IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,920

RICKEY BERNARD ROBERTS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

Appellee, **the State** of **Florida,** was the respondent in the trial court and Appellant, **Rickey Bernard Roberts,** was the petitioner. The parties will be referred to as the State and the defendant respectively. The symbol "R" will refer to the 461 page, three volume record on appeal, whereas the symbol "T.R." will refer to the trial record from the direct appeal, case no. 68,296.

STATEMENT OF THE CASE AND FACTS

The defendant's convictions for first-degree murder, armed sexual battery, armed kidnapping, and his resultant sentence of death were all affirmed by this Court on direct appeal in Roberts v. State, 510 So.2d 885 (Fla. 1987). The defendant thereafter filed a 183 page motion to vacate pursuant to Fla.R.Crim.P. 3.850 (R.l-183). After hearing oral argument on October 25, 1989, the trial court denied relief without an evidentiary hearing (R.342). This appeal follows. The defendant also has pending before this Court a petition for writ of habeas corpus, case no. 74,788. A comprehensive summary of the evidence presented at the defendant's trial is contained at pages 1-15 of the State's response to that petition. As will be seen, most of the 23 claims raised in the defendant's 3.850 motion (and in the instant appeal therefrom) were also raised in his petition for writ of

habeas corpus, with the exception of his ineffective assistance of trial counsel claims and his Brady claim, which not incidently are the only claims addressed by the trial court on the merits. The trial court found all other claims procedurally barred vis-a-vis rule 3.850, as they could have been, should have been, or were raised on direct appeal.

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SUMMARY OF ARGUMENT

All of the defendant's claims, with the exception of his Brady and ineffective assistance at trial and sentencing phase claims, are procedurally barred.

The defendant's Brady claims are without merit, as all of the allegedly exculpatory information was either available, immaterial or both.

The defendant's ineffectiveness at the guilt phase claim is facially insufficient as being devoid of specific allegations, and in any event is conclusively refuted by the record.

Finally, the defendant's claim that counsel was ineffective at the sentencing is likewise conclusively refuted by the record. Counsel undertook a reasonable investigation and pursued a vigorous, nearly successful penalty phase defense. The trial court's summary denial should thus be affirmed.

ISSUES PRESENTED

CLAIM I

WHETHER THE TRIAL COURT CORRECTLY RULED THAT THE "RAPE SHIELD LAW" ISSUE WAS PROCEDURALLY BARRED.

This precise issue was raised and decided on direct appeal, wherein this Court held:

> We recognize that if application of Florida's Rape Shield Law interfered with Roberts' confrontation rights or otherwise operated to preclude Roberts from presenting a full and fair defense. the statute would have to give way to these constitutional rights. *See Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). However, we reject Roberts' contention that the "specifics" of his conversation with Rimondi were necessary to refute her depiction of a "forced and hostile dialogue" and thus, exclusion of that aspect of his version of the conversation impermissibly limited his ability to present a full and fair defense. Rimondi had testified that during the drive from the causeway, Roberts had told her that he was a "professional hit man" and that he had threatened to harm her and her family. Roberts was allowed to give his account of this conversation and to refute every aspect of Rimondi's testimony. Roberts testified that they "had general conversations about occupation." The only limit on Roberts' testimony was on the specific type of employment Rimondi was allegedly engaged in. We find that the exclusion of this one otherwise irrelevant and highly prejudicial aspect of Roberts' version of the conversation in no

way hindered Robert's presentation of a complete defense.

(emphasis added) Roberts v. State, 510 So.2d 885 at 892 (Fla. 1987).

This Court fully recognized that when evidence of prior sexual conduct is relevant to the case, the rape shield law must yield to the confrontation clause. Here the victim's alleged activities as a prostitute were totally irrelevant. The defendant's defense was that either the rape victim's boyfriend or Joe Ward, whose house the rape victim was staying at, became jealous of the murder victim for being with her that evening, and that they murdered the victim and then had either forced or consensual sex with her, after which she either agreed or was intimidated into blaming it on the defendant. Defense counsel was not restricted in any way from cross-examining Ward, Cebey or the rape victim concerning their activities that evening or their relationships vis-a-vis each other (Cebey and the rape victim both testified they had sex 24 hours prior to the crime). The rape victim's alleged activities as a prostitute had nothing whatever to do with the "source of the semen" or any other issue in this case. Defense counsel simply wanted to portray the rape victim as a slut low-life runaway, whose character demonstrated that she was unworthy of belief. That is precisely what the rape shield law was designed, properly, to prevent.

Olden v. Kentucky, 488 U.S. ___, 102 L.Ed.2d 513, 109 S.Ct. 480 (1988), in no way changed any established confrontation clause principles and does not require a reconsideration by this Court. In Olden the defendant, a black man, claimed that the white victim had consented to the sexual activity, and he wanted to bring out, on cross-examination of the victim, that at the time of the offense she was living with another black man, and that she accused the defendant of forcible sex so as to prevent repercussions from her boyfriend. This cross-examination was forbidden, and hence the defendant was unable to demonstrate a motive for the victim to lie. Had such been anything close to the facts in this case, this Court would not have hesitated to reverse, but such was definitely not the case. In sum, there is absolutely no basis for revisiting this issue in the instant proceeding, and the trial court thus correctly determined this claim to be procedurally barred.

CLAIM II

SAME AS CLAIM I.

None of the additional cases cited by the defendant under claim 11, such as Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), (which decision relied heavily upon Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), a case cited by this Court in its opinion herein) or

Taylor v. Illinois, 484 U.S. ___, 108 S.Ct. 646, 98 L.Ed.2d. 798 (1988), in any way affect the validity of this Court's opinion on this issue. In Rock the trial court refused to allow the defendant to testify as to the facts of the offense because her recollection had been refreshed by hypnosis, a prohibition which obviously was fatal to her defense. In Taylor the trial court had prohibited a defense witness from testifying because of a defense discovery violation, a prohibition which the Supreme Court upheld.

The bottom line here is that the defendant seeks another bite at the apple as to an issue which was fully and fairly litigated on direct appeal. Defendant's present counsel apparently believes that any time the United States Supreme Court decides a case in a given area, the decision automatically constitutes "new law" which requires reconsideration of all prior decisions of this Court in that same general area. Such is certainly not the intended purpose underlying Rule 3.850.

CLAIM III

THE TRIAL COURT CORRECTLY DETERMINED THAT THE DEFENDANT'S BRADY CLAIM WAS WITHOUT MERIT.

The trial court denied the defendant's claims under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),

without comment, and with good reason, as the claims are all totally specious. Before addressing the facts of each claim, it is necessary to address the legal principles which govern such claims. A violation under Brady requires three components: First, that the evidence is suppressed; second, that it is exculpatory, and third, that it is material. Under the first prong, evidence is not suppressed where it is readily available to, or already in the possession of, the defendant. United States v. Torres, 719 F.2d 549, 555 (2nd Cir. 1983). "This is especially true where a defendant and the state have the same access to the sought-after information." James v. State, 453 So.2d 786 at 790 (Fla. 1984), cert. denied, 469 U.S. 1098 (1984). "Brady does not require the government to turn over information which, with any reasonable diligence [the defendant] can obtain himself." Halliwell v. Strickland, 747 F.2d 607 at 609 (11th Cir. 1984) (quoting Jarrell v. Balkcom, 735 F.2d 1242 at 1258 (11th Cir. 1984), cert. denied, 472 U.S. 1011 (1985).

The second prong of Brady, whether the information is exculpatory, is obviously a case by case determination based on the specific facts involved. The third prong, materiality, entails a determination of whether, had the information been provided defense counsel, there "...is a reasonable probability the result of the proceeding would have been different ..." . Thompson v. State, So.2d ___, 14 F.L.W. 527 at 528 (Fla. October 19th, 1989) (citing United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

In the instant case the alleged Brady materials were contained as notes in the State Attorney's files. As will be seen, all these materials were easily available to or already in the possession of defense counsel, and hence were not suppressed within the framework of Brady, and in addition the marginal or nonexistent exculpatory value of the information was totally insufficient to establish materiality, as defined in Bagley, supra.

The first matter addressed in the defendant's brief concerns notations in the state's file as to telephone calls by Michelle Rimondi, the rape victim, requesting that Sam Rayburn, the initial prosecutor, call her at the Holiday Inn because she needed money. The defendant neglects to mention that Michelle lived in Arizona, where she testified she moved after the crimes occurred. The defendant goes on to note that the State payed for her lodging when she came to Florida for her two depositions and trial testimony. The State would respectfully respond to the above as follows: So What.

This information was not exculpatory nor material, and defense counsel was perfectly free at deposition and trial to ask her who was paying for her lodging and expenses during her Miami stay. This issue is worse than specious, it is downright silly.

The next matter raised by the defendant, at page **23** of his brief, is a letter from Janet Reno to Michelle's father which, if anything, attests to Ms. Reno's desire that Michelle Rimondi get her life together in Arizona, where she lived with her mother. This letter was written in August **1984.** It is not exculpatory, it is not material, it is nothing.

The next matter addressed by the defendant, at page **24** of his brief, relates to Michelle's arrest for grand theft which occurred some three weeks prior to the December, **1985** trial. The defendant makes several points based on the pre-filing conference notes of the prosecutor who filed that case, Alex Miculescu. The issue of the admissibility of this arrest was raised in the petition for writ of habeas corpus as issue IV, and the State has fully set out the facts concerning this issue at pages **24-28** of its habeas response. In his brief the defendant makes several gross misstatements of fact concerning Mr. Miculescu's notes which require immense rectification. The notes **(R.262, 263)** were of his interview with the officer involved in the grand theft case, Detective Juan Koop. In recording Detective Koop's statement, Misculescu's wrote (R.**263)**:

> When M.R. [Michelle Rimondi] taken into cust[ody], ask[ed] to talk to Glick. Glick said to handle routinely. No special consideration.

Said she was a rape/murder wit[ness]. Didn't seem traumatized
Alex Miculescu
PTI
No bearing on decision whe[ther] to file.

The above notes, up to the point where the name "Alex Miculescu" appears, are notes of what the Detective told Miculescu as to what happened when Michelle Rimondi was taken into custody, which is absolutely obvious since Miculescu would not have been present when she was taken into custody. In his deposition on the eve of trial (T.R. 635-645), Miculescu stated that he had no contact with the prosecutors in the instant case, and the notes in no way suggest otherwise. He also stated in his deposition that he made the decision to send Michelle to P.T.I. after talking with the victim on the phone (T.R. 639), which decision was based on the fact that the victim and defendant knew each other and that all the property was returned (T.R. 642). He further stated in his deposition that he learned from Detective Koop, at the conclusion of the interview, that Michelle was a witness in another case, but that by then he had already decided to send Michelle to P.T.I.(T.R. 639). This testimony is totally supported by the notes, which indicate he did not learn she was a rape/murder witness until the conclusion of the interview (R.263).

The bottom line here is that the defendant's allegations at page **24** of its brief are blatant misrepresentations which are positively refuted by the record. In addition, the defendant's statement there that "in spite of a substantial criminal history, Ms. Rimondi received pretrial intervention" ...(emphasis added) is most interesting, and perhaps at oral argument defendant's counsel can explain the emphasized term, because as far as the State is aware, the grand theft charge was Michelle's first brush with the law. In sum, the factual basis for this claim is nonexistent.

The defendant next argues, at the bottom of page **24** of his brief, that the State "withheld" information from two witnesses, Leonara Michelle McGuldy and William Henry Kirk, that Michelle Rimondi used drugs and worked parties for "Bill", supposedly as a prostitute. The State Attorney's notes, upon which the defendant relies **(R.240-241, 258-260),** show that Leonara McGuldy met Rimondi in February of **1985**, eight months after the murder, and that William Kirk met Rimondi at a narcotics anonymous meeting in June **1985**, a year after the murder. That is a small matter, however, compared to the fact that the notes are from the prosecutor's deposition of Defense Witnesses (see defense witness list, T.R. 237).

For the defendant to claim a Brady violation based on information the State received from defense witnesses is quite extraordinary, to say the least.

The next matter, raised at page 25 of the defendant's brief, is the prosecutor's notes from discussions with State witness Dr. Rao, who treated Michele after the rape/murder at the Rape Treatment Center. The notes indicate Dr. Rao stated the victim did not appear upset enough to have witnessed a murder. Dr. Rao was a listed State witness who presumably was deposed by defense counsel and who testified at trial (T.R. 2529-2560). Defense counsel did not ask Rao if Rimondi was upset or whether Rimondi gave a credible account of the murder. The point is that the information was as readily available to the defense as it was to the State, and hence it was not suppressed. Nor can it be said that Rao's opinion, that Rimondi was not upset enough to have witnessed a murder, was such as would probably have affected the outcome at trial.

The next claim, presented by the defendant at the middle of page 25 of his brief, is premised on two very brief notations in the State's file (R.250, 222) which state, in their entirety:

Valerie Rao

sperm in V consist w/ sex nite B/F

(R.222)

Wolson (Problems)

1. Color blind to reds

2. sperm study - sperm lasts in entirety for 24 hours, and bits and pieces up to 120 hrs.

3. Undergraduate degree in Bugs.

(R.250)

The State submits that, as to the first entry,'' nite B/F" obviously referred to the night of the rape/murder (which was the night before Rao's examination), but that in any event Dr. Rao testified extensively as to her opinion and the basis for that opinion, and presumably did so at deposition. The State is simply not required to conduct the defendant's discovery. This entire practice by the defendant's current counsel of taking bits and pieces of the prosecutor's notes and then screaming Brady, is simply playing games. A perfect example is proffer 14 (R.248). The defendant quotes "Last coitus 6-3-84 - 10 A[M] Manny Not Sure."

The first point is that this entry merely shows the victim was not sure of the exact time she had sex with her boyfriend the day before the murder (6-3-84). Indeed, at trial she testified she believed it was probably 8 a.m. (T.R. 2108, 2126, 2544). The defendant had full opportunity to question Dr. Rao and Michelle Rimondi, both at deposition and trial, and it is not the State's job to scour its notes and records for any minor inconsistency which may exist in a witness' testimony. The

second point is that on the same page (R.248), Dr. Rao had stated that she doubted it was Cebey's sperm she found (at 8:20 a.m. on 6-4-84, the time of the exam), because she has never seen a case in which sperm survived more than 12 hours after intercourse. This is precisely what she testified to at trial (T.R. 2551), which positively establishes that the "sperm in V consist w/ sex nite B/F" (R.222) note cited above, clearly referred to the evening of the murder. In short, this entire Dr. Rao business is baseless nonsense, and a complete waste of everyone's time and efforts.

The next matter raised by the defendant, at the top of page 26, is that the State withheld information that state witness Joe Ward was a violent person and, indeed, "an asshole" (R.245). The State attorneys notes are again from a defense witness, one of the officers who arrested Ward for Carrying a Concealed Firearm.[1]

At trial, the facts of Ward's violent behavior, and resultant four felony convictions, was presented to the jury (T.R. 1595-1600, 2026, 2027). The State obviously did a poor job of nondisclosure as to this information.

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[1] It is interesting that the defendant's counsel states the arrest was for a drug offense, which is absolutely inexcusable given that the defendant's own exhibit (R.245) states in big letters ("Serving warrant for CCF").

As to the claim regarding state witness Jamie Cambell, the prosecutor's notes for Jeramie McNeely are, once again, from the prosecutor's deposition of a defense witness (T.R. **237)** Jaramie McNeely. The State is hard pressed to envision a more specious claim, yet one is just around the corner.

The defendant's final Brady claim, at pages 26 and **27** of his brief, is that the State had information that the defendant used drugs on the night of the offense, which information would have benefited the defendant's sentencing phase presentation, yet the State did not divulge this information to the defendant. The State would bet dollars to donuts that the state witnesses who possessed this information, Gary Mendus and Kevin Brown, were deposed by the defendant's counsel, and that the reason that they did not testify is because their testimony would have constituted "other crimes" evidence which was clearly inadmissible. The really interesting question here, however, is how such an insanely ridiculous argument can appear in print. THIS INFORMATION WAS AVAILABLE TO THE DEFENSE BECAUSE IT WAS POSSESSED BY THE DEFENDANT HIMSELF.

CLAIM IV

THE TRIAL COURT CORRECTLY RULED THAT THE ISSUE RELATING TO THE TESTIMONY OF RAPE COUNSELOR DENISE MOON WAS PROCEDURALLY BARRED.

This issue was raised by the defendant at trial and could and should have been raised on direct appeal. Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986), cert. denied, 479 U.S. 972. Trial counsel argued that Michelle Rimondi may have given exculpatory information to rape counselor Denise Moon, in the form of an inconsistent version of the rape/murder, and appellate counsel could certainly have raised this issue on direct appeal as a violation of Brady v. Maryland, supra, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and United States v. Bagley, supra. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), which was decided on February 24th, 1987, five months before this Court's decision on direct appeal herein, merely applied the due process dictates of the above cases (all of which are cited in that opinion) to a particular set of facts. This issue is clearly procedurally barred vis-a-vis this 3.850 proceeding. It should also be noted in passing that defense counsel was able to highlight numerous inconsistencies in Michelle Rimondi's description of events, including the fact that she did not tell anyone of the second sexual assault, which the defendant committed just prior to releasing her, until seven months after the incident, and that Rimondi described a different location for the initial rape (on the ground versus in the car).

The defendant had full access to Michelle and to numerous witnesses to whom Michelle related the events of the murder and

her ordeal, several of whom testified at trial, which is a far cry from the total vacuum of information faced by the defendant in Finley, supra. In any event, the issue is procedurally barred.

CLAIM V

THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

Because the trial court denied this claim without an evidentiary hearing, the burden is on the State to show that the record conclusively refutes his ineffectiveness claim. Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). In its ruling the trial court stated:

> **THE COURT:** Seems to me that the doctors involved in this case from my remembrance of the case and of the testimony before me, that these doctors did a very good job in examining this defendant and contacting those people of the family they thought were important and they testified here at length before this court and before the jury as to his background, as to his mental condition. The jury heard it all. Jury heard every bit of it.
>
> The Court's going to rule that there is no prejudice. The Court finds there is no prejudice by Mr. Lange's representation of this defendant in counts number 9 -- in claims number 9, 11, and 12 claiming ineffective assistance of counsel So that in effect, all the claims are denied.

(R.437).

The first point which must be addressed is the defendant's contention, at page **39** of his brief, that "the Court assumed an adequate showing of deficient performance had been made." This statement is perfectly absurd, because it is quite obvious from the above findings that the trial court felt Mr. Lange did an excellent job, via his three experts, at the penalty phase. The trial court is not required to rule on deficiency, Kennedy supra, at **914**, where the court finds no prejudice, however it is abundantly clear that the trial court here felt Mr. Lange's performance to be highly competent. The second point requiring immediate treatment is the defendant's repeated reliance on the fact that the vote for death was **7-5**. It may be that where counsel presents a weak or nonexistent penalty phase presentation, a 7-5 vote would signify a high probability of prejudice. However where, as here, counsel presents a strong case in mitigation, a 7-5 vote is merely a reflection of counsel's competent, nearly successful presentation. Thus the first, and most critical question, is what mitigating evidence **was** presented. In hindsight it can always be said that counsel could have done more, but that is not the issue. The issue is whether the actions he did take comported with the requirements of reasonably competent counsel.

The first witness called by defense counsel at the sentencing phase was Dr. Jeffrey Toomer, a psychologist (T.R. 3314). He evaluated the defendant on three occasions, and obtained an entire life history from the defendant (T.R. 3315), including family background, his relationships with his family, job and educational history. He administered various psychological and intelligence tests (T.R. 3317). As part of his investigative process he interviewed the defendant's uncle, George Roberts, as well as the defendant's mother (T.R. 3319), and reviewed his records from the Patuxent facility in Maryland.

He learned that the defendant was raised by his grandparents, and that he had only irregular contact with his parents (Id). The defendant's history reflects an organic brain syndrome or organic personality disturbance (T.R. 3321). The defendant was hospitalized several times as a child and was diagnosed as hypertensive, for which he received medication. The defendant has difficulty coping in stressful situations (R.3323). The defendant's step-father was a strict disciplinarian, and his grandmother frequently criticized him (R.3324). After the defendant left his mother and stepfather he moved to Brooklyn and "lived by his wits for the most part" (Id). The defendant was subsequently incarcerated in Maryland, where his emotional disorder was treated with thorazine. He moved to Orlando after his release, and became involved with drugs at that time (T.R. 3325).

The above history demonstrates an organic brain disturbance, which causes huge up and down shifts in his emotional state, characterized by poor impulse control, meaning at times he loses control of his behavior (T.R. **3326**). At times he exhibits paranoid, irrational behavior (T.R. **3327**). The defendant has an isolated explosive disorder, which is a classic indication of an organic personality disorder, and is characterized by sudden uncontrollable violence. The defendant's history clearly indicates an organic brain syndrome (T.R. 3329), and this brain damage causes his isolated rages.

The defendant felt neglected and rejected by his parents, (T.R. **3336, 3337**) and his mother has negative feelings about their relationship (Id).

Defense counsel next called Dr. Arthur Stillman, a psychiatrist (T.R. **3353**). He examined the defendant on three occasions. Based on his evaluations, he diagnosed the defendant as suffering from brain damage (T.R. **3363**). He used the defendant's records from the Patuxent Institute in assisting him in diagnosing the defendant. The history he received from the defendant and "others" indicated a long history of alcohol and drug abuse, which in a brain damaged person can have four to ten times the normal affect (T.R. **3365**). The combination of alcohol and or drugs can produce severe violent behavior. Neurological

tests on the defendant, performed by Hullstone, Radan and Murray, showed the defendant to have brain damage as to two areas in both temporal lobes, which results in the release of rage reactions which the defendant cannot control (T.R. 3367), especially when the defendant is under strong emotional stress or the influence of drugs. The defendant cannot control his behavior during these periods (Id). The neurologists report indicated, in addition to the damage to the temporal lobes, damage to the left parietal precumeous. This damage severely impairs the ability to tolerate stress (T.R. 3368). It is obvious from the defendant's history that he was born with this damage. The defendant did not have a normal childhood life (T.R. 3369).

The defendant's troubled history was reported not only by the defendant, but was corroborated by others as well (T.R. 3373), and this includes a history of drug and alcohol abuse, which he obtained from the defendant and

> other sources, various other histories and is repeatedly -- this is mentioned repeatedly as well from Mr. Roberts himself, but his records reflect that he was a drug abuser and alcohol abuser in the community that he lived in and from the background he came from. That is not surprising from the material early on up until the act of his arrest in this case.
>
> (T.R. 3373, 3374).

The defendant's condition, had it been diagnosed, could have been treated. The defendant simply cannot control his violent behavior. Drugs can trigger a violent rage, but so can any extreme emotion (T.R. **3375**). Once the defendant explodes, he loses all control (T.R. **3376**).

Defense counsel then called Dr. Barry Crown, a psychologist (T.R. **3406**). He specializes in Neuropsychology. He performed several neurological tests for the specific purpose of determining if the defendant had brain damage (T.R. 3418), and determined that the defendant did have posterior damage, meaning the portions toward the rear of the brain, which affects his thinking and reasoning functions (T.R. **3420**). Alcohol or drug use would aggravate the effects of the brain damage **(R.3420)**.

Turning to the arguments raised by the defendant in his brief, his central contention, from which all his arguments flow, is that trial counsel undertook no background investigation, and thus his sentencing approach, to rely on medical experts rather than calling family members, was not the product of reasoned strategy, but rather complete ignorance. The defendant further argues that because of this failure to investigate, trial counsel failed to provide the medical experts with sufficient information for a proper diagnosis. These allegations, the State submits, are conclusively refuted by the record.

There is no question that defense counsel has a duty, pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984), to investigate the defendant's background in preparation for the penalty phase, and that counsel cannot be presumed to have made strategic decisions where he has undertaken no investigation. Stevens v. State, 14 F.L.W. 513 (Fla. October 5th, 1989). However, where counsel has made an investigation, his decision whether to present certain witnesses or evidence is presumed to be the product of legitimate strategy. As the Eleventh Circuit stated in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983):

> None of this is very precise, but that in fact, is the point of our reluctance to second guess trial counsel's strategy. Effective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising. His position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions. His knowledge of local attitudes, his evaluations of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of defendant, his familiarity with the reactions of the trial judge under various circumstances, his

> evaluation of the particular jury, his sense of the "chemistry" of the courtroom are just a few of the elusive, intangible facts that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.
>
> (emphasis added) Id. at 970.

In the instant case Drs. Toomer and Stillman stated they had information on the defendant's life and background from birth up to the present, and that they had made certain they obtained this background, from the defendant himself, his treatment records, his mother, uncle and "others", his school and employment records, etc., as it was important to their findings of brain damage. They knew the defendant had been brought up by his grandparents, that he felt neglected and rejected by his parents, and had a troubled relationship with his mother. These experts knew all about the defendant's troubled history, and in fact based their very favorable conclusions on that history. It is true they did not go into great detail as to the defendant's early life, but the point is that they had the information and used it in arriving at their diagnosis.

At this point, the State will focus on one narrow point raised in the defendant's brief, at the bottom of page 56, where the defendant states "Information regarding Mr. Roberts' drug

and alcohol usage on the day of the offense was not provided to these experts.'' These experts, in particular Drs. Toomer and Stillman, each examined and interviewed the defendant on three occasions. Defense counsel presumably discussed the events surrounding the crime with the defendant on numerous occasions. Certainly if the defendant had been high on drugs, he would have told defense counsel and the experts. The State would also add that the evidence at trial, both from the victim's testimony and numerous other witnesses (see footnote 3, page 39 of the State's habeas response), disclosed that the defendant was acting rationally and coherently during the time period in question (so calmly and deliberately that the victim, to his tremendous misfortune, believed the defendant's impersonation of a police officer).

Another interesting point is that defendant's initial counsel, Thomas Scott, had filed a witness list containing the names of the defendant's mother, Josie Mae Robinson, his uncle, George Roberts, his aunt, Gertrude McKenzie, and uncle, Wallace Roberts (T.R. 147).

It is clear from the above that an investigation was undertaken, and that the experts relied on the fruits of that investigation. Defense counsel's choice of who to call at sentencing was not made in a vacuum of ignorance, as the defendant now alleges. Counsel may well have concluded that

reliance on family members, who had an obvious interest in the outcome, would be less effective than reliance on disinterested experts, from whom he elicited testimony supporting two statutory mitigating factors. It can always be said, after the fact, that counsel could have done more, that an even more compelling presentation could have been made, especially with the luxury of time. That is not the issue. The issue is whether counsel made a strategic decision, following adequate investigation, to pursue a certain course. This is not a case where the defendant was left defenseless at the sentencing phase. Defense counsel had to explain not only how the defendant could have committed this brutal rape murder, but the Maryland rape/attempted murder as well. Counsel decided the best way was to show the defendant possessed a defective brain, from the outset, which caused sudden explosions of violence totally beyond his ability to control. Counsel vigorously pursued this path, and the fact that five jurors voted for life is a testament to his diligent efforts.

CLAIM VI

THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT PHASE, WAS PROPER.

This claim, found at pages 62-66 of the defendant's brief, was rejected by the trial court without comment. The State argued that this claim was totally insufficient under Kennedy v. State, 547 So.2d 912 (Fla. 1989); see also Knight v. State, 394 So.2d 997 (Fla. 1987), because the allegations lack the required degree of specificity, and indeed any specificity whatever. As will be demonstrated, the state's argument was totally justified, and in addition the factual allegations, vague though they be, are nevertheless conclusively refuted by record. Agan v. State, 503 So.2d 1254 (Fla. 1987).

At page 62 of his brief the defendant states:

> Counsel needed to impeach the witness the State built its case upon -- Michelle Rimondi. A wealth of impeaching evidence was available but never used. Counsel failed to effectively use the available impeachment evidence to cross-examine Ms. Rimondi.

These are the same conclusory allegations contained in the motion to vacate (R.90,91). The allegations totally lack any factual foundation. Rimondi was in fact vigorously cross-

examined by counsel, and the defendant has failed to allege any matter not pursued by defense counsel at trial.

At the bottom of page 62 of his brief, the defendant alleges that counsel failed to cross-examine "State's witnesses" about "exposure to criminal charges unless they cooperated with the State." The defendant identifies neither the witnesses, their pending charges, or any other factual matter relating to this vague allegation. The defendant refers to claim X of his motion to vacate (R.93-95), which deals with prior counsel's withdrawal based on the changed testimony of witness Rhonda Haines. If indeed Rhonda Haines is the "State's witness" the defendant is referring to, the State would point out that Rhonda Haines was vigorously cross-examined by defense counsel concerning her open warrants for prostitution in Broward County, and whether she expected special treatment because of her testimony (T.R. 2435-2440). In sum, this allegation is likewise facially deficient, as well as being refuted by the record.

The rest of the allegations contained in the defendant's motion to vacate (R.90, 91) are also conclusory in nature wholly unsupported by specific facts, with the possible exception of paragraphs 11 (R.90) and 13 (R.91), which allege in essence that defense counsel should have presented a voluntary intoxication defense, rather than a "I didn't do it" defense. Even if the lack of specific factual allegations is ignored, counsel's

determination to pursue this latter defense, rather than the ever so unpopular with juries voluntary intoxication defense (which was totally refuted by numerous witnesses who testified the defendant was acting in a coherent, rational manner during the entire relevant time period) was clearly a strategic decision not subject to an ineffective assistance challenge under Strickland v. Washington, **466** U.S. **668, 104** S.Ct. 2052, **80** L.Ed.2d **674 (1984).**

The remaining point raised by the defendant in his brief, at the bottom of page **65,** is that rulings by the trial court prevented trial counsel from presenting relevant testimony and cross-examination. Aside from the fact that the defendant provides no specifics whatever, the "claim" itself simply does not exist. If the trial court made adverse rulings at trial, they could and should be raised on direct appeal.

In conclusion, the defendant's allegations of ineffective assistance of counsel, at the guilt phase, are all facially deficient and/or conclusively refuted by record, and the trial court's summary denial of this claim should thus be affirmed.

CLAIM VII

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S DAVIS V. ALASKA CLAIMS WERE PROCEDURALLY BARRED.

At trial defense counsel sought to cross-examine several State witnesses regarding their criminal histories, and in several instances he was precluded from doing so on the basis that no convictions were ever obtained. This issue clearly could and should have been raised on direct appeal, Kennedy v. State and Maxwell v. Wainwright, supra, and indeed the defendant has raised appellate counsel's failure to do so as an issue (IV) in his pending habeas corpus petition. For the State's arguments on the merits, see State's response at pages **21-30**. This issue **is** definitely not cognizable in the instant proceeding.

CLAIM VIII

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S "ALIAS" CLAIM WAS PROCEDURALLY BARRED.

This issue could and should have been raised on direct appeal, and the defendant has raised appellate counsel's failure to do so in his habeas petition (111). The State's argument on the merits is at pages **18-20** of its response.

CLAIM IX

THE TRIAL COURT CORRECTLY RULED THAT THE ISSUE OF THE TRIAL COURT'S ALLEGED REFUSAL TO CONSIDER MENTAL HEALTH MITIGATING EVIDENCE WAS PROCEDURALLY BARRED.

On direct appeal the defendant contested the trial court's refusal to find the two statutory mental health mitigating factors, a refusal which this Court upheld. Roberts v. State, 510 So.2d 885 at 894, 895 (Fla. 1987). He now alleges that the trial court erred in not considering his mental health evidence as nonstatutory mitigating evidence, in supposed violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This claim obviously could and should have been raised on direct appeal, and in his habeas petition (XIV) the defendant again alleges appellate counsel was ineffective for not raising this issue on appeal. The State's argument on the merits is at pages 48, 49 of its response.

CLAIM X

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S MAYNARD V. CARTWRIGHT CLAIM WAS PROCEDURALLY BARRED.

Aside from the fact that this Court has held Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) to be inapplicable to Florida's sentencing scheme, Smalley v. State, 14 F.L.W. 342 (Fla. July 6th, 1989), as has the Eleventh Circuit, Bertolotti v. Duqqer, 3 F.L.W. Fed. C1281 (11th Cir. August 31st, 1989), there was no objection to the HAC instruction at trial and the issue was not raised on direct

appeal. The claim is thus procedurally barred. Adams v. State 543 So.2d 1244, 1249 (Fla. 1989) and Atkins v. State, 541 So.2d 1165, 1166 (Fla. 1989).

CLAIM XI

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S BURDEN SHIFTING CLAIM REGARDING THE PENALTY PHASE INSTRUCTIONS WAS PROCEDURALLY BARRED.

This claim, aside from being waived by trial counsel's failure to object to the instruction, is a claim which could and should have been raised on direct appeal, and thus is procedurally barred in this proceeding. The defendant has raised this identical claim in his habeas petition (IX), and in its response (page 45) the State noted that this identical claim has been rejected on the merits by the Eleventh Circuit in Bertolotti, supra, at C1289, C1290.

CLAIM XII

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S "FAILURE TO INSTRUCT ON MERCY" CLAIM WAS PROCEDURALLY BARRED.

Aside from the fact that defendant's trial counsel never requested an instruction on "the jury's ability to recommend mercy because of sympathy evoked by the evidence in mitigation"

(defendant's brief at page 83), this issue was one which should have been raised on direct appeal, and thus is not cognizable herein. The defendant raised this issue in his habeas petition (X), and as the State noted in its response (page 46, 47), an identical claim was rejected by the Eleventh Circuit in Julius v. Jones, 3 F.L.W. Fed. C763 (11th Cir. May 31st, 1989).

CLAIM XIII

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S CLAIM, AS TO THE INSTRUCTION ON THE "IN THE COURSE OF A FELONY" AGGRAVATING FACTOR, WAS PROCEDURALLY BARRED.

This claim is, quite frankly, incomprehensible to the State. The issue of whether this aggravating factor was properly found was raised and decided on directed appeal. Roberts v. State, supra at 894. The defendant refers in his brief (page 85) to claim XVIII of his motion to vacate (R.155-162), which argues that a conviction for felony-murder results in an impermissibly automatic aggravating factor being found ("in the course of a felony"). This claim is also raised in the defendant's habeas corpus petition (XIII), and as the State pointed out in its response, this claim has repeatedly been rejected by this Court, and more recently by the Eleventh Circuit in Bertolotti, supra, at C1291. This issue was not preserved at trial, and in any event it is one which must be raised on direct appeal, and is thus procedurally barred.

CLAIM XIV

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S CLAIM, AS TO THE INSTRUCTION ON THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING FACTOR, WAS PROCEDURALLY BARRED.

As the State noted in its habeas response (XII, pages 47, 48), the defendant's trial counsel did not object to this instruction, nor request an instruction that committing the murder on parole was entitled to less weight, in aggravation, than committing the murder after a jailbreak. Indeed, counsel conceded that this aggravating factor applied. For present purposes it is enough to say that this issue is one which must be raised on direct appeal, and thus is procedurally barred.

CLAIM XV

THE TRIAL COURT CORRECTLY DETERMINED THAT THE DEFENDANT'S BOOTH V. MARYLAND CLAIM WAS PROCEDURALLY BARRED.

This issue was not preserved by objection, as the defendant acknowledges in his brief at page 86, not was it raised on direct appeal, and thus the issue is procedurally barred vis-a-vis Rule 3.850. Adams v. State, 543 So.2d 1244 (Fla. 1989); Eutzy v. State, 541 So.2d 1143 (Fla. 1989), and Grossman v.

State, 525 So.2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989). Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), does not aid petitioner, because in Jackson the defendant objected at trial and raised the issue on direct appeal, thus Jackson suffered no procedural default. See Parker v. State, 14 F.L.W. 557, 558 (Fla. October 25, 1989). This issue was also raised by the defendant in his habeas petition (VII), and for a discussion of the facts relevant to the claim, see the State's response at pages 40-44.

CLAIM XVI

THE TRIAL COURT PROPERLY HELD THAT THE DEFENDANT'S CALDWELL V. MISSISSIPPI CLAIM WAS PROCEDURALLY BARRED.

As the State noted in its habeas response (XI, page 47), none of the comments of the prosecutor or instructions of the trial court regarding the jurors role at sentencing, were objected to. Additionally, this is an issue which must be raised on direct appeal. See Dugger v. Adams, 489 U.S. ___, 109 S.Ct. ___, 3 F.L.W. Fed. S105 (February 28, 1989), and innumeral cases from this Court cited therein, as well as Bertolotti, supra, at C1287.

CLAIM XVII

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S CLAIM, THAT THE JURY WAS NOT ACCURATELY ADVISED THAT IT COULD CONSIDER ONLY THE STATUTORY AGGRAVATING FACTORS, WAS PROCEDURALLY BARRED.

The defendant did not object to the penalty phase instruction or request any special instruction in this regard. In any event this is an issue which must be raised on direct appeal and hence is procedurally barred herein. In his habeas petition (XVI) the defendant claims that the State argued to the jury, and the trial court relied upon nonstatutory aggravating factors. For a discussion of the facts relating to this barred claim, see the State's response at pages 50-56.

CLAIM XVIII

THE TRIAL COURT CORRECTLY FOUND THAT THE DEFENDANT'S CLAIM OF IMPROPER PROSECUTORIAL COMMENTS WAS PROCEDURALLY BARRED.

This issue clearly is one which must be raised on direct appeal, and this is procedurally barred. As the State pointed out in its habeas response (VI, pages 38-40), none of the comments were objected to and ***thus the issue was*** not preserved for appellate review in any event.

CLAIM XIX

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S CLAIM, THAT THE TESTIMONY OF ONE OF HIS MENTAL HEALTH EXPERTS WAS IMPROPERLY RESTRICTED, WAS PROCEDURALLY BARRED.

This claim was preserved at trial, and hence could and should have been raised on direct appeal, and the defendant has in fact raised appellate counsel's failure to do *so* in his habeas petition (XV), with the State's argument at pages 49, 50 of its response. The issue is obviously barred herein.

CLAIM XX

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S CLAIM, THAT HIS INITIAL COUNSEL IMPROPERLY WITHDREW BASED ON CONFLICT OF INTEREST, WAS PROCEDURALLY BARRED.

The "issue" of Thomas Scott's withdrawal as counsel could and should have been raised on appeal, and hence is procedurally barred. Actually, it should never have been raised because it is ridiculous. Mr. Scott felt an ethical obligation to withdraw, and he properly did *so.* If this claim is viewed as one of ineffective assistance of trial counsel, it is totally specious, as Mr. Scott was not the defendant's trial counsel, and although actions of a prior counsel could conceivably violate Strickland v. Washington, supra, nothing has been

alleged by the defendant which would even remotely support such a finding in this case.

CLAIM XXI

THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT'S NEIL/ SLAPPY/ BATSON CLAIM WAS PROCEDURALLY BARRED.

This claim was preserved at trial and could and should have been raised on direct appeal, and is thus procedurally barred. The defendant has raised appellate counsel's failure to present the issue on direct appeal as claim V, in his habeas petition, with the State's argument at pages **31-38** of its response.

CLAIM XXII

THE TRIAL COURT PROPERLY HELD THAT THE DEFENDANT'S "I DIDN'T GET MY FULL TWO YEARS" CLAIM TO BE WITHOUT MERIT.

This Court has already found this claim to be meritless. Cave v. State, **529** So.2d **293 (Fla. 1988).**

CLAIM XXIII

THE TRIAL COURT CORRECTLY FOUND THAT THE DEFENDANT'S CLAIM, THAT THE JUDGE AND JURY RELIED ON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION, WAS PROCEDURALLY BARRED.

This issue was not preserved at trial, but in any event it is one which must be raised on direct appeal, and hence is procedurally barred. To the extent that the defendant alleges trial counsel was ineffective for failing to successfully collaterally attack the 1974 Maryland rape/attempted murder conviction prior to trial, the State would respond in two ways. First, the defendant has specified no facts supporting his allegation that the Maryland conviction was unconstitutional. In his brief (pages 93, 94) the defendant states no grounds for collateral attack. In his motion to vacate (R.172), he states in essence "Just give me some time, I'll come up with something." This is a blatant violation of Kennedy, supra, hence the claim was properly summarily denied.

The second point which cries out for expression is that appointed trial counsel cannot be expected to prepare for the guilt-innocence and sentencing phase and simultaneously attempt to collaterally attack 10 year old convictions in other states. As counsel for Gerald Stano stated at his evidentiary hearing, trial counsel has neither the time or resources for such endeavors, Stano v. Dugger, 3 F.L.W. Fed. C1225 at 1229, 1230 (11th Cir. August 22, 1989). No trial judge would or should approve expenses for such collateral fishing expeditions, and counsel certainly cannot bear the expense himself. The staff at CCR do not have the responsibility of preparing for a first degree murder trial. They have the luxury of time and

apparently unlimited resources to investigate prior convictions, something a court appointed sole practitioner can only dream about. The State submits that reasonably competent counsel, under the standard of Strickland, supra, would not have undertaken collateral attack of the Maryland conviction. As counsel for Stano stated, it simply is not done, except by CCR, long after the fact.

CONCLUSION

The trial court's summary denial was proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF** OF **APPELLEE** was furnished by mail to **MARTY McCLAIN,** Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301** on this 7 day of December, **1989.**

RALPH BARREIRA
Assistant Attorney General