IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,136

JOHNNY L. ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHN'S COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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ineffective assistance of counsel are not properly before this Court. They are also attempts to get a second appeal on the substantive issues, and are therefore, procedurally barred.

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POINT I

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S CLAIM TAT NEWLY DISCOVERED RECANTATION EVIDENCE ESTABLISHED HIS INNOCENCE OF THE CRIME OF FIRST DEGREE MURDER AND A DEATH SENTENCE.

In his Rule 3.850 motion, Robinson claimed that key prosecution witness, Co-defendant, Clinton Bernard Fields, recanted his 1986 trial testimony in a 1993 affidavit. However, at the evidentiary hearing, Fields, after consulting with his attorney, refused to testify. (T 243).[1] Indeed, he refused to so much as identify the affidavit, say that it was his signature thereon, or indicate that it was signed without coercion. (T 251-252). Thus, the alleged affidavit was not authenticated, was not properly before the lower court, and is not properly before this Court.

Below the State objected to the admission of Fields' alleged affidavit based upon hearsay grounds. (T 252). Robinson did not claim any hearsay exception, neither was one available to him.[2]

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[1] Herein "T" refers to the Evidentiary Hearing Transcript; "R" refers to the record of the evidentiary hearing.

[2] The only possible exception would be statement against interest. Section 90.804(2)(C), Fla. Stat. (1993). However, the State asserts that Robinson could not have established the basis for this exception; certainly, he did not do so. First, there was no showing that Fields would be exposed to a perjury charge if he testified in accordance with the affidavit which Robinson alleges

The trial court correctly ruled that the affidavit was inadmissible. As a result, there is no evidence, new or otherwise, of the alleged recantation of Fields.[3] Thus, this Honorable Court's consideration of this claim ends here, and Robinson is entitled to no relief.

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is his. Clearly, it had been more than 3 years since the trial testimony; thus, the statute of limitations for perjury had expired. "[I]t cannot be said that a reasonable person would believe they were subject to a perjury penalty eight years after providing testimony at a trial." *Lightbourne v. State*, 644 So. 2d 54, 57 (Fla. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1406, 131 L.Ed.2d 292 (1995). Second, there was not so much as a scintilla of evidence of corroborating circumstances showing the trustworthiness of the statement allegedly made by Fields some eight years after trial. On the other hand, there were, as the trial court pointed out in its order, indications that at the time the affidavit was allegedly given by Fields, Fields was "mad at the State . . . ." (R at 5764). Indeed, in light of the fact that the trial judge had heard Fields testify most credibly at trial, he reasonably viewed the affidavit "with great suspicion."

[3] Neither were Fields' attorney's statements regarding what Fields told him during his representation properly before the lower court, or this Honorable Court. At the hearing, the State objected to the hearsay testimony of Attorney Cushman. (T 88). The trial judge overruled the objection on the assurance of defense counsel that he would tie it up with Fields' testimony. (T 88). The court specifically conditioned consideration of that evidence thereon. (T 88). Indeed, the trial judge later sustained the objection, but permitted a proffer and agreed: "If you can link it up, then I'll consider it." (T 91). Since Fields did not testify, it was not linked up, and Mr. Cushman's testimony regarding what Fields told him about the commission of the crime must be disregarded as it is not properly before either court. However, it is interesting to note that Mr. Cushman testified that Fields never used the word "accident" in describing the shooting. (T 117).

Assuming *arguendo* that the affidavit is that of Fields, it does not constitute newly discovered evidence. For evidence to be newly discovered, it must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) [*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)]. Further, even if there is newly discovered evidence, to merit relief, it must be so substantial that it would probably produce an acquittal on retrial. *Id.* at 911.

Robinson has always known exactly where Fields was -- in prison for the same murder for which Robinson is to be executed. He offers no explanation for why he did not seek him out earlier and obtain the information which is alleged in the unauthenticated affidavit. Neither does he offer an explanation of how or why Fields (allegedly) decided to give such information in February, 1993. Thus, Robinson has failed to carry his burden to show why he could not have obtained the evidence with the use of due diligence.

Neither is the deposition testimony of Captain Porter, or the oral statement Fields gave to the Captain, newly discovered. Assuming, but not conceding, that same indicates that Fields told the captain that the shooting was accidental, defense counsel,

Howard Pearl, knew about it, or could have discovered it with the exercise of due diligence. Attorney Pearl deposed Fields prior to Robinson's trial and vigorously cross-examined him at trial. He could have questioned Fields about the statement.

Indeed, the witness list in Robinson's case included Captain Porter and indicated that he had taken a "statement of Fields."[4] (T 202-204). Attorney Pearl had this document. (T 203). He could have, but did not, look in Fields' court file and examine the depositions therein.[5] (T 205).

Thus, neither the captain's deposition testimony, nor Fields' alleged new claim of an accidental shooting,[6] can qualify as newly

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[4] Robinson's claim that Attorney Pearl assumed that the only statement Fields had given to Captain Porter was the written one he had seen does not meet the standard. All he had to do was ask whether there was only one statement or whether the statement contained the entire statement given to the captain.

[5] Further, he could have attended the captain's deposition taken by Fields' trial attorney, but chose not to do so. (R 78, 152-153). Attorney Pearl claimed that he never obtained a copy of that deposition, although the prosecutor, Steve Alexander, testified that he gave him one. (T 150).

[6] The affidavit contains no statement that the shooting was an accident. Although it is claimed that Fields believes it was an accident, even that is clarified, "I can't say for sure because I could not see from where I was." (R 385).

discovered evidence.[7] If Counsel had asked the appropriate questions at the trial stage, the alleged evidence of an accidental shooting was discoverable. Thus, it is not newly discovered. *Correll v. State*, No. 88,474, slip op. at 2 (Fla. April 10, 1997).

Assuming *arguendo* that the allegations contained in Fields' affidavit may properly be considered by this Honorable Court, and that they constitute newly discovered evidence, Robinson's claim that it would probably have produced an acquittal is wholly without merit. "Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994). Indeed, "recanted testimony is exceedingly unreliable . . .." *State v. Spaziano*, No. 87,364, slip op. at 3 (Fla. April 17, 1997).

Robinson claims that if Fields had testified at trial in accordance with his affidavit, the State could not have established Robinson's guilt of first degree murder or of three of the five aggravators. Robinson specifically complains of four differences between Fields' trial and affidavit statements, to-wit:

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[7] Further, there is no ineffective assistance of counsel. Assuming for the sake of argument, deficient performance, Robinson cannot show prejudice because Fields was convicted despite the "accidental" statement he gave to Captain Porter.

At Trial: According to Robinson, Fields testified:

1) Robinson held a gun on the victim when he brought her to his car;

2) he put handcuffs on the victim;

3) he took her purse;

4) the victim did not consent to have sex with Robinson;

5) Robinson told him that he had to kill the victim to prevent her from identifying him; and,

6) the alcohol Robinson had consumed prior to the murder had little effect on him.

(IB at 7).

In his Affidavit: According to Robinson, Fields recanted his trial testimony as follows:

1) His testimony that Robinson held a gun on the victim was "not true;"

2) Robinson never said anything to him "about how he was going to shoot the lady or 'kill the bitch' or anything like that;"

3) Robinson and the victim "had a little tussle and somehow the gun went off." Fields believes that "it was an accident but I can't say for sure because I could not see from where I was;" and

4) He and Robinson had been drinking before the murder, and

they were "both very high -- way over the limit."[8] (IB at 8-9).

According to Robinson, Fields' trial testimony "provided the **only** evidence of felonies, premeditation, and the aggravators of committed during a felony, avoid arrest, and cold, calculated." (IB at 7). That assertion is simply not true.

Evidence of Felonies:

In his own sworn confession, Robinson said that he "had a gun," which was visible, when he approached the white, female victim. He admitted that he "grabbed her by the arm and said: 'Come on!' And she came . . .." (R 2134). By his own admission, he proceeded to take her from the area where her car was and to a cemetery where he perpetrated further crimes upon her. (R 2134-2135). The State contends that this evidence was sufficient on which to find that he feloniously kidnaped the victim.

Further, in his confession, Robinson admitted having the

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[8] The State suggests that evidence that Robinson was "very high-way over the limit" does not necessarily refute Fields' trial testimony to the effect that the alcohol consumed prior to the murder had little effect on Robinson. Indeed, in his alleged affidavit, Fields states that although Robinson "was a very heavy drinker . . . he mostly hid it from other people." (R 383). The State submits that if he was such a heavy drinker but was still able to hide it, it was because alcohol had little effect on Robinson's mental and physical functioning.

victim's "pocket book" and "blouse" which he threw away. (R 2136). Thus, his own statement provided evidence of robbery.

Robinson's confession also indicated that he forcibly had sex with the victim. He stated: "I got her out of her pants." (R 2134). He explained: "I took the gun . . . and layed it on the hood. Me and the chick were on the front of the car . . .." "[S]he went to pawing at me."[9] (R 2135).

Based on the foregoing, the State contends that Robinson's own confession provided ample evidence of felonies he committed. Clearly, Fields' testimony was not the "only evidence of felonies."

Finally, there is no claim that Fields recanted his trial testimony that Robinson took the victim's purse or that he handcuffed the victim after putting her in his car. Neither is there a recantation of his trial testimony that the victim repeatedly asked, even begged, to be returned to her car. (TR 503). This evidence also supports a finding of felonies on which

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[9] At trial, counsel conceded: "Johnny Robinson suffers from a psychosexual disorder in which to him sex is only attractive when it is accompanied by force and intimidation." (T 294). Counsel continued: "Now, this may be just part of the S & M thing that Johnny Robinson learned as his kind of sex." *Id.* Contrary to Robinson's claim, Dr. Krop did not withdraw his opinion that Robinson has a psychosexual disorder. *See*, Point IV, *infra*, at 40-42.

a conviction for felony murder could be grounded.

Premeditation:

In his confession, Robinson admitted that after shooting the victim the first time, he "got scared" and "shot her again." (R 2135). He claimed that he "had to" because "[h]ow do you tell someone I accidently (sic) shot a white woman." (R 2135). There was time for reflection between the first and second shots. Robinson stated that after he shot her the first time, she fell, he called to her, he got a flashlight, and looked at her. (R 2135). Further, after he saw the blood, he had time to, and did, reflect on his course of action. He decided that any claim of an accidental shooting would not be believed, and so, he shot her again to make sure that he killed her.[10] Thus, premeditation is shown from Robinson's own confession. Again, Fields' testimony was not the "only evidence of . . . premeditation."

The Aggravators:

Robinson's claim that Fields' trial testimony provided the "only evidence of . . . the aggravators of committed during a

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[10] Indeed, Robinson told Dr. Krop that he liked to think he shot her the second time to end her suffering. (T 309). Thus, Ms. St. George was clearly alive and visibly suffering from the first gunshot when Robinson made the carefully considered decision to shoot her again to make sure he killed her.

felony, avoid arrest, and cold, calculated" is likewise false. As detailed above, there was other evidence that the murder was committed during a felony. Robinson's confession provides ample evidence of kidnapping and considerable evidence of sexual battery and robbery.

Further, Robinson's statement provides evidence supporting the committed-to-avoid-arrest aggravator. After pausing to reflect, Robinson concluded that any claim that he had accidentally shot the white, female victim would not be believed. For this reason, he "had to" (R 33) make sure that she died so she could not turn him in to the authorities. Therefore, he shot her again, killing her. Any reasonable fact finder could conclude from that evidence that Robinson killed Ms. St. George to avoid arrest.

The heightened premeditation needed to support the cold, calculated aggravator is also evident from Robinson's own confession which shows a calm and cold, deliberately ruthless action with no pretense of legal or moral justification. It shows that Robinson chose a white, female, alone and apparently stranded on the roadside, displayed his gun, grabbed her and ordered her to go with him, took her to a secluded area - a cemetery, "played" with, or taunted, her, undressed her, continued to display the gun, physically fought with her, picked up the gun, and shot her "in the

face." She fell to the ground, he called to her, when he got no answer, he went to his car, found and retrieved a flashlight, went back to where the victim lay, looked at her, noted that she was "laying on her side and there was blood like coming (sic) from her face," thought about what to do, and decided that he "had to" kill her to eliminate her as a witness because he felt that no one would believe that he had accidentally shot her. The State asserts that under these circumstances, Fields' testimony was clearly not "the only evidence of . . . cold, calculated." It is submitted that Robinson's own confession, alone, would sufficiently support the finding of this aggravator. *See Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996); *Wuornos v. State*, 644 So. 2d 1000, 1008 (Fla. 1994, *cert. denied*, ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); *Walls v. State*, 641 So. 2d 381 (Fla. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

Next, Robinson claims that the information contained in the affidavit would have "required an instruction on voluntary intoxication." (IB at 10 n.3). At trial, Fields attempted to testify to the heavy drinking of alcohol by, or the intoxication of, Robinson, but **Defense Counsel's** objection was sustained by the

trial court. (TR-497).[11] Thus, this issue is procedurally barred.[12]

Robinson wants this Honorable Court to believe that with changes in Fields' trial testimony in regard to the four things enumerated above, he could have convinced a jury that the white, female victim (TR 417, 499), who was on her way (TR 446), late at night (TR 446-447), out-of-state (TR 448) to attend a child custody

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[11] Herein "TR" refers to the original trial record, as prepared for direct appeal.

[12] It is also without merit. In his alleged affidavit, Fields states that he and Robinson "had drank way too much . . . was both very high -- way over the limit. We was way way out there, totally wasted in fact." (R 384). However, at trial, Fields testified that when the men left the party, Robinson walked and talked normally. (TR 497). He also said that Robinson drove the car and otherwise appeared fine. (TR 497-498). Neither Fields, nor any other witness, including Robinson, has stated that Robinson "was 'substantially impaired to the extent that he did not know what he was doing.'" *Gudinas v. State*, No. 86,070, slip op. at 14 (Fla. April 10, 1997). In fact, any such claim would be preposterous. Robinson's confession details the events concerning the murder of Ms. St. George. In three handwritten pages, he tells who, what, when, where, and why. He describes his activities prior to accosting Ms. St. George on the side of the interstate, moves through a detailed description of his actions leading up to the murder, describes the murder, including his decision to shoot her a second time, his decision "to get rid of her stuff," and his efforts to eliminate evidence of his crime such as throwing away the victim's clothes and purse, and damaging the murder weapon with a screw driver before throwing it away. (R 32-34). Throughout , he directly quotes himself and Ms. St. George. Thus, his confession belies any claim that his alleged heavy drinking substantially impaired him to the extent that he did not know what he was doing. Clearly, Robinson would not be entitled to relief on such a claim. *See Gudinas*, No. 86,070, slip op. at 13-14.

proceeding (TR 448) the next day (TR 448), consented to be handcuffed and voluntarily accompanied two black males, whom she had never seen before, and who had stopped and approached her on the side of the interstate, in their vehicle, to a cemetery in a remote area far away from her car which she voluntarily left on the side of the interstate, in order to have consensual sex with both men. (TR 611). There is no reasonable possibility, much less a probability, that the alleged newly discovered evidence would have produced an acquittal in 1986; neither would it do so today. Robinson is entitled to no relief.

Finally, Robinson complains that the trial judge did not admit Fields' unauthenticated alleged affidavit into evidence. (IB at 12). He intimates that Fields would have testified if the State had granted him "use immunity." (IB at 12-13). In the alternative, Robinson claims that the State should have been "required to grant Fields use immunity because prosecutorial misconduct had distorted the fact finding process."[13] (IB at 13).

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[13] None of the three claims of prosecutorial misconduct are valid. The only allegation of police coercion is contained in the affidavit which Fields refused to authenticate. The claim that the State breached its plea agreement with Fields was contested. The evidentiary hearing established that there was a disagreement between Fields' attorney and the prosecutor over whether the prosecutor had agreed to recommend clemency. (T 100-102). The

At the instant evidentiary hearing, defense counsel admitted that the reason for Fields' refusal to testify was "unclear" and guessed that it was an assertion of his right against incrimination or anger because "he felt that his deal with the State had been breached."[14] (T 134). Regardless of whether "use immunity" should have been granted if Fields' refusal was based on a lack thereof, Robinson has utterly failed to show that the refusal was for that reason. The State contends that the reasonable inference from the information before this Honorable Court is to the contrary.

In 1989, at Robinson's resentencing proceeding, Fields refused to testify even though the prosecutor granted "use immunity," all of his state appeals and remedies had been concluded, and the trial

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prosecutor placed on the record, at Fields' deposition (Robinson's counsel was present (T 105)) that he would not ask "for any particular clemency or anything like that. . . . I'm not going to be asking for any type of clemency . . .." (T 102). Further, former Defense Counsel Cushman denied that he advised Fields not to testify at Robinson's 1989 resentencing proceeding, (T 85, 245), and the transcript from that proceeding shows that Fields was represented, and advised, by his attorney, Larry Griggs. (RT 280-282) [Herein "RT" refers to the Resentencing transcript].

[14] In light of this argument below, (T 245, 247, 248), it is absurd for Robinson to complain to this court that the trial judge's conclusion that Fields "now is 'mad' at the State" is without basis in the record. (*See* IB at 13).

judge ordered him to testify. (RT 281-282).[15] The transcript reveals a far more likely reason for Fields' refusal to testify: "[H]e has an IQ of about 62, he really doesn't remember that well anyway." (RT 281). At the evidentiary hearing, after consulting with his client, Fields' attorney explained: "He is real confused." (T 241, 242).

Further, at the evidentiary hearing, Robinson's own attorney told the court that Fields "has no beneficial interest in testifying here. He has a beneficial interest in not saying anything." (T 249). Thus, it is unlikely that any grant of "use immunity" would have produced the desired result.

There was no error, and Robinson is entitled to no relief.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S ALLEGED *BRADY/GIGLIO* CLAIM.

To establish a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 214 (1963), Robinson must show that the State withheld exculpatory evidence which has been newly discovered. He must then show that "there is a reasonable probability that 'had the evidence been disclosed to the defense,

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[15] Herein "RT" refers to the resentencing transcript.

the result of the proceeding would have been different.'" *Medina v. State*, 573 So. 2d 293, 296 (Fla. 1990)(*citing Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990)). To establish a *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) violation, he must show: (1) The testimony was false; (2) the prosecutor knew it was false; and, (3) the false testimony was material to the conviction and/or sentence. *Craig v. State*, 685 So. 2d 1224 (Fla. 1996)(*citing United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). He has shown neither.

A. Police Pressure/Prompting: Robinson complains that Fields testified "falsely" at trial due to improper "pressure and prompting by the police." (IB at 16). The basis for this claim is the unauthenticated alleged affidavit of Fields which was not admitted into evidence and is not properly before this Court. Neither is the testimony of Attorney Cushman properly before this Court; the lower court sustained the objection to the entire line of testimony regarding what Fields allegedly told him about the circumstances of the shooting. (T 88, 89, 91. See, Point I, *supra*, at 4 n.3). Thus, this a non-issue and need not be further considered.

Assuming *arguendo* that the allegations of the affidavit are properly before this Honorable Court, Robinson is entitled to no

relief. The information contained in the affidavit is not newly discovered evidence for the reasons asserted in Point One, *supra*, at 3-5. Further, due to the abundant evidence of guilt contained in Robinson's confession, as well as the testimony of Fields which has not been recanted, there is no reasonable possibility that had the alleged evidence of police pressure been disclosed the result would have been different. Thus, there is no *Brady* violation.

Neither has Robinson shown a *Giglio* violation. He has not established that either of the two statements which Fields' alleged affidavit indicates were included due to police pressure or suggestion were false or that the police knew them to be false.[16]

The unauthenticated affidavit says only that Robinson never told him "how he was going to shoot the lady or kill the bitch." It does not recant his testimony as to why Robinson was going to kill her. Thus, he has not alleged that the trial testimony on this matter was false.

Further, the affidavit does not say that the police knew that the claim that Robinson was holding a gun on Ms. St. George or that Robinson said "how he was going to shoot the lady or kill the

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[16] Robinson identifies these in his brief as "had to kill the victim because she could identify him" and "held a gun on the victim when they came to his car." (IB at 16).

bitch" was false. It alleges only that the police suggested Fields include those in his statement, and he "went along with it." Thus, the police may have simply been trying to help this young man include details they believed to be entirely true. That Fields "went along with it" only underscored their legitimate belief in the veracity of the facts so included. Since Robinson utterly failed to establish that the "murder motive" statement was false or that the police knew either of the statements were false, he has failed to establish a *Giglio* claim.

Robinson's failure to show that the alleged false facts were material to the conviction and/or sentencing precludes relief based on *Giglio*. It was <u>not</u> necessary to show that Robinson held a gun on Ms. St. George as he brought her to the car to establish Robinson's guilt of her kidnaping. Neither was it necessary to prove witness elimination as an aggravator to get a death sentence.

Finally, assuming that the issue is not procedurally defaulted, Robinson has failed to show any entitlement to relief. The type of pressure allegedly asserted by the police does not rise to the level necessary to invalidate a confession.

B. Contacts and Agreement with State: Contrary to Robinson's representations in his brief, Fields did **not** testify that "he **met with** the prosecutor only once . . .;" neither did he testify "that

they only **talked** once . . .." (emphasis added) (IB at 17). Rather, he said that he **practiced** his testimony **before** "**coming here**" (i.e., to court) when he spoke to the prosecutor for five to ten minutes prior to going to the courtroom to testify. (R 5813; Exhibit #3). The youth was responding literally to the question asked.[17] Fields was **not** asked how many times he had **met with** the prosecutor or how many times he had talked about the case with him. He was asked if he had seen and talked to "the detectives" several times, and he replied: "Yes." (R 5814; Exhibit #3). Thus, there was nothing for the prosecutor to correct.[18]

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[17] Indeed, Prosecutor Alexander testified that he had a "chat" with Fields "the day that we were getting ready to put him on the witness stand . . . there in my office. . . . [W]e were going over his testimony and we came upon a particular detail . . .." (R 5803). Mr. Alexander went on to explain that he gave Fields tips including to be serious and "if he didn't understand the question certainly ask to repeat it, and that kind of stuff." (R 5804). Clearly, it was this meeting that Fields regarded as "practicing" for his testimony later that morning. There was no deception.

[18] Attorney Alexander testified that the first time he spoke to Fields was at his deposition, given after Fields' conviction, and a couple of days before Robinson's trial was set to begin. (R 5794). Robinson's trial was then continued for approximately 30 days, and Mr. Alexander had more conversations with Fields during that time. (R 5797). Mr. Alexander's purpose was to make sure that Fields trusted him and build a rapport with Fields. (R 5797-5798). He and Fields talked "three, four, five times" prior to Robinson's trial, (R 5797), and the topics included "football games . . . the potato seasons . . . religion." (R 5805).

Robinson has not shown that Fields' trial testimony regarding the number of times he practiced his testimony was false, much less that the prosecutor knew it was false, or that it was material to the conviction and/or sentence. Thus, he has not shown a *Giglio* violation.

The claim that the prosecutor let Fields testify falsely regarding the agreement he had with the State is spurious. The "agreement" was put on the record in the presence of Attorney Pearl.[19] (R 3506-3509). If Fields' testimony was inaccurate, counsel could have brought that out on cross-examination. On cross, Attorney Pearl elicited from Fields that the agreement included:

(1) The prosecutor had promised to do his best to get the court to give Fields concurrent sentences for the murder charges and other three crimes;

(2) The prosecutor had granted him immunity;

(3) To get the help of the prosecutor in his case, he had "to come in here and help the State convict Johnny Robinson." (TR 521-522).

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[19] In his brief, Robinson admits that the prosecutor "explained **in detail** the deal with Fields" during Fields' deposition. (emphasis added)(IB at 18).

Fields also testified that part of the agreement was that he "tell the truth today to this jury." (TR 514). He said that the prosecutor had agreed to make recommendations for him and help him out. (TR 514). Finally, Fields testified that he "really can't remember" any more details of the agreement. (TR 514). Attorney Pearl could have refreshed Fields' recollection with the deposition transcript if he had felt that the information about a potential letter was of any real value.[20] The truth is that same was a relatively insignificant aspect of the agreement, the major provisions of which were clearly laid before the jury.

Robinson has failed to show that the information regarding how many times Fields met with the prosecutor is exculpatory. Neither has he alleged, or shown, why it could not have been discovered with diligence at the time of trial, or that it would have changed the result. Thus, he has not established a *Brady* violation.

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[20] At the evidentiary hearing, Attorney Cushman, implied that he understood the prosecutor to agree to write a letter recommending clemency. (*See* T 82, 87). However, the prosecutor maintained that he agreed: "[P]rovided Fields totally cooperated in the prosecution of his codefendant, that I would in turn write a letter to the Governor or the Parole Board, you know, so they would understand the . . . total cooperation Fields had given us in the case." (R 5795-5796). Fields breached his part of the agreement when he refused to testify at Robinson's resentencing, and so, he refused to write the "full cooperation" letter. (R 5809, 5810).

C. Fields' Statement to Captain Porter: Robinson complains that the State did not tell him that Fields made a statement to Captain Porter in which he said "that the victim was shot during an argument . . . not as the result of an announced decision to shoot her." (IB at 19-20). The statement at issue is:

> Fields said something to the effect of, somehow or another in the conversation that Robinson had called her a bitch and at that point, she either pushed him or slapped at him or something like that and in turn, he slapped at her or used his gun to threaten her with and that's when he shot her. That's when Robinson shot her.

(IB at 14). This statement does not equate to Fields having told the captain that Robinson shot Ms. St. George accidentally.

Moreover, it supports guilt of first degree murder. Fields said that Robinson threatened Ms. St. George with his gun and thereupon "he shot her." That there was (allegedly) some sort of conversation and turn-about slapping going on before Robinson threatened and shot her does not exculpate Robinson.[21] Since the statement was not exculpatory, it cannot be *Brady* evidence.

Further, assuming that the evidence is exculpatory, Robinson must show that it is newly discovered. This he has not done and cannot do. Neither can he show that if disclosed, the result would

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[21]Neither did it eliminate aggravators.

probably have been different: Robinson's confession contains essentially the same account. This information was available in Fields' trial, and he was nonetheless convicted. Robinson has not established a Brady violation.

Finally, Robinson has not demonstrated a *Giglio* violation. The subject statement was not inconsistent with Fields' trial testimony. That Robinson struggled briefly with Ms. St. George before he shot her does nothing to discredit, much less render false, Fields' trial testimony. The claim that the State knowingly presented Fields' false testimony at trial is without merit.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S REQUEST FOR AUTHORIZATION TO INCUR COSTS FOR ATTENDANCE OF WITNESSES AT THE EVIDENTIARY HEARING.

Robinson complains that the trial court denied his motion for payment of the travel expenses of 50 witnesses. He requested authorization to incur such expenses "pursuant to Rule 3.220(0), Florida Rules of Criminal Procedure . . .." (R 781). Under that pre-trial discovery provision, the County would have to pay for any authorized expenses. *Fla.R.Crim.P. 3.220(0).*

The court granted the motion to the extent that it authorized expenses for a total of eight witnesses - three attorneys, Dr.

Krop, Fields, and three background witnesses.[22] The court denied the remainder of the motion due to practicality concerns, including cost and time, and because the vast majority of the information about which the proposed witnesses would testify was, as postconviction defense counsel agreed, "overwhelmingly cumulative."[23] (T 570-571).

Regarding defense counsel's complaint that the ruling was too much of a limit on the defense presentation, the judge said:

> Well, you know, it makes it very difficult, Mr. Chipperfield, when you just hit me with a scatter gun. If you had come in with a reasonable list of witnesses, maybe I could have done it more effectively if I had to choose some witnesses, but you have got everybody's name that you ever heard, put them on a list, even wanted to fly in a psychiatrist from New England. To tell me what? To tell me Dr. Krop, if he had had more information, could come to a different opinion.

(T 569-570). Dr. Krop, who had read the affidavits, was competent to, and did, testify to the content of the affidavits and the

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[22] Two of the three background witnesses testified; the other failed to attend the hearing. (T 568).

[23] Counsel did *not* argue in the lower court that the information was needed to support Dr. Krop's "new diagnosis--alcohol abuse . . . ." (IB at 30). Thus, this point is not cognizable on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

effect of that information on his professional opinion. Certainly, he made it clear that if he had had that information originally, he could have reached a different opinion. Thus, there was no prejudice in the denial of funding for these witnesses.

The record does not appear to contain a written request for expenses relating to Dr. Robert Phillips, the New England psychiatrist Robinson wanted. Robinson told the court that Dr. Phillips' testimony would show "that Krop misdiagnosed Robinson and that background information is essential to a proper mental health evaluation." (IB at 30). The following occurred regarding the defense request for expenses for Dr. Phillips:

> [The Court]: . . . What's he going to testify to?
>
> [Defense Counsel]: . . . [T]he psychological diagnosis that Dr. Krop reached on Mr. Robinson and he determined that the diagnosis was wrong; he was misdiagnosed.
>
> [The Court]: Well, how is that relevant . . .? Dr. Krop is a recognized forensic psychologist in the State of Florida, probably has testified more in criminal court and particularly capital cases and particularly for the defense than any other psychologist around.
>
> [Defense Counsel]: . . . Dr. Krop himself has signed an affidavit saying that he's afraid that he misdiagnosed based upon inadequate information . . ..
>
> [The Court]: Why do you need to bring in a guy from New England to do it? Why can't Dr. Krop do it?
>
> [Defense Counsel]: Dr. Krop isn't certain right now exactly what the diagnosis is.

> [The Court]: Well now, . . . [w]hat is it about this psychiatrist that requires us to fly him in here from New England at some stupendous cost to the taxpayers to have him testify he disagrees with one of the foremost-recognized psychologists in the State of Florida in criminal court? . . .
>
> [Defense Counsel]: Well, . . . I don't think we're going to have to bring him in.

(R 6041-6042). Defense counsel explained that he hoped to present the evidence through an affidavit or deposition. (R 6042). There is no indication counsel ever renewed his request to have the doctor physically present to testify at the hearing. The failure to renew the request constitutes a waiver of it.

Robinson claims that he wanted to use Dr. Phillips "not only to show that Krop's diagnosis was incorrect, but to also show that the information Krop relied on was inadequate for making such a diagnosis and that Robinson could not be faulted for trial counsel's failure to investigate." (IB at 31). He says that Dr. Phillips would also have explained that Robinson was not at fault "because he had no way of understanding the potential legal significance of the events in his life."[24] (IB at 31). Only the

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[24] Robinson's capacity to understand the legal importance of the background information is clear in the record. Robinson is described as very articulate, knowledgeable and intelligent; a man who has a surprising vocabulary for a person with only a high school degree and a few college courses. (R 2357, 2361). Robinson

claim that Dr. Phillips was wanted to show that Dr. Krop misdiagnosed Robinson was raised below, and therefore, it is the only viable issue before this Court. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Clearly, Dr. Phillips was not needed to establish that point. Thus, there was no error in denying the request for travel expenses for Dr. Phillips.

Finally, the State asserts that the denial of the County funds should be upheld because the court was without power to order the County to pay the subject costs. The record does not disclose how Chipperfield and Link came to be counsel for Robinson. However, the statutes make it clear that the Capital Collateral Representative [hereinafter "CCR"] is responsible for the representation of death-sentenced persons in all collateral postconviction proceedings, "unless a court appoints or permits other counsel to appear as counsel of record." §27.702(2), Fla. Stat. (1996). CCR has been funded by the Legislature to pay the costs and expenses associated with the postconviction proceedings relating to death-sentenced persons. *Hoffman v. Haddock, No. 90,403, slip op. at 2 (Fla. May 30, 1997)*. Robinson's 3.850 motion is a collateral postconviction proceeding, and therefore, CCR has

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was quite capable of describing his life history. (T 415)

funds with which to pay his estimated costs.

In the event of a conflict of interest, a private attorney may be appointed. §27.703, Fla. Stat. (1996). "Appointed counsel shall be paid from funds appropriated to the Justice Administrative Commission" [hereinafter "JAC"]. *Id.* Since there is no explanation of how, or why, the private attorneys were representing Robinson instead of CCR, it is possible that there was a conflict. If so, the litigation funds should have come from the JAC.

There is no provision at common law for charging one party with the other's litigation costs. Rather, such provisions are statutory creations. *See, e.g., Wolf v. County of Volusia*, No. 88,146 (Fla. April 17, 1997); *Board of County Commissioners, Pinellas County v. Sawyer*, 627 So. 2d 757 (Fla. 1993). Thus, a County cannot be compelled to pay any costs not mandated by statute. *County of Dade v. Sansom*, 226 So. 2d 278 (Fla. 3d DCA 1969). There is no statutory provision mandating, or authorizing, the payment of the collateral postconviction costs at County expense. Thus, to the extent that the trial judge denied Robinson's subject motion, his ruling was correct.

It is clear that the Legislature intended for the monies it appropriated to CCR, or to the JAC, be used to pay expenses such as those Robinson sought authorization to incur. As this Court said

in *Hoffman*, "CCR is responsible for the costs . . . and we cannot compel the . . . County to pay the costs. . . ." *Hoffman, supra*. Postconviction Counsel's failure to request payment by the appropriate party is an adequate ground for affirmance of the trial court's order. Robinson has failed to show entitlement to the relief he seeks, and his claim should be denied.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S CLAIM THAT HIS TRIAL DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE, ESTABLISH NONSTATUTORY MITIGATION AND ARRANGE FOR COMPETENT MENTAL HEALTH EXAMINATION.

To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy v. State,* 546 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id. See Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed. 2d 674 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely

prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So.2d 1067, 1069 (Fla.1988)(*citing Strickland*, 466 U.S. at 687).

Dr. Krop, court-appointed to assist in Robinson's defense, (T 262), conducted clinical interviews of Robinson in March of 1986 prior to the original sentencing proceeding and in December, 1988 prior to the 1989 resentencing proceeding. (T 265). Before the original sentencing, Dr. Krop "reviewed some DOC records or spoke to one of the officers at the local . . . county jail." (T 267).

Prior to resentencing, Attorney Pearl gave his entire file on Robinson to Dr. Krop for his use in assisting in Robinson's resentencing defense. (T 276). The doctor went to the prison to review "the DOC file between the first and the second hearing . . .." (T 277). He reviewed the PSI which included the name and address of Robinson's adopted brother/uncle, Troy Hester, and contained other background information.[25] (T 312, 448, 2354-2378).

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[25] The PSI identified at least two potential background witnesses for Robinson, giving addresses, and mentioned at least two types of work Robinson had done. (T 275-276, 312). It also included a somewhat specific description of his past life and identified two schools he attended. (R 2360, 2361). Robinson admits that the PSI contained such information. *See* IB at 40.

On direct examination at the evidentiary hearing, Dr. Krop testified that his original diagnosis of antisocial personality disorder was incorrect based upon the affidavits Robinson's postconviction counsel had provided to him.[26] (T 281-282). He said that for a diagnosis of

> antisocial personality disorder, one of the required criteria is that the individual experience what we call a conduct disorder prior to the age of fifteen. That conduct disorder is based on a number of criteria that have to be fulfilled and occur before the age of fifteen.

(T 282). The DSM3R is the diagnostic source he used, and "under conduct disorder, the individual has to meet three or more of twelve different criteria that are listed."[27] (T 282). According

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[26] Previously in his testimony, Dr. Krop had emphasized the importance of talking to people to get information about the person being diagnosed; nonetheless, he did not attempt to contact any of the affiants. (T 349, 351-352). Inconsistencies such as this (and many others) seriously undercut the value of Dr. Krop's testimony on Robinson's behalf. Indeed, the trial judge found it "questionable that Dr. Krop is willing to change his diagnosis without interviewing the witnesses who gave the affidavits and without further interviewing Defendant in light of this 'new evidence.'" (R 5773). Moreover, it was questionable because "Dr. Krop is willing to change his diagnosis when he never indicated to Mr. Pearl that he didn't have enough information and exhibited no reluctance in making his first diagnosis of Defendant." (R 5773).

[27] There are actually thirteen criteria, only three of which must be met for the diagnosis.

to the DSM3R, for a diagnosis of antisocial personality disorder, one must have first qualified for a conduct disorder and have "[a] pattern of irresponsible and antisocial behavior since the age of 15," as indicated by at least *four* of the listed criteria.[28]

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[28] The criteria are:

(1) Is unable to sustain consistent work behavior, as indicated by any of the following (including similar behavior in academic settings if the person is a student):
(a) Significant unemployment for six months or more within five years when expected to work and work was available;
(b) Repeated absences from work unexplained by illness in self or family;
(c) Abandonment of several jobs without realistic plans for others;

(2) Fails to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing antisocial acts that are grounds for arrest (whether arrested or not), e.g., destroying property, harassing others, stealing, pursuing an illegal occupation;

(3) Is irritable and aggressive, as indicated by repeated physical fights or including spouse- or child-beating;

(4) Repeatedly fails to honor financial obligations, as indicated by defaulting on debts or failing to provide child support or support for other dependents on a regular basis;

(5) Fails to plan ahead, or is impulsive, as indicated by one or both of the following:
(a) Traveling from place to place without a prearranged job or clear goal for the period of travel or clear idea about when the travel will terminate;
(b) Lack of a fixed address for a month or more;

(6) Has no regard for the truth, as indicated by repeated lying, use of aliases, or "conning" others for personal profit or pleasure;

Dr. Krop opined that, based upon the alleged new information contained in the unadmitted affidavits, Robinson "more appropriately fits a mixed personality disorder than an antisocial personality disorder," (T 345), and so, he changed his diagnosis. (T 304). Dr. Krop described this disorder as "a catch-all disorder." (T 305). "[I]f you can find certain characteristics of a personality disorder, but you can't find them all, you simply say he has a personality disorder." (T 306).

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(7) Is reckless regarding his or her own or others' personal safety, as indicated by driving while intoxicated, or recurrent speeding;

(8) If a parent or guardian, lacks ability to function as a responsible parent, as indicated by one or more of the following:

(a) Malnutrition of child;

(b) Child's illness resulting from lack of minimal hygiene;

(c) Failure to obtain medical care for a seriously ill child;

(d) Child's dependence on neighbors or nonresident relatives for food or shelter;

(e) Failure to arrange for a caretaker for young child when parent is away from home;

(f) Repeated squandering, on personal items, of money required for household necessities;

(9) Has never sustained a totally monogamous relationship for more than one year;

(10) Lacks remorse (feels justified in having hurt, mistreated, or stolen from another).

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised. Washington, DC, American Psychiatric Association, 1987.

Dr. Krop then explained his diagnosis change: "I don't have sufficient information at this point in time to truly say this person has an antisocial personality disorder . . .."[29] (T 346). As a result, he ruled out antisocial personality disorder and changed his diagnosis to the catch-all, nonspecific one. (T 345). Nonetheless, on cross examination, Dr. Krop reluctantly admitted: "I cannot sit here necessarily and say that this person does not have an antisocial personality disorder."[30] (T 344).

If, at the time of the Rule 3.850 evaluation, the doctor did not have sufficient information to support his original diagnosis of antisocial personality disorder, it was because he did not ask

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[29] When the State pointed out that this conclusion resulted from Dr. Krop's failure to ask the diagnostic questions on antisocial personality disorder, the doctor agreed: "I **did not ask** some questions specifically related to the criteria that are listed in the DSM3 (sic)." (Emphasis added) (T 345-346). Dr. Krop did not ask Robinson about his cruelty to animals, whether he **often** lied, whether he had stolen with confrontation of the victim, whether he had set fires, whether he had destroyed people's property, or whether he often initiated physical fights (T 336, 338, 347, 349, 396, 403-404) - all criteria for conduct disorder which is a required criteria for antisocial personality disorder. Despite his repeated efforts to renege on his prior diagnosis of antisocial personality disorder, Dr. Krop admitted: "Mr. Robinson has engaged in numerous antisocial acts . . .." (T 335).

[30] Dr. Krop admitted that on two previous occasions in 1986 and 1989, he testified that the characteristics he found present in Robinson supported a diagnosis of antisocial personality disorder. (T 306).

Robinson the qualifying questions. His change of diagnosis is only valid under accepted psychological practices if Robinson does not fit the criteria for any other diagnosis. (T 345). Since the doctor did not first determine if Robinson met the criteria for antisocial personality disorder, his changed diagnosis to mixed personality disorder is not credible.[31]

Further, the record of the evidentiary hearing, through the testimony of Dr. Krop, shows that Robinson met the criteria for a conduct disorder. The evidence established that he has:

1. Stolen without confrontation of a victim on more than one occasion; (T 348-349, R 2358);

2. Run away from home overnight at least twice;[32] (T 323,

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[31] In trying to explain why he felt that one of the criteria he had previously used to diagnose a conduct disorder supporting the antisocial personality disorder diagnosis, i.e., truancy, was improperly applied to Robinson at the time he made his original diagnoses, he said: "I've learned that one of the reasons that he did not go to school was because of the teasing that he received because of the clothes that he wore." (T 283). He then identified his source of "learning" to be the affidavit of Aaron Eugene Kane. No where in that unadmitted affidavit does Mr. Kane state that, in his opinion, the poor quality or condition of Robinson's clothing, or any teasing they invoked, was a reason why Robinson was truant from school. (*See* R 5540-5541). Dr. Krop's testimony, and the bases on which he claims to have changed his diagnosis are fraught with faulty reasoning and extrapolation and are incredible.

[32] Robinson related that he ran away at nine or ten; he was looking for his aunt and hitchhiked to Baltimore. (T 399). He also ran

324, 399, 404);

3. Often lied (other than to avoid physical or sexual abuse);[33] (T 400, 401);

4. Was often truant from school;[34] (T 316,401-402);

5. Has broken into someone else's house, building, or car. (T 314; R 2358; TR 762).

Since only three of the foregoing are required for a diagnosis of conduct disorder, such a diagnosis was clearly proper.[35] *(See* T 326, 341-342.)

The record of the evidentiary hearing, through the testimony of Robinson's own expert witness, Dr. Krop, also shows that he met

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away at age 12 and began living in migrant labor camps. (T 404). Dr. Krop admitted that the facts support this factor. (T 324).

[33] Robinson lied to serve his own purposes. (T 400). Some of these included to get a job and on school evaluations. (T 401). Dr. Krop admitted that Robinson had "a history of lying." (T 401).

[34] He told Dr. Krop that he returned to school, after having quit for two years. (T 401). He quit again after three months because he "didn't feel comfortable with his peers . . .." (T 401). Dr. Krop admitted that such behavior constituted truancy. (T 316, 401-402).

[35] Robinson's claim that "the known evidence does not meet the criteria for that disorder, because his behavior prior to the age of fifteen could be explained by understanding his environment," (IB at 59), is without merit. Dr. Krop reluctantly admitted that "there's nothing in the manual [DSM3R] that says you are supposed to look for the motive or the context." (T 458).

the criteria for an antisocial personality disorder. At the hearing, Dr. Krop testified that Robinson met criteria five, seven, and ten, to-wit: He was impulsive, was reckless regarding his own or others' personal safety, as indicated by driving while intoxicated, and lacked remorse.[36] (T 308). In addition, the evidence at the hearing showed that Robinson:

(1) Failed to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing, pursuing an illegal occupation; (R 2358-2359; TR 762);[37] and,

(2) Repeatedly failed to honor financial obligations, as

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[36] At the evidentiary hearing, Dr. Krop testified that Robinson told him that he raped a prostitute, but he refused to "accept responsibility for raping her." (T 313). He also failed to show remorse. (T 313). Robinson told the doctor: "'No self-respecting brother would ever trick.' This is why he wouldn't pay the prostitute. 'I knew she was a prostitute. They want to be taken advantage of. That's why they're prostitutes.'" (T 328). Robinson expounded that "the ends justify the means." (T 328. *see* T 459). Further evidence of his lack of remorse is that 6 days after he kidnaped, robbed, raped, and murdered Ms. St. George, he raped another young woman in a disabled vehicle on the side of the interstate and robbed her friends. (R 3756-3772).

[37] "[H]is first difficulty was at around the age of twelve when he started getting into trouble with the law and he was first locked up in jail for, he stated, a breaking and entering charge at the age of thirteen." (T 314)

indicated by . . . failing to provide child support . . . on a regular basis. (T 391-392).

For a diagnosis of antisocial personality disorder, only four of the DSM3R factors have to be present.[38] There were at least five established at the evidentiary hearing. These were in addition to the factors necessary for the conduct disorder diagnosis. Dr. Krop clearly found that Robinson had a pattern of antisocial behavior since the age of 15. (T 335. *See* R 2358-2359). Thus, Dr. Krop's claim that the background information was of such a nature as to change the appropriate diagnosis of Robinson's personality disorders is wholly without merit. Moreover, even if as the trial judge found, the change in the diagnosis was "minor," (R 5773), it would not have made any difference in the outcome, and therefore, Robinson suffered no prejudice.

Dr. Krop down-played his prior diagnosis of psychosexual disorder. At resentencing, the doctor testified: "Psychosexual disorder is certainly an appropriate diagnosis." (T 382). At the evidentiary hearing, he said that he previously described Robinson "as having a psychosexual disorder based on my not having any

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[38] Of course, the conduct disorder diagnosis must also be met; it was in this case as described hereinabove.

evidence to the contrary that he was capable of forming and developing what I would consider appropriate or normal relationships." (T 383). However, he then said that the information contained in the affidavits did not change his professional opinion that Robinson has a psychosexual disorder - only that it was inappropriate to refer to it as a "diagnosis."[39]

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[39]The following occurred:

> [The State] Well, you say here [resentencing testimony] that your diagnosis is based upon his . . . recurring incidents of forced sex?
> [Dr. Krop]: Correct.
> [The State]: That hasn't changed?
> [Dr. Krop]: No.
> [The State]: So you didn't list anything else as your criteria for reaching that diagnosis, did you?
> [Dr. Krop]: That's correct.
> [The State]: Tell me where it requires that you change your opinion, based upon . . . your evaluation that he has . . . had other sexual relationships?
> [Dr. Krop]: Other meaningful, normal, appropriate relationships . . . we are not talking about the diagnostic criteria. . . .
> [The State]: Well, to find a disorder you had to use the criteria; didn't you?
> [Dr. Krop]: Correct, and I did **not** have any criteria. . . .
> [The State]: So you can't really say that what you've read in the affidavits change your mind. What you are telling us is you were wrong in 1986 to have ever put that label on him?
> [Dr. Krop]: Not to put the label of psychosexual disorder, but to call it a

(T 384). Thus, the background information made no significant difference in Dr. Krop's testimony regarding the sexual disorder. Robinson was not prejudiced by the doctor's not having that background information when he testified at sentencing.

Regarding Dr. Krop's 1989 investigation of Robinson's background, the doctor testified:

> Robinson was very reluctant to have me or his counsel contact his family members. He indicated that he did not want them to be involved, and he did not feel that they were particularly relevant in this case. It was only by persuasion of both Mr. Pearl and myself that he gave us at least two names of people we contacted.

(T 375). Robinson made it clear to Dr. Krop that "he preferred me not to get in touch with family members . . .," refusing to give him names when he asked for them. (T 376, 377). Robinson said that his close family members were either dead or could not help because they did not "really know much about him."[40] (T 449).

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diagnosis. . . . I was in error.

(emphasis added) (T 383-384).

[40] Dr. Krop testified that at the initial interview, Robinson gave him some family history information. He said that he loved his alleged abuser, step-grandfather, "Baby Boy," who was "the major caretaker that Mr. Robinson had as a child." (T 406). Baby Boy Hester was dead at the time of Robinson's trial, as was his grandmother, Janey. (T 448). Biological dad was still alive; he had last seen Robinson when Robinson was 14. (T 449).

Dr. Krop testified that as soon as Robinson gave names to Attorney Pearl, Counsel forwarded them to the doctor who acted upon them.[41] (T 377-378). Prior to the resentencing hearing, Dr. Krop spoke to the persons Robinson disclosed. Reverend J. B. Robinson, Robinson's biological father, said that his mother adopted Robinson when he was a baby. (T 378-379). He denied that he ever physically abused Robinson, and said he did not know his son very well as he had not raised him.[42] (T 379). Ernest Smith, Robinson's childhood friend, said that he did not know much about Robinson's family life, except that his mother, Karine Smith, had raised Robinson "part of the time." (T 379). Karine Smith said that she had seen bruises where Robinson's grandfather had beaten him. (T 379). She acknowledged that Robinson stayed with her. (T 379). According to Dr. Krop, these persons told him "a few other things," but he did not reveal them at the hearing. (T 379).

At the initial interview in 1986, Robinson told Dr. Krop that he was a migrant laborer who had lived in migrant labor camps and

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[41] According to Dr. Krop, at least one of the persons Robinson finally divulged refused to cooperate. (T 378).

[42] Robinson said his father accused him of stealing from him, and he had not had anything to do with him since. (R 2361).

gone from job to job.[43] (T 394, 413). He told him that he worked for a newspaper in Georgia for three years. (T 395). He also related that he had worked as a mechanic and a driver. (T 298).

He was "defiant at home" and began to be "more defiant."[44] (T 396). Robinson admitted his substantial criminal history beginning at age 13 when he was jailed and lied about his age.[45] (T 396, 397). Robinson told Dr. Krop that he never drank heavily because he could not afford to do so. (T 397). Robinson also told Dr. Krop that he engaged in violent crimes when he was 15 or 16 - one of which was assault and battery. (T 402).

Robinson told Dr. Krop that from "ages 12 to 14, he lived in migrant labor camps" with "drunk, dirty and perverted men." (T

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[43] Dr. Krop admitted that he failed to ask Robinson any detailed questions about this, or even to elaborate on it. (T 413). The State submits that this shows how little value the doctor placed on this type of information as mitigation. It renders his attempt at this late date to elevate the migrant life information contained in the affidavits incredible.

[44] Robinson said that he "was hit -- that a leather strap was used, that he got a lot of, quote, 'ass whippings for things I didn't do.'" "So I started doing them." (T 395).

[45] This occurred in Belle Glade, Florida; "he was charged with carrying a concealed weapon" - a gun. (T 399). He tried to use the gun on a coworker who "hit him with a pipe." (T 400). Robinson lied to the criminal authorities, convincing them he was an adult. (T 285). He also lied about his age later when applying for a job. (T 399-400).

404). In the context of sexual abuse, Robinson said: "'When you ain't big enough to whip them, you have to submit.'" (T 404-405). The doctor also admitted that none of the affidavits substantiate Robinson's claims of sexual abuse (which were disclosed during the first interview). (T 408).

The fact that Robinson engaged in significant antisocial behavior had not changed with the additional background information. (T 408, 409). The doctor had not become aware of anything that Robinson had been convicted, or accused, of that he claimed not to have done, or that anyone else indicated he had not done. (T 408). Neither had Robinson's deviant sexual behavior changed. (T 409).

Prior to reading any affidavits, Dr. Krop knew that Robinson was "out on the street" and "had to fend for himself." (T 414). Dr. Krop reluctantly admitted that Robinson was certainly "capable of describing" what migrant life in general, and his migrant life in particular, was like. (T 415). Dr. Krop had previously inquired into Robinson's "involvement in migrant labor camps."[46] (T 405).

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[46] The doctor only asked Robinson about life in the migrant labor camps during a two year period; he indicated that he might not have felt that any more information regarding it would be significant. (T 405).

Further, the trial judge clearly found Dr. Krop's claim that he did not know much about migrant laborer life - until after testifying at the 1989 resentencing hearing - incredible. The judge interrupted the questioning in this regard, and the following pertinent exchange occurred:

> [The Court]: Are you telling me today that until you read those books you didn't have any information about migrant labor camps?
>
> [Dr. Krop]: No, I don't think that's what I'm saying.
>
> [The Court]: What are you saying?
>
> [Dr. Krop]: . . . I didn't know that . . . was the extent of life, particularly of a young kid who is there without family. I'm **not sure** I was exposed to that. . . . [T]he documentaries I was familiar with pretty much focused on adults and their living conditions and so forth. I'm **not sure** I can recall seeing things which related to what it is like being a child growing up in that, other than a child coming and going home.
>
> [The Court}: I'm a little puzzled, because I can't imagine anyone living in this area in the state of Florida, being a professional man, not having some information of migrant labor camps because of the information you receive both from newspaper and television.
>
> I make no study of it, but I note from my own personal experience that there's been numerous documentaries, numerous newspaper articles. I am surprised to hear you testify you knew so

little about them.[47]

(emphasis added)(T 429-430).

Dr. Krop testified that the information on which he based his change of diagnosis from antisocial personality disorder to mixed personality disorder was provided by postconviction defense counsel. (T 433). Counsel did not provide "materials related to . . . three separate cases. One is a Volusia County case which occurred around the same time as the homicide, which it involves a rape." (T 433). The rape case also included armed robbery charges, and the facts were very similar to those of the instant case. (T 434). The doctor testified that that information is such that he "would typically consider in performing an evaluation." (T 433). Dr. Krop had to admit that there were numerous crimes for which Robinson had been arrested about which neither he, nor his counsel, had told the doctor. (T 437).

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[47] The court also established that Dr. Krop lives in Gainesville which is less than 70 miles from "the 'Potato Capital of the World,'" through which one must drive going from Gainesville to St. Augustine. "[O]n both sides of the road they have migrant labor camps." (T 428, 429). Dr. Krop also admitted on cross examination that he has evaluated others "who at some point in their lives have worked . . . have been migrant workers." (T 430-431). He said that these persons, whom he was evaluating for "competency and sanity," "probably" did not tell him about the conditions, and that he did not ask them about same. (T 430, 431, 432).

In summary, the trial judge quite reasonably found much of Dr. Krop's evidentiary hearing testimony to be questionable and incredible. Where they conflicted, the court clearly accepted the testimony of Attorney Pearl over that of Dr. Krop. This record supports that decision.

Defense Attorney Pearl testified that "from approximately 1979 to 1993," he "was assigned exclusively to the defense of death penalty/first-degree murder cases." (T 142, 229). During that time, he "defended approximately 300 of such cases . . . and tried with juries somewhere between 90 and 100." (T 229). When asked to "describe the role that Dr. Krop played as a penalty phase witness for you," Attorney Pearl testified in pertinent part:

> [M]y practice has been to use him and use him alone and to eliminate other witness[es] by using him to recount what would have been their testimony.
>
> With Dr. Krop's investigation, interviews, tests, his ability to receive information from anyone and included (sic) it in his testimony as history, even though it is mere hearsay, when I use a competent clinical psychologist like Dr. Krop to testify without using other people who might have furnished him the information, I eliminate the risk of loose canons. That is, if I use mothers, relatives, friends, I always run the risk that such people are not controllable and that their testimony may run away from me because they have their own agenda rather than to attend to the things I want them to say.

> I like to keep as much positive, absolute control over testimony that's presented in a case which I defend as is possible. With Dr. Krop, I can because he can bring in all the testimony as history, . . . without the risk of outbursts, without the risk of the uninvited ejaculations which might risk the defendant in the eyes of the jury . . ..

(T 180-1281). Attorney Pearl said that he relied on Dr. Krop to interview Robinson's family members and use such information in forming his expert opinions. (T 181). He elaborated:

> Back in those days, he had a free ride and so did I on the question of history that he could choose to adopt. He could refuse to adopt or believe some things that some witnesses told him if he wished to do so and adopt the statements of others and use them as part of the history which would be a part of the diagnosis, and therefore a part of his assessment of the defendant's mental state and also the existence or non-existence of statutory and non-statutory mitigating circumstances.

(T 226).

Attorney Pearl was asked if he made "any personal efforts to do background interviews in anticipation of putting people other than Dr. Krop on the stand in the penalty phase."[48] (T 181). He

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[48] Attorney Pearl said that strategically he felt that many times a background informant would talk to a mental health professional when they might not speak with an attorney. (T 578). This was another reason why he left contact with such persons to Dr. Krop.

replied: "I looked at other witnesses to see whether I might want to do it; decided not to."[49] (T 181-182). He added:

> [T]here was . . . no other people who could testify that Dr. Krop could not include in his testimony that would not put the defendant at additional risk on cross-examination by a competent prosecutor . . ..

(T 182).

Attorney Pearl indicated that in response to a letter inquiring about potential penalty phase witnesses just prior to the 1989 resentencing, Robinson wrote, mentioning that he had "several cousins throughout Georgia . . .." (T 182). The attorney said it was not his practice to contact such people himself, but he relied on Dr. Krop, or "someone in his employ," to do so. (T 183). Attorney Pearl had used Dr. Krop in "twenty-five to thirty-five" first-degree murder cases. (T 229). It was Attorney Pearl's opinion that "Dr. Krop is a skilled forensic psychologist. . . . [H]e has a good reputation, including a reputation for being truthful and for being reliable." (T 225).

At the evidentiary hearing, in reviewing his file, Attorney Pearl pointed out "some notes based on talking to Mr. Robinson

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[49] Attorney Pearl indicated that his investigator talked "to Mr. Robinson a couple of times." (T 182).

about matters that he apparently knew, names of relatives that he hadn't seen for a long time." (T 187). The attorney said that he is "sure" that he gave that information to Dr. Krop. (T 187). He added: "I did communicate with him several times and I did send him everything that I learned about Mr. Robinson." (T 188).

Attorney Pearl said that he inquired of the prison officials regarding whether Robinson was "a well-behaved inmate or whether he received Drs . . .." (T 187). He did this for the specific purpose of using "[a]n absence of DRS" . . . "as a non-statutory mitigating circumstance . . .." (T 187).

He added that he "would certainly have not visited or called Maryland Penitentiary or the Maryland Parole Commission. I would have left that to Dr. Krop." (T 188). He also indicated that in his notes, Co-defendant Fields' mother, who was Robinson's girlfriend at the time of the murder, was listed, as was "Mr. Thomas Keough" of the prison. (T 188). Likewise, relatives, "Carl Vickers, Audrey Vickers," some Virginia cousins, and "Al Manning" were listed in his notes as persons from whom potential penalty phase information might be obtained. (T 189). Attorney Pearl said that all of that information "certainly would have been

communicated in that form to Dr. Krop."[50] (T 189). Indeed, Dr. Krop acknowledged receiving, and reviewing, Attorney Pearl's entire file on Robinson.[51] (T 276).

Attorney Pearl said that Dr. Krop "reported that he had" tried to contact others to discuss Robinson, and he claimed to have "some corroboration for Mr. Robinson's self-reported experiences from his early youth . . .." (T 225). Dr. Krop never indicated to Attorney Pearl that he did not have enough information to make a proper diagnosis. (T 574). "He exhibited to me no reluctance in making his diagnosis. . . . [H]e didn't protest that he didn't have enough information." (T 574).

Attorney Pearl recounted that at the original trial and

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[50] In fact, Attorney Pearl said that "[a]s soon as I received an appointment, . . . I would then send to Dr. Krop everything that I had, a copy of every piece of paper that I had; the police reports, including whatever notes might have been made at our first interview with the defendant . . .. Thereafter, he would be developing from his patient other names, additional information. . . . I would see him . . . and by the time we were through, I would know pretty much whether or not he had everything . . . or there was anything further I might be able to do to assist him in preparing for his testimony at the sentencing phase." (T 228). He added: "I certainly would have done anything that he asked me to do, . . . but I don't remember that Dr. Krop asked me to do that" [contact background informants]. (T 229).

[51] This would have included "every other piece of past we had about the defendant. . . . [P]olice reports, the response to demand for discovery, witness statements . . .." (T 233).

sentencing, Robinson "was apparently so terribly embarrassed or hurt by these matters, that the jury was going to be told about his young life, that he opted to leave the courtroom rather than sit there and listen to it." (T 227). He expounded: "Robinson was reluctant to give information or to identify the people from his family or from his past that we might have considered calling to testify." (T 572). Indeed, Robinson told Attorney Pearl that he did not want them to testify. (T 572). Robinson's attitude regarding potential mitigation witnesses was "highly reluctant, non-communicative."[52] (T 588). Counsel explained that he simply "didn't have access to" those from whom postconviction counsel obtained the alleged, unadmitted affidavits. (T 588).

Eventually, Attorney Pearl was able to get "the names of two of his family members" from Robinson. (T 572). He "immediately sent that . . . to Dr. Krop for his evaluation and to contact those persons if they could be found."[53] (T 572-573).

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[52] Not only does this corroborate Dr. Krop's testimony, (T 375), it is also consistent with that of the investigator/writer of the PSI who said Robinson "was reticent about his family background," but "[o]therwise he was very open and verbal." (R 2357). Later, the writer repeated that "he was very reticent about discussing his family." (R 2361).

[53] Attorney Pearl said that in the twenty-five or more cases in which he had used Dr. Krop, the doctor had "[n]ever in any case"

Attorney Pearl said that in deciding whether to put on a given witness in mitigation, he first determines whether he can produce evidence which will go to establish a mitigation factor. (T 577). If so, then he considers whether that evidence could be attacked on cross in such a way as "to destroy the character of the defendant or to compromise the meaning or intent of the evidence I wanted to present." (T 577). He said that by using Dr. Krop, he had "a form of damage control." He did not "want to hand a club to the prosecutor to beat me over the head with." (T 577).

Attorney Pearl acknowledged that Robinson's criminal history and record were "extensive." (T 577). He was asked "what would be the danger of presenting a witness or witnesses who had not seen the defendant in some time and who . . . would come in and testify as to his good character?" (T 578). Counsel responded:

> It would be catastrophic . . . because if the prosecutor was knowledgeable, and I certainly think [Robinson's] was, he would have confronted those witnesses with Mr. Robinson's

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indicated that he needed a release before he would talk to proposed background informants. (T 573). Further, "Dr. Krop indicated to me that he wanted those names and addresses and telephones (sic) numbers so he could, in fact, contact them to get whatever information or corroboration he could to help him with his diagnosis and his testimony." (T 573-574). Indeed, Dr. Krop routinely contacted such persons "without asking me whether he should or could do that or not. That matter was in Dr. Krop's hands, and he knew it." (T 574).

> later criminal activity. . . . And then ask them whether or not that might change their minds about their opinion of Mr. Robinson's good character. And no matter what they said, that witness would have been destroyed.

(T 579). Another factor to be considered in deciding whether to put on a given witness was "what was bad in their own backgrounds that could be challenged." (T 580).

He also emphasized that although some evidence of prior criminal history might have come in on cross-examination of Dr. Krop, he felt that the jury hearing about it through the professional, who could give it "unemotionally while at the same time giving his diagnosis and his opinion with respect to mitigating circumstances," would neutralize much of the potentially inflammatory information. (T 588). He also felt that he could avoid having the undesirable information repeated and "driven into the minds of the Jury" which would emphasize the criminal background rather than the mitigating factors. (T 588).

The long-time defender testified that another factor in his evaluation of whether witnesses should be put before juries was based on his knowledge of the general characteristics of the jurors in the particular geographical area. (T 575-576). Attorney Pearl said that he knew at the time of trial that Robinson came from a poor childhood where he was exposed to poverty. (T 580-581). He

explained that as a matter of strategy, he did not feel that such information would substantially favorably impact a St. Augustine jury because "[i]n St. John's County you have a 50/50 chance of having two or three people exactly like that on the jury panel . . .." (T 581, 583). Certainly, he did not feel that it would be meaningful mitigation, or excuse, in any part, a murder. (T 583).

Regarding the migrant life background information, Attorney Pearl opined that strategically it did not seen reasonable to present a lot of evidence regarding that matter because he did not think it would be well received by a St. Augustine jury. He said that much of the information presented about the migrant life was designed "to evoke not only pity for the people who were in the stream, but also guilt on the part of the rest of us." (T 582). He felt that

> a jury in St. Augustine which had on the panel people who remembered and were present at the time that those things actually took place and who would not want to be reminded of feelings of guilt anymore than the rest of us do. . . . I think it would have made them hostile, not receptive.

(T 583). "So I would not have used that." (T 583).

Finally, Attorney Pearl testified that another reason why he did not want to put on any mitigation witnesses other than Dr. Krop was his fear that certain similar fact evidence would then come in.

(T 584). Robinson had committed a disabled-car, armed robbery and rape, in Volusia County, on an interstate, in the same motor vehicle, with Mr. Fields, about a week after he murdered Ms. St. George. (T 584; R 3756-3772). Attorney Pearl opined that the jury never heard this damaging information because nothing was presented in mitigation to open the door to such testimony. (T 585).

In *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992), the defendant alleged his counsel was ineffective for "failing to investigate and present mitigating evidence of Ferguson's mental impairment and difficult childhood." Counsel had spoken to his client's mother and some other members of his family, one of whom "was apparently reluctant to cooperate." *Id.* Only Ferguson's mother was called to testify at sentencing. "She testified that Ferguson was a good son, that he liked art and music, and that he helped support her when he was home." *Id.* Further, she said that he "had mental problems and had been in a mental hospital." *Id.*

In his 3.850 motion, Ferguson contended that additional family members should have been called to testify that:

> Ferguson's childhood was difficult. His family was poor and moved around a lot, and his mother worked most of the time to support the children. His father was an alcoholic, who died when Ferguson was thirteen. The death of his father depressed Ferguson, and he began having run-ins with the law and problems

> in school. Ferguson's mother had many boyfriends, some of whom physically abused her in front of the children. . . . Ferguson was shot by a policeman . . . [and] Ferguson's behavior changed -- he became paranoid and hostile.

Id.

This Court said that the investigation done by counsel into the "family background and mental history" was reasonable, and counsel's "performance was not deficient." *Id.*

> *Although counsel did not exhaust all available sources of information, . . . [h]e* was aware of Ferguson's mental problems . . . and made a tactical decision not to call the doctors as witnesses. Counsel . . . could have reasonably decided that presenting mental illness testimony would have opened the door to extremely damaging State rebuttal. . . . Instead of opening the door to this evidence, counsel informed the jury of Ferguson's mental condition through the testimony of Ferguson's mother . . .. This was a reasonable strategy in light of the negative aspects of the expert testimony.

Id. Deficient performance had not been established.

In the instant case, Attorney Pearl chose to present the family background and mental health evidence through the mental health expert rather than through family members. He testified that this was a conscious, deliberate choice based on his long-term, experienced-based belief that the professional would make the most credible witness and would be much less likely to hurt his

client's case by emotionalism or by following a personal agenda when testifying. He was also reasonably concerned that the lay witnesses would be more susceptible to cross-examination by the prosecutor, especially since most of them had not had significant contact with Robinson in many years. *See Breedlove v. State*, No. 80,161, slip op. at 6 (Fla. March 13, 1997).

Through Dr. Krop, Attorney Pearl showed the jury that Robinson had a difficult childhood, lived in poverty, suffered physical and sexual abuse, lived and worked in the migrant labor system, and had a psychosexual disorder. (*See* R 5769). The additional background information which Robinson claims was so critical was largely cumulative, and therefore, does not render trial counsel ineffective. *See Glock v.* , 537 So. 2d 99, 102 (Fla. 1989). Certainly, it is not of such importance as to render counsel's reasonable strategical decision on witness presentation deficient. *Ferguson*.

Moreover, there were additional strategy decisions for not putting on the subject testimony. Based upon his vast experience, Attorney Pearl also felt that a St. Augustine jury would not be favorably impressed with an effort to excuse a murder based on a bad, poverty-stricken childhood. Neither did he feel that the migrant life information would evoke pity for Robinson which would

overcome the feelings of hostility which such testimony would have engendered in the jurors. Attorney Pearl's opinion that this evidence would have most likely strengthened the likelihood that the jury would recommend the death penalty is reasonable. *See Medina v. State*, 573 So. 2d 293, 298 (Fla. 1990).

Robinson has not carried his burden to prove that Attorney Pearl's performance was deficient. However, assuming that there was deficient performance, Robinson has failed to show that it prejudiced him. First, the allegedly new background information does not add anything of substance; it merely gives more detail to the background information presented at trial through Dr. Krop. *See Clisby v. State*, 26 F.3d 1054 (11th Cir. 1994). Second, the change in Dr. Krop's diagnosis from antisocial personality disorder to mixed personality disorder which he claims is based on the additional information contained in the unauthenticated, unadmitted affidavits is minor and would not have significantly changed the sentencers' pronouncements. Finally, with five valid aggravators - or even with three - weighed against the nonstatutory mitigation, there is no reasonable likelihood that the result would have been different. *Breedlove, supra*.

Robinson claims that Attorney Pearl was ineffective because he did not provide enough background information to Dr. Krop to permit

him to do an effective evaluation. He also claims that the evaluation done by Dr. Krop was inadequate. This issue, even though couched in ineffective assistance of counsel phraseology, is procedurally barred because the adequacy of Dr. Krops' evaluation (and in-court testimony based thereon) could, and should, have been raised on direct appeal. *See Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988).

Further, the claim that Dr. Krop was ineffective or performed an inadequate evaluation was specifically waived in the trial court. When the judge pointed out that the information seemed to indicate more that Dr. Krop had not done a good job than that Attorney Pearl was at fault, Defense Counsel said: "Absolutely not. I've used Dr. Krop. He's a very, very good psychologist. But, he can't do any better than the information that he's given. The failure, we believe **is not Dr. Krop's** failure, it's Mr. Pearl's failure . . .." (emphasis added) (R 6055). Thus, the performance of Dr. Krop was not only not raised in the lower court, it was disavowed as an issue. Accordingly, it is not cognizable on appeal. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Assuming *arguendo* that this issue is not procedurally barred, it is without merit. In *Hill v. Dugger*, 556 So. 2d 1385, 1387 (Fla. 1990), the defendant claimed that his attorney was

ineffective because he "unreasonably failed to present critical mitigating evidence and failed to adequately develop and employ expert mental health assistance, and because the experts retained at the time of trial failed to conduct professionally adequate mental health evaluations." Hill's claims involved intoxication and mental condition. *Id.* at 1388. "Hill proffered affidavits from additional family members and acquaintances, giving information concerning his family background and drug use." *Id.* He also proffered reports from two new mental health professionals who stated that . . . Hill's conduct . . . was the result of cocaine ingestion, his below average intelligence, and Jackson's domination." *Id.* Finally, he asserted that

> his expert witness at his sentencing proceeding would now testify that he did not have sufficient information concerning Hill's history of substance abuse and intoxication at the time of the offense and that, given Hill's borderline intelligence and those two factors, he would now testify that Hill suffered from extreme mental disturbance at the time of the offense and that his poor mental ability impaired his judgment sufficiently to impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Id. Further, trial counsel submitted an affidavit admitting his ineffectiveness. *Id.*

This Court upheld the trial court's conclusion that counsel's

performance was not deficient. *Id.* Indeed, it did not even warrant an evidentiary hearing! *Id.*

In *Hill*, this Court said that although the "asserted information . . . might have been helpful to the mental health professional," it did not rise to a level which would establish ineffectiveness. *Id.* Certainly, that is the case here where the information in the affidavits merely fleshed-out what Dr. Krop already knew about Robinson. The information resulted in a slight change of the doctor's diagnosis - from antisocial personality disorder to mixed personality disorder. Indeed, as pointed out hereinabove, the evidence admitted at the evidentiary hearing did, in fact, support the original diagnosis of antisocial personality disorder.[54] Thus, the omission of the asserted information did not rise to the level of ineffectiveness.

Finally, Robinson claims that if Dr. Krop had had the background information, the doctor would have found that he

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[54] Where Dr. Krop went wrong in determining to change his diagnosis was that he only considered the criteria he had specifically found originally and discounted it somewhat due to the motive or purpose he felt was revealed by information in the affidavits. The doctor admitted that he had overlooked some otherwise qualifying information and that he had simply failed to ask some criteria questions because he already had enough for his original diagnosis.

suffered from an alcohol abuse disorder. (IB at 69). However, none of that information indicates that Robinson was intoxicated at the time of the subject crimes. (T 439). Indeed, the examples given by Dr. Krop refer not to alcohol ingestion by Robinson, but rather by members of his family. (T 368).

In *Hill*, this Court said: "[W]e find that the only evidence in this record to show that Hill was intoxicated . . . at the time of this incident was his own testimony . . .." 556 So. 2d at 1389. In this case, Robinson made some statements to his attorney indicating that he had been consuming intoxicants on the night of the murder. In the unauthenticated, alleged affidavit of Fields, some additional information indicating the consumption of intoxicants is provided. However, at no point does the affidavit state that Robinson was intoxicated or that his faculties were noticeably impaired. Rather, the available evidence on this issue is to the contrary. At trial, Fields testified that Robinson walked, talked, and appeared normal. Indeed, he drove the car, after they left the party, after he kidnaped Ms. St. George, and after he murdered her.[55] Further, the detailed statement given by

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[55] The two men spent quite a while driving around after they left the party and before they kidnaped Ms. St. George. (TR 496-498). There were only three beer cans found at the scene. (TR 423-498).

Robinson belies any claim of intoxication.

Consumption of alcohol does not necessarily equal intoxication. *See Reed v. State*, 560 So. 2d 203, 206 (Fla. 1990). Further, even if there is evidence of intoxication, a reasonable, effective defense attorney may decide not to present it. *Clisby v. Alabama*, 26 F. 3d 1054, 1056 (11th Cir. 1994). Robinson has failed to show either ineffective assistance of counsel or inadequate mental health evaluation. He is entitled to no relief.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING NUMEROUS CLAIMS OF ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AS PROCEDURALLY BARRED WHERE THE CLAIMS WERE AN IMPROPER ATTEMPT TO RELITIGATE SUBSTANTIVE ISSUES, OR TO RESURRECT PROCEDURALLY BARRED ISSUES, UNDER THE GUISE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In his brief, Robinson vaguely complains that the trial court improperly found his claims VI, VII, IX, X, XII, XIII, and XIV[56]

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[56] Claim VI alleged that Attorney Pearl insufficiently impeached Witness Fields, did not inquire into Robinson's intoxication, and did not object to leading questions. Claim VII alleged Attorney Pearl did not object or inquire into Witness Fields' refusal to testify at resentencing. Claim IX alleged that the prosecutor intentionally injected racial bias into the guilt phase and on resentencing. Claim X complained that Attorney Pearl failed to object when the prosecutor infected the trial with racial prejudice. Claim XII claimed Attorney Pearl should have objected to the all white grand jury and that there were no blacks on the

procedurally barred even though they were ineffective assistance of counsel claims which are proper in a Rule 3.850 motion. (IB at 72, 75). He offers no specific complaint about any of the issues contained in his underlying motion. Such a barebones pleading is wholly insufficient to properly raise the issue in this Honorable Court. *Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990)["'Other alleged instances of ineffectiveness which Roberts attempts to raise by merely referring to arguments presented in his motion for postconviction relief are deemed waived.' *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)"].

Moreover, this issue is otherwise procedurally barred. Allegations of ineffective assistance of counsel cannot be utilized to avoid the firm rule that Rule 3.850 motions cannot serve as a second appeal. *Medina v. State*, 573 So. 2d 293 (Fla. 1990)(*citing*, *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987)). A procedural bar cannot be avoided by raising otherwise barred claims as ineffective assistance of counsel. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). As the trial judge's order points out, claims

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venire. Claim XIII complained that Attorney Pearl did not object to prosecutorial misconduct consisting of statements made during the state's arguments to the jury during the guilt phase. Claim XIV complained that Attorney Pearl did not object to prosecutorial argument during the penalty phase.

VI, VII, IX, X, XII, XIII, XIV, are procedurally barred because they are attempts to relitigate the underlying substantive claims which could, and should, have been, or were, raised on direct appeal. (R 1223-1226).

Further, even if he had objected, there is no merit to the claims and no prejudice. Claim VI of the 3.850 motion is specifically addressed in Point VII of the briefs. Claim VII of the 3.850 motion is specifically addressed in Point VI of the briefs. Claim IX of the 3.850 motion is specifically raised in Point X of the briefs. Robinson is not entitled to relief on any of them for the reason(s) specified in the point relating to each claim. The State hereby incorporates its arguments and authorities regarding these claims (contained in Points VI, VII, and X) herein.

Claims X, XII, XIII, and XIV of the 3.850 motion are also referenced in another "barebones" claim in Point XI of the initial brief. (IB at 100). Robinson devotes two points, and five pages, of his brief to these claims and does not make a single argument, or cite any legal authority, specifically applying to any of them. Under such circumstances, Robinson has irrevocably waived these issues, and therefore, even in the absence of any other procedural bars, same can not be considered on their merits.

Regarding claim VIII of the 3.850 motion, the conflict based

on Attorney Pearl's status as a special deputy sheriff, the trial judge's order states that "[b]y agreement of counsel the Court will consider the record of the consolidated proceedings but will not hear further argument or evidence on Claim VIII." (R 1224). In light of this, Robinson's complaint that he did not receive an evidentiary hearing on this issue is frivolous.[57]

Claims may be summarily denied where the issue could and should have been, or was, raised on direct appeal. *Francis v. State*, 529 So. 2d 670, 672 n.2 (Fla. 1988); *Clark v. State*, 460 So. 2d 886, 888 (Fla. 1984). Whether there must be an evidentiary hearing on a matter depends on the sufficiency of the allegations. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991). Claim X - the prosecutor infected the trial with racial prejudice - could and should have been, or was, raised on direct appeal. *Robinson v. State*, 520 So. 2d 1 (Fla. 1988). Claim XII - a lack of blacks on the grand jury and trial venire - could and should have been raised on direct appeal. *See Wright v. State*, 491 So. 2d 1100 (Fla. 1986). Claim XIII - statements made by prosecutor during guilt phase closing arguments - could and should have been, or were,

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[57] The trial court addressed the issue in its final order, finding Robinson to be entitled to no relief.

raised on direct appeal. *Cherry v. State*, 659 So.2d 1069, 1072, 1074 n.1 (Fla. 1995); *Kight v. Dugger*, 574 So. 2d 1066, 1072 (Fla. 1990). *Claim* XIV - statements made by prosecutor during resentencing closing arguments - could and should have been raised on direct appeal. *See Id. Bonifay v. State*, 680 So. 2d 413, 418 (Fla. 1996).

Finally, the decision to object is a matter of trial tactics which is left to the reasonable discretion of trial counsel. *Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983). Even though an attorney may fail to make appropriate objections during a trial, "few trials proceed without any such error and '[i]t is almost always possible to imagine a more thorough job being done than was actually done.'" *White v. State*, 559 So. 2d 1097, 1100 (Fla. 1990)(*quoting Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)). Robinson has not alleged how Attorney Pearl's failure to object to any, or all, of the matters referenced in the Point X met this standard. This issue is without merit.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S CLAIM THAT DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO MAKE A "PROPER" OBJECTION TO FIELDS' REFUSAL TO TESTIFY AT RESENTENCING.

Robinson complains that Attorney Pearl was ineffective because he failed to object to reading Fields' trial testimony at the resentencing hearing. (IB at 77). He also claims that if Florida Statutes §90.804 governs this case, Attorney Pearl was ineffective because he failed to object on the basis that Fields was not shown to be unavailable. (IB at 78). He says that if Fields was unavailable, it was the State's fault, and therefore, the witness's prior testimony should not have been read to the jury on resentencing. (IB at 76-77).

Robinson grossly misrepresents the record when he states that Fields' former trial counsel, Tom Cushman, "advised Fields through his new attorney, Larry Griggs, that he should refuse to testify at Robinson's resentencing because the State had breached the agreement." (IB at 76). The citation given by Robinson to support this claim is "(App. 4)." *Id.* The document referred to is an affidavit allegedly given by Attorney Cushman, which was not introduced into evidence at the evidentiary hearing, and is, therefore, not properly before this Honorable Court. However, even if the affidavit may be considered, it simply does not say what Robinson represents.

The affidavit avers in pertinent part:

6. Steve Alexander never did follow through

> on his promise after Fields' appeal was unsuccessful. Because of that I consulted with Larry **Griggs** and he **advised** Fields prior to Robinson's resentencing in 1989 that he should refuse to testify. . ..

(emphasis added)(R 398). The statement indicates that Attorney Cushman and new Defense Counsel Griggs discussed the agreement Fields had with the State and agreed that it had been broken. It does **not** state that Attorney Cushman advised Fields of anything in regard thereto; neither does it indicate that Attorney Cushman advised Attorney Griggs that he should advise Fields to refuse to testify. It merely acknowledges that at some undisclosed point, Attorney Cushman learned that Attorney Griggs did so advise Fields.

Further, at the evidentiary hearing, Attorney Cushman testified that he did not have anything to do with Fields being instructed not to testify. (T 85). Clearly, the trial judge credited this testimony in rejecting the defense contention that the State was guilty of misconduct regarding Fields' refusal to testify at the resentencing hearing. (T 245). Further, the record of the resentencing proceeding shows that the State did its best to procure Fields' testimony at that proceeding. The prosecutor "granted him use immunity under 914.04 of the Florida Statutes . . . for any court proceedings where the State required his attendance and testimony." (RT 33, 137-138). The prosecutor further offered

and granted to Fields "use immunity under 914.04 for any testimony . . .," specifying that the State would not "prosecute him for any further conduct arising out of this transaction in regards to this case." (RT 138). Thus, it is clear that the State did nothing to procure Fields' refusal to testify.

In fact, Attorney Griggs announced the reason for Fields' decision, to-wit:

> We're . . . in **Federal Court**, and I don't believe that Mr. Alexander can give immunity in Federal Court. . . . And my client would prefer **not** to **testify** in order **to protect his rights** in the event any prejudice could accrue to him because of this.

(emphasis added)(RT 140). Another factor in the decision not to testify was that Fields "has an IQ of about 62, he really doesn't remember that well anyway." (RT 140). Robinson's claim that the State caused Fields not to testify is without merit.[58]

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[58] Robinson's allegation that Fields did not testify at the resentencing hearing because the prosecutor breached an agreement with Fields was **not** made at resentencing; it was raised for the first time in the Rule 3.850 proceeding. Like his other attempts to blame the failure to testify on the State, this one lacks evidentiary support. Prosecutor Alexander testified that he had agreed to write a letter advising the authorities of Fields' cooperation in the Robinson prosecution if, and only if, Fields totally cooperated throughout all of the proceedings. "[F]or the longest time," the prosecutor was "never asked to write it." (R 5809). By the time a request was made "in December of '88," Mr. Alexander "didn't think Fields had totally cooperated any more."

The judge ordered Fields to testify at the resentencing proceeding. (RT 140). Fields persisted in his refusal to testify. (RT 140-141). The court then held him in contempt and announced that he would impose a sentence at a later time. (RT 141).

When Fields refused to testify at the resentencing proceeding, he was unavailable as a witness. The State was entitled to have his testimony from the trial read to the resentencing jury. *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1985). In *Stano*, the State filed a motion to compel the witnesses to testify at Stano's resentencing hearing. *Id.* They refused, asserting that no sanctions, including "fines or imprisonment" would induce them to testify. *Id.* This Court upheld the reading of the witnesses' prior testimony to the resentencing jury. *Id. at 1286, 1287.*

This Court explained that the unavailability "requirements of subsection 90.804(1)(b) have been met here."[59] *Id.* at 1286. That

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(R 5809). Mr. Alexander had learned that Fields did not plan to testify at the resentencing proceeding scheduled for early, 1989. (R 5809-5810). Accordingly, the prosecutor did not violate the agreement, and the State was not guilty of any misconduct or connivance in regard to Fields' refusal to testify.

[59] Robinson also complains that although the trial judge threatened Fields with imprisonment for his refusal to testify, he did not follow through on it. However, in *Stano*, this Court said: "We see no purpose that would have been served in . . . actually fining or

provision requires only that the State show that the witness "persists in refusing to testify . . . despite an order of the court to do so." §90.804(1)(b), Fla. Stat. (1989). Where a co-defendant refused to testify at resentencing, "there was a substantial reason why the original witness was not available, as required by section 90.804, Florida Statutes (1989)." *Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994).

In Robinson's case, the State showed that the witness persisted in his refusal to testify despite the State's best efforts to procure his testimony. That the witness continued to persist in his refusal after the court ordered him to testify is also clear. Thus, as recognized by Attorney Pearl at the time, the State has shown unavailability. (RS Tr. 171-172). Attorney Pearl was not ineffective for failing to object to the reading of Fields' prior testimony based on a claim of availability or procurement of unavailability by the State.[60] *See Stano*; *Colina*.

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imprisoning them." 473 So. 2d at 1286. Neither was there any impropriety in this regard in Robinson's case.

[60] Further, Robinson points out that co-defense counsel Christopher Quarles objected to the reading of Fields' prior testimony on grounds other than unavailability. He implies that in deciding to do so, counsel was ineffective. The State points out that even if unavailability had been a potentially viable objection, defense counsel's strategic decision to object on other grounds which he presumably believed had a greater chance of success did not

Robinson's final argument is that Attorney Pearl should have raised a Florida Rule of Criminal Procedure 3.640 objection. The State submits that the aforementioned statutory provision would control over the rule of procedure. However, even if it applies, the rule does not afford Robinson relief.

Rule 3.640(b) provides in pertinent part:

> Witnesses and Former Testimony at **New Trial**. The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the state, mentally incompetent to be a witness, physically unable to appear and testify, or dead . . .. Before the introduction of the evidence of an absent witness, the party introducing the evidence must show due diligence in attempting to procure the attendance witnesses at the trial and must show that the witness is not absent by consent or connivance of that party.

(emphasis added). There is nothing in this rule which indicates that it applies to a resentencing proceeding; rather, the phrase "new trial" is used both in the caption and the body of the rule.

Further, the State submits that under the circumstances of this case, Fields was "mentally incompetent to be a witness" because he had a low IQ and could not remember the events clearly. Finally, the State surely exercised due diligence in attempting to

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constitute deficient performance.

procure Fields' testimony at resentencing, and there is no evidence whatsoever of any connivance by the State to prevent the witness from testifying. Thus, even if the rule had been applicable, Robinson would be entitled to no relief.

Robinson has not alleged, much less shown, how the reading of the prior testimony prejudiced him. He has made no allegation that if Fields had testified at the resentencing proceeding, he would have testified differently (and more favorably to Robinson) than he did the first time. Thus, Robinson has not met either prong of the *Strickland* standard; his claim is without merit.

POINT VII

DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE WHEN CROSS-EXAMINING WITNESS FIELDS.

The trial judge correctly concluded that this issue is procedurally barred. To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* Moreover, the distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's

perspective at the time. *Id.* Finally, the defendant must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result of the proceeding would have been different. *Id.*; Gorham v.State, *521 So.2d 1067, 1069 (Fla. 1988)* (citing Strickland, *466 U.S. at 687)*.

Further, a summary denial of such a claim is appropriate in the absence of factually specific allegations which are of such import as to show a sufficiently prejudicial deficiency in performance. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). Claims which have insufficient factual allegations are facially deficient, and mere conclusory allegations of ineffective assistance do not warrant an evidentiary hearing. *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990).

In any event, Robinson's complaint that he did not get an evidentiary hearing on the issues raised in this Point are spurious. Attorney Pearl was extensively questioned at the evidentiary hearing, and he was, or could have been, asked specific questions about the issues raised herein. Despite the trial judge's initial holding that the issues were procedurally barred, Robinson did, in fact, have his opportunity to present evidence pertinent to these issues. Having failed to produce evidence

sufficient to warrant any relief, he seeks a second bite at the apple. This claim should be rejected.

Assuming *arguendo* that the issues are not waived or otherwise procedurally barred, they have no merit.

A. Impeachment of Fields

Fields' Oral Statement to Captain Porter:

First, nowhere in this statement does Fields assert that Robinson accidentally shot Ms. St. George. He says only that he got the impression that "'she was basically talking back to Robinson,'" and Robinson "'slapped back at her **or** used his gun to threaten her with and that's when he shot her. That is when Robinson shot her.'" (emphasis added) (T 145). Fields did not explain what he meant by talking back to Robinson; Ms. St. George was most likely pleading for her life, begging to be returned to her car.[61] (*See* TR 503). Neither does he state why Ms. St. George pushed or slapped Robinson; most likely she was attempting to get away. Finally, Fields states that after slapping or threatening Ms. St. George, "he shot her."[62] (T 145).

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[61] Indeed, Robinson told Dr. Krop that she "kept yelling to take her back," and the doctor related same at Robinson's trial. (T 603).

[62] Robinson told Dr. Krop that he pushed Ms. St. George back and "'[t]he gun was in his right hand. As she **approached him**, the gun

Field's oral statement to Captain Porter hardly relates a tale of an accidental shooting. To the contrary, it shows that after first slapping or threatening Ms. St. George with his gun, Robinson simply shot her. There is no inconsistency with Fields' trial testimony. Thus, the statement provides no basis for a claim of inconsistent prior statement. Therefore, Attorney Pearl could not have rendered ineffective assistance of counsel in failing to impeach Fields with the oral statement to Captain Porter.

Further, even if it is assumed for the sake of argument that the statement indicated an accidental shooting, Robinson has failed to show ineffective assistance of counsel. To prevail on such a claim, the defendant must show both deficient attorney performance and that it prejudiced him. *Strickland v. Washington*, 466 U. S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A court . . . need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."

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fired and hit her . . ..'" (emphasis added) (T 603). Thus, Robinson's confession to Dr. Krop was not that the shooting was done during a struggle with the victim; rather, as she came up to (approached) him, he shot her. It should also be noted that what Fields refers to as "slapping" Ms. St. George may have been what Robinson referred to as trying to push her back. Both agree that after that touching occurred, Robinson shot Ms. St. George. There is nothing to indicate that the shooting of the victim, after the touching to slap or push her back, was other than intentional.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

Even if the first shot was accidental, the second clearly was not; **by Robinson's own admission**, it was premeditated. Thus, his conviction for premeditated murder could be based thereon. Any defective performance on Attorney Pearl's part regarding the allegedly prior inconsistent statement of Fields did not affect the outcome. Further, to the extent that Robinson's conviction of first degree murder must be based on the first shot alone,[63] any defective performance did not affect the outcome because he fired the fatal first shot into his victim while committing the felonies of kidnapping and sexual battery, thus making him guilty of felony murder.[64] Thus, confidence in the outcome has not been undermined. Since Robinson cannot meet the prejudice component of the *Strickland* test, his ineffective assistance claim fails.

Fields' Agreement with the State:

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[63] Robinson has at times claimed that the first shot instantly killed Ms. St. George, and therefore, the second shot could not constitute murder even though it was premeditated. (R 183-184, 184 n.11). However, he told Dr. Krop, and the doctor so testified at resentencing, that "after she was shot, she was apparently suffering." (RT Tr. 540). Thus, it was the second shot that ended her life, and that shot was uncontrovertedly premeditated.

[64] Dr. Krop testified at resentencing that Robinson admitted "that he had forced her to have sex with him." (RT Tr. 539).

Robinson claims that Attorney Pearl was ineffective in that he "failed . . . to cross-examine Fields about the full extent of the State's promises to him . . .." (IB at 81). The only specific part of the agreement about which Robinson complains to this Court is that "Pearl should have shown that the only conceivable reason for writing letters to the Clemency Board was to attempt to reduce the twenty-five year mandatory minimum Fields was to serve." (IB at 81-82). He adds that Attorney "Pearl should then have argued that this provided an incentive for Fields to lie." (IB at 82).

The record of the evidentiary hearing shows that Attorney Pearl was aware that the State had agreed to write a letter specifying Fields' cooperation in the Robinson prosecution. (R 198). He could not remember "whether I felt it was unimportant" or "whether I felt that asking him about that was a two-edged sword." (R 202). Regardless, Attorney Pearl's questioning made it clear to the jury that Fields had an incentive to lie.

The record shows that Attorney Pearl elicited the following from Fields regarding the agreement with the State:

(1) He had to "help the State convict Johnny Robinson" before he would "get the help of the State Attorney."

(2) He was "looking for some slack here . . . all of the slack you can get."

(3) He would do whatever he had "to do to get that slack."

(4) He "got some slack" in the way of a life sentence.

(5) He had not been sentenced for the "rape and the robbery and the kidnapping," and he was "looking for some slack" on the sentences for those offenses. The prosecutor had promised "to do his best to see that the sentences . . . wouldn't run consecutive to or after the first degree sentence."

(6) He had been granted immunity for his testimony.

(TR 520, 521, 522). Trial counsel's vigorous cross-examination of the witness on this issue was more than sufficient to meet the threshold of professional performance.

Further, even if the attorney's performance was deficient, Robinson has failed to, and cannot, show any prejudice. There is no reasonable possibility, much less a probability, that the outcome would have been different if Attorney Pearl had elicited the information about a possible letter or had objected to what Robinson incorrectly terms a misrepresentation of the agreement by the prosecutor to the jury.[65] Accordingly, he has failed to carry

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[65] The claim that the prosecutor misled the jury by getting Fields to testify that "[t]here is no specific agreement" is utterly without merit. The questions leading up to that testimony make it clear that the agreement was that if Fields cooperated in Robinson's prosecution, the prosecutor would do certain things to try and help

his burden under *Strickland*, and the trial court's rejection of this claim of ineffective assistance of counsel should be affirmed.

Failure to Question What Witness Fields' Drank:

Robinson complains that Attorney Pearl did not cross-examine Witness Fields about what he "had to drink the night of the offense." (IB at 82). He opines that "[i]f the jury had known all the facts, they would most likely have distrusted what Fields said about the events of that night." (IB at 82). First, it is pointed out that "most likely . . . distrusted" is not the standard.

Second, the only basis for a claim that Fields was intoxicated is the affidavit allegedly given by Fields which indicates that both he and Robinson were drinking on the night of the murder. This affidavit was **not** admitted into evidence and cannot properly be considered by this Honorable Court in this case on this issue (or otherwise). *See* Argument, Point I, *supra*, at 3-4.

However, the affidavit is quite detailed (as was Fields' trial testimony) regarding the events of the subject evening and the

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Fields with his own sentences, but there was no guarantee that any of the prosecutor's efforts would be successful. (TR 514-515). Further, when the prosecutor tried to lead Fields to testify to the details of the agreement, Attorney Pearl's objection to the "leading and suggestive questions" was sustained. (TR 514). Thus, if there was any error in the prosecutor's not more fully developing the details, it was invited by the defense.

details of the crime. (R 384). If Fields can now clearly remember the details of the drinking, level of intoxication, and the events of, and surrounding, the murder, there is no reason to believe that he was too intoxicated to remember the events and recite them accurately to the jury. Certainly, Robinson has neither alleged, nor proved, any such reason. Further, in light of Robinson's confession, there is no reasonable probability that the outcome of the trial would have been different even if Attorney Pearl had argued that Fields was intoxicated and could not clearly remember what happened. Thus, Robinson has failed to properly allege, much less establish, either deficient performance or prejudice.

Fields' Low Intelligence & Susceptibility:

Although post-conviction counsel raised this issue in the subject 3.850 motion, he did not ask Attorney Pearl a single question about it at the evidentiary hearing. The State contends that his failure to do so waived the claim. Further, although post-conviction appellate counsel alleges that this issue was "the subject of a lengthy suppression hearing in Fields' case," (IB at 82), it does not appear that he sought admission of the transcript of the alleged hearing, nor does he tell this Honorable Court what the outcome of the hearing in Fields' case was, much less on what the court's ruling was based. Such vague, barebones appellate

pleadings do not state a basis for relief in this Court. *See Roberts*, 568 So. 2d at 1260; *Duest*, 555 So. 2d at 852.

B. Instructions Regarding Weighing Testimony:

Robinson claims that "[s]ubparts 6 and 9 of Instruction 2.04, Standard Jury Instruction in Criminal Cases, would have been helpful in weighing Fields' testimony." (IB 83-84). He utterly fails to explain how he reached this conclusion. Such vague, conclusory claims do not warrant an evidentiary hearing; indeed, they are insufficient on their face. *See Roberts*, 568 So. 2d at 1260; *Duest*, 555 So. 2d at 852.

Further, this claim is procedurally barred because it could, and should, have been raised on appeal, and not in a Rule 3.850 motion. *Gorham v. State*, 521 So. 2d 1067, 1070 (Fla. 1988). This procedural bar cannot be avoided by phrasing the issue in terms of ineffective assistance of counsel. *Kight v.* Dugger, 574 So.2d 1066 (Fla. 1990).

Finally, even if the issue were properly raised in a post-conviction motion, was not otherwise procedurally barred, and adequately alleged ineffective assistance of counsel, Robinson would be entitled to no relief. He has not alleged, much less shown, that Attorney Pearl's failure to request this instruction - which he claims would have been "helpful" - fell outside the wide

range of adequate professional legal assistance. Neither has he alleged, or shown, that he was prejudiced from the failure to request the allegedly "helpful" instruction. Thus, this claim is legally insufficient on its face. *Strickland*.

C. Robinson's Intoxication:

At the evidentiary hearing, Attorney Pearl testified that "[t]here was never a basis" for an intoxication instruction."[66] (T 620). Further, defense counsel made a strategic decision not to pursue any evidence because "his actions during the time would have, I think, compromised any claim that might have been made." (T 620). Attorney Pearl explained:

> . . . I had very little evidence of intoxication . . . . it was only self reported. . . . And the evidence was that Mr. Robinson drove an automobile over a long distance, fired a pistol with some accuracy. And so, . . . you certainly couldn't claim that his faculties were impaired under those circumstances.

(T 621-622).

Further, although Robinson said that "he had been drinking," and gave the impression that he claimed to have been "drunk," he

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[66] As the trial judge pointed out, Attorney Pearl did request an instruction on intoxication as a defense, but [t]here was absolutely no evidence to support it, and the Supreme Court of Florida so found." (T 621).

also confirmed to his attorney "that the facts set forth in the statement that he made to the police were true." (T 213, 214). The actions related by Robinson in his statement, the details therein, including many direct quotes, and the explanation of his thoughts and actions which led to the second shot, make it clear that this killer was not intoxicated at the relevant times. Under such circumstances, counsel is not ineffective for making a strategic decision not to vigorously pursue and/or present intoxication evidence. *See White v. State*, 559 So. 2d 1097 (Fla. 1990). In *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994), the court noted:

> [C]ounsel knew that Clisby had used drugs and alcohol; but, as a tactical matter, counsel specifically avoided relying on this evidence before the jury. Precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use.

The court added:

> . . . [W]e think that most judges view drug and alcohol abuse as highly predictive of a propensity for criminal activity. . . . [W]e doubt that many sentencers view substance abuse as a strong mitigating factor. *Cf.*, *Rogers*, 13 F.3d at 388 (noting reasonableness of lawyers' fear that defendant's voluntary drug and alcohol use could be 'perceived by the jury as *aggravating* instead of mitigating'") (emphasis in original).

Id. at 1056-1057, n.2.

Moreover, even if his performance was deficient, Robinson has shown no prejudice resulting therefrom. He could have been found guilty under a felony murder theory even if he had established that he was too intoxicated to form the specific intent required for premeditated murder. Voluntary intoxication is not a defense to felony murder where the underlying felony is not a specific intent crime, such as sexual battery. *Buford v. State*, 492 So. 2d 355 (Fla. 1986). Thus, Robinson has failed to meet either prong of the *Strickland* test. This claim was properly denied.

Finally, as the trial judge held, this claim is procedurally barred because it "could and should have been raised on appeal . . .. *Woods v. State, 531 So. 2d 79 (Fla. 1988)." (R 1223-1224).* Claims regarding jury instructions should be raised on direct appeal and not in a Rule 3.850 motion. *Gorham v. State*, 521 So. 2d 1067, 1070 (Fla. 1988). Indeed, Robinson did raise this claim on appeal from his conviction. *Robinson v. State*, 520 So. 2d 1 (Fla. 1988). The procedural bar cannot be avoided by phrasing the issue in terms of ineffective assistance of counsel. *Kight v.* Dugger, 574 So. 2d 1066 (Fla. 1990).

D. Leading Questions

The instant claim has no factual allegations; Robinson fails to identify a single question which he regards as unduly leading,

much less explain how it prejudiced him. Such conclusory claims do not warrant an evidentiary hearing. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Duest*, at 555 So. 2d at 852. *See Kight, supra; Kennedy, supra.* See *also Swafford v. Dugger*, 569 So. 2d 1254 (Fla. 1990). The claim that Attorney Pearl was ineffective because he did not object to the State's leading questions on examination of Fields is legally insufficient. *See Mendyk v. State*, 592 So. 2d 1076, 1080 (Fla. 1992).

POINT VIII

THE TRIAL COURT DID NOT ERR IN DENYING THE CLAIM THAT THE JURY WEIGHED INVALID AND VAGUE AGGRAVATORS.

Robinson complains that the jury improperly weighed the especially heinous, atrocious, or cruel [hereinafter "HAC"] and the cold, calculated, and premeditated [hereinafter "CCP"] aggravators. He also claims that the jury improperly doubled the weight it assigned to the same evidence as a result of receiving instruction on both CCP and the avoid arrest aggravator. (IB at 85, 86).

The HAC issue was raised on direct appeal from the 1989 resentencing proceeding. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991). This Court stuck the HAC aggravator based on a lack of evidence to support it. *Id.* at 112. Claims which were raised on

direct appeal are not cognizable in a postconviction motion.[67] *Francis v.* State, 529 So. 2d 670, 672 n.2 (Fla. 1988). See Clark *v. State*, 460 So. 2d 886, 888 (Fla. 1984).

The CCP vagueness claim is also barred. The failure to raise the issue on direct appeal constitutes a procedural bar. *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994). *See Lambrix v. Singletary*, 10 F.L.W. Fed. S446 (May 12, 1997).

Finally, Robinson complains that "[t]he exact same evidence was used to support CCP and 'avoid arrest,'" and "[t]wo aggravators based on the same facts cannot be separately weighed." (IB at 90). He concedes that "[o]n direct appeal, the Court rejected this issue." (IB at 91). He is correct, *see Robinson*, 574 So. 2d at 113, and therefore, this issue, too, is procedurally barred. It is also without merit, as this Court pointed out in *Robinson* and the trial judge ruled below. 574 So. 2d at 113; R 1226. *See Derrick v. State*, 641 So. 2d 378 (Fla. 1994).

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[67] The vagueness of the HAC instruction was raised on direct appeal, although the issue was not addressed in this Court's opinion. Even if the issue was not procedurally barred for having been raised on direct appeal, Robinson would be entitled to no relief because he can show no prejudice since the HAC aggravator was stricken.

POINT IX

ROBINSON'S CLAIM THAT HE IS ENTITLED TO AMEND HIS RULE 3.850 MOTION AFTER ADDITIONAL PUBLIC RECORDS ARE PROVIDED BY THE STATE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Robinson complains that the trial court erred in denying his claim that he should be permitted to amend his Rule 3.850 "motion once he received all of the records." (IB at 94). In his motion, he complained that he had not received the pretrial motions and depositions he wanted from the clerk's office and had not been provided "the files of the individual police officers involved in the investigation of this case."[68] (R 373). He said that he had received the crime scene videotape and needed "the opportunity to review" it, so he could decide whether it was "relevant to any of the claims pled herein or . . . to additional claims." (R 373). He asked for "an order . . . compelling disclosure of all requested materials . . . and allowing him 60 days in which to amend this motion after compliance is complete." (R 374).

At the *Huff* hearing held on the motion on June 22, 1994, the following occurred:

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[68] His justification for wanting these personal records was "that there may be items . . . needed in order for counsel to identify and locate potential witnesses." (R 373).

> [Defense Counsel]: Your Honor, . . . we might abandon that claim before the hearing. I'm not completely familiar right now with whether these things have been provided to our investigator or not. I think some of them have, some haven't.
>
> THE COURT: How much time would you need to make a determination on that? . . .
>
> [Defense Counsel]: Two weeks.
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> THE COURT: When is the hearing?
>
> [Defense Counsel]: It's set in August, August 29th.
>
> THE COURT: So, we have some time. I'll give you two weeks. How about writing a letter, tell us . . . what your position is on that.
>
> [Defense Counsel]: Yes, sir.

(R 6104-6105).

Defense Counsel never wrote the letter and never again raised the matter in the trial court. The court did not issue its order finding the matter procedurally barred until more than three weeks after the *Huff* hearing, i.e., on July 14, 1994. (R 1228). Defense counsel failed to file anything with the court indicating that he still needed documents from the state. Neither did he thereafter ask the lower court to let him amend his 3.850 motion. Thus, this issue is procedurally barred.

Assuming *arguendo* that the claim may properly be considered by

this Court, Robinson has failed to show any entitlement to relief. His reliance on *Ventura v. State*, 673 So. 2d 479 (Fla. 1996) is misplaced. After raising the issue in his 3.850 motion, Ventura "moved for an order compelling compliance" with his public records requests. When "a number of the requested materials were finally produced," he alleged that the new materials reflected that the victim was actually killed by someone else. 673 So. 2d at 480-481. He amended his motion for rehearing on the 3.850 "to include factual allegations made possible by the intervening public records disclosure." *Id.* at 480. As a result, this Court concluded that he should have had the opportunity to file an amended 3.850 motion raising the new information issues. *Id. at 482.*

The facts of the instant case are far different than those in *Ventura*. Robinson did not move for an order compelling that records be provided; in fact, he indicated that he did not know if there were any outstanding records requests. Further, he acknowledged that he had received some of the records which he had indicated were outstanding in his 3.850 motion. Regarding the others, he made no claim that any of them were relevant to his 3.850 issues or that they would support any new or additional 3.850 claims. Indeed in this Court, he fails to identify what, if any, public records he has properly requested, but not received.

Neither has he alleged, much less established, any need for, relevance of, or entitlement to, any of the vaguely referenced public records. Finally, his claim that he should have been permitted to amend his 400-page motion is absurd in light of his trial attorney's failure to make such a request of the lower court. Robinson's instant claim is utterly without merit.

POINT X

THE TRIAL COURT DID NOT ERR IN DENYING THE RACIAL DISCRIMINATION CLAIM AS PROCEDURALLY BARRED.

In the lower court, at the *Huff* hearing on the Rule 3.850 motion, the racial discrimination issue was presented by Robinson as:

> [I]t is our allegation the decision to seek the death penalty and the ability to obtain it is a product of racial prejudice and discrimination in St. Johns County, limiting the claim to St. Johns County and the Seventh Circuit as opposed to statewide or nationwide.

(R 6059-6060). The defense contended that "the race of the victim is the determining factor in who gets the death sentence in St. Johns County . . .." (R 6060). Defense Counsel admitted that there were "only three" death penalties handed down in St. Johns County during the relevant time period." (R 6061). He agreed that "of the three death sentences in St. Johns County, two of the

people sentenced to death were white" and only one, Robinson, was black. (R 6061). All three victims were white. (R 6062). Defense Counsel agreed that the issue was not whether the court imposes the death sentence in a racially discriminatory manner, but only whether the State decision to seek it is based on racial discrimination. (R 6062).

On appeal, Robinson urges that the issue is whether "[t]he prosecutor in this case repeatedly and deliberately injected the issue of Robinson's race into the trial." (IB at 99). He claims: "The deliberate injection of race encouraged the jury to convict Robinson and sentence him to death on the basis of racial discrimination, rather than on the basis of the evidence." (IB at 99). The State contends that the issue raised in this Honorable Court is procedurally barred because it was not raised in the lower tribunal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). See Doyle v. State, 526 So. 2d 905, 911 (Fla. 1988). *Duest v. Dugger*, 555 So. 2d 852. Further, it is barred because there is no allegation that an objection was made on this basis at trial or resentencing. *See Steinhorst v. State, supra*. Finally, even if the issue raised here was raised below, it is barred because the claim was raised on direct appeal. *Robinson v. State*, 520 So. 2d 1

(Fla. 1988).[69] If the identical issue was not raised in the direct appeal, it could, and should, have been. *Cherry v. State*, 659 So. 2d 1069, 1072, 1074 n.1 (Fla. 1995); *Brown v. State*, 596 So. 2d 1026, 1027, 1028 (Fla. 1992), and so, it is procedurally barred.

Assuming *arguendo* that the issue is properly before this Honorable Court, it is without merit. To prevail on a "claim of prosecutorial discrimination in the pursuit of the death penalty," the defendant must produce "exceptionally clear proof of prosecutorial discrimination necessary to find an abuse of prosecutorial discretion." *Jordan v. State*, 22 F.L.W. S199, S200 (Fla. April 25, 1997). In *Jordan*, this Court again rejected the position Robinson takes herein, i.e., that the state constitution provides greater protections than the federal one in this regard. 22 F.L.W. at S200. In *Foster v. State*, 614 So. 2d 455, 463-464 (Fla. 1992), this Court soundly rejected the claim that statistics of the nature offered by Robinson herein, even where confined to a particular State Attorney's Office, were sufficient to meet the

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[69] The deliberate injection of racial prejudice issue was raised on direct appeal from Robinson's original sentencing proceeding. *Robinson v. State*, 520 So. 2d 1 (Fla. 1988). The case was remanded for resentencing, and this Court rejected Robinson's attempt to argue racial discrimination on appeal from the resentencing proceeding. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991).

"exceptionally clear discriminatory purpose in the specific case" standard established in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). *Id.* Neither do Robinson's statistics account for nonracial variables, nor rebut or challenge the legitimate reason for the decision to seek the death penalty in this specific case, i.e., Robinson committed an act for which the United States Constitution and Florida laws permit imposition of the death penalty. *See McCleskey*, 107 S.Ct. at 1769-70. Thus, alternative to the procedural bar holding on this issue, this Court should hold this claim to be without merit.

POINT XI

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S OTHER ASSORTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS.

Robinson complains that his trial counsel was ineffective because he did not object to "improper prosecutorial arguments at trial . . . and resentencing, [and] . . . the prosecutor's injection of racial prejudice at trial . . . ." (IB at 100). He adds that Attorney Pearl was ineffective "for failing to properly conduct voir dire . . . and due to a conflict of interest . . . ." (IB at 100). He then offers that "[t]he lower court erroneously denied most of these claims as procedurally barred." (IB at 100).

To show ineffective assistance of trial counsel, the defendant

must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). Counsel is strongly presumed to have rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* If he proves deficient performance, he must also prove that the deficiency so prejudiced him that the result is unreliable. Gorham v. State, *521 So. 2d 1067, 1069 (Fla. 1988)* [citing Strickland, *466 U.S. at 687*].

Summary denial of ineffective assistance claims is appropriate where there are no factually specific allegations which show a sufficiently prejudicial deficiency in performance. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). Claims which contain only conclusory allegations of ineffective assistance do not warrant an evidentiary hearing. *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990). Neither can claims be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852.

Robinson makes no factual averments in support of his above-referenced single-sentence conclusory claims. Neither does he indicate why he thinks the referenced action and/or inaction constitutes deficient performance or how such performance prejudiced him. He does not even deign to tell this Honorable

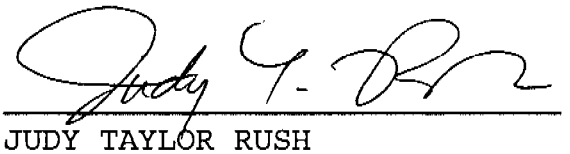
Court which of his five above-mentioned claims the trial court held procedurally barred. Such pleading is frivolous and should not be tolerated.[70]

CONCLUSION

Based upon the foregoing arguments and authorities, Robinson's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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[70] Further, Robinson's complaint that he did not get an evidentiary hearing on the issues raised in this Point is misleading. Attorney Pearl was extensively questioned at the evidentiary hearing, and he was, or could have been, asked specific questions about the issues raised in this claim. Certainly, the trial judge gave postconviction counsel wide latitude in questioning Attorney Pearl about matters which the court had previously ruled procedurally barred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Gail E. Anderson, Assistant CCR, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 13th day of June, 1997.

Of counsel