IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1229

MICHAEL L. ROBINSON

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
COURT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Cites to the records will be consistent with those used in Appellant’s Initial Brief, i.e.,

“OR” - original record on appeal from the 1995 conviction;

“R” - record on appeal from the 1997 penalty phase;

“PCR” - record in instant appeal to this Court;

“Supp. PCR” - supplemental record in instant appeal;

“T” - transcript of evidentiary hearing on postconviction motion;

STATEMENT OF THE CASE

As outlined by this Court in the first appeal, *Robinson v. State*, 684 So.2d 175, 176 (Fla. 1996)("Robinson I"):

> On January 23, 1995, appellant pled guilty to the first-degree murder of Jane Silvia. Prior to the plea colloquy, appellant's counsel explained that appellant did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Appellant expressed that he desired to die and was "seeking the death penalty in this case."
>
> On March 30, 1995, appellant waived his right to a penalty phase jury and the cause proceeded to sentencing before the trial court. The State called as its sole witness Detective David Griffin, who was the lead homicide investigator in the case and had taken two taped statements from appellant. At the penalty phase, Detective Griffin played the second taped interview in which appellant admitted to killing Jane Silvia. Relying on *Koon v. Dugger*, 619 So.2d 246 (Fla.1993), the defense proffered mitigating evidence which it had received from a psychologist, Dr. Berland, and appellant's mother. The State also presented brief testimony from the victim's brother who told the court that Robinson "destroyed my family." In addition to the evidence presented at the hearing, the court directed that a presentence investigation be conducted as to the circumstances of the crime and the defendant's background. A presentence report was subsequently completed and filed with the court.

On April 12, 1995, the trial court sentenced appellant to death. Because the trial court failed to consider and weigh evidence of substantial mitigation found in the record, this Court vacated the death sentence. *Robinson* I at 180.

ROBINSON I

In *Robinson I*, this Court vacated the death sentence because the trial court failed to consider and weigh all the available mitigating evidence in the record. As outlined by this Court, the defense presented the following mitigating evidence at the first penalty phase:

> (1) lengthy and substantial history of drug abuse, substantiated by reports of Dr. Kirkland and Dr. Berland;
>
> (2) use of marijuana since age 14, occasionally smoking as many as eight joints per day;
>
> (4) experimentation with numerous drugs, including methaqualone and hallucinogens;
>
> (4) four-year history of frequent and problematic crack cocaine use;
>
> (5) pattern of diverse and chronic substance abuse since age 14; use of Ritalin in high doses from ages 6 to 9.
>
> (6) various psychological disturbances and had a lifelong history of apparent mental health problems;
>
> (7) chronic psychotic disturbance involving thought disorder and mood disturbance;
>
> (8) some antisocial character disturbance which may be mediated by manic disturbance;
>
> (9) significant, bi-lateral cerebral cortical impairment; possibility of temporal lobe involvement;
>
> (10) delusional paranoid thinking, tactile and auditory perceptual disturbances; significant episodes of depression and manic disturbances;

> (11) history of delusional paranoid thinking, manic and depressive mood disturbance;
>
> (12) paternal and maternal history of mental illness and psychiatric hospitalizations;
>
> (13) prior testing which revealed narcissistic tendencies;
>
> (14) impaired mental functioning due to several brain injuries; possibility of brain damage during birth;
>
> (15) industrial accident left Robinson oxygen deprived for nearly an hour;
>
> (16) bicycle accident in 1992 in which Robinson was hit by car and severely injured;
>
> (17) difficult and unstable childhood; periods in state and military schools; separated from family at early age.

Robinson I, 684 So.2d at 179-180. The case was remanded "to the trial court to conduct a new penalty-phase hearing before the judge alone in accordance with *Farr* and within sixty days hereof." *Robinson I*, 684 So. 2d at 180.

ROBINSON II

After the second penalty phase, the trial judge again imposed the death penalty and Robinson appealed. *Robinson v. State*, 761 So.2d 269 (Fla. 1999)("*Robinson II*") As enumerated by this Court, the mitigation presented at the penalty phase hearing included:

> The defense presented three witnesses: Dr. James Upson, a neuropsychologist; Dr. Jonathan Lipman, a

neuropharmacologist; and Barbara Judy, Robinson's mother. [FN2] Dr. Upson conducted a battery of clinical tests on Robinson which he claims indicate that Robinson is of above-average intelligence but that he is impaired in the frontal and left temporal lobe of his brain. According to Dr. Upson, Robinson's brain impairment could be caused by a number of factors, including: recent drug use, the use of forceps during birth, and loss of consciousness during two episodes in his childhood, once when he was hospitalized for diverticulum and once when he was thrown in a pool while tied in an apparent Houdini imitation. Upson also testified that as a child, Robinson suffered from attention deficit disorder (ADD) and was prescribed Ritalin. Robinson is a chronic drug abuser who started consuming alcohol, marijuana and LSD in his teens, and eventually moved to methamphetamine and then cocaine, which he continued to use up until the murder. Dr. Upson also testified that Robinson was exposed to toxic poisoning in his early twenties and suffered a head injury when he was struck by an automobile while riding a bike. According to Dr. Upson, any of the above incidents could have caused Robinson's impairment. On cross-examination, Dr. Upson admitted that Robinson also exhibited signs of antisocial personality disorder, such as unpredictability, impulsiveness, manipulativeness, anger, suspiciousness, and moodiness.

FN2. Dr. Upson and Dr. Lipman are not the same doctors initially appointed in this case. At the first penalty proceeding, the court appointed Dr. Kirkland and Dr. Berland to examine Robinson for competency and for mitigating evidence. Although neither doctor was called to testify at the new penalty phase hearing, their evaluations were considered by the trial court.

Dr. Lipman testified about the effect chronic drug use had on Robinson. He opined that Robinson suffered from conceptual aberrations caused by LSD and that the combination of drugs consumed by Robinson caused a psychotoxic effect which produced

profound and long-lasting hallucinations and derangement of reality testing. When asked about symptoms one feels after the effects of cocaine wears off, Dr. Lipman explained: "With regard to cocaine and amphetamines, the withdrawal syndrome is characterized mostly by profound depression. However, if the user has experienced the drug chronically or at high doses to the point of frank psychosis, that psychosis does not immediately go away when the drug leaves the system. It persists for weeks and months.... We think those people probably have preschizophrenic processes going on in their brain." Dr. Lipman added that the psychotic effect experienced by chronic users is often joined by severe depression. Finally, Dr. Lipman testified that when he interviewed Robinson, he was in a drug-free state yet still exhibited signs of brain abnormalities in the temporal lobe. According to Dr. Lipman, that condition was exacerbated by extensive cocaine use, and at the time of the offense Robinson suffered from "a state of unreality brought about by the chronic effect of cocaine."

Both doctors agreed that drugs controlled Robinson's life and that because of his chronic drug use, Robinson was under extreme emotional disturbance and unable to control his actions. [FN3] However, both doctors admitted that at the time of the offense, Robinson knew what he was doing and knew that his conduct was wrong. Finally, both doctors agreed that Robinson suffered from emotional duress because he believed he would be sent back to prison unless he killed the victim. According to Dr. Lipman, Robinson feared prison because he had been raped several times while incarcerated. Both doctors testified that a Single Photon Emission Computed Tomography (SPECT) scan would have been helpful in locating Robinson's brain damage.

FN3. We note that Dr. Upson questioned whether Robinson was "substantially" impaired: "The word 'substantially' is difficult to deal with. I definitely think it was impaired. I think he knew what he was doing, but I don't think he could stop himself from doing it." According to Dr.

> Upson, Robinson experienced emotional distress and impaired capacity due to drug abuse, as well as fear of returning to prison.
>
> Other facts presented by the defense included: Robinson's father was an alcoholic who verbally abused Robinson and who disowned Robinson when he was fourteen or fifteen years of age, causing him to become a ward of the state and to be placed in a juvenile detention facility; Robinson married at the age of seventeen to a woman who introduced him to speed balling--a form of intravenous drug use combining the drugs preludin and dilaudid; at the age of nineteen, Robinson used cocaine an entire month without sleep; and just prior to the murder, Robinson spent four weeks binging on cocaine. Finally, Robinson's mother testified that she loved her son but knew that he abused drugs and that she had attempted to help him over the years by placing him in rehabilitation facilities. She also stated that Robinson's father was abusive and that Robinson's paternal grandfather had a mental disorder and died in a mental institution. Finally, John Thomas, the victim's brother, testified that Robinson destroyed his family.

Robinson II, 761 So.2d at 271-272.

In re-imposing the death penalty, the trial court considered the foregoing evidence as well as the mitigating and aggravating evidence introduced at the initial penalty phase proceeding. The court found the same three aggravating factors as before:

(1) the murder was committed for pecuniary gain;

(2) the murder was committed to avoid arrest; and

(3) the murder was cold, calculated and premeditated.

The trial court also found two statutory mitigating factors:

(1) Robinson suffered from extreme emotional distress (some weight);

(2) Robinson's ability to conform his conduct to the requirements of the law was substantially impaired due to history of excessive drug use (great weight).

Of the nonstatutory mitigation presented, the trial court found:

(1) Robinson had suffered brain damage to his frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct);

(2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators);

(3) Robinson felt remorse (little weight);

(4) Robinson believed in God (given little weight);

(5) Robinson's father was an alcoholic (given some weight);

(6) Robinson's father verbally abused family members (given slight weight);

(7) Robinson suffered from personality disorders (given between some and great weight);

(8) Robinson was an emotionally disturbed child, who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes, changed schools five times in five years, and had

difficulty making friends (given considerable weight);

(9) Robinson's family had a history of mental health problems (given some weight);

(10) Robinson obtained a G.E.D. while in a juvenile facility (given minuscule weight);

(11) Robinson was a model inmate (given very little weight);

(12) Robinson suffered extreme duress based on fear of returning to prison because where he was previously raped and beaten (given some weight);

(13) Robinson confessed to the murder and assisted police (given little weight);

(14) Robinson admitted several times to having a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse);

(15) the justice system failed to provide requisite intervention (given no additional weight to that already given for history of drug abuse);

(16) Robinson successfully completed a sentence and parole in Missouri (given minuscule weight);

(17) Robinson had the ability to adjust to prison life (given very little weight); and

(18) Robinson had people who loved him (given extremely little weight)

Robinson II, 761 So.2d at 272-273.

The claims raised in *Robinson II* included:

(1) the trial court erred in denying Robinson's motion to withdraw his guilty plea;

(2) the trial court erred in denying Robinson's motion for neurological testing;[1]

(3) the trial judge made prejudicial comments on the record and denied Robinson additional funds with which to investigate mitigating evidence;

(4) the sentence of death is disproportionate;

(5) the trial court erred in finding the murder was committed for pecuniary gain;

(6) the trial court erred in finding the murder was committed to avoid arrest; and

(7) the trial court erred in finding the murder was cold, calculated and premeditated (CCP)

This Court found no merit to claim (3) because none of the alleged comments by the trial judge indicated bias or prejudice against the defense, and the record indicated that the trial court granted all of Robinson's requests for appointment of experts and additional funds with which to

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[1] This issue reared its head again before the evidentiary hearing. Robinson requested a P.E.T. scan and E.E.G. due to indications in Dr. Wittenberg's report. (PCR168-169) After a telephonic hearing, the trial judge denied the P.E.T. scan because Robinson failed to establish that the test was "necessary to complete a medical opinion, only that the test would be helpful or that it would confirm an existing diagnosis." (PCR170) The trial court noted that a prior request for a P.E.T. scan had been denied, and that denial was affirmed in *Robinson II.* (PCR170) Robinson then arranged for a P.E.T. scan at his own expense - from raising funds from his mother, father and a group of Catholic churches. (PCR185) The motion for transport was granted. (PCR190, 191) There was no evidence presented at the evidentiary hearing which was derived from the P.E.T. scan except that the tests were "inconclusive." (T279).

investigate mitigating evidence. This Court also held that claims (5), (6), and (7) involved the same challenges to the aggravating factors on the same grounds asserted in *Robinson I* which had no merit. *Robinson I,* 684 So.2d at 179 n. 6; *Robinson II,* 761 So.2d at 273 n. 4.

As to Claim 1 on appeal in *Robinson II*, this Court found that the trial court did not err in denying the motion to withdraw the guilty plea because "the record conclusively refutes Robinson's claim that he was unable to form an intelligent waiver of his right to a trial." *Robinson II*, 761 So.2d at 274. This Court further stated:

> The record reflects that Robinson's plea was only accepted after an extensive inquiry. At the plea colloquy, the trial court asked Robinson whether he intended to plead guilty to first-degree murder and informed Robinson that the only possible sentences upon conviction for first-degree murder were death and life in prison. The trial court then questioned Robinson extensively about his background and the factual circumstances of the murder. Robinson explained to the trial court that he would rather be punished by death than sentenced to life in prison. Further, defense counsel notified the court that Robinson had been examined by medical experts and it was their opinion that Robinson was competent to proceed. In addition, both defense counsel and the State questioned Robinson to make sure that he understood that defense counsel had investigated mitigating evidence and that counsel was prepared to present such evidence on his behalf. Robinson stated that he understood but that he did not want to present any mitigating evidence. Finally, the state attorney told Robinson that he intended to seek the death penalty in this case. The record thus

> indicates that Robinson voluntarily and intelligently waived his right to a trial.

Robinson II, 761 So.2d at 274. In a footnote, this Court acknowledged that "It appears that [Robinson] merely changed his mind and no longer wishes to die" after specifically demanding the death penalty at the plea hearing and first penalty phase. *Robinson II,* 761 So.2d at 274 n. 5. This Court affirmed the death sentence on August 19, 1999. *Robinson v. State*, 761 So.2d 269 (Fla. 1999).

The United States Supreme Court denied Robinson's petition for writ of certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057, 120 S.Ct. 1563 (2000).

<u>RULE 3.850 MOTION TO VACATE JUDGMENT AND SENTENCE</u>

Robinson filed a "shell" motion to vacate on February 21, 2001 (PCR104-137). He filed an amended motion on October 3, 2001 (PCR192-259). The amended motion raised the following claims:

> 1. MR. ROBINSON IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE SHORT TIME PERIOD AND LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADING, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF *SPALDING V. DUGGER.*
>
> 2. MR. ROBINSON IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ROBINSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA.STAT. MR. ROBINSON CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

3. MR. ROBINSON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF MR. ROBINSON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.[2]

4. MR. ROBINSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE DEFENSE CASE AND CHALLENGED THE STATE'S CASE. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. ROBINSON'S CONVICTIONS ARE UNRELIABLE.

5. MR. ROBINSON WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL PLEA WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF MR. ROBINSON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

6. MR. ROBINSON IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

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[2]An evidentiary hearing was held on this claim only.

7. MR. ROBINSON’S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE FLORIDA LAW SHIFTS THE BURDEN TO MR. ROBINSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. ROBINSON. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

8. MR. ROBINSON’S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE 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 TO THE UNITED STATES CONSTITUTION.

9. FLORIDA’S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

10. MR. ROBINSON IS INSANE TO BE EXECUTED.

11. MR. ROBINSON DID NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE HIS RIGHT TO A CAPITAL SENTENCING JURY, AND THE TRIAL COURT’S INQUIRY ON THE PURPORTED WAIVER WAS CONSTITUTIONALLY INADEQUATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

12. THE SENTENCING COURT PRECLUDED MR. ROBINSON FROM PRESENTING AND THE SENTENCING COURT FROM CONSIDERING EVIDENCE OF MITIGATION, IN DEROGATION OF MR. ROBINSON'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

13. MR. ROBINSON IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND UNDER INTERNATIONAL LAW BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT.

14. MR. ROBINSON'S PLEA AND SENTENCING WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT

BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

15. THE EIGHTH AMENDMENT AND MR. ROBINSON'S DUE PROCESS RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD. TO THE EXTENT, TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

16. MR. ROBINSON WAS DENIED HIS RIGHT TO A FAIR PLEA AND SENTENCING BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, BY THE IMPROPER CONDUCT OF THE TRIAL COURT WHICH CREATED A BIAS IN FAVOR OF THE STATE. THE IMPROPER CONDUCT OF THE TRIAL COURT REPRESENTS HER PREDISPOSITION TO GIVING MR. ROBINSON THE DEATH PENALTY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING AND NOT MOVING TO RECUSE THE JUDGE.

17. THE TRIAL COURT'S DENIAL OF MR. ROBINSON'S REQUEST FOR A P.E.T. SCAN VIOLATES HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

(PCR 192-200; PCR 201-259). The State filed a Response to the motion (PCR 262-400; PCR 401-484).

The trial judge granted an evidentiary hearing on Claim 3 only (PCR 485). The evidentiary hearing took place January 29-30, 2003. The trial judge denied relief on May 19, 2003 (PCR 540-560). Robinson appealed, raising three issues:

1. THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON NUMEROUS ISSUES INVOLVING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

(a) Failure to adequately investigate and present available evidence of mitigation and to

secure competent expert mental health assistance.

(b) Failure to object or advise the court of Mr. Robinson’s entitlement to a jury determination of his sentence following the remand by this Court and to investigate Mr. Robinson’s ability to knowingly waive that right in his earlier proceeding.

(c) Failure to move to recuse trial court upon remand.

(d) Failure to object to constitutional error.

2. THE LOWER COURT ERRED IN DENYING MR. ROBINSON’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL’S FAILURE TO INVESTIGATE AND ACCURATELY AND PROPERLY WITHDRAW HIS PLEA.

3. VARIOUS CLAIMS RAISED BY MR. ROBINSON MUST BE RAISED HEREIN IN ORDER TO PRESERVE THEM AND TO PROTECT MR. ROBINSON’S RIGHTS.

STATEMENT OF THE FACTS

On August 16, 1994, Robinson confessed to the July 25, 1994, murder of Jane Silvia. As this Court found in *Robinson II:*

> According to Robinson's confession, he and Silvia had been dating, and prior to the murder he had stolen Silvia's television and VCR to pawn for money with which to purchase drugs. Robinson's mother sent Silvia money to buy back her property and she kept this money in her shoes. After their unsuccessful attempts to get back Silvia's property, Robinson and Silvia returned home and Silvia fell asleep on the couch. Robinson then went to his truck to obtain a drywall hammer. He laid the hammer in the bedroom and waited until he was certain Silvia was asleep. He then hit her in the head with the hammer twice, each time piercing her skull. Robinson claimed that Silvia never regained consciousness, although she was still breathing and blood poured from her mouth. Robinson then stuck the claw part of the hammer into the victim's skull. Further, to stop Silvia's breathing and heart beat, Robinson stuck a serrated knife into the soft portion of her neck and down into her chest. After Silvia died, Robinson buried her and took the money that she had hidden in her shoes. During his confession, Robinson also admitted that he had initially lied to the police by telling them that drug dealers had killed Silvia. During a supplemental interview, Robinson stated that he killed Silvia "because he didn't want to battle her for the money" and because he did not want to return to prison.

Robinson II, 761 So.2d at 271.

EVIDENTIARY HEARING EVIDENCE

At the evidentiary hearing on January 29-30, 2003, the defense presented the testimony of three mental health

experts: Dr. Mittenberg, Dr. Lipman, and Dr. Spencer; defense counsel, Mark Bender; a jail minister, Robert Swift; and Robinson's mother, Barbara Judy. The State presented the testimony of one mental health expert, Dr. McClaren.

I. TRIAL COUNSEL: MARK BENDER

Mark Bender, trial counsel, had handled seven or eight murder cases as a prosecutor even though this was his first capital case as a defense attorney. (T 5) Shortly after his appointment, Bender requested co-counsel. (T 6) Bender confirmed that, " ... Mr. Robinson did not want to have a trial, did not want to mount a defense, did not wish to present mitigation, he wished to plead guilty and receive the death penalty ..." (T 7) Bender "honestly believed that we did our best to convince Michael to prepare a defense to go to trial and try to save his life."

Robinson did not have an alibi. He led law enforcement to the victim's body. He confessed his guilt to police. Bender knew the evidence was overwhelming and there may not be a defense to mount; however, they urged Robinson to at least fight for his life. Robinson was very intelligent, very articulate, and scored very high on the IQ test. (T 8) In addition, "he was very sure of himself, very positive ... this was the path he had chosen ... reflected on ... made a

decision that this is what he wanted to do." (T 8-9) Robinson requested that his attorneys present no mitigation or defense; the attorneys advised their client that they would "proffer" mitigation, also against Robinson's objections. (T 53)

Robinson was evaluated by a mental health expert even though Bender had a “gut feeling” Robinson was competent, rational, and knew right from wrong. (T 9) Robinson indicated that he was very religious and "wanted to kill himself, but that was against his religion ..." Robinson believed that by seeking the death penalty, he would receive the "state's sanction for murder." (T 9-10) They did not discuss "at length" the opportunity of filing a motion to suppress the statements. Bender believed the police had performed their work properly. (T 10) Bender did not discuss voluntary intoxication as a viable defense. (T 11)

The defense team retained Dr. Berland, a neuropsychologist, and Antoinette Apel as mental health experts. (T 16) Dr. Berland found Robinson suffered from mental illness, "but it was not to a degree that affected his ability to know right from wrong, that he was competent at the time of the murder and competent to stand trial." (T 20) Dr. Berland had relayed that Robinson was, in fact, competent and had given logical reasons for entering a guilty plea. (T 51,

52) Dr. Apel did not submit a report and, according to Bender, was difficult to reach and "dropped the ball." (T 24) Bender asked the trial court for an additional evaluation to be conducted by Dr. Edward Kirkland. Prior to that evaluation, Robinson entered a plea. (T 21) Although Robinson may have suffered from a mental illness pursuant to Dr. Berland's findings, Bender did not call Dr. Berland on the issue of "mental weakness" at Robinson's initial plea hearing. (T 49)

Although it was unusual to enter a plea with only one doctor's evaluation, Bender believed there may have been "some time constraint of some type." He would have preferred that the second evaluation had been completed before proceeding to a plea. (T 31) However, Bender's decision to ask the trial judge to appoint an additional mental health expert, Dr. Kirkland, did not mean he had any doubts as to Robinson's competence. (T 55)

During his first sentencing hearing, Robinson was very stoic and wanted to receive the death penalty. (T 33) After the first direct appeal was remanded, Robinson sent Bender a letter, requesting withdrawal of the plea, and asking to have mitigation presented on his behalf. (T 37, 39) Bender was reappointed as Robinson's counsel for the re-sentencing proceedings. (T 39)

Although Bender and Robinson discussed moving to recuse Judge Russell from presiding over the resentencing, "Judge Russell and Mr. Robinson ... had a very good rapport and seemed to like one another ... I felt those intangibles ... you just go with your gut and ... staying with Judge Russell was a good choice ..." He believed that "going to a new judge with all the gruesome details" would not have been effective. (T 44) Robinson had concealed the victim's body, gave false statements to the police and robbed the victim of $120.00. Due to these facts, Bender believed Judge Russell was "our best shot at a life sentence." (T 57)

Although Bender thought he might have done a better job on moving to withdraw Robinson's guilty plea, "It's not easy to withdraw a plea. It doesn't just happen because someone now wants to have a trial." (T 45) Although he did not enter a written motion to withdraw the guilty plea, he made an *ore tenus* motion to withdraw the plea at the beginning of the new penalty phase. (T 47) Bender hired an additional expert (Dr. Upson) to evaluate Robinson's mental state for re-sentencing. Upson’s findings were no different from those determined by Dr. Berland in 1995. (T 60) Bender did not recall Dr. Upson having any concerns with the findings of Dr. Berland or Dr. Kirkland. (T 62) In addition, Dr. Lipman evaluated Robinson

for "lingering drug use" and did not find that it affected Robinson's competency. (T 64) During his three years of interaction with Robinson, Bender did not observe any indications that Robinson was not competent to enter his original plea in 1995. (T 65) Drs. Upson and Lipman were retained for mitigation purposes, not for the purpose of determining whether Robinson's plea was given knowingly, freely and voluntarily. (T 66)

In addition to the mental experts who evaluated Robinson, Lynn Williams, a mitigation specialist, "had put in hundreds of hours, pursuing Mr. Robinson's background and getting that information to us." (T 69) Drs. Upson and Lipman and Lynn Williams consulted frequently on the information they had gathered regarding Robinson. (T 70)

II. EXPERT TESTIMONY ON MENTAL HEALTH ISSUES AT EVIDENTIARY HEARING

Dr. Wiley Mittenberg, a clinical neuropsychologist, evaluated Michael Robinson on February 9, 2000, and February 19, 2001. (T 108) He reviewed previous psychological and neuropsychological examinations, as well as other available records. His technician performed eight or nine hours of testing. The tests consisted of Memory Malingering, MMPI, and the Weschler Adult Intelligence Scale, (T 77, 78, 84, 85) Robinson's full scale I.Q. was 119, above-average range. His performance I.Q. was 113, also in the above-average range. (T 86) A person performing in the superior range might have a full scale I.Q. of 120. (T 87) Robinson scored a 96 on the memory test, "in the average range, but well below what we would expect for a person of his intelligence and indicative of brain damage."(T 89)

In addition, Mittenberg gave Robinson the California Learning Test, which also indicated a memory impairment. (T 90) Various other tests were given which indicated "a disorder of thought process consistent with psychosis and/or brain damage." (T 92) Dr. Mittenberg concluded that Robinson suffered from "bipolar mood disorder due to brain damage" a diagnosis previously offered by Drs. Upson and Berland. (T 94)

Mittenberg reviewed medical records from a State Hospital in Missouri from 1987 which indicated Robinson had previously been diagnosed with "hyperactivity and treated with ritalin and psychotherapy" from the age of three through nine. Subsequent to that age, he entered a school for the emotionally disturbed where no medications were administered. (T 97) The hospital records also indicated a history of substance abuse including stimulants, depressants and alcohol. (T 97-8) In Dr. Mittenberg's opinion multiple instances caused brain damage, a condition that "does not go away because brain cells don't regrow." (T 100) In Mittenberg’s opinion Robinson did not make a knowing and intelligent decision to enter a plea of guilty. (T 102) He believed that "... Robinson entered a plea in a condition of mental weakness that was caused by permanent and long-standing brain damage and manic-depressive psychosis ..." (T 103)

On cross-examination, Dr. Mittenberg said he did not interview anyone who was with Robinson in 1995. (T 105) His conclusion that Robinson suffered from brain damage was based on his own examination of the defendant, previous medical records and the diagnoses from other mental health experts. (T 105) He was not impressed with Dr. Kirkland's report as "it seemed to be somewhat cursory, no testing was done."

Dr. Mittenberg said a person with bipolar disorder could function "quite well" with appropriate treatment. (T 113) If there was a prolonged absence of psychiatric medications, it would indicate that a person was not posing any problems in his behavior. (T 116) Dr. Mittenberg felt that even though Robinson may have been in possession of the facts while entering his guilty plea, his ability to rationally think about those facts was impaired. (T 120-21) Further, "If Mr. Robinson made a legally wise decision, it would have been by accident." (T 122) Nevertheless, Robinson was capable of making knowing and intelligent decisions about complex issues. (T 123)

Dr. Jonathan Lipman, a neuropharmacologist, evaluated (by telephone) Michael Robinson three times in 1997. (T 133, 137, 138, 141) In evaluating Robinson, he reviewed information received from mitigation expert, Lynn Williams, containing notes on interviews with Robinson, his family and friends, and former co-workers. In addition, he reviewed the statements Robinson made to police subsequent to the murder. (T 140-41) Records indicated Robinson took ritalin as a child, smoked marijuana as a teen, abused his father's valium prescription and other drugs, and would consume alcohol in the evening. (T 142-43) In his early twenties, Robinson had a "death wish" but

subsequently stayed away from intravenous drug use. (T 145-46) Robinson "used crack cocaine moments before the actual acts of the killing and had been without for several hours prior to that." (T 151) He had lied to police about his simultaneous use of drugs with the murder. (T 151) Robinson's decision to knowingly plead guilty "was deranged by organic toxicity due to drug use." (T 155)

On cross-examination, Dr. Lipman agreed that pharmacological agents can actually cause permanent brain damage. (T 157) His interview with Robinson showed " ... serious problems in reality testing ... his style of thinking was not normal or right ... he was pressured, his speech was tangential ... I could tell that this was in the absence of any drugs." (T 160) Robinson rejected a mitigation defense because he did not want to go back to prison, "where he would be raped, he would rather die than go back to prison." Robinson murdered his victim for money, "motivation that did not indicate brain damage. (T 161) However, Robinson experienced " ... supernatural paralysis of good and evil ... time dilations ...scotomata (light moving across vision).." (T 169) Further, Robinson cycles "between mania and depression." "He isn't just bipolar. There is something wrong with his views on reality." (T 171) Lipman had not seen any

psychological or psychiatric diagnosis of Robinson as being paranoid. (T 177)

Dr. John Alvin Spencer, a clinical and forensic psychologist, reviewed medical and trial records prior to evaluating Robinson. In addition, he reviewed the evaluation reports written by Drs. Lipman and Mittenberg. (T 179, 182, 183) Spencer's clinical interview of Robinson included administering the "MMPI TWO." (T 183) He determined that Robinson had a severe chronic mental order that manifested in his late teens or early 20's, a "bipolar disorder." (T 186-87) He was able to respond to certain things, " ... but he can't do so rationally because he can't hold his brain still long enough ..." (T 189) Further, " ... he's not rational because he can't organize, collect, synthesize." (T 199)

On cross-examination, Dr. Spencer said he was not asked to determine whether Robinson was incompetent for the current proceedings. (T 216) He knew there was something wrong with Robinson "within ten minutes" after meeting with him. (T 222) Further, Robinson's " ... thought processes are grossly compromised now and then ..." (T 231) From the material that was provided to him, it appeared that all the experts agreed that Robinson has a major mental illness. (T 242)

IV. JAIL MINISTRY: ROBERT SWIFT

Robert Swift has volunteered for twelve years at the Orange County Jail under the Chaplain's supervision, distributing bibles and conducting bible studies. (T 259) He found Robinson " ... intelligent, articulate, kind of up ... had a certain amount of energy ... had no difficulty talking." (T 260, 261) Robinson told Swift of his decision to seek the death penalty for himself, "He said this is what I want to do." (T 262) When Robinson was returned to Orange County for the evidentiary hearing, he expressed his desire for an alternative to the death penalty, life imprisonment. Swift said, "He sees a possibility of being of value in that kind of life." (T 268-69)

On cross-examination, Swift said he and his wife were instrumental in raising $2,500.00 for a P.E.T. scan to be conducted on Robinson. (T 271-72) Robinson and he continued to communicate through letters and visits since they first met. (T 273) Robinson had decided to plead guilty because of the guilt he felt in murdering Jane Silva. (T 277)

Upon examination fromm the trial court, Swift said it was his understanding that the results of the P.E.T. scan were "inconclusive ... and wouldn't serve any purpose." (T 279)

III. ROBINSON’S MOTHER: BARBARA JUDY

Barbara Judy, Michael Robinson's mother, said his birth "... was a long delivery and forceps were used ... The shape of his head was actually pointed for several weeks after he was born ... the prints of the forceps were on the side of his face." (T 280-81) She knew there was something psychologically wrong with him from a very early age. Robinson cried continuously and didn't want to sleep when she tried to feed him he would fight, scream and kick. He was very active" (T 281) At the age of six, Robinson was given Ritalin, and dosages increased over the next couple of years. (T 282-83) He was always doing dangerous things, " ... burned ...garbage inside the house ... sticking wires in the outlets ... he did those things all the time." (T 284, 285) She never saw her son consider the consequences of anything he did. Although he choose the "decision to die," she said, " ... that's the choice he made and it wasn't rational. But neither was what he had done." (T 287-88)

On cross-examination, Judy agreed that her son had shown unusual behavior during the course of his life. (T 288) She did not discuss his reasons to plead guilty. (T 290) Although she could not excuse his actions, "he came here damaged and I'm responsible for him being where he is." (T 291) Ms. Judy

provided information to law enforcement that led to Robinson's arrest. (T 292)

Upon examination from the trial court, Judy said she had filed a missing person's report on the victim, Jane Silva, her son's girlfriend. (T 296) Robinson showed up on her doorstep, looking "like something wild and he was really not coherent." (T 296) Upon careful questioning by her, he told her he had killed his girlfriend. (T 297) After Appellant left Judy's home, she did not call the police for a few days. Eventually, she "realized the state he was in he might hurt somebody else and it would be my fault and so I had no choice." (T 298) Neither she nor Robinson's father abused drugs nor alcohol. (T 301) She said, " ... we went to church, we were not perfect ... but he didn't learn the behavior in our house." (T 301)

V. STATE'S EXPERT TESTIMONY

Dr. Harry McClaren, a psychologist specializing in criminal forensic psychology, was the State's only witness. (T 305) He reviewed Robinson's medical and mental health records from the Department of Corrections, the penalty phase of the trial, and the depositions of Drs. Mittenberg, Spencer, and Berland. (T 311, 313) He spoke with Lisa Wiley, Union Correctional's Psychological Specialist, Barbara Judy, Robinson's mother, and Robert Swift, a Christian counselor. He met with Robinson twice and conducted psychological tests. (T 314) Dr. McClaren conducted the MMPI and the Multiaxial Inventory. He reviewed the prior intelligence tests given by other doctors, and read the neuropsychological reports of previous examiners. (T 316)

In his opinion, Robinson " ... understood that he was pleading guilty to murder, understood the possible consequences ... based on a lack of documentation of mental health problems ... it appears to me that he made a rational, knowing ... waiver ..." (T 321-22) Although he believes that Robinson has a mild bipolar disorder, he did not see a severe manic state, "not to the extent that he could not appreciate what he was giving up." (T 323, 337) In addition, the passage of time between Robinson's arrest and plea (six months)

increased his chances of "getting better." (T 324, 325) He agreed with Dr. Upson that Robinson suffered from mild or moderate brain damage. (T 332)

McClaren agreed that there were facts that supported the proposition that Robinson made the choice to murder Jane Silva in order to obtain drug money. (T 358-59) He said Robinson had "volitional control." (T 359) During Robinson's plea hearing, he did not see any indication of "major disorganized speech." (T 362) Most of Robinson's test scores were in the "high average" range. (T 364) Indications of Robinson's bipolar disorder did not come to light until the year 2000. (T 369) In addition, there was no indication that Robinson was suffering from a major depression in 1995 at the time he entered his guilty plea. (T 371)

On cross-examination, Dr. McClaren said he did not find any evidence of malingering in the tests he administered to Robinson. (T 335) On most of the tests administered by previous mental health experts, there was no evidence of Robinson trying to fake a mental illness. (T 336) Although Robinson entered a plea on January 23, 1995, and Dr. Berland's report was dated January 24, 1995, (T 32), McClaren explained that he has given "verbal reports" of his findings and was

later asked to dictate a written report in order to document a conversation with the attorney. (T 347)

An Order denying Robinson's Amended Motion to Vacate was issued on May 19, 2003. (PCR 540-560). This appeal follows.

SUMMARY OF THE ARGUMENT

Point I: This claim alleges Robinson was denied an evidentiary hearing on issues involving effective assistance of counsel. Those issues include failure to present mitigating evidence, failure to ensure a valid waiver of sentencing jury, failure to recuse the trial judge, and failure to object to constitutional error. The issues are insufficiently pled, conclusively refuted by the record, and have been denied by this Court on the merits. Extensive mitigation was presented at Robinson's re-sentencing and current counsel has shown nothing additional that would have changed the outcome of the proceeding. Robinson was competent at the time he entered the plea. At the plea hearing he validly waived a sentencing jury and stated repeatedly he wanted the death penalty. There was no basis to recuse the trial judge, and this issue was decided on the merits on direct appeal. Trial counsel raised numerous constitutional claims. Re-raising the claims as ineffective assistance claims will not change the fact the issues have no merit.

Point II: This claim alleges counsel was ineffective for failing to withdraw Robinson's plea when the case was remanded for re-sentencing. The record shows the plea was voluntarily entered and that Robinson was competent to enter the plea.

Point III: This claim raises issues in order to preserve them for federal review. These issues are insufficiently pled, procedurally barred or not ripe for determination, and have no merit.

ARGUMENT

CLAIM I

THE LOWER COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING ON ISSUES INVOLVING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Robinson claims the trial judge erred in denying several claims of ineffective assistance of counsel without an evidentiary hearing. As discussed below, the specific claims are refuted by the record and there was no error in the summary denial. The initial "shell" motion was filed in February 2001, and the amended motion filed under Rule 3.850 on October 10, 2001 (R 192). In *Finney v. State*, 831 So.2d 651 (Fla. 2002), this Court noted a distinction between 3.850 motions and 3.851 motions. This Court concluded that Finney's 3.850 claims of ineffective assistance of counsel were properly denied without an evidentiary hearing. Robinson is not entitled to an evidentiary hearing simply because he frames the claim as an ineffective assistance claim. All these claims are either facially invalid or conclusively refuted by the record. *See* Fla.R.Crim.P. 3.850(d); *Hamilton v. State*, __ Fla.L.Weekly __ (Fla. June 3, 2004); *Power v. State*, 29 Fla.L.Weekly S207 (Fla. May 6, 2004).

A. (Claims IV and V of Amended Motion)

Failure to adequately investigate and present available evidence of mitigation and to secure competent expert mental health assistance.

Robinson claims counsel failed to present available evidence of mitigation and the mental health evaluations were inadequate in violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). The trial judge summarily denied both claims because they were refuted by the record. Regarding mitigation, the trial judge found:

> Mr. Robinson alleges counsel failed to investigate, discover, and present significant evidence which would have established both statutory and non-statutory mitigating circumstances. He argues counsel presented "only extremely limited mitigation evidence" in the form of two doctors and his mother. He also alleges counsel had obtained an investigator, Lynn Williams, who was, by all accounts, doing all of the work, but the Court was "so distraught about paying the investigator" that Ms. Williams refused to turn over her findings and had to retain counsel to represent her interests. FN3. (A hearing was conducted, whereupon Ms. Williams and her attorney agreed to turn over the results of her investigation.) He also alleges that due to the Court's time constraints, the investigator was unable to finish the investigation.
>
> > FN.3. Ms. Williams charged $15,093.00 for services, at a rate of $45 per hour, and $2,292.49 for costs. She was awarded $9,810.45 for services and $2,292.49 for costs. In contrast, the two attorneys were

> paid $50 per hour pursuant to the court-appointed attorney contract, and they received a combined total of less than $8,500.00 for their work on this case.

After four pages of legal argument, he identifies the available evidence as follows. There were "witnesses" FN4. who would have testified to the facts surrounding Mr. Robinson's life, which would have caused the Court to find additional mitigation. He argues the Court should have learned the results of a PET scan; the fact he lived alone or in state juvenile facilities as an adolescent, finally succumbing to a cycle of drug abuse and crack addiction; the fact he suffered trauma resulting in brain damage, exacerbated by drug addiction; the fact his young life was marked by severe physical and psychological abuse and emotional and educational deprivation; and he was using drugs during the night and early morning hours leading up to the incident.

> FN.4. Rachel Spanjer (special education teacher), Maria Easley Phillips (ex-wife), Sue Doto (aunt), Doyle Robinson (father), Eula Bryant (grandmother), Jay Robinson (brother), Ariene Robinson (paternal grandmother), Bob Swift (prison ministry), Patricia Williams (former girlfriend), and John Carraway (owner of special school).

The record refutes Mr. Robinson's claim that these items were not considered. The following is a list, in the order presented by the State's Response, of the factors which were presented.

- Counsel vigorously pursued a PET scan but was unable to show a particularized need for a PET or SPECT scan beyond the testing which had already been done. Apparently, no such need existed: Mr. Robinson eventually underwent a privately-funded PET scan prior to the 2003 evidentiary hearing, but the results were inconclusive. Consequently, this test would not have yielded any helpful evidence in 1997. Furthermore, in the 1997 sentencing order, this Court found that Mr. Robinson actually did suffer

from brain damage but still imposed the death penalty, finding that it did not prevent him from functioning normally. There is simply no reasonable probability that additional testing would have made a difference in the outcome of the proceedings.

- Witnesses testified that Mr. Robinson had to leave home at age 14 or 15 (R2, pages 55 and 182) and that he was sent to a state school (R2, pages 66-67 and 197).

- This Court listed Mr. Robinson's drug abuse and crack addiction as mitigating factors in the 1997 sentencing order, and gave them great weight. (R2, pages 344 and 348).

- Counsel introduced evidence of several traumatic events to support the unrefuted neurological findings of Dr. Upson and Dr. Berland: forceps delivery, internal bleeding suffered as a child (resulting in unconsciousness, hospitalization and blood transfusion), swimming accident, sticking wires into electrical outlets, use of alcohol and drugs, painting accident from inhalation of fumes, bicycle/car accident, and rapes during previous incarcerations (R2, pages 64-68, 70-71, 77, and 185).

- Counsel presented evidence regarding the exacerbation of brain damage by drug use in the 1997 penalty phase hearing. (R2, pages 88 and 121).

- Counsel presented evidence of physical, psychological, emotional, and educational abuse in 1997: uncle gave him vodka (R2, page 68), father shunned and disowned him (R2 pages 55 and 203), witnessed father mistreat mother (R2, pages 189-190), father knocked him to floor (R2, pages 190-191), paternal grandfather suffered from paranoia and threatened family with gun and died in mental hospital (R2, pages 191-192).

- In 1995, Mr. Robinson told the Court he had been using cocaine through the period leading up to the murder but asserted that he had *not* used it on the day of the murder itself. (RI, pages 9-10). In 1997,

> Dr. Upson reported that Mr. Robinson said he was on a binge for a month prior to the murder. (R2, pages 75-76). Although he might now wish to present additional evidence, the Court already gave the drug abuse factors "great weight." (R2, page 348). *See also Robinson v. State,* 761 So. 2d 269, 271-272 (Fla. 1999).
>
> In its November 1996 opinion, the Florida Supreme Court remanded this case with directions to conduct a new penalty phase proceeding within 60 days. However, defense counsel asked for more time to prepare, which was granted. The death sentence was not re-imposed until August 1997, nine months after the opinion was issued. These additional months provided ample time for any additional investigation which Mr. Robinson had decided to allow his attorneys to pursue. Based on the foregoing, this Court finds that this claim is refuted by the record. Counsel presented a great deal of evidence in support of mitigation, which was duly considered and given great weight. There is no reasonable probability that additional evidence would have resulted in a different sentence.

(PCR 547-550).

As this Court found in *Robinson II*, there was an abundance of mitigation presented. Robinson has pointed to no specific mitigation that was overlooked. He merely presents the names of more witnesses, not specific additional mitigation these witnesses would have added to the list. Presenting duplicative or cumulative information does not meet a defendant's burden of pleading. *Gudinas v. State*, 816 So.2d 1095, 1106 (Fla. 2002); *Kennedy v. State*, 547 So.2d 912, 913

(Fla. 1989); *State v. Lawrence*, 831 So.2d 121,133 (Fla. 2002), *cert. denied*, 538 U.S. 926, 123 S.Ct. 1575 (2003).

Regarding Robinson's *Ake* claim, the trial judge found:

> Mr. Robinson alleges counsel failed to obtain an adequate mental health evaluation and to provide the necessary background information to the mental health consultant. He argues Dr. Upson and Dr. Lipman failed to conduct an adequate review of his background or family history, and further argues that counsel failed to conduct a thorough investigation. He argues his "entire history was classic mitigation" which should have been presented, and asserts that evidence of the abandonment, abuse, emotional and educational deprivation, and head traumas were poorly presented by counsel, along with the effects of drugs and alcohol on his behavior.
>
> Mr. Robinson was examined and psychologically tested by a number of experts based on an extensive history obtained from him, family members, and mitigation specialist Lynn Williams. (R2, page 58; Ins. 22-23; R2-136, Ins. 18-19). Furthermore, the underlying issues in this claim are essentially the same as those set forth in Claim IV, and Mr. Robinson provides little in the way of new facts counsel should have discovered or provided to the experts. Therefore, the Court concludes that this claim is refuted by the record for the reasons set forth in Claim IV.

(PCR 550).

The record indicates that during the resentencing hearing, defense counsel presented the testimony of several experts in psychology and mental health. Moreover, defense counsel also presented evidence of the family situation, Robinson's drug use and childhood problems through testimony

of his mother, Barbara Judy. A review of the record indicates that these individuals provided a complete picture of Robinson’s family problems and mental state. Contrary to Appellant's assertion, this evidence was presented in a clear and comprehensible manner. Because the record conclusively refutes Robinson’s claim that he received an incompetent mental health evaluation, the trial court's summary denial of this claim should be upheld. *See Sireci v. State*, 773 So.2d 34, 45 (Fla. 2000).

Robinson next faults the trial judge for “focusing” on the prejudice prong.(Initial Brief at 43) The trial judge addressed both deficient performance and prejudice. Even if she did not, “there is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Downs v. State*, 740 So.2d 506, 518 n. 19 (Fla. 1999), *cited in Stewart v. State*, 801 So.2d 59, 65 (Fla. 2001).

Robinson relies on *Harvey v. Dugger*, 636 So.2d 1253 (Fla. 1995), *Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998), and *Cook v. State*, 792 So.2d 1197 (Fla. 2001). In *Harvey*, this court remanded for an evidentiary hearing on ineffective assistance of counsel at the penalty phase; however, in *Harvey* there was “substantial mitigation evidence” that had not been

presented at the penalty phase, including mental state information. In the present case, the motion failed to allege any further information than that already presented. Likewise, in *Rivera,* the trial judge held the ineffectiveness claims were procedurally barred. This Court remanded for an evidentiary hearing because "[t]he trial court found only one statutory mitigator despite the fact that numerous mitigating factors allegedly existed and could have been considered." *Rivera*, 717 So.2d at 484. This Court listed twenty-one (21) mitigating circumstances that were alleged in the postconviction motion which had not been presented at the penalty phase. Ironically, *Rivera* contains findings which discredit Robinson's Claim I(c) below.

Third, Robinson relies on *Cook* in which the postconviction motion alleged counsel failed to properly investigate the mental mitigators and Cook's family and personal background, and that counsel waited until the day before the penalty phase hearing to seek the assistance of a mental health expert. The trial court found one mitigating factor: the absence of any prior criminal history. Cook alleged that Dr. Haber's brief evaluation was done the morning of the penalty phase without the benefit of family and other background information. This Court noted that defense

counsel's direct examination of Dr. Haber consisted of five pages in the appellate record, the State's cross-examination covered eight pages, and there was no redirect examination. Cook alleged substantial additional mitigating evidence including a long history of drug use, abuse as a child, racial threats and attacks upon moving to Florida, the death of a close sibling at an early age, a learning disability, and growing up in an atmosphere of chaos and instability. *Cook*, 792 So.2d at 1202-1203. In the present case, the facts were insufficiently pled and the allegations refuted by the record. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989).

Robinson also relies on *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), a case in which counsel presented evidence of only one significant mitigating factor: no prior conviction. *Wiggins*, 123 S.Ct. at 2543. As the Court observed, Wiggins had an "excruciating life history on the

mitigating side of the scale." *Wiggins*, 123 S.Ct. at 2543. The Court further described the mitigation evidence as "powerful" and included severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. Wiggins was homeless and had diminished mental capacity. In the present case, extensive mitigation was presented and there is no additional mitigation alleged in the postconviction motion. The trial court's order is supported by competent, substantial evidence and should not be disturbed.

(b) Failure to object or advise the court of Mr. Robinson's entitlement to a jury determination of his sentence following the remand by this Court and to investigate Mr. Robinson's ability to knowingly waive that right in his earlier proceeding.

This issue was Claim XI below. The trial judge found:

> Mr. Robinson alleges he did not voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury and the trial court's inquiry on the purported waiver was inadequate. He argues that at the time of his plea, he was suffering from chronic brain damage and cocaine withdrawal, plus he had experienced multiple small strokes, and was in the midst of a major depressive episode, of which his wish to die was a symptom. He

also alleges that trial counsel failed to seek a jury for the 1997 penalty phase and appellate counsel failed to seek rehearing before the Florida Supreme Court on the issue of a jury to issue a recommendation.

The issues in this claim are similar to those set forth in Claim III[3]. The claim is procedurally barred because it was raised on direct appeal, and the Florida Supreme Court found the record refuted Mr. Robinson's claim that he was unable to form an intelligent waiver of his right to a trial. *Robinson*, 761 So. 2d at 274.

Furthermore, when the Florida Supreme Court vacated the original death sentence, it remanded the case to this Court with directions "to conduct a new penalty phase hearing before the judge alone." *Robinson*, 684 So. 2d at 180. Mr. Robinson had previously waived his right to a penalty phase jury. Therefore, counsel had no basis to assert a non-existent right.

This claim lacks merit, and it is summarily denied.

(PCR 554). This finding is supported by competent, substantial evidence. The record shows that after Robinson entered his plea, the trial judge discussed the penalty phase with counsel. Counsel then stated:

> MR. IRWIN: We would be waiving the jury for penalty phase, judge.
>
> THE COURT: Have you talked to him about that?
>
> MR. IRWIN: Yes, we have.
>
> THE DEFENDANT: I have stated that earlier.

---

[3]That counsel was ineffective in failing to withdraw the plea.

> THE COURT: You don’t want a jury for the penalty phase?
>
> THE DEFENDANT: I don’t feel I need it. I think if you – contingent on – can you return a penalty phase of death by that?
>
> THE COURT: I’ve done it before.
>
> THE DEFENDANT: That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.

(OR 33). The State argued that since this was such an important decision, the State requested a jury panel to make the recommendation (OR 33).

Although the voluntariness of the plea was raised in Robinson II, this precise issue was not raided. This issue is procedurally barred, but Robinson seeks to avoid the bar by raising the claim as ineffective assistance of counsel. What Robinson is now raising, is his right to a jury on remand for resentencing. In effect, he is arguing that this Court’s remand for judge-alone resentencing in *Robinson II* was error. Robinson has also raised this issue in his habeas petition as ineffective assistance of appellate counsel. If this issue could have been raised on direct appeal from re-sentencing, as Robinson claim in his habeas petition, then it is procedurally barred for Rule 3.851 purposes.

This Court remanded for a resentencing hearing before a judge alone, and the trial judge followed this order precisely as required *See State v. Budina,* 29 Fla.L.Weekly D1062 (Fla. 2d DCA April 30, 2004). Robinson's real complaint is that this Court's order was wrong and the trial judge should not follow this Court's orders. As the trial judge observed, this issue has no merit and is properly summarily denied.

(c) Failure to move to recuse trial court upon remand.

This was Claim XVI below. The trial court held:

> Mr. Robinson alleges the Court's bias in favor of the State and predisposition to sentencing him to death are evident on the record. He argues the Court "constantly blamed the defense, was obsessed by what she thought was an over-abundance of money spent on defendant in Mr. Robinson, and made improper remarks..." (*See* examples in his motion on pages 61-62). He argues the Court changed its ruling on his request for a SPECT scan because she felt to much time had been wasted on his case, and went through the motions of a penalty phase when she was already aware that she would sentence him to death. Finally, he cites the conclusion in the April 12, 1995 sentencing order that the aggravating circumstances *could not* be outweighed by any *potential* mitigating circumstances, arguing this demonstrates the Court's inability to consider any mitigating circumstances in his case at any time. Again, almost as an afterthought, he adds the claim that counsel was ineffective for failing to recuse the Court prior to the new penalty phase hearing.
>
> Mr. Robinson's claims of actual bias are procedurally barred because the statements to which he refers were made on the record and, therefore, they were known at the time of the direct appeal. In addition, the comments are insufficient to show

> actual bias amounting to a denial of his constitutional right to a fair and impartial tribunal, citing *Asay v. State*, 769 So. 2d 974, 980 (Fla. 2000). The claim of actual judicial bias should have been, could have been, or actually was raised on direct appeal. (It does not matter whether it was or not; if it could have been raised, it is not appropriate for consideration in a motion for postconviction relief.) Therefore, it is procedurally barred.
>
> To the extent Mr. Robinson alleges that counsel should have moved to recuse the undersigned judge, that claim lacks merit. Mr. Bender testified at the January 2003 evidentiary hearing that he asked Mr. Robinson if he wanted another judge. Together, they decided that Judge Russell and Mr. Robinson had a good rapport, and that by the time of the second sentencing hearing, she was "numbed" to the facts of the case. There is no reasonable probability that the outcome would have been different if a different judge had assumed responsibility for this case.
>
> This claim is procedurally barred, it lacks merit, and it is summarily denied.

(PCR 557-558).

The issue of the trial judge's bias or impartiality was raised in *Robinson II* and this Court held:

> None of the alleged comments by the trial judge indicated bias or prejudice against the defense, and the record indicates that the trial court granted all of Robinson's requests for appointment of experts and additional funds with which to investigate mitigating evidence.

Robinson v. State, 761 So.2d 269, 273 (Fla. 1999). This issue is procedurally barred. Raising the issue as an

ineffective assistance claim does not resurrect the issue. *Medina*, supra.

Further, this claim has no merit. As defense counsel testified at the evidentiary hearing, they felt Judge Russell was the appropriate judge for Robinson's case. In order to succeed on a motion to disqualify:

> We have repeatedly held that a motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." *Jackson v. State*, 599 So.2d 103, 107 (Fla.1992); *Gilliam v. State*, 582 So.2d 610, 611 (Fla.1991); *Dragovich v. State*, 492 So.2d 350, 352 (Fla.1986). The motion will be found legally insufficient "if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." *Correll v. State*, 698 So.2d 522, 524 (Fla.1997). The fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or "allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that he judge discussed his opinion with others," are generally considered legally insufficient reasons to warrant the judge's disqualification. *Jackson*, 599 So.2d at 107.

Rivera v. State, 717 So.2d 477, 480-481 (Fla. 1998). This issue was argued on direct appeal and all facts were before this Court. Robinson argues that, had defense counsel filed a motion to recuse Judge Russell, a different standard would have applied and he would have prevailed. This is pure speculation. This Court found no merit to the allegations

raised in *Robinson II*. If there was no merit to the allegation, defense counsel cannot be ineffective for failing to raise the issue.

Last, Robinson complains that evidence was taken at the evidentiary hearing on this point (Initial brief at 56). This claim is couched in terms of issues on which the trial court erroneously denied an evidentiary hearing. Robinson just admitted evidence was presented; therefore, this claim has no merit.

(d) Failure to object to constitutional error.

This issue is insufficiently pled on appeal. *See Shere v. State*, 742 So.2d 215, 218 n. 6 (Fla. 1999). Robinson states that trial counsel failed to object and preserve issues of constitutional error, "for example" the unconstitutionality of the Florida death penalty (Initial brief at 57). Trial counsel filed a broad range of motions on the constitutionality of the death penalty. (OR 160-172, 173-174, 189-193, 196-212). This issue is not pled with enough specificity to identify the areas of complaint and frame a claim of ineffectiveness. Furthermore, the issue has no merit. This Court has repeatedly rejected challenges to the constitutionality of Florida's capital sentencing scheme. *See Floyd v. State,* 808 So.2d 175, 193 (Fla. 2002); *Fotopoulos v.*

State, 608 So. 2d 784, 794 & n. 7 (Fla. 1992) (rejecting a series of constitutional challenges to Florida's death penalty statute). Additionally, this Court has repeatedly rejected claims that electrocution is unconstitutional. *See, e.g., Provenzano v. Moore,* 744 So.2d 413, 415 (Fla. 1999); *Jones v. State,* 701 So.2d 76, 79 (Fla. 1997); *Medina v. State,* 690 So.2d 1241, 1244 (Fla. 1997). This Court has also rejected claims that lethal injection is unconstitutional and that the application of the amended statute violates the Ex Post Facto Clause. *See Bryan v. State,* 753 So.2d 1244, 1253 (Fla. 2000) (stating that lethal injection is "generally viewed as a more humane method of execution"); *Sims v. State,* 754 So.2d 657, 664 (Fla. 2000) (finding no ex post facto violation). Thus, even had counsel objected to the imposition of Robinson's death sentence on these grounds, he would not have prevailed. Counsel cannot be deemed ineffective for failing to make these meritless arguments. *See Griffin v. State* 866 So.2d 1, 17 (Fla. 2003); *Melendez v. State,* 612 So.2d 1366, 1369 (Fla. 1992). The trial judge found the constitutional claims presented in Claims VII, IX and XIII procedurally barred and without merit (PCR 553, 555).

Robinson also claims counsel was ineffective for failing to raise the issue of burden shifting on

aggravating/mitigating circumstances. This issue was Claim VII below. The trial court found the issue procedurally barred since trial counsel raised the issue before the trial court. (R 551). Furthermore, this issue has been repeatedly rejected by this Court and has no merit. The ineffective assistance of counsel claim is meritless because the underlying claim is meritless. *Moore v. State,* 820 So. 2d 199 (Fla. 2002); *Gorby v. State,* 819 So. 2d 664 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 623 (Fla. 2002); *Freeman v. State,* 761 So. 2d 1055, 1067 (Fla. 2000); *Rutherford v. Moore*, 774 So. 2d 637, 644 n. 8 (Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365 (Fla. 1998); *Shellito v. State,* 701 So. 2d 837, 842-43 (Fla. 1997); *Groover v. State*, 656 So. 2d 424, 425 (Fla. 1995); *See also, Blystone v. Pennsylvania,* 494 U.S. 299 (1990); *Boyde v. California,* 494 U.S. 370 (1990). This claim is not a basis for relief, and the Circuit Court's denial of relief should not be disturbed.

CLAIM II

THE LOWER COURT DID NOT ERR IN DENYING MR. ROBINSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO WITHDRAW HIS PLEA.

This issue was Claim III in the motion for postconvction relief. The trial court held:

> Mr. Robinson alleges counsel performed deficiently by failing to "accurately and properly withdraw" his plea in accordance with the requirements set forth in Rule 3.170(f) of the Florida Rules of Criminal Procedure. In the oral motion to withdraw plea, counsel argued that Mr. Robinson was unable to form an intelligent waiver of his rights, but failed to offer any further explanation. He contends that with proper preparation, counsel would have presented a written motion to the Court with a request for a specific hearing time. He argues that during the penalty phase proceedings a neuropsychologist was available to testify that he was suffering from a mental illness and a neuropharmacologist was waiting telephonically, but counsel failed to call them. He also argues counsel failed to prepare the doctors to testify to the issue of mental weakness, a requirement for withdrawing a plea.
>
> At the evidentiary hearing conducted January 29-31, 2003, Mr. Robinson presented testimony indicating that he suffered from bipolar disorder (manic type), behavioral problems since childhood, chronic brain damage, and severe after-effects stemming from his abuse of cocaine and cocaine withdrawal. In his motion, he also alleged that he had experienced multiple small strokes. Through collateral counsel, he argued that at the time of his plea, his chronic brain damage, combined with prolonged drug use, affected his personality, judgment, and impulsiveness. He also argued that these problems distorted his perceptions of reality and impaired his intelligence. Finally, he argued his request for the death penalty - in other words, his wish to die

- was merely a symptom of a major depressive episode, and that the severity of his depression rendered him incapable of entering a knowing, voluntary, and intelligent plea.

In 1995 and again in 1997, this Court was well aware of Mr. Robinson's history and mental state. The 1997 resentencing order contains a litany of mitigating issues including frontal lobe brain damage, mental health infirmity, and substance abuse that this Court considered. The expert testimony presented at the 2003 evidentiary hearing offered little more except details on the symptoms and effects of manic depression, which has been confirmed through the testimony of numerous witnesses throughout the years. However, the Court is not persuaded that Mr. Robinson's request for the death penalty - in other words, his wish to die - constitutes evidence that he was mentally or emotionally incapable of making the decision to waive his legal rights. His depression did not prevent him from making logical, self-interested decisions. The description "suicidal" has volatile connotations, but assuming Mr. Robinson was indeed suicidal as a result of his mental problems, drug abuse and his own actions, that does not mean he was irrational or incapable of making a knowing, intelligent, and voluntary decision.

From the first day he appeared in court, Mr. Robinson was determined to plead guilty and seek the death penalty. He was consistent with this request in every court hearing. At the January 23, 1995, plea hearing, he asked Judge Russell whether she was sure she could impose the death penalty without a jury. The transcript of this hearing demonstrated that he was calm and focused, showing none of the manic behavior which has been mentioned so often. He responded directly, with coherent explanations for his answers. At the first sentencing hearing, he insisted upon his competence. He expressed his satisfaction with his attorneys, acknowledging that they had attempted to convince him to pursue mitigation but taking full responsibility upon himself for the decision not to do so. Even after the second sentencing hearing, following the

unsuccessful attempt to withdraw the plea, he expressed his understanding that imposing the death penalty was a difficult thing to do. Several years on death row and consultations with a spiritual advisor have persuaded him that he should leave this life or death matter in God's hands. However, this change of heart does not invalidate his original decisions.

Mr. Robinson has consistently provided logical, rational reasons for pleading guilty. As he explained during the 1995 plea hearing, he killed someone and felt he deserved the death penalty because of that. As he expressed to Mr. Swift, the prison ministry volunteer, he felt remorse for murdering Ms. Silvia, someone whom he had loved and who had been good to him. As he expressed in a May 28, 1997, interview (the transcript of which was reviewed by defense witnesses for the evidentiary hearing), he was repeatedly raped in prison while serving an earlier sentence. It appears that the trauma and humiliation of those attacks instilled in him a grim determination to avoid future imprisonment at all costs.

Mr. Robinson was subsequently released on control release, but due to his drug addition, he stole and pawned several of Ms. Silvia's belongings to obtain cash for drugs. He feared that she would turn him in, and this new offense would have violated the terms of his release. He believed he would have to return to prison for 17 years, and this prospect spurred him to kill Ms. Silvia, who had become a potential liability. He believed that if he eliminated her and did not get caught, he would not return to prison, a highly logical, albeit self-interested, thought process. When he was ultimately caught and charged with murder, the outlook changed, but Mr. Robinson again responded in a logical fashion, deciding to pursue the death penalty. He wholeheartedly felt that he would rather die than spend his life in prison. While not everyone would agree with him on this point, this Court declines to find that his decision was unfounded, irrational, unknowing or involuntary. As Dr. McClaren pointed out, there are certain situations in which suicide

> may present a viable option. During World War II, soldiers who feared being captured or tortured carried cyanide capsules. Alternately, when faced with terminal illness, some individuals choose euthanasia to avoid prolonged suffering. These choices do not necessarily indicate the presence of mental illness or weakness.
>
> Mr. Robinson always presented himself as an intelligent, articulate person with keen insight and self-awareness, and he was never shy about making his desires or concerns known. Based on the foregoing, this Court concludes that he suffered no prejudice as a result of counsel's failure to file a written motion to withdraw his plea or to present testimony comparable to that submitted at the evidentiary hearing. There is no reasonable probability that these actions would have resulted in a more favorable outcome.

(PCR 543-547).

The 1995 plea colloquy clearly shows that Robinson made an intelligent waiver of his right to a trial. Prior to the entry of the guilty plea, defense counsel asked the Court to order a psychiatric evaluation to verify Robinson's competence to enter the plea. Counsel stated "[w]e think that he's competent. Dr. Berland has said that he's competent. We can go forward with the plea today." (OR 2) Based on that representation, the trial judge agreed to proceed with the plea hearing "contingent upon Dr. Kirkland's report" confirming Robinson's competency. (OR 3, 4)

Thereafter, Defense Counsel explained that Robinson "does not wish to present any defense" and "does not want to present

any mitigation." (OR 6) He added that Robinson "is seeking the death penalty." (OR 6)

Defense Counsel asked for an extensive colloquy to make sure that Mr. Robinson understood all the rights that he was giving up and to make sure that the attorneys explained to him in detail what would be involved and the efforts that they made to try to convince him that they felt that certain defenses could be raised. In the attorneys' opinion this was not a death penalty case, and there were a number of issues that could be raised at trial. The attorneys believed that even if Robinson were found guilty at trial, there was no certainty that any appellate court would necessarily uphold any death penalty sentence. Defense counsel represented they had met with Robinson "on a number of occasions" and Dr. Berland had also seen him. There was no reason to believe Robinson was not competent to proceed or didn't understand the nature of the proceedings. (OR 6-7)

Thereafter, an extensive plea colloquy ensued. Mr. Robinson was asked whether he understood that if he entered the guilty plea he "would only have the option of death or life in prison." (OR 7) He responded: "Yes, Ma'am, I do." (OR 7) Thereafter, Robinson was sworn and proceeded to answer many questions and provide a detailed factual basis for his plea.

(OR 8-9) Robinson provided his age, his educational background, a history of where, and with whom, he had lived throughout his life, his work and military service history, and his two-year marriage. (OR 8-10)

Robinson told the judge that the last time he did crack cocaine was "[s]hortly before this incident happened." (OR 9-10) He defined "shortly" as "days" before. (OR 10) He added that he was not feeling any effects of that drug at the time he murdered Jane. (OR 10). He told Judge Russell that he wanted to plead guilty to Jane's murder, and he was doing so freely and voluntarily. (OR 11) He acknowledged having been seen and evaluated by Dr. Berland who found him competent. (OR 11) Robinson explained that he killed Jane because he "was on parole . . . on a nine year sentence." (OR 12) He had been released "on CRD" after nine months, but "was on parole for seven years. .." (OR 12, 13) He had stolen a "TV, microwave, [and] VCR" from Jane, who had reported it to the police. (OR 13) Jane "was given seven days to call back and have the charges initiated." (OR 13) To him, "[t]he choice . . . meant ten years in prison on top of seven years I would get for violation of parole . . . if she made that call . ." (OR 13) When Judge Russell interjected: "Now you're looking at more than that," Robinson responded: "If I got away, I was looking

at nothing." (OR 13) Acknowledging that he thought it was possible for him to get away with Jane's murder, he added that in any event, he "would have rather faced death than go back to prison for seventeen years. (OR 13-14) Robinson said that he was well aware that in pleading he was facing the death penalty or "natural life behind prison bars." (OR 14) Robinson explained that he had been in prison four times in his 29 years, and he did "[n]ot very much" like it. (OR 14)

Judge Russell then asked: "How did you kill her?" (OR 15) Robinson proceeded to explain that he tried to get Jane's things back, but was unsuccessful. (OR 15) He had kept that information from her though, and "[s]o she wasn't aware of the danger that she was in." (OR 15) He added: ". . . I understood that once I had explained to her that she would no longer be able to get her things back, she was going to make the call . . . . I didn't feel like I could take that risk." (OR 15)

Regarding the help of his attorneys, Robinson told the court that:

> [t]hey have tried to explain to me everything that is going on, what the possibilities were, you know, what they could do. And they, you know, went to the court. They actually got me an extra lawyer that I, you know, beyond what I need . . . . and they are very good, and I'm very

> satisfied with what they have tried to do for me . . . . And they showed me . . . case law explaining that they have to do what I asked them to do concerning my defense as long as I am competent . . . and showed me case law concerning the court proceedings. (OR 16-17)

Robinson added that although his attorneys had tried to talk him into "fighting this," he did not think they could win at trial, especially not in view of the full confession he had given the police. (OR 17) He explained that as a Christian, he preferred to die and go to heaven rather than to spend his life in prison. (OR 18) Robinson assured the court that no one had promised him anything in exchange for his plea. (OR 18)

The State then presented the factual basis for the murder charges which was taken directly from the "full confession" Robinson had given the police. (OR 18-21) A copy of the transcript of the confession was placed into evidence in support of the factual basis for the plea. (OR 21)

Thereafter, Robinson supplied additional details of the crime. He opined that Jane did not wake up when he struck her, and the raising of her body was a "muscular reflex." (OR 22) He assured the court: "I happen to be a very intelligent

person," who "killed someone" and feel that "I deserve the death penalty." (OR 22-23)

At that point, Defense Counsel engaged Robinson in an extensive, detailed colloquy on the issue of counsels' advice and Robinson's instructions regarding the attorneys' handling of his case. (OR 23-27) During same, Robinson affirmed that his attorneys had "taken extensive depositions in this case" and had shown him "all of the evidence . . .." (OR 26) Robinson reiterated that his attorneys had done "a hundred percent of everything that you could have done, or that I would allow you to do." (OR 27) He added that although his counsel had explained to him what efforts they would use to try to get him off altogether, he did not feel that there was any chance that they would succeed. (OR 28)

Robinson acknowledged that he understood that entering a guilty plea would not affect the ultimate sentence; it would not increase, or decrease, the likelihood of being sentenced to death. (OR 28, 29, 30) He reiterated that he was nonetheless "[s]ure, absolutely" that he wanted to enter the guilty plea.

Thereupon, the trial judge found:

> After talking to you and the attorneys talking to you, I've asked more questions than normal because I want to get a feel for where you are mentally. It appears to me that you are alert and intelligent,

> and you seem to understand the consequences. (OR 30-31)

In an abundance of caution, and because one of the previously appointed mental health experts had not done an adequate evaluation of Robinson, Judge Russell appointed Dr. Kirkland to examine Robinson and report on his competency. (OR 31) In so doing, the judge made it clear that the appointment was being done in an abundance of caution, noting "I have no reason to believe that it won't come back the same as Dr. Berland." (OR 31) Thereafter, Judge Russell accepted the plea. (OR 35)

Dr. Berland's report,[4] dated the day after the plea proceeding, stated that Robinson falls within "the superior range of intelligence," having an IQ of 120. He concluded that:

> [d]espite . . . [a] history of symptoms of mental illness . . ., there was no evidence . . . recommending that this defendant be found incompetent to proceed to trial. . . . It was evident from both the actions that he described and from his reports of his thoughts at the time that he was clearly aware of the nature, the immediate consequences, and the wrongfulness of his actions at the time of this offense. There was therefore no

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[4] The reports of Dr. Berland and Dr. Kirkland were admitted as Defense Exhibit #1 in the original record, SC Case No. 85,605. The reports were attached as an exhibit to the State's answer brief in *Robinson II*, SC Case No. 91,317. They are likewise attached to this brief for the Court's convenience.

> evidence to support an insanity plea in this case. Additionally, he denied recent substance abuse or the symptoms of mental disturbance which might permit consideration of a 'Gurganus defense,' in which questions regarding his ability to form specific intent might be raised at trial.

Dr. Berland added that "[t]he only clinical legal issue . . . found was mitigation at sentencing." The doctor made clear that in reaching his opinion of competency, he was aware of Robinson's reasons for refusing to permit the presentation of mitigation at sentencing.

Approximately two weeks later, Dr. Kirkland examined Robinson, and on February 7, 1998, he issued his evaluation and opinion. Dr. Kirkland concluded that Robinson:

> 1. was legally sane at the time of the commission of the act of murder of his female friend, Jane Silvia.
> 2. was mentally competent to stand trial, and **to enter a plea of guilty.**
> 3. is competent to be sentenced.(emphasis added)

In the instant case, the trial judge had the benefit of a much more lengthy and detailed plea colloquy involving extensive personal participation by Robinson. Both of his trial counsel and the two prosecutors also participated. It is clear that Robinson knowingly, voluntarily, and intelligently entered his guilty plea, having full understanding of the significance thereof.

Further, the trial judge was aware of Dr. Berland's evaluation of Robinson's mental state and his opinion that Robinson was competent. In an abundance of caution, she accepted the plea on the condition that Dr. Kirkland's evaluation also reflect an opinion of competency.

Robinson challenges the findings the trial judge made after the evidentiary hearing; but, as outlined above, those findings are supported by the record of the plea hearing and this Court's prior findings in *Robinson II.* This Court held, among other findings, that:

> We find no error in the trial court's denial of Robinson's motion. Indeed, the record conclusively refutes Robinson's claim that he was unable to form an intelligent waiver of his right to a trial. The record reflects that Robinson's plea was only accepted after an extensive inquiry. At the plea colloquy, the trial court asked Robinson whether he intended to plead guilty to first-degree murder and informed Robinson that the only possible sentences upon conviction for first-degree murder were death and life in prison. The trial court then questioned Robinson extensively about his background and the factual circumstances of the murder. Robinson explained to the trial court that he would rather be punished by death than sentenced to life in prison. Further, defense counsel notified the court that Robinson had been examined by medical experts and it was their opinion that Robinson was competent to proceed. In addition, both defense counsel and the State questioned Robinson to make sure that he understood that defense counsel had investigated mitigating evidence and that counsel was prepared to present such evidence on his behalf. Robinson stated that he understood but that he did not want to present any mitigating evidence. Finally, the state

> attorney told Robinson that he intended to seek the death penalty in this case. The record thus indicates that Robinson voluntarily and intelligently waived his right to a trial. He has failed to demonstrate why such plea should be withdrawn. Accordingly, we find no error.
>
> Robinson's reliance on *Gunn v. State*, 643 So.2d 677 (Fla. 4th DCA 1994), is misplaced. There the defendant pled guilty but before sentencing moved to withdraw the guilty plea. The trial court summarily denied the motion without giving the defendant an opportunity to argue reasons for the motion. The district court held that as a matter of fundamental due process, Gunn should have been given the opportunity to be heard on his motion to withdraw the plea. *Id.* at 679. Here, the trial court did not deny Robinson the opportunity to provide grounds for his motion. Rather, defense counsel moved to withdraw Robinson's plea without providing factual allegations in support of the motion. Contrary to Robinson's assertion, the record does not indicate that the trial court denied Robinson the opportunity to argue his motion. Rather, in denying the motion, the trial court recalled Robinson's plea and correctly found that his claim was conclusively refuted by the record. [FN5]
>
> > FN5. We find no merit to Robinson's subclaim that he will be denied the benefit of his bargain if he is not allowed to change his plea. Robinson pled guilty and specifically demanded the death penalty. The fact that this Court initially reversed his sentence of death does not deny him the right to seek imposition of the death penalty. He may still do so. It appears that he merely changed his mind and no longer wishes to die.

Robinson v. State, 761 So.2d 269, 273 -275 (Fla. 1999). This Court ruled on the merits that Robinson’s plea was voluntary. The current attempt to frame this claim as an ineffective

assistance of counsel claim fails. This Court found that the plea was voluntarily entered; therefore, any attempt to withdraw the plea would be futile since, as this Court put it, "[Robinson] merely changed his mind and no longer wishes to die." *Id.* This is a classic example of raising a claim under the guise of ineffective assistance of counsel after the claim was rejected on the merits on direct appeal. *Medina v. State*, 573 So.2d 293 (Fla. 1990). Robinson can show no deficient performance or prejudice. *Strickland.*

<u>CLAIM III</u>

THE LOWER COURT DID NOT ERR IN DENYING VARIOUS CLAIMS WHICH HAVE NO MERIT AND WERE RAISED SIMPLY IN ORDER TO PRESERVE THEM

Robinson claims there "may" be public records which were not disclosed, the nature of which are unspecified. This claim is speculative and insufficiently pled. *See Shere v. State*, 742 So.2d, 215, 218 n. 6 (Fla. 1999). As stated in *Shere*:

> In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review.

Moreover, "[t]he purpose of an appellate brief is to present arguments in support of the points on appeal." *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990). *See also, Lawrence v. State,* 831 So.2d 121, 133 (Fla. 2002). The trial judge found that Robinson conceded this claim was insufficiently pled in Claim II of the postconviction motion (PCR 543). This ruling is supported by the record.

Second, Robinson claims he is innocent of the death penalty. This was Claim VI of the motion for postcoviction relief. The trail judge held these claims were raised on appeal and are therefore procedurally barred (PCR 551). Not only is this claim procedurally barred, it is insufficiently pled and has no merit. This Court made a thorough review of the case on direct appeal in both *Robinson I* and *Robinson II*. Robinson confessed to the murder and expanded on that confession in his 1995 plea.

Third, Robinson claims he is insane to be executed. This was Claim X below and the trial court found that Robinson conceded the claim was not ripe (PCR 553). The claim is facially insufficient and not ripe for adjudication. In his claim, Defendant does not assert any facts to show that he will be incompetent to be executed. Instead, Defendant merely asserts in a conclusory fashion that he may be incompetent in

the future. Such assertions are facially insufficient to state a claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). As such, the claim should be denied as facially insufficient. Moreover, this claim cannot be raised until an execution is imminent. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. Defendant cannot raise this issue in this Court pursuant to Fla. R. Crim. P. 3.811(c) until he has properly raised the issue with the Governor pursuant to §922.07, Fla. Stat. (1999). Thus, the claim is premature and was properly summarily rejected.

Fourth, Robinson claims the trial court restricted consideration of mitigating circumstances. This was Claims XII and XV below, and the trial court correctly held the issue procedurally barred. (PCR 555). Further, this issue has no merit. This was an issue in *Robinson II* and this court reviewed the trial court's determination of mitigating circumstances as follows:

> Here, the trial judge meticulously identified each mitigating circumstance presented by the defense and stated her conclusion as to each mitigator, supplying facts and reasoning for her conclusions.

Robinson v. State, 761 So.2d 269, 276 (Fla. 1999).

Last, Robinson claims lethal injection is unconstitutional. This was Claim XIII below and the trial court found the issue procedurally barred and without merit (PCR 555-556). This issue is procedurally barred because it could have been but was not raised on direct appeal. Additionally, the issue has no merit. *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003); *Provenzano v. State*, 761 So.2d 1097, 1099 (Fla. 2000); *Sims v. State*, 754 So.2d 657 (Fla. 2000).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Honorable Court affirm the trial court order denying 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: **Melissa Minsk Donoho**, **and James S. Lewis**, 500 S.E. 6th, Suite 100, Fort Lauderdale, FL 33301, on this ______ day of June, 2004.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on .

____
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