IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 96-CF-1362B**

KEVIN DON FOSTER,
Defendant.
_____/

FINAL ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's "Motion to Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend," filed on September 27, 2001, and "Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend," filed May 27, 2010. The State filed a response to the amended motion on July 21, 2010. An evidentiary hearing was held on April 26-29, 2011. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Foster v. State, 778 So.2d 906 (Fla. 2000).

> The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young, and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.
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> On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried

a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.

The execution of the vandalism was interrupted at around 9:30 p.m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have dinner with a friend, David Adkins. [*1]

*1: Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun for the killing, and replaced the standard birdshot with #1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p.m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of Schwebes' neighbors heard the shots and a car as it left the scene. [*2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner

confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

*2: The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shield's car had a bad muffler. One testified to seeing a car drive away.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a "group hug" as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this "red cloud" flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster ("Ms. Foster"), testified on direct examination that Foster called her from home at about 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p.m., but found Foster home when she returned a little past 11 p.m. She made another trip to the Circle K store and returned at about 11:20 p.m. once again to find Foster where she had left him. On cross-examination, however, Ms. Foster admitted that she merely assumed Foster was at home when he called her. Additionally, all of the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.

All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements [*3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.

Foster, 778 So.2d at 909-912 (some footnotes omitted).

2. A jury convicted Defendant of first-degree murder and recommended a sentence of death by a vote of nine to three. The Court followed the recommendation, and sentenced Defendant to death. The Court found two aggravating factors, and found that the mitigating factors did not outweigh the aggravating factors. His convictions and sentences were affirmed on direct appeal by the Florida Supreme Court. *See* Foster v. State, 778 So.2d 906 (Fla. 2000). The Defendant did not file a petition for writ of certiorari with the United States Supreme Court.

3. Defendant raised eleven (11) claims in his motion for postconviction relief. On October 22, 2010, a hearing was held in accordance with Huff v. State, 622 So.2d 982 (Fla. 1993). In the order setting evidentiary hearing, this Court denied all grounds except Claims III(a) and (b). That order is hereby incorporated by reference. The evidentiary hearing was held on April 26-29, 2011. Defendant was present and represented by counsel at the evidentiary hearing. At the conclusion of the evidentiary hearing, the parties were directed to submit written closing arguments to the Court. Defendant's written closing arguments were filed on June 28, 2011. The State's written closing arguments were filed on June 29, 2011.

4. According to Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. Furthermore, with "regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 669.

5. **As to Claim III(a)**, Defendant argues counsel was ineffective during the penalty phase for failure to investigate and prepare mitigating evidence. Defendant argues counsel failed to obtain mental health records, which would have provided "significant mitigation leads." Defendant believes counsel abdicated his responsibility to prepare mitigation evidence to Defendant's mother. Defendant further argues counsel failed to have Defendant evaluated by a neuropsychologist, failed to present evidence of depression and organic brain damage, failed to present evidence of Defendant's emotional maturity, and failed to present evidence of nonstatutory mitigation.

Abdication Of Responsibility To Prepare Mitigation Evidence

6. Roberta Harsh, who was an investigator with the Public Defender's office, testified that trial counsel, Robert Jacobs, was the driving force on this case (Evidentiary hearing transcript p. 20). She stated that the paralegal, James Wootton, showed her the photographs selected for a slideshow prepared for the penalty phase, and she did not notice anything that Mr. Wootton did that was very relevant to the penalty phase (Evidentiary hearing transcript pp. 21-22; 28). Ms. Harsh said that the Public Defender's office "pulled out all the stops" with this case, and she could not think of anything else they could have done (Evidentiary hearing transcript p. 28). Mr. Rinard, co-counsel for Defendant, testified that Mr. Jacobs took primary responsibility for both phases of the trial (Evidentiary hearing transcript p. 172). He stated that no mitigation specialists were retained, and did not believe there were such specialists at that time (Evidentiary hearing transcript p. 172). Mr. Rinard testified that school records were obtained (Evidentiary hearing transcript p. 183). The defense did the best to humanize Defendant to the jury, "based on the information we had" and thought it was important to get positive

information about Defendant "in front of the jury as opposed to the infamous picture of him holding the submachine gun with a grin on his face" (Evidentiary hearing transcript pp. 185-186). While he did not recall specific mitigation evidence, he was sure that he and Mr. Jacobs discussed Defendant's age and maturity, progress in school, and work history (Evidentiary hearing transcript p. 187). Mr. Rinard testified that Mrs. Foster provided alibi information, information on the co-defendants and their families, and witnesses for mitigation (Evidentiary hearing transcript p. 192). Mr. Rinard recalled that Defendant, not his mother, made all decisions about his case (Evidentiary hearing transcript p. 206). Regarding the decision to go with humanizing Defendant, rather than other mitigation strategies, Mr. Rinard said "we went with what we had" (Evidentiary hearing transcript p. 207). He recalled that Mrs. Foster did not want to engage in any discussion that showed a weakness or deficit in Defendant (Evidentiary hearing transcript p. 207). Kelly Foster, Defendant's sister, indicated she did not have much contact with Mr. Jacobs or Mr. Rinard (Evidentiary hearing transcript p. 150). She was in Mr. Jacobs' office every week dropping off papers her mother drafted detailing what Mrs. Foster believed were inconsistencies in the case (Evidentiary hearing transcript pp. 150-151). She assumed that Mr. Jacobs made the decision for what mitigation to present (Evidentiary hearing transcript p. 157).

7. Mr. Wootton testified that part of his job was to operate a new software program, and that Defendant's case was the first to be used with that software, in which every document received in the case was scanned into the program (Evidentiary hearing transcript pp. 40-41; 44). He indicated that Defendant's mother, Ruby Foster, was present for approximately half of the team meetings (Evidentiary hearing transcript p. 50). Ruby Foster voiced her opinion, and she was listened to, Mr. Wootton testified, but she did not accept reality, and thought that Defendant

could not have committed the murder and had been framed by his friends (Evidentiary hearing transcript p. 52). Ruby Foster supplied contact information for character witnesses, and sometimes gave them proposed questions for trial witnesses (Evidentiary hearing transcript p. 53). Mr. Wootton stated that there was overwhelming evidence against Defendant, both physical and eyewitness evidence, that they prepared for the penalty phase early on in the case, and that Ruby Foster was upset that they were doing so (Evidentiary hearing transcript pp. 54-55; 57). The defense had Defendant's school and medical records, and there was nothing significantly mitigating in those records (Evidentiary hearing transcript p. 60). Mr. Wootton testified that the opinion of the defense was to portray Defendant as a good kid gone bad, and try to convince the jury not to put him to death (Evidentiary hearing transcript p. 61). To show that Defendant had a good upbringing, they obtained photographs from Ruby Foster to use in a slideshow (Evidentiary hearing transcript p. 63). He testified that Mr. Jacobs put a tremendous amount of work into Defendant's case, and that all decisions on trial strategy were Defendant and Mr. Jacobs' (Evidentiary hearing transcript pp. 81-82). Mr. Wootton said the defense did not depend on Ruby Foster for information, and they had "sharp" investigators "who did a lot of outreach work" (Evidentiary hearing transcript p. 67). He stated that "our office did our job" and represented Defendant "to the best of our ability with what we had to work with" (Evidentiary hearing transcript p. 76). The testimony introduced at the evidentiary hearing shows that Defendant and Mr. Jacobs made the decisions regarding the case, and that Mrs. Foster merely provided contact information for possible penalty phase witnesses, lists of what she believed were inconsistencies in the evidence, or questions she believed should be asked of witnesses. Therefore, Defendant has failed to meet his burden of proof to demonstrate either prong of Strickland, and has not

established that Mr. Jacobs abdicated his responsibility to prepare mitigation evidence.

Depression And Mental Mitigation

8. Mr. Wootton explained that Mr. Jacobs handled mostly murder cases during that time period, and that some of the other cases had mental health issues (Evidentiary hearing transcript p. 80). Mr. Wootton recalled that when Mr. Jacobs asked about mental illness, Ruby Foster "exploded," saying there was nothing wrong with her son (Evidentiary hearing transcript pp. 58-59). Based on the mental health evaluations that had been done, Mr. Wootton testified that the decision was made that no further experts needed to be hired, because there was nothing in the evaluations to support mental health issues or abuse, and that all information from Defendant and his family was that Defendant came from a healthy, wholesome family (Evidentiary hearing transcript pp. 88-89). He stated that the defense received no negative information about the family from the family they contacted, and no other family members ever came forward (Evidentiary hearing transcript p. 90). Mr. Wootton recalled that the defense was never given any information that the gunshot to Defendant's abdomen prior to the offense was intentionally inflicted, and that Defendant told them it was an accident (Evidentiary hearing transcript pp. 94-97). Mr. Wootton reiterated that the defense looked for "anything and everything" that could be used for mitigation, and that he was aware of everything that came in on this case from discovery, investigator notes, or meetings (Evidentiary hearing transcript pp. 99-100).

9. Kelly Foster, Defendant's sister, testified as to the family's background and her mother's four husbands. She testified that her father, Ronald Newberry, had emotional issues from Vietnam (Evidentiary hearing transcript p. 107). She described Defendant's father, Jack Bates as a brutal man, but did not recall him hurting anyone (Evidentiary hearing transcript p.

109). Ms. Foster stated that Brian Burns was physical with her mother and had anger issues, such that he had broken windows and once broke her mother's nose (Evidentiary hearing transcript pp. 113; 115). Finally, she testified that there was turmoil in the house when they lived with John Foster, who adopted Defendant, that Mr. Foster argued with their mother, and that Defendant sometimes intervened in fights between Mr. Foster and their mother (Evidentiary hearing transcript pp. 123-124; 134). Ms. Foster indicated that Defendant acted out as a teen (Evidentiary hearing transcript pp. 137-138). She testified that Defendant was notorious as a child for getting into accidents, and described him as clumsy and hyper, and sometimes depressed (Evidentiary hearing transcript pp. 145; 147). Ms. Foster admitted she never told the defense team that Mr. Burns or Mr. Foster were abusive to her mother (Evidentiary hearing transcript p. 161).

10. Defense experts Dr. Wald and Dr. Masterson were appointed almost immediately upon Defendant's arrest, but Mr. Rinard did not remember if the experts filed reports, or what they reported (Evidentiary hearing transcript pp. 174-175; 180). He recalled a mention of Defendant receiving a concussion, but based on what was presented at trial, Mr. Rinard indicated he would have to say they did not have any information about head injuries or trauma for Defendant (Evidentiary hearing transcript pp. 196-197). He testified that Defendant and Mrs. Foster denied any history of depression, and that Defendant, Mrs. Foster, and Ms. Foster were all adamant that the self inflicted gun shot wound to Defendant's abdomen before the offense was an accident (Evidentiary hearing transcript pp. 198-199).

11. Mr. Rinard testified that the defense experts reviewed Defendant's medical records, though he did not know what records were reviewed (Evidentiary hearing transcript p. 201). He

stated that Mr. Jacobs only handled the large cases, and had worked on previous cases where a mental health issue was presented (Evidentiary hearing transcript p. 205). Mr. Rinard did not observe any mental health issues or depression in Defendant, and described Defendant as one of the least depressed clients he had ever met, based on the amount of time Defendant had spent in jail (Evidentiary hearing transcript p. 208). Mr. Rinard testified that Defendant denied any psychological or mental health issues for himself or his family, and denied any head injuries (Evidentiary hearing transcript pp. 211-212).

12. Defendant also presented testimony by Defendant's aunt, Linda Ahlbritton, his cousin, Candy Green, his grandfather Jack Bates, Ron Newberry, and his father Jack Bates. Ms. Ahlbritton admitted she had no relationship with Mrs. Foster or Defendant after Mrs. Foster's divorce from Ron Newberry (Evidentiary hearing transcript p. 227). While she stated that she believed Defendant's grandfather suffered from paranoia, that his grandmother had dementia, his aunt was paranoid, an uncle "had trouble with alcohol," and another aunt committed suicide, she testified that she never saw Mrs. Foster depressed (Evidentiary hearing transcript pp. 227-230). She had no observations regarding Defendant. Ms. Green testified that she thought their grandmother, grandfather, and an uncle were paranoid, that she believed her father had undiagnosed depression, and that an aunt had committed suicide (Evidentiary hearing transcript pp. 242-243). She never observed any displays of temper from Mr. Burns or Mr. Foster (Evidentiary hearing transcript pp. 244-245). She described Defendant as hyper and wild (Evidentiary hearing transcript pp. 246; 248-249). Ms. Green testified that Defendant was accident prone, and described a fall they took where Defendant may have hit his head (Evidentiary hearing transcript p. 247). She stated that neither she nor Defendant went to the

hospital after the fall (Evidentiary hearing transcript p. 252). Defendant's grandfather Jack Bates, Sr. testified that he had not had contact with Defendant after age 8 or 9 (Evidentiary hearing transcript p. 337). He described Defendant as hyper (Evidentiary hearing transcript p. 337).

13. Ron Newberry testified that Defendant was hyper, but was "just a normal, happy kid" (Evidentiary hearing transcript p. 355). He never noticed Defendant being depressed, but did describe Defendant as clumsy (Evidentiary hearing transcript pp. 355; 360). He indicated that he suffered a nervous breakdown after he returned from Vietnam, and saw a psychologist for six months, but after that, he suffered no effects (Evidentiary hearing transcript pp. 356-357). Mr. Newberry did testify at the penalty phase (Evidentiary hearing transcript pp. 360-361). Defendant's father, Jack Bates, Jr., testified that Defendant was in the hospital briefly after he was born for breathing problems (Evidentiary hearing transcript pp. 438-439). He described Defendant as hyper and active (Evidentiary hearing transcript p. 439). He indicated he saw Defendant every month or so after the divorce (Evidentiary hearing transcript p. 441). He testified that he attended the trial, spoke to Mr. Jacobs about questions he had regarding some of the testimony, and that Mr. Jacobs took his advice (Evidentiary hearing transcript pp. 445-446).

14. While much was made by postconviction counsel regarding Defendant's grandfather's alleged disowning of Mrs. Foster and Defendant following Mrs. Foster's divorce from Ron Newberry, where the grandfather allegedly stated that Defendant should never have been born, there was no testimony that Defendant was in any way affected. The accounts of this one incident indicate that Defendant was very young, and afterwards, there was no contact with the grandfather or little contact with other members of Mrs. Foster's family. The Court finds

counsel was not ineffective for failing to call any of these witnesses, or presenting this testimony. Mrs. Foster and Ms. Foster had ample opportunity to inform the defense about any negative mitigating information, yet provided none. Defendant, Mrs. Foster, and Ms. Foster all soundly declared to trial counsel that the gun shot wound to Defendant's abdomen prior to the murder was an accident. Indeed, all the testimony indicates Defendant was clumsy. While Ms. Foster mentioned that Defendant also jumped from a bridge into the river, this incident was not elaborated upon, and taken in light of Defendant's multiple criminal activities at the time with the Lords of Chaos, could have been merely a teenage stunt, rather than evidence of severe depression as postconviction counsel contends. Mr. Rinard was not asked whether Defendant or his family mentioned this incident to the defense team. None of the family members contacted by the defense team provided any negative information. Trial counsel cannot be found ineffective for failing to present negative mitigating information, when none was provided to him by Defendant, his family, or friends, and where counsel had no reason to believe such negative information existed. Anderson v. State, 18 So.3d 501, 510 (Fla. 2009); Henyard v. State, 883 So.2d 753 (Fla. 2004). In such a circumstance, it was not unreasonable for the defense to rely on an attempt to humanize Defendant to the jury. Even had all the information been elicited during the penalty phase that Defendant argued in his motion and written closing argument should have been elicited, the Court finds that the mitigating evidence that Defendant's friend died of cancer, the gun shot wound, the jump off the bridge, the break up with the girlfriend, and his mother's divorce would not have any reasonable probability of changing the outcome of the trial, as this mitigating evidence would not have outweighed the aggravating factors presented at trial. The record shows that Defendant planned the murder of the victim in retaliation for the group being

prevented from vandalizing the school gym and the group being potentially discovered, that Defendant shot the victim in the head at point blank range with a shotgun, and that the Defendant bragged about it afterwards. The alleged depression and upheaval Defendant now urges the Court to consider as mitigation would not in any way have outweighed those facts, as established at trial and the Florida Supreme Court opinion.

15. The evidentiary hearing testimony likewise reveals no "significant mitigation leads," as Defendant argued in his motion. Rather, the testimony reveals that most of these witnesses were extended family members who had limited contact with Defendant, or no contact with Defendant beyond about age 8. According to the testimony, Defendant was a normal, active child, if hyper and clumsy. The testimony revealed no abuse, no concussions, and only one recall of a possible head injury. Although Ms. Foster testified that their mother may have been struck by, or got into mutual fights with, two of her husbands, there was no testimony regarding abuse to Defendant. Alleged abuse of the mother would not be significantly mitigating for Defendant, in that evidence of this during the penalty phase would not have substantially outweighed the aggravating circumstances. Of the alleged mental health issues attributed to the extended family, there was no testimony of any diagnoses by an expert, but merely the witness' belief that certain members of the family became paranoid or suffered dementia as they got older, which is not an uncommon occurrence. That certain other extended family members had issues with alcohol or depression would also not be significantly mitigating for Defendant, and evidence of such conditions in extended family members, with whom Defendant had no contact, would not have substantially outweighed the aggravating circumstances. Testimony that Defendant was born prematurely or did not have his father as a constant figure in his life would have been cumulative

to the testimony of Mrs. Foster at trial. Foster, 778 So.2d at 911-912; (Penalty phase transcript p. 130). Even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. Darling v. State, 966 So.2d 366 (Fla. 2007). Further, Defendant has failed to demonstrate any prejudice from these witnesses not being called at trial, or the testimony being presented, as none of the testimony presented resulted in any mitigation evidence that would outweigh the aggravating factors.

Allegations Of Impairment Of Defense Team

16. To the extent that Defendant argues that his defense was impaired due to Mr. Jacobs' Parkinson's disease, the paralegal "snoozing" during the penalty phase, or alleged misconduct by co-counsel Mr. Rinard on unrelated cases, these claims fail. The allegations regarding Mr. Rinard were ruled irrelevant by the Court (Evidentiary hearing transcript pp. 203-204). As it relates to the allegation in Defendant's motion that Mr. Wootton slept during trial, Mr. Wootton stated that he did not (Evidentiary hearing transcript p. 74). Ms. Harsh testified that Mr. Jacobs had tremors for years, which were noticeable to her (Evidentiary hearing transcript p. 26). Mr. Wootton testified that he worked with Mr. Jacbos every day and knew he had the disease, but never saw tremors, and that "Mr. Jacobs was not effected by that disease in any fashion or form that would have hindered his ability to defend Kevin" (Evidentiary hearing transcript pp. 74-76). Mr. Rinard testified that, aside from being tired at the end of the day like they all were, he never saw Mr. Jacobs trembling or confused (Evidentiary hearing transcript p. 201). Jack Bates, Jr. testified that he believed Mr. Jacobs was frustrated or confused during trial (Evidentiary hearing transcript p. 447). Both Mr. Wootton and Mr. Rinard were sitting at the defense table with Mr. Jacobs during the trial, and the Court finds their testimony that Mr. Jacobs was not trembling or confused to be

more credible than those of other witnesses who were not in close proximity to Mr. Jacobs during the trial, or who have a motive for bias against Mr. Jacobs and in favor of Defendant's motion. The Court finds that Defendant has failed to meet his burden of proof that the defense team was in any way impaired during the trial.

17. On June 28, 2011, Defendant filed a motion to reopen the evidentiary hearing or supplement the record with a letter from Mr. Wootton to Mrs. Foster, received by postconviction counsel after the evidentiary hearing, and a comparison letter from Mr. Wootton to counsel. Copies of the letters are attached. By order rendered July 5, 2011, the record was supplemented to include the letters. The letter to Mrs. Foster appears to indicate they did have a personal relationship, contradicting Mr. Wootton's testimony at the evidentiary hearing. However, the Court does not find that the contradicted testimony regarding the relationship, has any reasonable probability of changing the outcome. That Mr. Wootton did have a relationship with Mrs. Foster does not change the substance of the rest of his testimony regarding Defendant's case. In one portion of the letter, Mr. Wootton tells Mrs. Foster that 'Counsel f***d up.' From the context of the letter, it is unclear whether Mr. Wootton refers to Defendant's case, or Mrs. Foster's case, as Mr. Wootton then goes on to discuss her arrest, plea bargain, and incarceration.[1] Even if Mr. Wootton did refer to Defendant's trial counsel, the Court finds this statement less than credible. The letters reveal that Mr. Wootton, incarcerated in prison and isolated from female company, was somewhat overly affectionate in his writings to both Mrs. Foster and postconviction counsel. It is not inconceivable that Mr. Wootton would tell Mrs. Foster what he thought she wanted to

[1] Ruby Foster was convicted of conspiracy to commit murder in Lee Case No. 00-CF-2609A, after she and Defendant attempted to solicit James Greenhill in a plot to murder three witnesses who had testified against Defendant. Mr. Greenhill was a former reporter for the News-Press, and was writing a true crime book about Defendant's case. The Court presumes the statement in the letter that Mr. Wootton did not know "why you ever trusted (if you did) that clown" and that "we know how the press convicts those it goes after" refer to Mr. Greenhill

hear. The Court finds Mr. Wootton's testimony, under oath, at the evidentiary hearing, where the Court was able to observe him and assess his demeanor, to be more credible than the letters.

Failure To Call Neuropsychologist

18. As it relates to Defendant's arguments regarding counsel's failure to call a neuropsychologist, Defendant called four experts to testify at the evidentiary hearing. Dr. Bordini testified that he evaluated Defendant in 2006 (Evidentiary hearing transcript p. 257). He reviewed records, conducted a clinical interview with Defendant, and performed a battery of neuropsychological tests (Evidentiary hearing transcript pp. 260-261; 263; 268-270). Dr. Bordini found it significant that Defendant had lost oxygen at birth, believing this put Defendant at high risk for neurological issues (Evidentiary hearing transcript pp. 264-265).[2] He testified that the tests revealed "soft" neurological signs of issues, and that there was a significant discrepancy between Defendant's verbal and nonverbal scores on the IQ test which could impact behavior (Evidentiary hearing transcript pp. 271; 278). However, he stated that Defendant's high verbal IQ score of 137 put him in the gifted range, and that his lower nonverbal score of 105 was average (Evidentiary hearing transcript pp. 278-279). Dr. Bordini diagnosed Defendant as having difficulties with executive function, and stated Defendant had depression, a nonverbal learning disorder, and possibly had bipolar disorder (Evidentiary hearing transcript pp. 290-291).

19. Regarding the gunshot wound to the abdomen, Dr. Bordini testified that Defendant told him it was an accident, and he did not have any emotional problems when discussing it (Evidentiary hearing transcript p. 301). He stated that none of the possible head injuries

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and the conspiracy case.

[2] To the extent that postconviction counsel repeatedly argues in her written closing argument that Defendant "nearly died" at birth and trial counsel ignored this evidence, the hospital records do not support this argument. Rather, the records show that, while Defendant was ill for a day or two due to respiratory distress syndrome, he recovered quickly, was deemed healthy enough to have a circumcision surgery, and was discharged six days after his birth.

reported would fall into the range of severe head injuries (Evidentiary hearing transcript p. 293). Dr. Bordini believed that those possible head injuries could have exacerbated any existing difficulties (Evidentiary hearing transcript pp. 293-294). This portion of the testimony is pure speculation. He opined that Defendant was very invested in appearing superior to others, downplayed any issues he was having, had low self awareness, was grandiose, and did not pick up on social cues (Evidentiary hearing transcript pp. 282-283). Dr. Bordini testified that Defendant tended to minimize his difficulties and that "he's not giving it to me" (Evidentiary hearing transcript pp. 291-292). If Defendant did not share information that might be mitigating with Dr. Bordini ten years after trial, and did not share such information with defense counsel before trial, counsel cannot be ineffective for not following up on mental health mitigation that was not disclosed. On cross-examination, Dr. Bordini testified that he could not diagnose Defendant with depression before his arrest, and that any depression existed subsequent to Defendant's arrest (Evidentiary hearing transcript pp. 316-317). The Court finds that Dr. Bordini's "soft" findings of possible neurological issues is speculative. Given that Defendant possesses a gifted verbal IQ and an average nonberbal IQ, even after 15 years of incarceration, the Court finds the contention that Defendant has organic brain damage to be not credible.

20. Defendant then called Dr. Sultan. Dr. Sultan testified that she has seen Defendant about ten times between 2002 and the present (Evidentiary hearing transcript p. 371). She is a psychologist, and was retained to evaluate Defendant for any mental defects that may have existed at trial, and for mitigation evidence (Evidentiary hearing transcript p. 370). Dr. Sultan stated that Defendant was immature, that he was obviously psychologically disturbed, that Defendant was initially hostile and reluctant to share any negative information, and that he spoke

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Copies of relevant portions of the birth records are attached.

only about how wonderful his family and mother were (Evidentiary hearing transcript pp. 371-372). She believed that over time in prison, Defendant "matured" and was able to reveal more (Evidentiary hearing transcript p. 372). Dr. Sultan reviewed records, and believed that while she thought Defendant was born with deficiencies, the oxygen he received at birth also caused deficiencies (Evidentiary hearing transcript pp. 380-381). She testified regarding the gunshot wound to the abdomen that Defendant repeatedly stated the gun discharged accidentally, and that he had not intended to harm himself (Evidentiary hearing transcript pp. 381-382).

21. Dr. Sultan also interviewed members of Defendant's family (Evidentiary hearing transcript p. 386). The Court finds the testimony of Dr. Sultan regarding her interviews with the family to be cumulative to the testimony provided by the various family members during the evidentiary hearing. Further, Defendant and his family adamantly denied any negative mitigation evidence at the time of trial. That Defendant and his family have, 15 years later, after repeated questioning by psychologists and psychiatrists retained by the defense, changed their stories, does not alter the fact that it was not unreasonable for trial counsel to have relied on the information provided by Defendant and his family at that time. Dr. Sultan diagnosed Defendant with bipolar 1 disorder (Evidentiary hearing transcript p. 405). She testified that she found the statutory mitigators that Defendant was under the influence of mental illness, and "possibly" organic disorder (Evidentiary hearing transcript p. 411). On cross-examination, Dr. Sultan admitted she did not speak to the codefendants or review their testimony, and did not speak to anyone about Defendant other than Defendant's family (Evidentiary hearing transcript pp. 416-417). Thus, the only information Dr. Sultan obtained was information from persons who have a bias in favor of Defendant. While she testified that an 18 year old boy's brain was immature, and would result in

an inability to engage in logical planning (Evidentiary hearing transcript p. 406), this testimony is contradicted by the trial record, which indicates that Defendant planned the murder to the extent of looking up the victim's address in the directory, calling the victim's phone to ensure he had the right address, obtaining masks, changing the license plate, and choosing a firearm from his mother's pawn shop that he believed could not be traced with forensics. The Court finds Dr. Sultan's testimony less than credible.

22. The defense next called Dr. Gur, a neuropsychologist. Dr. Gur testified that he received the results of the 2006 evaluation conducted by Dr. Bordini, and entered those results into an algorithm that creates an image of the brain (Evidentiary hearing transcript pp. 461-462). This algorithm was developed from weights derived by four leading experts in the field that were part of a university group (Evidentiary hearing transcript p. 498). The algorithm was patented by the university, and later sold to a company called Biologic (Evidentiary hearing transcript p. 506). Dr. Gur believed the patent had since expired, such that the algorithm was available to the public (Evidentiary hearing transcript p. 507). The algorithm has not been updated since it was developed (Evidentiary hearing transcript p. 503). Dr. Gur opined that Defendant is highly intelligent, near genius range for his verbal IQ score, and that his performance, or nonverbal, IQ score is average (Evidentiary hearing transcript pp. 489-490). He believed that this discrepancy is a strong indication of brain damage, and showed impaired executive functions (Evidentiary hearing transcript pp. 491; 494). Dr. Gur conceded that none of the testing performed on Defendant examined the subcortical structures, so the image was limited (Evidentiary hearing transcript p. 496).

23. The final defense expert was Dr. Hyde, who was admitted as an expert in neurology

and psychiatry (Evidentiary hearing transcript pp. 650-651). Dr. Hyde testified he was retained by postconviction counsel to evaluate Defendant in 2010 (Evidentiary hearing transcript p. 651). He reviewed documents, and interviewed Defendant and his mother (Evidentiary hearing transcript pp. 651-652). Dr. Hyde testified that Defendant scored perfectly on neurological and cognitive tests (Evidentiary hearing transcript p. 656). However, Defendant had some facial asymmetry, and mirrored movement of his left hand with his right hand, which Dr. Hyde believed were "subtle findings" that "may be" referable to right hemisphere dysfunction (Evidentiary hearing transcript pp. 656-658). He further believed the respiratory distress at birth reflected developmental dysfunction (Evidentiary hearing transcript p. 659). Dr. Hyde believed there was some supporting evidence of depression after Defendant's arrest (Evidentiary hearing transcript pp. 660-661). He did not feel the reported minor head injuries caused any brain damage to Defendant, but was rather a reflection of impulsive behavior or being clumsy (Evidentiary hearing transcript pp. 662-663). Dr. Hyde testified that Defendant met the symptoms of bipolar disorder, and that Defendant's symptoms were not consistent with narcissistic disorder (Evidentiary hearing transcript pp. 667-668). He stated that he had found the statutory mitigating factors of brain dysfunction and psychiatric disease (Evidentiary hearing transcript p. 673).

24. On cross-examination, Dr. Hyde acknowledged that he had evaluated Defendant 12 years after trial, and that Defendant and his mother reported no abuse in the home (Evidentiary hearing transcript pp. 674; 676; 679-680). Dr. Hyde called Dr. Gur's brain imaging method "recent" (Evidentiary hearing transcript p. 683). He testified that respiratory distress at birth was definitely not hypoxia, contrary to Dr. Bordini's testimony (Evidentiary hearing transcript pp.

684-685). Dr. Hyde conceded that he has testified 100% for defense, and is opposed to the death penalty in all cases except genocide (Evidentiary hearing transcript p. 686). The Court finds Dr. Hyde's "subtle findings" speculative at best. Considering Dr. Hyde's stated bias against the death penalty, and given that his bias could potentially have influenced his findings, his testimony in this capital case is less than credible.

25. The State called Dr. Wald, who evaluated Defendant prior to trial, and two experts. Dr. Prockop was admitted as an expert in neurology (Evidentiary hearing transcript pp. 517-518). He testified that he reviewed the abstracts and articles by Dr. Gur, as well as Dr. Gur's deposition, and it was his opinion that the brain image produced by Dr. Gur was inaccurate and invalid (Evidentiary hearing transcript p. 519). He stated that this brain imaging has not held up to scientific scrutiny, that no physicians or experts in the field have used it, and no scientific articles have cited the procedure (Evidentiary hearing transcript p. 519). Dr. Prockop testified that he had searched for any articles citing the brain imaging method, and found none (Evidentiary hearing transcript pp. 522-523). He only found abstracts published by Dr. Gur and his group (Evidentiary hearing transcript p. 523). Dr. Prockop questioned the defense experts' opinions that oxygen at birth could cause brain damage, indicating that the only danger he was aware of was that oxygen at birth could cause eye damage, and that the procedure had been phased out in recent years due to that problem (Evidentiary hearing transcript p. 525). On cross-examination, Dr. Prockop reiterated that the brain image method was inaccurate because the population control of 17 people cited in abstracts by Dr. Gur was too small (Evidentiary hearing transcript pp. 520-521). "The range of normal is very broad, and to assess what is normal, you need a lot of normals" (Evidentiary hearing transcript p. 530). He also testified that the results of

the testing done by Dr. Bordini were considered soft data, the interpretation of which depends on the perspective of the individual (Evidentiary hearing transcript pp. 535-536). Dr. Prockop stated that he attempted to find the full articles for Dr. Gur's abstracts, but that full articles did not exist (Evidentiary hearing transcript p. 538).

26. The State also called Dr. Gamache. Dr. Gamache was admitted as a neuropsychologist (Evidentiary hearing transcript p. 581). Dr. Gamache testified that Dr. Bordini's opinions that some abnormalities were signs of defects is wrong (Evidentiary hearing transcript pp. 583-584). He believed that Dr. Bordini's opinion that respiratory distress at birth caused damage was not supported by the data, since it is relatively common in infants, and the probability of brain damage from this is "next to zero" (Evidentiary hearing transcript pp. 584-587). Further, Dr. Gamache testified there was no evidence for brain damage in Defendant's case, and he was discharged within days (Evidentiary hearing transcript p. 587). He criticized Dr. Bordini's test results, stating that it was "making a huge leap to extrapolate brain damage" from Defendant's score on individual tests, and that Dr. Bordini's "premise that frontal lobe damage" was indicated from the abbreviated card sort test was not supported by the data, and did not correlate to the full version of the test (Evidentiary hearing transcript pp. 592-593). Dr. Gamache testified that a large difference between a person's verbal and nonverbal IQ scores did not equate to any defect (Evidentiary hearing transcript pp. 598-599). Dr. Gamache analogized Defendant's verbal IQ score to an exceptionally fast 100 meter sprint, and his nonverbal IQ score to a bench press that was just above average, wherein "the fact that he is exceptionally fast does not mean that his bench press strength is impaired; in fact, it's above average. It's not indicative of impairment" Evidentiary hearing transcript p 638). He stated that Defendant "is smarter than

the average person by a significant amount" (Evidentiary hearing transcript pp. 598-599). While Dr. Gamache stated that the trail making test has been shown to be specifically sensitive to frontal lobe defects, he criticized Dr. Bordini's belief that Defendant's results in this test showed such damage, since Defendant's scores were either above average or average, and not indicative of any brain damage (Evidentiary hearing transcript pp. 599-601). Dr. Gamache believed that the tests used by Dr. Bordini were older tests, and there are newer tests that focus on frontal lobe abilities that were not administered to Defendant (Evidentiary hearing transcript pp. 601-602). He testified that while the tests used by Dr. Bordini can be useful in making inferences about behavior, there was no evidence in the records that Defendant had any impairment in goals, planning, or switching goals (Evidentiary hearing transcript pp. 604-605). As an example, Dr. Gamache pointed out that Defendant adjusted his goal of vandalizing the gym into a goal of eliminating the victim as a witness to the vandalism, as part of his overall goal of criminal behavior and anarchy, which shows Defendant had no deficits in executive function (Evidentiary hearing transcript pp. 605-606).

27. Dr. Gamach also criticized Dr. Sultan's conclusion that Defendant had bipolar disorder as being only her subjective assessment (Evidentiary hearing transcript pp. 606-608). He pointed out that her assessment appears inaccurate, especially since she thought Defendant's IQ was only average (Evidentiary hearing transcript pp. 606-608). Dr. Gamache testified that he did not find support for bipolar disorder in Defendant's behavioral history, but he did find that Defendant met the criteria for narcissistic disorder (Evidentiary hearing transcript p. 610). Dr. Gamache stated he was familiar with brain map images in quantitative EEG and limited application in those areas, but that the brain map images used by Dr. Gur were not used

frequently by neuropsychologists (Evidentiary hearing transcript pp. 616-617). On cross-examination, Dr. Gamache indicated that he testified in one third of cases as a court appointed expert, in one third for the defense, and in one third for the State (Evidentiary hearing transcript p. 619). He testified that he was familiar with the brain image algorithm, but did not know of anyone other than Dr. Gur using it, and it was his opinion that the method was not generally accepted by the scientific community (Evidentiary hearing transcript pp. 629-630).

28. He testified that he was familiar with brain maturation, and that it did not manifest in subtle signs (Evidentiary hearing transcript pp. 696-697). He cited a recent study done at Emory University, which found that, contrary to common belief in the field, juveniles who engaged in the riskiest behavior had more mature brains then juveniles who did not engage in any risky behavior (Evidentiary hearing transcript pp. 697-698). Dr. Gamache questioned the diagnoses of bipolar disorder, since those diagnoses were based only on Defendant's self reporting (Evidentiary hearing transcript pp. 699-700). He also testified that he had reviewed the jail records, and there is no evidence of a depressive episode, just behavior typical of someone who was in custody for a serious charge (Evidentiary hearing transcript pp. 702-703). When questioned by postconviction counsel on cross-examination regarding Defendant's alleged refusal to shower or change his bed linen every time these activities were offered, Dr. Gamache testified that the jail records showed this remained Defendant's pattern for the two years he was incarcerated at the jail, and was not evidence that Defendant was crashing from a manic episode, contrary to Dr. Sultan's testimony (Evidentiary hearing transcript p. 704). He pointed out that that a jail record indicating "no" recreation did not mean Defendant refused recreation, but that possibly none was offered, since other jail records clearly state "refused" when Defendant

refused an activity (Evidentiary hearing transcript p. 705). Regarding the gunshot wound to Defendant's abdomen prior to the murder, Dr. Gamache testified that if the emergency room staff had suspected Defendant was suicidal, they would have made a referral (Evidentiary hearing transcript p. 715). The emergency room report, relevant portions of which are attached, indicates that Defendant and his mother both stated that the discharge of the gun was accidental, and denied any depression or suicidal tendencies. Defendant's statements at the time are more credible than Defendant's assertions of depression now, when he has a motive to show some sort of deficiency.

29. The State also called Dr. Wald, who, along with neurologist Dr. Masterson, was appointed to evaluate Defendant prior to trial. Dr. Wald testified that, although he did not recall evaluating Defendant, in evaluating any individual, he would conduct the evaluations in the same basic manner each time (Evidentiary hearing transcript pp. 556; 561). His records indicated that he had twice evaluated Defendant, had reviewed records, and had interviewed Mrs. Foster (Evidentiary hearing transcript pp. 557-558). In his evaluation, he would have observed Defendant's demeanor, emotions, and body language, would have obtained Defendant's social history and background, looked for delusions or paranoia, and inquired after Defendant's state of mind at the time of the offense (Evidentiary hearing transcript pp. 561-565). Dr. Wald testified that his evaluation would have detected bipolar disorder, and that the evaluation should have picked up frontal lobe damage in most cases (Evidentiary hearing transcript pp. 565-568). If he had thought there was a need for neurological testing of Defendant based on his evaluation, he would have referred Defendant to Dr. Masterson (Evidentiary hearing transcript p. 569). The record did not reflect that he submitted a written report, and Dr. Wald stated that he would never

prepare a report if he was asked not to do so (Evidentiary hearing transcript pp. 569-570). As stated previously, Mr. Wootton testified that Mr. Jacobs decided not to hire further experts, since the evaluations of Defendant indicated no mental health issues and no mental health mitigation. See Mr. Wootton's testimony, *infra*. To the extent that Mr. Wootton was tasked with inputting all documents and information relating to the case into the new computer program, the Court finds his testimony to be credible that, had any potential mitigating mental health information been received, trial counsel would have followed up on it. Co-counsel, Mr. Rinard, testified that the defense went with what they had, regarding their mitigation strategy of humanizing the Defendant. See Mr. Rinard's testimony, *infra*. Considering this testimony with Dr. Wald's testimony that his evaluation would have found bipolar disorder or frontal lobe damage, had Defendant possessed such defects, and considering the previous testimony by Mr. Wootton and Mr. Rinard, the Court finds that Defendant has failed to demonstrate that the pretrial evaluations of Defendant uncovered any mental defects or organic brain damage, or any significant mental health mitigation, which trial counsel failed to present.

30. That Defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Cherry v. State, 781 So.2d 1040 (Fla. 2000). Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was no mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who gives a more favorable diagnosis. Asay v. State, 769 So.2d 974 (Fla. 2000). Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others

may desire. Stewart v. State, 37 So.3d 243, 251-252 (Fla. 2010), *citing* State v. Sireci, 502 So.2d 1221, 1223 (Fla.1987). "[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert . . . questions the thoroughness of the prior evaluations." Stewart, 37 So.3d at 253-254. Counsel cannot be deemed ineffective simply because he relied on what may have been less than complete pretrial psychiatric evaluations. State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987). In addition, the denials of any mental health issues by Defendant and his family collaborated those evaluations, and counsel is not ineffective for relying on the utter lack of any negative mitigating evidence and not investigating deeper. Further, a subsequent finding of a mental deficiency does not necessarily warrant a new sentencing hearing, unless the psychiatric examinations were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. Id. at 1224. Defendant presented no evidence that Dr. Wald's evaluations were grossly insufficient, nor that he ignored clear indications Defendant suffered from mental retardation or organic brain damage. The Defendant's postconviction experts' "soft" and "subtle" findings do not cause the Court to find that any clear indications existed that Defendant suffered from organic brain damage. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground III(a) is DENIED**.

31. **As to Claim III(b)**, Defendant argues counsel was ineffective during the penalty phase for failure to adequately challenge the aggravating circumstances such that no adversarial testing could occur. Mr. Rinard testified that the defense knew negative information was going to be presented during the guilt phase, but was not sure that most of that information had anything to do with the aggravating circumstances, except perhaps the nature of the murder, which would

go toward the cold calculated and premeditated aggravating factor (Evidentiary hearing transcript p. 186). He had no recollection of arguing against some of the aggravating factors during the penalty phase, although the transcript and his notes in the case file indicated he did (Evidentiary hearing transcript p. 186). Postconviction counsel did not inquire further on this issue. Defendant presented no evidence that, or in what way, the arguments made at trial against the aggravating factors were inadequate. Defendant has thus failed to meet his burden of proof to establish either prong of Strickland. Therefore, **Claim III(b) is DENIED**.

32. For the reasons stated in the previous order directing an evidentiary hearing, Claims I(a) I(b), I(c), II, III(c), IV, V, VI, VII, VIII, IX, X, and XI are hereby denied.

33. The following are attached hereto: (1) relevant portions of the trial transcript; (2) relevant portions of the penalty phase transcript; (3) relevant portions of the record; and (4) relevant portions of the transcript of the evidentiary hearing.

Accordingly, it is

ORDERED AND ADJUDGED that that Defendant's "Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend," is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 15 day of July, 2011.

Edward J. Volz, Jr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013; **Terri L. Backhus**, Special Assistant, Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Scott Gavin**, Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Jennifer Gutmore**, Assistant State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399; **David Maijala**, Assistant State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399; and **Administrative Office of the Courts (XIV)**, 1700 Monroe Street, Fort Myers, FL 33901; this 7 day of July, 2011.

CHARLIE GREEN
Clerk of Court

By: TOMPKINS
Deputy Clerk