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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-219

JOHN STEVEN HUGGINS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND FACTS

Mr. Huggins stands on the statement of the case and facts in the Initial Brief and the additional facts in the argument and this Reply. Mr. Huggins further relies on the record on appeal as the ultimate authority, as to any omissions, misstatements, or nuances contrary to the record in either the appellant's or the appellee's briefs. Failure to dispute any omission, misstatement or nuance in the State's Answer in no way is intended as a waiver of the facts embodied in the record.

ARGUMENT

ISSUE 1

MR. HUGGINS WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN HE WAS FORCED TO PROCEED WITH THE 2009 COMPETENCY HEARING. THIS DEPRIVED MR. HUGGINS OF RIGHTS PROTECTED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUIVALENT FLORIDA PROVISIONS THEN AND AT ALL SUBSEQUENT PROCEEDINGS.

Although the State purports to address Issues 1 and 2 in a single argument, the State ignores Issue 1 and addresses only the competency claims in Issue II.

Issue I addresses the miscarriage of justice resulting from the trial court's finding that Mr. Huggins was competent based on facially insufficient facts. The sole witness at the competency hearing was Dr. Kopetskie, a state psychologist who could not recall how many times or hours he actually spent with Mr. Huggins discussing his case in the few weeks he actually evaluated Mr. Huggins (less than a month).

The doctor was forced to admit that additional interviews he claimed supported competency, the allegedly daily meetings with a "Recovery Team," were limited solely to day-to-day living issues – competency issues were not addressed. ROA 22/37-38.

The personality test Dr. Kopetskie administered was not diagnostic for malingering. The gold standard test (SIRS) for malingering was withheld because administrators told the doctor to withhold it.

There was no basis in the record to find Mr. Huggins competent. A few meetings of limited discussion of the case and a test not designed to measure malingering were all Dr. Kopetskie had. The withholding of the SIRS test proved the inadequacy of the evidence of competence, since the results of the SIRS test when it was finally administered proved Mr. Huggins had not been malingering. Dr. Kopetskie, asked what test he would have given if he had not been told to withhold further testing, was adamant that SIRS test was definitive: “That's the one that I would far and away -- far and above all the others that I would be interested in.” *Id*. at 66.

Dr. Kopetskie conceded that if Mr. Huggins were not malingering, then Mr. Huggins was not competent to proceed. ROA 22/39-40. Mr. Huggins was not malingering.

At a hearing after the evidentiary proceeding, Dr. Kopetskie refused to opine whether Mr. Huggins had been competent for the evidentiary hearing. Almost a year had elapsed between the time he determined competency and the evidentiary hearing, and, of course, he had been advised of the results of the SIRS testing, “far

and above all the others that I would be interested in," undermining his original opinion.

The State's silence on this Issue is compelling.

ISSUE 2

THE TRIAL FAILED TO CONDUCT A COMPETENCY HEARING BEFORE THE EVIDENTIARY HEARING, DEPRIVING MR. HUGGINS OF HIS RIGHTS PROTECTED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA EQUIVALENTS.

The State refers repeatedly to the fact that Mr. Huggins was found competent to proceed "following lengthy evaluations and extensive testimony" Answer Brief at 46. The State's statement of the facts devotes 17 pages to the proceedings in which Mr. Huggins was repeatedly found to be incompetent, and only five to the single proceeding leading to a finding of competency.

The State claims "Huggins' claim of incompetency fails because … the testimony from the treating **physicians** after long-term **treatment** establishes that fact … " Answer at 53. No physician or psychologist ever **treated** Mr. Huggins. The only **physician** charged with treating Mr. Huggins who testified, Dr. Thornton, admitted he did not and could not treat Mr. Huggins. Dr. Kopetskie, a psychologist, not a physician, only evaluated Mr. Huggins – he never rendered treatment.

The State claims the postconviction court found Mr. Huggins competent in its order denying the postconviction motion. Answer Brief at 21-22. This is wrong. In no way did the court resolve the pending competency issue. The court only noted the procedural history of the competency proceedings, ROA 5/915-17. The

court never held a hearing or ruled after it found postconviction counsel's June 2010 competency motion sufficient and ordered renewed evaluations by the surviving court panel. The final order recognizes that there had been no competency determination by the time of the evidentiary hearing:

> In an abundance of caution, the Court ordered the additional evaluations and concluded **it would be necessary to make a new ruling on Mr. Huggins' competency before allowing him to make decisions such as firing his attorneys or withdrawing the pending Rule 3.851 motion.** If Mr. Huggins had agreed to be evaluated by the doctors, the issue might have been resolved prior to the evidentiary hearing, but his own actions thwarted such an outcome.

ROA 5/917 (emphasis added). Cooperation with the experts before the hearing is a red herring, hollow and disingenuous – the deadline for the expert reports was two weeks **after** the evidentiary hearing. ROA 4/760. The court had no intention of resolving Mr. Huggins' competency prior to the hearing.[1]

The State argues at some length about the failure to administer psychotropic drugs to restore Mr. Huggins to competence. Answer at 49-50. Medication was necessary – Dr. Danziger and Dr. Villalba would have prescribed, the psychologists would have advised a prescribing physician. The fact that medication was deemed necessary confirms the experts' diagnoses of severe mental illness and incompetence. The fact is, a single psychologist with limited experience with Mr.

[1] This is further borne out by the fact that Fla. R. Crim. P. 3.851(g)(10) requires the court to schedule a competency hearing within 30 days **after** the experts complete their exams.

Huggins, knowingly relying on insufficient testing, denied Mr. Huggins necessary treatment, or any treatment at all.

The State suggests if treating physicians had prescribed appropriate drugs to restore competency, the defense would be in this Court arguing that fact. However, Mr. Huggins was never offered medication. There is no indication that he would have refused medication if it had been offered, or that the therapy would have been successful.

The State disputes Mr. Huggins' claim that the court denied him "his own" competency expert. Answer at 50 n. 32. Mr. Huggins' argument is that the court refused to appoint a new expert to replace the sole defense-recommended expert on the court panel. Recommendations from a court panel bear some modicum of neutrality and presumably greater weight, while a defense-retained expert is by definition partisan.

> [T]he doctor was appointed by the trial court to act as a neutral expert and report to and advise the court. *See Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970) ("Experts appointed by the Court to ascertain mental capacity are neither prosecution nor defense witnesses, but neutral experts working for the Court …

Miami-Dade County v. Jones, 793 So. 2d 902, 905 (Fla. 2001) (addressing fee obligation for court competency expert appointed pursuant to Rule 3.851).

The State relies on Mr. Huggins' behavior and statements to the court at the evidentiary hearing purporting to show he was competent: "Those exchanges show

Huggins to be alert, articulate, and focused in his statements." Answer at 50. Alert, articulate, focused public speaking has never been a guarantee of sanity or competence. Mr. Huggins was alert, articulate and focused in his attempts to present the delusional claims he has always urged on defense counsel and the court at every opportunity.

In the Initial Brief, counsel enumerated occasions during the evidentiary hearing when he advised the court of the delusional claims Mr. Huggins was communicating to counsel. Initial Brief at 10, 12-13 (three separate proffers of Huggins' delusional demands). The Initial Brief also addresses the court's error when it denied a proffer of the delusional nature of counsel's communications with Mr. Huggins. Initial Brief at 53-54.

The State argues that Mr. Huggins has no right to be tried *in absentia*. Answer at 52.[2] The other side of the coin is that the State and the postconviction court both take the position that Mr. Huggins' input was unnecessary for any of the postconviction claims. Given that the purpose of the rule requiring a hearing on claims requiring no input is to allow proceedings while the defendant is

[2] This is a change from the State's last stance on the matter, when it argued to the court in the July 30, 2010, hearing that the defendant did not have to be present for the evidentiary hearing in this case. ROA 35/37.

incompetent and therefore not present, Mr. Huggins' presence was not required. He had a right to resist appearing at such a hearing.

The postconviction court's position was that Mr. Huggins was competent for certain purposes. If that were so, then Mr. Huggins was competent to waive his presence for a hearing where his input was not required. This turns logic on its head – a hearing on issues not requiring his input was required only because Mr. Huggins was incompetent, so he was incompetent to waive. But his waiver should not have been required, as an incompetent defendant is incapable of being "present" and therefore a waiver of nonexistent "presence" is a nullity.

But Mr. Huggins was competent only when the court wanted him to be – when the court wanted to proceed. When Mr. Huggins attempted to fire counsel or to proceed pro se, the court found Mr. Huggins was not competent to seek those remedies.

The bottom line is that Mr. Huggins was both competent and incompetent, depending on the end sought by the postconviction court. He was deprived of the rights of a competent defendant when the court refused to entertain the *Nelson* and *Faretta* motions or honor his wish to waive his attendance at the hearing. He was deprived of the rights of an incompetent defendant when the court compelled a hearing on all claims. He was deprived of the rights of an incompetent defendant

when the court compelled a hearing on claims that required the input of a competent defendant.

ISSUE 3

MR. HUGGINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND PENALTY PHASE OF THE TRIAL WHICH VIOLATED MR. HUGGINS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State argues that many of the claims of ineffective assistance were insufficiently briefed to this Court.[3] These claims were sufficiently briefed in the original Initial Brief filed with this Court, which was struck. The State also references claims "abandoned on appeal." Answer at 55 n. 34. To the extent that the State may later claim some element or claim was abandoned in the drastic editing required to meet the Court's page limit, Mr. Huggins asserts that is not

[3] "A] substantial number of the claims contained in Huggins' brief are insufficiently briefed, and do not supply a basis for relief for that additional separate and independently adequate reason." Answer Brief at 46. Failure to challenge the motive of Angel Huggins to frame Mr. Huggins. Answer at 64-65. Failure to call Jonathan Huggins to establish the vehicle Mr. Huggins drove was not the victim's and that Angel Huggins pressured her son to falsely implicate Mr. Huggins. Answer at 66. Failure to call Robin Mansfield to testify to Angel Huggins' inculpatory statements and Angel Huggins' motive to frame Mr. Huggins. Answer at 66-67. Failure to impeach Smithson with evidence that road dividers prevented him from being at a location where he could observe Mr. Huggins allegedly driving the victim's vehicle. Answer at 67. Failure to limit the medical examiner's testimony to exclude evidence. Answer at 70. Failure to establish Angel Huggins' motive to collect reward money. Answer at 71. Failure to oppose introduction of the jewelry found by Angel Huggins and her mother. Answer at 72.

abandoning or waiving any claim or element which was raised in the original Initial Brief which was omitted in the shortened brief.

Denial of relief without consideration of the full arguments available to Mr. Huggins (on all issues, not just the ones the State claims are insufficient) deprives him of his federally protected rights including access to the courts, due process, a fair trial, counsel, and equal protection (based on over length brief waivers granted to other similarly situated capital defendants).

Smithson

The State claims insufficient briefing as to failure to impeach Mr. Smithson, Answer at 71. Mr. Smithson was the Johnny-come-lately witness who showed up only after the first trial was thrown out because of prosecutorial misconduct. Smithson claimed to have seen Mr. Huggins driving the victim's SUV near the time and place where she was believed to have been killed. His testimony placed him on the highway preparing to turn left at a point where aerial photos of the scene showed a guardrail (removed by the time of the second trial) rendering Smitshon's testimony impossible. Smithson is the witness whose credibility was so shaky that prosecutor Ashton claimed that the impeachment of another witness, Charlotte Green, rendered her value to the jury only as contrast to bolster Smithson's credibility. The facts and argument were included in the original Initial Brief.

Ineffective Assistance - Penalty Phase

The State argues that the record fails to show "anything less than a full investigation of mitigation" by trial counsel in the first and second trials. To the contrary, the record at the evidentiary hearing established substantial mitigation which was never presented to the jury, the court, or Mr. Huggins. The evidence was summarized in the Initial Brief at 14 (Dr. Carpenter – extreme mental or emotional distress at time of offense, history of severe mental illness, brain damage, mood swings, suicide attempts, delusions, paranoia, bipolar, psychotic thinking), 20-21 (Vitier – Huggins expressed paranoid delusional beliefs such as a conspiracy by Disney and the victim's employer to frame him), and 34 to 36 (Dr. Berland – psychosis, paranoid delusions including conspiracy to prosecute him, biologically-based mental health problems since at least 1992, both mental health mitigators applied).

Arguing that the record fails to show that the mitigation investigation was constitutionally inadequate ignores the mental health evidence at the evidentiary hearing. If the argument is that the defense attorneys did enough, the quantity and quality of mitigation developed by the postconviction experts using readily available information belies the adequacy of preparation. Dr. Berland opined that any mental health evaluator aware that Mr. Huggins was talking about a conspiracy against him during preparation for the trial, the Baker Act report, the antisocial

personality disorder diagnosis, and a history of the two suicide attempts, would need to look beyond the old MMPI results from the 1990's (showing antisocial personality disorder) to investigate further for mental health issues, the issues discovered in postconviction. ROA 33/486-88.

Also, the defense was barred from further establishing the insufficiency through the testimony of Attorney Tyrone King because the court allowed Mr. Huggins to refuse to waive the attorney client privilege.[4] Mr. King, not Wesley, had been responsible for developing the mitigation case for the first trial.

The State argues that the silent record favors Mr. Huggins because the State could not examine Mr. King (presumably to prove adequate investigation or tactical decision). Answer at 74-75. The State omits the fact that the record is silent because of the exercise of the privilege and the consequences that would have on the silences (such as the final order's determination that there was no evidence if ineffective penalty counsel).

Defense counsel Wesley advised the court that he had planned to use the penalty phase of the first trial "as a template" and had contacted the witnesses from the first trial and that he had advised Mr. Huggins of this fact. . ROA2002

[4] The fact that the court would have allowed examination only if Mr. Huggins waived the privilege is but another example of the fact that Mr. Huggins' input was necessary and the claim should not have been addressed in a hearing conducted pursuant to Fla. R. Crim. P. 3.851(g)(1).

26/1787-88. As such, whether "the template" was adequate, i.e. whether the original penalty phase investigation and presentation was constitutionally sufficient to adequately inform Mr. Huggins of what he was waiving at the second trial, was a key issue in the postconviction hearing. Allowing the incompetent Mr. Huggins to exercise a privilege to exclude the critical witness as to that "template" deprived Mr. Huggins of his state and federal rights.

The State argues that the any challenge to the adequacy of the *Faretta* waiver should have been raised on direct appeal. Answer at 76. Obviously, the record of substantial and readily available mitigation developed during postconviction investigation was unavailable to appellate counsel on direct appeal, and could not have been raised even if known as it was outside the record on appeal.

ISSUE 4

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY KNOWINGLY ARGUING FALSE FACTS TO THE JURY IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND CONTRARY TO THE MANDATES OF *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972). PROSECUTOR ASHTON'S CLAIM OF WORK- PRODUCT PRIVILEGE DENIED MR. HUGGINS' RIGHT TO CALL WITNESSES PROTECTED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State relies on the verbatim ruling on this issue from the order denying relief. Answer at 77-78. However, the first sentence is omitted. The full opening paragraph of the order on this claim is as follows:

> **Claim II: Mr. Huggins alleged the State committed prosecutorial misconduct by knowingly arguing false facts to the jury, contrary to *Giglio v. United States*, 405 U.S. 150 (1972).** The prosecutor argued Charlotte Green "had absolutely no way of knowing hat the car had been painted black other than by seeing it." He argued the State had expressly caused the information about the "unprofessional paint job" to be broadcast in the hope of finding a witness who had seen a white Ford Explorer with black paint.

ROA 5/944 (emphasis added). The omitted first sentence of the court's ruling makes it relatively clear that when the court wrote that "He argued the State had expressly caused the information" about the black paint job seeking tips to be publicized, the court was not ruling that Mr. Ashton argued this to the jury in the

closing(which arguably might cure the prejudice of the falsehood). The court was stating the defense argument on the postconviction claim.

Mr. Huggins didn't just argue that the State publicized the paint fact, Mr. Huggins proved it. The lead detective testified he and others publicized the paint job early in the case to get leads. ROA 32/319-22.The prosecution knew about the publicity directly because of the stack of extensive publicity in the court file from the first trial (which was not transmitted to this Court in either direct appeal – not relevant to the new trial order in the first appeal, not a part of the *de facto* record on appeal prepared according to Florida Rule of Appellate Procedure 9.200(a)(1) as trial counsel directed the clerk, ROA2002 13/1201). He argued the publicity in closing at the first trial.

The State highlights the court's effort to save the claim at the point where the court wrote that "Ms. Green acknowledged that she heard about the case in the media, but she was adamant that she personally saw a white Ford Explorer that had been partially spray-painted black." Answer at 77, ROA 5/944. This does not refute the claim, it proves it. The court made an express finding of fact that Ms. Green had seen the news reports about the SUV, establishing that there was a way for Green and the other witnesses to have known about the black paint without actually seeing the SUV – the media reports Green admitted she saw.

The further ruling that Ms. Green remained adamant that she saw the truck with black paint begs the issue. The claim of prosecutorial misconduct is not that Ms. Green didn't see the SUV. The claim is that Ms. Green (and the other witnesses) could have known about the paint through the media, that Mr. Ashton and the State knew this fact by the testimony of the lead detective and the publicity in the court file and his argument about the extensive publicity in the first trial closing, and that the falsehood was material.

Here is the full text of Ashton's trial argument about the paint:

> Charlotte Green has a lot of other issues. Charlotte Green doesn't come off as a real credible witness. She seems to be a little odd, would be my way of putting it. And **were it not for one fact, I would submit to you, that she might not have much credibility at all. But there is one indisputable fact she knew that she couldn't have known any other way.** And that's the black spray paint on the car. Charlotte Green said first time she saw this car, it had black spray paint on it. Noticeably bad spray painting job. Charlotte Green does not know anyone else involved in this case from the evidence you have heard. **She had absolutely no way of knowing that that car had black spray paint on it, other than by seeing it.**

ROA2002 27/1618-19 (emphasis added).

> **There is no way that any of these witnesses could have known about that lousy black spray paint job unless they had seen it.**

ROA2002 27/1619-20. The assertions were false, Ashton knew them to be false, and they materially affected the outcome.

Ms. Green's trial and evidentiary hearing testimony was so unreliable that Mr. Ashton threw her under the bus in his closing argument at the evidentiary hearing:

> I would submit to you that Ms. Green's main importance to the jury was how much better it made Mr. Smithson look. Ms. Green was impeached all over the place, but Mr. Smithson was not. So I would submit to you that additional impeachment of Ms. Green would not likely have changed the outcome of this case … .

ROA 34/605-06. By this argument, Mr. Ashton conceded that his closing argument about Green bolstered the credibility of Smithson. Mr. Ashton also conceded that Smithson had credibility problems.

The argument materially affected the outcome because it bolstered eyewitness testimony. The black paint falsehood was directly argued as the sole reason to believe Green: "were it not for one fact, I would submit to you, that she might not have much credibility at all. But there is one indisputable fact she knew that she couldn't have known any other way, And that's the black spray paint." ROA2002 27/1618-19.

The State made knowledge of the black paint the indicator of credibility for all of the eyewitnesses who testified about the black paint – in other words, most or all of the witnesses who associated the SUV with Mr. Huggins, the sole direct link between Mr. Huggins and the victim – a critical material fact, bolstered by the false closing argument.

The State is silent on the other element of the claim, the error in allowing Ashton to claim privilege about his knowledge of the publicity at the time he made the false closing argument.[5] The argument in the Initial Brief establishes the error of the ruling and requires remand to compel the testimony of Mr. Ashton. The State says nothing to the contrary.

[5] Mr. Ashton had no problem with disclosing his thoughts and knowledge in the proceedings on the habeas petition for a new trial based on prosecutorial misconduct for failure to disclose a witness. The only privilege raised in the proceedings was Mr. Huggins' attorney client privilege. ROA2002 V's 2, 4, and 5 *passim*.

ISSUE 6

MR. HUGGINS WAS COMPELLED TO WEAR A LEG BRACE AT TRIAL, DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT. TRIAL COUNSEL'S FAILURE TO OBJECT WAS EFFECTIVE ASSISTANCE. *STRICKLAND*.

The postconviction court indicated that it was well aware of the leg brace at trial, and prosecutor Ashton indicated by a nod of his head that Mr. Huggins wore the brace during the trial:

> THE COURT: We tried Mr. Huggins in the Hillsborough County Courthouse.
> MR. GEMMER: And they used a leg brace in Hillsborough County?
> **THE COURT: Yeah. If memory serves me correctly.**
> **MR. ASHTON: (Nods head.)**
> **THE COURT: He had a leg brace, sort of like a brace that an athlete would have, that was underneath his pants. That as long as you walked normally, you --it was not visible, but if one would try to run, it had a mechanism where it locked up.** He did not have shackles on, not in Hillsborough.

ROA 27/29.

Prosecutor Ashton affirmed that the leg brace included a chrome box at the ankle:

> MR. GEMMER: The only leg brace I'm aware of -- and I've seen a leather device, with a lot of chrome, and a big old chrome box down at the ankle.. . . – the State is nodding that that's the way the leg brace is. I don't know, because Mr. Huggins has not been able to tell me about it.

ROA 27/30.

> THE COURT: It was metal. It fit up on the leg and went all the way up here, and the pants leg covered it. It was not visible.
> MR. GEMMER: Where's the lock box, the key that would release it?
> THE COURT: It didn't have a lock box. It -- it --it would lock up if you tried to -- if -- as long as you walk normally, it did not lock.
> Now that's how it was explained to me. He walked in, he walked out. You could not see it. It was not visible.
> … .
> MR. GEMMER: Well, Your Honor seems to be a witness to it, knowing that it's metal, and that it did not have a lock box.
> THE COURT: All I can do is tell you what they explained to me in open court, with everybody's ears, when they used it. Because one of the things I always do is, uh, make sure if there's some type of restraint involved, in any case, that, one, it is not visible to the jury, and, two, if the defendant is becoming a witness, it does not hamper or become visible to a -- a jury..

ROA 27/30-31.

The judge claimed his knowledge of the description of the leg brace came solely from what he was told. However, the judge had to be relying on his personal observations of the brace because the discussion at trial did not include the details the judge described at the evidentiary hearing. In the 2002 trial, there was discussion of a brace as an alternative to leg shackles at a pretrial hearing before the first retrial attempt in Osceola County, ROA2002 7/248. The judge asks if the bailiffs have “the thing that makes you walk like Chester.” The spring-loaded locking pin was mentioned by the defense. There was mention that Mr. Huggins was wearing a brace with no further description during voir dire in Osceola.

ROA2002 16/23. Defense counsel was concerned that the jury might see the brace because Mr. Huggins was wearing the brace and sneakers.

At the trial in Tampa, only the unnatural gait was mentioned in discussion of Mr. Huggins' request to remove the brace for the upcoming penalty phase. The court kept the brace on but required the State and Mr. Huggins to work from the podium. ROA2002 27/1771-72. When Mr. Huggins renewed the motion to remove the brace, the State described it as not visible to the jury. Mr. Huggins said the brace popped and cracked when he got up, sat down, or walked, and he walked stiff-legged. ROA2002 28/1803-06. The trial judge denied the motion, ruling that the jurors "can't see it. I haven't heard it clicking." ROA 2002 28/1806.

Based on the information from others about the brace used in Tampa, the judge's knowledge was limited to the facts that the brace produced an awkward gait, popped and cracked, and that it purportedly could not be seen by the jury. At the postconviction hearing, he described the brace as metal, similar to an athlete's that went "all the way up here", not visible, allowing a natural gait when walking normally, and that it did not have the large chrome lockbox at the ankle (contrary to Mr. Ashton's nodding agreement with the defense when describing the large chrome lockbox typical on courtroom restraint braces).

It is simply bad faith for the court to deny relief on this claim on the ground that "Mr. Huggins did not present any evidence or testimony to support the claim

… Therefore, the Court finds that he has failed to meet his burden of proof." ROA 5/945-46.

How could prosecutor Ashton know that the leg brace was secured by a shiny lockbox at the ankle unless he personally observed it, a fact he affirmed by assent at the evidentiary hearing? The trial judge never said in the order denying postconviction relief that he did not observe the leg brace during the guilt phase, no doubt in part because he was caught describing the brace in some detail.

It is undisputed that Mr. Huggins wore the brace during the penalty phase and raised the issue during guilt deliberations, when he was already wearing the brace. Defense counsel was present during the deliberations, and was present behind the bar during the penalty phase as ordered by the trial judge, ROA2002 27/1737 and as affirmed by Mr. Wesley, 27/1773. If defense counsel failed to notice the leg brace during the penalty phase, then his failure to recall the brace during the guilt phase in no way establishes that Mr. Huggins was not wearing a brace in the guilt phase.

CONCLUSION

Based on the arguments and citations herein, Mr. Huggins respectfully urges this Court to grant the relief requested in the Initial Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Ken Nunnelley at capapp@myfloridalegal.com on April 18, 2013.

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CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

_____

/s/ David R. Gemmer
Counsel for Appellant