IN THE SUPREME COURT OF FLORIDA

Case No. 87,438

RICKEY BERNARD ROBERTS,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee

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

ANSWER BRIEF OF APPELLEE

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INTRODUCTORY NOTE ON RECORD CITATIONS

In the instant brief, the symbol "DR. ___" will designate the record on direct appeal in Florida Supreme Court Case No. The symbol "PCR. ___" will designate the record on appeal from Defendant's first R. 3.850 post-conviction proceedings in Florida Supreme Court Case No. The symbols "R.___" and "T. ___" will designate the record and transcript, respectively, of the proceedings below which are the subject matter of the instant appeal. The symbol "App. ___" will designate the Appellee's Appendix to this brief, which has been filed separately.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Defendant was indicted on June 21, 1984, for the first degree murder of George Napoles, sexual battery of M R , and two counts of robbery and kidnapping of the latter. He was convicted by a Florida jury of first-degree murder, armed sexual battery and armed kidnapping, in December, 1985. The jury recommended a sentence of death and the trial judge, after independent consideration of the facts, imposed a sentence of death. The trial judge found four (4) statutory aggravating circumstances: (1) the defendant had been previously convicted of a violent felony; (2) at the time of the commission of the capital felony, the defendant was under a sentence of imprisonment; (3) the capital felony was committed while the defendant was engaged in the commission of or the attempt to commit a sexual battery, and (4) the capital felony was especially heinous, atrocious or cruel. The trial court found no mitigating circumstances.

A. Facts

The facts established at the guilt phase of the trial are as follows. Sixteen year old M R , her best friend J (also 16), and 20 year old George Napoles drove to the beach along Rickenbacker Causeway in Miami the night of June 3-4, 1984. (DR. 2121, 1840). George was an acquaintance of J 's, (DR. 1830), but had just met M . (DR. 1831). Sunday evening, June 3, one of the girls called George after he finished work at Domino's Pizza and asked him to come to Joe Ward's house, where they were staying. (DR. 2130, 1837, 2020). After

George arrived, Joe's roommate, Ian Riley, asked the trio to leave so he could entertain a lady friend. (R. 1581, 2140).

On the way to Key Biscayne George brought some Wild Irish Rose wine. (DR 2140-1, 1839). After passing through the toll on the Rickenbacker, George turned left through the median strip and onto the sand, (DR. 2142, 1841), beyond a strip of trees. He parked with the back of his Dodge Omni toward the water and close to it. (DR. 2143-44, 1841). J , who was sitting in the front passenger seat, fell asleep a few minutes after their arrival at about 12:30 a.m. on June 4 (early Monday morning). (DR. 1839, 2149). She had a little of the wine, but M and especially George drank most of it. (DR. 2149). M tried to wake J after a while by pushing her arm but she continued to sleep. (DR. 2150-51, 1843).

The wine had a strong effect on George, who eventually got sick. Finally he got into the back seat of the four-door Omni (J was reclined in the right front (DR. 1842)), and lay down on the seat with his left foot resting on the sill of the open left door. (R. 2153-55). M sat in the driver's seat as George tried to sleep off his wine. (DR. 2154).

At 2:40 a.m., by the car's clock, a car headed onto the Key, crossed the median and came toward them, lights on. (DR. 2156). M watched as the car passed them on the beach, bright lights on. (DR. 2158). George said he could drive, so M got out of the driver's seat to let him get in. (DR. 2157-58). J

continued to sleep. (DR. 1882).

The cruising car, a brown 1975 Toyota, (DR. 2219), came up within 8-9 feet of the Omni, (DR. 2158, 2160), facing the driver's side. (DR. 2160). The occupant, a man, got out and asked what they were doing. (DR. 2161). M said they were relaxing, drinking wine. (DR. 2161). The man leaned in to look at the sleeping J , and asked about her. (DR 2161). Then he asked them for identification. (DR. 2162). George produced his from his back pocket but M had none. (DR. 2162-63).

M thought that the stranger was an undercover beach patrol officer: he was very clean, dressed in white shorts, light blue T-shirt with "Rick" on the front, and a light blue baseball cap, and he seemed to know what he was doing. (DR. 2163-64). He was tall, well built, had a very thin mustache and long sideburns, and had a little hair on his chin. (DR. 2167-68). The stranger took George's driver's license over to his own car and examined it under the interior light while George and M , stood silently by the Omni. (DR. 2166).

After turning out his lights, the man came back to the pair and told George to get on his car in the frisk position, hands on car, legs spread. (DR. 2167, 2169). George obeyed, by the back door, and the man patted him down. (DR. 2169-70). He patted M down where she stood, alarming her because she knew female police officers customarily searched females. (DR. 2171). He touched her on breast and

thighs. (DR. 2171). George asked the man for his I.D., and the stranger readily agreed. When George went to his car to see it the man reached through the open window and pulled out a baseball bat from the back seat. (DR 2172). He grabbed George's arm and brought him back to the Omni where he ordered M to face the interior and not to turn around. (DR. 2173). George was standing to M 's right. (DR. 2174). She heard the man tell George to assume the frisk position again, and then could see them by peering under her right arm. (DR. 2175-76).

She saw the man, (DR. 2235), hold George by one arm and hit him in the head with the bat. (DR. 2177). George stumbled and the man hit him again, in the back. (DR. 2178). George fell, cupping his hands over the back of his head where he had been hit, landing face down on a rock, (DR. 2178), his hands still on his head, (DR. 2180), as the man continued to hit him in the head. (DR. 2180). George moaned. (DR. 2180). M tried to scream but could not. (DR. 2180-81, 2185). She tried to run but she couldn't move. (DR. 2185).

The man pushed George along the beach behind the car, (DR. 2186), and then, still holding the bat, he pulled M to the ground, telling her to take her clothes off or she would get the same treatment as George. (DR. 2187).

She began to remove her pants, as ordered. (DR. 2188-89). The man, hearing a car approach, told her to dress, staying low. (DR. 2190). He searched George's wallet for money. (DR. 2191). After pulling M into the car and locking the

door, he backed his car along the beach for some distance. (DR. 2191, 2193). He stopped, came around to the passenger side, and told her to undress again. (DR. 2193). He himself dropped his pants, pushed the seat back and had intercourse with her. (DR. 2194). She did not resist. (DR. 2195). The bloody bat was still in the back seat where he had put it before the rape. (DR. 2195-96).

The rape took a couple of minutes, then they dressed before he drove the short distance back to George's car. (DR. 2195-2197). She stayed in his car as he looked at George's body, then he looked in on sleeping J . (DR. 2197-98).

On the way off the Key he threw George's wallet out the passenger window. (R. 2200). As they traveled south on U.S. 1, she asked Defendant if George was alive. (DR. 2201). He responded, laughing, that George Napoles, 20, was "dead as a doorknob." DR. 2201). M asked him to take her home. (DR. 2201). He described himself as a professional hitman who killed people for a living. (DR. 2202). Defendant said he was married to a 19 year old white prostitute with two children who would, he claimed, never have to work because of his (Defendant's) job. (DR. 2204). Realizing then that he did not have his wallet, he insisted that she go back with him to find it. (DR. 2205-06).

Back at the beach she offered to hold his hand to convince him she would not flee while he searched for the wallet. (DR. 2210). They found his brown wallet containing a great deal of cash. (DR. 2211). During this period the man turned

George over with his foot, listened to his chest and felt a pulse in his throat. (DR. 2212). George was still breathing some 1 ½ - 2 hours after the encounter had begun. (DR. 2212). In looking in on the still-sleeping Jammie, the man leaned into the Omni. (DR. 2213).

On leaving the Key this second time, Defendant and M passed two uniformed police officers who were standing close to M 's side of the car. (DR. 2215-16). He told her not to even think about calling to them, pointing to a small gun beside his seat. (DR. 2216). He said he could cut her tongue out with the knife he had in the dashboard, but it was, he said, too much torture. (DR. 2217).

Near Kendall Drive and 117th Avenue, Defendant stopped and raped M again, as before. (DR. 2223). She did not know if he ejaculated either time. (DR. 2224). Afterwards he told her that he would kill her and her family if she called the police. (DR. 2225).

As soon as she got inside the house, M ran to the room where she was staying, grabbed a blanket, went to a corner, put the blanket over her head and cried and cried. (DR. 2227). Then she woke Ian, they locked all the doors and windows, Ian got out his gun, and they called the police. (DR. 2227-28).

At about this time J woke up to find herself alone on the beach in the car. (DR. 1843). She looked for George and M for about an hour, did not see

George, and drove in the Omni to Cherie Gillotte's house. (DR. 1846). She and Cherie then returned to the Key. (DR. 1849-50).

Miami Detective Louise Vasquez was at the scene when J and Cherie returned to the beach Monday morning. George's body had been found at about 6:15 a.m. (DR. 1616). Defendant's palm print was later found on the roof of the Omni. (DR. 1627).

Vasquez got a telephone tip as to Defendant's name and work place, Jason's Lounge. (DR. 1635). She and Lt. Mike Gonzalez met Defendant there the next day. (DR. 1636).

Defendant voluntarily went to the Miami Police Department with Vasquez and Gonzalez, (DR. 1640), and gave voluntary fingerprint standards and photographs. (DR. 1647). M identified his car. (DR. 1646). Defendant said he was at Jason's Lounge until midnight, then went straight home, where he remained all evening. (DR. 1644). Confronted with car identification and palmprint, Defendant denied being on Key Biscayne in the past two months. (DR. 1648-49). He gave no further statements to the police. Defendant was then arrested and later indicted for George's murder, M 's rape and kidnapping, and two counts of robbery.

State witness Sean Brown, (DR. 1731), and State rebuttal witness Jimmy Horan, (DR. 2930), testified that at 11:30 p.m. on June 3, 1984, approximately three

hours before the crime occurred, Defendant had been in the pool area at Kendall Arms Apartments, and during a discussion about South Miami, Defendant had stated that he had a baseball bat in his car that would take care of any trouble he might find in that locale.

Thomas McMurray, another State witness, testified that at 12:30 a.m. on June 4, 1984, approximately two hours prior to the murder, he was at the Sonesta Beach Hotel on Key Biscayne, about a mile from the murder scene, when Defendant approached him at the hotel's beach area. He talked with Defendant for about a half hour, and Defendant gave him his business card, then departed around 1:00 a.m.

A search warrant was executed on Defendant's apartment. Seized were a T-shirt with "Rick" on it, white shorts, a baseball cap, and a brown wallet. (DR. 1655). A search warrant executed on Defendant's car yielded, inter alia, a photograph of Defendant, taken June 3, wearing a T-shirt with "Rick" on it, white shorts and a baseball cap. (DR. 1659, 1812, R.314).

Defendant was ticketed on May 24, 1984, ten days before the murder, in the same area of Key Biscayne at 5 am. (DR. 1769, 1774-76). He was cruising the beach, driving without lights at 5 mph. He identified himself as Less McCullars. (DR. 319).

Rhonda Haines, Defendant's live-in girlfriend, testified that he came home at

5:00 a.m. on June 4. (DR. 2377). He told her later on June 4 that he thought he had killed a man that evening. (DR. 2381). On a later jail visit, he told her that he met George and M and sleeping J , did cocaine with George and M , and had consensual sex with M . George became upset when Defendant "hogged" M , and Defendant responded by hitting George with his baseball bat. (DR. 2389-90). Defendant said he then took M home. (DR. 2389). Rhonda had seen, before June 4, a baseball bat and a small handgun in Defendant's car. (DR. 2387). Defendant said he threw the bat off a bridge after the murder. (DR. 2389). Rhonda was in the photograph taken with Defendant June 3. (DR. 314, T. 2392). He shaved the mustache and sideburns off June 4. (DR. 2396).

Defendant testified that he went out to Key Biscayne the night of June 3-4 to Sundays on the Bay, but it was closed. (DR. 2761). He had no gun or baseball bat and only a small pocketknife in the car. (DR. 2760).

He met Tom McMurray on the beach and after a friendly conversation gave him his business card. (DR. 2763). He recalled meeting Sean Brown earlier in Kendall but denied saying he had a bat in his car as a weapon. (DR. 2757).

On the way off the Key after meeting Tom, he met M hitchhiking. (DR. 2767). She wanted a ride home because her friend had passed out in the car. (DR. 2768). Defendant went with her when, she said, she wanted to get her purse out of the Omni. (DR. 2768). He leaned into the car looking at the sleeping J . (DR.

2768).

Then he and M got into his car and he drove her home. (DR. 2771). He then stopped at a 7-11 for coffee and some arthritis medicine for Rhonda and went home. (DR. 2771, 2784). He denied all crimes and denied admitting them to Rhonda. (DR. 2809). Defendant denied ever seeing George. (DR. 2838-39).

On cross-examination, Defendant admitted that he lied to Detective Vasquez about not being on Key Biscayne. (DR. 2815). He denied telling Vasquez that he had been at Jason's all evening and that he had returned home from Jason's Lounge at midnight, and remained there for the entire evening. (DR. 2816). On direct, Defendant had said he put his hand on the rear roof when he leaned into the victim's car to look at the sleeping J . (DR. 2769). On cross he said he had looked in through the front driver's side window. (DR. 2837). Technician Evans had testified that Defendant's fingerprint was found on the roof above the rear window (DR. 1937), along with his palm print on the top rear portion of the roof. (DR. 1937, 1980, 2007).

Defendant admitted shaving off his sideburns, moustache and partial beard the morning of the murder. (DR. 2855). He denied ever having shown the rape victim his wallet, (DR. 2859), although she had described it (she observed it when Defendant drove her back to the murder scene to find his wallet, which they found) as a "medium, brown leather wallet with--it folded once, then twice, then once over that." (DR. 2210). She then was shown Defendant's wallet, and identified it. (DR. 2211).

Blood tests showed that Defendant was a Type A, non-secretor; Manny Cebey was Type A, secretor; George was a Type B, non-secretor; and M was a Type A, secretor. Vaginal aspirate from M could have come from Defendant, but not George. (DR. 2492-3). Sperm was found, (DR. 2490), indicating intercourse within 12 hours (sperm is extremely unlikely to be found in the vagina after 12 hours). (DR. 2551). Manny, M 's boyfriend, had sex with her not later than 8 a.m. on June 3, more than 24 hours before she was tested at the Rape Treatment Center. (DR. 2108, 2126, 2544).

Defendant's shorts had blood, semen and possible vaginal fluid on them. (DR. 2504). The blood was type B, as was George's, whereas Defendant's blood is type A. (DR. 2492, 2504-6). There was human blood in Defendant's back seat (where M said he put the bat after beating George), but not enough to type it. (DR. 2498).

The cause of death was injury due to blunt trauma. (DR. 2614). There was one massive unblocked blow, and two or more with hands (at least two fingers were consequently broken) defensively covering the wound. (DR. 2625). The wound was 3 ½ inches long, Y-shaped, with the skull fractured in several directions. (DR. 2587, 2596). A baseball bat was consistent with the object used: rounded, hard, smooth. (DR. 2626).

George lingered for one to two hours or more, in and out of consciousness, not comatose and in considerable pain. (DR. 2601, 3265). Medical intervention early could well have saved him. (DR. 3268). Eventually, blood clotting in the brain stem slowed and then stopped one life function after another until George Napoles finally died. (DR. 2598-99). George's facial wounds were consistent with falling face down on a rock, (DR. 2584), as was described by M after George received the initial blow.

In his opening statement and closing argument, defense counsel theorized that either the rape victim's boyfriend, Manuel Cebey, or Joe Gary Ward, at whose house the rape victim and J C were staying that weekend, had murdered the victim because they were jealous of his being with the rape victim that evening, and that the rape victim blamed Defendant to protect either one or both of them.

Joe Gary Ward testified that he left Miami early Saturday morning with his girlfriend Anna Casuso, to travel to Gainesville to get Anna's furniture from storage, and then return it by Ryder rental truck to Miami. (DR. 2020-2023). They stayed at the home of Kathy Anthony. On Monday, while still in Gainesville, Ward received a call around noon from his roommate Ian Riley. (The crime occurred Monday morning between 2:40 a.m. and approximately 4:30 a.m.). Riley told him about the murder and rape. (DR. 2023-2035). He returned to Miami either Tuesday or Wednesday. Ward stated he never even met the murder victim. (DR. 2026-2028).

Ward's testimony was confirmed by his roommate, Ian Riley, who testified that Ward had left that weekend for Gainesville, where Riley reached him by telephone between 11:00 a.m. and noon the morning of the murder. (DR. 1581-1584, 1608).

Ward's testimony was corroborated by Anna Casuso, who traveled with him to Gainesville in order to retrieve her stored furniture, stayed with him at Kathy Anthony's house, was there when they received the call from Ian Riley, and who returned with Ward to Miami on Wednesday. (DR. 2062-2065). Ward's testimony was further corroborated by the rape victim, who testified she was staying at Ward's house while he was away in Gainesville, and that of J C . who did not see Ward at any time that weekend.

Manuel Cebey testified that he met the murder victim for the first time that Saturday, had a friendly introduction, after which the murder victim left with J C . Cebey never saw the murder victim again. (DR. 2103-2108). Cebey spent Saturday night with the rape victim, and went home to his parent's house early Sunday morning, and did not see her again until after the murder. This testimony was corroborated by both the rape victim, J C ., and Ian Riley, who all testified that the only people present at the Ward/Riley house that Sunday evening were the two victims, J C , Ian Riley, and Riley's girlfriend. Again, as with Ward, there was absolutely no evidence that Cebey was involved in the murder.

B. Direct Appeal

Defendant's convictions and sentences were affirmed on direct appeal to the Florida Supreme Court on July 2, 1987. Roberts v. State, 510 So. 2d 885 (Fla. 1987). The following six (6) issues had been raised on direct appeal:

1) Whether evidence was insufficient to prove either premeditation or felony murder, in violation of the 5th and 14th Amendment rights to due process;

2) whether trial court's failure to be present at a view by the jury, denied the defendant the right to an impartial jury and due process of the law guaranteed by the Florida and federal constitutions;

3) whether restriction on defendant's direct examination testimony denied him the right to testify, present a defense, and confront witnesses in violation of the federal and Florida constitutions;

4) whether the defendant's absence during various critical stages of his trial, denied him the right to due process, the right to be present and the right to effective assistance of counsel in violation of the federal and Florida constitutions;

5) whether the trial court erred in permitting the state to cross-examine a defense witness outside the scope of direct examination, thereby eliciting hearsay statements of chief prosecution witness in violation of due process of law and compulsory process guaranteed by the federal constitution;

6) whether the trial court erred in sentencing the defendant to death where:

(a) the heinous, atrocious or cruel (HAC) aggravator was not proven beyond a reasonable doubt and was not appropriate under the circumstances of this case,

(b) the trial court erred in determining that the capital felony was committed during the commission or attempt to commit a sexual battery,

(c) the trial court erred in rejecting evidence that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, in light of uncontradicted expert testimony by the defense,

(d) the trial court erred in imposing the death penalty where the evidence was insufficient to prove defendant's guilt of first degree murder beyond a reasonable doubt, and

(e) the death penalty in Florida is unconstitutional as it discriminates based on the race of the victim and the sex of the offender.

This Court denied relief as to the first claim, finding that the evidence was more than sufficient to support both felony and premeditated murder. Roberts, 510 So. 2d at 888. The court also found the second claim was without merit due to counsel's express waiver of the issue. Id., at 889-90.

As to point (3), Defendant asserted that the trial court's refusal to allow him to testify that R allegedly told him she was a prostitute violated his right to confront state witnesses and to present a defense. The Court rejected this claim, finding that the proposed testimony came within the ambit of the rape shield law, § 794.022, Fla. Stat., and was properly excluded. Id., at 892. The Court further observed that if the statute interfered with Defendant's constitutional rights as asserted, the statute would have to yield. Id. However, the Court rejected that contention, finding that other than the one statement regarding the alleged prostitution, Defendant was allowed to extensively contradict R 's account of what transpired during the ride from Key Biscayne to where he eventually dropped her off. Id. As such, "the exclusion of this otherwise irrelevant and highly prejudicial aspect" of his testimony "in no way hindered" his presentation of a complete defense. Id.

The Court also rejected Point (4), holding that the claims were either expressly waived by counsel, and/or that the State had met its burden of showing an absence of prejudice. Id., at 890-91. The fifth point was found to be without merit. Id. at 893-94. Finally, the Court rejected Defendant's challenges to his death sentence, and noted that Defendant did not challenge the trial court's findings that (1) he had previously been convicted of a violent felony -- rape and assault with intent to commit murder, or (2) at the time of the commission of the murder he was on parole in connection with that prior conviction. Id., at 894-95.

On November 18, 1987, Defendant filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 7, 1988. Roberts v. Florida, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 384 (1988).

C. First State Court Collateral Proceedings

The governor then signed a death warrant, with execution scheduled for October 31, 1989. On September 28, 1989, Defendant filed a Fla.R.Crim.P. 3.850 motion for post-conviction relief in the trial court, which was denied without an evidentiary hearing. Defendant appealed the denial of post-conviction relief to the Florida Supreme Court. This Court denied relief on September 6, 1990. Roberts v. State, 568 So.2d 1255 (Fla. 1990). The Defendant had raised the following issues:

1) the application of Florida Rule of Criminal Procedure 3.851 violated his due process and equal protection rights by shortening the time allotted under rule 3.850 in which to file a motion for postconviction relief;

2) the prosecutor peremptorily excused black prospective jurors in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and *State v. Slappy,* 522 So. 2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988);

3) the jury's sense of responsibility for sentencing was diminished contrary to *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985);

4) his rights to present a defense and to confront witnesses were denied

when he was prohibited from cross-examining M R. about alleged prostitution, contrary to *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1989);

5) his rights to present a defense and to testify were violated when Florida's rape-shield law was applied to limit his testimony, contrary to *Olden* and *Rock v. Arkansas,* 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987);

6) the state's repeated reference to him by an alias deprived him of his right to be presumed innocent;

7) his confrontation rights were violated when he was denied access to the rape-treatment counselor who treated R , contrary to *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987);

8) his rights were violated when cross-examination into crimes committed by the State's witnesses was limited;

9) trial counsel was ineffective during the guilt phase of the trial;

10) he was denied effective assistance of counsel when his first attorney withdrew because of purported conflict of interest;

11) he was deprived of an adequate mental health evaluation at the penalty phase because trial counsel failed to provide experts with adequate background information;

12) counsel was ineffective during the penalty phase for failing to investigate and present mitigating evidence;

13) the state's closing arguments in the guilt and penalty phases denied him

of fair and reliable capital sentencing;

14) the state withheld exculpatory evidence in violation of *Brady v. Maryland,*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963);

15) his sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, in violation of *Maynard v. Cartwright,* 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) and *Rhodes v. State,* 547 So. 2d 1201 (Fla. 1989);

16) the penalty phase instructions shifted the burden to the defendant to prove that death was inappropriate and the judge employed this standard, contrary to *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988);

17) the state improperly told the jury that sympathy towards the defendant was an improper consideration, contrary to *Penry v. Lynaugh*, ___ U.S. ___, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), and *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988), *rev'd sub nom. Saffle v. Parks,* ___ U.S. ___, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990);

18) his death sentence was predicated upon the finding of an automatic aggravating circumstance, in violation of *Lowenfeld v. Phelps,* 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988);

19) the aggravating factor of "under sentence of imprisonment" was given undue weight by the jury and judge, contrary to *Songer v. State*, 544 So. 2d 1010 (Fla. 1989);

20) the jury was allowed to consider victim-impact evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440

(1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989);

21) his sentence of death was based upon an unconstitutionally obtained prior conviction;

22) the trial court improperly refused to find mitigating circumstances which were clearly set out in the record;

23) nonstatutory aggravating factors were improperly introduced during the sentencing phase; and

24) the trial court improperly limited the testimony of the defense's mental health expert.

This Court noted that it had previously rejected the first claim. Roberts, 568 So. 2d at 1257. It found Claims (5) and (22) procedurally barred because they were raised and rejected on direct appeal. Id. Claims (2) through (4), (6) through (8), (10), (13), (15) through (21), (23), and (24), as well as that portion of (22) not raised on direct appeal, were held procedurally barred because they could have been raised on direct appeal, and none of the decisions upon which Defendant relied were such a change in the law as to warrant excusing the procedural default. Id., at 1257-58.

As to the remaining claims, the Court found that Claim (9), as to counsel's performance at the guilt phase, with regard to the three points raised on appeal, was facially insufficient. As such, this Court held that the trial court properly rejected the claims without an evidentiary hearing. Any remaining subpoints purportedly presented

on appeal by reference to the motion below were deemed waived. Id., at 1259-60. As to Claims (11) and (12), relating to alleged deficiencies of counsel and inadequate mental health assistance at the penalty phase, the Court affirmed the trial court's conclusion that based on the record, Defendant had failed to demonstrate prejudice. Id., at 1260. Likewise the Court concluded that Defendant's Brady claim (14) was facially insufficient and properly denied. Id.

The defendant had also, on September 28, 1989, filed a petition for habeas corpus review in the Florida Supreme Court which was consolidated with the above appeal from the denial of the 3.850 motion, and also denied on September 6, 1990. Id., at 1263. In his habeas petition, Roberts had raised the following seventeen claims:

1) Mr. Roberts' rights to present a defense and to confront the witnesses against him were denied when the court prohibited the cross examination of the State's key witness, M R , about her sexual history and when the defendant was foreclosed from testifying about her sexual history. *Olden v. Kentucky,* 109 S. Ct. 480 (1988), established that this court erred in Mr. Roberts' direct appeal.

2) Mr. Roberts was denied the right to present a defense when the court applied the rape shield law to limit Mr. Roberts' right to testify in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments under both *Rock v. Arkansas,* 107 S. Ct. 2407 (1987); and *Olden v. Kentucky,*

109 S. Ct. 480 (1989), and this court erred in Mr. Roberts' direct appeal.

3) Mr. Roberts was denied his right to trial by a jury that presumed he was innocent when the State repeatedly referred to him by an alias in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

4) Mr. Roberts was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when the court limited cross examination into crimes committed by the state's witnesses.

5) The Prosecutor peremptorily excused black prospective jurors solely based upon their race in violation of the Eighth and Fourteenth Amendments.

6) The Prosecutor's closing argument in the guilt and penalty phases denied Mr. Roberts a fundamentally fair and reliable capital sentencing determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

7) Mr. Roberts' rights to reliable capital trial and sentencing proceedings were violated when the State urged that he be convicted and sentenced to death on the basis of victim impact and other impermissible factors, in violation of *Booth v. Maryland*, *South Carolina v. Gathers*, and the Eighth and Fourteenth Amendments.

8) Mr. Roberts' sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, and the aggravator was improperly argued and imposed, in violation of *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Eighth and Fourteenth

Amendments.

9) Mr. Roberts' sentence of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the penalty phase jury instructions shifted the burden to Mr. Roberts to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Roberts to death.

10) The Prosecutor improperly asserted that sympathy towards Mr. Roberts was an improper consideration for the jury, depriving Mr. Roberts of a reliable and individualized capital sentencing determination, in violation of the Eighth and Fourteenth Amendments, *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989), and *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988)(en banc).

11) Mr. Roberts' sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987), *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and in violation of the Eighth and Fourteenth Amendments. Mr. Roberts received ineffective assistance of counsel when counsel failed to zealously advocate and litigate this issue.

12) The aggravating factor of under sentence of imprisonment was given undue weight by the jury and the court that imposed Mr. Roberts' death sentence in violation of the Fifth, Eighth and Fourteenth Amendments,

and *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988).

13) Mr. Roberts' death sentence is predicated upon the finding of an automatic, non-discretion-channeling, statutory aggravating circumstance, in violation of the Eighth and Fourteenth Amendments.

14) The Eighth Amendment was violated by the sentencing court's refusal to find the mitigating circumstances clearly set out in the record.

15) The penalty phase of Mr. Roberts' trial was fundamentally flawed when the trial court limited the testimony of the defense's mental health expert.

16) The introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Roberts' trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments of the United States Constitution

17) Appellate counsel was ineffective for failing to raise as an issue trial counsel's objection to the introduction of hearsay statements of the victim of the prior offense.

This Court rejected the procedurally barred claims which had also been presented and rejected in the post-conviction motion, Claims (7), (8) and (9). Id., at 1260-61. The Court also found that Claims (1), (2) and (14) were merely restatements of claims which were raised and rejected on direct appeal, and thus denied them. Id., at 1261. The Court found that the ineffectiveness of appellate

counsel contentions presented in Claims (3), (4) and (6) were without merit because the issues raised had not been preserved for appeal at trial. Id. Claims (10) through (13) and (16) were "unpreserved and meritless," and counsel was therefore not ineffective for not raising them on appeal. Id. Appellate ineffectiveness Claims (15) and (17) were denied because Defendant failed to show prejudice, i.e., that if counsel had raised the issues on appeal he would have prevailed. Id., at 1262. Finally, the Court rejected the alleged appellate ineffectiveness alleged in Claim (5) because no error had occurred at trial.

D. Federal Collateral Proceedings

On March 21, 1991, Defendant filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, which was denied on June 5, 1992, after a three day evidentiary hearing.. Roberts v. Singletary, 794 F. Supp. 1106, 1110-11 (S.D. Fla. 1992). Defendant had raised the following issues in that proceeding:

1) Mr. Roberts was deprived of his right to confront witnesses against him when the trial court prohibited cross-examination of the state's witness, M R , regarding her work as a prostitute and how that led to the victim's death.

2) Mr. Roberts was denied the right to present a defense when the court applied the rape shield law to limit Mr. Roberts' right to testify in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments under *Taylor v. Illinois*, 108 S. Ct. 646 (1988); *Rock v. Arkansas*, 107 S. Ct.

2704 (1987); and *Olden v. Kentucky*, 109 S. Ct. 480 (1989).

3) The withholding of material exculpatory evidence violated Mr. Roberts' due process rights, contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments.

4) Mr. Roberts' rights under the confrontation clause of the Sixth Amendment were denied when the rape treatment counselor, who had treated M R and was an employee of the State Attorney's Office, invoked privilege and refused to disclose whether in her conversations with Ms. R she had learned any exculpatory information.

5) Mr. Roberts was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when the court limited cross-examination into crimes committed by the state's witnesses.

6) Mr. Roberts was denied his right to trial by a jury that presumed he was innocent when the state repeatedly referred to him by an alias in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Counsel's performance was deficient in this regard, and Mr. Roberts was prejudiced as a result.

7) Rickey Roberts was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments.

8) The prosecutor peremptorily excused black prospective jurors solely upon the basis of their race in violation of the Eighth and Fourteenth

amendments.

9) Rickey Roberts was denied the effective assistance of counsel at the sentencing phase of his trial, and was denied a professionally adequate mental health examination because of counsel's deficiencies, in violation of the Sixth, Eighth and Fourteenth Amendments.

10) Appellate counsel was ineffective for failing to raise as an issue trial counsel's objection to the introduction of hearsay statements of the victim of the prior offense. This violated Mr. Roberts' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

11) The prosecutor's closing argument in the guilt and penalty phases denied Mr. Roberts a fundamentally fair and reliable capital sentencing determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments. Counsel was ineffective for not objecting and Mr. Roberts was prejudiced.

12) The penalty phase of Mr. Roberts' trial was fundamentally flawed when the trial court limited the testimony of the defense's mental health expert in violation of *Hitchcock v. Dugger* and *Penry v. Lynaugh*. Appellate counsel was ineffective in failing to raise this issue on direct appeal.

13) A capital sentencing jury must receive accurate penalty phase instructions regarding the "heinous, atrocious, and cruel" aggravating circumstance to be weighed against the mitigating circumstances. Mr. Roberts' jury did not receive adequate instructions in this regard.

14) A capital sentencing jury must receive accurate penalty phase

instructions regarding the "under sentence of imprisonment" aggravating circumstance to be weighed against the mitigating circumstances. However, Mr. Roberts did not receive adequate instructions in this regard.

15) A Florida capital sentencing jury must receive accurate penalty phase instructions regarding the "in the course of a felony" aggravating circumstance to be weighed against the mitigating circumstances. Mr. Roberts' jury did not receive adequate instructions.

16) Mr. Roberts' rights to reliable capital trial and sentencing proceedings were violated when the state urged that he be convicted and sentenced to death on the basis of victim impact and other impermissible factors, in violation of *Booth v. Maryland*, *South Carolina v. Gathers*, and the Eighth and Fourteenth Amendments.

17) A capital sentencing jury must receive accurate penalty phase instructions regarding the jury's ability to recommend mercy because of sympathy evoked by the evidence in mitigation.

18) The Eighth Amendment was violated by the sentencing court's refusal to find the mitigating circumstances clearly set out in the record.

19) Mr. Roberts' sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and in violation of the

Eighth and Fourteenth Amendments. Mr. Roberts received ineffective assistance of counsel when counsel failed to zealously advocate and litigate this issue.

20) Mr. Roberts' sentence of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the penalty phase jury instructions shifted the burden to Mr. Roberts to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Roberts to death.

21) The introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Roberts' trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

22) Mr. Roberts' sentence of death was based upon an unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the Eighth and Fourteenth Amendments, and counsel was ineffective for failing to litigate this claim.

23) The trial court's and defense counsel's failure to assure Mr. Roberts' presence during critical stages of his capital proceedings, and the prejudice resulting therefrom, violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

24) Mr. Roberts' Sixth, Eighth and Fourteenth Amendment rights were violated because no reliable transcript of his capital trial exists, reliable appellate review was and is not possible, there is no way to ensure that

that which occurred in the trial court was or can be reviewed on appeal, and the judgment and sentence must be vacated.

25) Mr. Roberts' trial was fraught with procedural and substantive errors which deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth Amendments.

After an extensive, three-day evidentiary hearing, the District Court issued an exhaustive opinion in which it concluded that Defendant was not entitled to relief. Roberts, 794 F. Supp. at 1106-41. The State's response to Claim I of the instant appeal relies extensively upon the District Court's thorough treatment of Defendant's claims. The court's findings will therefore be addressed in detail in the argument portion of this brief, infra.

Defendant then appealed to the United States Court of Appeals, Eleventh Circuit, which affirmed the findings of the District Court on August 10, 1994. Roberts v. Singletary, 29 F.3d 1474 (11th Cir. 1994). On this appeal Defendant raised only the following issues:

1) Roberts was deprived of his right to present his defense and to confront witnesses against him when the trial court limited Roberts' testimony and prohibited cross-examination of the State's witness, M R , regarding her work as a prostitute and its connection to the victim's death.

2) The withholding of material exculpatory evidence violated Roberts' due

process rights, contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments.

3) Roberts' rights under the Sixth and Fourteenth Amendments were denied when the rape treatment counselor, who had treated M. R and was an employee of the State Attorney's Office, invoked privilege and refused to disclose whether in her conversations with R she had learned any exculpatory information.

4) Roberts was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when the court limited cross-examination into crimes committed by the State's witnesses.

5) Roberts was denied effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments.

6) Roberts was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because he was not provided with effective assistance of counsel on direct appeal.

7) Roberts was denied the effective assistance of counsel at the penalty phase of his trial, and was denied a professionally adequate mental health examination because of counsel's deficiencies, in violation of the Sixth, Eighth and Fourteenth Amendments.

8) Roberts' sentencing jury did not receive instructions guiding and channeling its sentencing discretion by explaining the limiting constructions of the aggravating circumstances, in violation of the Eighth

and Fourteenth Amendments.

9) The Eighth Amendment was violated by the sentencing court's refusal to find the mitigating circumstances clearly set out in the record.

On August 10, 1994, the Circuit Court affirmed "the judgement of the district court denying habeas relief for all of the reasons expressed in its thorough and articulate opinion." Roberts, 29 F.3d at 1477. Defendant then sought review in the United States Supreme Court, which was also denied. Roberts v. Singletary, ___ U.S. ___,115 S. Ct. 2560, 132 L. Ed. 2d 814 (1995).

E. **Second State Collateral Proceedings**

On January 21, 1993, during the pendency of the federal habeas appellate proceedings, Defendant filed a second State habeas petition in this Court, which was denied on September 16, 1993. Roberts v. Singletary, 626 So. 2d 168 (Fla. 1993). Defendant had alleged the following claims:

1) Florida's statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. The facial invalidity of the statute was not cured in Mr. Roberts' case where the jury did not receive adequate narrowing constructions. As a result, Mr. Roberts' sentence of death is premised upon fundamental error which must be corrected now in light of new Florida law, *Espinosa v. Florida*.

2) The jury's death recommendation which was accorded great weight by

the trial court was tainted by consideration of invalid aggravating circumstances, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

3) Mr. Roberts' sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of *Stringer v. Black*, *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Sixth, Eighth, and Fourteenth Amendments.

This Court found these claims to be procedurally barred, and denied relief. Roberts, 626 So. 2d at 169.

F. Present Florida (Third) and Maryland Collateral Proceedings

On January 25, 1996, Governor Chiles issued a death warrant setting Defendant's execution for Friday, February 23, 1996 at 7:00 a.m. The warrant expires on February 29, 1996, at 12 p.m.

An exhaustive history of the Maryland collateral proceedings has been set forth in the Argument, claim II A, at pp. 57-64 herein. On February 20, 1996, Defendant filed a second Rule 3.850 motion for relief in the 11th Judicial Circuit Court of Florida, raising the following claims:

1) Mr. Roberts was denied an adversarial testing when critical, exculpatory evidence was not presented to the jury during the guilt/innocence or penalty phases of Mr. Roberts' trial. As a result, Mr. Roberts was denied

his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and confidence is undermined in the reliability of the judgment and sentence. Moreover, newly discovered evidence establishes that an innocent Mr. Roberts was erroneously convicted.

2) Mr. Roberts is innocent of first degree murder and of the death sentence.

3) Access to the files and records pertaining to Mr. Roberts' case in the possession of certain State agencies have been withheld in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions of the Florida Constitution.

4) Mr. Roberts was denied due process of law when his death sentence was imposed on the basis of information which he had no opportunity to deny or explain.

5) Mr. Roberts' death sentence is based upon the State's knowing and [sic] presentation of false testimony from a law enforcement officer in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

6) Mr. Roberts's sentence of death is based upon an unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the Eighth and Fourteenth Amendments.

The State filed an answer. On February 21, 1996, at 5:00 p.m., a hearing was held on the Rule 3.850 motion before the original trial judge, who had also conducted

the 1989 post conviction proceeding, the Honorable Harold Solomon. Based upon the pleadings and after hearing argument of the parties, the trial judge orally denied the motion for post-conviction relief. The court issued its written order summarily denying relief on February 22, 1996. Defendant then filed his notice of appeal to this Court, whereupon he was granted a stay of execution until February 29, 1996 at 7:00 a.m.

On February 21, 1996, this Court had denied Defendant's claims, raised in a separate action filed in the Second Judicial Circuit in and for Leon County, that he had been denied access to documents in the possession of the Attorney General's Office and the Clemency Board. Roberts v. Butterworth, No. 87,389 (Fla. February 21, 1996).

The Maryland Federal District Court, after being advised of this Court's grant of a stay, has scheduled a hearing, upon the State of Maryland's defenses of laches and failure to exhaust state remedies, at 9:00 a.m. on February 29, 1996. As noted previously, the Maryland proceedings have been detailed in the Argument section, Claim II A., at pp. 57-64 herein.

ARGUMENT

CLAIM I

DEFENDANT'S CLAIM BASED UPON ALLEGEDLY NEWLY DISCOVERED EVIDENCE IS REFUTED BY THE RECORD, ITS PRESENTATION WAS WAIVED BY THE DEFENSE, AND IS WITHOUT MERIT.

A. Rhonda Haines

In his first claim, the defendant relied upon an affidavit from Rhonda Haines, dated February 14, 1996. Haines stated that, contrary to her trial and deposition testimony, the defendant did not confess to her, and, that her 1984 statement to the prosecution, which had also been related to the defense at that time, currently constitutes the truth. (R. 100-103). In her 1984 statement, related to both the prosecution and defense, Haines had said that on the night of the murder, she had been home asleep, and thus could not provide an alibi for the defendant. Id. She had not mentioned any confession by the defendant.

In her 1996 affidavit Haines also stated:

> 7. In 1985, I testified at a deposition and at Rick's trial. My testimony was false. I testified the way that I did because Mr. Rabin [prosecutor] would not leave me alone and because he said he would take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better story." I was tired and afraid for myself, and so I lied.
>
> 8. Mr. Rabin was good on his word. After I testified, the Broward County charges disappeared. . . .
>
> 9. I have recently had the chance to review the sworn statement that I made to Sam Rabin on June 26,

> 1984, and it is true and correct. I answered all of his questions truthfully in that statement.

(R. 102-3).

The defense argued that it had been previously unable to find Ms. Haines. The defendant claimed, in part, that based on the above, "the State knowingly presented false and misleading testimony in order to secure a conviction," pursuant to Giglio v. United States, 405 U.S. 150 (1972), Brady v. Maryland, and its progeny, and Garcia v. State, 622 So. 2d 1325 (Fla. 1993). To the extent that Ms. Haines has now readopted her 1984 statement, which was previously related to the defense and fully presented before the jury at trial (see pp. 43-44), the State questions whether such can constitute either newly discovered evidence pursuant to Jones v. State, 591 So. 2d 911 (Fla. 1991), or "suppressed" evidence under Brady. The arguably "new" portion of the 1996 affidavit is Haines' reference that she was "pressured" by Rabin during her October, 1985, deposition, and December, 1985, trial testimony.

Even if this Court accepts that the above stated affidavit could not have been previously obtained, the defendant's claim is conclusively refuted by the record. The 1985 deposition and trial testimony, referenced by Haines, took place in October and December 1985, respectively. The record reflects, and the defense admitted that prosecutor Rabin had left the State Attorney's Office, for the private practice of law, in February, 1985. When he left he had nothing more to do with the case. (R. 463, 392, 398, T. 17). Both the transcripts of Haines' 1985 deposition and trial testimony also reflect that Mr. Rabin was not a prosecutor at the complained of times. The

record thus reflects that Mr. Rabin could not have "pressured" Ms. Haines into presenting false testimony at the relevant time periods, and, could not have made Broward County charges "disappear," as now claimed; he was no longer a law enforcement officer.

Although the knowing-presentation-of-false-testimony claim was refuted by the record, "in an abundance of caution," the State offered a limited evidentiary hearing, and proffered Mr. Rabin's immediate availability during the warrant period to refute Haines' allegations. (T. 21, 32-3). The State contacted the defense on the morning of February 21, 1996, and gave it notice of both its offer and the immediate availability of Mr. Rabin. Id. The State requested that the defense contact Ms. Haines, and, a) either make her available for said hearing, or, b) provide the State with her address so that it would be able to make arrangements for her transportation to the hearing. (T. 28-9). The defense did not agree. (T. 21, 23-4). At the hearing below, the State again extended said offer: the State was willing to agree to a limited evidentiary hearing as to Ms. Haines' recantation and allegations that she had been pressured or threatened, etc. (T. 23-4). As seen below, the defense again declined.

The defense stated that it would only agree to a full evidentiary hearing, scheduled after the expiration of the warrant period and an opportunity for further discovery. (T. 12-13, 26-8, 33). The defense stated that it would have to subpoena Ms. Haines, and the out of state procedure would take more time than the warrant period allowed, even while admitting that counsel knew about this matter at least 10

days prior to the hearing; nor would the defense provide an address for Ms. Haines. (T. 25, 29, 33, 42).

According to the defense, it was unknown how long it would take to produce Haines, but the trial court would have to schedule an evidentiary hearing, issue an out-of-state subpoena, which would then go to California, where "there has to be a determination made of whether the time set is reasonable notice to her so that she can be here." (T. 25, 54). The defense also stated that its Appendix included affidavits from trial counsel, pretrial counsel, post-conviction counsel, investigators, and various other individuals, all of whom would also have to testify as to this matter. (T. 33-5). Furthermore, according to the defense, the assessment of Haines' credibility required additional expert testimony, such as that presented at the Spaziano v. State evidentiary hearing with respect to witness Dilisio's testimony. (T. 35, 42). In sum, according to the defense, the defendant was entitled to a stay because no hearing under warrant could be conducted, as the instant case, like Spaziano required extensive pre-hearing preparation, and at least a 4-5 day evidentiary hearing. (T. 12-13, 42).

The above procedure was not acceptable to the State. Contrary to the Appellant's argument herein, the prosecution did not, "speak out of both sides of its mouth." The State maintained both in its written response, (R. 274-5), and its oral presentation, after having heard the defense's proposed delay and expansion of the offered hearing, that summary denial of the claim was proper:

> Is the evidence likely to result in an acquittal on the retrial? Ms. Haines is simply not an essential witness to the prosecution or the defense. She did not observe the killing. She did not observe the rape. She once stated that she would give the defendant an alibi by saying the defendant was with her, which she then subsequently retracted and which she now says she was asleep and can't give him an alibi.
>
> She acknowledged that part of the statement as being true. So the only issue is whether or not he made the statement and whether or not Mr. Rabin promised her anything in order to get that statement.
>
> It is not a question of whether or not Mr. Dilisio was induced by hypnosis to testify falsely in the Spaziano case. It is not a question of the person who was a physical observer of the body, which the defendant Spaziano allegedly pointed out to him on a dump.
>
> Ms. Haines simply is not that much of a critical witness. She doesn't have to be called on behalf of the state in reprosecutions. If she is called, then her prior testimony would come in to impeach her under 90.801. So the substance of her prior statement is going to be before the court as well as her new recantation, and both sides are going to be able to pick her apart.
>
> So the question, as I said, comes down to whether or not that single witness is sufficient to justify a hearing on newly discovered evidence. We don't believe so, but in an abundance of caution, we have offered to accomodate counsel and do that. (T. 38-9) (emphasis added).

The State respectfully submits that in light of the defense's refusal to make Ms. Haines available for testimony in the lower court, or even provide an address, the trial court's summary denial was proper. An affidavit in support of a claim of newly discovered evidence does not have any independent value apart from its function in obtaining the ultimate evidentiary hearing on a claim when such a hearing is warranted. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). The affidavit from Ms. Haines

could serve no purpose other than to obtain an evidentiary hearing, which the defense was not prepared for and declined. The State thus respectfully submits that the defense has waived any reliance on said affidavit. See Arango v. State, 437 So. 2d 1099, 1104 (Fla.1983)(no error in summary denial of postconviction relief, where appellant appeared at the postconviction hearing unprepared to carry his burden, and demanded instead that he be granted a stay of execution and appointment of experts in the "speculative expectation that he might be able, at some unknown future date, to develop evidence to support the motion for postconviction relief"); See also, Stano v. State, 497 So. 2d 1185, 1187 (Fla. 1986) (denial of a hearing was warranted, where, defense filed its motion for post-conviction relief immediately prior to execution, trial judge determined there was only one cognizable issue which might require a hearing, State was ready to proceed, but defense counsel asked for more time and proffer of additional live testimony.)

Finally, as noted above, the State argued that there was no reasonable probability of a different outcome, pursuant to Jones, supra. (R. 275-6; T. 21, 38-9). Even with Ms. Haines' current version of the truth, confidence in the outcome of the 1985 trial has not been undermined. The mere fact that Haines now claims her prior testimony was false, does not constitute a basis for relief under the circumstances of this case. See Armstrong v. State, 692 So. 2d 730, 735 (Fla. 1994) (Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. Moreover, recanted testimony is exceedingly unreliable, especially where the recantation involved a confession of perjury. Only where it appears that,

on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted).

In the instant case, there was an eyewitness to the murder, Ms. R , whose original trial testimony stands. The defendant's finger and palm prints were found on the murder victim's vehicle. The clothing worn by the Defendant at the time of the crimes, and later recovered from his residence, reflected the presence of semen, possible vaginal aspirate, and blood which was consistent with the murder victim's blood type. The defendant had denied any sexual contact with R , and claimed he had never even seen the murder victim. Defendant's presence within a mile of the crime scene, shortly before the crimes, was reported by other witnesses who have not been attacked to date. There was human blood in Roberts' car, on the back seat, where the eyewitness stated Roberts had put the murder weapon after beating the murder victim with it. Other witnesses, again not attacked herein, testified as to Roberts' own statements as to his possession of a baseball bat in his car and his willingness to use same as a weapon, only hours before the crimes; the murder victim's wounds were consistent with having been inflicted by a baseball bat. A knife was in fact recovered from the defendant's car, per the eyewitness' account. Roberts changed his appearance by shaving off his moustache, partial beard and side burns, within hours after the crimes. Roberts himself made inconsistent statements, demonstrating his consciousness of guilt. He first told the police he had been at a bar until midnight and then went home and remained there for all relevant times. He denied having been on Key Biscayne, the site of the murder, at anytime within the two

months preceding the murder. At trial, however, it was established that Roberts had in fact been issued a traffic citation, less than 10 days prior to the murder, within a close proximity of the murder site, traveling at 5 miles per hour, in the early morning hours, under an assumed name. Roberts himself again changed his story during his trial testimony, and admitted being at the murder site. Finally, even if Ms. Haines' current version of the truth is accepted, she was not an eyewitness and could not provide an alibi for the time period relating to the commission of the rape and murder herein.[1]

Apart from the above evidence of guilt, the defense has not analyzed Ms. Haines' impact at the trial herein. Ms. Haines testified, and the jury knew that she was an active street prostitute for some three years prior to trial, making approximately $800 a week, cash, with no taxes paid. (DR. 2400). Immediately after the crime she lied and told the police that Mr. Roberts was at home with her all night at the time of the crimes herein. (DR. 2413-14). She was thus arrested for this lie and charged as an accessory after the fact. (DR. 2415). She lied because she loved Roberts and wanted to protect him. She was jailed for approximately three weeks. (DR. 2416). She stated she was anxious to get out of jail and get back to work. (DR. 2417). She was then taken to the State Attorney's Office and gave her June 26, 1984 statement (now claimed to be the truthful version) to Mr. Rabin. (DR. 2419).

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[1] As noted in the court below, in the unlikely event of a retrial, if the State calls Haines as a witness, and the latter repeats her recantation, she could be impeached with her prior trial testimony. See F.S. 90.801. The State would also be able to present Mr. Rabin's testimony as impeachment.

The specific questions and answers in the 1984 statement, and inconsistences between this 1984 statement and her trial testimony, including the failure to mention the confessions in the 1984 statement, were all brought out before the jury. (DR. 2417-28, 2440-42). Defense counsel also established that the prosecutor, Rabin, had told Haines he was going to drop the accessory charges and release her from jail on the basis of her 1984 statement. (DR. 2423-4). Ms. Haines also agreed with defense counsel that she had two prostitution arrests and eleven "open arrest" or "fugitive" warrants in Fort Lauderdale at the time of trial. (DR. 2428-2435). Defense counsel established that Ms. Haines, although living in Arizona, had flown to Florida on separate occasions, for her 1985 deposition testimony and her trial testimony, without anyone having attempted to notify Broward authorities of her presence in Florida, and that she knew she would not have to answer for said warrants. (DR. 2435-2437).

In light of the overwhelming evidence of guilt related above, and the fact that the inconsistencies of Haines' testimony, including the now allegedly truthful 1984 statement, were fully explored before the jury, confidence in the outcome of the proceedings has not been undermined. Brady; Giglio; Jones; Armstrong; supra.

B. Allegations as to M R are procedurally barred

As seen above, the allegations with respect to Haines are refuted by the record, waived, and would not otherwise have affected the outcome of the proceedings. In his motion to vacate, in the court below, however, the defendant had suggested that his prior Brady/ineffectiveness claims with respect to the eyewitness R , all of

which the defendant admitted were raised in his first motion for post conviction relief in 1989, be addressed "collectively" in conjunction with his allegations as to Haines, pursuant to Kyles v. Whitley, 115 S.Ct. 1555 (1995) and Gunsby v. State, 21 Fla. L. Weekly S21 (1996). (R. 9, 16-21, 42-69). This claim has been abandoned on appeal, as there is no reliance upon Kyles in the Appellant's brief, and no mention of the extensive theory of defense and allegedly suppressed information, as presented in the court below. See Duest v. Dugger, 555 So. 2d 849, 852-3 (Fla. 1990) (attempt to raise post-conviction motion claims by simple reference on appeal does not preserve issues, "and these claims are deemed to have been waived.")

In an abundance of caution, however, the Appellee will address the claim, in light of Appellant's cursory references to allegedly "undisclosed" evidence, that eyewitness R was "extorting money," that there was a "threat to take further action" against her "if she did not toe the line" and that her "demeanor" was not consistent with having been raped. See Brief of Appellant at p. 86. The State would first note that all of said allegations were specifically pled in the Appellant's prior 1989 motion for post-conviction relief. (PCR 316-18, 270-3, 246-7, 277). As such, said allegations are successive and untimely, and are therefore procedurally barred. Bolender v. State, 658 So. 2d 82 (Fla. 1995).

The State would also note that neither Gunsby nor Kyles was in the successive procedural posture of the instant case. Nor do they involve the situation herein, where the defense refuses to even provide an address, let alone produce the witness who has

allegedly given false testimony. Most importantly, however, whether assessed "collectively" or not, the allegedly "suppressed" evidence relied upon herein had no impact on the result of the instant trial. This is because the defendant has neglected to mention that he obtained a multi-day evidentiary hearing on all of the Brady/ineffectiveness claims asserted herein, in the Federal District Court, where he was free to present any evidence and/or witnesses that he desired. He was, however, unable to establish any evidentiary foundation for these allegations. No favorable evidence was undisclosed, or "suppressed" by the prosecution.

The central theme in the successive Rule 3.850 below, was the defendant's purported theory of defense at trial. Defendant, in the court below, stated that his defense at trial was that the sexual battery victim, R , was a prostitute, and, the murder victim, Napoles, was a client killed when a "trick" went awry. According to the defendant, either R , or one or both of her male friends (Cebey and Ward)[2] who provided her protection in the prostitution business, killed Napoles. Defendant thus concluded that evidence of R 's prior sexual conduct was relevant, to discredit her account of the offense, and to exhibit her motive for lying, i.e., fear of prosecution for prostitution, accessory to murder, or even murder. (R. 42-69).

The only source of the above account of the theory of defense was trial counsel's recollection, during the federal habeas corpus evidentiary hearing, of what

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[2] The trial transcripts reflect that both these witnesses testified at trial. Mr. Cebey was R 's boyfriend; Mr. Ward had been dating R 's sister.

he had proffered and argued to the state trial court. As noted by the District Court, however, counsel's recollection of what transpired pretrial and at trial was directly contradicted by the transcripts of the pretrial and trial proceedings.[3] Roberts v. Singletary, supra, 794 F. Supp. at 1114-5. Despite full pretrial discovery and depositions, a full and fair trial, and, extensive post-conviction proceedings, including a full and fair three day federal evidentiary hearing, defendant to date has never presented or proffered one iota of evidence substantiating the above related theory of defense.

The transcript of the pretrial proceedings, after full discovery and deposition of all named witnesses herein, reflects that trial counsel proffered that R had been seen frequenting locations where acts of prostitution took place, and, had been overheard saying she worked for an escort service. (DR. 1509-11). The prosecution filed a motion in limine to exclude reference to R 's alleged prior sexual conduct, under the State rape shield law, "without first obtaining permission from the court outside the presence and/or hearing of the jury." (DR. 276-279).

The state trial court then conducted a hearing and asked defense counsel what

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[3] Indeed, with respect to an ineffective assistance of counsel claim, the District court found, "[t]he court can only conclude that Mr. Lange, in giving his testimony at the federal habeas corpus proceedings, regarding his private mental processes in making tactical decisions in this case, was prepared to say anything to help his client, regardless of how bad it made him look personally or whether the trial record of defendant's case substantiated the position he now takes." Roberts, 794 F. Supp. at 1120. Mr. Lange is one of the current affiants, whom the defense wishes to present, at an evidentiary hearing, in support of Haines' credibility.

the relevance of R 's prior sexual conduct was. Trial counsel did not in any way proffer or argue that the murder victim was a "client" killed when a "trick" went awry, as now theorized by the Defendant. (DR. 1515-16). Indeed, the transcript of said proceeding reflects that upon inquiry by the trial court, defense counsel expressly disavowed any "allegation that any money changed hands at [the time of the offenses herein]." (DR. 1515); Roberts v. Singletary, 794 F. Supp. at 1114. Likewise, there was no evidence, proffer, allegation or argument that Cebey and Ward, individually or in concert, were either involved in any prostitution business or protecting R in any such business, as theorized by defendant. Nor was any fear of charges for prostitution, accessory to murder, etc., ever mentioned as a motive. Indeed, as noted by the District Court, "there was strong evidence that the friends, Cebey and Ward, were nowhere near the crime scene on the night of the murder. Each presented solid alibis that were subjected to full cross examination by defense counsel. Additionally, both men submitted fingerprint and blood samples for testing. No link to the case was established thereby." Roberts v. Singletary, 794 F. Supp. at 1115, n. 2.

Instead of the arguments now advanced by the defendant, trial counsel stated that R 's prior sexual conduct was relevant solely because, the prosecution might put "consent" at issue during the course of trial. (DR. 1515-16). Defendant's position at this time was, however, that he had not had any sexual relations with R . The prosecution was obviously not claiming any consensual sex theory either. Based upon the above proffer of relevancy due to "consent" by the defense, the trial court granted the State's motion in limine, and excluded evidence of R 's prior sexual conduct,

without the defense first obtaining permission from the court outside the presence and/or hearing of the jury. (DR. 276, 1517).

At trial, consistent with his pretrial position, Defendant testified that he did not rape and did not have any sexual relations with R .. Trial counsel did not in any way proffer any of Defendant's current theories nor were said theories in any way raised on direct appeal to the Supreme Court of Florida. As noted previously, despite a full and fair evidentiary hearing in the federal district court, Defendant was again unable to present any evidence supporting his current theory.

In light of the foregoing, the District Court held that the exclusion of R 's prior sexual conduct did not infringe upon Defendant's right to present a full and fair defense, as the current theory of defense was never argued to the trial court and was based upon "non-existent facts":

> Trial counsel did not seek to introduce evidence of Rimondi's sexual history in order to prove Defendant's innocence or that the murder was committed by others. One searches the record in vain for any theory that R 's prior sexual conduct was relevant to any issue in this case.
>
> Roberts testified at trial that he did not rape R or have sexual relations with her. Nevertheless, his counsel argued the "consent" exception under the state rape shield law:
>
> > **THE COURT:** Doesn't this rape shield statute indicate that not only has to be a pattern of consent has to fit in with what occurred allegedly at the time of the rape?
> >
> > **[THE STATE]:** That's my understanding.
> >
> > **[THE DEFENSE]:** Consent has to be an issue. Why consent -- it has been consent. Has been

statements of Rick's former girlfriend, Rhonda Haines, which she gave about a month ago for the first time allegedly that Rick confessed to a consensual sexual activity between M , according to Rhonda Haines, months ago that Rick encountered Napoles and M on the beach. They got talking, did drugs together and they had sex together. M agreed to have sex with both Roberts and the dead guy, Napoles. And according to Rhonda Haines, this came from Rick, supposedly.

THE COURT: There is no allegation that any money changed hands at that time?

[THE DEFENSE]: No issue. It is just consent. Whether consent -- Rhonda Haines; allegation as to what Rick told her three weeks after the arrest about this places consent at issue because she says if you are to believe her and the jury has to listen to it, that Rick told her that it was -- it was a consensual sexual encounter; M agreed. She wasn't raped. She agreed to have sex voluntarily with Rick and with George and it was only according to Haines that Rick told her it was only after George Napoles felt that Rick was hogging M ; having taken too much time in the sexual act and that Napoles got offended and started to hassle Rick. Rick hit him with a bat and killed him.

But the sexual interaction between Haines points out -- between Rick and R was consensual. That's why consent is an issue.

R. at 1515-16. On the basis of defense's proffer of relevancy, the trial judge granted the state's motion in limine. R. at 1517.

There is no evidence in this record to substantiate either the (1) partying with consensual sex theory or, (2) the murder of Napoles by friends of R theory.

The question before the federal habeas court is not whether the state court improperly excluded evidence, but whether a violation of defendant's constitutional rights resulted therefrom. [citations omitted]. Exclusion of evidence cannot infringe upon Defendant's right to present a full and fair defense if the defense now posited, created from the suppressed evidence, did not exist at time of trial.

Olden, supra, is not to the contrary. . . . The "exclusion" of Roberts'

current theory of the case, found nowhere in this record, differs markedly from the suppression of Olden's pivotal and consistently maintained defense. It is axiomatic that a criminal defendant must stand on those objections actually argued in the trial court, and may not enlarge, add to, or otherwise change the argument contemporaneously at some later point in the proceedings. [citations omitted]. As noted, the motion in limine granted by the trial judge only barred evidence of R 's prior consensual sex "without first obtaining permission from the court outside the presence and/or hearing of the jury." R. at 276. If Roberts' theory changed at any point during the trial, the defense could have revisited the shield law issue at that time. The defense did not make any proffer resembling Robert's current theory. Post-conviction counsel is not free to create additional post hoc trial strategies, based on novel interpretations of excluded evidence and non-existent facts.

Therefore upon independent review, the Court finds that Roberts was not deprived of his right to present a full and fair defense.

Roberts' original theory that Ward or Cebey actually committed the murder was fully presented to the jury. After discussing R 's and Cebey's romantic relationship, defense counsel told the jury in opening statement that either Ward or Cebey were more likely suspects.[3] In closing argument the defense again forcefully argued the same theory.[4] The defense had full opportunity to cross-examine Ward and Cebey. This extensive cross-examination did not establish any facts to support the defense theory that Ward and Cebey were the murderers.

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[3] Lang [sic] explained the defense strategy in his opening:

> What happened had to have happened that night as the evidence will lead you. You conclude that during the course of George Napoles, C and M R , being on the beach drinking wine, either the very bad tempered and desirous Joe Ward knew that they had gone to Key Biscayne and went down there. Either one of them confronted George Napoles which is really the innocent party in this whole thing -- and jealously -- whether it was Ward or Cebey, got in an argument with George and beat George Napoles to death.

R. at 850.

[4] See closing arguments, R. at 3047 ("Now, I don't have to prove who did it. I came to you and I said the evidence will show you that someone else did it other than Rickey Roberts, and I told you from the evidence, two likely candidates are either

Cebey or Ward because of their relationship and their situation with R ") R. at 3043 ("Manny Cebey and Joe Ward . . . were much more likely, still more likely to have been the killer, certainly much more than Rickey Roberts"); R. at 3046 ("[Cebey] goes out to the Key and he committed the murder and because [R] is in love with him . . . she covered for him"); R. at 3045 ("And Ward went out to the Key after that and confronted, confronted Ca and R i and George Napoles and Joe Ward, because he is extremely violent, extremely dangerous, always has a horrible temper, he does what he does best and that is hurt people, just like the time he hurt the City of Miami police officers in the battery conviction. He did the same thing to Napoles").

Roberts v. Singletary, supra, 794 F. Supp. at 1114-15. The Eleventh Circuit Court of Appeals affirmed the district court's resolution of the instant claim, "for all of the reasons expressed in its thorough and articulate opinion." Roberts v. Singletary, supra, 29 F. 3d at 1477.

Like the theory of defense and the relevance of alleged prostitution, the laundry list of other allegedly suppressed and exculpatory pieces of evidence contained in the successive Rule 3.850 below, was also the subject of the federal evidentiary hearing.[4] The Defendant, however, has entirely ignored the evidence presented at said hearing. The uncontradicted evidence at said hearing reflects that the information at issue herein was either fully disclosed or not favorable. As noted by the district court, these claims are "meritless." Roberts v. Singletary, 794 F. Supp. at 1122.

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[4] The State would note that in the successive motion below, the defendant first argued alleged inconsistencies in R s account, by relying upon trial transcripts, with some references to defense counsel's closing argument at trial. Obviously that which was presented at trial does not constitute "suppressed" evidence. See Kyles, at 131 L.Ed.2d 510 (the inquiry is whether, "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable."). Moreover, on examination of the alleged inconsistencies, some of which were taken from the defense closing arguments, reveals that there were no material discrepancies in the account of the crime.

The Defendant first claimed that various telephone messages in the prosecution files, which were disclosed in 1989, reflected that R desired and received money as an inducement for her testimony. The prosecutor, at the federal evidentiary hearing, as noted by the defendant's pleading in the court below, unequivocally testified that R was never paid any money in exchange for her testimony or cooperation with the State. (R. 55-6). R , as was well known to the defense, had moved away from Miami after the crimes. (DR. 2351-52). When she was summoned for various defense depositions and/or interviews with and statements to law enforcement officers, R was put in a Holiday Inn, where all state witnesses stayed, and received the state per diem for meals. (R. 55-6). In light of the above uncontradicted evidence, the district court specifically found:

> . . . as was made clear at the evidentiary hearing, the 'money payments' to R were merely per diem expenses, normally paid to state witnesses, while she attended depositions.

Roberts v. Singletary, 794 F. Supp. at 1122. The district court thus concluded that this claim was "unsubstantiated." Id. In the court below, and apparently herein, the defense has relied upon a record custodian's deposition in 1996 which states "witness vouchers" are handled by the clerk's office, and, Mr. Rabin's response as to whether he remembered "expense reports," for the proposition that there is undisclosed evidence of extorting money. The foregoing does not constitute either newly discovered or suppressed evidence; the State also fails to see how there is any showing of money being extorted.

The Defendant in the court below, and apparently herein, next claimed that a letter written by the prosecutor to R 's father reflected that R had "reason to worry about criminal prosecution" as the prosecutor had threatened "further action." (PCR. 277). This claim was also found to be unsubstantiated. 796 F. Supp. at 1122. As noted by the defense, the letter at issue herein states that if R "fails to maintain regular contact with you or I [prosecutor], then I shall be in contact with you to take further action." At the federal evidentiary hearing, the prosecutor testified that, in exchange for allowing R , who was a material witness, to leave town and to help her put her life back in order, the prosecutor, R ., and the latter's father agreed to maintain regular contact and be available for statements, deposition, trial, etc., as needed. Maintaining regular contact with a material witness is a typical prosecutorial demand. R did, in fact, maintain contact, and there was never any threat of criminal prosecution in this regard. The State respectfully submits that demanding regular contact and availability from a material witness is not favorable or impeachment evidence. Defendant's current arguments with respect to this information are, as noted by the federal district court, "wholly unsubstantiated." Roberts, 794 F. Supp. 1122.

The defendant also claimed that the State suppressed information as to R having been charged with grand theft and having received pretrial intervention. Approximately three weeks before trial, after having given several statements and depositions to both the police and the defense as to the offenses herein, R was arrested and charged with an unrelated grand theft. The fact of her arrest and charge

of grand theft, her confession, the reason why she received pretrial intervention, whether she had sought favorable treatment from the prosecutors in Defendant's case, etc., were the subject of a pretrial court hearing, in the presence of defense counsel! (DR. 635-46, 664-65). In light of this full disclosure in open court, prior to trial, the State submits that any claim of a Brady violation, which requires "suppression" of information by the prosecution, was meritless.

Finally, the defendant claimed that the prosecutor's notes of the statements of Dr. Rao, the doctor who examined R after the rape, reflect that exculpatory information was suppressed by the prosecution. The allegedly "suppressed" information was that Rao had not believed R 's story due to her "cool and collected" demeanor and had to confirm that a murder had occurred by contacting the medical examiner's office. Roberts, 794 F. Supp. 1122. Again, as with the above claim, the record reflects that there was in fact full pretrial disclosure of the information complained of herein. At the federal evidentiary hearing, the State produced the transcript of Dr. Rao's pretrial deposition, taken by defense counsel. Said deposition reflects that Dr. Rao did, in fact, inform defense counsel of all the above matters about which the Defendant herein complains. The District Court again found this claim wholly unsubstantiated as well. Id. In light of this full pretrial disclosure, the State again submits that any claim of "suppression" of evidence pursuant to Brady is meritless.

As demonstrated above, the instant case does not involve a lack of disclosure

of any favorable evidence. In contrast to Kyles, supra, and Gunsby, where the lower courts had found that favorable evidence was not disclosed, in the instant case, after a full evidentiary hearing where the defense was free to present any and all evidence, the district court determined that all allegedly favorable evidence was in the possession of the defense. Roberts v. Singletary, 794 F. Supp. at 1122. Thus in addition to being abandoned on appeal, and, procedurally barred by virtue of being successive and untimely, these allegations are without merit pursuant to Kyles and Gunsby, supra.

CLAIM II

APPELLANT'S CLAIM BASED UPON HIS PRIOR CONVICTION IS PROCEDURALLY BARRED AND WITH OUT MERIT.

The Appellant has argued that due to the pendency of collateral proceedings on his prior Maryland conviction, he is entitled to a stay of execution until the resolution of said proceedings. The defendant has raised a number of ineffective assistance of counsel claims in Maryland. Herein, he is relying only upon his Maryland trial counsel's alleged ineffectiveness for failure to obtain a juvenile ajudication, as opposed to a conviction. The State respectfully submits that, (1) the claim of pendency of such proceedings, without said conviction having been vacated to date, does not entitle Roberts to a stay and is procedurally barred due to untimeliness; (2) even if the conviction is vacated by Maryland courts, the instant claim is still procedurally barred, as this is a sucessive motion for post conviction relief, and both the factual and legal basis therefor have been known for in excess of two years after the finality of the Florida judgment and sentences; (3) any invalidity of the Maryland conviction is

harmless beyond a reasonable doubt, pursuant to Johnson v. Mississippi, 486 U.S. 57, 100 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

A. History of the claim.

In 1985, Florida defense counsel filed a pretrial motion in limine to preclude any evidence of defendant's prior 1975 crime of rape and assault with intent to murder, committed in Maryland, during the guilt phase of trial. (DR. 231-3). Said motion reflects that the defense had full knowledge of the circumstances of said conviction. Id. The defense noted that the defendant, who at the time was 16 years of age, had been arrested in 1974 for the rape of a 17 year old female, after forcible entry into the victim's apartment, and had then stabbed her several times. (DR. 231). The defense noted that after, "a waiver of jurisdiction in the juvenile court, the accused, through counsel, waived jury trial, being found guilty after a bench trial." (DR. 232). The judgment and sentence were upheld on appeal, in April, 1976. Id. "In 1983, after his release on parole, the accused became a fugitive from parole supervision in the State of Maryland, remaining a fugitive until his arrest on the case before this Court." Id.

At the 1985 sentencing phase of defendant's trial, the State presented both documentary evidence and testimony from the investigating police officer, with respect to said prior conviction of rape and assault from Maryland. (DR. 3284-99). The Maryland officer described the defendant's above noted underlying conduct in said crime, based, in part, upon the defendant's own voluntary statements to the police. Id. See also Roberts, 794 F. Supp. 1138. The defense had no objection, and in fact,

had been willing to stipulate to the fact of the conviction and having been on parole. (R. 3217, 3247, 3255, 3297-98).[5] Rather, the defense wished to preclude presentation of the underlying conduct. (R. 3247-49). The objection was overruled, upon the State's argument that, "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." (R. 3248-9).

On cross-examination of said officer, the defense stated, "We have Rickey Roberts' records here, if you need to refresh your recollection." (DR. 3300). The defense then proceeded to establish the age of the defendant at the time of the case, the pretrial motions, date of the bench trial, waiver of a jury, degree of the crime in Maryland, etc. (DR. 3300-301). The defense also established that the defendant had been subsequently imprisoned at the Patuxent Institute in Maryland, which houses inmates with psychiatric or psychological problems. (DR. 3301-2).

During its case for mitigation, the defense then presented testimony from J. Toomer, PhD. (DR. 3313). Dr. Toomer testified as to the defendant's "psycho-social history" from "approximately age three" through the time of trial. (DR. 3316-3325). He specifically relied upon records from the Patuxent facility in Maryland where defendant had been an inmate. (DR. 3319, 3337). Toomer described the defendant's

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[5] The only objection to the documentary evidence was as to the parole order from Patuxent Institute, on the grounds that it was not a properly authenticated document. (R. 3255-56).

various "confrontations with the criminal justice system," including that in Maryland. (DR. 3324-5). Toomer stated that his conclusion, with respect to mental mitigation, was arrived at "by looking at the total picture of the patient from the very beginning," based on the above stated psycho-social history and records. (DR. 3329).

On cross examination, the State established that knowledge of what had happened at the time of crimes was necessary to Dr. Toomer's diagnosis. (DR. 3334). The records from Patuxent Institute, which had actually been utilized by Dr. Toomer, were then introduced into evidence and published to the jury. (DR. 545-555. 3341-3, 3346-47). The fact of the Maryland conviction, the length of his sentence (life), and the underlying circumstances of the offense were included in said reports. (DR. 546). Likewise, Dr. Stillman, another defense expert as to mental mitigators, testified that he had also relied upon the Patuxent Institute's reports, in addition to "a police report of the event as it occurred." (DR. 3387).

The trial court found the Maryland conviction to be a prior violent felony aggravator. That court also found that since Roberts had been on parole when he committed the Florida crimes, the under sentence of imprisonment aggravator was also applicable. On direct appeal, this Court noted that neither of said aggravators had been challenged on any basis. Roberts v. State, at 510 So. 2d 894, n. 2.

In the first, 1989, motion for post-conviction relief, current collateral counsel for defendant alleged, "Mr. Roberts' sentence of death was based upon an

unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the Eighth and Fourteenth Amendments, and counsel was ineffective for failing to litigate this claim." (PCR. 171). Collateral counsel stated that they were in possession of the Maryland files and a "cursory" review of those files reflected that the prior conviction "suffers from the same constitutional infirmity as the instant [case]," and that Roberts "was suffering in 1974 from the same mental illnesses he suffered from during the 1985 proceedings." (PCR. 172). No other basis for alleged invalidity was specified.[6]

This Court found that the claim was procedurally barred as it could have been raised on direct appeal. Roberts v. State, 568 So. 2d at 1258-59. No new allegations or evidence were presented in the 1991 federal petition for writ of habeas corpus, or at the 1992 evidentiary hearing thereon.[7] The Federal District Court thus honored this Court's finding of procedural bar. 794 F. Supp. at 1141. On appeal, the defendant abandoned this claim in the Eleventh Circuit Court of Appeals. Roberts, 29 F. 3d at 1477.

In April 1995, defendant through the same collateral counsel noted above, filed a motion for post conviction relief in the Maryland State Court. The State of Florida

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[6] Prior violent juvenile charges, which have not been reduced to felony convictions, do not constitute a statutory aggravator under Florida law. Jones v. State, 440 So. 2d 570, 579 (Fla. 1983).

[7] The Federal District Court opinion reflects that the Maryland trial transcripts had been presented to it. Roberts, 794 F. Supp. 1138 n. 25.

was not a party, nor did the defendant ever serve it with any of the Maryland pleadings. (App. 1, p. 3). Maryland provides for an automatic post conviction hearing, pursuant to Article 27, Annotated Code of Maryland, Section 645 A (f). Such a hearing was scheduled for November 20, 1995. The defense sought to continue said hearing, on the grounds that it was having difficulty transporting the defendant to Maryland, again without any service of any pleadings upon Florida. The hearing was continued. Thereafter, defendant wrote a letter requesting that no hearing be scheduled for January 4, or 11-20, 1996. (App. 3). The hearing was rescheduled for March 22, 1996.

The defendant then filed a motion to expedite the hearing after the Florida Governor signed a warrant for execution. A week prior to the scheduled date of execution, on February 16, 1996, the defense, which had previously wanted Roberts to "testify in person," announced that they would be willing to submit affidavits or depositions in lieu of defendant's live testimony. (App. 4, p. 3). The defense also stated that it had a number of other witnesses, and requested to "submit Affidavits right now or early --" (App. 4, p. 3-4,13).

Maryland objected, on the grounds that both the trial defense counsel and the trial judge had died prior to the filing of defendant's motion.[8] Moreover trial counsel's files with respect to the Maryland conviction could not be found. (App. 4, p. 6-7).

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[8] The trial judge and trial counsel died on December 17, 1992, and June 7, 1992, respectively. (App. 2 at pp. 2, 34).

The defense affidavits or depositions had not been provided to Maryland either. (App. 5, p. 21). The Maryland post-conviction judge, having expressed concern "about the issue of laches in this case," denied the motion to expedite based upon the State of Maryland's objection. (App. 4, at pp 5, 13).

The defendant did not appeal to Maryland state courts. On Saturday evening, February 17, 1996, counsel for the State of Florida received telephonic notice from defense counsel that a federal petition for writ of habeas corpus had been filed in the United States District Court for the Northern District of Maryland. (App. 1, p. 2). The pleadings were faxed on Sunday afternoon, February 18, 1996. Id. They reflected that the Secretary of Florida's Department of Corrections was a named party, and that a request for stay of Florida warrant proceedings was pending. (App. 1, pp. 3-4). Counsel for Florida was also informed that the district court had orally scheduled a hearing for Tuesday, February 20, 1996, at 4:00 p.m., as Monday, February 19, 1996, was a federal holiday. However, the scope of the hearing and whether Florida's presence was required had not been determined. (App. 1, p. 2). Florida served a motion to dismiss on February 19, 1996. (App. 1).

The District Court rescheduled the hearing, first for 5:00 p.m., February 20, 1996, and then for 8:00 a.m., February 21, 1996, due to defense counsel's travel difficulties. Again there was no notice as to the scope of the hearing or any requirement for Florida's presence. Undersigned counsel nevertheless attended this Maryland District Court hearing via telephone conference. (App. 5).

In the meantime, at approximately 4:00 p.m. on February 20, 1996, defense counsel had filed their motion for post conviction relief in the Circuit Court in Miami, Florida. Later that evening, the Florida Circuit Court scheduled a hearing for 5:00 p.m. on February 21, 1996. Said motion, inter alia, alleged that the prior Maryland conviction was invalid, specifically referencing ineffective assistance of counsel for failure to seek a juvenile adjudication in Maryland.

The Maryland Federal District Court was advised of the Florida pleadings and the scheduled hearing thereon. (App. 5). Nonetheless, the District Court entered an oral order that unless there was a "permanent" stay in effect by 5:00 p.m. on February 21, 1996, counsel for Florida had to appear, in person, by 8:00 a.m. on February 22, 1996, in Baltimore, Maryland. (App.5).

The State Circuit Court in Miami, after a hearing which terminated at approximately 7:30 p.m. on February 21, 1996, orally denied the defendant's motion for post conviction relief and request for stay. Counsel for Florida thus personally appeared before the Maryland District Court on February 22, 1996 at 8:00 a.m. On the same date, the Miami Circuit Court entered its written order. Upon the defendant's filing of his Notice of Appeal to the Florida Supreme Court, this Court entered a stay of execution until 7:00 a.m., February 29, 1996. The warrant expires at noon on the same date.

The Maryland Federal District Court was advised of this court's order. The said

federal court then denied Florida's motion to dismiss, assumed jurisdiction over Florida, and scheduled a hearing, on the State of Maryland's Answer, for 9:00 a.m., February 29, 1996. Said order was previously lodged with this Court. The federal court hearing is limited to the issues of failure to exhaust State remedies and laches, which are the only defenses currently pled by the State of Maryland. (App. 2).

B. Procedural Default

The Appellant has stated that both the state court and federal court in Maryland have ordered an evidentiary hearing on his prior 1975 conviction. Brief of Appellant, at p. 54. The Appellant has thus argued that he is entitled to a stay of execution from this Court, in order for the Maryland courts to address the validity of his prior conviction.

The Appellee would first note that the State of Maryland has relied upon laches, in both state and federal courts, since despite the availability of a remedy, defendant has waited in excess of twenty years, until after both defense counsel and the trial judge died in 1992, and the former's files cannot be located. The Maryland state court, which granted an automatic evidentiary hearing pursuant to its own rules of procedure, has refused to expedite said hearing. The Maryland federal court's hearing is on the issues of laches and failure to exhaust state remedies. Neither court has made any preliminary assessment of the substantive merits of the defendant's claims.

More importantly however, this Court has repeatedly held that similar pendency of post-conviction efforts to vacate a prior conviction are not a ground for a stay of

execution, pursuant to Johnson v. Mississippi. See Henderson v. Singletary, 617 So. 2d 313, 316, n.4 (Fla. 1993) (pendency of collateral proceedings to vacate prior conviction did not entitle defendant to stay of execution under Johnson; this Court also refused to direct expedited review of such proceedings); Eutzy v. State, 541 So. 2d 1143, 1146 (1989) ("the fact that Eutzy is seeking collateral review of this [prior] conviction does not entitle him to relief under Johnson."); Bundy v. State, 538 So. 2d 445, 447 (Fla. 1989) (same); Tafero v. State, 561 So. 2d 557, 559 (Fla. 1990).

Moreover, the State submits that, even if the Maryland courts invalidate the prior conviction, any claim pursuant to Johnson v. Mississippi will remain procedurally barred. This is because the claim based upon Johnson is successive, and both the factual and legal basis[9] of the claim were known at least as of 1988, prior to the defense's first September 1989 motion for post conviction relief (which in fact did allege invalidity of the prior conviction). See Adams v. State, 543 So. 2d 1244, 1246 (Fla. 1989) (all post conviction relief motions filed after June 30, 1989, and based on new facts or significant change in the law must be made within two years of date facts become known or change was announced).

In Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993), this Court held a similar claim based upon an invalid prior conviction to be procedurally barred:

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[9] The factual basis for the claim was available as of at least 1985, when the defense was in possession of the Maryland records and had the defendant's "psycho-social" history available to it. Florida case law prohibiting use of juvenile adjudications as a statutory aggravator was available since 1983; Johnson v. Mississippi was decided in 1988.

> In this claim, Henderson argues that his two 1982 Putnam County first-degree murder convictions are invalid because his attorney for those offenses, Howard Pearl, rendered ineffective assistance due to the fact that he had a conflict of interest because he was a special deputy sheriff in another county. A claim based on the alleged invalidity of the prior convictions was raised in Henderson's 1987 motion for post-conviction relief and found procedurally barred. 522 So. 2d at 836 n. However, the "conflict of interest" claim now alleged was not raised in that motion; nor was it raised within two years after the judgment and sentence became final as required by rule 3.850. Even if Howard Pearl's status as a special deputy could not have been ascertained at the time the original motion was filed, Pearl's status has been public knowledge since this Court's April 20, 1989 decision in *Harich v. State*, 542 So. 2d 980 (Fla. 1989). Thus, the conflict claim is procedurally barred because Henderson failed to raise it within two years of that date. *Adams v. State*, 543 So. 2d 1244, 1246-47 (Fla. 1989) (in accordance with the two-year period set forth in rule 3.850, a defendant must raise any contentions based upon new facts within two years of the time such facts become known). (emphasis added).

Likewise, this court in Bundy, supra, held:

> Bundy's second claim relates to the validity of the Chi Omega convictions which were used in part as a basis for the finding of the aggravated circumstance that Bundy had committed prior violent felonies. He says that the Chi Omega convictions may be set aside in the pending federal court proceedings. Under such circumstances, he argues that he would be entitled to resentencing pursuant to the rationale of *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).
>
> This claim is procedurally barred for failure to raise it on direct appeal or in the first motion for post-conviction relief. It is also barred by the two-year provision of rule 3.850.

Bundy, 538 So. 2d at 447. This Court noted that at trial, Bundy's attorney was aware of the alleged insufficiency of the prior conviction, and, that in his first motion for post-conviction relief Bundy had argued that the reliance upon his prior conviction

meant that his death sentence was predicated upon "misinformation of constitutional magnitude." Id. This Court held, "[t]herefore, Bundy has long been aware that he could challenge his death sentence by challenging the validity of his prior convictions, even though Johnson v. Mississippi had not yet been decided." Id. See also Eutzy, 541 So. 2d at 1147 (where claim of invalidity of prior conviction was based upon facts which could have been ascertained with the "exercise of due diligence", within the two year time limit, same was barred).

In the instant case, as noted in the historical section of this claim, trial counsel was fully aware of that defendant had been a juvenile at the time of his prior conviction, and was in possession of both the court records from Maryland, and the defendant's "psycho-social" history. Likewise, collateral counsel in the first 1989 motion for post-conviction relief, expressly argued that reliance upon the Maryland prior conviction meant that the Florida death sentence was unconstitutional, and even cited the 1988 decision in Johnson v. Mississippi, on appeal of denial of relief to this Court. To entertain the instant claim at this point would be to tolorate and encourage a blatant abuse of procedure.

The instant claim is thus, at the minimum, barred by the successive/two-year limits of Rule 3.850, and Adams, supra. Thus, the Appellee respectfully submits, that even if the Maryland courts vacate the prior conviction, the instant claim is still barred in light of the procedural history and record knowledge of counsel in the instant case. Bundy, Henderson, Eutzy, supra. Appellant's reliance upon Duest v. Dugger, 555 So.

2d 849 (Fla. 1990) and Rivera v. Dugger, 629 So. 2d 105 (Fla. 1994) is unwarranted. Both said cases involved a first motion for post conviction relief and did not involve the procedural and factual context herein. See also, Preston v. State, 564 So. 2d 120, 121 (Fla 1990) (no procedural bar on a successive motion for post-conviction relief where defendant obtained an order vacating his prior conviction within one year of the decision in Johnson v. Mississippi.).[10]

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[10] The Appellee recognizes that in Johnson, the United States Supreme Court did not accept the Mississippi Supreme Court's finding of procedural bar. 486 U.S. at 587. However, this was because a state procedural bar must be "adequate and independent." Id. The Court found that the state court's procedural bar had not been, "consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary." Id. In the instant case, both the successive and two-year time limit provisions of Fla.R.Crim.P. 3.850, and the provisions of Adams with respect to the time limits for filing pursuant to changes in law emanating from the United States Supreme Court, have been consistently and regularly followed in this State. Henderson, Bundy, Eutzy, Preston, supra.

C. **Merits**

Even if this Court does not impose the procedural bar discussed above, and the Maryland courts eventually find the prior conviction to be invalid, the Appellee submits that Johnson v. Mississippi does not require reversal in the instant case. First, in Johnson, the "sole" evidence supporting the prior violent felony aggravator was an invalidated conviction. In the instant case, said aggravator is also supported by the defendant's conviction for armed kidnapping of R . See Henderson, 617 So. 2d at 316 (prior conviction aggravator would stand, in light of contemporaneous convictions, even if unrelated prior conviction would be reversed).

Second, the "sole" evidence of the aggravator presented in the Johnson sentencing, was documentary evidence of the fact of a prior conviction; there was no evidence of the underlying conduct for same. 486 U.S. at 585-86. The Court thus specifically noted, "[t]he possible relevance of conduct which gave rise to the [prior conviction which was later vacated] is of no significance here because the jury was not presented with any evidence describing that conduct." 486 U.S. at 586.

The Court specifically distinguished its prior precedent in Zant v. Stephens, 462 U.S. 862, 887, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) where, the invalidation of an aggravating circumstance did not require reversal because, "we specifically relied on the fact that the evidence adduced in support of the invalid aggravating circumstance was nonetheless properly admissible at the sentencing hearing." Johnson 486 U.S.

at 590, n. 9, citing Zant, supra. In Zant, the aggravator of a "substantial, past history of a serious assaultive behavior" had been invalidated, but the underlying evidence of the defendant's criminal record was "nevertheless fully admissible at the sentencing phase." Zant 462 U.S.at 885, 886. Similarly in Barclay v. Florida, 463 U.S. 939, 956, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Court held:

> The trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law: that record did not fall within the definition of any statutory aggravating circumstance, and Florida law prohibits consideration of nonstatutory aggravating circumstances. In this case, as in *Zant v. Stephens*, 462 U.S. at 887-888,103 S.Ct. 273, 77 L.Ed.2d 235, nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. The trial judge did not consider any constitutionally protected behavior to be an aggravating circumstance. See id., at 884, 77 L.Ed.2d 235, 103 S.Ct. 2733. And, again as in Zant, nothing in the Eighth Amendment or in Florida law prohibits the admission of the evidence of Barclay's criminal record. On the contrary, this evidence was properly introduced to prove that the mitigating circumstance of absence of a criminal record did not exist. This statutory aggravating (sic) circumstance plausibly described aspects of the defendant's background that were properly before the [trial judge] and whose accuracy was unchallenged." Id. at 887, 103 S.Ct. 2733, 77 L.Ed.2d 235,.

In the instant case, as seen in the historical section of this claim, the details of the underlying conduct of the defendant in the Maryland crimes were presented. The defendant, even now, does not challenge the accuracy of the conduct described, but claims that his Maryland trial counsel was ineffective for failing to have sought a juvenile adjudication, instead of an adult conviction, for said crime. Moreover, as noted previously, the defendant's own experts at sentencing relied upon reports of his Maryland conduct and imprisonment, in presenting "psycho-social" and mental

mitigation in his behalf.

The sentencer in Florida was thus presented with admissible evidence under the federal constitution, see Johnson v. Mississippi, Zant v. Stephens, Barclay v. Florida, Henry v. Wainwright, 721 F. 2d 990, 994 (11th Cir. 1983).[11] Likewise, evidence of the underlying conduct was admissible under Florida law. See Parker v. State, 476 So. 2d 134, 139 (Fla. 1985) (no error in admitting evidence of prior juvenile criminal offenses, where the defense extensively explored the defendant's "past personal and social developmental histsory, including a prior criminal history."); Muehleman v. State, 503 S. 2d 310, 315-16 (Fla. 1987) (the admission into evidence, during penalty phase, of a "'Juvenile Social History Report' detailing [defendant's] juvenile criminal record" was proper, where "psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion." This Court also held that there was no error in allowing three police officers to testify as to prior crimes of burglary, theft, assault and possession of drugs, in order to "expose the jury to a more complete picture of those aspects of this defendant's history which had been put in issue."); Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988) (penalty phase testimony as to uncharged crime admissible where the defendant opened the door to this type of

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[11] In Henry the court held:

> In this case, the nonstatutory aggravating circumstance relied on by the judge was Henry's resisting arrest and shooting a police officer as the officer knelt on the ground begging not to be shot again. Henry's actions clearly have a material bearing on the character of the defendant, and the actions are not constitutionally protected conduct. This is enough to render the evidence constitutionally "admissible" under *Barclay.*

evidence).

The evidence as to violation of parole is in the same posture; same was relevent due to the defense experts' extensive reliance upon the Patuxent Institute records from where the defendant had been paroled. Moreover, the aggravating factor of commission of the murder while under a sentence of imprisonment - or parole, in the instant case - is not affected by any potential vacating of the Maryland rape conviction. Even if that conviction were to be vacated and remanded for retrial, the fact still remains that Roberts was on parole at the time that he committed the Florida murder.

The relationship between Roberts' parole status at the time of the murder and a potential, subsequent reversal of the Maryland conviction underlying that parole status, is highly analogous to the situation of a convict who escapes from prison and is then convicted for the escape. Even after a successful, subsequent collateral challenge to the original conviction for which he was incarcerated when he escaped, the defendant cannot obtain reversal of the escape conviction based upon the invalidity of the crime for which he was incarcerated. See, State v. Culver, 110 So. 2d 674, 676 (Fla. 1959), where this Court stated:

> The fact that petitioner has never been tried for the felony with which he was charged at the time of his escape or, even, that he is innocent of such charge, as he here contends, is of no legal consequence insofar as his incarceration under the escape conviction is concerned. . . . Even though the indictment under which he was confined at the time of his escape is subsequently dismissed . . . or

> the conviction under which he was confined at the time of his escape is subsequently reversed or set aside on appeal, . . . the prisoner must nevertheless bear the penalty for the separate and distinct offense of escape. As stated in Commonwealth v. Nardi, supra, 138 A. 2d 140, 142:
>
> > "Defendants in criminal cases are now entitled to appeal, as a matter of right, in every case in which there has been an error in a sentence to imprisonment. They are not, however, entitled to raise any question as to the regularity of the sentence by breaking the jail or the penitentiary, as such a proceeding frequently involves danger to the lives of the officers of the prison."

(emphasis added). The foregoing principles have routinely been reiterated. See, e.g., Nichols v. State, 509 So. 2d 1243 (Fla. 2d DCA 1987); Allen v. State, 140 So. 2d 640 (Fla. 1st DCA 1962); Simmons v. State, 310 So. 2d 441 (Fla. 2d DCA 1975) (reversal of conviction of escaped convict did not suffice to constitute defense to charge of harboring an escaped prisoner); State v. Fulkerson, 300 So. 2d 276 (Fla. 2d DCA 1974); Patten v. State, 531 So. 2d 203, 206 at n. 2 (Fla. 2d DCA 1988) ("Further, the subsequent vacation of an illegal sentence does not affect a conviction for escape while the sentence is being served. . . . By analogy, since Patten was placed on community control, under color of law, his absconding from that sentence even if illegal, when not stayed, should permit a sentence bump into the second cell.")

Similarly, Roberts could not terminate his parole through the extrajudicial means of flight from Maryland. And, just as a subsequent reversal of an underlying conviction does not invalidate an escape conviction predicated upon same, so too, an after the fact reversal of Roberts' underlying Maryland conviction should have no bearing on the

validity of the aggravating factor at issue herein. Roberts was aware of the conditions of parole at the time of his flight and the murder in Florida. Those parole conditions, extant at the time of the Florida murder, render the commission of the murder more egregious regardless of whether Roberts ultimately has a successful attack on the underlying Maryland conviction.[12]

As seen above, the aggravator of prior violent felony is still valid in the instant case, by virtue of defendant's conviction for armed kidnapping of R . The evidence presented as to the Maryland offenses and violation of parole, was properly and constitutionally admissible, in light of the "psycho-social" history and mental mitigation presented by the defense. In addition to all the aggravators remaining, the trial court herein did not find any mitigators. Thus, even if the Maryland prior "conviction" is vacated, any error pursuant to Johnson v. Mississippi is harmless beyond a reasonable doubt. Bundy, at 538 So. 2d 447; Henderson, at 617 So 2d 316; Tafero, at 561 So. 2d 559; Zant v. Stephens.

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[12] At the time of the murder, not only did Roberts know that he was on parole for his Maryland rape conviction, but he did not know that there would be any subsequent collateral attack on that rape conviction, let alone a successful collateral attack on that rape conviction. Indeed, since Roberts was fleeing Maryland, it can reasonably be inferred that he had no intention of undertaking any further attacks on the Maryland conviction.

CLAIM III

DEFENDANT'S CLAIM PURSUANT TO THE PUBLIC RECORDS ACT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In the court below, Roberts raised two different public records issues.[13] Lack of access to public records is not a basis for granting relief as defendant could have presented these claims previously. Zeigler v. State, 632 So. 2d 48 (Fla. 1994); Agan v. State, 560 So. 2d 222 (Fla. 1990). In the instant case, the record reflects that the defendant was in possession of the State Attorney's files prior to the 1989 first motion for post conviction relief. (PCR.312, 317). If the defendant desired more information, same could and should have been pursued at that time.

As the defendant has accused the State of misconduct, the Appellee submits that the depositions complained of here are filed in the record. The record reflects that not only were the two depositions, previously at issue in this Court pursuant to the State Attorneys Office's Certiorari Petition, in fact taken, but that collateral counsel also deposed three former prosecutors. With respect to the original deponents, there is apparently no complaint as to the actual custodian of records, Mr. Nieves, since the latter answered all questions. (R. 430-60). All files in the latter's possession had in fact been turned over to the defense. Id. With respect to the second original deponent, Ms. Moon, the Appellee invites this Court's attention to the actual

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[13] The claim relating to the Attorney General's files has been abandoned on appeal, based upon this Court's opinion which resolved the issue against the defendant. See Roberts v. Butterworth, case no. 87,389 (Fla. Feb. 21, 1996).

questioning. There was a virtual absence of any questioning of Ms. Moon with respect to any records generated by her in the State Attorney's Office. Instead, the Appellant focused on her prior employment with the Jackson Memorial Hospital rape treatment center. (R. 413-418). Whereas Ms. Moon has been employed in the State Attorney's Office since 1984, the Appellant was questioning her about her familiarity with the 1995 employee rules utilized by Jackson! (R. 413, 417-21). Finally, the only specific complaint with respect to failure to respond to questions argued in the lower court, was the defendant's reference to "Did you get files on Rhonda's then pending prostitution charge from Broward County?" during Judge Glick's deposition. (T. 54). The record reflects that the witness answered "I don't recall." (R. 308). The instant claim is procedurally barred and without merit.

CLAIM IV

THE LOWER COURT DID NOT ERR IN DENYING THE MOTION TO DISQUALIFY, WHERE SAME WAS UNTIMELY AND INSUFFICIENT.

A. The Appellant's motion to disqualify Judge Solomon from hearing the second motion for post-conviction relief was based, in its entirety, on matters which have been fully known, as a matter of public record, since the 1985 penalty phase proceedings. The effort to use such matters as a basis for disqualifying the trial and sentencing judge from hearing a post-conviction motion over 10 years later is untimely and improper. Furthermore, the matters alleged in the motion to disqualify are clearly not of a nature which would warrant disqualification in any event.

On the first day of the sentencing phase proceedings, prior to the presentation of any evidence, defense counsel requested that the prosecutor present the documents he intended to introduce into evidence, so that the defense could either stipulate or object to the documents. (DR. 3251). The parties then proceeded to discuss the various documents which the prosecution was seeking to use as evidence, and defense counsel started addressing documents from the Patuxent Institute of Maryland. (DR. 3253). Defense counsel claimed that the documents were not properly authenticated. (DR. 3253-54). The prosecutor then described the documents which were at issue. (DR. 3255). Those documents consisted of the following: a notarized certification, dated December 17, 1985, from the director of the Patuxent Institution; an order for work/school release, dated January 17, 1981; an order of parole, dated August 25, 1981; an order of parole, dated July 27, 1982; a "wanted notice" for Roberts, pertaining to his Maryland parole violation. The last of these documents bore a seal separate from the package of documents which had been certified by the director. The purpose of the prosecution's use of the documents was to establish that Roberts had been on parole and absconded from his parole at the time that he committed the murder in Florida. (DR. 3255).

After hearing the description of the documents at issue, the judge overruled the lack of authentication objection:

> **THE COURT**: I don't think that requirement is in there for both of these documents which are from the Patuxent Institute in Maryland, which is the last penal institution where Mr. Roberts resided. That is the penal institution which he's on parole, to which

> he's on parole.
>
> They also are authenticated documents of these institutions. They are signed by -- both of them are signed, one of them is signed by the Director of the institution for Patuxent whom I spoke with last evening, and the other one is signed by the assistant superintendent of the institution, Mr. Robert Johns.
>
> I think the documents should come in evidence and can be argued about by either side.

(DR. 3256). The foregoing comment is the one which the Appellant alleges for the basis for the motion to disqualify Judge Solomon from conducting the current motion for post-conviction relief.

It is thus evident that any disqualification claim based upon the foregoing comment, which the Appellant refers to as an improper "extra-judicial inquiry" "with a mental health expert," is a claim which arises from the judge's comment, in open court, over ten years ago, with defense counsel present. The defense did not undertake to query the judge about the "discussion" referred to at that time; nor did defense counsel move to disqualify the judge, either during the penalty phase proceedings before the jury, which were still in progress, or during the ensuing 10-day period in between the jury's sentencing recommendation and the final hearing at which the judge imposed the sentence. Indeed, current counsel filed their motion for post-conviction relief and proceeded to hearings with Judge Solomon in 1989, again without reference to the current allegations.

Under the foregoing circumstances, the motion to disqualify the judge was

properly denied as it was untimely. Pursuant to Rule 2.160(e), Fla.R.Jud.Admin., "[a] motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling." As the facts forming the basis for the current motion were a matter of public record over 10 years ago, the timeliness requirement of Rule 2.160(e) has obviously not been complied with. While the Appellant asserts that the motion was filed immediately after Judge Solomon was reassigned to hear the current post-conviction motion, that ignores the fact that trial counsel failed to seek disqualification on the basis of the same known facts in 1985, and current collateral counsel, also having full knowledge of the facts, failed to seek disqualification of Judge Solomon on the same grounds during the course of the first post-conviction proceedings, in 1989, when current counsel was representing Roberts.

Under similar circumstances, the Fourth District Court of Appeal recently found the timeliness provisions not to have been complied with. In McGauley v. Goldstein, 653 So. 2d 1108 (Fla. 4th DCA 1995), the basis for a disqualification motion was the trial judge's adverse sentencing ruling which the Fourth District had previously reversed on appeal. The same attorney who had previously represented the defendant in the prior case was appointed to represent the defendant in new cases, in December, 1994, but, notwithstanding counsel's obvious knowledge of the alleged basis for disqualification, counsel waited two months to file the motion to disqualify. Under such circumstances, the motion was deemed untimely.

In addition to being properly denied due to untimeliness, the motion to disqualify was also insufficient on its face, as the grounds alleged would not induce a defendant to believe that the defendant would not receive a fair post-conviction hearing due to a bias or prejudice of the judge. The comment, "one of them is signed by the Director of the institution for Patuxent whom I spoke with last evening," is not such a comment as would warrant per se disqualification of a judge. See, e.g., Parnell v. State, 627 So. 2d 1246 (Fla. 3d DCA 1994); Time Warner Entertainment Company, L.P. v. Baker, 647 So. 2d 1070 (Fla. 5th DCA 1994); Nassetta v. Kaplan, 557 So. 2d 919 (Fla. 4th DCA 1990). The comment in question does not contain any information which would cause a defendant to believe that the judge was biased against him. The clearest evidence of this is the fact that trial counsel remained silent in the face of the judge's comment, and obviously did not perceive that comment as being indicative of bias.

B. The Appellant's argument herein, in addition to using the foregoing facts as the basis for the motion to disqualify, also relies on the same facts in the motion for post-conviction relief, arguing that the judge engaged in an improper "extra-judicial inquiry" "with a mental health expert." Any claim based on this matter is clearly procedurally barred. As this claim was obviously known through the trial transcripts, the claim either could have and should have been raised on direct appeal, or could have and should have been raised on the first motion for post-conviction relief. See, e.g., Bolender v. State, 658 So. 2d 82 (Fla. 1995) (Bolender failed to demonstrate why he could not have procured pertinent testimony prior to an earlier motion for post-

conviction relief and claim was thus barred as successive); Tafero v. State, 542 So. 2d 987 (Fla. 1987) (successive post-conviction motion procedurally barred); Stewart v. State, 495 So. 2d 164 (Fla. 1986) (successive motion barred where grounds were known or could have been known at time of initial motion for post-conviction relief). Furthermore, this claim is time barred as the claim could have and should have been raised within two years of the finality of the conviction/direct appeal, as the two year period, under Rule 3.850, was operative at that time. Bolender, supra; Adams v. State, 543 So. 2d 1244 (Fla. 1989).

Furthermore, the blatant effort of the defendant to imply that the judge spoke to the director of the Institute with respect to the defendant's mental health is utterly without basis in the record. As detailed previously, the documents which the director had certified the prior day were totally unrelated to any aspect of the defendant's mental health. Furthermore, at no time during the proceedings did the judge ever suggest that he had obtained or relied on any extraneous, "extra-judicial" documentation, regarding the defendant's mental health or regarding any other matter. The sentencing order does not refer to any such matters; nor did the judge's verbal pronouncements in open court. Indeed, the only subsequent reference regarding the evidence of events in Maryland, is the judge's statement that he considered same in conjunction with aggravating circumstances. (DR. 3809-10). They were not considered with respect to any aspect of the defendant's mental health or alleged mental mitigating circumstances. To the extent that the defendant's argument alludes to the trial judge finding that Mr. Roberts has an "anti-social personality disorder and

not brain damage," the State would simply note that the judge based that finding on evidence adduced at the penalty phase. Dr. Toomer, a defense witness, offered the opinion of the defendant as having an anti-social personality. (DR. 3340-42). Toomer also noted that none of the Maryland records evaluating Roberts' mental status contained any evidence or diagnosis of organic brain damage. (DR. 3342). Thus, the record fully supports the conclusion that the trial judge's findings were based solely on in-court evidence and were not based on the newly alleged "extra-judicial" investigation. Accordingly, this claim was properly denied.

C. The Appellant next alleges that Judge Solomon's statement to the press, after he verbally denied all pending motions, in which the judge simply stated that he had been on the case a long time and that the pleadings he "heard today were insufficient," provided a basis for the judge's disqualification. First, this claim has never been presented to the trial court and cannot be presented to this Court, as an appellate court, as a court of first impression. Tillman v. State, 471 So. 2d 32 (Fla. 1985) (claim presented on appeal must be same as claim presented in trial court). Second, the judge's comment herein came after the conclusion of the post-conviction hearing, when there was no longer any matter pending before the judge, and the alleged comment did no more than reiterate the judge's prior ruling and state the obvious: that he had been the judge on the case for a long time. There is nothing inherent in either of those comments which could in any way imply that the judge was biased in his prior rulings. Compare, Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995) (the judge's comments to the media were made during the midst of trial and

were indicative of a judicial bias, as they reflected a predisposition to sentence the defendant to death). The comments referred to herein are innocuous comments which do not reveal any form of a bias.

D. The Appellant's final related claim, alleging that Judge Solomon signed the order denying the motion for post-conviction relief prematurely, is refuted by the record. While the judge, after denying the motion, had indicated that the parties could come back the following afternoon at either noon or 1:00 p.m. for the order, (T. 65), defense counsel then sought clarification, (T. 66), and the judge explained that he would sign the order, but that it was not necessary to "reconvene" at that time. (T. 66). Defense counsel then explained that he "just ask[ed] for the opportunity to review it [the order] before it gets presented to you." (T. 66). In further discussions, defense counsel advised the prosecutor how to reach defense counsel, at the latter's hotel, with a copy of the proposed order. (T. 66-68). Counsel for appellant admits, in his brief herein, that he received a faxed copy of the proposed order, at his hotel, the following morning, at 11:15 a.m., and that the actual order was signed subsequent to that time. See Brief of Appellant, p. 74. Consistent with the trial court's pronouncement in open court, that order simply stated that the motion for post-conviction relief was denied.

Based on the foregoing, the record clearly reflects that counsel merely wanted to see the order before it was presented to the judge. In view of the brevity of both the written and oral pronouncements, it is impossible to see the basis for any

contention that the written order did not reflect the judge's ruling, or that it omitted any aspect of the judge's ruling. The Appellant does not even remotely suggest what, if anything, the order should have stated, but failed to state.

Lastly, as to the Appellant's reference, in this issue, to the failure to grant an evidentiary hearing on the first claim of the post-conviction motion, that claim is fully addressed in Argument I herein, pp. 36-43, supra.

CLAIM V

THE CLAIM REGARDING ALLEGEDLY FALSE TESTIMONY DURING THE SENTENCING PHASE PROCEEDINGS IS PROCEDURALLY BARRED AND REFUTED BY THE RECORD.

The defendant claims that Coulbourn Dykes, the Salisbury, Maryland Chief of Police, presented false testimony during the 1985 sentencing-phase proceedings in the instant case. The defendant's motion focuses on two areas: the reasons why the Maryland rape victim did not come to testify in the Florida proceedings; and the knife either found or used at the scene of the Maryland rape. Both variations of this claim are procedurally barred. First, they have been filed beyond the two-year time period authorized by Rule 3.850, Florida Rules of Criminal Procedure. Bolender, supra; Adams, supra. As noted in Bolender, a post-conviction movant, alleging newly discovered evidence, operating under the two-year provision of Rule 3.850, "must demonstrate as a threshold requirement that his motion for relief was filed within two years of the time when evidence upon which avoidance of the time limit was based could have been discovered through the exercise of due diligence." 658 So. 2d at 85.

The defendant herein makes no such demonstration.

Second, both of these claims are successive, as they could have and should have been presented in the first motion for post-conviction relief in 1989. The defense does not present any justification for the failure to present these claims in the prior Rule 3.850 motion and no such justification can conceivably exist.

With respect to the testimony of Chief Dykes regarding the knife found at the scene of the rape, the defense argues that Dykes and the Florida prosecution misled the sentencing jury into believing that a knife found in the bedroom of the rape victim was one which had been used by Roberts and which Roberts had brought to the scene of the rape. The current argument, that such testimony was misleading, is based upon the transcripts of the Maryland rape trial. Those transcripts were clearly available to defense counsel at least as early as the first motion for post-conviction relief in 1989, if not at the time of the trial herein.[14] In the first motion for post-conviction relief, counsel for Roberts, in claim XXI, which attacked Florida's reliance on the Maryland rape conviction, and specifically alleged that counsel had obtained files regarding the Maryland case and was in the process of investigating those files. Roberts' counsel was allowed to submit a supplemental motion to vacate three weeks later, but the supplemental motion did not contain any further elaboration on the files from Maryland which counsel had been reviewing. Thus, this claim could have and should have been

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[14] Defense counsel, during cross-examination of this officer, sought to refresh the latter's recollection with Maryland records.

raised in the first Rule 3.850 motion and is barred as being successive and untimely. Bolender, supra; Stewart, supra; Tafero, supra.

Furthermore, Chief Dykes' testimony at the sentencing phase clearly refutes the current claim. Dykes summarized the Maryland rape victim's version of that offense. The defendant forced his way into the victim's residence, holding a small folding pocket knife in his hand, which he held to her throat. (DR. 3290-91). After the defendant raped the victim, she started fighting and kicked that knife out of his hand. (DR. 3291-92). The defendant then picked up a pair of scissors, which he used to stab the victim. (DR. 3292). The knife which was subsequently found in the bedroom was described as a butcher-type knife, a hunting knife, with a long blade. (DR. 3293). It was thus clearly not the knife which the defendant entered with and threatened the victim with. Moreover, regardless of which knife was used or brought to the scene, the testimony clearly established that the defendant was brandishing a knife as he entered the residence; it makes little difference, in the context of the defendant's claim herein, which knife he had brought with him. Thus, apart from being procedurally barred, this claim is one which is without merit and refuted by the trial transcripts herein.

With respect to the second claim herein, Chief Dykes, in his sentencing phase testimony, had stated, in response to defense counsel's question, that he had tried to get the rape victim to come to Florida to testify, but she wouldn't because "she never got over the assault..." (DR. 3303). Relying upon a recent affidavit from the rape

victim, the defense now claims that the reason why she did not come to Florida was merely that she could not leave her children. The defense does not furnish any explanation as to why this claim could not have been presented in the first motion for post-conviction relief. There is no assertion that the Maryland rape victim was unavailable or could not be located prior to 1989. Under such circumstances, this claim is both time barred, as being beyond the two-year filing period, and constitutes a successive post-conviction motion.

The State would further note that the affidavit which has been procured at this late date from the Maryland rape victim, while alluding to her need to take care of her children, does not in any way assert that any of the matters stated by Chief Dykes were false. She does not say that she was not hysterical or upset at the time; she does not say that she was able to face this matter again. All of Chief Dykes' statements are fully consistent with the victim's simultaneous need to take care of her children; it is not an either/or, all-or-nothing proposition. Thus, this claim is facially insufficient, as the Maryland rape victim does not state that any of Dykes' testimony was false.[15] Lastly, from the foregoing, it is clear that the Maryland victim's affidavit

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[15] Furthermore, in a written statement, dated December 26, 1985, which is contemporaneous with the Florida penalty phase proceedings, and which statement the Maryland victim gave to the Salisbury, Maryland Police Department, the victim expressly stated that in December, 1985, neither she nor her family had yet been able to get on with their lives; she was still plagued with mental anxiety and nervousness, with terrible fears, which still existed. See, pp. 2-3 of statement. This statement was presented by the state during the trial court penalty phase proceedings (DR. 3510), and while the trial court declined to hear it when proffered, the court did permit the State to present it as a state exhibit to be stamped and put in the court file. Id. Thus, a statement contemporaneous with the penalty phase proceeding, which the victim gave to the police, was fully corroborative of Chief Dykes' in-court testimony.

is not the type of newly discovered evidence which would probably produce a different result. As such, it fails to make out a viable claim. See, Jones v. State, 591 So. 2d 911 (Fla. 1991); Bolender v. State, 661 So. 2d 278 (Fla. 1995).

CLAIM VI

ROBERTS' CLAIMS OF INNOCENCE ARE INSUFFICIENT.

In this claim, Roberts contends that he is innocent of the crime of first degree murder and that he is innocent of the death penalty. As to the first matter, even taking all of Roberts' allegations as true, such are insufficient under Jones v. State, 591 So.2d 911 (Fla. 1991), or Herrera v. Collins, 113 S.Ct 853, 122 L. Ed. 2d 203 (1993). There remains eyewitness testimony, corroboration from other witnesses, as well as the presence of Roberts' palm print on the victim's car and other physical evidence, in addition to his own inconsistent statements, as detailed in pp. 43-44 herein. Relief is thus not warranted. See Bolender v. State, 661 So. 2d 278 (Fla. 1995).

As to the sentence, Roberts likewise remains eligible for death under Sawyer v. Whitley, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), regardless of the allegations in the instant motion. There were four (4) aggravating circumstances found as part of his death sentence, and the only "attack" upon the heinous, atrocious or cruel aggravator is the contention that the jury instruction on that factor was invalid under Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992). Collateral counsel fail to note that this identical claim was presented to the Florida Supreme Court in

Roberts' second state habeas petition, and found procedurally barred due to lack of preservation at trial and on appeal. See Roberts v. Singletary, 626 So. 2d 168 (Fla. 1993). Roberts has no right to re-present this matter in yet another successive proceeding. See State v. Salmon, 636 So. 2d 16 (Fla. 1994). To the extent that the jury instructions are attacked on any other basis, such is likewise procedurally barred at this juncture, see Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993), Porter v. State, 653 So. 2d 374 (Fla. 1995), Francis v. Barton, 581 So. 2d 583 (Fla. 1991), and the felony-murder aggravator would likewise be sufficient by itself to render Roberts death-eligible. No relief is warranted as to this claim.

CONCLUSION

Based on the foregoing, the Appellee requests that all relief, including any request for a stay of execution, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **MARTIN McCLAIN, Esq.** and **JENNIFER M. COREY, Esq.,** Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 26 day of February, 1996.

Fariba N. Komeily
Assistant Attorney General