chip on his shoulder. How is the change explained if the Defendant's frontal lobe abnormality had not changed? There is no explanation in the evidence. The fact that Defendant may have been a difficult, hostile, and angry client who acted like he had a chip on his shoulder, without more, is not evidence that Defendant suffered from a reduced ability to control impulsive behavior or suffered from any other manner of emotional disturbance.

This Court has thoroughly reviewed Defendant's DOC disciplinary records. Defendant was sentenced and remanded to death row on November 4, 1994, so his DOC disciplinary records cover a period of almost ten years. There are twelve Disciplinary Reports, none of which contain any information that remotely suggests the Defendant suffers from a reduced ability to control impulsive behavior or from any manner of emotional disturbance.

Even if the Defendant's hypofrontal lobe abnormality is regarded as a mental or emotional disturbance, and even if it is thought to be extreme, the testimony is clear that the Defendant was not under its influence at the time of the murder. Dr. Krop, in referring to a letter he wrote to Mr. Moore; unequivocally stated that he would not have been ab1e to directly relate the neuropsychological impairment to the incident itself. He went on to say, "In other words, I am not indicating that because he has brain damage he killed this woman." (page 1181). Dr. Krop again states that there is no direct relationship, no causal relationship between the brain damage and the murder. (p1190).

Dr. Krop does opine that the Defendant's actions in Ms. Berger's home were very consistent with people with frontal lobe abnormality (page 1189) and he characterized these actions in her home as a "rage reaction." (page 1190). However, this mitigating circumstance is not being urged with regard to the Defendant's actions in Ms. Berger's home; it is being urged with regard to the murder. After analyzing the events in Ms. Berger's home, Dr. Krop negated the applicability of this mitigating factor by stating, "The rest of what happened is pretty much consistent with an individual who has already engaged in an act

which he knows is wrong and trying to both avoid detection and trying to cover up for his crime." (page 1189).

Dr. Krop's testimony is wholly consistent with Defendant's behavior immediately following the murder. He returned to his parents' home and changed his clothes; there is no evidence that he was agitated or disturbed or in any way acting out of the ordinary. He drove to his brother's home; he responded to his brother's inquiry about the blood dripping from his rear wheel well by telling his brother that he had run over a possum. There is no evidence that he was agitated or disturbed or in any way acting out of the ordinary.

This Court finds that this mitigating factor does not exist.

2) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREEMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED. ' 921.141(6)(f), *Fla. Stat*.

The Defendant in his Sentencing Memorandum argues that:

> Mr. Hoskins did not have the mental and emotional maturity to govern and control his conduct and impulses on that tragic day. Like a child, once he began to engage in the terrible acts for which he has been convicted, he was unable to stop his conduct and extricate himself from the situation . . . Having committed the sexual battery on Ms. Berger, his actions are certainly more consistent with a child-like panicked reaction as opposed to a well thought out plan to eliminate witnesses and avoid arrest and detection.

There may be evidence to support this argument with regard to the rape, but there is simply no evidence to support this argument with regard to the murder. Dr. Krop's testimony is that after the sexual battery, "The rest of what happened is pretty much consistent

> with an individual who has already engaged in an act which he knows is wrong and trying both to avoid detection and trying to cover up for his crime. (page 1189) When questioned about the Defendant's purpose in binding and gagging Ms. Berger and stuffing her in the trunk of the car, Dr. Krop testified that "I presume the purpose was to avoid detection and to get away from the scene as quickly as he could without being detected." (page 1176). With regard to the drive to Georgia, Dr. Krop testified, "Well, he's driving. He's trying obviously - again, by this point he knows he's done something and he's trying to avoid detection." (page 1177).
>
> Defendant argues that his frontal lobe abnormality supports this mitigating circumstance. The Court's above analysis of mitigating factor (1) is equally applicable here.
>
> The Court finds that this mitigating factor does not exist.

(R1015-1021).

There is, of course, no requirement that the sentencing court credit mitigation testimony, regardless of whether it is factual testimony or expert opinion. *Walls v. State*, 641 So. 2d 381 (Fla. 1994). In fact, a trial court is not bound to accept opinion testimony even when that testimony is uncontroverted, a situation that does not exist here. While Drs. Wu, Wood, and Krop testified to various matters, that testimony was challenged by the testimony of Dr. Mayberg, who succinctly identified multiple deficiencies in the theory and methodology upon which Hoskins' experts relied. In this case, as the sentencing court found, the facts do not support the claimed mental mitigation. Because that is so, it was properly given little weight.

The third subclaim contained in Hoskins' brief is a straightforward claim that the mitigation outweighs the aggravation. Under settled Florida law, this Court does not evaluate the weight that should be given to aggravation and mitigation. *Pearce, supra.* This claim is merely a repetition of the first subclaim contained in this issue. It has no greater merit in this form, and is not a basis for relief.

Hoskins also claims that "two inappropriate aggravating circumstances" were found. Specifically, he claims that the murder was not committed to avoid arrest and was not especially heinous, atrocious or cruel. In finding these aggravating factors, the sentencing court discussed the evidence in detail, and properly applied both aggravating factors.[19]

With respect to the avoiding arrest aggravator, this Court has upheld the application of that aggravating factor in a case that is virtually identical to this one. In *Nelson v. State*, 850 So. 2d 514, 525 (Fla. 2003), the victim was abducted from her home and ultimately taken to a remote area and killed. This Court affirmed the avoiding arrest aggravator. Likewise, the facts of *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), are substantially identical to these facts –- this Court upheld the avoiding arrest aggravator in that case, as well. Settled

[19] The trial court's sentencing order is extremely detailed. It is attached as Appendix A for the convenience of the Court, and is found in the record beginning at R990.

Florida law supports the application of the avoiding arrest aggravator, as the sentencing court found. There is no basis for relief.

With respect to the heinousness aggravator, the findings of the trial court establish that the facts of this case satisfy even the strictest definition of this aggravating factor. In *Duest v. State*, 855 So. 2d 33, 45-46 (Fla. 2003), this Court upheld the application of the heinousness aggravator in a case that was, if anything, somewhat less heinous, atrocious or cruel than this one. The heinousness aggravator was properly found, and there is no basis for relief.[20]

Hoskins does not directly address the proportionality of his death sentence in his brief. Hoskins' crime is similar to *Nelson v. State,* 850 So. 2d 514 (Fla. 2003); *Belcher v. State,* 851 So. 2d 678 (Fla. 2003*);* and *Israel v. State,* 837 So. 2d 381 (Fla. 2002), where this Court affirmed the sentences of death. If anything the facts of this case are even more aggravated. Death is the proper sentence.

VI. THE UNCONSTITUTIONAL DEATH PENALTY STATUTE CLAIM

On pages 81-87 of his brief, Hoskins argues that the Florida death penalty act is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The problem for Hoskins with this

[20] To the extent that Hoskins suggests that there is an "intent element" to the heinousness aggravator, that is not the law. *Guzman v. State,* 721 So. 2d 1155, 1160 (Fla. 1998).

claim is that his convictions for robbery, sexual battery and kidnapping, which formed the basis of the during the course of an enumerated felony aggravator, take his case outside of any possible applicability of *Ring*. *See, Fitzpatrick v. State*, 900 So. 2d 495, 525 (Fla. 2005); *Crain v. State*, 894 So. 2d 59, 78 (Fla. 2004); *Huggins v. State*, 889 So. 2d 743, 772 (Fla. 2004); *Rodgers v. State*, 29 Fla. L. Weekly S724 (Fla. Nov. 24, 2004). Moreover, this Court has specifically rejected the claim that Florida's statute violates *Ring*. *Fitzpatrick, supra; Huggins, supra.* This claim has no merit, and is not a basis for relief.

STATE'S CROSS-APPEAL

THE TRIAL COURT IMPROPERLY ADMITTED THE "PET-SCAN" EVIDENCE

PRELIMINARY MATTERS

During the history of this case, Hoskins has been repeatedly evaluated by Dr. Krop, whose supposed "changed testimony" led to the resentencing proceeding which was concluded in November of 2004. What is significant is that the ultimate sentencing order summarized Dr. Krop's findings in the following way:

> Dr. Krop's involvement with the Defendant and with this case dates back to 1993. He first evaluated the Defendant on October 18, 1993, and thereafter saw him twice in 1994, once in 1998, and a final time on July 29, 2003. He had the police reports, all of the Defendant's relevant records and the relevant depositions taken in this case. He consulted with Dr.

> Weiss who did a neurological evaluation of the Defendant. He reviewed the PET-scan report and consulted with Dr. [Frank] Wood. He conducted clinical interviews of the Defendant and gave the Defendant a battery of neurological tests in 1993 and a more sophisticated battery of neurological tests in 2003. In 1993, he **diagnosed the Defendant as having a hypofrontal lobe abnormality and his diagnosis remains basically the same today. The PET-scan done in 1998 and the additional testing done in 2003 added support to his diagnosis but did not really change his diagnosis in any way.**

(R1016-17). [emphasis added]. It is ironic indeed that Hoskins obtained a resentencing proceeding (and the attendant years of delay) based upon the claim that Dr. Krop's testimony would "change," only to find that Krop's diagnosis did not change at all.[21]

THE STANDARD OF REVIEW

The standard of review for a *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), issue is *de novo, Brim v. State*, 695 So. 2d 268, 275 (Fla. 1997), *Hadden v. State*, 690 So. 2d 573, 579 (Fla. 1997) (noting specifically" that "the appropriate standard of review of a *Frye* issue is *de novo*"), *Berry v. CSX Transp., Inc.*, 709 So. 2d 552, 557 (Fla. 1st DCA 1998), and, when undertaking such review, the appellate court should consider the issue of general acceptance at the time of appeal rather than at

[21] This result calls into question the integrity of the proceedings that addressed the "change" in Krop's testimony. What is done cannot be changed, but it does, nonetheless, suggest that the evidence upon which this Court relied to order a resentencing proceeding was, at the very least, inaccurate.

the time of trial. *Hadden, supra.* The appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination. *Hadden, supra*.

THE FACTS RELEVANT TO THE CROSS-APPEAL

Despite the fact that the *Frye* hearing in this case was conducted over a period of several months and consumes 1700 pages of transcript, the issue is very narrow. There is not, and never has been, any dispute that the PET scan procedure, when correctly conducted, will produce images of the brain which indicate the level of metabolism in the distinct regions of the brain. There is no claim, in this case, that the PET scan conducted on Hoskins was not conducted properly from a technical standpoint. Likewise, the State does not contend that a properly conducted **and interpreted** PET scan is not able to detect a "hypofrontal lobe abnormality."[22]

Dr. Helen Mayberg is a neurologist who has extensive clinical and research experience with the PET scan. (R1448-1453).[23] She was accepted as an expert in the areas of

[22] The PET scan uses radioactive glucose (sugar) to measure the level of metabolism in the brain's regions. If a region is "hypometabolic" it has a lower metabolism than a "normal" brain would have. **The issue is what is "normal."**

[23] For purposes of this appeal, the State has primarily referred to Dr. Mayberg's penalty phase testimony because it is far more succinct than the *Frye* hearing testimony, and because it is properly relied on by this Court in the *Frye* analysis since that

psychiatry, neurology, neuropsychiatry and PET scanning without objection. (R1453). The analysis of a PET scan is conducted by comparing the scan of the subject's brain to a "normal database." (R1454).[24] Because PET scan machines are different, the "normals" must be re-done when a new or different machine is used. (R1454-55). As Dr. Mayberg put it, "the idea is to compare apples to apples and not apples to bananas." (R1456). For the comparison of a subject's scan to the "normals" to be valid, it must be from the same scanner and the data must have been acquired using an identical protocol.[25] (R1455). **No other expert has ever testified that this is not the standard of practice.**

In Hoskin's PET scan, one side of the visual cortex showed up as a "hot spot," which means that the metabolic rate was highest in that specific region of his brain. (R1479). Dr. Mayberg did not have enough information to determine why this occurred, but it indicated to her that one side of the visual cortex would not be "activated" (*i.e.*, showing increased metabolism) if Hoskins was following the instructions given to

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testimony is four years newer than the *Frye* hearing. References to the *Frye* hearing are clearly indicated.

[24] This database is legally analogous to the database used in DNA analysis.

[25] Dr. Wood stated that it was impossible to print the images off the scanner in Jacksonville; as a consequence, it was necessary to take "photographs" of the images on the screen. (R997).

him for the administration of the test. (R1480-81). For the purposes of evaluating the metabolic rate of the various parts of Hoskins' brain, the relative intensity of the different areas is "scaled" relative to the "hottest" spot, which, in this case, was the visual cortex.[26] (R1482). The scale of metabolic activity is set by the scanner's computer in proportion to the hottest spot, which in this case was the visual cortex and the eye muscles. (R1584). The picture of Hoskins' frontal lobe metabolic activity produced by the scanner is always going to be dependent on the hot spot in the eyes because that scale is produced based upon the "hottest pixel" in the scan. (R1485-86).[27] **No testimony to the contrary was offered.**

Hoskins' expert, Wood, did not scan Hoskins on the machine that he used to generate his "normals," nor did he follow the procedure that he used in generating his database of "normal" scans. (R1487). Wood did not assess Hoskins' orbital frontal cortex as he did in the case of his "normal" group. (R1493). Wood did not attempt to reproduce the method he used in

[26] There was an equally hot spot in Hoskins' eye **muscles**, which, of course, are not his brain at all. (R1485).

[27] The State suggests that with an understanding of how the PET scanner determines the relative levels of metabolic activity in the brain, it is apparent that if one area is exceptionally active and the scanner evaluates the other areas in proportion to that active area, the other areas may be artificially depressed.

developing his "normal" group when he conducted Hoskins' scan, and has inadequate data on Hoskins to compare him to the "normals." (R1511).[28] The scanner used on Hoskins cannot do the same things that the scanner used to generate the "normals" can do. (R1511-12). Finally, Wood did not use the "hottest pixel" as the starting point for scaling purposes in any of the "normals" -- he **only used that method in this case**. (R1517). Not only was Hoskins' scan done on a different scanner using a different protocol from the one used to develop the "normals," the scan of Hoskins' brain was scaled in a totally different way. (R1517).[29]

THE COMPARISON OF HOSKINS' SCAN TO THE "NORMALS" DOES NOT SATISFY *FRYE*

In the context of DNA statistical analysis, this Court held:

We restate the relevant language from *Frye*:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the

[28] The "normal" scans were done in North Carolina at Wake Forest University using a Siemens scanner. (SR181, 671). Hoskins' scan was done in Jacksonville on a Positron scanner that is primarily used to conduct **cardiac** PET scans. (SR40, 671).

[29] This different sealing process guaranteed that Hoskins' scan would not look like the "normal" scans.

> deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> 293 F. at 1014 (emphasis added). We reiterate that we should not treat population frequency statistics as an extension of the first step in the DNA testing process. Those statistics are a distinct step in the DNA testing process. The district court reasoned incorrectly when it found that both statistical reporting methods in this case were admissible because the chemical and biological techniques used in the first step of the DNA testing process satisfied the Frye test. *See Brim*, 654 So. 2d at 187. It is improper to label calculations created with principles of statistics and population genetics as simply deductions from a methodology based on chemistry and molecular biology. The district court's result, however, is correct. We may allow multiple reasonable deductions when all are based on generally accepted principles of population genetics and statistics. At the time this case was tried, processes that did not utilize the "ceiling principles" might not have satisfied the *Frye* test because those calculations did not take into account the possibility of population substructures. A sizeable portion of the scientific community speculated that failure to account for population substructures made "product rule" statistics unreliable. In 1996, that view changed and, therefore, the "ceiling principles" are no longer necessary. We do not find, though, that they are unreliable. While the results obtained through the use of "ceiling principles" might be unduly conservative, the scientific principles underlying the calculations are still generally accepted. By analogy, the fact that we now have calculators does not make long-hand arithmetic unreliable. If anything, calculators only make such longhand work unnecessary. Necessity, though, is not the concern of the *Frye* analysis. [footnote omitted].

Brim v. State, 695 So. 2d 268, 273 (Fla. 1997). For analytical purposes, Wood’s “normals” are the legal equivalent of the population frequency statistics at issue in *Brim*. As in *Brim*,

the physical administration of the procedure (the PET scan) and the science underlying it is not at issue -- the real issue, which the Circuit Court misapprehended, is the scientific validity of the **interpretation of those results**. The true facts are that Hoskins has not produced any evidence, let alone a preponderance of the evidence, that the procedure used in comparing Hoskins' scan to the "normals" is scientifically acceptable to anyone other than Wood himself. Stated differently, Hoskins did not show that it is reliable and generally accepted in the scientific community to compare scans as was done in this case.[30] That is the standard that he must meet, and the Circuit Court was wrong when it found that Hoskins had carried his burden of proof.

In addition to the invalid comparison between Hoskins' scan and the "normals," which is an independently adequate basis for exclusion of the PET scan results, Hoskins did not establish that even assuming his frontal lobe is hypometabolic, that fact establishes some propensity for violent behavior. There is no

[30] The *Textbook of Neuropsychiatry* emphasizes the limitations of PET scans and emphasizes the same variables that Dr. Mayberg described. Robin A. Hurley, M.D., L. Anne Hayman, M.D. & Katherine H. Taber, M.D., *Clinical Imaging in Neuropsychiatry, in* Textbook of Neuropsychiatry and Clinical Neurosciences 245, 295-96 (Stuart C. Yudofsky, M.D. & Robert E. Hales, M.D. ed., 4th Ed., 2002). Drs. Wu and Wood refused to recognize the limitations, despite the fact that those limitations are well-known.

"violence spot" in the brain that can be identified by any currently-existing process. (SR 1029, 1036). And, contrary to the arguments advanced at the *Frye* hearing, none of the scientific articles (which came into evidence under the "learned treatise" exception) support Hoskins' position, assuming they were properly admitted in the first place. A review of those articles does not lead to the conclusion that there is any general scientific acceptance of the idea that a particular PET scan pattern is predictive of violent behavior. (SR 301, 319, 327, 1238). Any contrary conclusion is, with all due respect, science fiction.[31]

Finally, the few reported decisions on the issue hold that, for forensic purposes such as these, the PET scan does not satisfy *Frye*. *See, Clemons v. State*, 2005 Ala. Crim. App. LEXIS 128 n. 5 (June 24, 2005); *Lamasa v. Bachman*, 8 Misc. 3d 1001A (N.Y. Apr. 13, 2005); *United States v. Gigante*, 982 F. Supp 140 (E.D.N.Y. 1997). The State does not dispute that the PET scan is a valuable tool in the context of patients suffering from Alzheimer's Disease, stroke, or dementia.[32] (R1525; SR908, 1034-

[31] Interestingly enough, the study conducted by Dr. Raine consists of nothing more than blatant experimentation on prisoners without compliance with the relevant guidelines. See, http://grants2nih.gov/grants/policy/hs/prisoners.htm Conducting a PET scan on Hoskins is only slightly less egregious.

[32] The American College of Radiology has produced "Appropriateness Criteria" for the use of various neuroimaging in head trauma

35 1093, 1177). However, there is no scientific basis for the leap from those situations to the amorphous, non-specific "prediction of violence" context of this case. Even putting aside the defects in the comparison of Hoskins' PET scan to the "normals," there is no generally accepted scientific opinion that there is a "murderer" profile that can be identified by a PET scan. The Circuit Court erred when it held the PET scan evidence admissible.

THE CIRCUIT COURT IMPROPERLY ALLOWED HOSKINS' WITNESSES TO BOLSTER THEIR TESTIMONY

The majority of the testimony offered by Hoskins at the *Frye* hearing consisted of his various experts reading from various professional journals and asserting that the opinions contained in those articles (which reported the results of various experiments) supported their opinions relative to this case. All of this testimony came in over the State's objection that the testimony was hearsay. (SR182). The Circuit Court was wrong when it overruled the State's objection.

Despite the evident confusion over the applicability of § 90.706, *Fla. Stat.*, to a *Frye* hearing, Florida law is settled that a "learned treatise" is not admissible as substantive

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cases. The PET scan has a role that is described as "complementary," but is never ranked as the "most appropriate" procedure -- it is invariably the **least appropriate**. Appendix B. there seems to be no "general acceptance" that the PET scan is appropriately used in head trauma cases (which Hoskins claims to have).

evidence. *See, Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 4th DCA 1993); *Chorzelewski v. Drucker*, 546 So. 2d 1118 (Fla. 4th DCA 1989). Instead, Florida law restricts the use of a learned treatise to cross-examination only. *See,* § 90.706, *Fla. Stat.* When used as substantive evidence (as is the case here), a treatise is hearsay that does not come within any exception. *See,* § 90.803, *Fla. Stat.*[33] The fact that the treatises at issue in this case were used in the context of a *Frye* hearing does not make any difference -- the Rules of Evidence still apply, and the trial court ignored them.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the sentence of death. With respect to the Cross-Appeal, the State submits that the PET scan was erroneously admitted into evidence.

Respectfully submitted,

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[33] *Federal Rule of Evidence* 803.18 contains a learned treatise exception -- the Florida rules do not.

CERTIFICATE OF SERVICE

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

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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