IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-330

MAURICE LAMAR FLOYD,
Appellant,

v.

STATE OF FLORIDA
Appellee.

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does not accept Appellant's statement of the case and facts. The procedural history and facts in this case were outlined by this Court in *Floyd v. State,* 850 So. 2d 383, 387-393 (Fla. 2002):

> Mary Goss, the victim in this case, was found dead at approximately 11:30 p.m. on July 13, 1998. Police found her body on the ground beside her house located on Bronson Street in Palatka, Florida. The cause of Ms. Goss's death was a single .357 caliber gunshot that entered the left side of her face and proceeded to sever her brain stem, killing her instantaneously. Two days later, on July 15, 1998, police found Floyd, Ms. Goss's son-in-law, hiding in the attic of a house in the Palatka area. Floyd was subsequently charged with the murder of Ms. Goss. [FN1]
>
>> FN1. The indictment returned against Floyd was for premeditated murder or felony murder (Count I), armed burglary of a dwelling (Count II), and aggravated assault (Count III).
>
> Testimony adduced at trial indicated that Floyd exhibited very controlling behavior toward his wife, Trelane, [FN2] who was Ms. Goss's daughter. On July 11, 1998 (extending into the early morning hours of July 12), Trelane had gone with some of her cousins to a supper club to celebrate her birthday. Floyd followed her to the club and spotted her consuming alcohol and dancing. He later approached the group and told Trelane that it would be necessary for her to find another way home, because he was going to take her car, which she had driven to the club. In the past Floyd had expressed his disapproval of Trelane's alcohol consumption.
>
>> FN2. When she testified at trial, Trelane was no longer married to Floyd.
>
> When Trelane returned home around 5 a.m. on the morning of July 12,

Floyd informed her that he would not permit her to sleep, and he proceeded to increase the volume on the televisions and the radio in their apartment. He also threatened to kill Trelane or someone she loved as a reprisal for her drinking or if she ever attempted to run or hide from him. Shortly thereafter, Trelane felt a gun being placed beside her head as she was lying in bed. Floyd pulled the trigger three times, but the weapon did not fire. [FN3] Trelane advised Floyd that she was going to seek a divorce and testified at trial that she did not call the police about this incident because she was in a very confused state.

> FN3. The record does not indicate whether the gun was loaded at that time. Later in the day on July 12 (one day before Ms. Goss was murdered), Trelane surmised that the gun must have been a .357, because she saw a .357 on the toilet tank in the bathroom when Floyd was showering. She hid the gun behind the bar in their apartment, and testified that she never saw the gun again.

On July 13, the day Ms. Goss was murdered, Trelane and Floyd had a heated argument on a Palatka street not far from their apartment. Trelane had stopped her car in the street to speak with a friend. Her three-year-old goddaughter was also in the vehicle. Floyd was in his car behind Trelane and he insisted that Trelane take her goddaughter home, calling Trelane a "whore." Fearful for the safety of both herself and her goddaughter, Trelane decided to seek protection in a sheriff's office. Floyd followed and proceeded to ram his car into the back of Trelane's vehicle.

A high speed chase ensued, during which Trelane sounded the horn on her automobile to warn both oncoming traffic and pedestrians who might be in harm's way. The tires on both cars squealed as they slid into the parking lot at the sheriff's office. Trelane exited her car and screamed for help. Hearing both the sounds of squealing tires and Trelane's plaintive cries, Deputy Dean Kelly responded from his desk inside the sheriff's office. Deputy Kelly was the only armed officer in the vicinity as the events unfolded at approximately 7:30 p.m. that evening. Trelane hurriedly reported to Deputy Kelly that Floyd had rammed her car and

that she was fearful for her safety. The deputy saw Floyd moving rapidly toward them as they spoke, and he held out his hand to prevent Floyd from accosting Trelane. He then advised Floyd that he was going to be placed into investigative custody until it could be determined exactly what had transpired. Deputy Kelly instructed Floyd to turn around and to place his hands behind his back. Floyd extended his hands in the air and backed up, insisting that he had done nothing wrong and that he merely wanted to talk to his wife. After the deputy repeated his order for Floyd to submit to custody, Floyd fled the scene. Deputy Kelly began pursuit for a few moments but then halted, fearful of leaving Trelane and her goddaughter defenseless if Floyd decided to double back to attempt to harm them. The subsequent efforts of a K-9 unit and other officers to apprehend Floyd on the evening of July 13 were fruitless.

After giving a statement to sheriff's office personnel, Trelane called her mother, Ms. Goss, from a pay phone at the sheriff's office. Trelane testified that she "told her [mother] what was going on" regarding the incident at the sheriff's office. Ms. Goss informed Trelane that Trelane's three children were at Ms. Goss's house. [FN4] After hearing what had transpired earlier on the street and at the sheriff's office between Trelane and Floyd, Ms. Goss said of Floyd, "I won't let him get my grandchildren." Ms. Goss was also aware that the twenty-one-year-old Floyd was then on probation for previous violations of the law.

FN4. Earlier on July 13, Floyd had transported Trelane's three children to be with their grandmother, Ms. Goss.

During the trial, several witnesses described the subsequent events that led to the death of Ms. Goss. J.J. Jones, the oldest of Trelane's three children, testified [FN5] that on July 13, 1998, the day that Ms. Goss was killed, Floyd took him and his two younger siblings to the home of their grandmother, Ms. Goss. J.J. also stated that after he had fallen asleep that evening, Ms. Goss awakened him and instructed him to go to the home of her neighbor, Jeanette Figuero, and to call the police from there. Before he exited Ms. Goss's home, J.J. noted that she was clearly upset. As J.J. was moving toward Jeanette Figuero's home, he noticed that Floyd was "squeezing [Ms. Goss] behind the door" at the front of Ms.

Goss's home. Moments later he saw Ms. Goss running outside. J.J. stated that he also observed Floyd standing on Ms. Goss's front porch and firing a gun three times. J.J.'s two siblings, LaJade Evans and Alex Evans, were directly behind him, as Ms. Goss had awakened them also. J.J. testified that he never saw Floyd leave the victim's porch, and that the last thing he observed before pounding on Jeanette Figuero's door for help was his grandmother, Ms. Goss, lying on her back. J.J. eventually led the police to the spot where he thought his grandmother's body would be. As one of the officers directed a flashlight beam on the ground, the light revealed Ms. Goss's lifeless body. Ms. Goss was clad only in a nightgown and was not wearing any undergarments. [FN6]

FN5. J.J. Jones was eight years old when he testified. The trial judge engaged in witness-qualification procedures to ensure that J.J. was capable of understanding the proceedings and that he understood his responsibility to testify truthfully. After the trial judge indicated that he was prepared to have J.J. sworn as a witness, the defense voiced no objection.

FN6. Ms. Goss's husband, Clifford Goss, testified that his wife never received guests in her home unless she was fully dressed. He said that she would never have company inside her home if she was not wearing undergarments.

LaJade Evans, J.J. Jones' younger sister, testified [FN7] that she followed J.J. to Ms. Figuero's home to seek help. LaJade saw Floyd on the victim's porch, shooting a gun at the victim. LaJade said Floyd fired two shots from the porch, and that she heard one more shot fired in the direction of the victim. She added that she saw Floyd running toward the victim's home but that he did not go inside the home again after having fired his weapon.

FN7. LaJade Evans was six years old when she testified. After the trial judge and the State asked qualifying questions, LaJade was sworn as a witness. The defense did not object.

Jeanette Figuero testified [FN8] that during the evening of July 13, she heard three gunshots followed by the sounds of pounding on her door and the plaintive cries of a child or children saying, "Open the door, open the door, please open the door." Figuero's son, Gary Melendez, opened the door to allow J.J., LaJade, and Alex into the home. Figuero said the children were talking very fast and when she inquired as to the problem, they exclaimed that their grandmother, Ms. Goss, had been shot. When she asked J.J. who shot Ms. Goss, he responded, "Maurice Floyd." [FN9] Figuero also testified that she heard J.J. mention Floyd's name when he talked to the 911 dispatcher. [FN10] The prosecutor asked Jeanette Figuero if she believed that J.J. was "smart" and "bright," and whether she believed him when he said that Floyd had shot Ms. Goss. Figuero answered that she believed J.J. was a bright child and that she believed his version of the events, especially after she called over to Ms. Goss from her front porch and received no response.

FN8. In the chronology of the trial, Jeanette Figuero testified before J.J. Jones.

FN9. Floyd's objection to this testimony as inadmissible hearsay and lacking in foundation was overruled. Floyd did not object until Ms. Figuero had fully completed her answer. Gary Melendez, Figuero's son, also testified that the children said that "Maurice Floyd" shot Ms. Goss. He said the children were frightened, crying, and nervous when they first reached Figuero's home.

FN10. Relevant parts of J.J. Jones' conversation with the 911 dispatcher were played during the trial over Floyd's hearsay objections. On the 911 tape, J.J. Jones said that "Maurice Floyd" was the person "who was shooting."

Figuero also testified that earlier in the evening on July 13, she had been speaking with her neighbor, John Brown, from the porch of her house. Brown mentioned that a young male had been constantly walking up and down the sidewalk in front of Ms. Goss's home. Subsequently, Figuero

noticed that a young African-American male was on Ms. Goss's front porch, and was talking to Ms. Goss for some time through the closed screen door. She could not recognize the young male because his back was to her and it was also dark. After leaving her porch for a few moments and then returning, Figuero noticed that the young male had apparently entered Ms. Goss's home. She heard the voice of an angry male emanating from inside the victim's home, addressing Ms. Goss in sometimes profane tones. Figuero testified that she clearly heard the young male say in an angry tone, "Why did she have to involve the GD crackers." [FN11] She also saw the young male move menacingly toward a person who was sitting on the sofa in Ms. Goss's home. The young male abruptly halted when he noticed that Figuero had spotted him. Figuero stated that she assumed at all times the young male was addressing himself to Ms. Goss because she knew that Ms. Goss was in the home. Approximately twenty-five minutes after hearing the angry male's voice, Figuero heard the sounds of gunfire which led J.J. Jones and his siblings to appear at her door.

> FN11. The record indicates Figuero's moral reluctance to relate exactly the profane or sacrilegious statement made by the young male. Therefore, she used "GD" as a euphemism. The record also indicates Figuero's understanding that the term "cracker" as used in this context was a reference to a white person. The State posits in its brief that Floyd's reference was to Deputy Dean Kelly, who prevented Floyd from accosting Trelane earlier in the evening outside the sheriff's office. The State notes that Deputy Kelly is a white male and that Floyd is African-American.

John Brown, the neighbor with whom Figuero was speaking earlier that evening, testified that on the evening of July 13 he saw two men walking up and down the sidewalk in the vicinity of Ms. Goss's house. One man, dressed in black, was noticeably taller than the other. The shorter man eventually disappeared from sight, but the taller man continued walking up and down the sidewalk. The man dressed in black eventually made his way up the steps of the home to Ms. Goss's front porch and began talking to her. Brown testified that approximately an hour later he heard a loud

"commotion" emanating from Ms. Goss's house, involving a loud, angry male voice. He heard "two big shots" while he was still inside his home and subsequently heard children running. Proceeding to the sidewalk in front of his home, Brown saw a man dressed in black run off the steps of Ms. Goss's home and then run up a side street in a northerly direction. Brown stated that this man "fit the general description" of the "black man" who had dropped off children at Ms. Goss' house earlier in the day on July 13. [FN12]

FN12. Brown also said that the man who dropped off children at Ms. Goss's house drove a red Honda automobile. This matches the general description of Floyd's automobile which was established through other trial testimony.

Police officers Stokes and Zike responded to the 911 call made from Jeanette Figuero's home. Stokes spoke with J.J. Jones and his sister, LaJade Evans, about what had happened. He noted that they were in a very excited state when he spoke with them. He also stated that when he asked if the children had seen the shooting, they responded that Floyd had fired a gun at their grandmother, Ms. Goss. [FN13] Zike testified that when he and Stokes entered Ms. Goss's home looking for suspects and clues, they noticed that "the door had been kicked in." [FN14]

FN13. Floyd objected that the excited utterance exception was not a proper basis to admit Stokes's testimony regarding what the children had told him. The trial judge overruled the objection.

FN14. Ms. Goss's husband, Clifford, testified that the lock on the door appeared as if it had been kicked or broken. He said the lock was not in that condition when he left for work on July 13 at approximately 4 p.m. Ms. Goss was not at home when Clifford left for work.

The State did not produce the murder weapon at trial. However, the State did present evidence of a confession that Floyd made to a friend. Tashoni

> Lamb testified that Floyd visited her apartment around midnight on July 13, and that he left after 6 a.m. on July 14. Floyd asked to speak with Lamb privately, out of the hearing of her children. Lamb stated that Floyd pulled a gun out of the pants he was wearing, placed it on a dresser in the apartment, and said, "I just shot Miss Mary, the grandmother." She related that Floyd's reason for shooting Ms. Goss was that "she had threatened to call the police on him." Lamb stated that she did not call the police because she concluded that they would certainly apprehend Floyd. She further testified that Floyd contacted her by phone later on July 14, a day before he was arrested. When the prosecutor asked at trial if anyone had ever asked her to provide an alibi for Floyd, she responded, "Maurice did." She also testified that during the phone conversation, Floyd asked, "Do you want to see me die?"

This Court affirmed the murder conviction and sentence of death, but struck the conviction for armed burglary and the aggravating circumstance of "during a felony." *Floyd v. State,* 850 So. 2d 383 (Fla. 2002). The United States Supreme Court denied Floyd's petition for writ of certiorari on January 12, 2004. *Floyd v. Florida,* 540 U.S. 1112 (2004).

On January 10, 2005, Floyd filed a postconviction motion pursuant to Rule 3.851, raising five claims. (V1, P1-79).[1]

After a Case Management hearing, the Circuit Court entered an order setting an evidentiary hearing on Claims I, ineffective assistance of counsel; Claim II, ineffective

[1] Cites to the present record on appeal are "V," to signify "volume." The volume number of the current record is then cited, followed by the page number in that volume, i.e. "V1, P32" indicates volume 1, page 32. Cites to the supplemental record in the present case are "SRV" followed by the page number, i.e., "SRV1, P32." Cites to the original record on direct appeal are "ROA." Cites to the supplemental record on

assistance of counsel and court-appointed psychologist; and Claim III, cumulative effect of errors. (V3, P416-421).

Floyd moved, and was granted leave, to amend his Rule 3.851 Motion with one additional claim: shackling. (V2, P395-415; V7, P1233). The evidentiary hearing was held November 28-29, 2005, and January 9, 2006. The Circuit Court entered an order denying postconviction relief on January 8, 2007, as amended January 31, 2007. (V7, P1239-58). Floyd appealed that Order. Floyd also filed a Petition for Writ of Habeas Corpus which is concurrently pending before this Court. Case No. SC07-1894.

Psychological evaluations of child trial witnesses. Floyd filed a motion requesting psychological examinations of the child witnesses; i.e., the victim's grandchildren who witnessed her murder. (V1, P135-139). There were three grandchildren. Two of them testified at trial on April 6, 1999: J.J. Jones and LaJade Evans. (ROA 1704-1719, 1725-1741). The motion was heard April 7, 2005. (V2, P210-274). Floyd argued the defense mental health expert, Dr. Berland, should be allowed to conduct a psychological evaluation on the children because it was relevant to their competence to testify at trial; and, therefore, trial counsel's ineffectiveness for not challenging their competence. (V2, P213). Floyd had not sent notice of the

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direct appeal are "ROA."

hearing to either the children or the children's mother, Trelane Jackson. (V2, P214). The trial judge questioned the authority of a court to order a psychological evaluation on a trial witness six years after they testified. (V2, P214, 227). The trial judge also questioned the children's right to be noticed. (V2, P215). The State objected to a psychological evaluation because the issue of competency was procedurally barred and Floyd had no good faith basis to request the exam. (V2, 247-249). The trial judge denied the motion, stating there was nothing extraordinary about this situation that would require the psychological evaluation. (V2, P272).

Floyd next filed a motion for limited discovery, including depositions and interrogatories. (V2, P149-51). The motion was heard at the Case Management Conference on April 28, 2005. Collateral counsel wanted to subpoena the "psychological evaluation records for any mental health experts who evaluated the children." (V8, P1457). The State expressed concern about the children's privileged documents. (V8, P1460). The State also requested that if collateral counsel was going to pursue the children's mental health, school and medical records, it would be appropriate to involve a guardian *ad litem* or victim advocate. (V8, P1463-64).[2] The State expressed concern that if collateral counsel was proposing to subpoena

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2 A guardian *ad litem* was appointed for the minor children during the trial. (ROA1, P18, 19, 23-24, 98).

privileged records, a protective order would be in order. (V8, P1468). The trial judge indicated that defense counsel was asking for records which surprised the State, but that if the State was asking for a protective order, they should file a motion. (V8, P1468). The trial judge ruled that Floyd could conduct depositions. (V8, P1470-71). Collateral counsel stated that he was withdrawing everything in his motion for limited discovery except the request for depositions and *subpoena duces tecum*. (V8, P1471). The trial judge ruled that Floyd could take "oral depositions and depositions that require production of documents upon request of Court." (V8, P1473). Collateral counsel then stated he wanted to depose Trelane Jackson, any mental health professional "involved in this," and the children. (V8, P1473). The trial judge asked what information Floyd expected to glean from the children six years after their testimony. At the time of the hearing in April 2005, the children were 11, 12, and 14 years old. (V8, P1474). The trial judge stated that deposing the children would require a court order and an attorney *ad litem* or victim advocate would be appointed to be with the children to "make them comfortable for the deposition purposes." (V8, P1478). Collateral counsel stated he had anticipated that ruling. (V8, P1479). Collateral counsel had not issued any subpoena for deposition for the children. (V8, P1479).

On May 5, 2005,[3] the trial judge entered an order memorializing the Case Management Conference and: (1) attaching a schedule of the claims to be heard at the evidentiary hearing; (2) requiring court permission for deposition of the child witnesses; (3) ordering no contact with the child witnesses until an attorney *ad litem* is appointed for the children; (4) re-scheduling the evidentiary hearing. (V3, P417).

On November 9, 2005, Floyd renewed the motion to allow a psychological evaluation of the children and to depose their mother, Trelane Jackson. (V3, P452-71). However, Floyd withdrew the request for a psychological evaluation of the children at the hearing. (V4, P660). The State did not object to the deposition of Trelane Jackson. (V4, P685, 701, 702). Floyd requested orally to depose J.J. Jones, and did not request to depose LaJade Evans. (V4, P707). The State objected to the deposition of J.J. Jones because it was not properly pled in the motion to depose Trelane. (V4, P703). The judge denied the motion to depose J.J. and noted that collateral counsel needed to file a motion if he wanted to depose J.J. (V4, 708-09). The State objected to the *subpoena duces tecum* to the Children's Home Society for the mental health evaluations of the child witnesses. (V4, P685). Neither the children nor the Children's Home Society had been noticed on the hearing. (V4, P686).

[3] The order was not filed with the Putnam County Clerk until November 2, 2005. (V3, P416-421).

However, the State had contacted counsel for the Society, Frank Gonzalez, who was on stand-by to assert privilege and confidentiality. (V4, P701). The trial judge questioned collateral counsel on whether the records were privileged. (V4, P686). Apparently, the children had a psychological reaction to seeing their grandmother shot in front of them and were referred to the Children's Home Society for counseling. (V4, P689). The trial judge ruled orally on each issue (V4, P683, 704, 706, 721), and entered an order dated November 18, 2005, denying the motion for psychological examination of child witnesses, granting the motion to depose Trelane Jackson, denying the motion to issue a subpoena to Children's Home Society. (V7, P1232-1234).

After the judge ruled orally on the motions, collateral counsel requested an emergency hearing for appointment of a *guardian ad litem* in order to depose the child witnesses. (V4, P709). The trial judge offered hearing time the next day. (V4, P709-10). The State did not object to hearing the motion to depose J.J. at that time. (V4, P711). The trial judge asked for the relevance of deposing the child, age 14. (V4, P711). The only explanation collateral counsel gave was that he wanted to explore the lighting conditions and the child's ability to observe the person inside the grandmother's house.[4] Supposedly, the children's mental state was relevant to

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4 At the time, Floyd was married to the children's mother and Floyd took the children

ineffective assistance of counsel for failing to "adequately examine the children for purposes of determining their ability to testify, the psychological abilities." (V4, P712). The State observed that collateral counsel had not yet deposed trial counsel, Mr. Withee, to determine whether the lighting was an issue and whether he pursued the issue. (V4, P716). Collateral counsel then argued that the child "could have had a lot of second thoughts in six, seven years" since the murder. The trial judge asked collateral counsel to explain the relevance to any claim of ineffective assistance of counsel. (V4, P718). The trial judge denied the motion. (V4, P721). Collateral counsel later asked to amend his oral motion to depose J.J. Jones to include permission for a psychologist to be present at the deposition. (V4, P720). The trial judge did not allow the oral amendment to an unscheduled oral motion.

Motion to Interview Jurors. On October 17, 2005, Floyd filed a motion to interview jurors on the shackling issue. (V2, P387-94). At the November 14, 2005, hearing on all pre-evidentiary hearing issues, the motion was denied without prejudice after defense counsel "tabled" the motion until the record on the shackling issue was decided. (V7, 721-22). The motion was renewed on January 9, 2006, (V4, 735-42)

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to the grandmother's house. When Ms. Goss woke the children and told them to get out of the house, they ran past Floyd. Neighbors testified they could see the man inside Ms. Goss's house, that the children came running from the house, that they called 911 and placed J.J. on the phone, and that J.J. showed police where to find Ms. Goss's body. *Floyd v. State,* 850 So. 2d 383, 387-393 (Fla. 2002).

after the evidentiary hearing had taken place and an order entered allowing hearing time on January 9 only for mental health experts. (V4, P733-734). At the close of the experts' testimony, the renewed motion was heard. (SRV3, P638-657). The renewed motion was denied. (SRV3, P657).

EVIDENTIARY HEARING FACTS

Trelane Jackson, Floyd's ex-wife, is the daughter of the victim, Mary Goss. (SRV1, P100-01). Trelane's three children, who were seven, six, and five years old at the time, witnessed the shooting. (SRV1, P101). The eldest, J.J., wore glasses for a short time, although Trelane could not recall if it was before or after her mother was shot. (SRV1, P102). After the shooting, her children received counseling because they were scared, traumatized, and frightened. (SRV1, P104, 108). She talked to a victim's advocate, who helped her find counseling for the children. Trelane did not have records of the counseling sessions. (SRV1, P109). The children attended counseling both before and after trial and are still having problems. (SRV1, P109-110). Trelane lived in a safe shelter with the children for 3-4 weeks until "they captured Lamar."[5] (SRV1, P112). The State objected to inquiries about counseling. The objection was sustained as to privileged matters. (SRV1, P105). Alex, the youngest

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5 Floyd's full name is Maurice Lamar Floyd.

son was eventually medicated with Ritalin. (SRV1, P109).

Tashoni Lamb[6] was a friend of Floyd's at the time of the shooting. (SRV1, P123). On the night Mrs. Goss was shot, Floyd came to Lamb's house. (SRV1, P123). Lamb informed police the morning after Floyd had been arrested, that he had been at her house the night of the shooting. (SRV1, P124, 125).[7] Lamb told police that Floyd had been at her house for approximately five hours. (SRV1, P135). Lamb's friend, Camellia Wright, called her and told her about the shooting. (SRV1, P137, 138). Floyd was with Ms. Lamb at that time. (SRV1, P139, 140). Ms. Lamb told police that Floyd told her, "I just shot Ms. Mary." (SRV1, P150-51, 154).

During the audiotaped interview between Detective Sandberg and Ms. Lamb, Detective Sandberg informed Ms. Lamb that Floyd might have left the gun that killed Mrs. Goss somewhere in Lamb's house because Floyd spent the night at Lamb's house the night of the shooting. (SRV1, P155). When "Kenny" came home, he thought Lamb and Floyd "was messing around." Kenny hit her in the jaw and knocked

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[6] Although this name is "Tashunie" Lamb in the evidentiary hearing transcripts, the Florida Supreme Court opinion refers to this person as "Tashoni" Lamb. For consistency, this name is cited as "Tashoni."

[7] Portions of an audiotape of an interview of Lamb on July 16, 1998, at 1:34 a.m. were played to refresh Lamb's recollection at the evidentiary hearing. (SRV1, R130-133, 137-38, 152-). Apparently the relevant portion was a statement on the audiotape that Lamb said Floyd killed Ms. Goss because "she was running her mouth, she just was running her mouth, talking, and he say he just shot her." (SRV1, P154).

her teeth out. (SRV1, P156, 157). Lamb purposely raised her voice when Kenny was beating her, so Floyd would come out from the other room and stop what was happening. (SRV1, P165).

Ms. Lamb did not see any blood on Floyd's clothing. Floyd told Ms. Lamb "that the eight-year-old probably seen him." (SRV1, P158). Floyd told Ms. Lamb that he had wanted to talk with Trelane earlier in the day, but Trelane "decided she wanted to drink and, you know, he was there watching the kids and she was out drinking ... he said she pissed him off and acting all crazy and stuff. He said the only thing he want to do is talk to her and she didn't want to talk, all she want to do is drink." (SRV1, P 161). Floyd did not tell Ms. Lamb where he was going or what he would do when he left her house. (SRV1, P160). She could not recall if Floyd told her why he shot Mrs. Goss. (SRV1, P164). Ms. Lamb did not recall telling the jury that Floyd told her he had shot Mrs. Goss because she was going to call the police. (SRV1, P 171).

On cross-examination, Ms. Lamb said she received a phone call from her friend Camellia Wright, *after* Floyd arrived at her home. Wright told her that Mrs. Goss (a/k/a Mary Jackson) had been shot, which Ms. Lamb had already learned from Floyd himself. (SRV1, P176). She did not recall why she told police that Floyd had arrived after Ms. Wright's phone call to her. (SRV1, P177).

Camellia Wright testified she did not call Tashoni Lamb and tell her that Floyd

shot Mrs. Goss. She did not have a phone in her home at that time. She found out about the shooting a day later. (SRV1, P178). She did not know Tashoni's phone number. (SRV1, P179).

Garry Wood, currently in private practice, was the assistant state attorney who prosecuted Floyd's case. (SRV2, P 217). Mr. Wood did not recall speaking to anyone who spoke with Kenneth Davis (Ms. Lamb's boyfriend) at the jail regarding his knowledge of events in this case. (SRV2, P228). Mr. Wood did not recall anything about a case against Kenneth Davis, Ms. Lamb's boyfriend. (SRV2, P230-31). He did not recall telling Doug Withee (defense attorney) that charges would be dropped against Mr. Davis. (SRV2, P231). He did not tell Ms. Lamb that she would be prosecuted for harboring Floyd if she did not testify against him. (SRV2, P231-32). The State Attorney's office did not threaten Tashoni Lamb about testifying nor was perjured testimony presented at Floyd's trial. Mr. Wood did not have Tashoni Lamb change her testimony in any way; "Whatever she said, she said, but I didn't tell her what to say or how she said it." (SRV2, P267). There was no deal with Ms. Lamb to dismiss domestic violence charges of her boyfriend, Mr. Davis, if she testified a certain way. (SRV2, P 269). When Mr. Wood signed a "No Information" on the Kenneth Davis case, he did not have independent knowledge of that particular case at that time. (SRV2, P270). It would be harder to prosecute a domestic violence case

when the victim was not willing to cooperate with the State Attorney's Office. (SRV2, P 274).

Mr. Wood recalled that the three child eye witnesses (Floyd's stepchildren) received mental health counseling after the murder. (SRV2, P233). The State Attorney's office was not involved in compensating Children's Home Society for the counseling. (SRV2, P234). Mr. Wood did not receive any communications from the children's counselor that pertained to privileged information. (SRV2, P237).

Mr. Wood did not recall child witness "J.J." wearing glasses nor did he ever recommend that J.J.'s eyesight get checked. (SRV2, P261). The child witnesses were not coached, nor did Mr. Wood tell them what to say or how to testify. (SRV2, P265). Mr. Wood did not have any concerns about the children's ability to recollect the events of the night Mrs. Goss was killed. He did not have any concerns about their competence to testify. There was a lot of other evidence in this case. (SRV2, P266-67).

Douglas Withee, an assistant public defender since 1992, was Floyd's defense attorney. Currently, he handles major sex crime and death penalty cases in Florida's Twentieth Circuit. During his tenure with the Seventh Circuit, he handled homicide cases, both death and non-death cases. (SRV2, P286). Of the 49 murder cases that he handled (not all were death penalty cases), Floyd's was the only case where the death

penalty was advised by the jury. (SRV2, P287).

Mr. Withee did not have co-counsel for Floyd's case. (SRV2, P288). He retained people to do mitigation and investigative work by petitioning the court. (SRV2, P288-89). Withee and defense investigator Freddie Williams almost always investigated cases together. (SRV2, P356-57). He retained Dr. Krop to do mitigation. (SRV2, P290). Dr. Krop prepared the psychological work and Mr. Withee gave him material of a social nature. (SRV2, P290). Withee collected information from wherever he could get it: "hospital records, school record, any head injuries, things of that nature" and including an interview with Floyd. (SRV2, P291). He obtained school records, information regarding the prior murder of his brother, and a 1991 psychological report prepared by Dr. Robert David, Ph.D. (SRV2, P 292). Dr. David's report did not help with any mental mitigation that could be used in Floyd's defense, the report did not indicate any form of pathology in Floyd. (SRV2, P293, 294). Throughout Withee's representation in this case, he corresponded with Dr. Krop regarding any progress he had in obtaining mitigation. (SRV2, P297-98). In his January 26, 1999, letter, he wrote Dr. Krop, "I am in serious need of mitigation." (SRV2, P300). He sent Dr. Krop everything he had. (SRV2, P301). Eventually Dr. Krop notified him that, "The bottom line is I would suggest my testimony might cause the jury to view him in a negative manner" and that he could not help Withee in the

trial. (SRV2, P302-03). Mr. Withee did not a have an independent recollection as to what information Dr. Krop would testify to that was “harmful.” (SRV2, P349, 351).

Although Withee spoke with Floyd’s parents often, he could not recall details about any information they might have provided. (SRV2, P351). He could not recall his strategic decisions on not objecting to purported “improper” jury instructions. He did not request an instruction on age as a mitigating factor because Floyd did not fit this category. (SRV2, P352-53).

Mr. Withee’s “theme” for this case was that it was a continuing domestic dispute. (SRV2, P353). He could not recall with any specificity any information Floyd gave him regarding his background or criminal history. (SRV2, P356).

During the penalty phase, Mr. Withee avoided any information he had with regard to Floyd’s violent behavior in school or his criminal behavior. (SRV2, P357-58). He did not want the jury to know Floyd had antisocial personality disorder. (SRV2, P358). Neither did Withee want the jury to know that Floyd had shot and killed his own brother. (SRV2, P361). Withee tries to keep the negative aspects at a minimum and present the positives during the penalty phase. (SRV2, P359). Withee had contacted Dr. Krop four months before trial, requesting any available mitigation. (SRV2, P359). He did not have much as far as mitigation, “All I had was what I offered, which wasn’t much.” (SRV2, P360). Withee had worked with Dr. Krop for

many years and would not second-guess Dr. Krop's opinion that he would "do ... more harm than good" if he testified at trial. (SRV2, P362).

Mr. Withee did not recall reviewing the State Attorney's file or tape recordings of witnesses. He was not aware that any tape recordings existed. (SRV2, P367, 368, 370). Although he would have read all of the police reports, he did not recall Tashoni Lamb's statement that Floyd had shot Mrs. Goss because he was angry with her. (SRV2, P370). He recalled that Ms. Lamb had said Floyd asked her to provide an alibi for him the night he shot Mrs. Goss. (SRV2, P372). Mr. Withee did not cross-examine Ms. Lamb at trial because "I didn't want the jury to hear it - hear his admission three or four times." (SRV2, P375).

The first time Mr. Withee met the child witnesses was at their depositions. He does not interview children outside the presence of the State. He did not recall being informed that the children were receiving counseling. (SRV2, P382). He did not consult an expert on child testimony. (SRV2, P384). He had no information regarding whether Floyd's relationship with his stepchildren was a good or bad relationship. (SRV2, P385). Mr. Withee recalled that the child witnesses were questioned as to their competency to testify. Had he not been satisfied, he would have asked them additional questions. (SRV2, P405). Floyd's relationship with his mother-in-law (victim) was that "she was an ally of his when it came to the activities of his wife ...

going out to the parties and consuming an excess amount of alcohol ... " (SRV2, P385).

It is Mr. Withee's strategy not to antagonize the jury. He does not make "spurious objections" just to make them. He does not make objections which would interrupt the flow of the trial. (SRV2, P392, 393). He did not recall one of the veniremen making statements that defendants sentenced to death should be executed with little delay. (SRV2, P401-02).

Mr. Withee recalled going with Investigator Freddie Williams to interview Tashoni Lamb. (SRV2, P408). Withee believed the statements Miss Lamb made to Detective Sandberg and the Grand Jury regarding why Floyd had shot Mrs. Goss were the same general statements and were not impeachable. (SRV2, P423).

Mr. Withee investigated the purported alibi that Floyd's parents had provided for him. (SRV2, P411-12). Withee said, "I didn't - I don't in any manner want to be accused or do any - - perpetrate any fraud on the tribunal, or anybody else, for that matter, for something I don't believe in." (SRV2, P411). In addition, someone tried to get Ms. Lamb to change the time line, "and that raised apprehension in my mind." (SRV2, P411). The alibi provided by the parents would have put Floyd in Palatka at the time of the crime. "I just couldn't buy it, and if I don't buy it, the jury isn't going to buy it." (SRV2, P413).

During Floyd's trial/penalty phase, Mr. Withee did not notice Floyd's leg brace, "it was a nonissue to me." (SRV2, P416). He did not recall any leg braces "clattering around" and Floyd was seated right next to him. (SRV2, P416). Withee would encourage non-visible restraints if he felt his client was "going to lose it in the courtroom." (SRV2, P417). Withee objected to shackles at the penalty phase. (SRV2, P417). Mr. Withee did not recall any discussion before trial about putting a leg brace on Floyd. He did not recall the leg brace becoming an issue of any kind. Had it been an issue, he would have advised Floyd to avoid letting the jury see it. (SRV2, P388, 390).

Withee did not remember Mickey Hoffrichter, counselor from the Children's Home Society. He did not believe the children had been coached prior to testifying and they, "seemed to be pretty straightforward." (SRV2, P418, 419). The children's statements contained a litany of excited utterances to which Mr. Withee objected. (SRV2, P419-20). When police could not find Mrs. Goss' body, J.J., the eldest child witness, led them to where she had been shot. (SRV2, P420).

Freddie Williams has been an investigator with the Public Defender's Office since 1981. (SRV2, P429). He conducted several interviews and went to the crime scene. (SRV2, P429). In addition, he gathered potential mitigating evidence. (SRV2, P430). Subsequent to his interview with Ms. Lamb, Williams typed his own notes and

put them in Floyd's file. (SRV2, P434). He also typed notes after his interviews with Floyd's father, Charlie Floyd, and Lt. Ricky Wright. (SRV2, P436, 437).

Julian Browning has been an investigator with the State Attorney's Office (Palatka) since 1982. (SRV2, P440, 446). He did not specifically recall interviewing Tashoni Lamb or Kenneth Davis. (SRV2, P442, 443). He has never pressured a witness into testifying. (SRV2, P445). Browning did not remember Ms. Lamb being reluctant to talk with him. (SRV2, P447).

Mitchell Halbrook was the court bailiff for Floyd's trial. In 1999, defendants in felony trials in Putnam County would wear a leg brace, no exceptions. (SRV2, P463, 464). Halbrook was responsible for putting leg braces on defendants before they entered the courtroom, along with two other escorts. (SRV2, P460). The leg brace remained on the defendant until he was returned to his holding cell. (SRV2, P461). The defendant was instructed on how to make the leg brace collapse at the knee so he could sit down. (SRV2, P462). A defendant would walk with a stiff leg if he had a brace on. (SRV2, P463). The defendant would already be seated before the jury was brought in. (SRV2, P470). It was standard practice not to move the defendant in or out of the courtroom in the presence of the jury. (SRV2, P470). The prosecutor's table was seated closest to the jury box; the defendant's table was closest to the judge. (SRV2, P472).

Maurice Floyd testified he wore a leg brace at all times during his trial in 1999 while he was in the courtroom. (SRV2, P485). He limped when he wore the brace, including the occasions when he approached the bench. (SRV2, P486). He had to pull his pants leg up in order to grab the latch of the brace so he could flex his leg. (SRV2, P487). The leather strap at the bottom of the brace was visible because his pant legs were above it. He heard the device click every time he used it. (SRV2, P488).

Dr. Harry Krop, a licensed psychologist, has evaluated approximately 2000 first-degree murder cases, most of these at the pre-trial level. Approximately 10% of these cases are post-conviction cases. Although Dr. Krop had evaluated Maurice Floyd, he was not able to locate his file. (SRV2, P311). Normally his office would retain death penalty case files indefinitely; however, his office may not have been notified that Floyd had been sentenced to death and eliminated Floyd's file. (SRV2, P312). Dr. Krop did not recall much about Floyd's file with the exception of what was contained in Mr. Withee's letters. (SRV2, P313). Normally, with a death penalty case, Dr. Krop would conduct a clinical interview and give the defendant a standard battery of psychological tests such as the MMPI and other personality tests. After the initial evaluation, he would request additional documents that would include police records, school records, medical records (including medical records of other family members), birth records, psychiatric records, military records, PSIs, and any DOC

records.(SRV2, P314-15). He would also interview family members, check for a history of substance abuse, head injuries or birth problems, and investigate the possibility of brain damage or organic deficits. Typically, Dr. Krop is looking for frontal lobe deficits or signs of mental retardation, if that is an issue. (SRV2, P316).

Intellectually, Floyd scored in the average range with an IQ of 95. He had a 20 point difference between verbal and performance. (SRV2, P316-17). Generally, a 20 point difference is considered significant, but that "doesn't necessarily reflect organicity ... or brain damage ... it can suggest the possibility of a learning disability ... " (SRV2, P317). Floyd exhibited memory problems, but nothing from Floyd's self-report indicated that he exhibited memory problems regarding the offense. (SRV2, P317). Floyd's neurocognitive functions were within normal limits, "anything related to frontal lobe or conceptual reasoning or those areas which might have a direct bearing on the offense itself were all within normal limits." (SRV2, P317).

Dr. Krop believed that if he was called to testify at trial, his testimony might be harmful due to inconsistent and contradictory information from Floyd and his parents. He told Floyd it was important to be forthright with the information he was given. (SRV2, P322-23). If Dr. Krop testified about contradictory or inaccurate information, his credibility would be questioned. (SRV2, P323). If a defendant denies culpability, it is more difficult to find statutory mitigators but does not preclude other mitigators

from being investigated. (SRV2, P329). Dr. Krop would have noticed if Floyd exhibited any signs of psychotic behavior and would have told defense counsel about it. (SRV2, P340).

A 27-point difference between Floyd's verbal and performance IQ would reflect a learning disability or academic deficiencies. Dr. Krop ruled out brain damage for Floyd due to results from the other tests involved. Neurocognitive functions were normal. (SRV2, P341). Dr. Krop spent approximately 12 hours with Floyd. (SRV2, P345). This was enough time to do a proper evaluation, and he would have asked defense counsel for more time if he thought he needed it. His job is to assist clients, even if that means not testifying. (SRV2, P345). Dr. Krop had worked closely with Mr. Withee (trial defense counsel) on at least 15 cases. (SRV2, P332-33).

Dr. Henry Dee, clinical psychologist and neuropsychologist, (SRV1, P20-22) evaluated Floyd, reviewed school records, other evaluations, collateral information, and discovery information regarding the offense. (SRV1, P32). Dr. Dee administered tests which indicated Floyd has a full scale IQ of 95,. There was a 20 point difference between verbal and performance IQ's: 87 and 107, respectively. (SRV1, P38). Although Floyd had some academic problems in school, Dr. Dee did not know whether he had been diagnosed with a learning disability. (SRV1, P47).

Dr Dee stated that Floyd's impulsive behavior resulted in the victim's death. It

was poorly planned and poorly executed. Floyd did not make any attempts to disguise himself at the time of the crime, "which I think is the hallmark of an impulsive crime." (SRV1, P54-5). In Dr. Dee's opinion, Floyd was under the influence of extreme mental or emotional disturbance at the time of Mary Goss' murder. (SRV1, P56). Likewise, Floyd's ability to conform his actions within the requirements of the law was substantially impaired. (SRV1, P57).

In Dr. Dee's opinion, Floyd has left hemisphere dysfunction and possibly right hemisphere damage as well. (SRV1, P82). He would classify Floyd as having "chronic brain syndrome with mixed features." (SRV1, P82). The mixed features increase impulsivity and irritability. (SRV1, P82).

Floyd did not admit to Dr. Dee that he shot Mrs. Goss nor did he discuss the actual crime. (SRV1, P83). Dr. Dee did not have any information from Floyd "with respect to his subjective mental state, but often I don't find that useful anyway." (SRV1, P84). Further, "he told me he didn't do it." (SRV1, P85). Floyd reported that he had sustained two concussions since his incarceration. (SRV1, P86). He had attended school until the seventh grade, received passing grades, and rarely got into physical fights. (SRV1, P88).

Dr. Dee conceded Floyd has antisocial tendencies. (SRV1, P89). He committed juvenile thefts and burglaries and failed to plan ahead. His involvement with repeated

physical fights and assaults were indicative of irritability and aggressiveness. He shot his brother; thereby showing reckless disregard for the safety of himself and others. (SRV1, P90). In order to diagnose antisocial personality disorder, a person must have had a diagnosis of conduct disorder by age 15. (SRV1, P93). Dr. Dee did not conduct any neurological testing on Floyd. (SRV1, P95).

Dr. Robert Berland reviewed Floyd's medical records, interviewed Floyd and his family, and opined, Floyd has a biological mental illness: a "psychotic disturbance" that he has suffered from since a very young age. (SRV3, P525).

Dr. Berland said Floyd had classic symptoms of early childhood brain injury which is some form of manic disturbance and some form of paranoid disturbance. (SRV3, P529).

In Dr. Berland's opinion, Floyd suffers from a substantially impaired capacity to conform his conduct to the requirements of the law. He has a biological brain dysfunction. (SRV3, P531). Even if he knows something is wrong, he will be driven to do it, due to his underlying mental illness. (SRV3, P532). In Dr. Berland's opinion, symptoms of psychosis immediately followed Floyd's car accident at age 18 when he began experiencing headaches and depressive episodes. (SRV3, P536). Dr. Berland's ultimate diagnosis for Floyd is that he suffers from "a long-standing psychotic disturbance that involves endogenous, or biologically determined, mood disturbance.

It involves thought disorder ... particularly delusional paranoid beliefs ... perceptual disturbance ... auditory hallucinations." (SRV3, P537). In Dr. Berland's opinion, Floyd murdered Mary Goss because of irrational jealousy. (SRV3, P538).

Dr. Berland did not discuss the circumstances surrounding this crime with Floyd. (SRV3, P545).

Dr. William Riebsame, licensed psychologist, reviewed records, conducted testing, and evaluated Floyd. Dr. Riebsame has conducted approximately 50 evaluations in capital cases during the last 15 years. (SRV3, P556).

When Floyd was 14 years old, an evaluation by Dr. David indicated that Floyd's mother had a normal pregnancy with him and there were no symptoms of physical disabilities. (SRV3, P568). Floyd's criminal behavior began at age 10. He also threatened the principal of his school when he got into a fight with a classmate. Floyd had no psychotic symptoms and there were no signs of auditory or visual hallucinations. There were no delusional thought processes. Dr. David did indicate Floyd suffered from a sleep disorder. (SRV3, P569). There was no evidence of a mental illness, abnormal types of thinking, feeling, or acting that would have suggested any illness, disease, or defect. (SRV3, P570).

When Floyd was 15 years old, he shot his brother and was hospitalized at a psychiatric hospital. A clinical interview indicated no signs of psychotic symptoms.

(SRV3, P570). There was no history of previous mental illness, physical or sexual abuse. Floyd was diagnosed as having a dependent personality and sleep disorder. (SRV3, P571). He was prescribed Sinequan and other sleep medications but he refused to take them. (SRV3, P573).

Floyd reported that he experienced low back and neck pain as a result of a car accident at age 18. He did not report any head injury nor did he describe any change in behavior as a result of the accident. (SRV3, P675). Floyd did, however, report that he received several concussions while playing basketball at the prison after the murder. Subsequently, he experienced the onset of headaches. (SRV3, P575).

Dr. Riebsame did not find that the statutory mitigators, "extreme emotional disturbance" and "unable to conform his conduct to the law," were present in this case. Floyd was in control of his behavior and made decisions to prevent himself from being caught by law enforcement. (SRV3, P579). Floyd had confronted his wife at the police station. He threatened her not to get him arrested because he was on probation. Mrs. Goss threatened to call police. Floyd knew he would violate parole if the police were called. (SRV3, P580). Since he was armed at the time, he made a decision, pursued Mrs. Goss outside, and shot her. (SRV3, P580). He left the murder scene, disposed of the weapon, attempted to persuade Tashoni Lamb to change her story and tried to have his parents provide an alibi for him. He made every attempt to

mislead law enforcement. (SRV3, P580-81). These factors show Floyd appreciated the criminality of his conduct. There was no extreme emotional disturbance or substantial impairment because Floyd recognized his situation and eliminated Mrs. Goss so she would not call the police.

Dr. Riebsame's testing showed the same discrepancy between the verbal and performance IQ that the other doctors found. Dr. David, Dr. Dee, Dr. Krop and Dr. Riebsame all saw that Floyd had a learning disability. (SRV3, P585). A disparity in numbers does not mean brain damage. Floyd is not brain damaged. His brain operates in the above average range but operates "differently than most people." (SRV3, P587).

There was no evidence that Floyd had any kind of delusional or thought disorder. (SRV3, P600-601). Brain-damaged children usually are the result of prenatal trauma or substance abuse behavior on the part of the mother. There was no report of head trauma for Floyd nor alcohol abuse on his part of his parents'. (SRV3, P588-89). Floyd's mother had a normal pregnancy and delivery even though Floyd had a stillborn twin brother. (SRV3, P589).

Floyd's overall diagnosis indicated no mental disorder. He experiences a sleep disorder, "Dyssomnia NOS," as well as a learning disorder, NOS. Floyd also meets the criteria for antisocial personality disorder and personality disorder, NOS, which would include the paranoid/compulsive sort of dependent traits. (SRV3, P604-05).

Approximately 40% of the male prisoners that Dr. Riebsame has interviewed have antisocial personality disorder. (SRV3, P618, 625). In sum, Floyd has a personality disorder, a learning disorder, and a sleep disorder. (SRV3, P605, 618).

Floyd's paranoid traits go "hand in hand" with an antisocial individual. The onset of conduct disorder before the age of 15, which Floyd exhibited, is one of the diagnostic criteria for antisocial personality disorder. (SRV3, P606, 607). In addition, Floyd exhibited failure to conform to social norms with respect to lawful behavior, and impulsivity or failure to plan ahead, also criteria for antisocial personality disorder. A person does not have brain damage just because they are antisocial. (SRV3, P607). Antisocial personality disorder, a diagnosis for an individual who is at least age 18, excludes a schizophrenic or a manic episode. (SRV3, P609).

Floyd's brain abnormality is reflected in his learning disorder. (SRV3, P613). If there had been some sort of intervention in Floyd's schooling, he probably would have performed in an average range in a school curriculum. (SRV3, P613). Since Floyd did not do well in school, he became frustrated and behaved inappropriately. (SRV3, P614).

In sum, Floyd suffered chronic instability, lack of intervention by his parents and a learning disability, which Dr. Riebsame labeled as mitigating factors. (SRV3, P622). There are many individuals who are diagnosed with a learning disability that

also have antisocial personality disorder. Without a proper intervention, the antisocial behavior development reaches full bloom in an adult. (SRV3, P624). Floyd's brain abnormality suggests that his brain functions in a different way, not that he has brain damage. (SRV3, P626). There was nothing in Dr. Riebsame's testing that would indicate Floyd need a PET scan. (SRV3, P628).

Upon examination by the Court, Dr. Riebsame said a learning disorder and a learning disability are synonymous. School systems tend to use the term "learning disability." The DSM IV uses the term, "learning disorder."(SRV3, P629-30). A person with a learning disorder does not mean that person has brain damage; the brain operates differently. (SRV3, P630). A learning disorder is often the result of "nature" but can often be resolved through "nurturing." (SRV3, P632). Learning disabled people often have more than adequate intelligence. (SRV3, P633). Approximately 5 to 10 percent of a school system's population in now being identified as learning disabled. (SRV3, P633). Dr. Krop's December 11, 1998, letter, discussed the fact that his test results may reflect academic deficiencies and learning disability. (SRV3, P636).

SUMMARY OF ARGUMENT

Point I. Counsel was not ineffective in either the guilt or penalty phase, and the trial court order is supported by competent substantial evidence. The trial judge

properly qualified the children, and trial counsel was not ineffective for challenging the determination of competence. Trial counsel deposed the children and made a strategic decision on how to cross-examine them. The allegation the children were "prepped" fails for lack of proof. The trial judge did not abuse his discretion in denying access to the children's privileged counseling records. Collateral counsel abandoned the psychological evaluation of the children and the depositions of LaJade and Alex. He could give no valid reason for deposing J.J. A postconviction defendant does not have unqualified entitlement to discovery.

Counsel was not ineffective for failing to have Floyd plead to aggravated assault, a conviction which would be an aggravating circumstance in the murder case. Floyd has not alleged that he wanted to, or would have, pled to the charge and only a defendant can enter a plea. Floyd's statements to his wife are not privileged because they were made while he was committing aggravated assault against her.

Counsel was not ineffective in his cross-examination of Tashoni Lamb. He interviewed her 4-5 times pre-trial and found her credible. Her statements to trial counsel and to the police were consistent. He made a strategic decision not to cross-examine her so that she could not repeat Floyd's admissions. Further, Floyd told the police Lamb was his alibi, but when she would not lie for him, he and his family tried to get Lamb to change her story. This issue was explored pre-trial at a *Nelson* hearing,

and the record shows that counsel and the defense investigator investigated Lamb extensively.

Trial counsel and his investigator also investigated the alibi story contrived by Floyd and his parents. This issue was also explored at the pre-trial *Nelson* hearing and the details of the investigation are in the record.

Floyd contacted Dr. Krop early in the case. Dr. Krop conducted testing, and trial counsel provided records. At the *Nelson* hearing, it becomes apparent that Floyd's parents were not cooperating with Dr. Krop insofar as providing background history, and that Floyd did not want to cooperate with Dr. Krop. Dr. Krop eventually told trial counsel that, on balance, there was more negative than positive and his testimony could harm Floyd. Trial counsel made an informed strategic decision not to present mental health testimony. This decision was reinforced at the evidentiary hearing when it became apparent Floyd is antisocial.

Trial counsel was not ineffective in his treatment of the jury instructions. This Court already decided error, if any, was harmless, so there is no prejudice.

Point II. Floyd was not denied the effective assistance of a mental health expert, and this issue is procedurally barred.

Point III. There is no error, either individual or cumulative.

Point IV. Floyd was not improperly shackled in front of the jury, and this issue

is procedurally barred. Floyd wore one leg brace on his left leg, not shackles. Counsel was not ineffective regarding shackling. In fact, he prevented the trial judge from shackling Floyd before the penalty phase.

ARGUMENT

CLAIM I

COUNSEL WAS NOT INEFFECTIVE AT THE GUILT OR PENALTY PHASE

Floyd makes a series of allegations regarding trial counsel's effectiveness at the guilt and penalty phases. These allegations will be addressed separately by the letter assigned in the Initial Brief, hereinafter referred to as ("IB").

A. Testimony of child witnesses/*Brady* evidence. Floyd argues in this section:

- trial counsel was ineffective for failing to challenge the competence of J.J. Jones and LaJade Evans (IB 22-26, 28, 29-32);

-the trial court's competency determination was inadequate, an issue which is procedurally barred (IB26-28);[8]

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8 *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006)(A claim that could and should have been raised on direct appeal is procedurally barred.) (citing *Davis v. State*, 928 So. 2d 1089, 1120 (Fla. 2005)); *Duckett v. State*, 918 So. 2d 224, 234 (Fla. 2005). Proceedings under Florida Rule of Criminal Procedure 3.850 are not to be used as a second appeal. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1991). Moreover, it is inappropriate to use a different argument to relitigate the same issue. *Id*. Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *Id*.; *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987); *Sireci v. State*, 469 So. 2d 119 (Fla. 1985)).

- the State violated *Brady* by not providing information the victim's advocate at the State Attorney office assisted Trelane Jackson in finding counseling for her children after they witnessed the murder of their grandmother; or, in the alternative, counsel was ineffective for failing to impeach the child witnesses with the fact they had counseling (IB 29-30, 32-33);

- the trial judge denied collateral counsel access to the counseling records of the children (IB29, 33-39);

-trial counsel was ineffective for failing to object to hearsay (IB39-44).

An evidentiary hearing was held on these issues, after which the trial judge held:

> Mr. Floyd argues that Mr. Withee, counsel for the defendant, was ineffective regarding the presentation of information from Mrs. Goss' grandchildren, J.J. Jones and LaJade Evans. Mr. Floyd argues that J.J. Jones wears glasses, that Garry Wood, the prosecutor, told LaJade how to testify, that Ms. Hoffricher "prepped" the child witnesses, that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to advise defense counsel the children were "prepped" and that Mr. Withee failed to prepare for the children's testimony.
>
> Mr. Floyd has the burden of proof on an ineffective assistance claim to show (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra.[9] On the Brady claim, Mr. Floyd's burden is to show (1) evidence favorable to the accused, because it is either exculpatory or impeaching, (2) that the evidence was suppressed by the State, either willfully or inadvertently,

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9 The Order recognized *Strickland* as the applicable law and set forth the components of *Strickland*. (V7, P1261).

and (3) that prejudice ensued. Guzman v. State, 868 So.2d 498 (Fla. 2003). Prejudice under the Brady analysis is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Carol v. State, 815 So.2d 601 (Fla. 2002).

The issue raised by Mr. Floyd as to whether or not J.J. Jones wears glasses is a non-starter. J.J.'s mother, Trelane Jackson, testified that J.J. wore glasses for a short time, although she could not recall whether it was before or after her mother, Mary Goss, was killed. Mr. Wood, the prosecuting attorney, did not recall J.J. wearing glasses nor did he ever recommend that J.J.'s eyesight be checked. There seems to be no reliable proof that he was wearing glasses at the time of the incident or that he had any sight problems at all. Mr. Floyd has totally failed on this issue to the extent that his ability to see what was happening was actually affected and that somehow his ability to see the events would be something other than what he testified to. Since J.J. was able to lead police to his grandmother's body, it is quite obvious that J.J. had perceived the events he described and nothing presented by Mr. Floyd reliably challenges that conclusion.
Mr. Floyd also attempts to make an issue of a statement made by LaJade Evans to the effect that Mr. Wood, the prosecutor, told them what to say. When Mr. Wood testified at the hearing his testimony was that the child witnesses were not coached or told what to say or how to testify beyond sitting up straight and telling the truth. The court finds the testimony of Mr. Wood believable and there is no basis to conclude that the children were told what to say on the record in this cause.

Mr. Floyd next claims that Mickey Hoffrichter from the Children's Home Society "prepped" the child witnesses regarding their trial testimony and that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to advise defense counsel that the children were "prepped." Ms. Hoffrichter was listed as a witness in the case and she originally had the potential to testify in regard to victim impact involving the children. As one might expect, children of such a tender age who had seen and been in the proximity of the murder of their beloved grandmother would be adversely affected by such violence and the loss

of a person they care so deeply for. Counselors regularly perform the role of counseling people who are going through difficult periods of time associated with grief, especially of this magnitude, and involving children of tender years. There is some suggestion that efforts were made to make the children more comfortable by showing them the courtroom, the witness chair, and the general layout so that they would not be stunned when they were required to come forward. This is not only garden variety civility on the part of a counselor and/or prosecutor, but is meant to diminish the traumatic impact that sometimes occurs when young children are required to provide testimony in cases like this one. There is absolutely no evidence that suggests that the witnesses were coached or told what to say and there is no evidence that they testified to any facts or circumstances that had been provided to them that were not true. The threshold in regard to this claim has not been met.

Mr. Floyd further asserts that Mr. Withee did not prepare for the testimony of these young children. Mr. Withee himself is an experienced litigator who has been handling serious and difficult cases since 1966 and had specialized in capital cases for some time at the time this case was tried. Evidently after a short stay in another Public Defender's office handling lower level cases, he has returned to handling capital cases at this time. Mr. Withee indicated that from a strategy standpoint he relied upon the court to qualify the child witness and would not generally interfere unless the trial court's actions in that regard were inadequate. By strategy Mr. Withee explained that he did not want to antagonize a jury, especially a death qualified jury, by making "spurious objections" just to make them. As the State points out, Mr. Withee stated that his strategy regarding child witnesses was as follows:

> "And also know I am dealing with kids all the time and I have — what do you say in the theatre, kids and animals, you are going to be out shown? I don't — I don't — I don't attack children. Almost always depose them to find out what kind of kids they are, to talk to anybody who shows up at the deposition about have they had a tendency to lie, things like that, if that's possible, but I certainly don't attack them in any manner in the courtroom unless I am dead dog certain that I have an iron clad liar in my

hands and I can prove it."

His evaluation of Mrs. Goss' grandchildren was that they were nice kids and they were on the verge of tears through the whole time that they were testifying about their grandmother. This court finds that the approach of Mr. Withee is consistent with the actions and conduct of a reasonable lawyer under the same or similar circumstances and that his decision to handle these child witnesses on a low key approach made practical and strategic sense based on the facts of this case.

In addition Mr. Floyd claims that Mr. Withee's failure to object to permissible hearsay and bolstering regarding Corporal Stokes, Officer Zike, Jeanette Figuero and Gary Melendez and that the failure constitutes allowing impermissible hearsay and bolstering. As noted above, Mr. Withee clearly stated that his strategy on the appropriate use of objections was that he would not pepper the record with unnecessary objections for fear of irritating the jury during the course of the trial which conversely indicates that he would only object on bases that were clearly sound and relevant. An attorney is not ineffective for decisions that are part of the trial strategy that, in hindsight, did not work out to the defendant's advantage. Strickland, 466 U.S. at 689.

Mrs. Figueroa, who testified at trial, indicated that the children just told her what had happened saying their grandmother was shot when she asked them what was the matter. There was no contemporaneous objection to the question, an issue that was dealt with in regard to Mr. Floyd's appeal. She apparently went on to confirm that she believed J.J.'s version of the events and stated that J.J. was a bright child, all without objection. In the direct appeal of Floyd v. State, 850 So.2d 383 (Fla. 2002), the court found these issues to be harmless error which in essence is a finding that there has been no prejudice.

On Claim 1(a), Mr. Floyd has failed to meet either prong of the Strickland case. He has failed in his burden to show that the conduct of Mr. Withee was defective and even if the alleged conduct was defective, there has been no showing of prejudice to the extent that the confidence and the outcome would be eroded.

(V7, P1262-65).

The trial court order is supported by competent substantial evidence. This Court's standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Stephens v. State/McDonough*, 32 Fla. L. Weekly S735 (Fla. Nov. 1, 2007) *quoting Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) and *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)). Although Floyd slights the trial judge for making credibility determinations, (IB46-49), that is precisely what the trial judge is supposed to do at an evidentiary hearing.

As to the claim trial counsel failed to challenge the competency of the children or impeach their testimony: Trial counsel conducted depositions of the children. He testified at the evidentiary hearing that the children were straightforward and that his reasoned strategy is not to antagonize a child witness who is telling the truth. This is particularly true in this case because the children saw their beloved grandmother

murdered: clearly a traumatic event for a child. This strategy was reasonable, and the trial judge made a determination of both credibility of trial counsel and the reasonableness of that strategy.

Further, as the trial judge held, Floyd presented no evidence to support the claims he now makes. J.J.'s mother, Trelane, testified that J.J. wore glasses for a short time, although she could not recall if it was before or after her mother was shot. (SRV1, P102). Mr. Wood did not recall child witness "J.J." wearing glasses nor did he ever recommend that J.J.'s eyesight get checked. (SRV2, P261). Floyd did not call J.J. at the evidentiary hearing or elicit testimony from Trelane as to why J.J. wore glasses. This Court found:

> J.J. testified that he never saw Floyd leave the victim's porch, and that the last thing he observed before pounding on Jeanette Figuero's door for help was his grandmother, Ms. Goss, lying on her back. J.J. eventually led the police to the spot where he thought his grandmother's body would be. As one of the officers directed a flashlight beam on the ground, the light revealed Ms. Goss's lifeless body.

Floyd v. State, 850 So. 2d 383, 389 (Fla. 2002). There is little doubt J.J. was able to see quite clearly where Mrs. Goss ran to get away from Floyd's repeated shots. There is also little doubt that J.J. knew exactly who Floyd was: his stepfather, who had dropped him off at Mrs. Goss's house earlier that evening. It is inconceivable that Floyd would want an attorney to vigorously cross-examine a child who: (1) witnessed

his grandmother being shot; (2) ran to a neighbor screaming; (3) told the 911 operator Floyd shot his grandmother; then (4) lead the police to the body. What possible benefit could be derived from preying on a child who could react emotionally.

The claim regarding LaJade being coached by Mr. Wood is based on a statement in her testimony when Mr. Withee asked LaJade whether anyone told her what to say and LaJade said "yes." Floyd failed to prove that this statement by LaJade was anything more than a misinterpretation of the question. The only evidence presented at the evidentiary hearing on this subject was the testimony of Garry Wood that the child witnesses were not coached, nor did he tell them what to say or how to testify. (SRV2, P263, 265). Likewise, Floyd presented no evidence on the issue that Ms. Hoffrichter "prepped" the child witnesses, that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to advise defense counsel the children were "prepped." Mr. Wood told Doug Withee about the counseling the children received from Mickey Hoffrichter at Children's Home Society. She was listed as a witness in the case. (SRV2, P249, 250). Hoffrichter help Mr. Wood deal with the children's needs; she did not "prep" or "coach" the children. (SRV2, P258). There was no evidence of "prepping" by Mickey Hoffrichter, and she was not called as a witness at the evidentiary hearing. To the contrary, the evidence at the hearing contradicts the defense claim. Floyd also argues this claim in the alternative, i.e., if trial counsel did

have the information, he should have used it to impeach the child witnesses.

Floyd claims the trial judge denied him access to the children's counseling records (IB34). These records are privileged, and the trial judge did not abuse his discretion in denying disclosure or sustaining objections to questions posed to Trelane about the content of the counseling sessions §90.503 *Fla. Stat.* (2005). Next Floyd argues about the denial of his motion to conduct a postconviction psychological evaluation of the children. (IB34-35). Collateral counsel abandoned this claim, and it cannot be litigated on appeal. (V4, P660); *See Darling v. State*, 966 So. 2d 366, 387 (Fla. 2007). Further, Floyd was unable to cite any authority which would allow a psychological evaluation on a trial witness six years after trial, particularly a child who was appointed a guardian *ad litem* for trial proceedings. To the extent Floyd argues trial counsel should have unfettered access to witnesses (IB38), Floyd ignores the fact the children were appointed a guardian *ad litem*, that there are particular safeguards with children, and that trial counsel *was* able to depose the children.

Floyd also complains about deposing Trelane (IB35); however, that motion was granted. (V7, P1232).[10] Regarding denial of the motion to depose the children, Floyd

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10 Floyd claims the order on the pre-hearing motions was not entered until after the evidentiary hearing (IB36). This is a misrepresentation. The order was entered November 18, 2005, four days after the November 14 hearing. The fact that the records were not stamped by the Putnam County clerk until February 2007 is due to the fact the hearing was in Volusia County. Collateral counsel was served a copy of

withdrew the request to depose anyone except J.J. (V4, P707). The trial court conducted a full hearing on the issue, and collateral counsel could supply no answers to the trial judge's questions regarding relevance. (V8, P1474). In any case, even though the trial judge stated he would appoint a guardian *ad litem* for the children, Floyd never pursued the issue and did not request that J.J. be a witness at the evidentiary hearing. This issue was abandoned by failing to pursue the testimony of J.J.

Floyd seems to believe a postconviction defendant has an absolute right to discovery. To the contrary, a defendant may engage in postconviction discovery only upon a showing of good cause. *State v. Lewis,* 656 So. 2d 1248, 1250 (Fla. 1994). *Lewis* does not suggest that parties have an unqualified entitlement to engage in prehearing discovery relating to a postconviction motion. Rather, the availability of discovery in a postconviction case is a matter firmly within the trial court's discretion. *See id*. at 1250; *Marshall v. State*, 32 Fla. L. weekly S797 (Fla. Dec. 6, 2007). Floyd was unable to provide good cause to depose J.J. and had no good faith basis to obtain the psychological records. The trial judge did not abuse his discretion in pre-hearing

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the order and called her as a witness at the evidentiary hearing. (V7, P1234; SRV1, P100-113).

discovery rulings. *See Blanco v. State*, 963 So. 2d 173, 177 (Fla. 2007); *Reaves v. State*, 942 So. 2d 874, 881 (Fla. 2006).

The allegation that Mr. Withee did not prepare for the child witnesses, is also contradicted by testimony at the evidentiary hearing. He deposed all three children. (ROA2, P228-244, 245-251, 252-266). Mr. Withee has extensive experience with children through his employment since 1966 (SRV2, P406). If he is satisfied with the Court's qualification of the child witnesses, he does not "jump in." (SRV2, P405).[11] It is Mr. Withee's strategy not to antagonize the jury. He does not make "spurious objections" just to make them. He does not make objections which would interrupt the flow of the trial. (SRV2, P392, 393). He does not stand and object to every single thing that "comes down the pike." He does not belive that juries are a "bunch of idiots," and he does not object to every little thing at the expense of alienating the jury. (SRV2, P399). Mr. Withee's strategy with regard to the children was:

> And also now I'm dealing with kids all the time and I have –what do they say in the theatre, kids and animals, you're gonna be outshone? I don't—I don't—I do not attack children. I almost always depose them to find out what kinds of kids they are, and talk to anybody who shows up at the deposition about have they had a tendency to lie, things like

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[11] As previously stated, whether the trial judge's qualifying questions to the children were adequate was an issue for direct appeal and is procedurally barred. Raising the claim under the guise of ineffective assistance of counsel will not breathe life into this claim. *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000). Furthermore, a review of the qualifying questions shows the trial judge properly qualified the child witnesses. (ROA 1699-1701; 1724-1726).

> that, if that's possible, but I certainly don't attack them in any manner in the courtroom unless I am dead dog certain that I have an ironclad liar on my hands and I can prove it.

(SRV2, P406). Mr. Withee's assessment of the children at trial was:

> They were nice kids and they were on the verge of tears through the whole time they're testifying about grandma. . . . and I'm certainly not going to get a little kid crying, particularly in a death penalty case. . . . .they can be terribly, terribly compelling and shooting something back at me that is unsuspected, like *I am telling the truth*, and then start bawling. So, no, I don't attack kids. I never have and I never will.

(SRV2, P407).

The claim of failure to object to hearsay testimony can be broken dawn as follows::

> (1) Testimony of Cpl. Stokes regarding J.J.'s statements. The record cites show that *Mr. Withee objected* on page 1615 of the direct appeal record on the basis on foundation and hearsay. Mr. Withee also objected on page 1616 when the officer was asked what the children told him. He objected again on page 1617 on the basis excited utterance was not established and the statement was hearsay. The objections were overruled;
>
> (2) Testimony of Ofc. Zike that the children identified Floyd as the shooter. The record shows that *Mr. Withee objected* on the basis of excited utterance and hearsay on page 1643. Upon his second objection, the officer's statement was stricken, page 1644.
>
> (3) Testimony of Jeanette Figuero that the children identified Floyd as the shooter, heard J.J. name Floyd when he spoke to 911, and overheard J.J. identify Floyd to police. There was no objection; however, each of these statements were excited utterances, and the court had already overruled objections on this basis;

> (4) Testimony of Jeanette Figuero that J.J. was smart and she believed what he told her. There was no objection; however, this issue was raised on direct appeal and this Court found the error harmless;
>
> (5) Testimony of Gary Melendez that he saw the children name Floyd when Ms. Figuero asked them who shot Ms. Goss. There was no objection, however, the sentence preceding this statement was that the children identified Floyd as soon as they ran to Figuero's house and 4-5 seconds after the final shot. (ROA 1688).

As the record shows, Mr. Withee did object to two of the statements. Although Floyd faults counsel for failing to make repeated objections, Mr. Withee clearly stated his strategy on objecting fruitlessly. Counsel is not ineffective for failing to make a futile objection. See *Willacy v. State*, 967 So. 2d 131, 140 (Fla. 2007); *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Further, an attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant's advantage. *Strickland*, 466 U.S. at 689. The fact that present counsel might or would have chosen a different strategy does not render trial counsel's decision unreasonable or ineffective. *See Cooper v. State*, 856 So. 2d 969, 976 (Fla. 2003). A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *Windom v. State,* 886 So. 2d 915 (Fla. 2004); *White v. State*, 729 So. 2d 909, 912 (Fla. 1999).

This Court addressed the issue of hearsay and bolstering on direct appeal:

Floyd asserts that the trial judge erred in overruling hearsay and foundation objections to the testimony of Jeanette Figuero, given in response to the prosecutor's question concerning what J.J. Jones and LaJade Evans told her once they were inside her home, when she responded:

> And then the children just told me what happened, said their grandmother was shot, when I asked them what was the matter.

Floyd did not object until Ms. Figuero had fully completed her answer, nor did Floyd move to strike the question and subsequent answer or ask that a curative instruction be given to the jury. Even if the objections were well founded, any error regarding the admission of these statements is harmless, at best. *See generally State v. DiGuilio*, 491 So. 2d 1129 (Fla.1986). [FN24] J.J. Jones personally testified as to what he told Ms. Figuero, and the comments by Ms. Figuero were, in many respects, cumulative to the direct eyewitness reports. **Therefore, the error, if any, in admitting Ms. Figuero's statement was harmless**. *See Torres-Arboledo v. State*, 524 So. 2d 403, 408 (Fla.1988). (Emphasis supplied)

> FN24. In light of the competent, substantial evidence presented by the State which supports Floyd's conviction based on a theory of premeditated murder, we further reject Floyd's contention that the admission of Ms. Figuero's statement constituted fundamental error.

Floyd further contends that Ms. Figuero improperly bolstered the credibility of J.J. Jones when, in response to the prosecutor's inquiries, she confirmed that she believed J.J.'s version of the events and stated her belief that J.J. was a "bright" child. Floyd's defense counsel did not contemporaneously object to this testimony. Moreover, all of the cases on which Floyd relies are distinguishable. In those cases either defense counsel timely objected to the asserted improper bolstering, a policeman improperly bolstered the credibility of the only eyewitness to the defendant's criminal act, or an expert opined on a matter not related to

> her expertise. None of these situations occurred in Floyd's case. We therefore reject Floyd's assertion of entitlement to relief on the basis of fundamental error.

Floyd v. State, 850 So. 2d 383, 400 (Fla. 2002). Although Floyd claims this Court did *not* find any error harmless, this Court clearly stated in conclusion that "Any errors that occurred during Floyd's trial were harmless." *Floyd v. State,* 850 So. 2d 383, 408 (Fla. 2002). Thus, not only was counsel not deficient because he did object to several of the statements, but also this Court's finding of harmless error on the other statements is a finding on the merits and there is no prejudice. This claim cannot meet either the deficient performance or the prejudice prong of *Strickland*.

B. Prior bad acts: domestic violence. Floyd alleges counsel was ineffective for failing to object to testimony regarding a threat Floyd made to his wife, Trelane, the day before the shooting that if she ever left him, he would kill someone she loves (IB49). The statements made about killing someone Trelane loved were made when Floyd pointed a gun at her head. The aggravated assault was the next day when Floyd tried to ram Trelane with his car. Floyd was charged with aggravated assault in the same indictment as the murder (ROA 11-12). After Floyd tried to ram Trelane, she called Mrs. Goss and told her what was going on. That is when Mrs. Goss told Trelane she would never let Floyd hurt her grandchildren. Floyd argues trial counsel should have had Floyd plea to the aggravated assault charge on Trelane so that the

statements he made would be privileged in the murder charge. First, an attorney cannot force his client to plea. Floyd ignores the fact that counsel cannot enter a plea for a defendant.

Florida Rule of Criminal Procedure 3.171(c)(1) provides:

> Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

In *Florida v. Nixon*, 543 U.S. 175, 187 (2004), the Court recognized that the decision to plead is personal to the defendant:

> A guilty plea, we recognized in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. *Id.*, at 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709. While a guilty plea may be tactically advantageous for the defendant, Id., at 240, 23 L. Ed. 2d 274, 89 S. Ct. 1709, the plea is not simply a strategic choice; it is "itself a conviction," Id., at 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709, and the high stakes for the defendant require "the utmost solicitude," *Id.*, at 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709. Accordingly, counsel lacks authority to consent to a guilty plea on a client's behalf, *Brookhart v. Janis*, 384 U.S. 1, 6-7, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966); moreover, a defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid, *Boykin,* 395 U.S., at 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709.

Thus, it is simplistic to argue that counsel should have had Floyd enter a plea. He cannot. Floyd would have to allege and prove that that he *would* have entered a plea

to aggravated assault, knowing that it could be used as an aggravating circumstance in his murder trial. Because Floyd has the burden of proof at the postconviction stage, this claim must fail. *Walton v. State/Crosby*, 847 So.2d 438, 444. (Fla. 2003).

Insofar as the spousal privilege, Section 90.504(b), Florida Statutes, provides that when one spouse is charged with a crime committed against the other, there is no privilege. Floyd fails to explain why the spousal privilege would preclude the statement. Floyd further faults counsel for failing to object to the evidence. He acknowledges that trial counsel's theory was that the murder of Mrs. Goss was the by-product of a domestic dispute, and the evidence of Floyd threatening Trelane after her night of partying was part of that domestic violence scenario (IB50). Floyd then argues that trial counsel:

> Mr. Withee failed to understand that all of the acts of domestic violence would have still been admissible because they were not communications, and his defense theory would have been undiminished. The only matter excluded would have been the damning threat.

(IB51). Floyd does not explain exactly how this was supposed to unfold. The threats to Trelane were part and parcel of the offense and Trelane called Mrs. Goss to warn her and the children Floyd fails to inform this Court how he expected to exclude the statement, particularly since the crime was committed against Trelane.

An evidentiary hearing was held on this issue, after which the trial judge held:

This post judgment claim brought by Mr. Floyd alleges that trial counsel was ineffective for failing to object to the testimony regarding a threat Floyd made to his wife, Trelane, the day before the shooting. Floyd claims that the statement is inadmissible pursuant to a spousal privilege. Further, Floyd alleges that counsel was ineffective for failing to object to the testimony of Trelane Jackson that Floyd placed a gun to her head as he threatened to kill her family if she left him and that there was a domestic assault several hours before the shooting.

The State filed a notice of intent to introduce evidence pursuant to Florida Statutes 90.401 at trial dealing with the prior bad acts. Mr. Floyd complains that Mr. Withee was not diligent in asserting all appropriate pretrial and trial objections to challenge the introduction of the information concerning the prior bad acts.

At the evidentiary hearing Mr. Withee testified that although he originally objected to the Williams Rule evidence, it is clear that he ultimately made a tactical decision to try to use the evidence to the defendant's benefit, testimony which the court finds to be reliable.

As the State points out, the decision not to oppose the admission of domestic violence evidence here was clearly a strategic decision. However, even if Mr. Withee had tried to exclude the evidence, Mr. Floyd has failed to demonstrate that it was actually inadmissible in this case. Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams Rule* evidence and is, therefore, admissible under Section 90.402, Florida Statutes, because it is relevant. The testimony regarding the alleged prior bad acts was a relevant and inseparable part of the act which is at issue and it was necessary to admit the evidence to adequately describe the deed. Griffin v. State, 639 So.2d 968. Mr. Floyd was charged with committing an aggravated assault on his wife, Trelane, on July 13 and the facts leading up to that assault are inseparable from the assault itself, just as the assault is inextricably intertwined with the murder of Mary Goss. Even if the prior bad acts were not inextricably intertwined, they could be admitted as *Williams Rule* evidence which allows the admission of relevant information

> material to the issues in the murder case, such as identity, intent, motive and premeditation.
>
> Mr. Floyd then assumes that the aggravated assault charged involving Trelane could properly be severed from the murder charge and, therefore, alleges that counsel was ineffective by failing to seek and obtain a severance of the aggravated assault charge from the murder case involving Trelane's mother, Mary Goss. This, he claims, would have allowed him to exclude the statements that he made to Trelane as prior bad acts days prior to the murder. There is no question that in applying spousal privilege, Section 90.504(3) clearly excludes communication between spouses in criminal proceedings in which one is charged with a crime committed against the other spouse. Therefore, the question is whether counsel was ineffective in not obtaining a severance of the charges. Rule 3.150, Florida Rules of Criminal Procedure, provides in Section (a) that two or more offenses that are triable in the same court may be charged in the same indictment or information and a separate count for each offense whether the offenses are felonies or misdemeanors, or both, or based on the same act or transaction or on two or more connected acts or transactions. On the facts of this case, it appears clear that the cases could be brought together and, therefore, counsel was not ineffective in obtaining severance that would allow him to take advantage of the spousal privilege argument.

(V7, P1265-66). The trial court order is supported by competent substantial evidence.

The State filed a Notice of Intent to Introduce Evidence Pursuant to F.S. 90.404 (ROA 166). That evidence included:

> (1) Trelane and Floyd were having marital problems during the two days prior to the murder;
>
> (2) Floyd became visibly upset on July 11, 1998, when Trelane went out celebrating her birthday;
>
> (3) The following morning, Floyd put a gun to Trelane's head and

> pulled the trigger three times (apparently the gun was not loaded). Floyd told Trelane he would kill her if she left him or began drinking again. If she ran away from him, he would "get someone that she loved;"
>
> (4) Trelane and Floyd argued on July 13, and he made her leave the apartment without the children. He then took the three children over to Mrs. Goss' house;
>
> (5) Later that day, Floyd chased Trelane in his vehicle, striking her car. She drove to the Sheriff's office where Office Kelly tried to arrest Floyd, but the latter ran away.

(ROA 166-167). As the trial judge found, Mr. Withee originally objected to the *Williams* Rule evidence. (ROA 1334-1338). However, the evidence was later used to Floyd's advantage. Mr. Withee testified at the evidentiary hearing that:

> My theme, if you will—I try to get a theme in every case, but sometimes you can't—this case was couched in domestic, and that's why I didn't object to some of the things coming in, particularly all the domestic between this young man, his wife, or ex-wife. And the entire transaction, if you will, appeared to be one continuous domestic issue. And because I'm old, I remember when domestic was an absolute bar to the death penalty, and as I said in Deposition, that changed virtually overnight to, well, the Supreme Court saying –if I might paraphrase it – well, we didn't really mean that; we meant it might be. And then the next time it was addressed as, well, it's not a bar. So this was over a course of a year or so they went from one end of the spectrum to the other.
>
> But I didn't have a lot, and that was pretty much related to the Court and to Dr. Krop when he says *I'm in serious need of mitigation*. So I said what other thing can I do, and so I said, well, let's let the domestic issue, inasmuch as I can tolerate, and maybe that will help the appellate staff, if he is found guilty and gets the death recommendation from the jury. So that was—that was my—my theory. My notes reflect rage, and I was

trying to get as much domestic in as I could because of the relationship of all the parties so that the appellate people, Chris Quarles, in particular – I think Chris did it. It didn't work.

Q: And do you remember on the –your impression, at least on the continuum of when domestic disputes were an absolute bar to the death penalty, when this case came up is that the case in your mind or—

A: I thought it was still–still a pretty good—pretty arguable issue at that time when this was tried because I knew he was –he was having a tough time with Trelane, I believe he name was, and didn't think she was being fair with him, so that's why I went after the domestic thing to try to get something for the appellate people. I think it was still probably in the middle category of, well, you know, the Supreme Court saying—

(SRV2, P353-54). Mr. Withee was correct that murders committed during domestic violence situations have a long history of being viewed as disproportionate.[12]

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12 *See Halliwell v. State,* 323 So. 2d 557 (Fla. 1975) (death sentence disproportionate where defendant in love with victim's wife and became enraged at victim's treatment of her); *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983)(death penalty disproportional where committed during heated domestic dispute); *Cheshire v. State*, 568 So. 2d 908, 911 (Fla. 1990)(murders reasonably could be characterized as "the tragic result of a longstanding lovers' quarrel"); *Farinas v. State,* 569 So. 2d 425 (Fla. 1990)(death sentence disproportionate where defendant obsessed with idea of reconciling with former girlfriend, kidnapped her, and shot her in the back as she tried to escape); *Douglas v. State*, 575 So. 2d 166 (Fla. 1991) (death sentence disproportionate where defendant had been involved with victim's wife, abducted victim and wife and killed victim); *White v. State*, 616 So. 2d 21 (Fla. 1993)(death sentence disproportionate where defendant and victim dated, he was jailed for assaulting her new boyfriend, and vowed to kill her when he got out); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985)(husband bludgeoned wife to death with hammer or other blunt instrument) *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988) (life, not death, sentence is "proportionately correct" for shooting death of former girlfriend's lover); *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988) (shooting death of wife and stepdaughter); jury recommendation of death); *Wilson v. State*, 493 So. 2d 1019, 1023

In fact, the Florida Supreme Court has stated that "when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted." *Blakely v. State*, 561 So. 2d 560, 561 (Fla. 1990)(*citing Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988).

This Court finally put to rest the abhorrent trend of claiming a murder committed during domestic violence is excusable. In *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003), this Court stated: "This Court does not recognize a domestic dispute exception in connection with death penalty analysis." However, until this Court finally found inexcusable the parade of domestic horribles, this area of the law was fair game for defense attorneys. Given this Court's express statement before *Lynch* that the death penalty is not warranted "when the murder is a result of a heated domestic confrontation," Mr. Withee can hardly be ineffective for using this strategy.

Not only was this a strategic decision, even if this counsel tried to exclude the evidence, Floyd has failed to demonstrate that it was inadmissible. As this Court has explained, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not

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(Fla. 1986) ("death sentence is not proportionately warranted" for shooting death of father and stabbing death of cousin); *Ross v. State*, 474 So. 2d 1170, 1174 (Fla. 1985) ("death penalty is not proportionately warranted" for bludgeoning death of wife).

Williams Rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. It is necessary to admit the evidence to adequately describe the deed." *Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994) (quoting Charles W. Ehrhardt, *Florida Evidence* § 404.17 (1993 ed.)), *cert. denied*, 514 U.S. 1005 (1995); *Smith v. State*, 866 So. 2d 51, 62 (Fla. 2004). Floyd was charged with the aggravated assault of Trelane on July 13 (ROA 11-12), and the facts of that assault are inseparable from the murder.

C. Theories of innocence/*Brady/Giglio*. Floyd alleges counsel was ineffective for failing to impeach Tashoni Lamb with inconsistent statements about when she received a phone call from Camilla Wright, whether Floyd told her Mrs. Goss was going to call the police, and whether charges were dropped against her boyfriend in exchange for her testimony (IB53-59). The *Brady* claim is that the State failed to provide defense counsel with Lamb's July 16, 1999, audiotaped statement to Detective Sandberg and the State threatened Lamb with arrest for harboring Floyd (IB53-55, 68-70). The *Giglio* claim is that the State presented false testimony from Lamb that Floyd told her he shot Mrs. Goss because she was going to call the police and that Camilla Wright called Lamb before Floyd arrived at her apartment (IB59-68). As an alternative to the *Brady/Giglio* claims, Floyd argues counsel was ineffective for failure to digest these facts which were available to him, but he failed to "glean" from the

reports. (IB68). Last, Floyd faults Mr. Withee because he should have argued domestic dispute *and* alibi.[13]

An evidentiary hearing was held on this issue, after which the trial judge held:

> Floyd alleges that trial counsel was ineffective for failing to present evidence that a domestic violence battery charge against Tashunie Lamb's boyfriend, Kenneth Davis, was dismissed after Ms. Lamb refused to testify against him. Floyd argued that the quid pro quo for the dismissal of charges against Kenneth Davis on October 13, 1998 was Tashunie Lamb's testifying against Floyd at the Grand Jury on October *5,* 1998.
>
> At the evidentiary hearing, former prosecutor, Garry Wood, testified that he did not threaten Tashunie Lamb about testifying nor was perjured testimony presented. Mr. Wood stated that there was no deal with Ms. Lamb to dismiss domestic violence charges against her boyfriend, Mr. Davis, if Ms. Lamb testified a certain way in Maurice Floyd's case. The only testimony offered on this point at the evidentiary hearing by the defense was that Tashunie Lamb did not want Kenneth Davis prosecuted and that she would not show up for a court appearance so they dropped the case. She stated that she did not talk to the State Attorney about the domestic violence case against Kenneth Davis. Further, in a police interview dated August 3, 1998, Tashunie Lamb quite clearly stated that Maurice Floyd shot Ms. Goss because "she was talking trash, threatened to call police, I shot her."
>
> At the evidentiary hearing Tashunie Lamb could not recall what Mr. Floyd had told her and Mr. Floyd takes the position that the inconsistencies given *5* years apart show that the State presented false testimony in violation of Giglio v. United States, 405 U.S. 150 (1972). Further, Floyd argues that because only Detective Sandburg's report rather than a written report and an audio tape of Trelane Floyd Jackson's

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13 In Claim IIB Floyd faults counsel for arguing domestic dispute, but endorses the theory in Claim IIC. The theories of alibi *and* domestic dispute are inconsistent. Floyd could hardly claim he shot Mrs. Goss in the heat of passion if he wasn't there.

interview were provided to Mr. Withee, the State violated Brady v. Maryland, 373 U.S. 83 (1963).

To establish a Giglio violation, Floyd must show (1) the testimony given was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. Guzman v. State, 868 So.2d 498 (Fla. 2003).

To establish a Brady claim, Floyd's burden is to show (1) the evidence is favorable to the accused, because it is either exculpatory or impeaching, (2) the evidence was suppressed by the State either willfully or inadvertently, and (3) that prejudice ensued. Guzman v. State, supra.

Detective Sandburg's police report contained the same information as the audio tape and there is no dispute that the defense received Sandburg's report, so there can be no Brady violation. The police report put the defense on notice of the tape's existence so they could request a copy from law enforcement if they wanted one. Under these circumstances the tape is equally available to the State and the defense and cannot support a *Brady* violation. Armstrong v. State, 862 So.2d 705 (Fla. 2003).

The audio taped interview of Tashunie Lamb was clearly referenced in the police report and could not have been suppressed because it's existence and the substance of its content was disclosed in the police report that was furnished to defense counsel. Apparently the tape was available for the asking. Secondly, there was absolutely no evidence presented by Mr. Floyd at the evidentiary hearing that Tashunie Lamb's differently worded statements were anything other than a witness recalling the same facts and using different semantics on different days. The record is devoid of any evidence that suggests that any state official had any input in Tashunie Lamb's recollection of Floyd's statements. Mr. Floyd has failed to show that any evidence was suppressed or that any false or misleading testimony was given.

In addition Mr. Floyd asserts that Mr. Withee failed to present a proposed alibi defense that would be advanced for the use of Mr. Floyd's parents and brother. In his statements Mr. Floyd first claimed that he ran from the Sheriff's Office and called his mother from a pay phone on

> Highway 17, and thereafter his mother and two brothers took him to the bus station in St. Augustine. Freddie Williams, the investigator for the Public Defender's Office, and Mr. Withee investigated the proposed alibi. Notes from their investigation show that the times did not match up with Mr. Floyd's brother, Darin, one of the proposed alibi witnesses, who said that he was asleep all day and Floyd's father, Charles, had tried to get Tashunie Lamb to change her testimony to make the alibi work. Mr. Withee concluded that to present that alibi would be a fraud on the court and he declined to do that. It is obvious that the strategy could never have worked. Even if successful the alibi could not eliminate the possibility of the defendant being in Palatka at the time of the murder. Mr. Withee also noted that the father's statement contradicted Mr. Floyd's mother's statement.
>
> It is clear that the defendant has no due process right to require his counsel to aid in the commission of a fraud on the court by presenting perjurius testimony. Dehaven v. State, 618 So.2d 337 (Fla. 2d DCA).

(V7, P1266-68).

This order is supported by competent substantial evidence. Prosecutor Garry Wood testified he did not threaten Tashoni Lamb about testifying, nor was perjured testimony presented. (SRV2, P263, 265). There was no deal with Ms. Lamb to dismiss domestic violence charges of her boyfriend, Mr. Davis, if she testified a certain way. (SRV2, P269). The only testimony from Lamb was that she did not want Davis prosecuted and did not show up for a court appearance, so they dropped the case. She did not talk to the State Attorney about the domestic case with Davis. (SRV1, P172).

Lamb told Mr. Withee on July 16, 1998, that Floyd said he shot Mrs. Goss

because he was "piss off at Goss because she as going to call the police." She also told Mr. Withee she had given a statement to the investigating officer. (V3, P497-495; State Exhibit 3). On December 9, 1998, Lamb told the defense investigator that she was not threatened by the police but that Floyd's family attempted to get her to change her testimony. (V3, P497; State Exhibit 3). Lamb told State Attorney investigator Julian Browning on August 3, 1998, that Floyd shot Mrs. Goss because "She was talking trash. Threatened to call the police. I shot her." (V3, P584; SRV2, P447-448; Defense Exhibit 14). There is no question Mr. Withee was aware of Lamb's July 16, 1998, statement to Detective Sandberg and it is uncontested that defense counsel received a copy of his police report memorializing that interview. (ROA 1427-1442). That report clearly states there was a "taped statement" of Lamb made on July 16. The police report states that Lamb said Floyd "told her he shot Ms. Goss because she made him angry." (V3, P574; Defense Exhibit for ID 7). The issue here is ineffective assistance of counsel, and defense counsel clearly had the three above statements of Lamb: that Floyd said he killed Mrs. Goss because (1) she made him angry; (2) she "piss him off" and threatened to call the police; (3) she was talking trash and threatened to call police. At the *Nelson* hearing in February 1999 before Floyd's trial, defense counsel explained to Floyd that Lamb is a "reliable witness" a "solid witness" that works at a mental health facility (ROA 1431). Basically unimpeachable and "a

perfect state witness, and a gentle lady." (ROA 1431). Withee had interviewed Lamb four to five times (ROA 1431).

There is no *Brady* violation because defense counsel had Det. Sandberg's police report which referenced the audiotape and repeated the contents of the audiotape. *See Stewart v. State*, 801 So. 2d 59, 70 (Fla. 2001). There is no *Giglio* violation because Lamb's testimony at trial was consistent with her statements to defense counsel, the State attorney investigator Julian Browning, and Det. Sandberg on the audiotape.

Floyd argues the only evidence Mrs. Goss intended to call the police was Tahoni's statement. Not so. The Florida Supreme Court found as fact that J.J. testified that "Ms. Goss awakened him and instructed him to go to the home of her neighbor, Jeanette Figuero, and to call the police from there." *Floyd v. State,* 850 So. 2d at 389.

Regarding the alibi defense, Freddie Williams and Mr. Withee investigated the alibi. The defense investigator's notes show that on October 28, 1998, Mr. Withee and the investigator met with Floyd's parents and talked to Floyd's brother. (V3, P503-504, State Exhibit 4). Mr. Withee met with Floyd on November 3, 1998, and explained the time discrepancies. Withee noted there were "major problems" with time discrepancies. Also, "father statement contradicts the mother's." In conclusion, "We now know these statements are untrue—even if they now change the content—

even more untrue." (V3, P501; State Exhibit 2). Mr. Withee testified:

> I didn't - - I don't in any manner want to be accused or do any - - perpetrate any fraud on the tribunal, or anybody else, for that matter, for something I don't believe in. There was another issue regarding that alibi that had to do with a phone call made from a telephone down by the marina as a part of this whole scenario regarding the alibi. Freddy and I went and checked that phone booth and the phone had been removed two years before that. This was relayed to us by the parents or Maurice himself, but—and that was involved in that and the phone records came up and we didn't check phone records because he said he called there from St. Augustine. And the other deal was the phones being –he made a phone call from the area of the marina, which was out north of Palatka on whatever road that is that goes into Jacksonville.
>
> Q. And then the father tried to get Shonda (Tashoni) to change her story, correct?
>
> A. Someone did. A family member contacted Miss Lamb, so we were informed, and I don't remember who informed us of that, but to try to get her to change the time line, and that raised apprehension in my mind. And the fact that that phone, that was supposedly hanging on the wall I believe at the marina or the restaurant that's out there, hadn't been there for two years, so we checked with the owner of the facility, so that didn't hold water either, so I just couldn't go with it. God knows, if I may bring that into this, if there was an alibi, I would have used it. I'm not in the business of not using things, I'll use anything I can use, but if it starts stinking and I see the jurors looking down their glasses like that at me, I won't do it. Just won't do it. It's too risky.

(SRV2, P411-412).

At the pre-trial *Nelson* hearing Floyd insisted Lamb and his parents could provide an alibi. Trial counsel had investigated both Lamb and his parents as alibis. Mr. Withee interviewed Lamb 4-5 times and her testimony was always consistent with

the police reports. The parents were obviously fabricating an alibi. (ROA1414, 1419, 1427-29, 1432).

Regarding the time discrepancy about when Camilla Wright called Lamb, this issue was also explored at the pre-trial *Nelson* hearing and Lamb had told Withee exactly what she said in the police report. (ROA 1428). Lamb said in the police report and to the defense investigator that Wright called at 1:00 a.m. before Floyd arrived at her apartment, and she only let him in because she was afraid of him (V578, State Exhibit for ID7). Lamb told the defense investigator that Floyd's arrived at her apartment between 11:55 p.m. and 12:00 a.m. (V3, P497; State Exhibit 3). Lamb had told defense counsel and the investigator that Floyd arrived around 1:00 a.m. (V3, P497½, State Exhibit 3). Lamb clearly made inconsistent statements pre-trial, but Floyd has failed to show the significance of what this evidence would have shown. The fact that defense counsel did not cross-examine Lamb is not surprising given the fact he admitted the crime to her tried to get her to change her testimony to provide an alibi. As defense counsel stated, when there is a damaging witness, it is very detrimental to have their testimony repeated time and time again. In any case, Floyd has failed to explain the significance of the time frames, the testimony at the evidentiary hearing was less-than-enlightening, and this claim fails for lack of proof. *See Walton, supra.*

(D)(i). Investigation into mitigation. Floyd claims trial counsel failed to investigate mitigation, specifically, mental health mitigation. An evidentiary hearing was held on this issue, after which the trial judge held:

> At the evidentiary hearing Mr. Floyd presented numerous mental health experts which he claims establish that Mr. Withee had available to him the opportunity to assert additional statutory mitigators, those being (1) the crime was committed while under the influence of extreme mental and emotional disturbance and (2) the defendant was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. According to Dr. Dee, a neuropsychologist, Mr. Floyd suffers from some unspecified form of brain damage and sleep disturbance. Mr. Floyd further asserts that Dr. Berland established that Floyd had a longstanding psychotic disturbance and suffers from delusional, paranoid beliefs, auditory hallucinations, early childhood brain injury causing psychotic symptoms during childhood and a brain injury from an automobile accident at age 18. Mr. Floyd asserts that Dr. Riebsame, the State's mental health expert, supplied non-statutory mitigating factors including sleep disorder, low executive functioning, learning disability, chaotic childhood and inattentive parenting.
>
> The facts of this case clearly indicate that Mr. Withee did contact a mental health expert, Dr. Krop, to assist in both the guilt and penalty phases of Mr. Floyd's trial. Dr. Krop, a well known expert who has testified for years in cases throughout the Central Florida area, found the same disparity between Floyd's verbal and performance IQ scores that every other expert found before or since the murder of Mary Goss. In fact, Mr. Withee gave notice on March 3, 1999 that he intended to present evidence of family dysfunction, learning disability and statutory and non-statutory mental health information offered by Dr. Krop. Mr. Floyd had been undergoing a mental health status evaluation and Mr. Withee had been communicating with Dr. Krop for some time. On March 31, 1999, Dr. Krop advised Mr. Withee that his testimony regarding Mr. Floyd could "cause the jury to view him in a negative way." Dr. Krop had reviewed Floyd's school records, police records,

medical records and other documents. He interviewed Mr. Floyd's parents for additional background information. Dr. Krop observed in a letter to Mr. Withee that Floyd had not been "candid" in providing his background and his parents have also provided inconsistent and contradictory information. Mr. Withee's handwritten note on this letter indicates that Dr. Krop's first letter stated that some mental health mitigation existed, however, Dr. Krop's March 31, 1999 letter said there is no mitigation he could offer on Floyd's behalf. Apparently Dr. Krop indicated in a letter of December 11, 1998 that neuro-psychological testing showed "a significant discrepancy between his verbal and non-verbal abilities. Although these results may reflect academic deficiencies, they may also reflect a learning disability." Furthermore, Floyd "showed deficits in his memory (both verbal and non-verbal realms), and that all of the neurocognitive functions were within normal limits."

Dr. Krop testified at the evidentiary hearing that he could not locate Floyd's file and he did not specifically remember Mr. Floyd, but that he could discuss what he meant by the statements included in his report. He states his evaluation would have consisted of a clinical interview and the standard battery of psychological tests. Dr. Krop also testified that he worked with Mr. Withee before and he had a standard list that he would provide to defense counsel of records he wanted to review to format an opinion. Based on his review of the correspondence with Mr. Withee, Dr. Krop stated that his tests revealed Floyd's IQ to be in the average range with a full scale IQ of 95. Dr. Krop noted that there was a difference between verbal and performance IQ scores of over 20 points "which generally is considered significant." However, Dr. Krop explained that this disparity "doesn't necessarily reflect overnicity" which he later explained to be brain damage. At best Dr. Krop felt that the discrepancy between performance IQ test scores and his verbal scores suggests the possibility of a learning disability. The more important fact is that there was no deficit in Mr. Floyd's neurocognitive functions which means that his testing did not reveal "anything related to frontal lobe or reasoning or those areas which might have a direct bearing on the offense itself." There does not appear to be any serious memory problems and no further testing was recommended.

Dr. Krop reportedly saw no sign of psychosis or psychotic behavior in his examination of Mr. Floyd. He spent 12 hours with Mr. Floyd and stated that he would have requested more time if he felt it was needed. Dr. Krop agreed that Mr. Floyd and his parents both lacked truthfulness in providing background information which would have hindered his ability to develop mitigation.

Based on this information Mr. Withee testified that an anti-social personality disorder which would have been the conclusion of Dr. Krop was not something that he would want to present to a jury although it is a common diagnosis for homicide defendants. Mr. Withee also recognized that Dr. Krop has handled hundreds of cases and testified extensively in capital cases so that his conclusion that the negative component of his testimony would clearly outweigh the positive side was well respected.

The *Strickland* test measures the reasonableness of trial counsel's conduct and the adequacy of his representation which should not be utilized in hindsight. The question is whether the decision not to call Dr. Krop or any other mental health experts for either statutory or non-statutory mitigation was reasonable based on the facts and circumstances of the case and whether a complete and thorough mental health evaluation was done. The court believes Mr. Withee and the testimony of Dr. Krop that a strategic decision was made by counsel after consulting a very well respected mental health expert who had a great deal of experience in testifying in capital cases concerning Mr. Floyd. It is clear that a thorough mental health work up had been done, that the evaluation was done as much as could be expected, especially in light of the negative information provided by Mr. Floyd and his parents which was apparently provided selectively in order to gain advantage. The expert himself concluded that he was vulnerable on cross-examination of causing more harm to the client based on the information that he had than benefit to be gained and, therefore, a strategic decision not to call a mental health expert and to abandon the presentation of those issues appears to be a sound strategic approach at that time.

It should be noted that there appears to be a trend in the law where

> extensive work is being done in terms of presenting both statutory and non-statutory mitigation that deals with mental health issues. From a practical standpoint these may or may not be successful and always carry with them great risk of harm if not properly and soundly presented. In light of Mr. Floyd's violent past which resulted in the death of his brother at age 14, the court finds that the defendant has not established the first prong of the *Strickland* test that the decision of counsel not to advance the proposed statutory and non-statutory mitigation was deficient.
>
> In addition Mr. Withee had done some investigation into the background concerning the killing of Mr. Floyd's brother. Rather than allow that to be a focal point of the case, he declined to cross examine when that information was presented since it, in his judgment, represented a much more violent circumstance. Having made a bonafide and solid strategy decision, the obligation of this court is to view the case in the posture in which it was presented at that time. There is no viable challenge to the quality of the expertise of Dr. Krop and the doctor's analysis with his extensive background, training and reputation in the area. Mr. Floyd has failed to meet his burden of proof on this issue.

(V7, P1269-72).

Mr. Withee did contact a mental health expert: Dr. Krop. Dr. Krop found the disparity between verbal and performance IQ that every other expert found. The record on appeal shows that Dr. Krop had conducted his evaluation by December 11, 1998. (V3, P555, Defense Exhibit 4). Mr. Withee gave notice on March 3, 1999, that he intended to present evidence of family dysfunction, learning disability, and statutory and non-statutory mental mitigation offered by Dr. Krop. (ROA 127). Mr. Withee had been communicating with Dr. Krop for at least nine months before trial

which took place April 6-8, 1999. However, on March 31, 1999, Dr. Krop advised Mr. Withee that his testimony could "cause the jury to view him [Floyd] in a negative way." (V3, P556, Defense Exhibit 9). Dr. Krop had reviewed Floyd's school records, police reports, medical records and other documents. He interviewed the parents for additional background information. Dr. Krop observed that Floyd had not been "candid in providing his background and his parents have also provided inconsistent and contradictory information." (V3, P558, Defense Exhibit 9). This is corroborated by the pre-trial *Nelson* hearing at which Withee stated the parents were not cooperating (ROA 1433). The *Nelson* hearing also shows that Withee was pursuing mental health mitigation and traveled with Floyd to Dr. Krop's office. (ROA 1434). Floyd was less than cooperative (ROA 1440). Mr. Withee's handwritten note on this letter indicates that Dr. Krop's first letter indicated that mental mitigation existed; however, the March 31 letter said there was not. Mr. Withee requested clarification. The first letter Mr. Withee was referring to was Dr. Krop's letter dated December 11, 1998, stating that neuropsychological testimony showed "a significant discrepancy between his [Floyd's] verbal and non-verbal abilities. Although these results may reflect academic deficiencies, they may also reflect a learning disability." Furthermore, Floyd "showed deficits in his memory (both verbal and non-verbal realms), but all other neurocognitive functions were within normal limits." (V3, P555,

Defense Exhibit 4).

Dr. Krop testified at the evidentiary hearing that he had misplaced Floyd's file and did not specifically remember Floyd, but he could discuss what he meant in his report. (SRV2, P314). His evaluation would have consisted of a clinical interview and a standard of psychological tests. (SRV2, P314). He had worked with Mr. Withee before, and had a standard list of records he wanted to review. (SRV2, P315). Floyd's IQ was in the average range with a full-scale IQ of 95.(SRV2, P316). There was a difference between verbal and performance IQ of over 20 points, "which generally is considered significant." However, this disparity "doesn't necessarily reflect organicity." After questioning by the trial judge, Dr. Krop clarified that "organicity" means brain damage. The disparity between verbal and performance IQ scores suggests the possibility of a learning disability. The more important statement, according to Dr. Krop, was that there was no deficit in neurocognitive functions which means "anything related to frontal lobe or conceptual reasoning or those areas which might have a direct bearing on the offense itself." There were some memory problems, but nothing that would suggest Floyd had problems with memory related to the offense. Dr. Krop did not recommend further neurological testing. (SRV2, P317). Dr. Krop recognized that a learning disability and memory problems were mitigating.(SRV2, P318).

Dr. Krop did not recall why he wrote that his testimony could be viewed negatively; however, issues which typically caused him concern in this area were "if the client has a long-standing personality disorder, such as a antisocial personality disorder."(SRV2, P323). If Floyd had violence or involvement with the criminal justice system, there is a "good likelihood that I would have had a diagnosis of antisocial personality disorder."(SRV2, P323). Dr. Krop wouldn't necessarily not testify if there were other areas in the diagnosis that could help. (SRV2, P324).

Dr. Krop had been qualified as an expert 200-300 times in capital cases and several thousand overall. (SRV2, P333). If the diagnosis of Floyd were not helpful, he would not write it in a letter. (SRV2, P335). If Floyd's background material showed that at age 14 he was expelled from school for threatening a classmate and his principal, that he engaged in property crimes and fighting, that would fulfill the criteria for conduct disorder, a prerequisite of antisocial personality disorder. (SRV2, P336). Some of the other criteria for antisocial personality disorder are repeated arrests, lying, use of aliases or conning other, impulsivity, aggressiveness (such as fighting), reckless disregard for safety of others (such as shooting your brother), lack of remorse, failure to maintain a job. (SRV2, P338-40).

Dr. Krop saw no sign of psychosis or psychotic behavior in Floyd. (SRV2, P340). Dr. Krop spent 12 hours with Floyd and would have requested more time if he

felt it was needed. (SRV2, P345). Floyd's and his parents' lack of truthfulness would hinder the ability to develop mitigation. Further, the inconsistent information is a concern particularly if provided in a selective and self-serving manner. (SRV2, P341).

Dr. Krop had worked with Mr. Withee at least 15 times and still worked with him. Withee was a bit obsessive/compulsive which is a good trait in a capital defense attorney. They worked closely together as a team. (SRV2, P332). It would be Mr. Withee's call from a legal standpoint to weigh the positives and negatives. (SRV2, P333).

Mr. Withee testified that antisocial personality disorder is not something he would present to a jury although it is a common diagnosis for homicide defendants. (SRV2, P358). In fact, he didn't think he would ever allow antisocial personality disorder to go to a jury unless "it was tied in with so much other good stuff." (SRV2, P359). A defendant is always more likely to receive a life recommendation from the jury if he is viewed in a positive light. (SRV2, P359). Mr. Withee issued a "cry for help" to Dr. Krop because there was not much mitigation in Floyd's case. (SRV2, P360). For instance, Mr. Withee had talked to the police officer involved in Floyd shooting his brother in North Carolina, and it was "a whole lot worse, toward the premeditated range" than what it appeared. (SRV2, P361). The prior felony was

presented as a voluntary manslaughter and Withee made a tactical decision not to "take a chance" in cross-examining on the issue. (SRV2, P361). Dr. Krop is well known among public defenders and is one of the pre-eminent psychologists in the area. If Dr. Krop said his testimony would be harmful, Withee would certainly believe him. (SRV2, P362).

Although Floyd presented two experts at the evidentiary hearing, one who said Floyd had brain damage and the other who said he was psychotic; and the State presented one expert who diagnosed Floyd as antisocial, the real issue here is what information Mr. Withee had at the time of trial to make the decision to present mental health mitigation or not. As *Strickland* cautions, the facts should not be viewed in hindsight. In hindsight, Floyd would throw everything up against the wall in hopes something would stick. This includes Dr. David's report that at age 14 Floyd was expelled from school for a year for threatening the principal and fighting, that he was committing burglaries, that there were no disorders of thought, mood or personality, that there were no auditory or visual hallucinations and the parents confirmed this, there were no persecutory ideations or delusions, no phobias or strange beliefs, and no evidence of pathology. When Dr. David interviewed the family in 1991, the mother said she had a normal pregnancy with Floyd and that he met all developmental milestones. (V3, P506-508, Defense Exhibit 1). Dr. David's report supports Dr.

Riebsame's diagnosis of antisocial because it lays out conduct disorder.

Next, collateral counsel would present the 1992 mental health evaluation from Dorothea Dix hospital after Floyd shot his brother. That evaluation shows that Floyd has no indications of impairment of reality contact, memory loss, or ability to relate. In 1992, there was no confusion of thought or disturbance in reality contact. Floyd denied hallucinatory experience. There was no impairment of reality contact or thought disorder. Floyd had been expelled from school, then went to Florida but had "many conflicts with the law." There were no signs of psychosis, confusion or memory loss. (V3, P509-513, Defense Exhibit 2). Mr. Withee clearly stated he wanted to avoid discussion of the brother's murder and present Floyd in a positive light. Allowing the jury to know that Floyd is a classic antisocial is not consistent with that strategy. This Court has acknowledged in the past that an antisocial personality disorder is a trait most jurors tend to look disfavorably upon. *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005)(*quoting Freeman v. State*, 852 So. 2d 216, 224 (Fla. 2003). *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004)(same); C*ummings-El v. State*, 863 So. 2d 246, 268 (Fla. 2003). Floyd has failed to show counsel was deficient in relying on Dr. Krop's diagnosis of antisocial, particularly since this diagnosis was corroborated by the evidence at the evidentiary hearing. Further, he cannot show prejudice. He now parades before the court the exact evidence that Mr. Withee made

a strategic decision not to present. Mr. Withee's decision to minimize the impact that Floyd murdered his brother and has an antisocial personality was reasonable.

D(ii). Present mitigation at penalty phase and *Spencer* hearing. This argument repeats those made in Section D(i) above, except as the evidence would apply to the *Spencer* hearing. Floyd additionally argues trial counsel was ineffective for failing to object to trial judge errors in the jury instructions. Specifically, the judge omitted a portion of the instruction on nonstatutory mitigation. This issue was raised on appeal and this Court made a ruling on the merits that any error was harmless as follows:

> When we further consider the three strong aggravating factors present in this case, the possible mitigating factors, and the eleven to one jury recommendation for a sentence of death, **we conclude that a perfect instruction would not have in any way altered the jury's recommendation here.** Therefore, we determine that no relief based on fundamental error is warranted on this matter. (emphasis supplied).

Floyd, 850 So. 2d at 403. Floyd cannot meet the prejudice prong of *Strickland.*

Floyd next claims trial counsel was ineffective when he failed to request an instruction on age as a mitigating circumstance. Mr. Withee did not request an instruction on age as a mitigating factor because Floyd did not fit this category. (SRV2, P352-53). This is a correct assessment of the law. Age 21, in and of itself, does not require a finding of the age mitigator. *See Garcia v. State*, 492 So. 2d 360,

367 (Fla. 1986)(age 20); *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997) (age 20); *Nelson v. State*, 850 So. 2d 514, 528 (Fla. 2003) (age 21). Floyd was married and supporting three children. An evidentiary hearing was held on this issue, after which the trial judge held:

> Mr. Floyd asserts that the trial court erred by amending a portion of the instruction on non-statutory mitigation and that counsel was ineffective in that regard. The Supreme Court, in its ruling, indicated that "we conclude that a perfect instruction would not have in any way altered the jury's recommendation here." Floyd v. State, 850 So.2d 403. Since the Florida Supreme Court has already determined that the error of omission in instructing the jury would not have changed the outcome of this case, then Mr. Floyd cannot demonstrate a reasonable probability of a different result that is required by the prejudice prong of *Strickland.* Mr. Floyd next claims that trial counsel was ineffective when he failed to request an instruction on age as a mitigating circumstance in this case. Mr. Withee did not think the requested instruction applied. Mr. Floyd being the age of 21 in and of itself does not require a finding of the age mitigator. Garcia v. State, 492 So.2d 360 (Fla. 1986) (age 20), Gudinas v. State, 693 So.2d 953 (Fla. 1997) (age 20), Nelson v. State, 850 So.2d 514 (Fla. 2003) (age 21). The trial evidence indicated that Mr. Floyd was married, held a job, assumed responsibility for a house and his wife's children from a former relationship and had assumed the normal responsibilities of adult life prior to murdering Mary Goss, those facts would be inconsistent with the finding that he was too immature to bear full moral responsibility for the crime. The court has concluded that the age mitigator is not applicable and therefore failure to request same is not ineffective assistance of counsel.

(V7, P1272). The trial judge order is supported by competent substantial evidence.

E. Jury selection. In his original Rule 3.851 motion, Floyd alleged trial counsel was ineffective during jury selection. There was no evidence presented on

this issue, and this issue fails for lack of proof. *Walton*, *supra.*

Jury selection issues were raised on direct appeal, and this Court ruled:

> Floyd asserts in his first issue that the trial judge impermissibly allowed the State to exercise a peremptory challenge to excuse Noel Rios from the prospective panel, who was identified as a Hispanic male. [FN20] Floyd contends that the trial judge impermissibly allowed the State to strike Rios from jury service based on racial grounds. [FN21] We disagree.
>
> > FN20. **We reject the State's contention that this issue is not preserved for review. Floyd clearly had a continuing objection before the trial judge which we determine was sufficient to preserve the issue.** (Emphasis supplied)

Floyd, 850 So. 2d at 393-395. The issue regarding Juror Rios was raised on direct appeal and decided on the merits. This Court clearly held the issue was preserved and had no merit. This issue is procedurally barred and should not be raised under the guise of ineffective assistance. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be re-litigated under the guise of ineffective assistance of counsel); *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). In any case, the issue has no merit, so counsel cannot be ineffective.

The trial judge held:

> In his original 3.851 motion, Mr. Floyd alleged that trial counsel was ineffective during jury selection. However, Mr. Floyd presented no evidence on the issue at the evidentiary hearing even though he did not

> expressly abandon it. There having been no evidence on the jury selection issues the court, therefore, finds that Mr. Floyd has failed in his burden in regard to either prong of the Strickland test. The court further notes that the Florida Supreme Court clearly held that the jury selection issue was preserved by trial counsel and also had no merit. This court finds that issue is procedurally barred and should not have been raised in a rule 3.851 proceeding under the guise of ineffective assistance of counsel. Freeman v. State, 761 So.2d 1055 (Fla. 2000).

(V7, P1272-73).

CLAIM II

FLOYD WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF A MENTAL HEALTH EXPERT; THIS ISSUE IS PROCEDURALLY BARRED.

This claim is an “ineffective assistance of mental health expert” and is procedurally barred. This claim is brought pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), and this Court has repeatedly held the issue is procedurally barred. *See Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003) (holding an *Ake* claim contained within an ineffective assistance of counsel claim "procedurally barred because it could have been raised on direct appeal"); *Moore v. State*, 820 So. 2d 199, 203 n.4 (finding *Ake* claim procedurally barred because it could have been raised on direct appeal); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000) ("The claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

Whether counsel was ineffective for relying on Dr. Krop’s advice is discussed

in Claim 1. This Court has also repeated held that claims of ineffective assistance of counsel based on *Ake* have no merit. *Whitfield v. State*, 923 So. 2d 375 (Fla. 2005); *Elledge v. State*, 911 So. 2d 57 (Fla. 2005).

The trial judge held:

> Claim II deals with a claimed "ineffective assistance of mental health expert" which is procedurally barred. This type of claim is brought pursuant to Ake v. Oklahoma, 470 U.S. 68 *(1985)*. Such claims must be raised on direct appeal and are procedurally barred in collateral litigation. Marshall v. State, 854 So.2d 1235 (Fla. 2003); Moore v. State, 820 So.2d 1999; Cherry v. State, 781 So.2d 1040 (Fla. 2000).
>
> Again, as the State points out, whether trial counsel was ineffective for relying on Dr. Krop's advice not to call him as a mitigation witness or mental status witness has been discussed above. Obviously Dr. Krop's conclusions in regard to the deficiencies in the evaluation of Mr. Floyd were not severe. The risk of having to discuss a number of negative features of Mr. Floyd's case involving his violent history and an obvious conclusion that he had an anti-social personality disorder all came into play in the evaluations done by Mr. Withee. The tactical and strategic decision was made not to present this slight positive information that Dr. Krop may be able to advance when weighed against the negative information that would likely accompany that evaluation. In essence Mr. Withee concluded, from a tactical and strategic standpoint, that the risk of damage to his client's case was outweighed by the potential benefit which on its fact seems sound and the court believes Mr. Withee in regard to that having been a tactical decision. This conclusion is complemented by the fact that Mr. Floyd and his parents gave inconsistent information that would expose the defendant to allowing the jury to conclude that he was somehow trying to manipulate the mental health status which could be devastating to his defense. It is clearly noted by the court that should those mitigating factors have been advanced, the State would have an opportunity to discuss his criminal background including the violent death of his brother at age 14 which Mr. Withee

> had concluded would more likely make that a predominant feature of the case rather than others that he wished to shift the presentation to. Those are all strategic decisions made by a lawyer based on the facts and circumstances in this case. Mr. Withee had the defendant evaluated by a well regarded mental health expert who has testified in many cases like this and had been cross examined hundreds of time and who knew the likely outcome and evidentiary value of his entire analysis once exposed.
>
> Based on both the factual and legal conclusions set forth above, Mr. Floyd has failed to carry the burden in regard to Claim II.

(V7, P1273-74). These findings are supported by competent substantial evidence.

CLAIM III

THERE WAS NO ERROR, EITHER INDIVIDUALLY OR CUMULATIVELY

There is no individual error, and thus, no cumulative error. *See Harvey v. State*, 946 So. 2d 937 (Fla. 2006); *see also Downs v. State*, 740 So. 2d 506 (Fla. 1999) (where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail).

CLAIM IV

FLOYD'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY IMPROPER SHACKLING; COUNSEL WAS NOT INEFFECTIVE

An evidentiary hearing was held on this issue, after which the trial judge held:

> Mr. Floyd's claim IV is based on the assertion that he is raising pursuant to Deck v. Missouri, ___U.S.__161 L.Ed.2d. 953, 125 S.Ct. 2007 (2005) which denounced that routine shackling of defendants as a matter of

course if not permitted during the penalty phase of a capital trial. Florida law requires that the trial courts protect the due process rights of defendant by avoiding unnecessary shackling during trials including penalty phase proceedings and has done so. Hill v. State, 921 So.2d 579 (Fla. 2006). The Hill case cited Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987). The State asserts that the claim has been available to Mr. Floyd since Mr. Floyd's trial in 1999 and, therefore, is procedurally barred since it could and should have been raised on direct appeal. Therefore, the court finds that the argument is procedurally barred.

However, if the case were considered on its factual basis, the essence of the case is that the courts do not wish to have constraints or "shackles" that are visible to the jury, whether in the guilt phase or penalty phase of a capital murder trial. The theory is when shackles are visible to the jury, they may influence the jury to abandon the presumption that the defendant is innocent in the guilt phase of the proceeding or to perceive that he is a bad or dangerous person while considering whether to recommend a death sentence during the penalty phase. The case applies only to visible shackles.

At the evidentiary hearing, Mitch Holbrook, the bailiff at Mr. Floyd's trial, testified that Mr. Floyd did not ever have shackles on during either the guilt/innocence or penalty phase of the trial. The restraint employed was a leg brace device. The device essentially is a hinged metal device that is secured around the ankle region and upper thigh in such a way that when it straightens out totally, it locks into place. The effect of the brace would mean that the leg would be locked in place which would make it difficult or impossible for the defendant to run. The device itself is under the pants leg of the defendant and is not visible.

By practice defendants were not typically walked in and out of the courtroom in the jury's presence and each of the defendants was instructed on the operation of the leg brace so it would not lock into position. The testimony of Mr. Holbrook and other evidence at the evidentiary hearing indicated that Mr. Floyd himself testified that he wore the brace during the trial and claimed that it caused him to "limp" when he had to walk wearing it. He recalled walking to the judge's

bench for a bench conference once during trial and he claimed that the leather strap would be visible around his ankle.

Quite the contrary, Mr. Withee, defense counsel, testified that he did not remember anything about the leg brace. He did not remember anything that stood out or that the leg brace ever became a problem. Mr. Withee himself indicated that he had been “very aware” of the issues of visible shackling, jail garb and the like throughout his 30 year career and has always been “an advocate of no braces of any kind” although he stated he would not object if there was a legitimate security issue and the restraint used was not visible to the jury.

Factually during this case, Mr. Floyd had the leg brace on underneath his clothes during the guilt/innocence phase. During penalty phase the bailiffs proposed putting Mr. Floyd in cuffs or leg shackles that would have been visible to the jury. Mr. Withee objected and a hearing was held. This court directed that the shackles not be used during the penalty phase and that the same constraint used during the guilt/innocence phase, that being the leg brace, continue to be used.

The court at the time did not consider the leg brace to be a shackle and it clearly was not a visible constraint of any kind. The leg brace was a security device used to protect the court, the court staff, the public, the bailiffs, and counsel from a defendant who has now killed twice. The constraint was reasonable and invisible to the jury. At best they saw an ankle wrap around the lower part of the device. To spring to a conclusion that this is somehow a shackle or constraint requires a level of sophistication that is unlikely and clearly has not been established by the proof. When the issue was raised at the beginning of the penalty phase, the court ruled in favor of Mr. Withee and would not allow the shackles to be used during the penalty phase. Mr. Withee does not remember any noise or snapping that current counsel demonstrated at the time of the evidentiary hearing and there is absolutely no evidence that any such snapping ever took place. If it had the attorney sitting next to the defendant would obviously have heard it and he did not.

While defense counsel wishes to speculate that the jury somehow saw an

ankle wrap and concluded that the defendant was shackled seems to be in the assertion of wild speculation. The claim that the bailiffs or other court personnel may have explained the purpose of the brace to the jurors if they were curious about the leg mechanism is an absurd statement without any legal support.
It should be noted that the Putnam County Courthouse is a relatively small courthouse of ancient origin. Somehow the defendant presumes that the jury expects people charged with first degree murder to be walking to and from the courthouse every day at the beginning and the end of trial. It would not take a rocket scientist to conclude that the defendant is not coming and going with all others to and from the courtroom on a daily basis. The purpose for avoiding constraints is to avoid the negativity associated with those constraints. Obviously we have seen defendants appear in cages in civil countries and heavily shackled which creates an aura that detracts from the jury's duty to first presume a person innocent during the guilt/innocence phase and second to provide the defendant with freedom from negative influences during the important penalty phase. Both of those goals were met in this case by this trial judge. The leg device is a commonly used device that is not visible under the clothing of Mr. Floyd. Even if one or more of the jurors had seen the ankle portion of the device, there is really no logical reason they would conclude that was a restraint or anything other than a brace of some kind. The jury is instructed not to receive information about the case other than during the course of the trial from the witness stand and evidence offered in trial. To presume that they somehow went on some type of search to discover information about the brace is without record support and patently absurd. When the deputy sheriffs sought to actually use shackles, during the penalty phase, Mr. Withee objected and the court, as is its obligation, held a hearing. The court concluded that level of security was not necessary and the shackles were not used.

There is no evidence that Mr. Withee has been ineffective in regard to the constraint issue. In fact, the evidence is to the contrary. The minute visible constraints were proposed, Mr. Withee objected, his objection was heard and his objection was sustained. To now try to manufacture something that did not occur demeans the process. In regard to the shackling issue, there has been neither a showing that Mr. Withee was

ineffective or that there was any actual prejudice within the meaning of Strickland. See also Eutzy v. State, 536 So.2d 1014 (Fla. 1985).

(V7, P1274-77).

The trial judge is correct that this issue is procedurally barred. Any substantive constitutional challenge to the restraint employed could have and should have been presented on direct appeal and is thus procedurally barred. *See Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). *Elledge v. State*, 911 So. 2d 57 (Fla. 2005).

Floyd tries to avoid the procedural bar by raising the claim as an ineffective-assistance-of-counsel claim. The Florida Supreme Court will not consider such procedurally barred claims under the guise of ineffective assistance of counsel. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *Rodriguez v. State*, 919 So.2d 1252 (Fla. 2005). Even if this issue were not procedurally barred, the case on which Floyd relies, *Deck v. Missouri*, 544 U.S. 622 (2005), does not apply retroactively. *See Marquard v. Sec., Dept. of Corrections*, 429 F.3d 1278 (11th Cir. 2005).

Last, this claim has no merit. *Deck* and the Florida cases addressing this issue concern themselves with shackles that are visible to the jury, whether in the guilt phase or penalty phase of a capital murder trial. It is only when visible shackles are used that the State is required to prove beyond a reasonable doubt that that a shackling

error (if there was one) did not contribute to the verdict. Obviously, if a prisoner restraint is not visible to or perceived by the jury as a restraint it cannot have any influence on their deliberations. Thus, where visible restraints are not employed, the defendant bears the burden of proving actual prejudice to be entitled to postconviction relief on a shackling claim.

Trial counsel was not deficient because he did object when the trial judge suggested placing visible restraints on Floyd before the penalty phase. (ROA 2011-2017). The only restraint used was a leg brace, and the testimony at the evidentiary hearing contradicts Floyd's testimony that the jury could see the brace. The trial judge made a credibility determination that the leg brace was not visible to the jury.

Photographs of the leg brace device were introduced in evidence at the evidentiary hearing (Vol. 3 P488, 490; State Exhibits 6 and 7).

Floyd's trial counsel, Doug Withee testified that he didn't notice the brace.. "It was not something that stood out ... I don't recall the braces [sic] ever becoming an issue of any kind." (SRV2, P388) . Mr. Withee noted that he has been "very aware" of issues of visible shackling, jail garb and the like throughout his 30 year career and had always been "an advocate of no braces [sic] of any kind," although he stated that he would not object if there was a legitimate security issue and the restraint used was not visible to the jury. (SRV2, P390-91). This testimony is corroborated by Mr. Withee's

actions during Floyd's trial he immediately sprung into action and protested what he deemed the lack of a sufficient individualized showing of a need to shackle Floyd at the start of the penalty phase proceeding when the bailiffs proposed putting Floyd in cuffs or shackles that could have been visible to the jury. (ROA 2011-2017) . Mr. Withee obviously was well aware of the very issue now belatedly being raised by Floyd at the time this case was tried. However, because the leg brace was so unobtrusive that even the trial judge was unaware of its use until the bailiff mentioned it, it was not the sort of visible shackle to which *Deck* applies. (ROA 2015-16) . The trial court did not consider the leg brace to be a shackle, let alone a visible one, and did decide that on balance it was the most minimal restraint that was appropriate to maintain safety and security in the courtroom in the penalty phase of this particular case given statements attributed to Floyd about not going to prison after the guilty verdict. (ROA 2015-16) . Mr. Withee also noted at the start of the penalty phase that Mr. Floyd had been actively cooperating with him and participating busily throughout the trial while wearing his leg brace, which refutes any claim now that the leg brace that was concealed under Floyd's clothing somehow inhibited or "hindered" Floyd from participating in his own defense. (ROA 2013).

Floyd's claim is fundamentally based upon speculation that the jury saw the leather strap of the leg brace around Floyd's left ankle and somehow knew that it was

part of a device under Floyd's clothing that was being used as a security measure to restrain him. There was no evidence presented at the Rule 3.851 hearing in support of Floyd's baseless assertion in his initial written closing argument that the outlines of the leg brace were visible to the jury through Floyd's clothing. As noted above, the device was obviously not visible to the trial judge or to Floyd's own attorney, since they were unaware of it prior to the bailiff telling them about it.

Floyd's argument attempts to broaden the term "visible shackles" (the kind addressed in *Deck)* to include one or more of the jurors potentially hearing the click produced when the hinge on the leg brace locked into place or possibly noticing Floyd walk with a stiff left leg in order to avoid his burden to prove actual prejudice as a result of the use of the leg brace in his trial. Because there was no deficient performance actual prejudice, trial counsel cannot have been ineffective within the meaning of *Strickland. Eutzy v.* State, 536 So. 2d 1014, 1015 (Fla. 1985).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to David Gemmer, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, on this _____ day of December, 2007.

____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

____
Assistant Attorney General