IN THE SUPREME COURT OF FLORIDA

GUERRY WAYNE HERTZ,

Appellant,

vs.

Case No. SC05-59
L. C. No. 97-214-CF

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

On Direct Appeal From A Final Order Of The Circuit Court Of The Second Judicial Circuit, In And For Wakulla County, Florida, Denying Hertz' Florida Rules Of Criminal Procedure 3.850/3.851 Motion For Post Conviction Relief, As Amended, in a Capital Case.

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PRELIMINARY STATEMENT

Guerry Wayne Hertz, a co-defendant below, is the appellant in this proceeding. He will be referred to as the "defendant," "Guerry" or "Hertz." The State of Florida, plaintiff below, is the appellee. It will be referred to as "the state."

The post conviction record on appeal is in three volumes. Volume I contains Hertz' complete Florida Rule of Criminal Procedure 3.850/3.851 motion for post conviction relief and part of the state's response thereto. Volume II contains the remainder of the state's response to the post conviction motion, additional pleadings,[1] and a part of the evidentiary hearing transcript held regarding certain issues contained in the post conviction motion. Volume III contains the remainder of the transcript of the evidentiary hearing on the post conviction motion as well as the trial court's order denying the post conviction motion and other documents. The clerk has placed a page number in the lower right hand corner of each page of the record on appeal. Thus, references to the post conviction record will be by the letter "R" (for record on appeal) followed by a volume and page

[1] Hertz was permitted to file an amended motion setting forth in detail the claim that his defense counsel failed to present all mitigating evidence extant at the time of the penalty phase of his state court trial. (R. Vol. II, pp. 309-316) The state filed a response specifically denying this claim. (R. Vol. II, pp. 328-330)

number. It is noted that the court reporter has provided a page number for each page of the above referenced evidentiary hearing transcript in the upper right hand corner of each page. Thus, when referring to this transcript, appellant includes the "R" number provided by the clerk appearing at the bottom of each page as well as the court reporter's page number (referenced by the letters "EH" followed by a page number).

References to the record on appeal in Hertz' direct appeal of his judgments and death sentences will be by the letters "OR" (for original record), followed by a volume and page number.

All emphasis is added by appellant unless indicated otherwise.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature Of The Case

This is a direct appeal to the Supreme Court of Florida from a final order (R. Vol. III, pp. 492-503) in *State v. Guerry Wayne Hertz, et. al*, Case No. 97-214-CF, rendered by the Circuit Court of the Second Judicial Circuit, in and for Wakulla County, Florida, Hon. N. Sanders Sauls, Circuit Judge, presiding, denying Hertz' motion for post conviction relief, as amended, filed per the provisions of Florida Rules of Criminal Procedure 3.850/3.851.

B. Jurisdiction

This Court has jurisdiction to review the lower court order denying Hertz' Florida Rule of Criminal Procedure 3.850/3.851 motion for post conviction relief per the provisions of Article V, Section 3(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I), and Florida Rule of Criminal Procedure 3.850(g).

C. Course Of The Proceedings

On August 26, 1997, co-defendants Guerry Wayne Hertz, Jason Brice Looney, and Jimmy Dempsey were indicted for the first degree murders of Melanie King and Robin Spears committed on July 27, 1997 in Wakulla County, Florida. They were also indicted for armed burglary of a dwelling, armed robbery with a firearm, arson of a dwelling, and use of a firearm during the commission of a felony. (R. Vol. I, p. 58; OR Vol. I, pp. 1-3) The defense was notified that the state intended to seek the death penalty. (R. Vol. I, p. 58; OR Vol. I, p. 13) A host of pretrial motions followed.

On April 7, 1999, a hearing was held on Hertz' motion to determine competency. (R. Vol. I, p. 58; OR Vol. III, pp. 216-475) Dr. Michael D'Errico found that he suffered from Attention Deficit Hyperactivity Disorder (ADHD). (OR Vol. III, pp. 329-336) He attempted suicide at age 18. (OR Vol. III, p. 337) Dr. D'Errico determined that Hertz was not competent to stand trial, but with treatment he could become competent.

(OR Vol. III, pp. 342-345) He admitted that Hertz could have been malingering and, if so, that would change his conclusion. (OR Vol. III, p. 359) Dr. Joseph Sesta, a neuropsychologist, examined this defendant and also found Hertz to be incompetent to assist his attorneys at trial. (OR Vol. III, pp. 380-382) Dr. Thomas Conger, a clinical psychologist retained by the state, tested Hertz regarding competency as well. Although agreeing with many of Dr. Sesta's findings, Dr. Conger determined that Hertz did not want to perform well on the tests he administered and was competent to stand trial. (OR Vol. III, pp. 412, 414-418) A Wakulla County Sheriff's deputy testified that on one occasion when Hertz was being transported back to the jail, he said that he intended to bang his head against his cell and make a mess. (OR, Vol. III, pp. 438-441) Judge Sauls ruled, based upon the doctors' reports and testimony, that Hertz was competent to assist his attorney and stand trial. (OR. Vol. III, p. 473)

The trial including jury selection commenced on November 29, 1999 and concluded some 10 days later.[2] Hertz was found guilty of two counts of first-degree murder, burglary of a dwelling while armed with a firearm, armed robbery with a firearm, arson of a dwelling, and the use of a firearm in the commission of a felony. (R. Vol. I, p. 58, 59; OR Vol. XX, pp. 2177-

[2] Prior to trial, Dempsey plead guilty in exchange for a life sentence, and testified against Looney and Hertz.

2180) The penalty phase of the proceedings was held on December 9, 1999 in Crawfordville. (R. Vol. I, p. 59; OR Vol. XIX-XX, pp. 2200-2416) At the conclusion thereof, the jury recommended death by a vote of 10-2. (R. Vol. I, R. 59; OR Vol. XX 2415-2416, Vol. II, pp. 203, 204) On February 18, 2000, Judge Sauls sentenced Hertz to death for the murders and to various terms of incarceration for the other offenses of conviction. (R. Vol. I, p. 59; OR Vol. II, pp. 290-300)

On direct appeal, Hertz raised the following issues:

1. Venire person Free was impermissibly struck from the jury venire on the erroneous ground that her opposition to the death penalty rose to the level justifying exclusion under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985).

2. The trial court erred in finding that Hertz was competent to stand trial.

3. The trial court erred in admitting gruesome photographs of the victims, the scene of the crime, and the autopsy.

4. The details of the collateral crimes in Volusia County became an impermissible feature of the trial causing prejudice that outweighed its probative value in the case in chief.

5. The evidence adduced at trial was insufficient to convict the defendant of first-degree murder.

6. The statute authorizing the admission of victim impact evidence is unconstitutional in violation of Article V, Section 2, Florida Constitution, thus making the admission of the subject testimony unconstitutional and prejudicial.

7. The trial court erred in not requiring a unanimous verdict regarding the imposition of the death penalty.

8. Four of the seven statutory aggravating factors upon which the jury was instructed and which the trial court found to have been proven beyond a reasonable doubt were not legally applicable, and their consideration was not harmless error.

9. The death sentences received by the defendant were disproportionate to the life sentences Dempsey received. See *Hertz v. State*, 803 So. 2d 629 (Fla. 2001); R. Vol. I, p. 60.

On November 1, 2001, this Court affirmed the convictions, judgments, and sentences. *Hertz v. State*, 803 So. 2d 629 (Fla. 2001). On November 16, 2001, Hertz filed a motion for rehearing. On December 21, 2001, that motion was denied. On December 21, 2001 the mandate was issued. On June 28, 2002, a timely filed petition for writ of certiorari was

denied by the Supreme Court of the United States. *Hertz v. Florida*, 536 U.S. 963 (2003).

On June 30, 2003, Hertz filed his Florida Rule of Criminal Procedure 3.850/3.851 motion to vacate his judgments and death sentences. (Vol. I, R. 1-56) The state filed a detailed answer. (R. Vol. I, pp. 57-200; R. Vol. II, pp. 201-247) After a case management conference (*Huff* hearing),[3] the defendant was permitted to file an amended motion setting forth in detail the essence of his claim that his defense counsel failed to properly present all mitigating evidence extant at the time of his state court trial. (R. Vol. II, pp. 309-316) The state filed a response denying this claim. (R. Vol. II, pp. 328-330) An evidentiary hearing was held on July 27, 2004 on the claim set forth in the amended motion for post conviction relief. (R. Vol. II, pp. 331-340, EH, p. 3-70; R. Vol. I, pp. 401-417, EH, p. 71-86) Dr. William Mosman, Ph. D., a forensic psychologist and member of the Florida Bar, testified for the defendant. (R. Vol. II, pp. 334-386; EH, p. 4-55) Robert Rand, Hertz' lead defense counsel, testified for the state. (R. Vol. II, pp. 386-400, R. Vol. III, pp. 401-416; EH, p. 55-86) The parties then submitted written closing arguments for the trial court's consideration. (R. Vol. III, pp. 418-491)

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[3] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

D. Disposition In The Lower Tribunal

On December 30, 2004, the trial court rendered a final order denying Hertz post conviction relief. (R. Vol. III, pp. 492-503) On January 10, 2005, Hertz filed a notice of appeal to this Honorable Court. (R. Vol. III, pp. 504, 505)

E. Statement Of The Facts

i. The Guilt/Innocence Phase Of The Trial

The basic facts of the case are set forth in this Court's decision in *Hertz v. State*, 803 So. 2d 629, 635-637 (Fla. 2001) that affirmed the judgments and death sentences:

> 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 mobile home in Wakulla County, Florida. Hertz, Jason Looney, and Jimmy Dempsey were indicted on August 26, 1997 for the 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. The offense date was determined to be July 27, 1997.
>
> Prior to trial, codefendant Dempsey negotiated a plea with the state and received consecutive life terms in return for providing his testimony at Hertz and Looney's joint jury trial.
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> The trial commenced on November 29, 1999 and concluded on December 9, 1999. Hertz was represented at trial by Robert Rand, Esq. and Lynn Alan Thompson, Esq. Hertz did not testify during the innocence/guilt phase.
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> The evidence presented at the trial revealed the following facts:

At approximately 11:00 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 2:00 a.m. asking to use her telephone claiming that 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, "(t)here'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 $1500.00 of the victims' money in an envelope, which was ultimately divided equally among the three codefendants. 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, and face-down 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, "(s)orry, can't do that" and 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' house, where they 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 5:00 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 paid a cab driver $100.00 to drive him to his aunt's house in St. Augustine. Hertz was arrested that same day in St. Augustine, and the victim Spears' .9 mm gun was recovered from Hertz's bag. A firearms expert with the 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, consistent with the .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 $464.00, and Dempsey's wallet with $380.00 were also found in the Mustang. A fingerprint analyst with the FDLE studied 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 had 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 during the guilt phase of the trial. 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.

ii. The Penalty Phase

In his opening statement at the beginning of the penalty phase, State Attorney Willie Meggs enumerated seven distinct aggravating factors found in Section 921.141(5), Florida Statutes, that he claimed applied to the facts in the case: (1) Hertz was on probation at the time the crime was committed; (2) he had been convicted of a felony involving violence prior to the sentencing date; (3) he committed the homicides during a burglary, a robbery or the crime of arson; (4) the homicides were committed to avoid

arrest; (5) the defendant committed the homicides for financial gain; (6) the two first-degree murders were heinous, atrocious or cruel; and (7) the defendant committed the crimes in a cold, calculated and premeditated fashion. (OR Vol. XIX, pp. 2203-2205) In his opening statement, Rand did not reference any of the statutory mitigating factors set forth in Section 921.141(6), Florida Statutes. (OR Vol. XIX, pp. 2209-2211) Instead, defense counsel discussed various conditions of Hertz' life, focusing on his childhood. Among other things, Rand noted that Hertz was born to deaf parents. They were heavily involved in drug use. Growing up, Hertz was passed between relatives and social service agencies. (OR Vol. XIX, p. 2210)

The State called Reginald Byrd as its first witness. (OR Vol. XIX, p. 2211) He was a probation officer with the Florida Department of Corrections, Probation and Parole Services, and was supervising Hertz. He was still on probation on July 7, 1997, the day of the homicides committed in this case. (OR Vol. XIX, p. 2212)

The state then called Karen King, the mother of the slain Melanie King. She read a victim impact statement prepared by her and other family members. (OR Vol. XIX, p. 2215) Melanie was attending Tallahassee Community College's school of nursing and working full time with the

Florida Lottery. King had to accept Melanie's nursing pin for her at her graduation. Melanie planned to work in the field of pediatrics. (OR Vol. XIX, p. 2216)

The state next called Janet Spears, Keith Spears' mother. She also presented a victim impact statement. Keith was her only son. (OR Vol. XIX, p. 2219) He was a partner in his family's business. He was very close to his sister Angie, and they discussed raising their future children together. (OR Vol. XIX, p. 2220)

The state rested.

The defense first called Deborah Hertz, the defendant's mother. She has been completely deaf all her life. (OR Vol. XIX, p. 2259) She met Wayne Hertz, the defendant's father, at the Florida School for the Deaf and Blind. After graduating from the school, she met Wayne again in Tallahassee where the two began dating. Deborah and Wayne were both taking drugs while they were seeing each other. Wayne encountered difficulty paying for his drugs. (OR Vol. XIX, pp. 2260, 2261) The two began to steal to pay for drugs and for the rent. Both were arrested and faced the possibility of going to prison. (OR Vol. XIX, p. 2262) She and Wayne conceived a child to avoid prison. The two were not married at the time, and Deborah did not recall if she loved Wayne. She took pity on him.

Wayne was not a good husband during her pregnancy (OR Vol. XIX, p. 2263), and she continued to use drugs during this time. Wayne hit her during this time, and Deborah would punch her own stomach after arguing with Wayne in an effort to end the pregnancy. (OR Vol. XIX, p. 2264) She learned from Wayne's mother that his sister was born with club feet. (OR Vol. XIX, p. 2265) She turned Guerry's care over to her mother shortly after he was born, and he lived with his grandmother for the first five or six months of his life. (OR Vol. XIX, p. 2266)

Wayne was using cocaine and other drugs. He physically abused Deborah and Guerry. (OR Vol. XIX, pp. 2268-2270) She eventually signed papers relinquishing custody of Guerry. (OR Vol. XIX, p. 2272) Attempts to correct his clubfoot were not successful and only made matters worse. (OR Vol. XIX, p. 2273) Wayne treated their son, Casper, much better than he treated Guerry. (OR Vol. XVIII, pp. 2274, 2275)

Guerry was diagnosed with ADHD. Deborah did not understand what ADHD meant, and no one explained it to her. Deborah found it very difficult to control Guerry as a child. (OR Vol. XIX, p. 2276) Guerry's behavior improved when he took Ritalin, but Deborah did not always give him his medication. Wayne sometimes prevented Deborah from giving Guerry his Ritalin, demanding that Deborah control him without the

assistance of medication. When Guerry was eight years old, Deborah learned that Wayne was providing him with marijuana. (OR Vol. XIX, p. 2277) Guerry attempted to kill himself via a drug overdose around January of 1996 after he broke up with his girlfriend. He was hospitalized for a few days and then saw a psychiatrist. (OR Vol. XIX, pp. 2278, 2279)

The defense then called Guerry Wayne Hertz, Sr. ("Wayne"), the defendant's father. (OR Vol. XIX, p. 2279) He testified that he was deaf in his left ear and could hear a little with a hearing aide in his right ear. He attended Florida School for the deaf, where he met his future wife. (OR Vol. XIX, p. 2280) When Wayne met Deborah again, he was using marijuana and hashish, a strong version of marijuana. He also used Quaaludes, cocaine, and acid. He used these drugs frequently. (OR Vol. XIX, p. 2281) Wayne would pay for drugs by stealing items to exchange with drug dealers. Deborah assisted in some of these exchanges. He was arrested several times for these illegal activities. He was approximately twenty years old at this period of his life. He began using drugs at the age of 10. (OR Vol. XIX, p. 2282)

After being arrested for stealing, Wayne and Deborah were facing a prison sentence. The two decided to conceive a child to avoid prison. (OR Vol. XIX, p. 2283) Wayne and Deborah informed their lawyer that Deborah

was pregnant, and they received probation. Guerry was born with a club-foot and Wayne did not like this. Though handicapped himself, Wayne wanted a child without defects and resented his son for his disability. When Guerry was three weeks old, Wayne took him to Deborah's mother. (OR Vol. XIX, p. 2284) Deborah and Wayne went to south Florida where they continued to use drugs and steal. Neither parent saw the baby for five or six months. (OR Vol. XIX, p. 2285)

Deborah's mother brought Guerry to his parents off and on. She also tried to help Wayne find a job. (OR Vol. XIX, p. 2285)

Guerry required surgery on his clubfoot several times while he lived with his grandmother. (OR Vol. XIX, p. 2286) Sometimes Guerry lived with his father, sometimes with his grandmother. Wayne was homeless for 18 months and lived in a van. Guerry was in school at the time and lived in the van with his father. Wayne was spending his entire paycheck on purchasing marijuana and crack cocaine. (OR Vol. XIX, p. 2287) Wayne sometimes had arguments with Deborah and hit her in front of Guerry. He also hit Deborah while she was pregnant. Wayne testified that Deborah would punch her own stomach to attempt to end the pregnancy. Deborah's mother did not approve of Guerry's parents living in a van and abusing drugs. (OR Vol. XIX, p. 2288) Wayne added that he had difficulty

controlling his temper when he used drugs. He would sometimes have fights with Guerry. (OR Vol. XIX, p. 2289) He did not consider himself a very good father and acknowledged that Guerry did not have a good childhood. He introduced Guerry to marijuana at the age of eight. Wayne shared other drugs with Guerry and began to take acid. (OR Vol. XIX, p. 2290)

Guerry was diagnosed with ADHD, attention deficit hyperactive disorder, and was prescribed Ritalin. He was better behaved and performed well in school when he took the medication. Wayne did not want his son to take Ritalin, hid the drug from him, and told Deborah that their child could not take it. (OR Vol. XIX, p. 2291) Guerry had problems when he did not take the prescribed drug. (OR Vol. XIX, p. 2292)

When Guerry was 16 years old, he lived with Wayne in Tallahassee. Wayne's roommate at the time was a cocaine dealer. (OR Vol. XIX, p. 2292) He did not know his son's birth date and bought him presents for his birthday and Christmas only once in a while. (OR Vol. XIX, p. 2293)

The defendant introduced in evidence an affidavit from Vita Lincoln, one of Guerry's teachers at Sable Elementary School. Guerry was grouped with the students in the "low" learning category. (OR Vol. XIX, pp. 2296, 2297) He was hyperactive. He would come to school with dirty clothes,

unwashed and not properly rested since his family would fish for food at night. (OR Vol. XIX, p. 2297)

Iris Watson, Guerry's maternal grandmother, also testified for the defense during the penalty phase. She observed the treatment administered for Guerry's clubfoot that required repeated casting when he was small. Watson had Guerry's casts changed correctly when he lived with her. The casts were supposed to be changed once every two weeks. (OR Vol. XIX, p. 2300) Guerry's parents failed to have his cast changed on time, and his leg developed ulcers. He was forced to wear a brace and a special shoe. He eventually had to have several surgeries on his foot. (OR Vol. XIX, p. 2301)

Watson testified that the marriage of Guerry's parents was troubled. Wayne slapped Guerry, though he claimed it was an accident. (OR Vol. XIX, p. 2302) Guerry's teachers noted a dramatic decline in his performance when he stopped taking Ritalin while living with his parents. (OR Vol. XIX, p. 2303)

The Defense then called Guerry's aunt, Deborah Hertz. (OR Vol. XIX, p. 2305) She testified that the defendant had poor hygiene as a child. He did not take his medications. When he was 10 or 11 years old, the defendant told her that his parents were involved in drug activity. (OR Vol. XIX, p. 2306) There was a significant difference in Guerry's behavior when

he was taking Ritalin. (OR Vol. XIX, p. 2307) While Guerry lived with his grandmother and took his Ritalin, his grades improved. His grades declined when he lived with his parents. Deborah found a suicide note from him while he was living with his father. (OR Vol. XIX, p. 2308) About that time, he stole a gun, a 22 caliber Ruger. Deborah's brother, Wesley Hertz, told her that he used crack cocaine with the defendant during the time they lived together in 1997. (OR Vol. XIX, p. 2309)

During cross-examination, Deborah acknowledged that she did not have much contact with Guerry in the period immediately prior to the commission of the homicides. She disapproved of some of his friends and refused to allow him into her house. (OR Vol. XIX, p. 2310) She knew that he had a girlfriend, but she did not allow her to come to her home. Deborah stopped having contact with Guerry when he was 13 years old. (OR Vol. XIX, p. 2311)

On redirect examination, Deborah testified that Guerry's friends had poor reputations, did not have jobs, and used drugs. She reiterated that she had limited contact with him after he turned 13. She said that he became more and more like Wayne Hertz, Sr. and Wesley Hertz. (OR Vol. XIX, p. 2312)

The defense then called Dr. Michael D'Errico, a forensic psychologist. He interviewed Guerry in the Leon County Jail on three occasions in 1998 and 1999. He reviewed his psychological and educational records. (OR Vol. XIX, p. 2314) Guerry had been diagnosed as suffering from attention deficit hyperactivity disorder at the age of 13. He was again diagnosed for the same disorder when he was 18 years old. Dr. D'Errico found that there had been evidence of a history of ADHD before Guerry was diagnosed the first time. (OR Vol. XIX, p. 2315) He confirmed that he would also diagnose the defendant with ADHD. The most effective method of treating ADHD is chemotherapy in the form of Ritalin. (OR Vol. XIX, p. 2316) Dr. D'Errico found that Ritalin had controlled the defendant's ADHD symptoms at various points in his educational history. The doctor also noted that Hertz' behavior became problematic when he stopped taking Ritalin. (OR. Vol. XIX, p. 2317) He stated that Guerry's history of physical abuse and his clubfoot would have had detrimental effects on his psychological well-being. (OR Vol. XIX, p. 2318) Dr. D'Errico performed intelligence tests on Guerry and found that his score on the performance subsection of the test was 39 points higher than his score on the verbal subsection. He concluded that Guerry's upbringing in a home in which spoken language was not used accounted for the large disparity in his scores. His ability to

understand and use language was severely impaired. (OR Vol. XIX, p. 2319)

Dr. D'Errico found that Guerry demonstrated temper problems and difficulty maintaining interpersonal relationships. After his relationship with his girlfriend ended, Guerry attempted to commit suicide by taking an overdose of Ritalin. (OR Vol. XIX, p. 2320)

On cross-examination, Dr. D'Errico acknowledged that he reviewed reports from other psychologists. (OR Vol. XIX, p. 2321) He conceded that Guerry may have understood the consequences of his actions in the commission of the crime. However, his ADHD might have interfered with his ability to fully comprehend the consequences of his actions. (OR Vol. XIX, p. 2323)

The defense next called Donnie Crum, a Major with the Wakulla County Sheriff's office, to testify. Crum took a statement from Jimmy Dempsey in 1997. (OR Vol. XIX, p. 2326) Crum read a portion of the statement in which Dempsey described shooting Keith Spears. (OR Vol. XIX, p. 2327) Dempsey stated that he could not tell where Jason Looney shot. (OR Vol. XIX, p. 2329) On cross-examination, Crum acknowledged that Dempsey had previously given inaccurate information to one of the FDLE agents. (OR Vol. XIX, p. 2331)

The defense rested.

In State Attorney Meggs' closing argument during the penalty phase (OR Vol. XX, pp. 2372-2380), he emphasized that the seven specific statutory aggravators he referenced in his opening statement had been proven beyond a reasonable doubt -- and that the mitigating factors did not outweigh the aggravators. In Mr. Rand's brief closing argument (OR Vol. XX, pp. 2394-2402), he did not mention by name any of the statutory mitigating factors referenced in Section 921.141(6), Florida Statutes. Nor did he contest the existence and proof of any of the statutory aggravators referenced by Mr. Meggs. Id. Rand noted that Guerry learned from his parents that he was "nothing" (OR Vol. XX, p. 2397), subjected to violence as a child and, throughout most of his life, treated with "indifference." (OR Vol. XX, p. 2398, 2399) He stressed the life sentence given to Dempsey. (OR Vol. XX, p. 2399, 2400) He asked the jury to consider the outline of Guerry's life (set out in Defendant's Ex. 4 placed in evidence, including the psychological reports warning that if he did not get help he was going to be in "terrible trouble") introduced in evidence during the penalty phase. (OR Vol. XX, p. 2403)

iii. Findings By Trial Court Re. Sentencing

The results of the penalty phase proceedings are reported in *Hertz v. State*, 803 So. 2d 629, 637-638 (Fla. 2001):

> 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 dated February 18, 2000, the court imposed a sentence of death for each murder. Hertz did not testify during the penalty phase.
>
> With respect to Hertz, the trial court found as aggravating factors per Section 921.141(5), Florida Statutes, 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 per Section 921.141(6), Florida Statutes, the trial court found that (1) Hertz's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was entitled to some weight and (2) his age of 20 years was given only moderate weight. As to all other non-statutory 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) 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 codefendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court.[4]

iv. The Evidence Presented During the Post Conviction Evidentiary Hearing

The William Mosman Testimony

The defense called William Mosman, Ph. D., a licensed psychologist and member of the Florida Bar, to testify at the evidentiary hearing regarding mental health mitigation evidence that was allegedly available but not presented during the penalty phase of Hertz' state court trial. (R. Vol. II, pp. 334, 336-339; EH, pp. 4, 6-9)[5] The documents he used in his analysis included Hertz' entire file from the Florida Department of Health, certain of his school records, a Florida State University Multi-disciplinary Evaluation administered to him, the original report of Dr. Sesta from January 1999, and records from the Florida State Psychology Clinic, and the Department of Corrections' Division of Probation and Parole. (R. Vol. II, pp. 337, 338;

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[4] In the four non-capital counts, the trial court sentenced Hertz to life for the burglary of a dwelling while armed (Count III); life for robbery with a firearm (Count IV); 30 years for arson of a dwelling (Count V); and 15 years for use of a firearm during the commission of a felony (Count VI). All sentences were ordered to run consecutively to one another.

[5] As noted, "EH" is the symbol that was used in the lower tribunal to reference the transcript of the evidentiary hearing held regarding the amended 3.850/3.851 motion for post conviction relief. This citation is used in addition to the record on appeal "R" citation for convenience.

EH, pp. 7, 8) He also used the sentencing transcripts, sentencing memorandum, the Florida Supreme Court's opinion (that affirmed Hertz' judgments and death sentences), and his 3.850/3.851 motion for post conviction relief, as amended. (R. Vol. II, p. 338; EH, p. 8) He met with Hertz at Union Correctional Institution near Raiford, Florida, to perform independent testing and review more of Hertz' records. (R. Vol. II, pp. 339, 340; EH, pp. 9, 10) He administered the WRATN 3, the WAIS III, M-FAST, the lateral Dominance Examination, the Draw Person, the Bender Gestalt, and the Trail Making A and Trail Making B test on Hertz. (R. Vol. II, p. 341; EH, p. 11)

Dr. Mosman noted that the two statutory mitigators found by the trial court to have been proven but to have little weight were (1) Hertz' impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and (2) his chronological age of 20, within the context of Sections 921.141(6)(f) and (g), Florida Statutes. (R. Vol. II, p. 342; EH, p. 12) The four non-statutory mitigators considered by the trial court were (1) Hertz' difficult childhood, (2) no significant criminal history and/or he posed no problem since incarceration, (3) expressions of remorse, and (4) Dempsey was given a life sentence subsequent to a plea. (R. Vol. II, p. 342; EH, p. 12) Of the six witnesses who testified on Hertz'

behalf during the penalty phase, five were family members, including the defendant himself.[6] (R. Vol. II, p. 343; EH, p. 13) Expert testimony was presented by Dr. D'Errico regarding matters related to Hertz' mental health. (R. Vol. II, p. 343; EH, p. 13) Dr. Sesta did not testify, but Mosman read his report and spoke with him. (R. Vol. II, p. 343; EH, p. 13) Dr. Sesta told him that he (Sesta) felt that a lot of his findings were mitigating but that he was never consulted by defense counsel or Dr. D'Errico. (R. Vol. II, p. 344; EH, p. 14) Dr. Mosman added that Dr. D'Errico was a forensic psychologist, not a neuropsychologist. (R. Vol. II, p. 344; EH, p. 14)

Dr. Mosman testified that documents were available to establish additional statutory and non-statutory mitigating factors, but defense counsel apparently never used them. (R. Vol. II, p. 345; EH, p. 15) He noted that the statutory mitigator of age at the time of the commission of the crime refers to mental, social, and emotional age, not just chronological age. (R. Vol. II, p. 345; EH, p. 15) He stated that although, chronologically, Hertz was twenty-something at the time of the offenses, he had the mental capacity and age of only a 14-year-old. (R. Vol. II, p. 345; EH, p. 15) Defense counsel never explained to the jury this important aspect of mental health mitigation. (R. Vol. II, p. 346; EH, p. 16) Dr. Mosman believed that the

[6] Hertz did not testify before the jury made its recommendation, but at the actual time of sentencing.

defendant suffered from organic brain damage that contributed to his low maturity at the time of the homicides. (R. Vol. II, p. 347; EH, p. 17) Substantial evidence existed to support this contention, according to Dr. Mosman. From data going back to when the defendant was 7 years and 6 months of age up to the time of the trial, Hertz showed a 25 to 39 point difference in the verbal and performance I. Q. (R. Vol. II, p. 347; EH, p. 17) This indicated a situation attributable to genetics. (R. Vol. II, p. 348; EH, p. 18) The portion of the brain involved, the frontal area, is the last to develop and is responsible for evaluating information, identifying meaning, making lists of possibilities and probabilities, and assisting in picking and choosing alternatives. (R. Vol. II, p. 348; EH, p. 18) Hertz' brain damage was significant because it is directly related to impulse control, analysis, judgment, maturity, and self-control. (R. Vol. II, p. 348; EH, p. 18)

Mosman believed that Hertz committed the homicides while under extreme mental or emotional disturbance, which constitutes another statutory mitigator that defense counsel could have presented at trial but did not. (R. Vol. II, p. 346; EH, p. 16) According to Dr. Mosman, evidence supported the claim of mental disturbance, though this factor was never even discussed by Rand during the penalty phase. (R. Vol. II, p. 346; EH, p. 16)

Dr. Mosman testified that, in addition to these statutory mitigators,

five non-statutory mitigators existed that were not presented at the sentencing trial. First, Mosman found indicators that suggested that Hertz would be a positive functioning person in the controlled environment that exists in the prison system. (R. Vol. II, p. 349; EH, p. 19) Second, Dr. Sesta diagnosed Hertz with brain damage, and Hertz' history of ADHD could have been caused by that damage. (R. Vol. II, p. 349, 350; EH, p. 19, 20) Furthermore, the type of brain damage detected indicated that it was permanent and genetically related. (R. Vol. II, pp. 349-351; EH, pp. 19-21) Third, Hertz' genetic defects including his clubfoot, caused disruptions in his schooling and in peer group relationships. (R. Vol. II, p. 350; EH, p. 20) There was a long family history of genetic problems, manifested by several family members being born deaf. (R. Vol. II, p. 350; EH, P. 20) There was also a history of drug and alcohol abuse. (R. Vol. II, p. 351; EH, p. 21)

Dr. Mosman explained that a competency examination, such as the one used in evaluating the defendant, focuses only on current cognitive functioning and understanding at a specific point in time. (R. Vol. II, p. 351; EH, p. 21) The test used on the defendant was outdated by over 2½ to 3 years. (R. Vol. II, pp. 351, 352; EH, pp. 21, 22) In contrast, a forensic psychological examination presents a comprehensive picture of developmental history. (R. Vol. II, pp. 351-353; EH, pp. 21-23) Dr.

Mosman did not see any clinical or strategic reason not to present this mitigation information which was available to counsel. (R. Vol. II, p. 354; EH, p. 24)

Dr. Mosman was cross-examined by Assistant State Attorney Eddie Evans. Mosman acknowledged that he has testified in about 10 to 15 other capital cases during the penalty phase. (R. Vol. II, p. 355; EH, p. 25) He had testified one or two times for the state in post conviction cases, but most of the time he appeared on behalf of the defense. (R. Vol. II, pp. 355, 356; EH, pp. 25, 26) He did not read the transcript of the guilt phase of the trial because he wanted to keep his review as narrowly and tightly focused as possible. (R. Vol. II, p. 356; EH, p. 26)

Dr. Mosman did not agree with the prosecution that mitigation testimony should be tailored to the aggravating factors presented by the state. He felt that it should go beyond that. (R. Vol. II, p. 357; EH, p. 27) Mitigation should take into consideration everything in the history, character, and records of the defendant that helps explain why the crime happened exactly the way it did and when it did, not 6 months earlier, not 7 weeks later, and should reflect a comprehensive picture of the defendant. (R. Vol. II, p. 357; EH, p. 27)

Dr. Mosman did not read Dr. Sesta's competency hearing testimony, the competency hearing evaluation itself, or Dr. Conger's report, because they dealt with competency. (R. Vol. II, pp. 358, 359; EH, pp. 28, 29) There is a real problem in clinical forensics, according to Dr. Mosman, in confusing competency with mitigation, because they are two totally separate matters. (R. Vol. II, pp. 359, 360; EH, pp. 29, 30) Dr. Mosman added that Dr. Sesta's report was only partially a competency report, in that it also covered neurological work done on the defendant. (R. Vol. II, p. 360; EH, p. 30)

Dr. Mosman acknowledged that he did not read the state's Ex. 4[7] (introduced as the defendant's Ex. 2 during the penalty phase of the original state court trial) or defense counsel's closing argument during the penalty phase. (R. Vol. II, pp. 360, 361; EH, pp. 30, 31) He read certain mitigation memoranda. (R. Vol. II, p. 361; EH, p. 31) He also read the testimony of the defense witnesses who appeared during the penalty phase. (R. Vol. II, p. 361; EH, p. 31) He did not know if defense exhibit 2 went beyond what the witnesses said. (R. Vol. II, p. 362; EH, p. 32)

Dr. Mosman conceded that the fact that Hertz suffered from a clubfoot

[7] This exhibit consisted of a bound compilation of Hertz' medical, mental health and school records.

and underwent surgeries to correct it was presented to the jury and the trial court during the penalty phase, but he noted that the detailed records from the Department of Children and Families regarding the extent of neglect and how it tied into the family history were not presented. (R. Vol. II, p. 366; EH, p. 36) He admitted that the issue of color blindness standing alone might not be considered a statutory mitigator. He felt, however, that it should be considered in conjunction with the other genetic defects, including the clubfoot, and the frontal lobe organic brain dysfunction, which when tied together, become meaningful. (R. Vol. II, p. 368; EH, p. 38)

Dr. Mosman said that Hertz being the alleged leader of the group in the crime, did not refute his contention that Hertz demonstrated the mind of a 14-year-old. There are 10, 12, and 14-year-olds who are leaders of gangs. (R. Vol. II, p. 370; EH, p. 40) In his opinion, Hertz was not capable of mature reflection at the time of the crime. (R. Vol. II, p. 370, 371; EH, pp. 40, 41) Dr. Mosman said that nothing about the facts and circumstances of the crime were beyond the capabilities of an average 14-year-old. The house they burglarized was only 500 yards from Hertz' own home,[8] so it was

[8] When it was pointed out to Dr. Mosman that he was incorrect in stating that the victims' house was 500 yards from Hertz' home, he responded that his point was that they were on foot and walking through the neighborhood and one of the doors they knocked on happened to belong to a

basically a neighborhood type offense. (R. Vol. II, p. 373; EH, p. 43) After stealing the cars, the defendants bragged about it at a Wal-Mart store, which is exactly the kind of thing that kids would be expected to do. (R. Vol. II, p. 373; EH, p. 43) There are levels of development to adulthood, and Hertz had been permanently stunted at approximately the level of age 14. (R. Vol. II, pp. 373, 374; EH, pp. 43, 44) The circumstances of the crime were, in the doctor's opinion, consistent with adolescent behavior as compared to what would be done based upon sophisticated, mature, careful planning. (R. Vol. II, p. 374; EH, p. 44)

Dr. Mosman acknowledged that he did not read the testimony of Ms. Lincoln, the elementary school teacher who said that Hertz was hyperactive, unhappy and hard to motivate, but not stupid. (R. Vol. II, pp. 378, 379; EH, pp. 48, 49) Mosman said that the behavior described by the teacher was consistent with the school records he reviewed. (R. Vol. II, p. 379; EH, p. 49) He also acknowledged that Dr. D'Errico indicated that the 39 point difference between Hertz' verbal and performance IQ could be explained by neurological testing as having a developmental basis since he was raised in an environment where spoken language was not used and he suffered from

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woman who grew up across the street from Hertz. (R. Vol. II, p. 375; EH, p. 45)

ADHD. (R. Vol. II, pp. 379, 380; EH, pp. 49, 50) However, Dr. Mosman reiterated that Dr. D'Errico is not a neuropsychologist and had not reviewed Hertz' earlier school records that would have shown the error of D'Errico's conclusion. (R. Vol. II, p. 380; EH, p. 50)

Dr. Mosman explained that frontal lobe damage was indicated by the full neuropsychological battery performed by Dr. Sesta in 1999 as well as his own more recent testing. (R. Vol. II, p. 381; EH, p. 51) The Weschler series of tests were used for school placement and were designed to examine brain functioning, cognitive skills, and strengths and weaknesses to arrive at an accurate understanding of how the person functions. (R. Vol. II, pp. 380, 381; EH, pp. 50, 51) They give an IQ, but a full scale IQ was not very meaningful in Hertz' case because some areas are retarded and other areas are well developed; thus it is necessary to have all the sub-scores available. (R. Vol. II, p. 382; EH, p. 52) The Weschler test alone might suggest brain damage, but used alone cannot conclusively demonstrate the presence of brain damage. (R. Vol. II, p. 383; EH, p. 53) He added that Dr. Sesta's report found that there was impairment and damage in the frontal area of the brain. (R. Vol. II, p. 384; EH, p. 54) He also found there was cerebral dysfunction in the orbital lobes, and neurodeficient development disorder of a chronic and permanent nature. (R. Vol. II, p. 385; EH, p. 55) This

information was available to defense counsel but was not used at trial. (R. Vol. II, p. 385; EH, p. 55)

The Robert Rand Testimony

Robert Rand, Esq., was Hertz' lead trial counsel. (R. Vol. II, p. 387; EH, p. 57) He served four years with the State Attorney's Office in the Second Judicial Circuit, about one year with the Florida Department of Law Enforcement, and four years with the Statewide Grand Jury before entering private practice. (R. Vol. II, p. 387; EH, p. 57) He has handled approximately 1000 criminal cases and around 12 to 15 first-degree murder cases, three of which included a penalty phase. (R. Vol. II, p. 388; EH, p. 58) At the time of Hertz' trial, he was familiar with both the guilt/innocence phase and the penalty phase of first-degree murder cases in Florida. (R. Vol. II, p. 388; EH, p. 58)

Lynn Alan Thompson, Esq., an experienced criminal trial lawyer, assisted Rand in the penalty phase trial of this case. (R. Vol. II, p. 389; EH, p. 59) Rand and Thompson conducted what they felt was a thorough investigation of Hertz' entire life and all aspects of his upbringing. (R. Vol. II, pp. 389, 390; EH, pp. 59, 60) They examined Guerry's troubles with many of his family members, some of whom were called as witnesses at trial. (R. Vol. II, p. 391; EH, p. 61) Rand and Thompson learned that Hertz

had been conceived so that one of his parents would avoid incarceration, that both of his parents were deaf, and that he had birth defects, among other problems. (R. Vol. II, p. 392; EH, p. 62)

Rand testified that Hertz was difficult to communicate with, easily distracted, and unable to concentrate. (R. Vol. II, p. 392, 394, 395; EH, p. 62, 64, 65) Sometimes he talked to imaginary friends. (R. Vol. II, p. 392; EH, p. 62) Hertz claimed that he did not know the facts of the case, and Rand found that he generally "was not a good historian of his own life." (R. Vol. II, p. 394; EH, p. 64) Rand found it necessary to contact Guerry's family members and school teachers to learn the details of his life. (R. Vol. II, p. 393; EH, P. 63) Rand asked two mental health experts, Dr. D'Errico and Dr. Sesta, to examine and analyze the defendant. (R. Vol. II, p. 393; EH, p. 63)

Rand was concerned about calling Dr. Sesta as a defense witness at trial due to his performance during the earlier competency hearing proceedings. (R. Vol. II, p. 395; EH, p. 65) Among other things, Dr. Sesta had testified as to possible frontal lobe damage on direct examination, but, according to Rand, essentially retracted that testimony on cross-examination. (R. Vol. II, p. 396; EH, p. 66) Thus, Rand called Dr. D'Errico as his sole expert witness during the penalty phase of the trial. (R. Vol. II, pp. 396,

397; EH, pp. 66, 67) In Rand's opinion, Dr. D'Errico was able to competently explain that the difference between Hertz' performance and verbal IQs was due to the defendant's upbringing in a "non-verbal home." (R. Vol. II, p. 397; EH, p 67) Rand also introduced in evidence as defense Ex. 2 at trial (the state's Ex. 4 in evidence during the post conviction evidentiary hearing) all of the mental health records and reports that had accumulated over the years. (R. Vol. II, p. 398; EH, p. 68) This included reports from teachers, doctors, psychologists, and others. Id. Rand wanted the jury to have a factual basis for the arguments that he would make during the penalty phase of the trial. (R. Vol. II, p. 399; EH, p. 69) Rand called the defendant's parents and his aunt as witnesses during the penalty phase as well. (R. Vol. II, p. 400; EH, p. 70)

Rand spoke with two jurors after the trial who indicated that they reviewed state's Ex. 4 and that other jurors had done the same. (Vol. III, R. 401; EH, p. 71) He added that he presented evidence of Hertz' troubled youth including his physical deformities, his impaired hearing ability, and other emotional problems as well. (Vol. III, R. 401; EH, p. 71) When cross-examining Mr. Dempsey during the guilt phase of the trial, Rand attempted to stress that Dempsey was the smartest of the three defendants and he led the others in the commission of the homicides and other crimes. (Vol. III, R.

402; EH, p. 72)

On cross-examination, Rand acknowledged that he did not think that he had made copies of state's Ex. 4 for each member of the jury. (Vol. III, R. 403; EH, p. 73) While the exhibit touched on a variety of mitigators, Rand acknowledged that he did not individually enumerate "numbers of mitigators" during the penalty phase. (Vol. III, R. 404; EH, p. 74) Nor did Rand try to present a number of mitigators that would outnumber the state's specifically enumerated aggravators. He had no strategic reason for not doing so. Rand did not feel that presenting a numerical balance (between mitigators and aggravators) was of any real importance to the jury. (Vol. III, R. 405; EH, p. 75)

Rand indicated that he was not aware of Guerry's mental age of around 14 or 15 years at the time of the homicides, as testified to by Dr. Mosman during the post conviction evidentiary hearing. (Vol. III, R. 407; EH, p. 77) He acknowledged, however, that he was aware, based upon Dr. Sesta's examination of Hertz, that the defendant suffered from ADHD and mild cerebral dysfunction, that the left side of his brain had developed less than his right side, and that his frontal lobe was less developed than it should have been. (Vol. III, R. 408; EH, p. 78)

Rand admitted that the two jurors he talked to were the same two who

recommended life for Hertz. (Vol. III, R. 411; EH, p. 81) He could not say that the other jurors read state's Ex. 4. Id. He admitted that the presentation of evidence in book form was less effective than live testimony. (Vol. III, R. 412; EH, p. 82)

On redirect examination, Rand stated that by using state's Ex. 4 in evidence, he wanted the jury to get a picture of what Hertz had experienced in his troubled upbringing and life. (Vol. III, R. 413; EH, p. 83) He felt that the standard jury instruction regarding the consideration of non-statutory mitigators was sufficient to inform the jury that it could consider this kind of evidence. (Vol. III, R**.** 413; EH, p. 83)

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in finding that Hertz' trial counsel was not ineffective during the penalty phase of the trial for two reasons.

The Ineffectiveness

1. Counsel failed to fully present all available mental health mitigating evidence.

2. With regard to the mental health mitigation that counsel did offer, it was ineffectively presented and argued collectively instead of individually, thereby significantly minimizing its critical importance.

In seeking the death penalty, the state argued the existence of no less than seven separate and distinct statutory aggravating factors under Section 921.141(5), Florida Statutes, that justified the imposition of the death penalty against Hertz. (OR Vol. XX, pp. 2372-2380) It was imperative for defense counsel to respond by aggressively presenting and arguing all available mitigating evidence, statutory and non-statutory, within the context of Section 921.141(6), Florida Statutes, in such an individual and specific way as to establish that the mitigating evidence exceeded and outweighed the aggravating factors within the context of Section 921.141(2)(b), Florida

Statutes, and, therefore, life sentences for the two homicides were appropriate. Defense counsel failed to do this.

During his closing argument (OR Vol. XX, pp. 2394-2402), defense counsel never mentioned by name even one of the statutory mitigators referenced in subsection (6) of Section 921.141, Florida Statutes, despite the fact that the record established clear and convincing proof of three of them:

1. Hertz' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Sec. 921.141(6)(f), Fla. Stat. (1996). The trial court gave some weight (OR Vol. II, pp. 295-300) to this mitigator even though Dr. Mosman showed that there was ample evidence of same.

2. While he had a chronological age of 20 years at the time of the homicides, Hertz' psychological and mental age was no more than that of a 14-year-old. Sec. 921.141(6)(g), Fla. Stat. (1996). The trial court gave just moderate weight to the age mitigator because defense counsel presented it only in the context of Hertz' chronological age. (OR Vol II, pp. 295-300) Had Rand presented the age mitigator properly, the jury would have been faced with recommending death regarding a young teenager, and probably would not done so.

3. According to Dr. Mosman, a third statutory mitigator, the fact that the capital felonies were committed while Hertz was under the influence of extreme mental or emotional disturbance within the context of Section 921.141(6)(b), Florida Statutes, was supported by medical and mental health records and reports available to Rand prior to the penalty phase of the trial. (R. Vol. II, p. 346; EH, p. 16) However, Rand failed to grasp the importance of this information.

This means that Rand could have proven the existence of three strong statutory mitigators, instead of the two weakly presented ones that Judge Sauls cited but that Rand did not even mention to the jury during the penalty phase.

Dr. Mosman noted further that there was substantial proof of at least five other non-statutory mitigators that were not presented to the judge or jury in the context of Section 921.141(6)(h), Florida Statutes. They were:

1. Hertz' ability to be rehabilitated in an incarcerated environment and to be a positive, functional person therein. (R. Vol. II, p. 349; EH, p. 19)

2. Hertz had several genetic defects, resulting in color-blindness and a clubfoot. (R. Vol. II, p. 350; EH, p. 20)

3. As Dr. Sesta noted, Hertz had organic brain damage that could not be cured. (R. Vol. II, p. 347; EH, p. 17)

4. Hertz' medical problems included four surgeries that disrupted his academic performance and peer group relationships. (R. Vol. II, p. 366; EH, p. 36)

5. Hertz had a history of drug and alcohol abuse, beginning at a very young age. (R. Vol. II, p. 351; EH, p. 21)

Dr. Mosman added that the case for life sentences would have been substantially enhanced had defense counsel called Dr. Sesta to testify. This was especially true given the fact that the state did not present any expert testimony of its own during the penalty phase. Dr. Sesta had important information regarding brain dysfunction symptoms exhibited by Hertz that Rand did not develop.

The Prejudice

Hertz suffered prejudice as a result of his counsel's ineffectiveness to the extent required by Florida law as described in decisions of this Court such as *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995). Had all of the available mental health mitigation been presented and argued in an effective manner, especially by clearly individualizing and enumerating each mitigator, there is a distinct likelihood and reasonable probability that the

outcome of the proceedings would have been different, as the jury would have determined that the mitigating factors outweighed the aggravating factors. The jury then would have recommended against the imposition of the death penalty. Under those circumstances (since there would have been ample evidence to support the jury's life recommendations), the trial court would have had no choice but to sentence Hertz to life in prison rather than death. In the event that the trial court overrode the jury recommendation, any resulting death sentence(s) would have been reversed on direct appeal to this Honorable Court.

ARGUMENT

Issue I.

The trial court erred in not finding that defense counsel was ineffective for failing to present all available evidence of mental health mitigation during the penalty phase of the state court trial in a convincing manner and that prejudice resulted. Thus, Hertz' right to counsel as protected by Amendments VI and XIV, United States Constitution, and Article I, Section 16, Florida Constitution, was violated.

Standard of Appellate Review

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Hertz' Florida Rule of Criminal Procedure 3.850/3.851 motion for post conviction relief, as amended (R. Vol. III, pp. 492-503), is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support same. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). As this Court stated in *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002), "[t]he standard of review we apply in reviewing the trial court's ruling on this issue (of alleged ineffective assistance of counsel in a post conviction capital case) is two-pronged: 'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice

prongs de novo," citing its decision in *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001).

Merits

The attorney general often cites *Strickland v. Washington*, 466 U.S. 668 (1984), for the proposition that the appellant in a capital case in Florida has a high bar to clear when seeking to overturn the denial of a post conviction motion to set aside a death sentence. That is true. But there is a critical corollary to this proposition – which is that defense counsel's obligation to zealously represent the client during the penalty phase is absolutely indispensable if the trial is to meet minimum constitutional standards of fairness. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, supra, 446 U.S. at 685. Counsel's obligation includes the vigorous and complete investigation and effective presentation during the penalty phase of all available mitigating evidence, especially mental health mitigation in the context of Sections 921.141(6)(b) and (f), Florida Statutes. Failure to meet this obligation can have fatal and terribly unfair results given

the stakes, especially where the investigation would have produced the kind of mental health mitigating evidence that lay just beneath the surface in the case at bar.

Defense counsel's case for a life sentence was essentially to the effect that Hertz had a bad childhood, a clubfoot and ADHD, a condition that he conceded could be treated with medication. If this were the extent of Hertz' mental problems, they would not outweigh the admittedly atrocious facts of the case as described in the 7 aggravators presented by the state. But Hertz' mental problems were far worse. Dr. Sesta found after extensive testing and observation:

> . . . indications of mild cerebral dysfunction from the Halstead-Reitan battery. The supplementary tests also confirmed mild cerebral dysfunction, in particular, a very unusual pattern of brain functioning in that the left side of the brain was functioning much poorer than the right side of the brain. I also saw indications that the front or anterior portion of the brain was not functioning as well as it should. I saw flagrant deficits in the frontal lobe functions as well.
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> The frontal lobe, basically, one of my neuroanatomy professors used to state that the frontal lobe is what separates the behavior of the five year old from the behavior of the 30 year old. It essentially provides the breaks for human behavior. Other areas of the brain provide motivation, violence, aggression, sexual things and the frontal lobes essentially are often called the executive of the brain. They basically mediate behavior and

> determine an appropriate forum to ventilate our urges. They basically break or inhibit inappropriate behavior.

(OR, Vol. III, p. 372) Dr. Mosman read many of these same medical records and performed some of the same psychological tests on Hertz that other mental health experts including Dr. Sesta had performed. (R. Vol. II, pp. 337-341) He determined that much of this data was never presented to the jury during the penalty phase especially that information related to "brain damage." (R. Vol. II, p. 346) Dr. Mosman found " . . . a frontal lobe dysfunction." (R. Vol. II, p. 347) That dysfunction was "not because he was raised in a home that was non-verbal . . ." *Id*. The brain damage was significant because "it's directly related to impulse control, analysis, judgment, maturity, self-control, all the things that separate adolescents from adults." *Id*. at 348. Furthermore, the "brain damage was permanent, something that could not be cured or remedied." Id. at 350, 351. Some of Hertz' physical problems (such as his clubfoot) were the result of "a genetic defect . . ." *Id*. at 349.

None of this information made its way to the jury and judge during the penalty phase. Had it been presented, the results of the penalty phase would have been far different.

In *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), the Court found trial counsel ineffective for spending only 18 hours preparing for the penalty

phase. In *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993), the defendant was convicted of first-degree murder and sentenced to death upon aggravated facts that resemble those in the case at bar. Deaton and an accomplice abducted and gruesomely murdered the victim (whom Deaton strangled with an electrical cord) " . . . in order to obtain the victim's car and money." *Deaton*, supra, 635 So. 2d at 5. The co-defendants then drove the stolen car to Tennessee where they were apprehended. *Id*. In post conviction proceedings, the trial court, while finding that there was no basis to set aside Deaton's conviction for first-degree murder, determined that defense counsel failed to fully present available mitigating evidence during the penalty phase. The trial court therefore set aside the death sentence, holding that the defendant's waiver of his right to testify and to call mitigating witnesses was not made knowingly and voluntarily, as defense counsel failed to adequately investigate mitigation. This Court affirmed.[9] See also *Rose v. State*, 675 So. 2d 567 (Fla. 1996). (Counsel ineffective for failure to develop and present all available mitigating evidence.)

[9] Hertz does not argue that his trial counsel failed to properly represent him during the penalty phase to the extent of the woeful ineffectiveness exhibited by Deaton's trial lawyer. Rand's efforts were obviously much better, but, as Hertz has demonstrated herein, they were not nearly enough to pass the test of effective assistance of counsel during that phase of the trial.

In *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), a case whose facts are also similar to those in the case at bar, the defendant was convicted of a grisly strangulation murder and sentenced to death based upon a unanimous jury recommendation. This Court noted that in order to demonstrate ineffective assistance of counsel during the penalty phase, Hildwin had to prove that "counsel's performance was deficient and that counsel's deficient performance affected the outcome of the sentencing proceedings. *Strickland (v. Washington*), 466 U.S. at 694." Stated otherwise, Hildwin had to demonstrate that but for counsel's errors he probably would have received a life sentence. *Hildwin*, supra, 654 So. 2d at 109. Much like the case at bar, in the original penalty phase trial, defense counsel " . . . called five lay witnesses – including Hildwin's father, a couple who periodically cared for him when he was abandoned by his father, a friend of Hildwin, and Hildwin himself."[10] *Hildwin*, supra, 654 So. 2d at 110. These witnesses testified that Hildwin's mother died before he was three years old, his father abandoned him on several occasions, he was a pleasant person, and he had a substance abuse problem. *Id*.

[10] When one considers that Dr. D'Errico's penalty phase testimony was essentially limited to testifying about Hertz' struggles with ADHD, the facts in *Hilwin* are even more similar to the case at bar in terms of what was presented during the penalty phase and what could have been presented.

In Hildwin's post conviction proceedings, the testimony of two mental health experts revealed that the defendant also had a history of emotional problems similar to those of Hertz, including substance abuse, child neglect, and ". . . signs of organic brain damage." *Id*. According to the experts, Hildwin's capacity to appreciate the criminality of his conduct was significantly impaired. *Id*. This Court determined that, since trial counsel could have discovered the mental health mitigation with reasonable diligence and since the evidence was substantial and probative, failure to present it deprived Hildwin of a reliable penalty phase trial. Hildwin's sentence was reversed, and the case was remanded for a new sentencing proceeding. See also *Phillips v. State*, 608 So. 2d 778 (Fla. 1992), in which counsel was found ineffective for failing to prepare for the penalty phase. The court found prejudice where the close jury vote (6-6) might have been different had mitigation been properly presented.

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

While Judge Sauls cited the statutory mitigator of Hertz' diminished capacity to appreciate the criminality of his conduct as a part of his sentencing memorandum, the trial court gave the mitigator only "some" weight. (OR Vol. II, pp. 295-300) This could only have been because Rand

never even bothered to address this statutory mitigator in his opening statement and closing argument in the penalty phase. (OR Vol. XIX, pp. 2209-2212; OR Vol. XX, pp. 2394-2402) More importantly, Rand did not present any testimony from Dr. Sesta about Hertz' brain damage to establish that key mitigator. As described in some detail above, Dr. Sesta, a neuropsychologist, examined Hertz for seven hours to determine whether there were any cerebral functioning problems. (OR Vol. III, pp. 361-363) In the process, he secured the Eastside Psychiatric Hospital 1995 suicide attempt records. (OR Vol. IIII, pp. 365-366) Dr. Sesta's examination resulted in his conclusion that Hertz suffered from a mild cerebral dysfunction, that his frontal lobe was less developed than it should be, and that the left side of his brain was poorer than the right side. (OR Vol. III, p. 371) Although Dr. Sesta concluded that Hertz did not evidence head trauma [11] or neurological disease, his condition reflected a Neurodeficient Development Disorder. (OR Vol. III, pp. 372, 373). Dr. Sesta saw flagrant

[11] Dr. Sesta spent two days with Hertz, about three or four hours a day, conducting the individual tests of brain functioning, as well as the forensic psychological examination of his competency to proceed to trial. (OR Vol. III, p. 365.) He found indications of mild cerebral dysfunction from the Halstead-Reitan battery of tests. The supplementary tests also confirmed mild cerebral dysfunction, in particular a very unusual pattern of brain functioning in that the left side of the brain was functioning much poorer than the right side of the brain. The front or anterior portion of the brain was not functioning as well as it should have. (OR Vol. III, pp. 371-373)

deficits in frontal lobe functions as well. (Vol. III, OR. 371, 372) According to Dr. Sesta, the frontal lobe of the brain "is what separates the behavior of the five-year old from the thirty-year old. It essentially provides the brakes for human behavior." (OR. Vol. III, p. 372) Dr. Mosman's testing and analysis confirmed that Dr. Sesta's findings showed that Hertz demonstrated symptoms of organic brain damage and that these symptoms would have supported the mitigator set forth in Section 9212.141(6)(b), Florida Statutes. (R. Vol. II, p. 349, 350; EH, p. 19, 20) Dr. Mosman explained that frontal lobe damage was revealed by the full neuropsychological battery performed by Dr. Sesta in 1999 as well as his (Mosman's) own more recent testing. (R. Vol. II, p. 381; EH, p. 51) He added that Dr. Sesta's report found that there was impairment and damage in the frontal area of the brain. (R. Vol. II, p. 384; EH, p. 54) He also found there was cerebral dysfunction in the orbital lobes, and neurodeficient development disorder of a chronic and permanent nature. (R. Vol. II, p. 385; EH, p. 55) This information was available to defense counsel through Dr. Sesta (and some other qualified neuropsychologist) but was not used at trial. (R. Vol. II, p. 385; EH, p. 55)

This powerful evidence would certainly have caused the jury and the trial court to find that Hertz' capacity to appreciate the criminality of his

conduct or to conform his conduct to the requirements of law was substantially impaired within the context of 921.141(6)(f), Florida Statutes. As stated, Rand never called Dr. Sesta as a witness in the penalty phase although Dr. Mosman was able to locate and speak with him. (R. Vol. II, p. 343; EH, p. 13) Dr. Sesta told him (Mosman) that he (Sesta) felt that a lot of his findings were mitigating but that he was never consulted by defense counsel. (R. Vol. II, p. 344; EH, p. 14) The failure to call Dr. Sesta to testify on Hertz' behalf clearly constitutes ineffectiveness, and Hertz paid a heavy price for it.

During the post conviction evidentiary hearing, the state attempted to offer an explanation as to why Dr. Sesta was not called as a defense witness during the penalty phase by suggesting that the decision was a tactical one. (R. Vol. II, pp. 395-397; EH, p. 65-67) Rand testified in this regard that during the competency hearing, Dr. Sesta accurately,

> laid out in his testimony in the competency hearing what he had told us and what was contained in this report as to this differential between Mr. Hertz' IQ in one aspect and the higher IQ in the other aspect and the indication that that was a much larger than normal spread and it could indicate frontal lobe damage and, you know, he postulated a number of different, and I thought, probably accurate conclusions based on his testing of Mr. Hertz.

(R. Vol. II, pp. 395, 396; EH, pp. 65, 66) However, according to Rand, on cross-examination, Dr. Sesta "retracted what he had said in his report and what he had said to us and made his conclusions essentially ineffective and his testimony, therefore, was ineffective." (R. Vol. II, p. 396; EH, p. 66) Furthermore, the state, in its written post-hearing closing argument, attempted to minimize Hertz' cerebral dysfunction by attributing it to his "non-verbal upbringing, a learning disability and the ADHD" (R. Vol. III, p. 462) that would improve with medication. (R. Vol. III, p. 462) Apparently, based upon Rand's testimony and the attorney general's written final argument, Judge Sauls concluded in his final order denying Hertz post conviction relief:

> 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 under cross examination. Thus, Rand called Dr. D'Errico as the only expert witness during the penalty phase of the trial.

(R. Vol. III, p. 499) Judge Sauls added that Dr. Sesta did not find that Hertz' conduct was influenced to any significant degree by brain damage (R. Vol. III, p. 497) and that his neurological development disorder was the result of "being brought up, being raised by deaf parents, as well as his ADHD and

learning disability which indicated brain dysfunction (R. Vol. III, p. 497)."

This was unfortunate. A review of the cross-examination of Dr. Sesta during the competency hearing (OR Vol. III, pp. 383-391) does not support the state's "strategy" argument. Dr. Sesta was quick to note in his report that there was a "disingenuous quality to his (Herz') behavior at some points of the examination" he conducted. (OR. Vol. III, p. 384) The doctor did not suggest that Hertz suffered from "schizophrenia or bipolar disorder or any major mental illness." (OR Vol. III, p. 385) But he continued to assert the fact that his examination and testing showed "cognitive disorder not otherwise specified which is – which described the functioning of his brain . . ." (OR Vol. III, p. 386) Furthermore, Dr. Sesta's tests for brain damage included built in material designed to reveal dissimulation or faking. As Dr. Sesta noted on direct examination, "(i)n a criminal forensic case one certainly needs to be aware of the possibility that the defendant is going to present disingenuously or try to lie or fake." (OR Vol. III, p. 370) Dr. Sesta concluded:

> Q. Dr. Sesta, let me ask you the same question I asked Dr. D'Errico, if you took out the parts that Mr. Meggs has raised as far as malingering, George or – you know, making a plan to bang his head on the wall, does that in anyway alter your opinion about the behavior you observed, the test results that you got, and the consistency between those things, and the

psychological records obtained from his early childhood that he suffers from ADHD and needs medication?

A. No sir, it would not.

(OR Vol. III, p. 392)

The Failure To Develop And Present Evidence of the Extreme Mental Illness Statutory Mitigator Per Section 921.141(6)(b), Florida Statutes

In *State v. Lara*, 581 So. 2d 1288 (Fla. 1991), Lara was convicted of the first-degree murder of Grisel Fumero and the rape and second-degree murder of his girlfriend. The jury recommended death by a vote of 8-4 on the first-degree murder conviction. Among the claims raised by Lara was that "counsel was ineffective for failing to adequately investigate, develop, prepare, and present mental health defenses at trial." *Lara*, supra, 581 So. 2d at 1294. In post conviction proceedings, the trial judge granted a new penalty phase trial based upon a finding that trial counsel failed to investigate and present all available mental health mitigation, stating:

> The court concludes that, because the defendant's trial counsel failed to present significant and compelling mitigating evidence at the penalty phase of the original trial, the defendant is entitled to a new hearing before the jury and court on the penalty to be imposed. The court finds that had there been presented to the jury for its consideration the evidence of the defendant's brutal treatment by his father, the defendant's bizarre behavior signaling serious mental illness, there is a reasonable probability that the jury's recommendation and therefore the sentence imposed by the Court would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct.

> 2052, 80 L. Ed. 2d 674 (1984). See Combs v. State, 525 So. 2d 853 (Fla. 1988); Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Lara, supra, 581 So. 2d at 1290. The trial court found that defense counsel ". . . did not properly utilize expert witnesses regarding defendant's psychological state." *Lara*, supra, 581 So. 2d at 1291. In addition this Court found:

> . . . although at trial defense counsel failed to present testimony of mental health experts regarding the defendant's diminished mental capacity (no such witnesses testified before the jury, and only one, Dr. Cava, testified at the original sentencing hearing before the Court), during the present Rule 3.850 proceedings, such experts testified convincingly that the defendant had an extreme emotional disturbance and an impaired capacity to conform his conduct to the requirements of the law. Although the Court finds that this expert testimony is not sufficient to grant relief on the ground that the defendant was incompetent to stand trial or had a valid insanity defense, it is clear that the defendant's trial counsel should have investigated and prepared these areas for presentation to the jury as evidence in mitigation at the penalty phase of the trial, State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), and that, had such evidence been presented, the jury might well have recommended a penalty other than death. Clearly defense counsel's actions were not based on any tactical decisions or strategy, despite the State's contrary suggestion.

Similarly, Dr. Mosman also determined that Hertz committed the capital felonies while under the influence of extreme mental or emotional disturbance within the context of Section 921.141(6)(b), Florida Statutes. He supported this finding with the same medical and mental health records

and reports available to Rand prior to the penalty phase of the trial. (R. Vol. II, p. 346; EH, p. 16) According to Dr. Mosman, though available evidence supported the claim of emotional disturbance, Rand never discussed this factor during the penalty phase at all. (R. Vol. II, p. 346; EH, p. 16) Mosman found in this regard that Hertz' mental problems greatly exceeded those referenced by Dr. D'Errico and, more importantly, had a different cause. Dr. D'Errico attributed Hertz' mental problems primarily to attention deficit hyperactivity disorder (which he noted could be controlled by medication), the history of neglect and physical abuse in the home, and his interpersonal struggles caused by his clubfoot. (OR, Vol. XIX, pp. 2315-2319) Dr. Mosman, on the other hand, determined that Hertz suffered from organic brain damage that possibly had a genetic origin that could not be cured. (R. Vol. II, pp. 349-352; EH, pp. 19-22) Surely, the presence of this compelling mitigator would have helped explain to the jury Hertz' violent conduct exhibited during the commission of the homicides.

The Failure To Properly Present The Statutory Age Mitigator

Rand also failed to appreciate the fact that the age mitigator (Section 921.141(6)(g), Florida Statutes) takes into account and can be based upon social, mental, and emotional development, or the lack thereof, not simply

chronology. (R. Vol. II, pp. 370-374; EH, p. 40-44) See *Hurst v. State*, 819 So. 2d 689 (Fla. 2002). *See* also *Foster v. State*, 778 So. 2d 906, 920 (Fla. 2000), where the Court held (with emphasis added):

> Finally, with regard to mitigation, Foster claims error in the trial court's rejection of Foster's age at the time of the killing as a mitigator. Section 921.141(6)(g), Florida Statutes (1996), expressly includes the age of the defendant at the time of the crime as a mitigating circumstance. We have recognized, however, that there is no bright-line rule for applying this provision. See Campbell v. State, 679 So. 2d 720, 726 (1996). The appropriate application of this mitigator goes well beyond the mere consideration of the defendant's chronological age. See id. Rather, it entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated.

According to Dr. Mosman, Hertz had a mental age of no more than 14 years. (R. Vol. II, p. 370; EH 40) This point was never conveyed to the judge and jury during the penalty phase. The trial court found in this regard that Rand was "not aware of the defendant's mental age of around 14 or 15 years at the time of the crime." (R. Vol. III, p. 499, 500)

The state did not attack Dr. Mosman's findings regarding the age mitigator on the merits during the proceedings in the lower tribunal by presenting expert testimony to refute it. This may be because, as noted above, this Court has recognized the expanded definition of the age

mitigator under Section 921.141 (6)(g), Florida Statutes, on numerous occasions. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002); *Foster v. State*, 778 So. 2d 906, 920 (Fla. 2000). Instead, the state advised Judge Sauls that the doctor testified as to the mental age mitigator in another case (*Kimbrough v. State*, 2004 Fla. LEXIS 958, 29 Fla. L. Weekly S330 [Fla. June 24, 2004]), but no relief was granted. (R. Vol. III, pp. 479-486) This was not helpful and may have resulted in the trial court's error in not giving the mitigator the great weight that it deserved. Had it been presented properly, the jury would have certainly recognized its critical importance.

The Failure To Present Available Nonstatutory Mitigation

In *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001), defense counsel presented some mitigating lay evidence during the penalty phase, but the testimony did the defendant more harm than good. Ragsdale was convicted and sentenced to death. In post conviction proceedings, the defendant was granted an evidentiary hearing on his ineffective assistance of counsel claim. Defendant's siblings testified to his upbringing in an abusive environment and to his drug abuse. A psychiatrist opined that Ragsdale was psychotic at the time of the crime, possibly the result of organic brain damage and other factors. This Court determined that counsel was ineffective for not

developing and presenting this mental health mitigation and that prejudice resulted. A new penalty phase trial was ordered.

In *Heiney v. State,* 620 So. 2d 171 (Fla. 1993), the Supreme Court found that the trial court erred in determining that the defendant was not prejudiced by the deficient performance of defense counsel. The Court concluded that defense counsel had not conducted a proper background investigation and had therefore failed to discover several important non-statuory mitigating factors. This Court stated in that regard:

> At the 3.850 hearing, Heiney argued that there were nonstatutory mitigating factors which could have and should have been investigated, discovered, and presented by his lawyer at the sentencing proceeding. The circuit court agreed and found that substantial nonstatutory mitigation was, in fact, present. Further, the court found that Heiney's original counsel, in totally failing to investigate potential mitigating factors, acted measurably below the standard established for reasonably competent counsel at the penalty phase. However, the court concluded that there was no reasonable probability that the outcome of the penalty proceeding would have been different had the mitigating factors been presented because those mitigating factors could not outweigh the aggravating factors found by the original trial court. Thus, the circuit court found that Heiney was not prejudiced by the deficient performance and denied relief.

Heiney v. State, 620 So. 2d 171, 172 (Fla. 1993). A new penalty phase trial was ordered. Likewise, Dr. Mosman testified that nonstatutory mitigators (not brought to the jury and trial court's attention during the penalty phase)

included Hertz' ability to be a positive person in the prison system and his genetic defects. (R. Vol. II, pp. 349, 350; EH, 19, 20) Dr. Mosman also noted that Dr. Sesta diagnosed Hertz with brain damage, and Hertz' history of ADHD could have been caused by that damage which can be considered as a separate nonstatutory mitigator. (R. Vol. II, p. 349, 350; EH, p. 19, 20) Furthermore, the type of brain damage detected indicated that it was permanent and genetically related. (R. Vol. II, pp. 349-351; EH, pp. 19-21) Dr. Mosman also found that Hertz' genetic defects, including his clubfoot, caused disruptions in his schooling and in peer group relationships. (R. Vol. II, p. 350; EH, p. 20) While the jury was advised of Hertz' clubfoot, the damaging effect upon his mental health was not made clear. There was also a long family history of genetic problems, manifested by several family members being born deaf. (R. Vol. II, p. 350; EH, P. 20) There was a history of drug and alcohol abuse beginning at an early age. (R. Vol. II, p. 351; EH, p. 21) The impact of all of these factors was seriously underemphasized by defense counsel.

Trial Counsel's Method Of Presenting Mitigation Was Ineffective

Defense counsel's ineffectiveness went beyond not presenting all of the available mental health mitigation that Dr. Mosman said could have been

introduced in evidence. It also included counsel's failing to present what he had in an effective manner. Rand did not ask that the mitigator found in Section 921.141(6)(b), Florida Statutes (capital felony committed while defendant under the influence of extreme mental or emotional disturbance), be included in the jury instructions. He did not request that the jury be advised that it could consider Hertz' mental or emotional age, as opposed to only his chronological age, in the context of Section 921.141(6)(g), Florida Statutes. (OR Vol. XX, pp. 2342-2372) He never even raised the extreme mental or emotional disturbance statutory mitigator. In fact, he never once, either in his opening statement (OR Vol. XIX, pp. 2209-2211) or brief closing argument (OR Vol. XX, pp. 2394-2402) during the penalty phase, mentioned any specific statutory mitigator found in Section 921.141(6), Florida Statutes. As a result, the trial court instructed the jurors that they could consider seven[12] separate aggravating factors as to Hertz (OR XX, pp. 2402-2406) However, in terms of mitigation, the trial court advised the jury (OR Vol. XX, p. 2407) only that:

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[12] Hertz was (1) on probation at time of homicides, (2) had previously been convicted of felony involving violence, (3) committed the capital felonies in the course of burglary, arson and robbery, committed the capital felonies (4) for pecuniary gain and (5) in order to avoid arrest. Furthermore, the capital felonies were (6) especially heinous, atrocious or cruel and (7) involved heightened premeditation. (OR Vol. XX, pp. 2403-2405); *Hertz v. State*, 803 So. 2d at 637.

> Among the mitigating circumstances you may consider, if established by the evidence, are the following. The first mitigating circumstance is applicable only to the Defendant Hertz, and is as follows: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The remaining circumstances are applicable to both of the defendants (referring to Hertz and Looney) and are as follows: First, the age of the defendant at the time of the crime and any of the following circumstances that would mitigate against the imposition of the death penalty. A. any other aspect of the defendant's character, record or background; and B, any other circumstance of the offense.

Rand's closing argument (OR Vol. XX, pp. 2394-2342) consists of less than eight pages of the trial transcript. It is the kind of argument that one would expect in a non-capital case where there are no statutory guidelines that must be followed by the jury. It is a brief tug at the heartstrings based upon Hertz' troubled childhood and the fact that his co-defendant, Dempsy, got life. The argument evaporates under the weight of the seven aggravators presented by the state.

Prejudice

It did not have to be that way, and Hertz suffered prejudice as a result, because:

1. As stated above, if the jurors understood that they were being asked to recommend two death sentences regarding a person with the mind and emotions of a 14-year old at the time of the crimes, the age mitigator would have been strengthened exponentially within the context of Section 921.141(6)(g). Rand should have singled out this crucial reason for a life recommendation based upon the testimony of an expert like Dr. Mosman who could have confirmed its legal and scientific legitimacy.

2. Had Rand presented the testimony of Dr. Sesta and another expert like Dr. Mosman effectively, it would have been obvious that Hertz' capacity to appreciate the criminality of his conduct was significantly diminished within the context of Section 921.141(6)(f), Florida Statutes. This is especially true if Rand had specifically argued the existence of this individual mitigator in his closing argument.

3. The testimony of Dr. Sesta and some other expert such as Dr. Mosman, including the evidence that Hertz was brain damaged and suffered from genetic defects, would have also established the fact that Hertz was seriously mentally disturbed at the time of the homicides within the context of Section 921.141(6)(b), Florida Statutes. Rand would then have been in a position to argue a third individual mitigator.

4. To the three statutory mitigators referenced by Dr. Mosman in his post conviction hearing testimony, Rand could have argued at least five non-statutory mitigators individually within the context of Section 921.141(6)(h), Florida Statutes. This would have resulted in the recognition of more individual mitigators than aggravators.

Most importantly, however, the true picture of the severe limitations of the ability of Guerry Wayne Hertz to conform his conduct to the basic rules of law based upon his various mental and emotional problems, almost all of which he could not control, would have been made clear to even the most skeptical juror and judge had defense counsel presented it. The jury and judge were entitled to see this picture, but they did not due to trial counsel's ineffectiveness. Fundamental fairness demands that a new penalty phase trial be ordered so that this injustice can be corrected.

CONCLUSION

For the reasons set forth above, the Court is requested to reverse the final order of the lower tribunal rendered on December 30, 2004, find that Hertz was denied effective assistance of counsel during the penalty phase of his state court trial for the failure of counsel to present all available mental health mitigation, remand the cause to the lower tribunal for a new penalty phase trial and grant Hertz such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been furnished to counsel for appellee, the State of Florida, Carolyn Snurkowski, Esq., Chief of Criminal Appeals, the Office of the Attorney General of Florida, the Florida Capito1, Plaza Level One, Tallahassee, Florida 32399-1050, and Eddie Evans, Esq., the Office of the State Attorney, Second

Judicial Circuit of Florida, 4th Floor, Leo n County Courthouse, Tallahassee, FL 32301, by U.S. mail delivery, this 10th day of June, 2005.

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font, 14 pitch, in compliance with the provisions of Florida Rule of Appellate Procedure 9.210.

_____
Clyde M. Taylor, Jr., Esq.