IN THE SUPREME COURT OF FLORIDA

JOHNNY ROBINSON,

Petitioner,

v. CASE NO. 95,336

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ISSUES & ARGUMENT

CLAIM I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE "FUNDAMENTAL ERROR CAUSED BY THE STATE ATTORNEY'S DELIBERATE INJECTION OF RACIAL PREJUDICE AT THE GUILT PHASE" AS A CLAIM ON DIRECT APPEAL.

Robinson complains that his appellate counsel rendered him ineffective assistance by failing to raise as an issue on direct appeal that the prosecutor deliberately injected racial prejudice into the guilt phase of his murder trial. (Petition at 9). He cites a single occurrence; the adjective "white" was used on direct examination during the prosecutor's brief recapitulation of a witness's testimony at trial. The State contends that Robinson has not met either prong of the ineffectiveness standard. To prevail on a claim of ineffective appellate counsel, the petitioner must show that his attorney's performance was professionally deficient and that the defendant was prejudiced thereby in that had the deficiency not occurred, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988).

"One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and to focus upon those most likely

to prevail. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)." *Provenzano*, 541 So. 2d at 1167.

Robinson complains that during the guilt phase, the prosecutor used the word "white" when repeating a brief portion of Mr. Fields' trial testimony quoting Robinson's inculpatory statements made at the crime scene. As this Honorable Court noted in the appeal from the resentencing proceeding, Robinson told law enforcement that he shot Mrs. St. George the second time because "How do you tell someone I accidentally shot a white woman." *Robinson*, 574 So. 2d 108, 113 (Fla. 1991).[1] His claim that "white" should have been

[1]This statement can be found in the record on direct appeal at page 2135.

edited out of his statement due to the danger of racial prejudice was soundly rejected by this Court. *Id.*

The prosecutor's slip in rewording the witness's response to include the word that Robinson used in his own statement was not objected to and was not so egregious as to require a mistrial. Appellate counsel is not ineffective for failing to raise claims which were not properly preserved. *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). Even where a claim is preserved for appeal, the failure to raise it does not prejudice the defendant where the act complained-of is a matter which comes within the discretion of the trial judge. *Tompkins v. Dugger*, 549 So. 2d 1370 (Fla. 1989). The State submits that whether to impose any sanction, much less grant a mistrial, for the misquote and the complained-of argument was a matter well within the trial court's discretion. Thus, even had the issue been preserved, appellate counsel would have been required to show that no reasonable judge could have exercised his discretion to deny sanctions or a mistrial. Robinson's appellate counsel would not have been able to carry that burden based on the misquote and the closing argument. The failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193; *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

Further, despite Robinson's repeated characterization of the prosecutor's motives in using this adjective as deliberate injection of racial prejudice, the record shows otherwise. In the deposition Robinson took of the trial prosecutor, Steven Alexander, Mr. Alexander testified that he did not remember using that word, but "[i]f I did it, it was certainly not intentional. I just did it." (Appendix A at 74).

At that same deposition, Robinson asked Mr. Alexander about the closing argument about which he complains in the instant petition. Defense counsel asked: "[Y]ou argued that it was . . . unlikely . . . that a white woman would go voluntarily with two black males. Why did you argue white and black in that context?" Mr. Alexander replied:

> Because if you read Robinson's confession which was put into evidence . . . his written confession . . . [i]t says, 'white woman'. He put it in his confession that nobody is going to believe that a white woman went with me to a cemetery and got accidentally shot or something like that. So I was more-or-less paraphrasing his confession. Of course, I certainly thought it was fair game since it was into (sic) evidence.

(Appendix A at 73).

Thus, the only hint of racial tones was the single, simple misquote of the witness's trial statement during which the prosecutor reverted to the pre-trial statement in which Robinson

had used the adjective "white" in describing his victim. Appellate counsel can not reasonably be criticized for failing to raise this extremely weak issue. *Atkins v. Dugger*, 541 So. 2d at 1167.

Moreover, it should be noted that although Robinson presents his claim to this Honorable Court in a manner implying that the prosecutor's misquote followed immediately on the heels of Field's trial testimony, same is not true. Rather, the witness gave other testimony and even left the witness stand and performed a demonstration for the jury before the misquote occurred. (*See* R1[2] 504-505). The record clearly shows that the prosecutor was merely trying to get the witness back on track after the demonstration by paraphrasing the pertinent testimony given earlier. That he inadvertently used the wording Robinson had used in his pre-trial statement did not infect the guilt phase with racial prejudice. Indeed, Robinson's trial counsel did not regard the matter of any importance as evidenced by his utter failure to make any objection, or ever complain, about the misquote.[3]

Finally, it must be remembered that Robinson's instant death

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[2]"R1" refers to the record on direct appeal from the trial (and original penalty proceeding). "R2" refers to the record on direct appeal from the resentencing.

[3]It is also noteworthy that although both trial and appellate counsel were extensively questioned by collateral counsel at the evidentiary held on the Rule 3.850 motion, no questions were asked regarding this alleged fundamental issue.

sentence was handed down by a jury that did **not** hear the penalty phase prosecutorial statements which this Court found impermissible in *Robinson v. State*, 520 So. 2d. 1 (Fla. 1988). The State contends that the complained-of adjective, used a single time in the somewhat lengthy guilt phase proceeding, was not capable of resulting, and did not result, in Robinson's conviction. Neither did the closing argument do so. Rather, Robinson was convicted based upon the overwhelming evidence of his guilt. *See Robinson*, 520 So. 2d at 5. Appellate counsel will not be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

Indeed, there is no reasonable possibility that the single reference to the race of the victim, or the closing argument, *if* error, was fundamental error.[4] Since it was not fundamental error, and no objection was made below, Robinson would have been entitled to no relief had appellate counsel raised the issue on direct appeal. Thus, appellate counsel's failure to raise the instant

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[4]Robinson brought up the race of the victim on direct examination of his expert witness. He told Dr. Krop that he shot Mrs. St. George the second time because "'he wouldn't get a lot of mercy from having shot 'a white woman.'" *Robinson*, 520 So. 2d 1, 7 n.3. Further, the State submits that Robinson invited the error by using the adjective *in a racial context* in his pre-trial confession which was admitted into evidence.

issue does not constitute ineffective assistance, and Robinson is entitled to no relief.

CLAIM II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE "RACE DISCRIMINATION PERMEATING THE JUSTICE SYSTEM" AS A CLAIM ON DIRECT APPEAL.

Robinson next complains that his appellate counsel rendered him ineffective assistance by failing to raise as an issue on direct appeal that race discrimination so permeated the justice system in St. John's County that he is entitled to a new trial with a racially neutral jury. According to Robinson, "[b]ecause black-victim homicides are not treated with the same seriousness as white-victim homicides, every decision about any particular homicide case is significantly skewed by racial bias." (Petition at 14). The State disagrees, and further, contends that Robinson has not met either prong of the ineffectiveness standard, i.e., deficient performance or prejudice.

This issue is procedurally barred because this claim has been decided adversely to Robinson by this Court in the appeal from his Rule 3.850 motion. In the trial court, the circuit judge concluded that this claim was an improper attempt "'to relitigate substantive matters under the guise of ineffective assistance.'" *Robinson v. State,* 707 So. 2d 688, 697-698 (Fla. 1998). In the appeal from his

Rule 3.850 motion, Robinson contended that the trial court erred in so ruling. *Id.* at 697. This Court found "no merit in this claim." *Id.* at 698. Thus, this Court upheld the trial court's ruling that the instant issue was an attempt to relitigate substantive matters.

It is also procedurally barred because the statistics and arguments regarding the instant claims of racial prejudice in the judicial process were not presented to the trial judge until the relatively recent post-conviction proceeding. The failure to preserve an issue at trial or raise it on direct appeal constitutes a procedural bar to an attempt to raise it in a habeas petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989).

In his instant petition, Robinson cites the following areas of discrimination: (1) the decision to charge the defendant "and whether, and how vigorously, the prosecution seeks the death penalty;" (2) the "selection of grand jury members and forepersons; and (3) "prosecutors are prone to remind juries . . . of the races of the victims and the defendants . . .." (Petition at 14). Robinson concludes that "[d]iscrimination in all these forms pervades the justice system in St. Johns (sic) County. It also pervaded the pretrial and trial proceedings against" Robinson. (Petition at 15).

Allegations of ineffective appellate counsel may not be used to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). The deliberate injection of racial prejudice issue was raised in the direct appeal from the initial trial and conviction.[5] *Robinson*, 520 So. 2d at 7. Appellate counsel's performance cannot be deemed deficient for failing to raise every conceivable aspect of a claim. *Scott v. Dugger*, 604 So. 2d. 465 (Fla. 1992).

Indeed, it is the responsibility of appellate counsel to winnow out the weaker claims and to "focus upon those most likely to prevail." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. See Jones v. Barnes,

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[5]After resentencing, this Court rejected Robinson's attempt to again obtain relief on a claim of racial discrimination. *Robinson*, 574 So. 2d at 113.

463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)." *Provenzano*, 541 So. 2d at 1167.

In Robinson's case, appellate counsel chose the strongest possible claim of racial discrimination, i.e., prosecutor's injection of racial discrimination issue in the (original) penalty phase. To have also complained about the prosecutor's misquote of guilt phase testimony and closing argument based on Robinson's own statement admitted into evidence - both of which were not objected to, may have seriously diluted the penalty phase claim. Certainly, an efficient appellate counsel could have reasonably so determined. Thus, Robinson is entitled to no relief on this claim. *See* Claim I, *supra*.

Moreover, assuming *arguendo* that the merits should be considered, Robinson's claim has none. To prevail on a "claim of prosecutorial discrimination in the pursuit of the death penalty," the defendant must produce "exceptionally clear proof of prosecutorial discrimination necessary to find an abuse of prosecutorial discretion." *Jordan v. State*, 694 So. 2d. 708, 711 (Fla. 1997). In *Jordan,* this Court again rejected the position Robinson takes herein, i.e., that the state constitution provides greater protections than the federal one in this regard. *Id.* In *Foster v. State*, 614 So. 2d 455, 463-464 (Fla. 1992), this Court

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

Finally, Robinson well knows that the facts do not support his claim in so far as he alleges that the decision whether to charge and how vigorously to seek the death penalty in his case was influenced by improper racial considerations. During his 1994 deposition of Prosecutor Alexander, Robinson learned that Mr. Alexander had only decided to seek the death penalty in two of the many murder cases over which he had decision-making power. (Appendix A at 45). One of the two defendants was black (Robinson) and the other was white. *Id.* at (Appendix A, at 9). Responding

to Robinson's question: "[I]n exercising your discretion, what you do consider in determining whether you go for the death penalty or not," Mr. Alexander replied that if there were "two strong aggravating factors, in my opinion, that's enough to go for the death penalty." *Id.* at (Appendix A at 44). He always looked up the defendant's prior record, and "if I didn't have two strong aggravators" or "[i]f the guy didn't have a prior record, he did not seek the death penalty. (Appendix A at 45-46). He added:

> I think as a prosecutor when I see a guy who has a record like Robinson had, who had just been released recently, had raped somebody else up in Virginia, . . . he had . . . four prior rape convictions, if my memory serves me correctly, three or four, and he was on parole for it in Maryland, I think the guy deserves the death penalty. I mean, here he had just raped some girl in Virginia and then a week or two weeks later he rapes this girl in St. Augustine and kills her . . .." [6]

(Appendix A, 46-47).

He went on to explain that the white defendant against whom he had sought the death penalty, "Jerry Rogers was the same way . . .." (Appendix A at 47). Mr. Alexander testified that there were no factors - other than two aggravating circumstances or prior record" which influenced his decision to seek the death penalty. (Appendix

[6]Robinson had kidnaped and raped the woman in Virginia "at gunpoint." (Appendix A at 51).

A at 47-48). He made the decision to seek the death penalty against Robinson based on those factors and no others. (Appendix A at 48).

Likewise, Robinson well knows that the facts do not support his complaint that there were no black jurors because of improper racial considerations. The truth is that Robinson personally directed his trial attorney to strike all black jurors. (Appendix A at 64). He did this in both the guilt and penalty phases. *Id.* Indeed, Mr. Alexander "was darn mad about it because I wanted blacks on that jury." (Appendix A at 65). He added: "I just felt that black jurors would have been good and I would have liked to have had some. . . . [T]here were some seated and all were struck by defense counsel and defense counsel had told me he was doing that at the request of his client." (Appendix A at 66).

Mr. Alexander testified to the many, many steps he took to put more blacks on the State payroll once he became State Attorney. (Appendix A at 57). His aggressive minority hiring campaign resulted in the hiring of black and hispanic attorneys, investigators, and secretaries. (Appendix A at 58-59).

Having been read the same statistics from Radalet and company that appear in the instant petition, and having been asked assuming that the figures were correct, what explanation he had "for why the figures would be skewed in that way," Mr. Alexander replied:

> I would suggest to you that if each one had the record that Johnnie Robinson had, then it's warranted. I don't know what kind of record all these guys have. Whether Beverly St. George happened to be white, black, green, yellow doesn't matter. I mean, the only thing that mattered to me when I was seeking the death penalty was Robinson's record.
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> Why didn't I seek it for Fields? . . . [I]f I was just going after black people, why not just go after Fields. He's . . . a prior clean record and . . . was not the shooter . . .. Robinson certainly was the shooter and Robinson had a very bad prior record and was on parole at the time. What difference does it make, you know, really if the victim was white, black or green. Had the victim been black, I can assure you, I would have still have gone after Robinson with the same zeal, it's just the fact that she happened to be white.

(Appendix A at 68-69). Defense counsel queried: "As far as you're concerned then, the charging decision does not take into account the race of the victim?" (Appendix A at 69). To which Mr. Alexander replied: "No." *Id.*

Thus, it is clear that the decision to charge Robinson and vigorously seek the death penalty against him was not based on racial considerations of any kind. Neither has Robinson established that prosecutors are prone to remind juries of the races of the defendants and victims, and he has utterly failed to meet the requirements of *Jordan* in regard to the alleged statistical information.[7] Indeed, his claim regarding the grand

[7]Mr. Alexander testified that he was not aware of any statistics regarding racial characteristics of jurors or others in

jury and forepersons was rejected on its merits by this Court in the recent Rule 3.850 appeal. *Robinson*, 707 So. 2d at 698-669. Thus, even were the instant issue not at least twice procedurally barred, it is without merit.

St. Johns County. (Appendix A at 66).

CLAIM III

ROBINSON'S *BRADY/GIGILIO* CLAIM IS NOT APPROPRIATE IN A HABEAS CORPUS PETITION, AND IN ANY EVENT, IS WITHOUT MERIT AS THIS HONORABLE COURT HAS PREVIOUSLY HELD; NEITHER HAS HE DEMONSTRATED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Robinson reasserts his *Brady/Gigolo* claim despite this Honorable Court's rulings rejecting it. *Robinson*, 707 So. 2d at 693-694. Acknowledging that the issue has been held procedurally barred **and without merit**, he purports to raise it again "for preservation purposes." (Petition at 25 n.6). There is no authority for Robinson's position in this regard, and his reassertion of this issue is a waste of valuable time and judicial resources.

His claim that "[appellate counsel was ineffective for failing to raise this claim on direct appeal" is also a sham. It has long been held that the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193; *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Since, as Robinson concedes in his petition, this Court found the instant claim without merit, appellate counsel can not be deemed ineffective. Robinson is entitled to no relief.

CLAIM IV

ROBINSON'S DEATH SENTENCE WAS NOT RENDERED UNRELIABLE BY THE PROSECUTOR'S CLOSING ARGUMENTS AT PENALTY PHASE; NEITHER WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE THE CLAIM ON DIRECT APPEAL.

This issue is procedurally barred because this claim has been decided adversely to Robinson by this Court in the appeal from his Rule 3.850 motion. In the trial court, the circuit judge concluded that this claim was an improper attempt "'to relitigate substantive matters under the guise of ineffective assistance.'" *Robinson*, 707 So. 2d at 697-698. In the appeal from his Rule 3.850 motion, Robinson contended that the trial court erred in so ruling. *Id.* at 697. This Court found "no merit in this claim." *Id.* at 698. Thus, this Court upheld the trial court's ruling that the instant issue was an impermissible attempt to relitigate substantive matters. Neither is it permissible in this proceeding.

The failure to preserve an issue at trial or raise it on direct appeal constitutes a procedural bar to an attempt to raise it in a habeas petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989). The instant claim should be denied.

Moreover, Robinson's claim that his appellate counsel was ineffective because he did not raise this issue on appeal likewise fails. An allegation of ineffective assistance of appellate

counsel can not be used to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). Neither can appellate counsel be deemed ineffective for not raising unpreserved claims, such as the instant one, on direct appeal. *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). Even where preserved, the failure to raise a claim on direct appeal does not result in prejudice where the matter complained-of was within the discretion of the trial judge. *Tompkins v. Dugger*, 549 So. 2d 1370 (Fla. 1989). Closing arguments are well-established to be matters within the discretion of the trial judge. *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997);[8] *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990).

Robinson complains that the prosecutor's closing comments were inappropriate in that (1) he "dressed-up" Witness Fields' testimony "to make an emotional appeal to the jury" by stating that the victim's children were on her mind when Robinson murdered her; (Petition at 30); (2) misstated "the time it took for the kidnaping and killing . . ." stating that it may have lasted "an hour . . . [or] two hours;" (Petition at 31); (3) told the jury the victim

[8]As in *Moore*, the trial judge in this case properly instructed Robinson's jury that closing argument "is not evidence" and is merely "intended to aid you in understanding the case." (2R 612).

was not "partying" and had had no alcohol to drink; (Petition at 31-32); (4) made a "distinction between statutory and non-statutory mitigation" and emphasized that the aggravators were statutory while the mitigators were non-statutory; (Petition at 32-33); and (5) argued a non-statutory aggravator - "that the victim was compliant or cooperative" (Petition at 33). The State contends that the evidence supports all of the prosecutor's arguments to the jury.[9] It is axiomatic that each party's argument will invite the jury to view the evidence before it in the light most favorable to that party. Such is the permissible purpose of argument.

The allegation that the prosecutor impermissibly emphasized the difference between statutory and non-statutory factors is not borne out by the quoted portions of the argument. Further, these references contained no implication that the statutory factors should be weighed more heavily than the non-statutory ones. Certainly, the pros did not, explicitly or implicitly, suggest

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[9]In quoting the prosecutor's estimate of the length of the ordeal for Mrs. St. George, Robinson selectively omits the immediately preceding sentence, to-wit: ". . . is terrorized over a period of **who knows how long**?" (emphasis added)(R2 627). Thus, it was clear that the prosecutor was estimating based on the facts that had been established and common sense regarding the approximate time it would take to accomplish the established acts. The immediately following paragraph makes that clear. (R2 627). Thus, it appears that Robinson's complaint about the prosecutor's time estimate is made in bad faith and is an attempt to mislead this Court.

"that all of his aggravating factors were important while the mitigating factors were not." (Petition at 33). Robinson's claim to the contrary is a fiction and does not entitle him to relief.

Robinson's claim that by asserting that "the victim didn't do anything wrong" (Petition at 34) the prosecutor argued for a non-statutory aggravator is also devoid of merit. Robinson's defense was that Mrs. St. George, a woman he had never met before, stranded on the side of the interstate, willingly accompanied him and his co-defendant to a remote place and willingly had sex with them. The State suggests that as a matter of common knowledge, there are some jurors who would regard this behavior, if true, as wrong or immoral. Thus, the prosecutor's comment pointing out that the victim did not do anything wrong was warranted in light of the defense strategy. However, even if it was an improper comment, it was not so egregious as to be fundamental thereby excusing the failure to object. Indeed, any error, even if it had been objected to, was harmless due to the overwhelming evidence of guilt. *See, supra*, 5 - 6.

CLAIM V

ROBINSON'S ANTI-SYMPATHY/ANTI-MERCY CLAIM IS NOT COGNIZABLE IN THIS PROCEEDING, AND IN ANY EVENT, IS WITHOUT MERIT.

Robinson complains that the trial judge improperly instructed his penalty phase jury that it was not to make its decision "because you feel sorry for anyone." (Petition at 36). He also complains that the judge told the jury that feelings of "sympathy . . . should not be discussed . . .." (Petition at 36). He claims that the decision in *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988) is authority for his position that such statements constitute reversible error. (Petition at 37).

Although Robinson admits that the 10th Circuit's decision in *Parks* was reversed, he claims that the reversal did not affect the holding regarding the anti-sympathy/anti-mercy instructions. (Petition at 37). He is wrong. This claim is clearly foreclosed by *Saffle v. Parks*, 110 S.Ct. 1257, 1263 (1990). This Court has repeatedly followed *Saffle* in holding that Florida's law does not unconstitutionally instruct juries not to consider sympathy. *See Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995); *Hitchcock v. State*, 578 So. 2d 685, 694 (Fla. 1990).

Moreover, this issue was not preserved at trial or raised on

direct appeal. Thus, it is not appropriate on habeas review. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989). Robinson is entitled to no relief.

CLAIM VI

ROBINSON HAS DEMONSTRATED NO ERROR ENTITLING HIM TO RELIEF ON HIS CLAIM THAT HIS JURY INSTRUCTIONS WERE CONSTITUTIONALLY INADEQUATE.

Robinson claims that certain jury instructions given at resentencing constitute fundamental error. (Petition at 40). He complains that the heinous, atrocious, and cruel [hereinafter "HAC"] instruction and the cold, calculated, and premeditated [hereinafter "CCP"] instruction were unconstitutionally vague. He objected to the standard instructions, and proposed instructions to replace them. Although the trial judge did not give the requested instructions, he modified the standard instructions. (Petition at 45, 46).

In *State v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995), this Court considered the instant issue. Finding that the HAC instruction given was constitutionally invalid under *Espinosa*, this Court went on to find the error harmless. *Id.* In reaching this conclusion, this Court considered the circumstances of the murder, including the force with which the fatal stabbing blow was delivered, that the victim "drowned in his own blood," and that he "had defensive stab wounds . . . and did not die immediately." *Id.* This Court determined that given these facts, "this aggravator clearly existed and would have been found even if the requested

instruction had been given." *Id.* at 76-77. Moreover, this Court added that the "two other valid aggravating circumstances, including the previous conviction of a violent felony" also rendered the *Espinosa* error harmless. *Id.* at 77.

In *Banks v. State*, 700 So. 2d 363 (Fla. 1997), this Court upheld a finding of HAC. In so doing, this Court said:

> Even where the victim's death may have been almost instantaneous (as by gunshot), we have upheld this aggravator in cases where the defendant committed a sexual battery against the victim preceding the killing, causing fear and emotional strain in the victim. E.g., *Swafford v. State*, 533 So.2d 270, 277 (Fla. 1988); *Lightbourne v. State*, 438 So.2d 380, 391 (Fla. 1983). For purposes of this aggravator, a common-sense inference as to the victim's mental state may be inferred from the circumstances.

700 So. 2d at 366. The evidence showed that the "victim was sexually battered for approximately twenty minutes before appellant finally shot her." *Id.* The defendant's blood was found under the victim's fingernails. *Id.* at 367. The HAC finding was upheld.

In *Henyard v. State*, 689 So. 2d 239, 254 (Fla. 1996) this Court rejected the contention that had the victims been adults, the HAC aggravator would not have been found. This Court said:

> We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. *See, e.g.*, *Routly v. State*, 440

> So.2d 1257, 1265 (Fla. 1983), and cases cited therein. Moreover, '[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous.' *Preston v. State*, 607 So.2d 404, 410 (Fla. 1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993). In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children.

689 So. 2d at 254. Thus, it is clear that a finding of HAC can be predicated on events occurring prior to the actual infliction of the killing blow, or gunshot, as the case may be.

In the instant case, Robinson took the stranded interstate motorist by gunpoint, handcuffed her, forced her into his car, transported her to a remote cemetery, stripped her of her pants, raped her twice on the hood of his car, while "she went to pawing at me," and invited the codefendant to also rape her (which he did), and then after discussing whether to kill her in her presence, and in the face of her pleas that she not be harmed, he shot her in the face. (*See R 2135;* R2 110-111). As she lay on the ground, blood "coming from her face," Robinson shot her again, killing her. (R 2135). The State asserts that the entire sequence of these long-lasting and terrifying events compels a finding of

HAC under any definition. Therefore, any *Espinosa* error in this case was harmless beyond a reasonable doubt.

Moreover, it also qualifies for a finding of harmlessness due to the number and strength of the remaining aggravators. Four strong aggravators were found in addition to HAC. These included avoid arrest, prior violent felony (very recent Virginia rape at gunpoint), committed during a felony (sexual battery & kidnaping), and CCP. There was no statutory mitigation, and only 3 nonstatutory mitigators - difficult childhood/absence of a mother, psychosexual disorder, and functions well in prison. The State contends that even without the HAC or CCP aggravators, the *Espinsoa* error is harmless because of the three other strong aggravators and the insubstantial mitigation. *Banks*; *Breedlove*.

The same is true of Robinson's complaint about the CCP jury instruction. Although it might not have passed muster under *Jackson*, any error was harmless. Robinson's own confession shows a calm and cold, deliberately ruthless action with no pretense of legal or moral justification. It reveals that he chose a female, alone and stranded on the roadside, displayed his gun, grabbed her and ordered her into his car, took her to a secluded area - a cemetery, "played" with, or taunted, her, undressed her, continued to display the gun, physically fought with her, picked up the gun,

and shot her "in the face." She fell to the ground, he called to her, and when he got no answer, he went to his car, found and retrieved a flashlight, went back to where she lay, looked at her, noted that she was "laying on her side and there was blood like coming (sic) from her face," thought about what to do, and decided that he "had to" kill her to eliminate her as a witness because he felt that no one would believe that he had accidentally shot her. (R 2135). Implicit in the latter is Robinson's knowledge that Mrs. St. George, had he permitted her to live, would not have backed-up his claim of an accidental shooting. Further, there were four other valid and very strong aggravators. Thus, the *Jackson* error, if any, was harmless beyond a reasonable doubt. *Banks v. State*, 700 So. 2d 363, 365 (Fla. 1997).

Robinson's complaint about the avoid arrest aggravator is procedurally barred. No where does he assert that an objection to the language of the instruction was made below. (Petition at 58-59). Without such a very specific objection, the issue is barred in a habeas corpus proceeding. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989). Further, this claim could have been raised on direct appeal, and is therefore procedurally defaulted. *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

Robinson makes no claim of ineffective assistance of appellate

counsel in the failure to raise this issue on direct appeal. Certainly, had he done so, he would have had to have done so in bad faith. Robinson's own statement, admitted into evidence, at trial makes it clear that after pausing to reflect, Robinson concluded that any claim that he had accidentally shot the woman would not be believed. For this reason, he "had to" make sure that she died so she could not turn him in to the authorities. Therefore, he shot her again, killing her. (R 33). Of course, Witness Fields' testimony regarding how Robinson discussed killing her to avoid arrest also supports this aggravator. There can be no doubt that this aggravator was properly found, and Robinson's claim to the contrary is frivolous.

Robinson's claim that the finding of both the CCP aggravator and the avoid arrest aggravator constitute improper doubling in his case because they are based on identical evidence is procedurally barred because it could have been, but was not raised at trial or on direct appeal. *Parker*. Claims which could or should have been raised in earlier appeals and proceedings and which could not possibly have altered the outcome are barred. *Atkins v. Singletary*, 622 So. 2d. 951 (Fla. 1993).

Moreover, this Court has specifically rejected the instant claim on the merits. *See Robinson*, 707 So. 2d. 690 n. 2. In *Gore*

v. State, 706 So. 2d. 1328 (Fla. 1997) and in *Banks v. State*, this Court made it clear that these two aggravators are "not merely restatements of each other." *Banks*, 700 So. 2d. At 367. Since this issue was rejected on the merits in the 3.850 appeal, Robinson cannot have it heard in the instant petition. *Scott v. Dugger*, 604 So. 2d. 465 (Fla. 1992).

Moreover, the evidence supporting the two aggravators, while overlapping to the extent of the facts regarding Robinson's decision to kill the victim because it would not be believed that he accidentally shot her, is different. As Robinson admits in his petition, Witness Fields testified that Robinson told him that he was going to kill her because she could identify him. (Petition at 59). Further, CCP can be found in this case without reference to the common fact - that the same fact also supports another aggravator, which does not depend on that fact for its viability, does not constitute impermissible doubling. Finally, the State contends that even if the two aggravators were considered as one, leaving four strong aggravators to be weighed against the insubstantial non-statutory mitigation, there is no possibility that the outcome would have been different. Thus, Robinson is entitled to no relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to James H. Walsh, Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of May, 1999.

Of Counsel

APPENDIX A

Deposition of Steve Alexander on June 10, 1994, record pages 874-953.