IN THE SUPREME COURT OF FLORIDA

GUERRY WAYNE HERTZ,

Appellant,

v. CASE NO. SC05-59

STATE OF FLORIDA,

Appellee.
_________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL
FLORIDA BAR NO. 158541

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 29

ARGUMENT 30

ISSUE I... 30

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR POSTCONVICTION FINDING DEFENSE COUNSEL'S REPRESENTATION EFFECTIVE AT THE PENALTY PHASE.

A. Failure to Fully Develop and Present the Diminished Capacity Statutory Mitigator Per 921.141(6)(f), Fla.Stat.......................... 42

B. Failure to Develop and Present Evidence of Extreme Mental Illness Statutory Mitigator Per 921.141(6)(f), Fla.Stat............. 49

C. Failure to Properly Present the Statutory Age Mitigator............................ 50

D. Failure to Present Nonstatutory Mitigation... 52

E. Trial Counsel's Method of Presenting Mitigation was Ineffective........................ 57

CONCLUSION 59

CERTIFICATE OF SERVICE 59

CERTIFICATE OF TYPE SIZE AND FONT 59

TABLE OF CITATIONS

CASES PAGE(S)

Anderson v. State,
863 So.2d 169 (Fla. 2003) 43

Arbelaez v. State,
898 So.2d 25 (Fla. 2005) 48

Asay v. State,
769 So.2d 974 (Fla. 2000) 28,30

Barnhill v. State,
834 So.2d 836 (Fla. 2002) 43,51

Breedlove v. State,
692 So.2d 874 (Fla. 1997) 32

Brown v. State,
721 So.2d 274 (Fla. 1998) 48

Brown v. State,
755 So.2d 616 (Fla. 2000) 47,49

Bryan v. State,
533 So.2d 744 (Fla. 1988) 48

Caballero v. State,
851 So.2d 655 (Fla. 2003) 51

Cherry v. State,
659 So.2d 1069 (Fla. 1998) 30

Damren v. State,
838 So.2d 512 (Fla. 2003) 49

Davis v. State,
875 So.2d 359 (Fla. 2003) 48

Farrell v. State,
2005 Fla. LEXIS 1297,
30 Fla.L.Weekly S457 (Fla. June 16, 2005) 39

Foster v. State,
679 So.2d 747 (Fla. 1996) 43

Foster v. State,
778 So.2d 906 (Fla. 2000) 50

Gordon v. State,
704 So.2d 107 (Fla. 1997) 48

Haliburton v. Singletary,
691 So.2d 466 (Fla. 1997) 49

Henry v. State,
862 So.2d 679 (Fla. 2003) 39

Hertz v. Florida,
536 U.S. 963 (2002) 3

Hertz v. State,
803 So.2d 629 (Fla. 2001) 3,10

Hodges v. State,
28 Fla.L.Weekly S475 (Fla. 2003) 28

Hodges v. State,
885 So.2d 338 (Fla. 2003) 30

Howell v. State,
877 So.2d 697 (Fla. 2004) 57

Jackson v. Dugger,
547 So.2d 1197 (Fla. 1989) 52

Johnson v. State,
660 So.2d 637 (Fla. 1995) 44

Jones v. State,
732 So.2d 313 (Fla. 1999) 28,30

Kimbrough v. State,
886 So.2d 965 (Fla. 2004) 32,51

Kokal v. State,
718 So.2d 138 (Fla. 1998) 30

Nelson v. State,
850 So.2d 514 (Fla. 2003) 51

Occhicone v. State,
768 So.2d 1037 (Fla. 2000) 32

Pietri v. State,
885 So.2d 245 (Fla. 2004) 47

Provenzano v. Dugger,
561 So.2d 541 (Fla. 1990) 48

Reaves v. State,
639 So.2d 1 (Fla. 1994) 55

Rogers v. State,
783 So.2d 980 (Fla. 2001) 54

Rompilla v. Beard,
125 S.Ct. 2456, 2005 U.S.LEXIS 4846,
73 U.S.L.W. 452 (Decided June 20, 2005) 31

Rose v. State,
617 So.2d 291 (Fla. 1993) 48

Rutherford v. State,
727 So.2d 216 (Fla. 1998) 30

Sochor v. State,
883 So.2d 766 (Fla. 2004) 32

Spann v. State,
857 So.2d 845 (Fla. 2003) 55

State v. Sireci,
502 So.2d 1221 (Fla. 1987) 32

Stephens v. State,
787 So.2d 747 (Fla. 2001) 43

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 27,30,31,40

Van Poyck v. State,
694 So.2d 686 (Fla. 1997) 30

Other Authorities

Section 921.141(6)(b), Florida Statutes 49,50

Section 921.141(6)(f), Florida Statutes 42

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

On August 26, 1997, Guerry Wayne Hertz, Jason Brice Looney, and Jimmy Dewayne Dempsey were indicted for the first-degree murders of Melanie King and Robin Keith Spears committed on the 27th day of July, 1997, in Wakulla County, Florida. They were also indicted for burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling and use of a firearm during the commission of a felony. (OR I 1-3)[1].

Pretrial a series of motions were filed.[2] On April 7, 1999, a hearing was held on Hertz' motion to determine his competency to stand trial (OR III 216-475). Jury selection and the trial commenced November 29, 1999, and concluded on December 9, 1999, with a jury convicting Guerry Hertz and co-defendant Jason Looney of the first-degree murders of Melanie King and Robin Keith Spears; guilty of burglary of a dwelling

[1] "OR" will connote Original Trial Record; "PCR" will connote Postconviction Record for purposes of this appeal.

[2] Motions to sever the cases; to change venue; to suppress statements made by Hertz; to declare Hertz incompetent to stand trial; to preclude the State from introducing evidence relating to events that occurred in Daytona Beach regarding this case; and a plethora of challenges to the imposition of the death sentence, as well as aggravating factors and a request to declare Section 922.10, Florida Statutes, as unconstitutional.

while armed with a firearm; guilty of armed robbery with a firearm; guilty of arson of a dwelling; and guilty of use of a firearm in the commission of a felony. (OR XIX 2177-2180). The penalty phase of the proceedings were held on December 9, 1999 (OR XIX-XX 2200-2416). By a majority vote of 10-2, for each murder, the jury recommended and advised that the death penalty be imposed against Guerry Wayne Hertz and Jason Brice Looney. (OR XX 2415-2416; 0R II 203, 204).

On February 18, 2000, the trial court, in concurrence with the jury's recommendation that the death penalty be imposed, prepared a sentencing order, setting forth the aggravating and mitigating circumstances found. (OR II 290-300).[3]

[3] As to Guerry Hertz, the trial court found as aggravating factors that (1) the capital felony was committed by a person convicted of a felony and was on felony probation; (2) Hertz was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (aggravated battery in Volusia County, Florida); (3) the capital felony was committed while Hertz was engaged in the commission of a burglary, arson and robbery; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (the defendants discussed and determined, especially defendant Hertz, that they would leave no witnesses); (5) the crime was committed for financial or pecuniary gain (the court merged this aggravating factor with the capital felony was committed during the course of a burglary, arson or robbery); (6) the murder was especially heinous, atrocious or cruel, and (7) the murder was cold, calculated and premeditated without any pretense of moral or legal justification. (OR II 291-295).

On appeal, the Florida Supreme Court in Hertz v. State, 803 So.2d 629 (Fla. 2001) affirmed the judgments and sentences entered.[4] Hertz filed a petition for writ of certiorari in

---

In mitigation, the trial court found (1) Hertz' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law which was given some weight; (2) his age of twenty (20) which was given only moderate weight; (3) as to all other non-statutory mitigation, (a) Hertz' difficult childhood was given significant weight; (b) Hertz had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated was given marginal weight; (c) Hertz' remorse and the fact that he cried during some of the testimony and when he made his statement to the court was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to "no weight" and (e) the fact that a co-defendant, Dempsey, received a life sentence following a plea, was given significant weight and was substantially considered by the trial court. (OR II 295-300).

[4] Hertz raised the following claims on direct appeal: (1) The trial court improperly excused for cause a venire member whose opposition to the death penalty did not prevent or substantially impair her ability to perform her obligations; (2) Hertz was not competent to stand trial; (3) the trial court erred by admitting gruesome photographs of the bodies at the crime scene and the autopsy; (4) the details of the collateral crimes in Volusia county became a feature of the trial causing prejudice that substantially outweighed the probative value of the evidence; (5) the evidence was insufficient as a matter of law to sustain the convictions; (6) the statute authorizing the admission of victim impact evidence is an unconstitutional usurpation of the Court's rulemaking authority under article V, section 2, of the Florida Constitution, making the admission of such testimony unconstitutional and reversible error; (7) the trial court erred in denying the defense motion to require a unanimous verdict; (8) four of the seven aggravating factors upon which the jury was instructed and which the trial court found are legally inapplicable and their consideration was not harmless

the Unites States Supreme Court which was subsequently denied in Hertz v. Florida, 536 U.S. 963 (2002)(Ring/Apprendi issue).

On June 30, 2003, Hertz filed his motion for postconviction relief asserting in part, that trial counsel rendered ineffective assistance at trial and at the penalty phase of trial.[5] The State's response was filed per court order September 15, 2003. Hertz filed an amended motion for postconviction relief on March 8, 2004, and on April 23, 2004, the trial court reset the matter for evidentiary hearing for July 27, 2004. Following the evidentiary hearing on that date, counsel filed post hearing memorandum and closing arguments. On December 30, 2004, the trial court denied all postconviction relief.

The instant appeal followed.

FACTS AT TRIAL AND POSTCONVICTION

Pretrial Competency Hearing

---

error; and (9) the death sentence in this case is disproportionate.

[5] Specifically Hertz alleged in Claim I that counsel was ineffective, A. Failure To Seek A Venue Change From Wakulla County, Florida; B. Failure To Object To Inadmissible Victim Impact Statements; C. Counsel Was Ineffective During The Penalty Phase By Advancing Mitigating Evidence Collectively Instead Of Individually And Independently Under Section 921.141 (6)(h), Florida Statutes, And By Failing To Argue The Existence Of Additional Statutory Mitigation. As to Claim II, Hertz argued his Ring claim.

On April 7, 1999, a competency hearing was held to determine whether Hertz was competent to assist his counsel and stand trial. The defense first called Dr. Mike D'Errico, who testified that he interviewed Hertz on October 2, 1998, October 16, 1998, and April 2, 1999, to determine whether Hertz was competent to stand trial. (OR III 224-230). During the nine hours he spent with Hertz over three days, a series of tests were given, including the Wechsler Adult Intelligence Scale Revised, and MMPI by this forensic psychologist. (OR III 329). Dr. D'Errico testified that he received information regarding Hertz' background and school records and that it was clear as early as the fourth or fifth grade that Hertz had Attention Deficit Hyperactivity Disorder (ADHD). A child with this disorder would be hard to control behaviorally, and would have a tendency towards horseplay in classes. Ritalin was the prescribed drug for this behavioral problem. (OR III 333-336). In Hertz' circumstances, when he took his Ritalin, he did better in school. (OR III 336). Dr. D'Errico testified that when Hertz was 18 years old, he was admitted to the Eastside Psychiatric Center as a result of an attempted suicide when Hertz overdosed on Ritalin. Hertz spent four days as an inpatient, diagnosed with an adjustment disorder with a depressed mood and then was released. (OR III 337).

Dr. D'Errico testified that although Hertz knew he was charged with first-degree murder; although he knew about the penalties to be imposed and although he knew about the courtroom and its functioning; he had "no factual understanding" or rational understanding because he was suffering from hyperactive behavior and was distracted. (OR III 339-341). It was his opinion that Hertz does not have the ability to interact with his attorney, albeit, his full scale IQ is 91 with a verbal of 79 and a performance level of 118. (OR III 342-343). Dr. D'Errico discounted Hertz' imaginary friend "George" and was more concerned about the fact that Hertz seemed more depressed, his hygiene became worse and he had an unrealistic attitude about his legal situation – he could not wait to get out of trouble and go home. (OR III 344-345). He noted that Hertz had recently been placed on suicide watch at the jail because he was self-abusive, banging his head against the cell walls. (OR III 345). It was Dr. D'Errico's belief that if Hertz received appropriate hospital and medical treatment, he could be returned and would be competent to stand trial. (OR III 347-348).

On cross-examination, Dr. D'Errico admitted that Hertz was not exhibiting any inappropriate conduct during the time the doctor testified and admitted that Hertz could be faking.

(OR III 249, 353). It was his belief that the disparity between the verbal and performance level of his IQ was due to his family's history of deafness and therefore a environmental problem, rather than a medical problem. (OR III 354-355). On re-direct, Dr. D'Errico admitted that "if Hertz had planned" to bump his head against the cell and do injury to himself, that would be an indication of malingering because he planned to be disruptive in jail. (OR III 359).

Dr. Joseph Sesta, a neuropsychologist examined Hertz for seven hours, to determine whether there were any cerebral functioning problems. (OR III 361-363). Dr. Sesta obtained background, family history and reviewed Dr. D'Errico's profile of Hertz, and secured the Eastside Psychiatric Hospital 1995 suicide attempt records. (OR III 365-366). Dr. Sesta observed that Hertz suffered from ADHD and that during the interviews, Hertz was fidgety. (OR III 367). Dr. Sesta concluded that it would be difficult for Hertz to work with his attorneys at trial but, on medication, he could be better. (OR III 368-369). Hertz was given a battery of tests which resulted in a conclusion that Hertz suffered from a mild cerebral dysfunction; that his left side was poorer than his right side, and that his front lobe was "less than it should be". (OR III 371). Dr. Sesta also concluded that Hertz'

condition presented a Neurodeficient Development Disorder; however there were no neurological disease or trauma. It was his determination that this was based in part on his non-verbal upbringing, a learning disability and the ADHD. (OR III 372-373). Hertz would improve with medication and the doctor did not believe Hertz was malingering rather, Hertz was careless about what or how he chose to answer. (OR III 375). Dr. Sesta also gave no consideration to Hertz' statements about his invisible friend George and, except for the statements about George, observed that he did not think Hertz was faking. Hertz had disingenuous behavior but no flagrant faking. (OR III 376). It was Dr. Sesta's view that Hertz factually understood what was going on but, could not rationally understand the information. As a result, his ability to assist his counsel was impaired and he would not be able to follow what was happening in court. (OR III 380-381). Because Hertz was incompetent to stand trial at that time, it was Dr. Sesta's recommendation that he be sent to a forensic psychiatric hospital and be given psychopharmacological treatment to restore competency. (OR III 382).

On cross-examination, Dr. Sesta confirmed that behavior regarding "George" was contrived and that it was clear that Hertz could function well at times. (OR III 383-384). He

also observed that Hertz could control his conduct when he wanted to, was lucid and could understand what was happening. Hertz had no Axis I "major" mental illness, no schizophrenia or bipolar disorder. (OR III 385-387). Dr. Sesta, when asked about whether Hertz' conversation with the detectives would change his opinion as to whether he was competent, observed that it would not and it did not matter to him that "Hertz told people ten days after the crime that he was going to act crazy and bang his head." He admitted that Hertz could be malingering. (OR III 390-391).

Several lay witnesses testified at the competency hearing in behalf of Hertz, specifically Iris Watson, Hertz' maternal grandmother, and Deborah Hertz, his mother. Both testified that Hertz, as a child, had trouble because of hyperactivity and, that when he took his medicine Ritalin, he improved. (OR III 393-402).

Likewise, a paralegal that worked with defense counsel Robert Rand, testified that she had difficulty in communicating with Hertz and that while he was concerned about himself he never asked about his case. (OR III 402-405).

The State called a clinical psychologist Dr. Thomas Conger who examined Hertz in the Leon County Jail on two occasions, February 23, 1999, and February 24, 1999, for

approximately seven hours. (OR III 406-411). In Dr. Conger's view, Hertz was competent to proceed--after he likewise administered a series of comprehensive neuropsychological tests on Hertz. (OR III 412). Dr. Conger concluded that Hertz had a learning disability and agreed with many points that Dr. Sesta made with regard to test results. It was Dr. Conger's view that Hertz did not want to perform very well on the tests. If Hertz wanted to assist his lawyer he would and that Hertz had many more abilities than he was willing to show. (OR III 414-418). On cross-examination he admitted that Hertz had ADHD and that medicine usually helped people with such a disorder. (OR III 418-419). His view was, that Hertz, based on the tests, could and did sustain performance at a normal level whether on medication or not. (OR III 420). When asked whether his opinion would change if he knew that Hertz had taken similar tests three weeks earlier, Dr. Conger stated that knowing that would reinforce his opinion and make it more solid that Hertz was competent. (OR III 422-423).

Wakulla Deputy Sheriff Donnie Crum testified that he talked with Hertz in August 1997, when he was transporting Hertz back to Wakulla County. A transmitter was put in the van and recorded Hertz' conversation with others on the trip back. During the trip, Hertz stated that he would cause

injury to himself by banging his head into the cell and make a bloody mess. (OR III 438-439, 441).

The trial court, following argument by counsel, concluded that upon reviewing the three doctors' reports, reviewing the rules and observing Hertz, Hertz had sufficient present ability to consult with his lawyer if he chooses to and has a factual understanding as well as a rational understanding of what was happening. Hertz was competent to stand trial. (OR III 473).

Trial

The salient facts of the crimes may be found in Hertz v. State, 803 So.2d 629, 635-637 (Fla. 2001):

> In the early morning hours of July 27, 1997, the charred bodies of Melanie King and Robin Keith Spears were found in the victims' burning home in Wakulla County, Florida. Hertz, Jason Looney, and Jimmy Dempsey were each indicted for the first-degree murders of the victims, and each codefendant was also charged with burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling, and use of a firearm during the commission of a felony as a result of this incident. Prior to trial, codefendant Dempsey negotiated a plea with the State and was sentenced to consecutive life sentences in return for providing his testimony at Hertz and Looney's joint trial.
>
> The evidence presented at the trial revealed the following facts. At approximately 11 p.m. on July 26, 1997, Hertz and his codefendants left an acquaintance's house on foot within walking distance from the victims' home. All three men were armed with guns. A resident who lived about 500 yards from the victims testified that Hertz appeared at her

door at about 2 a.m. asking to use her phone because "his truck had broken down." When she refused, the trio continued down the road towards the victims' home and, upon seeing the victims' black Mustang, Looney said, "There's my car right there. That's the one I want."

Dempsey and Hertz went to the victims' front door as a decoy and asked if they could use the phone. King provided them with a cordless phone, and Dempsey feigned making a phone call. When Dempsey attempted to return the phone, Hertz pointed his gun at King and forced his way in. Looney then entered and pointed his rifle at Spears. Spears and King were bound and gagged with duct tape and placed face down on their bed. Hertz and his codefendants removed a significant amount of the victims' property, including a VCR, a television, jewelry, furniture, and CDs, and loaded the victims' belongings into the victims' two vehicles. Looney also found approximately $1500 of the victims' money in an envelope, which was ultimately divided equally among the three.

Hertz and Looney concluded that they could leave no witnesses and informed Dempsey of their decision. Dempsey said Hertz and Looney then poured accelerants throughout the victims' home. All three men, still armed, went to the bedroom where the victims were bound, side-by-side, facedown on their bed. When they entered the back bedroom, King said that she would "rather die being burnt up than shot." She stated, "Please, God, don't shoot me in the head." Hertz replied, "Sorry, can't do that," and then he proceeded to open fire; Looney followed and then Dempsey. The victims died as a result of the gunshot wounds.

Subsequent to the shootings, the victims' home was set ablaze. Hertz drove away in the victims' white Ford Ranger, and Looney drove the victims' black Ford Mustang, with Dempsey as a passenger. According to Dempsey, the whole episode at the victims' home lasted about two hours. The trio proceeded to Hertz's house and unloaded the stolen items and divided up the money. Two employees at the Wal-Mart

in Tallahassee testified that the three men made purchases at the store at around 5 a.m. the morning of the murders, before "showing off" their new vehicles, i.e., a black Mustang and a white Ford Ranger, to both of the employees. A Wal-Mart receipt for a clothing purchase was later found in the victims' Mustang, corroborating the employees' testimony.

Hertz and his codefendants made their way to Daytona Beach Shores where, later that day, they were involved in a pursuit and shootout with police. Looney and Dempsey were arrested after abandoning and fleeing from the victims' black Mustang. Hertz abandoned the victims' Ford Ranger after being shot, and he paid a cabdriver $100 to drive him to his aunt's house in St. Augustine. Hertz was arrested that same day in St. Augustine, and victim Spears' .9mm gun was recovered from Hertz's bag.

A firearms expert with FDLE testified that one of the bullets recovered from the area of the victims' burned bed was fired from the .380 Lorcin handgun recovered from Looney at the time of his arrest in Daytona Beach, i.e., the same handgun owned by Keith Spears and used, according to Dempsey, by Hertz to shoot the victims. The other bullet was fired from a .30 caliber carbine rifle, not inconsistent with .30 caliber rifle used by Looney to shoot the victims, and later recovered in the victims' Mustang. A roll of duct tape, Looney's wallet with $ 464, and Dempsey's wallet with $380 were also found in the Mustang. A fingerprint analyst with FDLE analyzed latent fingerprints taken from the Mustang and concluded that Hertz and his codefendants had all touched the car. The chemist found evidence of various accelerants on items of clothing found in the Mustang. In addition, a law enforcement investigator with the State Fire Marshal's Office testified that the kind of damage that was done by the fire does not happen unless an accelerant is used.

The state medical examiner testified that the bodies were severely burned. He graphically detailed the condition of the bodies as depicted in the

photographs: the legs were burned off below the knees, the hands were burned to nubs, the bones of the arms were fractured by the fire, and the skulls were burned partially away. The victims had to be positively identified by dental records. The medical examiner also testified that there could have been other injuries that were not detected due to the extensive burns.

King was shot at least two times in the head, which caused her death. However, the medical examiner was not able to trace the path of the bullet because the skull was burned away. He testified that it was possible that other bullets struck the body, which could not be determined because of the fire. King lived one to two minutes after she was shot. However, there was no soot in the trachea, indicating that she was not alive when the fire started. Spears was shot at least one time in the head, which caused his death. The bullet went in the back of the neck and exited above the right eye. Spears also lived one to two minutes after he was shot, and again, no soot was discovered in his trachea, meaning that he was dead at the time of the fire. The defense did not present any evidence.

Penalty Phase

On December 9, 1999, the penalty phase of Hertz and his co-defendant, Jason Looney's sentencing commenced.[6] (OR XIX-XX).

[6] Following discussions concerning the victim impact statements that were to be presented to the jury, both defense counsel for Hertz and Looney had no objections to the victim impact statements that were to be read. (OR XIX 2182-2183). Further discussions commenced with regard to the limitation on the testimony of Andrew Harris, a cellmate of Dempsey pretrial. (OR XIX 2195-2196). The State agreed that questioning of Harris would be limited to whether, pretrial, Harris was in a cell with Hertz. (OR XIX 2197-2198).

Reginald Byrd, a Department of Corrections parole officer, testified Hertz was on probation at the time of the crime and was in violation status as of July 7, 1997. (OR XIX 2212). A certified copy of the aggravated battery conviction of both Hertz and Looney, previously stipulated to by defense counsels, was introduced. (OR XIX 2213-2214).

Karen King, Melanie King's mother (OR XIX 2214-2217), and, Janet Spears, Keith Spears' mother, both read prepared statements concerning their children. (OR XIX 2218-2220).

Hertz presented evidence in his behalf. Deborah Hertz, Hertz' mother, who was completely deaf, testified, through an interpreter, that she met Hertz' father, who was likewise hard of hearing but not totally deaf. (OR XIX 2259-2260). They were living together and using drugs. As a result of financial difficulties, they started stealing to pay for drugs, the rent, and were subsequently arrested for theft. (OR XIX 2260-2262). Mrs. Hertz testified that she got pregnant during the time to avoid either of them going to prison and that they finally married a few months later. (OR XIX 2262-2263). Hertz' father was not a good father and the two parents fought continuously and continued to use drugs. She also admitted that she used some drugs during the pregnancy but stopped pretty early on because it made her

sick. Hertz was born with a club foot. (OR XIX 2264). During her pregnancy, she tried to abort her pregnancy by hitting herself in the stomach several times but she did give birth. Within a few weeks of the birth, she gave Hertz to her mother. (OR XIX 2264-2265). Hertz lived with his grandparents for the first six months of his life and finally was returned to his parents. Throughout his childhood, he was shuffled back and forth from his parents to his grandparents. (OR XIX 2266-2267). Mr. Hertz would punish his son by spanking him on the bottom until it was purple. She recounted how once when they were all totally homeless due to his parents' drug usage, they lived in a van. (OR XIX 2269). Mrs. Hertz admitted that both she and her husband were addicts and their relationship over the years was an "on and off relationship" and "very tumultuous." (OR XIX 2269-2270). Over the years, Hertz had operations to fix his club foot. She recalled one time when Hertz's father started beating him and was on top of him and she had to get her husband off of Hertz. (OR XIX 2273).

Hertz has a younger brother, Casper, who the father seemed to favor and Hertz was jealous. (OR XIX 2273-2275). The defense published school pictures and also presented evidence that Hertz at an early age was diagnosed with ADHD

due to his behavioral problems in school. (OR XIX 2276). Mrs. Hertz observed that when her son was on medication he was much better and that, in 1995-96, Hertz overdosed on Ritalin and tried to kill himself because he had broken up with his girlfriend. He was taken to a psychiatrist. (OR XIX 2278-2279).

Guerry Hertz, Sr., testified that he used marijuana, hashish, Quaaludes, cocaine and acid throughout his life. (OR XIX 2281-2282). He observed that when facing prison, he convinced his then girlfriend that she should get pregnant to avoid prison. (OR XIX 2283). When Hertz was born, he had a club foot and his father was very upset about that and held it against his son. (OR XIX 2284). Soon after his birth, the baby was taken to his wife's mother's house and they did not see the baby for the first six months of its life. He noted that the baby would be taken on and off again to the grandmother's house to live during Hertz' childhood. (OR XIX 2284-2286). He hit his wife during her pregnancy and that she tried to abort the baby. (OR XIX 2288). He observed that they fought in front of the child, that he was not a good father, and Hertz did not have a good childhood. (OR XIX 2289-2290). He admitted giving his son marijuana and other drugs when Hertz was eight, and admitted that he would not

allow his son to get his medication Ritalin. (OR XIX 2290-2291). At one point Hertz was living with his father and a roommate, a crack cocaine dealer. (OR XIX 2292).

Hertz' lawyer introduced the affidavit of Vita Lincoln, an elementary school teacher from Melbourne Sabel Elementary School who taught Hertz when he was a child. She observed that Hertz was in the lower group of students and that he had problems sometimes coming to school with dirty clothes and smelling bad. Hertz would stay out all night fishing with his parents for food because they were so poor. When she brought this to the attention of the principal, the principal took Hertz under his wing, bought clothes for him and tried to help. Hertz was a hyperactive kid, unhappy and although he was not stupid, he was hard to motivate. (OR XIX 2294-2298).

Iris Watson, Deborah Hertz' mother, testified that as a baby, Hertz needed surgery for his club foot and had to wear casts that needed to be changed frequently. (OR XIX 2299-2300). At one time, because the cast was not changed timely, Hertz developed sores all over his foot and could not wear a case and had to wear a special shoe until the wounds healed. (OR XIX 2301). She observed when Hertz was on Ritalin he was happy and did well. When he was not on medicine he did not do

as well. He did not have a normal childhood. (OR XIX 2303-2304).

Deborah Hertz, Hertz' aunt, testified that he was never well cared for or clean and frequently was kept off his medicine. (OR XIX 2305). She observed that when Hertz was on his medicine it was like day and night and that his grades depended on whether he was on his medicine. (OR XIX 2307-2308). She recalled a time in February 1997, when a suicide note was found from Hertz. She filed a report with the Sheriff's Department in an attempt to have him hospitalized under the Baker Act. She admitted that she really didn't know if Hertz was suicidal. (OR XIX 2308-2309). She knew that he had a .22 Reuger pistol and that in 1997, he was using crack cocaine and drugs with his brother. (OR XIX 2309-2310).

On cross-examination, Ms. Hertz admitted that she really did not know much about her nephew before the murders since he was not allowed in her house - because she did not care for his friends. (OR XIX 2310-2311). She did not see him much after his thirteenth birthday and did not know much about him. (OR XIX 2311).

Dr. Michael D'Errico, a forensic psychologist, testified at the penalty phase on behalf of Hertz. He testified that he interviewed Hertz on two separate occasions, October 2, 1998,

and October 16, 1998, at Leon County Jail. (OR XIX 2313-2314). Dr. D'Errico received a plethora of information as to Hertz' background, including a multi-disciplinary assessment from FSU at age fourteen. Dr. D'Errico testified that Hertz suffered from Attention Deficit Hyperactivity Disorder and as a result Hertz had problems all of his life. (OR XIX 2314-2315). ADHD is treated with Ritalin and Hertz had a history of being on and off his medication. (OR XIX 2316-2317). Hertz' childhood was characterized by abuse, humiliation, low self-esteem and poor self-image and he was born with a club foot. (OR XIX 2318). He observed that it was noteworthy that there as a 39 point spread between Hertz' verbal IQ and his performance IQ which suggested some brain damage, however, neurological testing demonstrated that it was a developmental reason because he was raised in an environment where the spoken language was not used and he suffered from ADHD. (OR XIX 2318-2319). Hertz suffered from suicidal ideations and had a temper problem and clearly had trouble with interpersonal relationships. His modus operandi was to act disruptive if something happened to a relationship, for example. He observed that Hertz overdosed on his Ritalin medication and was hospitalized following his breakup with a

girlfriend. He likely had an "unspecified cognitive disorder". (OR XIX 2320-2321).

On cross-examination, Dr. D'Errico admitted that Hertz knew what he was doing and the consequences of his conduct, however, he observed that Hertz was impulsive and suffered from ADHD which may have lessened his awareness of the consequences. (OR XIX 2323). In discussing Hertz' suicide attempt, the doctor admitted that Hertz was released after five days of treatment in the hospital with no follow-up. (OR XIX 2324).

While no additional testimony was presented by Hertz' counsel, Exhibit 2, a voluminous exhibit on Hertz's life, compiled by the defense, was introduced. (OR XIX 2325).

At the sentencing proceeding, Hertz testified personally, asking for the families to forgive him, stating that he would never get out of jail if he gets life. "He won't be able to give his mother grandchildren. He just wanted to live out his life in prison, because he wants to explain to brothers to stay away from trouble-makers and live their lives without any trouble". (OR IV 499-501).

In Hertz, 803 So.2d at 637-638, the Court noted:

> A jury convicted both Hertz and Looney of the first-degree murders of King and Spears, burglary of a dwelling while armed with a firearm, armed robbery with a firearm, arson of a dwelling, and use of a

firearm in the commission of a felony. By a majority vote of ten to two, for each murder, the jury recommended and advised that the death penalty be imposed against Hertz and Looney. By written order, the judge imposed a sentence of death for each murder.

With respect to Hertz, the trial court found as aggravating factors that (1) the capital felony was committed by a person convicted of a felony and who was on felony probation; (2) the capital felony was committed by a person previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (3) the capital felony was committed while Hertz was engaged in the commission of a burglary, arson, and robbery; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (5) the murder was committed for financial or pecuniary gain (the court merged this aggravating factor with the fact that the capital felony was committed during the course of a burglary, arson, or robbery); (6) the murder was especially heinous, atrocious, or cruel, and (7) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification.

In mitigation, the trial court found (1) Hertz's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was given some weight; (2) his age of 20, which was given only moderate weight; (3) as to all other nonstatutory mitigation, (a) Hertz's difficult childhood was given significant weight; (b) the fact that Hertz had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Hertz's remorse and the fact that he cried during some of the testimony and when he made his statement to the court was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to "no weight" and (e) the fact that a codefendant, Dempsey, received a life sentence

following a plea, was given significant weight [*638] and substantially considered by the trial court. n1 On appeal, Hertz raises a variety of challenges to his convictions and death sentence. n2

n1 In the four noncapital cases, the judge sentenced Hertz to life on the burglary of a dwelling while armed (count III); life on the robbery with a firearm (count IV); 30 years on the arson of a dwelling (count V); and 15 years for the use of a firearm during the commission of a felony (count VI). All sentences were ordered to run consecutive to one another.

n2 Hertz claims: (1) The trial court improperly excused for cause a venire member whose opposition to the death penalty did not prevent or substantially impair her ability to perform her obligations; (2) Hertz was not competent to stand trial; (3) the trial court erred by admitting gruesome photographs of the bodies at the crime scene and the autopsy; (4) the details of the collateral crimes in Volusia county became a feature of the trial causing prejudice that substantially outweighed the probative value of the evidence; (5) the evidence was insufficient as a matter of law to sustain the convictions; (6) the statute authorizing the admission of victim impact evidence is an unconstitutional usurpation of the Court's rulemaking authority under article V, section 2, of the Florida Constitution, making the admission of such testimony unconstitutional and reversible error; (7) the trial court erred in denying the defense motion to require a unanimous verdict; (8) four of the seven aggravating factors upon which the jury was instructed and which the trial court found are legally inapplicable and their consideration was not harmless error; and (9) the death sentence in this case is disproportionate.

July 27, 2004, Postconviction Evidentiary Hearing

Dr. Bill Mosman was called by Hertz to testify as to what other mental mitigation existed and could have been presented at the penalty phase of trial. Initially Dr. Mosman reviewed those documents he had read which included school records, medical records from various evaluation centers and clinics, Department of Corrections' medical records, Dr. Sesta's original report dated January 13, 1999, and the 3.850 motion. He met with Hertz, February 27, 2004, for the purpose of doing additional testing. (PCR II 337-339). Based on the various tests performed (PCR II 341), Dr. Mosman, concluded that beyond the two statutory and five non-statutory mitigators presented, trial counsel should have presented additional evidence as to: 1) Hertz's emotional, social and mental age, instead of "just his physical age"; and 2) that Hertz was under an "emotional disturbance" at the time of the murders. (PCR 14-16).

It was Dr. Mosman's view that the defense should have matched the number of mitigators with the number of aggravators presented. (PCR II 346).

Dr. Mosman determined that the reason there was such difference between Hertz's verbal and performance scores per IQ testing was due to frontal lobe brain damage. He rejected

the theory of other experts that the variance was due to Hertz's being reared in a non-verbal environment. (PCR II 347-348). This finding was significant to Dr. Mosman because he opined how brain damage impacts impulse control, ability to analyze of a problem, maturity, and self-control--which separates adolescents from adults. (PCR II 348).

He observed that more evidence could have been presented as to: Hertz's genetic defects, clubfoot, deafness, color blindness (he thought Hertz had genetic brain damage); Hertz history surrounding drug and alcohol abuse; and more evidence of how Hertz could be rehabilitated. (PCR II 349-351). He chided the methodology used by Dr. D'Errico and ultimately observed there was no reason why trial counsel had not explored these areas. (PCR II 352-354).

On cross-examination however it was clear that Dr. Mosman was not aware of the facts of this case and had not read any of the guilt phase or pretrial competency hearing transcripts, because he wanted to stay focused. (PCR II 356-359). Dr. Mosman had not read Dr. Conger's report as to the competency hearing because he did not think it was relevant (PCR II 359), and although he admitted that Dr. Sesta was employed for more than just a competency determination, he never spoke to

defense counsel Rand as to why Dr. Sesta was not called at the penalty phase. (PCR II 359).

Dr. Mosman was totally unaware of the defense exhibits introduced at the penalty phase, which included a book compiled on Hertz's life. (PCR II 360). He never read any of the defense's closing arguments; did not know if the book on Hertz would have been helpful; since he had access to witnesses, did not know what defense trial counsel did present; and stated that defense counsel presented no remorse evidence. (PCR II 360-363). In his report dated March 4, 2004, prepared in advance of his testimony and in support for an evidentiary hearing, Dr. Mosman stated Hertz's "history, character, records" were "not presented to the jury". (PCR II 363).

In cross examination of Dr. Mosman, it became clear he had no idea what was presented at the penalty phase by the defense and he was "totally mistaken" in his assessment that "no evidence" of certain factors were "not presented" to the jury. He opined that the jury should have known that Hertz suffered from a genetic defect of deafness, but noted that Hertz was neither deaf nor hearing impaired. (PCR II 364-365). He admitted that evidence was presented at the penalty phase that Hertz had a clubfoot and went through a number of

surgeries and other suffering with the disability. His complaint against counsel was that counsel did not use "medical records" instead of lay witnesses to describe these events. (PCR II 366-367). He observed that defense counsel should have emphasized the color blindness and other genetic defects as well as the frontal lobe damage. (PCR II 367-368). He did not know that Dr. Conger had diagnosed Hertz as only suffering from anti-social personality disorder (PCR II 369), and was reminded that defense counsel brought out evidence of Hertz's ADHD.

Although he insisted that Hertz was immature, with a mental age of a 14 year old, he did not know whether the crime facts negated evidence of immaturity, and had not read the transcript of Hertz's conversation in the police van where Hertz said he would act crazy. (PCR II 370-371). Dr. Mossman's view, after the state recited the facts of the crime (PCR II 371-373), was that the crime was done by adolescent thinking. (PCR II 373-374). Ultimately after admitting that he had little knowledge or recollection of the facts of the penalty phase (PCR II 375-379); he stated that his opinion about the reason there was a variance in Hertz's IQ, was a difference in medical opinions. (PCR II 379-383). He

concluded that Hertz was “neurologically deficient”. (PCR II 385).

The State introduced the original trial transcripts before calling Mr. Robert Rand, defense counsel at trial. (PCR II 386).

Mr. Rand testified that he had handled a number of first degree murder cases and, of the 12 to 15 cases, three went to penalty and only this one resulted in a death sentence. (PCR II 386-389). He worked with another capital attorney Lynn Thompson on this case and investigated all aspects of Hertz’s life, including up-bring, schooling, medical records, psychological history, disciplinary history, criminal history, talked to relatives, at least 6, and people who knew Hertz. (PCR II 390). Rand tried to be selective in having family members testify because he wanted to portray a “vibrant picture of Hertz” which showed a tragic background, and a horrible life as a young man. (PCR II 391) Rand had Hertz examined for competency because Hertz was not very responsive or interested. Rand observed that Hertz was “not a good historian of his own life.” (PCR II 392,394).

Rand secured medical experts and provided them with as much information as they needed. He had worked with Dr. D’Errico before and thought he was very good. He retained a

neuro-psychologist to assist him and wanted him to look at Hertz's entire medical history. (PCR II 394-395). Rand testified that, after seeing what happened to Dr. Sesta on cross at the competency hearing decided that he would not be a good witness and was not that helpful. (PCR II 395-397). He decided to use Dr. D'Errico at trial. He had no reason to question the doctor's analysis of the variance in Hertz's verbal verses performance scores as to Hertz's IQ. (PCR II 397-398).

Rand believed that Hertz had a powerful story to tell and did it in two ways, he prepared an extensive history in book form that could go with the jury during deliberations and he also presented evidence at the penalty phase through witnesses. (PCR II 399-400). In summary, Rand put on evidence that Hertz was impaired mentally, had deformities, had a troubled youth, has emotional problems and was a loner. He also, at the guilt phase, emphasized that a co-defendant Dempsey, was the leader and smarter, and had received a life sentence. Rand believed he presented a comprehensive picture of Hertz. (PCR III 401-402).

On cross, Rand said that it was not a numbers game when deciding how much should be presented based on the number of aggravators presented, rather he presented Hertz's life. (PCR

III 403-404). He never looked at "mental age" because it was never brought up by any of the doctors and only first mentioned at the evidentiary hearing. (PCR III 407,408). Rand did address Hertz's brain damage and, the fact Hertz suffered from ADHD (PCR III 407); did note that Hertz's left side of his brain developed poorer than the right, that Hertz's had a 92 IQ but there was some variance; that Hertz suffered from NDD (Neuro-deficient Developmental Disorder) and stated that he relied on his experts. (PCR III 407-408).

He admitted that he did not ask for a different instruction other than the standard jury instruction as to the mitigation. (PCR III 409).

The trial court following written memoranda and closing arguments from the parties, denied relief on December 30, 2004, concluding that:

> "10. The defendant and postconviction counsel have failed in their burden of showing that any ineffectiveness of trial counsel deprived the defendant of a reliable trial and penalty phase proceeding under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. Counsel did conduct a very thorough and reasonable investigation of mental health mitigation prior to trial and made a strategic and reasonable decision as to presenting this information through the mental health expert he utilized. Counsel did not fail to investigate potential mitigating evidence and did not fail to obtain adequate mental health evaluations. See, Hodges v. State, 28 Fla.L.Weekly S475 (Fla. 2003); see also Jones v.

State, 732 So.2d 313 (Fla. 1999), Asay v. State, 769 So.2d 974 (Fla. 2000).

> There is no evidence in the record to lend weight that any mental age or extreme mental disturbance mental health mitigator asserted by Dr. Mosman, as either statutory or nonstatutory, contributed to the defendant's actions in committing his crimes. Dr. Mosman's testimony likely would have been entitled to insignificant weight had it been presented in the penalty phase. His asserted additional statutory mitigators are without basis in the record and clearly conflicts with the evidence of the defendant's conduct and behavior presented during trial. He was not familiar with the significant facts and circumstances or the evidence presented during the guilt phase and his assertions of the mitigation was somewhat conjectural. Dr. Mosman essentially presented no other supportable credible mitigation that would have been found that was not presented by the trial court through the expert and lay witnesses presented. The defendant has simply presented an additional mental health expert with different conclusions than those of the expert relied upon by the trial counsel. There has been no convincing demonstration that the evaluation of trial counsel's expert was insufficient. The penalty phase jury was aware of most, if not all, of the mitigation regarding the defendant's background and childhood.
>
> * * *
>
> The defendant has clearly failed to establish any deficient performance by or ineffective assistance of counsel nor that the defendant was deprived of a reliable trial or penalty phase proceeding...."

(Order dated December 30, 2004).

SUMMARY OF ARGUMENT

The trial court did not error in concluding that Hertz failed to demonstrate counsel rendered ineffective assistance in the penalty phase of Hertz's trial. Evidence was presented and argued that covered all aspects of Hertz's life, addressing his childhood, mental state and other factors that provided individualized sentencing of this unique person.

The trial court properly considered and weighed the factors presented but concluded that the aggravation for these murders outweighed the mitigation presented.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR POSTCONVICTION RELIEF, FINDING DEFENSE COUNSEL'S REPRESENTATION EFFECTIVE AT THE PENALTY PHASE.

As determined by the trial court in denying postconviction relief, Hertz cannot meet the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), which provides that a defendant must 1) demonstrate deficient performance by counsel (the errors were so serious that counsel was not functioning as counsel), and 2) demonstrate that such deficient performance resulted in prejudice (there was a reasonable probability that, but for counsel's deficiencies, the results would be different). See Van Poyck v. State, 694 So.2d 686 (Fla. 1997); Kokal v. State, 718 So.2d 138 (Fla. 1998); Rutherford v. State, 727 So.2d 216 (Fla. 1998); Cherry v. State 659 So.2d 1069, 1072-73 (Fla. 1998); Jones v. State, 732 So.2d 313 (Fla. 1999); Asay v. State, 769 So.2d 974, 978 (Fla. 2000); Hodges v. State, 885 So.2d 338, 347 (Fla. 2003), wherein the Court held:

> The presentation of changed opinions and additional mitigating evidence in the postconviction proceeding does not, however, establish ineffective assistance of counsel. See Asay v. State, 769 So.2d 974, 987 (Fla. 2000); Rutherford v. State, 727 So.2d 216, 224 (Fla. 1998). The pertinent inquiry remains whether counsel's efforts fell outside the "broad range of reasonably competent performance under prevailing professional standards." See Maxwell, 490 So.2d at 932. Upon review of the trial court's order and

> record, we conclude that Hodges' penalty phase counsel performed in accordance with such standards. Our analysis of this case turns on the distinction between the after-the-fact analysis of the results of a reasonable investigation, and an investigation that is itself deficient. Only the latter gives rise to a claim of ineffective assistance of counsel.

Herein, defense counsel, Mr. Robert Rand, was an experienced capital litigator, who was keenly aware of his responsibilities and the background of his client. At the evidentiary hearing, he testified he was prepared and did present a plethora of mitigation from both experts and family and friends. He compiled a historic tome of Hertz's life and the jury had that available to review when they deliberated. He made strategic decisions as to which of his experts to call to testify and as a result, a wealth of evidence was introduced as to Hertz's background.[7] See Occhicone v. State,

---

[7] Unlike Justice O'Connor observations in her special concurrence in Rompilla v. Beard, 125 S.Ct. 2456, 2005 U.S. LEXIS 4846, 73 U.S.L.W. 4522, (Decided June 20, 2005), Mr. Rand acted well beyond the standards of reasonable professional judgment in accessing Hertz's mitigation and presenting same

.

"I write separately to put to rest one concern. The dissent worries that the Court's opinion "imposes on defense counsel a rigid requirement to review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial." Post, at 1 (opinion of KENNEDY, J.). But the Court's opinion imposes no such rule. See ante, at 14. Rather, today's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104

768 So.2d 1037, 1048 (Fla. 2000); see also Asay, 769 So.2d at 986 (no ineffective assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987) (not ineffective assistance of counsel to rely on psychiatric evaluations that may have been less than complete);[8] Sochor v. State, 883 So.2d 766 (Fla. 2004); see,

---

S.Ct. 2052 (1984). Trial counsel's performance in Rompilla's case falls short under that standard, because the attorneys' behavior was not "reasonable considering all the circumstances." Id., at 688, 80 L.Ed.2d 674, 104 S.Ct. 2052. In particular, there were three circumstances which made the attorneys' failure to examine Rompilla's prior conviction file unreasonable."

In summary Justice O'Connor found that trial counsel's failed to properly access Rompilla's prior conviction which was likely to be at the heart of the state's case for the death penalty; failed to appreciate that the state's use of the prior conviction would "eviscerate" the defense's primary mitigation argument; and inexplicably the decision by defense counsel not to get the prior conviction files, readily available to the defense, was not a result of any tactical decision, all justified the holding that counsel performance did not meet standards of "reasonable professional judgment".

[8] Even *assuming arguendo*, that there was some deficient performance herein, no prejudice has been shown. There is simply no basis to support a prejudice finding based on the postulations of Dr. Mosman as to other mitigation which could have been presented. In fact most of what Dr. Mosman offered as additional mitigation was presented. The only topic "not discussed" was Hertz's mental age, which defense counsel stated was never mentioned by any of the experts he met with or presented at trial. See Maxwell, 490 So.2d at 932.

The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had

Kimbrough v. State, 886 So.2d 965, 975-77 (Fla. 2004)(Dr. Mosman found similar results as in the instant case.):

> Dr. Bill Mosman, a forensic psychologist and practicing attorney from the Miami, Florida, area, testified regarding potential statutory and nonstatutory mitigators which were not introduced at trial. Mosman reviewed various materials provided by Berland, reviewed the work of Dr. Sidney Merin, the State's mental health expert, reviewed the sentencing transcript, reviewed school records, and had conversations with Berland. Mosman did not personally examine Kimbrough prior to testifying and did not administer any tests to Kimbrough. He reviewed the defense investigator's file and recognized that Pizarroz "did voluminous amounts of work." From his review of the materials, Mosman thought that "from a statutory point of view, there were 5 statutory mitigators that were available and well reasonably could have been argued. From a hyper technical point of view there were three, but two of those are disjunctive." As to the potential statutory mitigators, Mosman stated:
>
>> They are a felony was committed while under the influence of extreme mental disturbance, felony committed while under the influence of extreme emotional disturbance, and mental is different than emotionally, capacity to appreciate the criminality of his conduct was substantially impaired, capacity to conform

---

established six serious aggravators. Even with the postconviction allegations regarding Hertz's mental verses physical age, the admission of that evidence "would not" have led to a life recommendation. See Asay, 769 So.2d at 988 (determining that there was no reasonable probability that evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State had established three aggravating factors, including CCP); see also Breedlove v. State, 692 So.2d 874, 878 (Fla. 1997).

his conduct to the requirements of law was substantially impaired.

Age of the defendant at the time of the crime clearly, clearly, multiple severe impairments in that area, these are the statutory ones.

Mosman testified that his review of the record and applicable case law revealed some thirty nonstatutory mitigators that could have been argued to the jury. Mosman stated:

The 30 are clearly a potential, an ability to be rehabilitated. There is a lack of family life that's separate. And background. Those are not the same ones. To collapse them is a complete misunderstanding of what the mental health process and the development of the child is all about.

There was history of neglect, disadvantage or deprived childhood, clearly educational deficits, emotional impairments, and results of any emotional disturbance. Those are separate and separately found in forensic materials and training in cases, emotional disturbance, even if not extreme.

There is extreme mental or emotional disturbance which is separate again, mental impairments, both cognitively and intellectually in the record. It's right in the data base.

Medical problems or history of injuries that is in the records, utilization, drugs or alcohol, previous contributions to the community or society. That was, is, and existed in the records. Psychological difficulties.

There is another one that's recognized and it's a tongue twister. It's called

iatrogenises from the systems and it's spelled "iatrogenises." Forensically, that's described as systems aware of problems and fail to deal with it. And we'll get into what that means later.

Remorse, positive confinement record, excuse me, and because I am testifying today and all of those record we would add another one, a good prison record. There is another one, behavior during trial. Those are disjunctive, not the same thing at all. Non anti-social personality, cannot be diagnosed, and that has to be a non-statutory mitigator in these types of situations. Can function in a structured environment. That's a separate one. Crime, itself, was out of character to the preincident situation Another one, he lost his cousin several years ago. Any impact that had on him. Failure to maintain relationship with family members that is in the records and it has been separately to be found mental health related non-statutory mitigators.

Mild brain abnormality. I will say that again. Mild brain abnormality. M.V.D. mental, grew up without a father is separate from the background issue and lack of family life, educational difficulties, positive traits and I can't even read my handwriting here. Yes. I can.

Mental and emotional handicaps, so those in a summary and while I understand some sound similar, they are actually different but the last one or two perhaps from a real technical mental health perspective, they are separate they enter play out on what was going on here so I think that if you count them up, that would be 30 non-statutory and 5 statutory from a mental health perspective.

Mosman also testified that Kimbrough had an extreme emotional disturbance at the time of the crime due to various stressors which were acting on his life.

Mosman stated that Kimbrough's capacity to conform his conduct to the requirements of the law was substantially impaired. This impairment was based upon the lack of "stability" or "consistency" in Kimbrough's upbringing. During his upbringing, Kimbrough learned that if he had emotional needs he had to take care of them himself.

In support of the statutory age mitigator, Mosman explained that "age has to do with mental age, developmental age, social age, intellectual age, moral age." Kimbrough rated a ten percentile rating "from all the years of academic functioning." His school records also reflected annual testing where "76 out of 100 of his same age peers were educationally much more sophisticated and skilled than he." Mosman calculated that based on an IQ of seventy-six, Kimbrough had the intellectual efficiency of a thirteen-year-old child. Kimbrough's emotional age, his ability to relate and engage in mature interpersonal relationships, was also low.

On cross-examination, Mosman acknowledged that this was not the first time he had testified in a capital case that a defendant's mental age does not match his chronological age. He had previously testified that a thirty-eight-year-old man had the mental or developmental age of a fourteen-year-old. Mosman was not aware that this Court upheld the trial court's rejection of this proposed mitigator because his opinion was contradicted by the other twenty-five witnesses called by the defense during the penalty phase. He agreed that none of the various IQ test scores in this case placed Kimbrough in even the mild mental retardation range.

Mosman noted that Pizarroz found notes from a long-term girlfriend of Kimbrough's who said that he was well-mannered and stated that Kimbrough was able to maintain relationships with "cousins, aunts, uncles, people that he met." Relying on this evidence, Mosman testified that a jury could conclude that the

Collins rape and murder, followed by one other rape n8 was out of character for Kimbrough. Mosman referred to a Federal Bureau of Investigation manual describing the various types of rapes and concluded that Kimbrough's second rape fit the "expressions of relationship fantasies" category. On cross-examination, however, Mosman agreed that his testimony concerning relationship "fantasy rape" was made without having talked to Kimbrough about what he was thinking at the time he committed the rape.

n8 Between the time of the Collins murder and the time he was charged with the murder, Kimbrough committed another rape. He pled guilty to the rape charge.

Mosman stated that mild brain abnormality might be found in the frontal lobe and "could have been argued." He thought the Weschler and MMPI tests could be used to argue brain damage or abnormality even though a PET scan rendered a normal reading. Although Mosman did not administer any tests to Kimbrough, he thought referrals could have been made to obtain additional testing.

Mosman noted that Kimbrough exhibited no evidence of a conduct disorder prior to the age of fifteen, was not aggressive, was not a disciplinary problem in school, and behaved well with his family. Accordingly, Mosman said that antisocial personality disorder could not be diagnosed in this case.

On cross-examination, Mosman said that he has been called to testify in thirty to thirty-five homicide and capital postconviction cases in Florida since 1990. In each of these cases, Mosman was called by the defense. When asked about the underlying data to support his opinion that the statutory mental mitigators applied at the time of the crime, Mosman asserted that he relied upon Kimbrough's traditional level of functioning. However, Mosman agreed that he did not talk to Kimbrough's mother, his other relatives, his friends, or his girlfriend to see if Kimbrough was somehow disordered in his thoughts at the time of the Collins murder. Mosman said that he did not do so because "they would have, in all probability, no information on that issue at all."

In rebuttal, the State called Dr. Sidney Merin, a psychologist specializing in clinical psychology and neuropsychology. Merin conducted a court-ordered neurological and psychological examination of Kimbrough. He also reviewed background materials relating to Kimbrough and the criminal proceedings against him. Merin interviewed and tested Kimbrough for just over six hours. He administered an IQ test and testified that Kimbrough had a full scale IQ of eighty-one, which is in the low average range. Merin thought that Kimbrough had a learning disability and that his "fund of information" was low. Merin also administered other tests which placed Kimbrough in the lower end of the average range. Merin stated: "I would conclude that he's probably in the low average range overall."

Merin testified that tests performed on Kimbrough revealed a statistically significant elevation in the psychopathic deviate scale. As to the significance of this result, Merin stated:

What you're more likely to say is this represents a significant degree of real rebelliousness in the personality, a significant degree of superficiality, an inclination not to become deeply, emotionally involved with others, although on the surface they can appear very nice. They make a good first impression. And after you talk with them a while, you begin to see what they're saying doesn't fit together, doesn't seem to - - it's not that it doesn't make sense, but it seems to be self-serving. Also found with people who have conflict with authority, who are manipulative, who are confidence people, who can act impulsively, who can defy the rules, who can be insensitive to the feelings of others, have a lot of difficulty with empathy. These are people who sometimes have a history of being under-achievers. Or, again, they may be impulsive, may have a tendency to blame their family for whatever occurs to them or blame other people for whatever occurs to them, although projection on this scale is not necessarily a prominent feature.

Merin testified that based on the results of all the tests he administered, he did not find that Kimbrough suffered from a serious emotional or mental disorder. However, he did find an Axis II, or behavioral disorder, and a general personality disorder with borderline and antisocial features. Merin also diagnosed a learning disability, which was due to Kimbrough's personality characteristics and not due to brain damage. As far as brain functioning, Merin said that he did not see any problems.

Merin testified that he would not have found any statutory mitigating circumstances in this case. As a single nonstatutory mitigator, Merin might have found a borderline personality disorder which had its underpinnings possibly in Kimbrough's unstable early childhood. He noted, "that's a rather mild non-statutory." Merin did not find any evidence that Kimbrough suffered from an extreme mental or emotional disturbance at the time of the crimes and did not find any evidence that Kimbrough's capacity to appreciate the criminality of his conduct at the time of the crime was substantially impaired.

Merin did not find evidence to support a conclusion that Kimbrough's developmental or emotional age was less than his chronological age. Merin also did not agree that Kimbrough qualifies for a borderline intellectual functioning diagnosis, stating:

> Well, first of all, I don't agree with your definition of borderline because--I don't agree with it because he's got many areas where he's perfectly average. So I would not in any way--I would not in any way suggest that he has a borderline, whatever it was, diagnosis that you're referring to. And you asked which ones? Well, let's just take a look at it. I referred to them earlier. We can take a look at it again. Average vocabulary, average verbal abstraction scores, average visual reasoning, average nonverbal comprehension skills and several of those are just a smidgin below average. So I would not in

> any way suggest that he's got that borderline intellectual deficit. If you're just gonna use a number--which doesn't really mean anything, any psychologist will tell you those IQ numbers don't mean anything, because next week it could change. What you look for are levels and the way it's distributed.

> Trial Court's Findings
>
> In its order denying Kimbrough's 3.850 motion, the court devoted eight pages to the resolution of Kimbrough's Ake claim and set forth its factual findings. The court agreed that Cashman misunderstood the significance of the psychopathic deviate scale but noted that Sims, who understood the scale, concurred with striking Mings. The court held that the decision not to call Mings and Berland was a reasonable trial tactic.
>
> ***
>
> As to the potential mitigation found by Mosman, the court noted that he did not conduct any independent testing and that there were no witnesses at the evidentiary hearing who could have presented direct evidence regarding these potential mitigators. The court further concluded that many of the mitigators cited by Mosman would have been given little or no weight.

See also Henry v. State, 862 So.2d 679 (Fla. 2003) (Dr. Mosman’s testimony was rejected because there was not substantial evidences to support his findings at the post conviction evidentiary hear); and Farrell v. State, 2005 Fla. LEXIS 1297, 30 Fla.L.Weekly S457 (Fla. June 16, 2005), wherein the Court held:

> In the instant case, the record supports the trial court's conclusion that there was no particularized need for the SPECT scan. The postconviction experts independently determined that Ferrell suffered from

> the same injury, i.e., mild to moderate diffuse brain damage to the frontal lobe caused by chronic alcohol abuse. While the scan would have confirmed the experts' diagnoses, it was not necessary in formulating their medical opinions about his brain damage. Further, Ferrell cannot show any prejudice from the trial court's denial of the SPECT scan. His experts were still able to testify that he had mild to moderate brain damage, which was consistent with the testimony presented at trial. The scan would not have provided any additional information about Ferrell's functional impairment than that presented. Thus, the trial court did not abuse its discretion in denying this request.
>
> As to Ferrell's claim that counsel rendered ineffective assistance in not requesting a SPECT scan in 1992, we agree with the trial court that he is not entitled to relief. Under the Strickland standard, Ferrell must prove both deficient performance by counsel and prejudice from this deficiency. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). There was no evidence that such scans were being ordered in capital cases in Florida in 1992. Thus, counsel's failure to obtain a scan was not deficient performance. In addition there is no reasonable probability that the presentation of a scan would have resulted in a different outcome here. The jury heard Dr. Upson's testimony and was aware of Ferrell's problems. The scan results could have confirmed Dr. Upson's diagnosis of brain damage but were not necessary in forming that diagnosis. Thus, Ferrell was not prejudiced by any alleged failure of counsel in this regard. Accordingly, we affirm the trial court's denial of postconviction relief on this claim.

Defense counsel "individualized" the mitigation during the penalty phase of the trial by presenting the family history, medical records, school records, and the many difficulties that had befallen Hertz. Mr. Rand was successful

in convincing the trial court that at least two statutory mitigating factors were applicable as well as a number of non-statutory factors.

The jury was provided materials summarizing the evidence and the life of Hertz and at closing was told that Hertz life was wasted and ruined. Rand reminded the jury about Hertz's background, his physical disabilities and his lack of education. Defense counsel personalized Hertz by showing the jury pictures of Hertz as a little boy and talking about the pain in that little boy's eyes because he was not loved or nurtured. He reminded the jury that Hertz was conceived to keep his parents out of prison and that Hertz was passed around and treated with indifference.

Rand told the jury that Hertz was no worst than Dempsey who received a life sentence and that they should all be treated the same. He observed that it was very sad to hear about the murders of Keith Spears and Melanie King and to hear their mothers express pain and loss, but it was also sad because Hertz never had anything from his family, no love, no nurturing, no medical treatment, just indifference. (OR XX 2394-2402)

Defense counsel provided the jury with a complete portrait of Hertz and his life, which allowed the jury to

consider an unlimited array of factors in determining the sentence to recommend. Hertz's parents and sibling detail the living conditions that Hertz faced his entire life and Dr. D'Errico, a forensic psychologist, detailed all of Hertz's medical and mental history.

Finally at the Spencer hearing, defense counsel called Hertz's mother who testified it would be unfair to give him death because it was Dempsey who killed the people. Hertz also took the stand and asked the families of the victims to forgive him and that he would never get out of jail. He observed that he wanted to tell his brothers to stay out of trouble and live their lives trouble-free.

A. Failure To Fully Develop And Present The Diminished Capacity Statutory Mitigator Per 921.141(6)(f), Florida Statutes

The record below reflects that the jury was instructed as to three mitigating factors, including "diminished capacity to appreciate the criminality of Hertz's conduct". Hertz's is now suggesting that defense counsel was not "forceful enough" in arguing the availability of the mitigation to the jury and the trial court-"the trial court gave the mitigator only 'some' weight; (OR Vol. II, pp. 295-300)" (App. Brief p. 49), and "[T]his powerful evidence would certainly have caused the jury and the trial court to find Hertz' capacity to appreciate

the criminality of his conduct...was substantially impaired....” (App. Brief p. 51).

First, the jury heard the evidence presented pertaining to this mitigator.[9] Whatever weight was given by jurors is not quantifiable, since the jurors are not required to divulge what mitigation they embraced. Moreover the trial court found this mitigating circumstance, observing only that the evidence did not support a finding that “his conduct was substantially impaired, accordingly, while entitled to some weight it was not entitled to moderate weight.” (OR II 296).

Trial courts have the sound discretion to determine what weight, if any, to accord to mitigating factors. Stephens v. State, 787 So.2d 747, 761 (Fla. 2001). This Court has held

[9] In Hertz, 803 So.2d at 637-38, the Court recapped the mitigation found at trial: “In mitigation, the trial court found (1) Hertz's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was given some weight; (2) his age of 20, which was given only moderate weight; (3) as to all other nonstatutory mitigation, (a) Hertz's difficult childhood was given significant weight; (b) the fact that Hertz had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Hertz's remorse and the fact that he cried during some of the testimony and when he made his statement to the court was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to "no weight" and (e) the fact that a codefendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court.

that it will sustain a trial court's assessment of the weight given to a mitigating factor absent an abuse of discretion and when the evidence supports the conclusions. Anderson v. State, 863 So.2d 169, 178 (Fla. 2003). Because trial courts are in the best position to observe the unique circumstances of a case, they have broad discretion in their decisions as to how much weight to assign to a particular mitigator. Foster v. State, 679 So.2d 747, 755 (Fla. 1996)("As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion."); Barnhill v. State, 834 So.2d 836, 853 (Fla. 2002)(Because the trial judge has discretion to determine the relative weight to give to each established mitigator, and that ruling will not be disturbed if supported by competent, substantial evidence in the record, Spencer v. State, 691 So.2d 1062, 1064 (Fla. 1996); Johnson v. State, 660 So.2d 637, 646 (Fla. 1995), and because the judge's sentencing order shows that he relied on competent, substantial evidence, we reject Barnhill's arguments concerning the weight to be given the mitigators.)

Second, to the extent, Hertz is arguing that Dr. Sesta should also have been called at the penalty phase rather than just Dr. D'Errico, merely challenges defense counsel's

strategy as to the penalty phase presentation. The trial court in denying postconviction relief, found that defense counsel had a reasonable strategy for not calling Dr. Sesta and that conclusion went unrefuted at the evidentiary hearing and based on the record.[10] The court observed:

> "...Rand had worked with Dr. D'Errico before and was very impressed with his work and ability to testify. He (Rand) was concerned about calling Dr. Sesta as a witness at trial due to his actions during the earlier competency hearing proceedings. After seeing what happened to Dr. Sesta on cross examination therein he decided that the doctor was not a good witness and not that helpful. Among other things, Dr. Sesta testified as to possible frontal lobe damage on direct examination, then essentially backed off of that testimony upon cross examination. Thus, Rand called Dr. E'rrico (sic) has (sic) the only expert witness during the penalty phase of the trial."

(Order dated December 30, 2004, p 8).

Moreover, to the extent that Hertz now argues that the only evidence of "brain dysfunction" would have been presented to the jury and trial court was via Dr. Sesta, such an assertion is in error. The trial court correctly found that "[T]he record reflects that Dr. Sesta, a neuropsychologist did not find brain 'damage'." (Order December 30, 2004, p. 6).[11]

---

[10] See PCR II 395-396.

[11] Dr. Sesta was hired pre-trial to assess whether any cerebral functioning problems existed, (OR III 361-363), and testified at Hertz's competency hearing. He diagnosed ADHD (OR III 367), after administering a number of tests, concluded

The record also reflects that through lay witnesses and Dr. D'Errico, in particular, at the penalty phase, evidence was presented that Hertz had ADHD and had suffered all his life from this disorder. (OR XIX 2314-15) Hertz' childhood was characterized by abuse, humiliation, low self-esteem and poor self-image and he was born with a club foot. (OR XIX 2318).

Dr. D'Errico testified that Hertz had a normal full scale IQ of 91, but observed that it was noteworthy that there as a 39 point spread between Hertz' verbal IQ of 79 and his performance IQ of 118 which "suggested some brain damage", however, neurological testing[12] demonstrated that this was due

---

that Hertz suffered from a mild cerebral dysfunction; that left his left side was poorer than his right side and that Hertz's frontal lobe was less than it should be. (OR III 371) Hertz's condition presented a Neurodeficient Development Disorder (NDD) however; there was no neurological disease or trauma. The NDD was based in part on Hertz's non-verbal upbringing, a learning disability and ADHD.(OR III 372-373). Hertz would improve with psychopharmacological treatments. (OR III 375, 382).

On cross-examination at the competency hearing, Dr. Sesta admitted that Hertz could function well at times, could control his actions when he wanted to, was lucid, and could understand his circumstances. Dr. Sesta admitted that Hertz had no Axis I mental illness, no schizophrenia or bipolar disorder, and could be malingering. (OR III 385-391).

[12] It was Dr. D'Errico who recommended that a neurological assessment be made, regarding the disparate numbers as to the IQ. Dr. Sesta at the competency hearing testified that any in explaining the variances in Hertz's mental agility there was

to a developmental reason; Hertz was raised in an environment where the spoken language was not used[13] and he suffered from ADHD. (OR XIX 2318-2319). Hertz suffered from suicidal ideations, had a temper problem and trouble with interpersonal relationships.[14] Hertz likely had an "unspecified cognitive disorder". (OR XIX 2320-2321). On cross-examination, Dr. D'Errico admitted that Hertz knew what he was doing and the consequences of his conduct, however, he observed that Hertz was impulsive and suffered from ADHD which may have lessened his awareness of the consequences. (OR XIX 2323).

Third, at the postconviction evidentiary hearing Dr. Mosman, disagreed with Dr. D'Errico's assessment of Dr. Sesta's report concerning the nature of the "cerebral dysfunction", to wit: variance in verbal verses performance IQ numbers. However Dr. Mosman, "was not aware of any type of brain scan indicating definitely that the defendant had brain

---

some neurodeficient developmental disorder due in part to Hertz's upbringing in a non-verbal household. (OR III 371-373).

[13] This was the same assessment made by Dr. Sesta.

[14] His modus operandi was to act disruptive if something happened to a relationship. For example, Hertz purportedly overdosed on his Ritalin medication and was hospitalized following his breakup with a girlfriend. However on cross, in discussing Hertz' suicide attempt, the doctor admitted that Hertz was released after five days of treatment in the hospital with no follow-up. (OR XIX 2324).

damage and he did concede that the bottom line differentiation between his conclusions and Dr. D'Errico was that he interpreted the data one way and Dr. D'Errico another...." (Order December 30, 2004 p 7).[15]

A different conclusion from a "new doctor" at postconviction does not make out a case of ineffective assistance of counsel. Pietri v. State, 885 So.2d 245, 265-66 (Fla. 2004):

> We noted that the defendant had failed to demonstrate, at the postconviction hearing, an inadequacy in the penalty phase testimony of the defendant's mental health expert, and the defendant had simply presented additional mental health experts who came to different conclusions than the penalty phase expert. See id. at 320. There, we reasoned: "The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis." Id. Further, we held that the defendant had failed to demonstrate that he suffered prejudice because "although the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana." Id. at 321; see also Brown v. State, 755 So.2d 616, 636 (Fla. 2000) (Strickland standard not satisfied where mental health expert testified during postconviction hearing that even if he had been provided with additional background information, his penalty phase testimony would have been the same); Rose v. State,

[15] See PCR II 379-383. Dr. Mosman ultimately concluded that Hertz was "neurologically deficient". (PCR II 385).

> 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990) (holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).

See also Davis v. State, 875 So.2d 359, 371 (Fla. 2003).

And finally, any possible error based on Dr. Mosman's testimony as to brain dysfunction would be harmless.[16] See: Arbelaez v. State, 898 So.2d 25, 37 (Fla. 2005):

---

[16] Likewise herein, "more emphasis on Hertz's cerebral dysfunction" would not have altered the outcome. Hertz, 803 So.2d at 653: "Furthermore, in light of the circumstances of this case, including the existence of six aggravating circumstances (i.e., commission while on felony probation; previous conviction of a violent felony; commission during robbery and arson and for pecuniary gain; commission to avoid arrest; CCP; and HAC) and only two statutory mitigating circumstances, we find the imposition of the death penalty to be proportionate when compared to other similar cases. See Brown v. State, 721 So.2d 274 (Fla. 1998) (affirming death penalty where evidence established four aggravating factors--prior violent felony conviction; murder committed during robbery and pecuniary gain, merged; HAC; and CCP--and two nonstatutory mitigating factors); Gordon v. State, 704 So.2d 107 (Fla. 1997) (affirming death penalty where evidence established four aggravating factors--murder during commission of burglary; pecuniary gain; HAC; and CCP--and only minimal evidence in mitigation for drowning murder and robbery of victim); Bryan v. State, 533 So.2d 744 (Fla. 1988) (affirming death penalty for execution-style shooting where evidence established six aggravating factors--previous violent felony; committed during robbery and kidnapping; avoid arrest;

> Although we believe that expert testimony relating to Arbelaez's low intelligence would have been vastly preferable and that counsel was deficient in failing to arrange for such testimony, we are confident that the presentation of such testimony would not have changed the outcome. Given that the jury listened to Arbelaez's testimony and also heard him explain on videotape how he executed a premeditated murder of a five-year-old boy to exact revenge on his former girlfriend, we do not believe that expert testimony about Arbelaez's intellectual limitations, short of mental retardation or major mental illness, would have altered the jury's perceptions to such an extent that it would have been swayed from its nearly unanimous recommendation of death. See Damren v. State, 838 So.2d 512, 517 (Fla. 2003) (concluding that counsel was not ineffective in failing to present evidence of minimal brain damage, "in light of the strong [CCP, HAC, and contemporaneous violent felony] aggravating factors which were present"); Sweet, 810 So.2d at 866 (concluding that mitigation evidence of the defendant's "low-average" IQ and his "personality disorder" would not "have led to the imposition of a sentence other than death, given the four strong aggravators" in the case); Brown v. State, 755 So.2d 616 (Fla. 2000) (concluding that mitigation evidence of the defendant's low intelligence would not have altered the outcome of the trial, given the presence of strong aggravating factors); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997) (holding that "in light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified [to his finding of a "strong indication of brain damage"], the outcome would have been different").

B. Failure To Develop And Present Evidence Of Extreme Mental Illness Statutory Mitigator Per 921.141(6)(b), Florida Statutes

---

pecuniary gain; HAC; and CCP--and only minimal nonstatutory mitigation)." Hertz, 803 So.2d at 653.

Hertz next argues that trial counsel should have also argued that he was under the influence of extreme mental and emotional disturbance as a plausible mitigating factor. Relying on Dr. Mosman's postconviction assessment, he contends that his "mental problems" greatly exceeded what was represented at the penalty phase. He specifically asserts that Dr. Mosman "determined that Hertz suffered from organic brain damage that possibly had a genetic origin that could not be cured."

The trial court rejected this contention and explained why in its order. (Order December 30, 2004, p. 4-6). Essentially, the court found all of Dr. Mosman's opining to be unsupported by the record, unsupported by any specific facts as to the crime, and most glaringly, incredible because Dr. Mosman was uninformed as to the facts and events of Hertz's case. Dr. Mosman read no guilt phase transcripts, read no part of Hertz's competency hearing, did not read all of the doctor's reports, read none of the mitigation evidence presented in book form to the jury and never spoke to defense counsel.

Hertz has shown no basis nor relevant case authority to suggest the trial court erred in concluding that trial counsel

was ineffective for “not asserting that Sec. 921.141(6)(b), Florida Statutes, was applicable in this case”.

C. Failure to Properly Present the Statutory Age Mitigator

Citing Foster v. State, 778 So.2d 906, 920 (Fla. 2000), Hertz also urges that counsel should have emphasized not only his chronological age but his mental age of 14, per Dr. Mosman. The record reflects the statutory age mitigator was found; Hertz was 20 years old at the time of the murders and the court gave the mitigator moderate weight. Hertz, 803 So.2d at 637.

In Kimbrough v. State, 886 So.2d at 975-76, Dr. Mosman presented this same theory without success:

> In support of the statutory age mitigator, Mosman explained that "age has to do with mental age, developmental age, social age, intellectual age, moral age." Kimbrough rated a ten percentile rating "from all the years of academic functioning." His school records also reflected annual testing where "76 out of 100 of his same age peers were educationally much more sophisticated and skilled than he." Mosman calculated that based on an IQ of seventy-six, Kimbrough had the intellectual efficiency of a thirteen-year-old child. Kimbrough's emotional age, his ability to relate and engage in mature interpersonal relationships, was also low.
>
> On cross-examination, Mosman acknowledged that this was not the first time he had testified in a capital case that a defendant's mental age does not match his chronological age. He had previously testified that a thirty-eight-year-old man had the mental or developmental age of a fourteen-year-old. Mosman was not aware that this Court upheld the trial court's rejection of this proposed mitigator because his

> opinion was contradicted by the other twenty-five witnesses called by the defense during the penalty phase. He agreed that none of the various IQ test scores in this case placed Kimbrough in even the mild mental retardation range.

Albeit age was found herein, based on the nature of Hertz's crimes, it is unlikely Dr. Mosman's theory would add any credible evidence to Hertz's case. Barnhill v. State, 834 So.2d 836 (Fla. 2002); Caballero v. State, 851 So.2d 655, 661-62 (Fla. 2003), and Nelson v. State, 850 So.2d 514, 528-29 (Fla. 2003).

Finally, the record demonstrates and the trial court found that defense counsel had never heard from any of his experts that Hertz's "mental age was only 14". Mr. Rand did an extensive investigation into Hertz's background and, while there was a plethora of evidence as to Hertz's childhood and difficulties in school, and illness and neglect, there was no evidence on "mental age" of 14, as divined by Dr. Mosman. A defense lawyer is not ineffective due to any "failure" to unearth every possible appellation given to "immaturity". Jackson v. Dugger, 547 So.2d 1197, 1200-1201 (Fla. 1989):

> There is no requirement that the issue of a defendant's competency must be reopened because the psychiatrist who examined the defendant reached a legitimate conclusion based on the symptoms displayed by the defendant but failed to associate those symptoms with another mental deficiency. **Nor is the attorney representing the defendant ineffective for failing to pursue every possible**

> **defense based on a particular mental condition. From the information given to counsel by the court-appointed doctor, counsel formulated a defense centered on Jackson's diminished capacity.** The evidence of Jackson's abusive childhood, her abusive marriage, and her alcohol and drug addiction was presented to and considered by the jury during her sentencing proceeding. The additional testimony Jackson now seeks to admit on these points is, perhaps, more detailed than that originally presented at sentencing. Nonetheless, it is essentially cumulative of the prior evidence. **We find nothing in the record to support the contention that Jackson's psychiatric evaluation was deficient or that trial counsel rendered ineffective assistance of counsel.**

(Emphasis Added).

D. Failure to Present Nonstatutory Mitigation

Based on Dr. Mosman's involvement, Hertz now contends there was additional nonstatutory mitigation that should have been presented. In particular, Hertz argued below that the following should have been emphasized: 1. Hertz's ability to be rehabilitated in prison, and be a positive person; 2. that Hertz has more than one genetic defect, color blindness as well as a club foot; 3. brain damage which cannot be cured; 4. Hertz had medical problems including a number of surgeries for his club foot; 5. long history of family history of deafness; and 6. history of drug and alcohol abuse.

The penalty phase record reveals that defense counsel either presented evidence as to each of these nonstatutory factors or, there was a basis not to.

1. Prison rehabilitation and positive person – At the penalty phase the State introduced through Parole Officer Reginald Byrd, the fact that Hertz was on probation at the time of the crime and was in violation status when the crime occurred. (OR XIX 2212). Moreover there was the shootout in Daytona Shores when Hertz got shot trying to escape capture,[17] not to mention these double murders. However in spite of the forgoing the court found no significant history and no history of violence and gave this mitigation marginal weight.

2. Genetic defect - color blindness and club foot - The penalty phase record is replete with evidence about Hertz's club foot and the surgeries he endured due the defect. (OR XIX 2264, 2273, 2284, 2299-2301, 2318). The trial court gave significant weight to Hertz's difficult childhood.

---

[17] Hertz and his codefendants made their way to Daytona Beach Shores where, later that day, they were involved in a pursuit and shootout with police. Looney and Dempsey were arrested after abandoning and fleeing from the victims' black Mustang. Hertz abandoned the victims' Ford Ranger after being shot, and he paid a cabdriver $100 to drive him to his aunt's house in St. Augustine. Hertz was arrested that same day in St. Augustine, and victim Spears' .9mm gun was recovered from Hertz's bag. <u>Hertz</u>, 803 So.2d at 636.

3. Brain damage - At an early age Hertz was diagnosed with ADHD due to his behavioral problems at school (OR XIX 2276); and was in need of mental health help when he tried to overdose on his Ritalin over being jilted by a girlfriend. (OR XIX 2278-79). Vita Lincoln, an elementary school teacher, said Hertz was a hyperactive child, in the lower group of students, unhappy and hard to motivate. (OR XIX 2294-98). His aunt recalled in February 1997 Hertz left a suicide note. (OR XIX 2308-2310). And Dr. D'Errico mentioned suicidal ideation. (OR XIX 2320-2321).

The trial court found that Hertz's capacity to appreciate the criminality of his conduct and conform said conduct as a statutory mitigator, which was evidence from the mental problems which "plagued" Hertz all his life.

4. Medical problems and surgeries - The record clearly reflects that evidence of Hertz's mental and physical problems were presented at the penalty phase through family and medical testimony. The trial court found this as part of Hertz's difficult childhood. Rogers v. State, 783 So.2d 980, 995 (Fla. 2001):

> A mitigating circumstance is broadly defined 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. Id. at 419 n.4. When addressing mitigating circumstances, the sentencing court must

> expressly evaluate in its written 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. See id. at 419. "As with statutory mitigating circumstances, proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." Id. at 419 n.3; see Reaves v. State, 639 So.2d 1, 5 (Fla. 1994) (finding no error where trial court reasonably grouped several nonstatutory mitigating factors into three). After finding mitigating circumstances, the court must expressly consider in its written order each established mitigating circumstance and then must weigh the aggravating circumstances against the mitigating circumstance, in order to facilitate appellate review. See Campbell, 571 So.2d at 420.

See also Spann v. State, 857 So.2d 845, 857 (Fla. 2003).

5. Long History of Family Deafness - The trial court pointed

to evidence of deafness in Hertz's family in justifying the statutory mitigator that Hertz's capacity to appreciate the criminality of his conduct was impacted by this circumstance. The trial court found: "Evidence and argument was presented that the defendant was born with a physical disability (club foot), to a deaf mother and a partially deaf father who were neglectful and addicted to drugs and unable to provide a stable environment or appropriate medical and parental care for the defendant. ....Evidence was also presented that the defendant did have several operations to alleviate his birth

condition and that he was prescribed and given Retelin (sic) for his attention deficit hyperactive disorder." (Sentencing Order OR I 295-296).

Hertz was not entitled to a separate nonstatutory mitigating factor of evidence that was clearly considered and utilized by the trial court to find the statutory mitigating factor. Moreover, it is difficult to fathom how counsel was ineffective when the issue of family deafness was considered by the trial court in mitigation.

6. History of Drug and Alcohol Abuse - Hertz further contends that the historical evidence of drug and alcohol abuse should have been presented. It was. Hertz's mother testified that she and Hertz's father were living together using drugs. She got pregnant with Hertz, during this time, to avoid either of Hertz"s parents going to prison. His mother used drugs while she was pregnant with hertz and she tried to abort hertz and then abandoned him once he was born. (OR XIX 2260-2270). Hertz's father testified that he used an assortment of drugs throughout his life and got his wife pregnant to avoid jail on drug charges. He used marijuana and other drugs in front of Hertz and gave Hertz drugs at age eight. At one point Hertz and his father were living with a crack cocaine dealer. (OR XIX 2289-2292).

Defense counsel testified at the postconviction evidentiary hearing that he investigated all aspects of Hertz's life and "tried to be selective in having family members testify because he wanted to portray a 'vibrant picture of Hertz' which showed a tragic background and a horrible life as a young man." (PCR 62-64).

The trial court concluded that this evidence of poor family background and hardships as a youth was entitled to significant weight. (Sentencing Order, OR I 296).

Moreover as noted by the trial court in its December 30, 2004 Order denying relief, "...The standard jury instructions do not instruct a jury that aggravators are statutory or that certain mitigators are statutory and others nonstatutory. The mitigation presented would not have been provided any more impact or weight for its consideration if it had been given multiple enumerations for multiplicative matching purposes with regard to the State's aggravators. The jury was not left with the impression that the mitigation they could consider was limited nor that the mitigation not specifically designated as statutory could not impact or be weighed against the State's statutory aggravators. Furthermore, counsel made it clear and ably argued that any mitigator could outweigh all of the aggravators argued by the State." (Order December 30,

2004, p. 12); Howell v. State, 877 So.2d 697, 704-705 (Fla. 2004).

E. Trial Counsel's Method of Presenting Mitigation was Ineffective

Terminally, Hertz argues that counsel could have been more forceful in presenting the mitigation. The record reflects that not only did counsel investigate, collect information and then make his presentation to the jury, but he also compiled a mitigation tome, which chronicled Hertz life and had it available for the jury to review. (PCR II 398-400) Rand testified in the postconviction evidentiary hearing that he believed Hertz had a story to tell, which was best told through a book. Rand wanted the jury to have Hertz's life via the book and to take it back to the jury room. He noted that there were issues to be discussed in closing but he did not want to get bogged down and wanted the jury to review Hertz's life through the book prepared.[18]

Counsel was not ineffective for electing the method by which to best present Hertz's mitigation.

[18] The record below further shows that Dr. Mosman had no idea that defense counsel prepared a mitigation book for the jury and that it was given to them for consideration (PCR II 361-363), nor does Hertz even acknowledge the fact that the mitigation book was introduced in his argument herein.

The record is replete with evidence that Rand provided effective assistance of counsel at the penalty phase of Hertz's trial.

CONCLUSION

Based on the foregoing all relief should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____
CAROLYN M. SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL
FLORIDA BAR NO. 158541

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4566

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Clyde Taylor, 119 East Park Avenue, Tallahassee, FL 32301, this 12th day of July, 2005.

____
CAROLYN M. SNURKOWSKI

Assistant Deputy Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify that this brief was typed using Courier New 12 point.

____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General