IN THE SUPREME COURT OF FLORIDA

JOHNNIE HOSKINS,	)	
	)	
	)	
Appellant/Cross Appellee,	)	
	)	
vs.	)	CASE NUMBER SC05-28
	)	
STATE OF FLORIDA,	)	
	)	
Appellee/Cross Appellant	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF CROSS-APPELLEE

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SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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	)	
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_____	)	

SUMMARY OF THE ARGUMENT

The state of Florida has completely failed to preserve the issue at the penalty phase below. Although there was a lengthy pretrial hearing, at the trial proceedings, the state failed to renew their objection. Although the prosecutor successfully objected to certain aspects of the testimony, the state failed to object on the same grounds raised at the pretrial hearing and maintained by the assistant attorney general on appeal. In fact, the state affirmatively waived any objections to the PET scan evidence at trial. The prosecutor stipulated to the qualifications of appellant's expert witnesses and the admissibility of the PET scan evidence.

PET scans are not a new or novel scientific principle. They have been previously recognized in reported cases as early as 1992. Additionally, the

preponderance of the evidence established the admissibility of the PET scan testimony and evidence. In fact, the state does not contest the scientific community's acceptance of the PET scan procedure. Instead, the state takes issue with the method employed by Dr. Wood in interpreting PET scans. The state also takes issue with the contention that future behavior can be predicted by a PET scan.

It is therefore clear that the state's objections go to the weight of the evidence rather than the admissibility. The jury heard from numerous experts. The state's expert informed the jury of the state's criticism of the defense experts and conclusions. The jury was free to reach their own informed decision.

Since the PET scan evidence was admitted at a penalty phase, this Court should allow broader latitude. A capital jury's consideration of mitigating circumstances cannot be limited in any way. Florida Statutes provide a more lax standard of admissibility at a penalty phase.

Finally, any possible error was clearly harmless. The jury recommended death by an almost unanimous (11to 1) vote. The trial court accommodated the state by imposing death.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE PET SCAN EVIDENCE.

Preliminary Matters

Hoskins initially wishes to take issue with the state's characterization of the history of this case, specifically the criticism of the delay. In the early 1990s when this case first commenced, the Office of the Public Defender was ready, willing, and able to pay for a Positron Emission Tomography Scan (PET-scan). Hoskins requested only that the judge sign an order authorizing his transport for the test. ***Hoskins v. State***, 702 So.2d 202, 208-9 (Fla. 1997). The trial court declined to sign the order and this long appellate drama began.

Contrary to the state's assertion, the issue never was whether Dr. Krop might "change" his testimony. As this Court stated in its original opinion, "...Dr. Krop proffered that the Pet-Scan was necessary for him to render a **more definitive opinion** regarding Hoskins' mental condition, and he recommended that the test be performed." ***Hoskins v. State***, 702 So.2d at 209. (Emphasis added.) Following remand, the state **conceded** that Dr. Krop's testimony "changed". ***Hoskins v. State***, 735 So.2d 1281 (Fla. 1999) As Dr. Krop consistently testified and as the

trial court's sentencing order clearly states, the PET scan "added support" for Dr. Krop's diagnosis. (R 1017)

It is clear that Dr. Krop's testimony did, in fact, change. The PET scan results allowed Dr. Krop to be more certain of his diagnosis that Hoskins suffered a hypofrontal lobe abnormality. Although Dr. Krop's diagnosis did not change, his testimony did. The state seems to be confusing the two.

Standard of Review

Hoskins submits that the standard of review is not *de novo* as the state contends. As the assistant attorney general clearly states at page 44 of his brief:

> There is not, and never has been, any dispute that the PET scan procedure, when correctly conducted, would 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."

The state clearly concedes that PET scans fall within the realm of general acceptance in the scientific community, even for the purpose used below. Therefore, Hoskins submits that the proper standard of review is whether the trial court abused its discretion in admitting the evidence at the penalty phase. An appellate court will not overturn a trial court's decision to admit such evidence in

the absence of a clear abuse of discretion. ***Sims v. Brown***, 574 So.2d 131 (Fla. 1991).

The State Failed to Preserve this Issue for its Cross-Appeal Where There was No Contemporaneous, Specific Objection to the PET Scan Evidence nor Testimony and the State Stipulated to the Admissibility

In order to preserve this issue for appeal, the state was required to interpose a specific contemporaneous objection to the evidence and/or to testimony. ***Clark v. State***, 363 So.2d 331(Fla. 1978) Even though there was an extensive pretrial hearing on the admissibility of this evidence, the state cannot bootstrap their concern at that hearing to alleviate the requirement of a contemporaneous objection. ***See, e.g., Teffeteller v. State***, 495 So.2d 744(Fla. 1986)["appellant cannot bootstrap this concern over the voir dire issue to alleviate the requirement of a contemporaneous objection."]

The record on appeal from the penalty phase retrial reflects no specific nor contemporaneous objection to the testimony of appellant's experts nor the physical evidence gleaned from the PET scan. In fact, the state specifically stated its lack of objection at every turn. By the time trial rolled around, the prosecutor may have made a strategic decision to allow the jury to hear the testimony and view the PET Scan evidence.

When Hoskins called Dr. Wu as his first witness at the penalty phase, the state did object to certain portions of Dr. Wu's presentation. Specifically, there was a lengthy discussion about reliance on different "normals" as well as the power point demonstration incorporating various learned treatises. (XI 872-93) In accordance with the state's objections, Dr. Wu modified his presentation somewhat and the testimony was presented without the state renewing its objection to the scientific reliability of the PET scan evidence. In fact, the state stipulated to Dr. Wu's qualifications as an expert in the fields of PET scans and neuropsychology. (XI 896) The trial court expressly stated that Dr. Wu would be allowed to express opinions in the those areas and the state failed to object.

Dr. Wood was the second witness called by the defense at the penalty phase. The state interposed an objection to new "normals" that Dr. Wood had compiled. The state objected on **that** basis, **not** to the scientific reliability or acceptance. (XI 967-68) After a brief pause, the parties reached a resolution and **the state specifically agreed on the record to the evidence being introduced.** (XI 968)

Dr. Wood was accepted by the court as an expert and allowed to express opinions in the area of brain imaging and neuropsychology without objection from the state. (XI 986) The state did appear to object to Dr. Wood expressing opinions about the evaluation of school records and this objection was sustained. (XI 983-

85) The only other objection to Dr. Wood's testimony was an oral motion in limine that he not mention that he is an ordained Baptist minister. (XI 969) The trial judge agreed with both parties that Wood's status as a minister was irrelevant.

The PET scan images to which the state took great exception at the ***Frye*** hearing, were admitted into evidence at the penalty phase with an affirmative waiver of, "No objection" by the prosecution. (Defense exhibits 1-13; XI 901) and (Defense exhibits 14-22; XI 998-999) The record clearly reflects that this issue has not been preserved for this Court to review.

PET Scans are Not a "New or Novel" Scientific Principle.

When expert testimony relies upon new or novel scientific evidence, the proffering party must demonstrate the methodology or principle has sufficient scientific acceptance and reliability in the particular field in which it belongs. ***Frye v. United States***, 293 Fed.1013, 1015 (D.C. Cir. 1993) Unanimous scientific consensus is not required for a finding of general acceptance. Merely counting a majority of the members of the relevant scientific community is not controlling. This court must also consider the quality of the evidence supporting or opposing the principle. ***Brim v. State***, 695 So.2d 268 (Fla. 1997).

PET scans have been around for decades and have been dealt with in various jurisdictions as far back as the early 1990s. ***See, e.g., People v. Weinstein***, 156

Misc. 2d 34, 591 N.Y.S. 2d 715(1992) This Court has dealt with the issue, not only in the prior decisions in this very case, but also in ***Rogers v. State***, 783 So.2d 980, 997 n.5 (Fla. 2001). In response to a state argument that a PET Scan failed to satisfy ***Frye***, this Court stated:

> Moreover, contrary to the State's assertions, the United States Court of Appeals for the Eighth Circuit has determined that "[t]here is also no question that the PET scan is scientifically reliable for measuring brain function." ***Hose v. Chicago Northwestern Transp. Co.,*** 70 F.3rd 968, 973(8th Cir.1995).

This Court has previously recognized that PET scans appear in cases reported as early as 1992. ***Davis v. State***, 742 So.2d 233, 237(Fla. 1999). Because PET scan testimony has been admitted in Florida and other jurisdictions, the concept is no longer a new or novel scientific principle subject to a ***Frye*** analysis. ***See, e.g., Johnson v. State***, ___So.2d ____, 2006 WL 1095844, (Fla. 1st DCA April 27, 2006)[Shaken Baby Syndrome testimony has been admitted in Florida and in other jurisdictions and is no longer a new or novel scientific principle subject to ***Frye*** analysis.]

The Preponderance of the Evidence Established that the PET Scan Evidence Should be Admissible.

The state does not contest the scientific community's acceptance of the PET

scan procedure. Rather, the state takes issue with the method employed by Dr. Wood in interpreting the PET Scan in this case, specifically, Dr. Wood's comparison of Hoskins' brain scan on one machine as compared to the "normals" obtained on a different machine. The state also takes issue with the contention that a "violence spot" in the brain can be identified by a PET scan. State's brief, pp 49-50.

The record contains an extraordinary amount of evidence that establishes by a preponderance of the evidence, at the very least, that the methods employed by Dr. Wood in reading and interpreting Mr. Hoskins' PET scan is accepted within the scientific community. At the conclusion of the evidence portion of the ***Frye*** hearing below, the trial court synthesized the issues: (1) a properly administered PET scan provides an accurate picture of the sugar metabolism of the targeted area of the brain; (2) psychiatric disorders may be based on organic brain disorders; (3) there are recognized correlations between frontal lobe deficits and behavior; and (4) comparing the activity in one area of the brain to the rest of the brain as compared as to a group of normals is helpful in determining brain deficits. (SR X 1638-42)

The state below conceded all of the aforementioned conclusions but for the final one. Other than Dr. Mayberg, all of the experts who had sufficient expertise

in the area agreed that all of the above statements were clearly established and accepted by the scientific community. The sheer weight of the testimony at the ***Frye*** hearing certainly establishes a preponderance of evidence to support the trial court's ruling.

The State's Complaints About the Admissibility of the PET Scan go to the Weight of the Evidence Rather Than its Admissibility.

The state's objections to the evidence clearly reflect that the state's objections to the PET scan go to the weight of the evidence rather than the admissibility. After hearing from appellant's three expert witnesses, the jury also heard from Dr. Mayberg who was called by the state. The jury heard Dr. Mayberg testify at great length. She challenged the methodology used and conclusions reached by Mr. Hoskins' experts. (XIV 1447-1540) The jury was free to weigh the evidence and reach their own conclusions.

Even if There Were Error Below, It is Utterly Harmless in Light of the Jury's Almost Unanimous (11 to 1) Recommendation that Hoskins Should Die for his Crimes.

Counsel almost feels compelled to concede the issue raised in the state's cross-appeal. Counsel would so concede, if Hoskins would be guaranteed a new penalty phase. Hoskins would cheerfully make this concession, even if PET scan

evidence were precluded at the new trial. As this Court can plainly see, the state was not hindered in their quest for a jury recommendation and sentence of death. It is therefore abundantly clear that any so-called error was utterly harmless.

The PET Scan Evidence Was Properly Admitted Where the Proceeding Was a Penalty Phase

During a capital trial, the jury's consideration of mitigating circumstances cannot be limited in any way. Any mitigating circumstance can be considered in support of a life sentence. ***Eddings v. Oklahoma***, 455 U.S. 104(1982). A trial court cannot restrict consideration of nonstatutory mitigating factors. ***Mills v. Maryland***, 486 U.S. 367 (1988). Unlike aggravating circumstances, mitigating circumstances need not be proved beyond a reasonable doubt. ***Campbell v. State***, 571 So.2d 415, 419 (Fla. 1990)

Section 921.141(1), Florida Statutes states, in part:

> In the proceeding [penalty phase], evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

The only restriction of this subsection is that it shall not be construed to authorize

the introduction of any evidence secured in violation of the federal constitution or the state constitution.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to affirm the trial court's ruling admitting the PET scan evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Johnnie Hoskins, #962032, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 1st day of May, 2006.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
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