IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-450

JOHNNY HOSKINS

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

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RESPONSE TO ORAL ARGUEMNT REQUEST

The facts at issue in this proceeding are straightforward, the Circuit Court's order is comprehensive, and the controlling legal principles are clear. The State believes that oral argument is unnecessary, but defers to the preference of the Court.

RESPONSE TO STATEMENT OF THE CASE AND FACTS

The State does not accept the statement of the case and facts set out on pages 2-51 of the *Initial Brief.*

THE UNDERLYING FACTS

For the facts underlying the offense, the State relies on the following:

> Johnny Hoskins appeals a circuit court judgment imposing a sentence of death upon resentencing. We have jurisdiction. *See* art. V, § 3(b)(1), *Fla. Const*. For the reasons explained below, we affirm.
>
> I. THE FACTS AND PROCEDURAL HISTORY
>
> The facts supporting Hoskins's convictions are detailed in our decision on his direct appeal of his convictions and previous death sentence. *Hoskins v. State*, 702 So. 2d 202, 203-04 (Fla. 1997). We briefly summarize them. On Sunday, October 18, 1992, police went to eighty-year-old Dorothy Berger's home after neighbors discovered that her door was open but no one was home. The television and air-conditioning were on; a small amount of blood, a bent pair of eyeglasses, and a green hand towel were on the bed; several items in the room appeared to be out of place; a shoe impression was visible in the dust on the floor; and Berger's car was gone. There was no sign of forced entry. The victim had last been heard from around 6:30 p.m. the previous evening.

Hoskins lived with his girlfriend next door to the victim. On the evening of October 17, a witness saw him driving a car similar to the victim's. At about 5 a.m. the next morning, Hoskins arrived at his parents' house in Georgia driving that same car. After he arrived, he borrowed a shovel and left. He returned about twenty minutes later. On Monday, October 19, he was stopped in Georgia for a traffic violation. Police later determined that the car he was driving belonged to the victim. Police found vegetation and blood in the trunk of the car. Thereafter, Hoskins's father led police to an area near his home where the type of vegetation found in the trunk grew. The victim was discovered there in a grave with her hands tied behind her back and a gag in her mouth.

Further examination revealed that the victim had been raped; had numerous injuries to her body; had several blows to her head, one of which likely caused her to become unconscious; and had died of strangulation, which occurred after the sexual battery and beating. DNA analysis revealed that the semen found on the victim and on the victim's bed sheet could have come from Hoskins.

The jury convicted Hoskins of first-degree murder, burglary of a dwelling, sexual battery with physical force, kidnapping, and robbery, and the circuit court sentenced him to death for the first-degree murder. *Hoskins*, 702 So. 2d at 203. The trial court set aside the original penalty phase proceeding. *Id*. at 204. Before the second proceeding, at the suggestion of defendant's mental health expert (Dr. Krop), the defense requested neurological testing to develop mitigating mental health evidence. The trial judge denied the request. *Id.* In the second penalty phase proceeding, the jury unanimously recommended, and the trial judge imposed, a death sentence. Id. On appeal, we affirmed Hoskins's convictions and the sentences, except the death sentence. [FN1] As to the death sentence, we remanded for a PET scan and subsequent evidentiary hearing to determine whether the PET scan showed an abnormality and, if so, whether the results caused Dr. Krop to change his testimony. *Id*. at 210-11. The trial judge concluded that the PET scan showed an abnormality and that (as conceded by

the State) Dr. Krop's testimony changed as a result. *Hoskins v. State*, 735 So. 2d 1281, 1281 (Fla. 1999). The trial court did not reach the validity of the PET scan or conduct a hearing pursuant to *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923) (requiring new or novel scientific principles to "have gained general acceptance in the particular field in which it belongs"). 735 So. 2d at 1281 n. 1. Based on the trial court's findings, we vacated the death sentence and remanded for a new penalty phase proceeding, with the validity of the PET scan and *Frye* issues to be considered as part of the new sentencing proceeding. *Id.* The trial court held a *Frye* hearing and overruled the State's objection to the admissibility of the PET scan evidence.

> [FN1] We rejected Hoskins's sole guilt phase issue on appeal-"that he was deprived of his right to be tried by a fair and impartial jury drawn from a representative cross section of the community" because the trial court permitted the court clerk to excuse certain jurors-as procedurally barred. Hoskins, 702 So. 2d at 205-06.

Following the new penalty phase proceeding, the jury recommended death by a vote of 11-1. By special interrogatories, the jury found three aggravating circumstances: (1) the capital felony was committed during the course of or in flight after committing the crimes of robbery, sexual battery, or kidnapping (vote of 12-0); (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (vote of 12-0); and (3) the capital felony was especially heinous, atrocious, or cruel (HAC) (vote of 10-2). The trial court found the same aggravating circumstances had been proven beyond a reasonable doubt.

The trial court found the following mitigating circumstances: (1) the Defendant formed and maintained loving relationships with his family (little weight); (2) the Defendant was a father figure to his siblings (little weight); (3) the Defendant protected his mother from his father's abuse (little weight); (4) low IQ (little weight); (5) low mental functional ability (little weight); (6) some abnormalities in the

brain which may cause some impairment (little weight); (7) an impoverished and abusive background (some weight); (8) mental age equivalent (between fifteen and twenty-five) (little weight); (9) the Defendant helped support his family financially (little weight); (10) the Defendant had and cared for many pets (little weight); (11) no disciplinary problems in school (little weight); (12) the Defendant suffered from poor academic performance and left school at age sixteen to work to help his family (little weight); (13) the Defendant was not malingering (little weight); (14) the Defendant expressed remorse (little weight); (15) potential for rehabilitation and lack of future dangerousness (little weight); and (16) good jail conduct, including death row behavior (little weight). [FN2] The trial court concluded that any one of the aggravating circumstances standing alone far outweighed all of the mitigating circumstances and resentenced Hoskins to death.

> [FN2] The trial court found each mitigating circumstance pursuant to section 921.141(6)(h), *Florida Statutes* (2004), "any other factors in the defendant's background that would mitigate against imposition of the death penalty." The trial court also found mitigating circumstance (8) pursuant to section 921.141(6)(g), "[t]he age of the defendant at the time of the crime." Thus, the trial court found one statutory mitigator and fifteen nonstatutory mitigators. The trial court found mitigators (14) through (16) based on the hearing held pursuant to *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993) (holding that the trial court should conduct a hearing to allow the parties to be heard, afford the parties an opportunity to present additional evidence, allow the parties to comment on or rebut information in any presentence or medical report, and afford the defendant an opportunity to be heard in person).

Hoskins v. State, 965 So. 2d 1, 5-7 (Fla. 2007).

THE EVIDENTIARY HEARING FACTS

Dr. William Morton, Psychopharmacologist, studies the effects of drugs on the brain as well as the effects they might have on someone's thinking, feelings and behaviors. (V2, R142-43, 147).[1] He is not a medical doctor, psychologist, or a psychiatrist. (V2, R187, 196). He has testified in various states only for the defense in approximately fifty death penalty cases. (V2, R184, 186).

Dr. Morton conducted a clinical interview of Hoskins.[2] He asked Hoskins about his history of drug use and if there were any psychiatric medicines he was currently taking. (V2, R152, 153). Morton reviewed documents which included Hoskins' criminal record, educational background, pre-sentencing investigation, trial transcripts, Florida Supreme Court opinions, and various clinicians' reports.[3] (V2, R153-54, 155, 190, 199). Dr. Morton noted that a CAT scan conducted by Dr. Weiss was within normal limits. (V2, R188).

Hoskins started drinking alcohol at age 15. By the time he was 19, he was drinking on a regular basis. He abused alcohol, marijuana and cocaine. (V2, R159, 160, 195). Hoskins self-

[1] The postconviction appeal record is cites as V_, R_. The direct appeal record is cited as DAR V_, R_.

[2] Dr. Morton met with Hoskins in September 2008, and October 2008, for a total of three hours. (V2, R152).

[3] The reports included Dr. Wood's assessment of a PET scan, Dr. Krop's assessment, and Dr. Weiss' neurological examination report. (V2, R154).

reported that, while using drugs, he suffered some mild auditory hallucinations and was continually paranoid. (V1, R28). He was hyper and irritable. (V2, R161-62). By the time of the murder, he abused cocaine and marijuana on a daily basis. (V2, R162). Hoskins began dealing in cocaine to support his own habit. (V2, R162). However, he spent a fair amount of time incarcerated. (V2, R192, 194).

Dr. Morton said various factors explain someone's inability to control substance abuse. Factors include: 1) genetic history; 2) Prenatal development; 3) environment; 4) stressors or effects on biochemistry; 5) other drugs. (V2, R164-66, 167). Although not an "absolute," people in a lower social economic group have a higher likelihood of developing an addiction. (V2, R166).

Hoskins father drank excessively and was physically abusive to Hoskins and his mother. (V2, R168). Hoskins is genetically and developmentally pre-disposed to addiction. (V2, R168). The family lived in a small, rural area - "all they had was a family." (V2, R168). Hoskins was close with one sister who died of leukemia. (V2, R169).

When Hoskins drank excessively, his behavior was erratic. (V2, R170). There was no indication Hoskins was psychotic. Further, he did not have hallucinations or relate having bizarre thoughts. (V2, R171). Dr. Morton relied on Georgia school

records in determining that Hoskins overall IQ is 71, “borderline mental retardation.” (V2, R170, 196).

Dr. Morton explained some people suffer serious side effects from drug withdrawal although others do not. Long-range effects can affect the brain long after the drugs are out of the body, “weeks and months.” (V2, R179).

Dr. Morton said alcohol affects people in different ways. Some become relaxed and calm while others feel anxious, panicky, irritable and restless. (V2, R180). Alcohol can affect a person’s sleep, and can cause depression, memory impairment, and hallucinations, although this is a rare occurrence. Brain damage is quite consistent with long-term alcohol use. (V2, R180).

Dr. Morton testified that marijuana, in general, has pleasant effects. (V2, R180). Users are relaxed and lose a sense of time. However, some may experience paranoia at the possibility of getting caught with an illegal substance. (V2, R181).

Cocaine users are restless and feel uncomfortable. Their minds “jump around.” Between 60% and 80% of people in treatment are paranoid. (V2, R181). Some people experience hallucinations - - some are visual, but more are auditory. (V2, R181). Hoskins experienced auditory hallucinations as well as “tactile feeling, things on him occasionally.” (V2, R182). 25% of cocaine users

think they have “certain powers” that they do not have. Violent acts occur. Severe side effects cause relapses. (V2, R182).

In Dr. Morton’s opinion, at the time of the crime, Hoskins was impulsive, irritable, aggressive, violent, hyper and anxious. He would have experienced a “fight or flight” type nervous system. Hoskins was paranoid, suspicious of others, potentially psychotic, and was not thinking logically. (V2, R183).

Dr. Morton said there were impulsive elements to this crime. (V2, R201). However, cocaine use did not cause Hoskins to rape Ms. Berger. (V2, R201-02). Dr. Morton was not sure if Hoskins reported cocaine use to the other experts involved in this case or to his lawyers. He initially denied cocaine use “to a number of health practitioners.” (V2, R202-03, 208). Dr. Morton based his opinion on the information provided by Hoskins, Hoskins’ acquaintances, the record, and other experts. (V2, R188).

Shirley Furtick, social worker from South Carolina, investigates mitigation. (V2, R214-15, 217). She conducts a clinical interview with the defendant, family members, and former employees. (V2, R220). She investigates potential prenatal issues, family stressors, developmental issues, family relationships, school, military, and marriage issues, as well as “the climate of the community.” (V2, R221).

Various members of Hoskins' family were school drop-outs, abused alcohol, or had criminal records. (V2, R225). Hoskins starting abusing alcohol in his teen years. (V2, R226). His brother, James, had a history of schizophrenia. (V2, R228).

Furtick was aware the trial court found in its sentencing order that Hoskins had a loving relationship with his family. Various family members testified on Hoskins' behalf at the penalty phase. (V2, R233).

Dr. Hyman Eisenstein,[4] neuropsychologist, examines brain functioning and focuses on "brain behavior relationships." (V2, R242, 248 249).

In preparation for this case, Dr. Eisenstein reviewed evaluations conducted by other clinicians, jail records, Florida Supreme Court opinions, and interviewed several people familiar with Hoskins. In addition, he conducted a comprehensive neuropsychological exam. (V2, R249, 250, 281-82,304). The battery of tests included testing Hoskins' IQ, memory, motor sensory language, achievement, and overall emotional level. (V2, R251).

Hoskins motor strength was in the "high normal range" and "totally intact," which indicated Hoskins' desire to give his "utmost performance throughout the evaluation." (V2, R252).

[4] Dr. Eisenstein has been involved in approximately 75 death penalty cases and only has testified for the defense. (V2, R324).

There was a slight impairment in the left frontal activities. (V1, R121). Hoskins' score on the Trail Making Test Part A indicated significant impairment. His score on the Trail Making Test Part B showed he was mildly impaired. (V2, R256). Various tests indicated Hoskins was mildly impaired in language skills or communication. (V2, R257-61). The results of the Wechsler Adult Intelligence Scale, Third Edition, indicated a full scale IQ score of 79, indicative of "borderline intellectual functioning."[5] (V2, R262, 264, 302). Eisenstein agreed that a diagnosis of 70 or below is an indication of mental retardation. (V2, R323-24). Dr. Eisenstein reviewed the raw data from the Minnesota Multiphasic Personality Inventory (MMPI), which was administered by the State's witness, Dr. McClaren, and is comprised of a variety of validity scales. (V2, R268, 271). The schizophrenia and paranoia scales were slightly elevated. The mania and psychopathic deviant scales were both within normal the range. (V2, R273, 276, 321). An elevated score on the schizophrenic scale does not mean Hoskins is schizophrenic. (V2, R321-22). Hoskins is not antisocial. (V2, R276, 322, 324). There were indications of problems with negativity, emotional withdrawal, isolation, and communication. (V1, R143). Hoskins

[5] The transcript incorrectly states the "Webster" Adult Intelligence Scale. (V2, R262). Dr. Eisenstein initially testified Hoskins' full scale IQ score was 77. The MMPI is a test comprised of 567 true/false items. (V2, R268, V3, R442).

was not malingering. (V2, R277, 279, 320). The results of the MMPI were normal. (V2, R326).

Dr. Eisenstein was aware that the trial court found some evidence of a brain abnormality in the sentencing order. (V2, R284). In Dr. Eisenstein's opinion, Hoskins suffers from a "frontal lobe impairment." (V2, R284-85, 286). He is "severely impaired." (V2, R287). There are more deficits in the right front lobe than the left. (V2, R287). Hoskins' brain damage has remained constant since initial testing was conducted in 1993. (V2, R287-88).

Hoskins meets the criteria for intermittent explosive disorder.[6] (V2, R289, 301, 302, 308). He is "mentally ill." (V2, R328). Dr. Eisenstein said Hoskins had approximately one disciplinary report per year since his current incarceration which is a period of fifteen years. (V2, R311). However, DOC records indicated Hoskins had not had a disciplinary action in the previous four years. (V3, R337-38). Dr. Eisenstein said if aggressive episodes were the result of drug abuse, intermittent explosive disorder is not a proper diagnosis. (V2, R316; V3, R344).

Dr. Eisenstein said Hoskins recalled some of the details of the murder and rape of Ms. Berger. (V2, R316-17). He told Dr.

[6] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

Eisenstein he remembered having an altercation with her, putting her in the trunk of her own car, driving to Georgia, and borrowing a shovel from his father in order to bury Ms. Berger in a peanut field close to his parents' home. (V2, R317-20).

Hoskins self-reported drug and alcohol abuse in the period around the time of, and immediately following, the crime. (V2, R293, 308-09). However, a Substance Abuse Assessment, dated November 7, 1994,[7] indicated Hoskins was not under the influence of drugs or alcohol at the time of the crime. (V3, R336). In Dr. Eisenstein's opinion, Hoskins suffers from a mental or emotional disturbance. (V2, R300). He is unable to control his impulses. (V2, R302).

John Randall Moore[8] was Hoskins' lead trial counsel with Ken Rhoden and Mr. Funk as co-counsel. (V3, R350, 351, 353, 367). Funk had a very good rapport with Hoskins and communicated well with him while Moore and Rhoden handled the defense. (V3, R367). Various investigators assisted with the case. (V3, R354). Moore attempted a plea deal but the State had no intentions of waiving the death penalty. (V3, R354-55, 368).

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[7] The murder occurred on October 17, 1992. *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997).

[8] In 1999, this case was remanded by the Florida Supreme Court. Ernie Chang was lead counsel with co-counsel Keith Mitnick. (V3, R361, 362).

Moore informed the State of what he intended to provide as support for mitigating circumstances. Supporting information included a list of witnesses and a video of where Hoskins was raised. Moore said he "would have revealed all of the points in favor of waiving death." (V3, R355-56). He made several trips to Hoskins' home town in Georgia and interviewed at least 15 witnesses. Several mental health experts[9] were retained to evaluate Hoskins. (V3, R357). Moore's strategy for mitigation was "brain damage, retardation, poverished [sic] childhood." (V3, R357). He recalled obtaining Hoskins' school records. (V3, R358). Hoskins was emotionally traumatized when his sister died. He was very close with all his siblings. (V3, R358).

Moore did not file a motion for independent DNA testing as it related to being under the influence at the time of the murder. (V3, R359). Toxicology testing of Hoskins' blood would have been "of limited value" since Hoskins was arrested three or four days after the crime had occurred. (V3, R359, 365). There was no proof of Hoskins abusing drugs or alcohol at the time of the murder.[10] (V3, R359-60, 371). Hoskins insisted "he didn't do

[9] Experts included Dr. Krop, Dr. Riebsame, and Dr. Weiss. (V3, R358).

[10] Hoskins indicated that he had a cocaine addiction problem at the time of the murder which Hoskins's girlfriend "may have" corroborated. (V3, R373). In addition, the presentence investigation report ("PSI") listed a drug conviction. (V3, R380-81).

it," so there was no presentation of an intoxication defense. (V3, R360-61, 368-69, 371). Hoskins repeatedly said he did not murder Ms. Berger. (V3, R368, 369-70, 373). Moore agreed that the evidence at trial showed that subsequent to murdering Ms. Berger sometime on Saturday, October 17, 1992, Hoskins drove to a friend's house in Melbourne in Berger's car, repaired the tail lights, and then drove to his family's home in Georgia, with Ms. Berger in the trunk. (V3, R373-74, 402). Further, he borrowed a shovel from his father, disappeared for a few hours, and returned in Berger's car.[11] (V3, R374, 402). He attended a family barbeque at a relative's home on Sunday, the next day. (V3, R366).

Moore said Dr. Krop was very helpful with Hoskins' case. They discussed the case several times. (V3, R361, 362). However, Dr. Krop wrote Moore a letter on October 21, 1993, and advised Moore that he found no evidence of any major mental illness or drug or alcohol abuse. (V3, R371-72). Moore did not recall discussing Hoskins' potential cocaine intoxication at the time of the murder with Dr. Krop. (V3, R376). Krop advised Moore that the sequence of events in the rape, kidnap, and murder of Ms. Berger reflected planning and a person attempting not to get

[11] The medical examiner had testified at trial that Ms. Berger was alive when placed in the trunk. In addition, she was alive when struck in the head with a "hard object" consistent with a shovel. (V3, R401-02).

caught. (V3, R374-75). Moore did not recall at what time Hoskins actually confessed to Dr. Krop that he had committed the crimes. (V3, R375, 378). He was unsure if he talked to Ernie Chang about his discussions with Dr. Krop. (V3, R363-64). Moore did not know what Dr. Krop testified to at Hoskins' third penalty phase. (V3, R377). However, Moore gave Ernie Chang "everything we had" after Chang became new counsel in 2003. (V3, R363).

Ernest Chang represented Hoskins for his third penalty phase. (V3, R381, 383, 384). Keith Mitnick was co-counsel. (V3, R383-84, 394). Chang could not recall the numerous times he spoke with prior counsel John ("Randy") Moore to discuss the case. (V3, R385, 392, 394). He reviewed all of the records from the trial, the two previous penalty phases, and the *Frye* Hearing.[12] (V3, R393, 399). He did not retain an investigator or a mitigation expert as "the work had already literally been done twice." (V3, R386). Chang said, "I was going to do everything Randy did, plus anything else I could think of." (V3, R386). In addition to the witnesses that testified at the prior penalty phases, Chang also called Dr. Wu and Dr. Wood. (V3, R395). Dr. Wu explained what the PET scan is, and Dr. Wood performed the PET scan. Dr. Krop was the primary expert that testified as to Hoskins' brain damage. (V3, R396, 404).

[12] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Chang spoke with Dr. Krop several times prior to his testimony at the penalty phase. They discussed "impulse control problems." (V3, R389, 398, 404, 405, 413). Dr. Krop did not find there was alcohol or drug use in this case. (V3, R400). However, Dr. Krop informed Chang that, in his opinion, the PET scan would "strengthen" his conclusion that Hoskins "did have some hypo-frontal lobe damage." (V3, R397).

Chang spoke directly with Hoskins, several family members, and reviewed the PSI. (V3, R387, 388). He did not believe alcohol or drug use were factors to raise as mitigation. (V3, 400-01). Hoskins admitted to Dr. Krop that Ms. Berger was alive in the trunk of the car and that he had struck her with a shovel. (V3, R414). Chang did not hire any experts to review the evidence or to speak to Hoskins. He does "whatever is necessary in every case." (V3, R390). Chang said Dr. Krop had done the "entire work-up of Johnny Hoskins. About the only alternative is to … go out and find yourself another expert to redo everything that Dr. Krop had already done." (V3, R417).

The State called Dr. Harry McClaren, psychologist. (V3, R418). He has evaluated "hundreds" of defendants that were either in the pre-trial stage where the State was seeking the death penalty or had already been sentenced to death. (V3, R422-23). He has testified for both the State and the defense, but more often for the State. (V3, R423).

Dr. McClaren evaluated Hoskins on June 25-26, 2009. (V3, R424, 438). He reviewed medical records, prison records, trial records, as well as the previous penalty phase proceedings. (V3, R424-25, 427-28). He administered and scored the MMPI, 2nd Edition, and the Rotter Incomplete Sentences Blank. (V3, R425, 439-40). The results of the MMPI indicated Hoskins was giving "valid testing." He was consistent in his responses. (V3, R425). The Schizophrenia scale of the MMPI was "scarcely" outside the normal limits. At this level, it did not indicate schizophrenia, but more that Hoskins was "not connecting with other people," consistent with someone on death row. (V3, R426). Results of the Rotter Incomplete Sentences Blank showed Hoskins' concern for his family. (V3, R426).

Dr. McClaren reviewed the IQ testing administered by Dr. Eisenstein. (V3, R426). Due to what Dr. McClaren identified as a scoring error, Hoskins' full scale IQ is actually 80. (V3, R427). Hoskins is not mentally retarded. (V3, R427).

Dr. McClaren reviewed prison records and noted Hoskins does not have a significant number of disciplinary reports. (V3, R428). This suggests Hoskins has "good control of himself … and tends to argue against severe problems with impulse control." (V3, R428).

Hoskins told Dr. McClaren some details of his childhood and his father's abuse. Dr. McClaren was unsuccessful in his

attempts to located or speak to any family members. (V3, R451-52, 457, 462). Alcohol abuse was a “regularity” in the family home. (V3, R458). School records reflected Hoskins was in special classes. He self-reported at least four head traumas and described them to Dr. McClaren. (V3, R460). As a result of the head injuries, Hoskins suffered from headaches and memory loss. (V3, R460). Hoskins reported his drug-related arrests as well as drug use at the time of Berger’s murder. (V3, R460). Prior to the murder, he had lost his job and was suffering from incidents of sleeplessness. (32, R461).

Hoskins self-reported to Dr. McClaren that he had been abusing cocaine and alcohol for several days prior to the crime. (V3, R429-30). On the day of the murder, Hoskins visited Ms. Berger’s neighbor, Hoskins’ girlfriend. (V3, R430). With Berger’s consent, he borrowed her car and went to see a friend. In addition, he went to see someone else who owed him money. (V3, R431). Hoskins got some money and cocaine and returned to Berger’s house. (V3, R432). Berger gave him “a hard time” about doing cocaine and alcohol. She then asked Hoskins “if he could have sex with her to kind of work off his debt to her for some previous lawn work, something that he had money that he had borrowed from her.” (V3, R432). Hoskins said he had “kind of a relationship with Ms. Berger” where they traded sex for money. (V3, R432). Hoskins quarreled with Berger because he wanted to

use her car again and she found him abusing cocaine in her bathroom. (V3, R432). Hoskins said this led to a tussle and he put Berger in the trunk of her car. He then drove the car looking for someone that he was supposed to "party with." Hoskins told Dr. McClaren his memory was unclear as to the events but that he recalled driving to his family's home in Georgia. (V3, 432-33). He recalled getting a shovel but he was not sure if Berger was "dead or alive when he got her out of the trunk." (V3, R433). Hoskins told Dr. McClaren he had lied to Dr. Krop and that "he really just didn't care at the time." (V3, R433). If Hoskins' recollection of events of the night Ms. Berger was killed was true, Dr. McClaren would diagnose Hoskins with cocaine dependency and alcohol dependence, a personality disorder, not otherwise specified, as well as a cognitive disorder, not otherwise specified, with a degree of brain dysfunction. (V3, R434-35, 436-37). Dr. McClaren did not agree with a diagnosis of intermittent explosive disorder. (V3, R437). That diagnosis is "rare." (V3, R438). The results of the MMPI were consistent with Hoskins "perhaps" suffering from some brain damage due to self administered intoxicants. (V3, R453).

SUMMARY OF THE ARGUMENT

The post-conviction relief court properly denied relief on the claim of ineffectiveness of counsel for not presenting evidence of "intermittent explosive disorder." Hoskins' actions

were, at all times, goal directed and consistent with the actions of an individual who has committed a crime and does not want to be caught.

The remaining ineffectiveness of counsel claims were also correctly resolved by the trial court. There was no evidence to suggest that Hoskins was intoxicated at the time of the crime, and, consequently, no basis for counsel to have expected a defense of intoxication to be at issue in this case. Further, drug and alcohol use mitigation was presented at least to some degree, and, in its mitigating value, is essentially identical to the "brain damage" mitigation that was presented. As the post-conviction court found, the evidence was that Hoskins made a conscious effort to avoid arrest, and any "intoxication" did not impact his actions in any fashion.

The post-conviction relief court properly denied relief on the "cumulative error" claim because there is no error to "cumulate" in the first place.

ARGUMENT

I. THE (FIRST) PENALTY PHASE INEFFECTIVENESS CLAIM

On pages 54-61 of his brief, Hoskins says that the post-conviction trial court should have found that trial counsel was ineffective for not presenting evidence that Hoskins suffers from "intermittent explosive disorder." This claim was addressed by the lower court beginning at V7, R1205, where that court

properly denied relief.[13] The standard of review applied by an appellate court when reviewing a trial court's ruling on a post-conviction relief motion which was denied after an evidentiary hearing is: "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."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). The circuit court properly denied relief, and that result should not be disturbed for the reasons set out below.

THE LEGAL STANDARD

Hoskins' ineffective assistance of counsel claims are governed by the well-settled *Strickland v. Washington*, 466 U.S. 228 (1984), standard. The Florida Supreme Court has described that standard in the following way:

> In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court established a two-pronged standard for determining whether counsel provided legally ineffective assistance. A defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the

[13] Hoskins' brief contains no reference to the order.

> defendant by the Sixth Amendment." *Id.* at 687. The defendant also must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.; see Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.").

Reese v. State, 14 So. 3d 913, 917 (Fla. 2009). Or, stated somewhat differently:

> The yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the United States Supreme Court in *Strickland*. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudiced the defendant. To establish the deficiency prong under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Garcia v. State*, 949 So. 2d 980, 987 (Fla. 2006). To establish the prejudice prong under Strickland, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007) (*quoting Strickland*, 466 U.S. at 694).

Duest v. State, 12 So. 3d 734, 742 (Fla. 2009). In the context of a case similar to this one, where the claim concerned an “uncalled” mental state expert, this Court said:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668,

> 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). Because both prongs of the S*trickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Bates v. State, 3 So. 3d 1091, 1100 (Fla. 2009). A mental state evaluation is not constitutionally required in every case, and a defendant certainly has no constitutional right to a **favorable** mental state evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). This Court has said:

> While we do not require a mental health evaluation for mitigation purposes in every capital case, *Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005), and "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every case," *Wiggins*, 539 U.S. at 533, "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Riechmann*, 777 So. 2d at 350. Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the

> death penalty."' *Arbelaez*, 898 So. 2d at 34 (*quoting Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

Jones v. State, 998 So. 2d 573, 583 (Fla. 2008).

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Hoskins was evaluated by several mental state professionals, and cannot complain that he did not receive far more process than he was due. In the final analysis, Hoskins' complaints about the mental state aspect of his penalty phase boil down to no more than a complaint about the result. Hoskins has presented nothing that was not before the jury at his resentencing proceeding.

Moreover, Hoskins' claims of prejudice are insufficiently pleaded, and relief should be denied on that basis, as well as because he has not shown that trial counsel's performance was in any way deficient. With regard to the sufficiency of pleading necessary to properly present an ineffectiveness of penalty phase counsel claim, this Court has held:

> [Jones] offers nothing more than the blanket assertion that "[h]ad the evidence been presented, the result of the penalty proceedings would have been different." A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different -- that is, a probability sufficient to undermine confidence in the outcome. *See Holland v. State*, 916 So. 2d 750, 758

(Fla. 2005) (defendant's claim that "**he was prejudiced because penalty phase counsel's deficiencies substantially impair confidence in the outcome of the proceedings is merely conclusory and must be rejected**"); *Brown v. State*, 894 So. 2d 137, 160 (Fla. 2004); *Armstrong v. State,* 862 So. 2d 705, 712 (Fla. 2003) (finding that a mere conclusory allegation of prejudice was legally insufficient).

> Notwithstanding the insufficiency of the claim, we are confident that had the additional mitigation evidence been introduced, there is no reasonable probability that the outcome would have been different -- *i.e.*, our confidence in the outcome remains. "**Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings**." *Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999). Here, the mental mitigation evidence presents a "double-edged sword" and is not sufficient to overcome the substantial aggravation. *See Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.").

Jones v. State, 998 So. 2d at 585. (emphasis added). Hoskins has offered nothing more than the conclusory, *ipse dixit* arguments that were found insufficient in *Jones* as support for his ineffectiveness claims. His arguments are legally insufficient, and, because Hoskins has the burden of proof, his ineffectiveness claims fail.

Hoskins argued to the lower court (at pages 14-21 of the motion and pages 6-9 of the closing argument) that penalty phase

counsel were ineffective because they did not find a mental state expert who would testify more "favorably" than did Dr. Krop. This claim is no more than an attempt to replace a considered penalty phase strategy with a "new" strategy in the hope that the new version will be more successful. There is no claim that the original mental state expert performed an inadequate evaluation, nor is there any assertion that Dr. Krop's opinion has changed in any way.[14] Dr. Krop did not testify at the evidentiary hearing, so the last word from him is his penalty phase testimony.

Hoskins has done nothing more than demonstrate that present counsel might try the case differently, and might, with the benefit of hindsight, time, and a made record, produce yet another "expert" willing to testify in a different fashion. *Clisby v. State of Ala.*, 26 F.3d 1054, 1057 (11th Cir. 1994); *Card v. State,* 992 So. 2d 810, 818 (Fla. 2008); *Peede v. State/McDonough*, 955 So. 2d 480, 494 (Fla. 2007) (*quoting Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000)). That does not meet Hoskins' burden under the two parts of *Strickland*. And, Hoskins cannot demonstrate deficient performance or prejudice under *Strickland* in light of Dr. Krop's extensive penalty phase testimony. *See,* DAR, V12, R1100-1192.

[14] Such a change would be suspect, anyway, given that his opinion in this case has **never changed.**

In any event, Hoskins' new mental state expert is not qualified to testify as to whether or not Hoskins meets the legal standard for finding the statutory mental state mitigating circumstances -- that is a legal determination that is the province of the Court, and is one which is not a proper subject of "expert" testimony. *Wickham v. State,* 593 So. 2d 191, 193 (Fla. 1991); *accord, Palm Beach County v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983). Moreover, Hoskins says that his expert would testify that his behavior is **"akin"** to Intermittent Explosive Disorder. Whatever that means, it makes no sense to argue that Hoskins' counsel was constitutionally ineffective because he did not present such vague and inconclusive testimony, especially when it was contradicted by the other experts involved in this case, and was not supported by Hoskins' history. (V3, R428, 434-35, 436-37, 438). Moreover, neither *Strickland* nor common sense require counsel to pursue possible mitigation when the client has indicated that certain avenues will not be productive. In this case, Hoskins had denied drug use to Krop and to his attorney -- that denial obviated the need for investigation into an area that would not be favorably received by the jury, anyway. *Clisby, supra*. Because Hoskins denied any involvement in the offenses, no voluntary intoxication defense was possible at the guilt stage. Likewise, under these facts, it was reasonable for

penalty phase counsel not to present a “drug-abuse-mitigation” case, especially since that would be admitting that Hoskins sexually assaulted, kidnapped and murdered his 80-year-old neighbor because he was under the influence of drugs. Such a strategy would hardly help Hoskins’ cause, especially in view of the conflict as to the precise diagnosis applicable to Hoskins. The State suggests that the testimony of Dr. McClaren is more credible than that of the defense expert because that testimony is consistent with Hoskins’ known history and prior behavior.

In denying relief on this claim, the collateral proceeding trial court said:

> . . . Dr. Eisenstein testified at the evidentiary hearing that the Defendant has Intermittent Explosive Disorder which causes inability to control his behavior and to control impulses. Dr. Eisenstein gave some examples of conduct of the Defendant that occurred prior to the crime which supported the diagnosis. (See Exhibit "J", pgs. 158-159). He described the degree of the Defendant's brain damage as severely impaired. (See Exhibit "J", pg. 154). However, on cross-examination, Dr. Eisenstein testified that one of the criteria for Intermittent Explosive Disorder is that the aggressive episodes of the person are not better accounted for by another mental disorder including substance abuse. (See Exhibit "J"; pgs. 176-177 and 183). The State's expert, Dr. Harry McClaren, a Psychologist specializing in forensics, testified that he met with the Defendant in June, 2009. He testified that the Defendant reflected good control over himself and was not impulsive. He testified that he did not find the diagnosis of Intermittent Explosive Disorder to be compelling. (See Exhibit "J", pgs. 295 and 304).
>
> The Court finds that the Defendant was not

> prejudiced by his attorneys' failure to call an expert witness to testify that the Defendant had Intermittent Explosive Disorder. Had the defense presented such an expert, it is possible that this testimony would have been weakened by the testimony of a State witness such as Dr. McClaren or by cross-examination questioning regarding the Defendant's substance abuse. Even if the defense attorneys did successfully show that the Defendant had Intermittent Explosive Disorder, it is unlikely that the result of the penalty phase would have changed. The symptoms of Intermittent Explosive Disorder, as described by Dr. Eisenstein, are similar to the symptoms of a frontal lobe impairment. The jury heard. that the defendant was impulsive and that he had difficulty controlling his aggression. Yet the jury found that this was. not sufficient to overcome the aggravation in this case. It is unlikely that had the jury heard that the Defendant had Intermittent Explosive Disorder that they would have found such a diagnosis to overcome the aggravating circumstances. Evidence of Intermittent Explosive Disorder also would not have changed the Court's decision to impose the death penalty. In discussing the evidence of the Defendant's frontal lobe impairment in the sentencing order, the Court pointed out that Dr. Krop had testified that after the Defendant committed the sexual battery, the rest of the Defendant's actions are consistent with someone who knows that he did something wrong and is trying to avoid detection and to cover up his crime. The Court found that the remainder of the Defendant's actions, after he committed the sexual battery, were not affected by the Defendant's brain damage. (See Exhibit "I"). This same finding would be applicable to any evidence that may be presented that the Defendant had Explosive Intermittent Disorder.
>
> (V7, R1205-06).

That result is correct, is in accord with settled law, and should not be disturbed.

II/III. THE (SECOND AND THIRD) INEFFECTIVENESS CLAIMS[15]

On pages 61-66 and 66-70 of his brief, Hoskins says that penalty phase counsel were ineffective for not using a "mitigation expert to obtain a comprehensive social, biological or psychological history," and for not presenting "substance abuse mitigation." The standard of review applied by an appellate court when reviewing a trial court's ruling on a post-conviction relief motion which was denied after an evidentiary hearing is: "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."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). The circuit court properly denied relief, and that result should not be disturbed.

Hoskins said below (on pages 21-27 of the motion and on pages 9-12 of the closing argument) that trial counsel conducted an inadequate mitigation investigation. To the extent that

[15] These claims are essentially sub-parts of Claim I. For clarity, they are addressed separately from that claim. Likewise, for clarity and economy, Claims II and III are combined here.

Hoskins claims that counsel could not render constitutionally effective assistance without using a "mitigation specialist or investigator," there is no constitutional requirement to support that assertion. To the extent that this is an uncalled witness claim, the evidentiary hearing testimony is essentially cumulative of the mitigation that was found to exist at sentencing. **The only "mitigation" that Hoskins has identified as not having been presented at sentencing is substance abuse information, which the trial expert had found no evidence of. (V2, R238-39).**

In reversing an ineffectiveness finding, the United States Supreme Court recently said:

> Like the Court of Appeals, Van Hook first contends that his attorneys began their mitigation investigation too late, waiting until he was found guilty-only days before the sentencing hearing-to dig into his background. *See* 560 F.3d, at 528. But the record shows they started much sooner. Between Van Hook's indictment and his trial less than three months later, they contacted their lay witnesses early and often: They spoke nine times with his mother (beginning within a week after the indictment), once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime. App. to Pet. for Cert. 380a-383a, 384a-387a. As for their expert witnesses, they were in touch with one more than a month before trial, and they met with the other for two hours a week before the trial court reached its verdict. *Id*., at 382a, 386a. Moreover, after reviewing his military history, they met with a representative of the Veterans Administration seven weeks before trial and attempted to obtain his medical records. *Id.,* at 381a, 386a. And they looked into enlisting a

> mitigation specialist when the trial was still five weeks away. *Id.*, at 386a. The Sixth Circuit, in short, was simply incorrect in saying Van Hook's lawyers waited until the "last minute." 560 F.3d, at 528. *Cf. Williams v. Taylor,* 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (counsel waited "until a week before the trial" to prepare for the sentencing phase).

Bobby v. Van Hook, 130 S.Ct. 13, 18 (2009). In yet another recent case, the Court emphasized the high standard a defendant must meet to establish a basis for relief on ineffectiveness grounds:

> To prevail on this claim, Belmontes must meet both the deficient performance and prejudice prongs of *Strickland*, 466 U.S., at 687, 104 S.Ct. 2052. To show deficient performance, Belmontes must establish that "counsel's representation fell below an objective standard of reasonableness." *Id.,* at 688, 104 S.Ct. 2052. In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Id*., at 688-689, 104 S.Ct. 2052. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.,* at 689, 104 S.Ct. 2052.

Wong v. Belmontes, 130 S.Ct. 383, 384-385 (2009). In speaking to the lack of prejudice, the Court emphasized that:

> It is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Belmontes had committed another murder - "the most powerful imaginable aggravating evidence," as Judge Levi put it, *Belmontes*, S-89-0736, App. to Pet. for Cert. 183a - is added to the mix. Schick's [defense counsel] **mitigation strategy failed, but the notion that the result could have been different if**

> **only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful.**

Wong v. Belmontes, 130 S.Ct. 383, 391 (2009). (emphasis added). That observation is equally applicable here. Hoskins committed a brutal murder and went to great lengths to avoid apprehension. The crime, from its beginning in Melbourne until it ended in central Georgia several hours later, was in no way an "impulsive" crime. Trial counsel presented substantial mitigation, which this Court detailed in its decision affirming Hoskins' death sentence. The "new" mitigation evidence, when considered along with that which was presented, is, at best, cumulative, assuming *arguendo* that counsel should have discovered things that Hoskins denied. In any event, that "new" mitigation does not outweigh the horrific facts of Hoskins' murder. Hoskins cannot establish either prong of *Strickland*, and there is no basis for relief.

In denying relief, the collateral proceeding trial court said:

> Ineffective assistance of counsel due to the failure to present a voluntary intoxication defense does not exist where no evidence is presented that the Defendant was in fact intoxicated at the time of the offense. *Pietri v. State,* 885 So. 2d 245 (Fla. 2004). The Defendant presented evidence that he had an alcohol and a drug problem during the time period that the crimes were committed. However, the Defendant presented only minimal evidence at the evidentiary hearing that he was actually intoxicated at the time that the crimes were committed. Dr.

Hyman Eisenstein, a Clinical Psychologist with a subspecialty in Neuropsychology who testified as an expert for the defense, testified that in his opinion, the Defendant was intoxicated at the time of the crime. (See Exhibit "J", pgs. 174-175). Dr. Harry McClaren, an expert witness for the State testified at the evidentiary hearing that the Defendant told him that he took an 8-ball of cocaine on the day of the crime. Dr. McClaren testified that this is about 3 1/2 grams which is a lot. (See Exhibit "J", pg. 330). However, a defendant is only entitled to a jury instruction on voluntary intoxication when evidence is presented at trial that the defendant was intoxicated to the extent that he was unable to form the necessary intent to commit the offenses. *Broxson v. State,* 505 So. 2d 1361, 1364 (Fla. 5th DCA 1987). No evidence was presented at the evidentiary hearing that the Defendant was intoxicated at the time of the crime to the extent that he was unable to form the necessary intent to commit the offenses. Therefore, the Defendant has not demonstrated that had his attorneys attempted to raise such a defense, the defense was likely to be successful. The Defendant was not prejudiced by his attorneys' failure to raise a voluntary intoxication defense.

Furthermore, the State argues in their closing argument that the Defendant was not prejudiced by the defense attorneys' failure to pursue a voluntary intoxication defense because Count I was presented to the jury on both a premeditation theory and a felony murder theory. In *Davis v. State,* 875 So. 2d 359 (Fla. 2003), the Court held that the defendant was not prejudiced by the failure to present a voluntary intoxication defense where the general verdict did not differentiate between premeditation and felony murder because felony murder is a general intent crime for which the voluntary intoxication defense was not available. Here, the Defendant was convicted of several felonies in addition to murder, including sexual battery which is a general intent crime. Therefore, even if the jury found that his intoxication negated premeditation, they could still find that he was guilty of felony murder.

(V7, R1195-96)

. . .

> It is also unlikely that the result of the penalty phase would have changed had the jury heard of the Defendant's drug and alcohol addiction. As stated above, the defense did not present much evidence that the Defendant actually consumed alcohol or drugs on the day of the crime or that he was under the influence of alcohol or drugs at the time of the crime to the extent that he would not be able to form the intent to commit the crime. Although evidence that the Defendant had a drug and alcohol addiction might provide some mitigation, this type of evidence is similar to the evidence that was presented that the Defendant had a frontal lobe impairment. The Defendant's addiction clearly did not have any affect on the Defendant's decision to try to cover up his crime after he committed the sexual battery. No evidence was presented that the Defendant killed the victim in a desperate attempt to obtain more drugs or alcohol. Instead the evidence showed that the Defendant made a conscious decision to avoid arrest for the sexual battery that, he had committed. Since the jury did not find the Defendant's brain damage to overcome the overwhelming aggravating circumstances in this case, it is unlikely that they would have found the Defendant's drug and alcohol addiction to overcome the aggravating circumstances. Therefore, the Defendant was not prejudiced by his attorneys' failure to present mitigation evidence of his drug and alcohol addiction.

(V7, R1206-7). Those findings should not be disturbed.

IV. THE "CUMULATIVE ERROR" CLAIM

On pages 70-71 of his brief, Hoskins says that he is "entitled" to relief based on the "cumulative error" that, according to Hoskins, are "errors alleged" in the post-conviction relief motion. He has not identified those errors in his brief, and, for that reason, this claim is insufficiently briefed and should be stricken. *Kilgore v State/McNeil*, 35 Fla.

L. Weekly S665 (Fla. Nov. 18, 2010); *Simmons v. State,* 934 So. 2d 1100, 1111 n.12 (Fla. 2006); *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997)("failure to fully brief and argue these points constitutes a waiver of these claims"); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). In any event, as the trial court found, there is no "error" to "cumulate" and, therefore, no basis for relief:

> The Defendant's final claim, raised under both Claim XV and Claim XVI is that cumulatively, the combination of procedural and substantive errors deprived the Defendant of a fair trial. The Defendant claims that each of the errors alleged in his Motion for Post-Conviction Relief considered together, entitle him to relief. As this Court has found that the defense attorneys did not render ineffective assistance of counsel as to all of the Defendant's claims, the Defendant's cumulative claim fails.

(V7, R1216). That ruling is correct, and should be affirmed in all respects. *Schoenwetter v. State/McNeil*, 46 So. 3d 535, 562 (Fla. 2010).

CONCLUSION

Hoskins conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Carol Contreras Rodriguez, Assistant CCRC- Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 on this _____ day of January, 2011.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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