IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1860

TIMOTHY ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT FOR ESCAMBIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT I

THE TRIAL COURT ERRED WHEN IT DENIED MR. ROBINSON'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION BECAUSE COUNSEL'S PERFORMANCE DURING THE PENALTY PHASE WAS INEFFECTIVE.

In Answer Brief of Appellee, the State offers the following arguments in opposition to Mr. Robinson's claim that trial counsel rendered ineffective assistance of counsel during penalty phase: (1) The evidence offered by Mr. Robinson during penalty phase would have prejudiced Mr. Robinson; (2) The mitigation offered in postconviction is not enough to overcome the "extremely weighty aggravation;" and (3) The evidence Mr. Robinson presented during postconviction was "largely repetitious" of the evidence presented during the penalty phase. Brief of Appellee, 2, 30-33. In this Reply Brief of Appellant, Mr. Robinson will reply to each of these arguments.

1. THE STATE'S ARGUMENT THAT THE EVIDENCE PRESENTED DURING POSTCONVICTION WOULD HAVE PREJUDICED MR. ROBINSON

The State argues that "Robinson's postconviction evidence, not any trial counsel deficiency, would have prejudiced Robinson and reinforced the State's trial evidence that showed Robinson's leadership role in the home invasion charged in this case." Answer Brief of Appellee at 30.

The fact that postconviction counsel uncovered some apparently adverse evidence is unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." *See Sears v. Upton*, 130 S.Ct. 3259, 3264 (2010). While some of the evidence offered during postconviction might not have made Mr. Robinson more likeable to the jury or to the trial court, competent counsel would have been able to turn most, if not all, of this evidence into a positive. *Id.*; *See also, Porter v. McCollum*, 130 S.Ct. 447 (2010) (holding that evidence that defendant was AWOL was consistent with defendant's theory of mitigation and did not diminish the evidence of his military service). Much of the evidence that the State points to as prejudicial would have aided the jury and the trial court in understanding Mr. Robinson and the factors that led to his arrest and conviction. Moreover, when considered in the context of the trial and postconviction proceedings as a whole, the evidence cited by the State is not

prejudicial.

For example, the State argues that Edward Robinson, Sr.'s testimony that Mr. Robinson was "very aggressive" and treated him like he was "non-existent" would have harmed Mr. Robinson in the penalty phase and it would have conflicted with the theme that Mr. Robinson was a "sweet child . . . who went to church regularly, wanted to be a minister, obtained his high school diploma or equivalent degree, and assisted with family finances." Answer Brief of Appellee, 40-41. Likewise, the State argues that the postconviction testimony of Mr. Robinson's brother "that he used drugs with the Defendant, broke into houses with him, and armed himself with a .22 rifle with Defendant Robinson when anyone 'messed with' them" was a "weakness in Robinson's postconviction evidence." *Id*. at 42-43.

First, this Court held on direct appeal that the evidence presented during the penalty phase of Mr. Robinson's trial, which established only that Mr. Robinson "maintained close family ties and had been supportive of his mother," did not provide a reasonable basis for the jury's life recommendation. *Robinson v. State*, 610 So. 2d 1288, 1292 (Fla. 1992). By the time of the penalty phase, the jury had already convicted Mr. Robinson of four counts of first degree murder, one count of attempted first degree murder, six counts of kidnapping with a firearm, two counts

of sexual battery with a firearm, one count of conspiracy to traffic in more than 400 grams of cocaine, and two counts of robbery with a firearm. R. Vol. I, 1201-05. By virtue of these convictions, the jury had already decided that Mr. Robinson was "aggressive" and that he was involved with drugs. Testimony about Mr. Robinson's prior drug use or aggressive behavior would not have been a bombshell for the jury or for the trial court.

Additionally, it is important to consider the context in which Mr. Robinson allegedly displayed aggression toward his father and treated him as though he was "non-existent." By all accounts, Mr. Robinson's father was violent, explosive, and cruel. He told Mr. Robinson that he was not his real father, Evid. Vol. I, 91, and viewed him as "the baby in the way." PC-R. Vol. XI, 2125. He did not show his children any love. Evid. Vol. I, 10, 45, 147. It is hardly surprising that Mr. Robinson ignored or displayed aggression toward a man who beat him and his siblings with two-by-fours, sticks, extension cords, and his fists[1], knocked out two of Mr. Robinson's teeth[2], verbally abused, embarrassed, and insulted his children[3], threatened to kill his entire family on multiple occasions[4], chopped up the furniture

[1] Evid. Vol. I, 137-38; Evid. Vol. II, 188, 281.
[2] Evid. Vol. I, 138.
[3] PC-R. Vol. XI, 2128; Evid. Vol. I, 9, 73, 76-77, 136-137; Evid. Vol. II, 281.
[4] Evid. Vol. I, 19, 51, 144.

with a bowie knife[5], broke his mother's jaw and nose and gave her black eyes[6], knocked his mother down the stairs[7], pulled his mother's hair out[8], threw his mother down and choked her[9], hit his mother in the head with vases[10], and called his mother a "stupid bitch" and a "whore."[11] In fact, Mr. Robinson's father was so abusive that even Mary Robinson, whom the State describes as "Robinson's loving mother,"[12] once shot him in the hip at point blank range. PC-R. Vol. XI, 2116-17. Furthermore, as Dr. Dunn explained, boys like Mr. Robinson who repeatedly witness their mothers being beaten experience "a tremendous amount of repressed anger and trauma that is lifelong." Evid. Vol. II, 279.

In contrast to the testimony presented at the penalty phase of Mr. Robinson's trial, which provided no explanation for Mr. Robinson's behavior, the testimony presented at the evidentiary hearing establishes how "some very negative influences and corrupting influences, abuse and violence . . . made it very difficult for him to proceed in a healthy and productive kind of way." Evid. Vol. I, 207-08; *See also*, *Sears*, 130 S.Ct. 3259 (holding that the fact that the Sears' brother was a

[5] Evid. Vol. I, 93-96, 140.
[6] Evid. Vol. I, 137, 161.
[7] Evid. Vol. I, 81.
[8] Evid. Vol. I, 81.
[9] Evid. Vol. I, 94.
[10] Evid. Vol. I, 140.
[11] Evid. Vol. I, 77; Evid. Vol. I, 279.
[12] Answer Brief of Appellee, 31.

convicted drug dealer and user who introduced Sears to a life of crime would have been consistent with the defense theory of mitigation). Mr. Robinson was exposed to drugs, violence, and crime in the community on a daily basis. Evid. Vol. I, 124-26. At a very young age he witnessed fights, shootings, stabbings, and even murders. *Id.* at 124-25. Even the police, who were routinely shot at, would not respond to the James E. Scott Project unless they were called twice. Evid. Vol. II, 260, 263. As bad as the environment was in the streets, the Robinson home, where the children were traumatized by verbal and physical abuse, was arguably worse. Evid. Vol. I, 136. In order to survive in this environment, Mr. Robinson had to learn how to fight to protect himself and his younger siblings. *Id.* at 127

Moreover, the evidence presented at the evidentiary hearing demonstrates how Mr. Robinson's family, which Marvin Dunn, Ph.D. described as "one of the worst" families he had ever seen, Evid. Vol. II, 291, encouraged and, at times, forced Mr. Robinson to engage in illegal and aggressive activities at an early age. Mr. Robinson's older brother, Edward, has been convicted of eleven felonies. Evid. Vol. I, 123. He sold drugs to help his mother buy a house, Evid. Vol. I, 146, and put Mr. Robinson and their younger sister, Teeshawn, through a window to break into a house when Mr. Robinson was ten years old, *Id.* at 130. He broke down crying during his postconviction testimony, Evid., Vol. I, 126, and he

apologized to Mr. Robinson for not being a better role model.

> Q: Would you say you were a role model for Tim?
>
> A: I got to say this here. I got to say it to Timothy – that I'm sorry. I'm sorry. I'm sorry, man, for not giving you a better way than this here. I'm sorry.

Id. at 148.

Although Edward Robinson accepts much of the blame for not being a better role model for his younger brother, their parents were also corrupting influences. Mr. Robinson's mother enlisted Mr. Robinson and his brother to help her shoplift from department store and grocery stores, *Id.* at 147, and his father brought Mr. Robinson along to rob a house. *Id.* at 191. His mother taught her children that they had to fight because she did not want them "growing up punks." *Id.* at 127. His father and uncles made the children fight each other to see who was the toughest. *Id.* at 127. Mr. Robinson's father, who glorified drugs and criminal activity and lived the "gangster lifestyle," *Id.* at 79, 97-98, admitted to smoking marijuana in front of his children and having other drugs in the home when Mr. Robinson was growing up. PC-R. Vol. XI, 2120. Mr. Robinson and his brother, Edward, smoked marijuana with their father from the time they were twelve or thirteen years old. Evid. Vol. I, 136.

Additionally, as stated above, the State argues in its brief that one of the

weaknesses in Mr. Robinson's postconviction evidence was the testimony of his brother, Edward, that he used drugs with Mr. Robinson. Answer Brief of Appellee, 42. However, this Court has previously held that evidence that the defendant has a history of drug abuse is mitigating, as opposed to the State's incorrect assertion that this testimony would have prejudiced Mr. Robinson. *See, e.g., Williams v. State*, 987 So. 2d 1, 11 (Fla. 2008); *Boyett v. State*, 688 So. 2d 308 (Fla. 1997).

The State argues that "the father's testimony would have also conflicted with the mother's trial testimony by characterizing her as the 'boss' in the family," and that "Robinson overlooks his postconviction evidence in which his father testified that neither he nor his wife beat the children." Answer Brief of Appellee, 41, 57. The State fails to address the testimony that Edward Robinson, Sr. provided at the same deposition, in which he paints himself as anything but a man who was under the domination of his wife and did not abuse his children. He was jealous of the attention Timothy's mother received from other men, and he "didn't want her out of [his] sight." PC-R. Vol. XI, 2114, 2121. He also testified that he became angry when he could not control Mary and the children. *Id.* at 2121-22. He "would slap her around" or "attack her" in front of the children. *Id.* at 2121-22. He described how he verbally abused, embarrassed, and insulted his children because of the

profound and lasting effect that verbal abuse had on him as a child. *Id.* at 2128. Although in his deposition Mr. Robinson's father denied beating his children, he admitted to Marjorie Hammock, MSW that he used physical punishment with his children, and several family members reported to Ms. Hammock that they witnessed Edward Robinson, Sr. being severely physically abusive toward his children. Evid. Vol. II, 188. Ivory Baker recalled one incident when Edward Robinson, Sr. beat Mr. Robinson's younger brother, who was five or six years old at the time, as though he was a grown man. Evid. Vol. I, 17. Mr. Robinson's older brother, Edward, also testified about the physical abuse their father inflicted on the entire family:

> Q: Can you tell us about the physical abuse?
>
> A: Well, he beat us. Beat us with two-by-fours. He beat me with a two-by-four board until I was black and blue. He used to jump on my mama, break her jaw, break her nose. He was a violent man.
>
> Q: Did he beat all of the kids?
>
> A: All the kids. Mainly he beat us more when we tried to stop him from jumping on my mother. We could see him jumping on my mother and she's hollering and screaming. Leave my mother alone. I remember one day what happened with Timothy. He slapped Timothy so hard and so brutal that he knocked his teeth out of his mouth. Two teeth came flew out of his mouth.
>
> . . .
>
> Me and Tim had the most hard – to stand up to him when he would do things. But we wasn't no match for him because he – he used his

> fists. He would punch with his fists and two-by fours and sticks, extension cords, you know.
>
> Q: Would he cause injuries?
>
> A: Yes, m'am. Black and blue. Bust your mouth, nose, knock you in the eye. Yes, m'am.
>
> Q: Do you remember how old you and Tim were when you started getting in the middle of these fights?
>
> A: I was to say I was probably ten. Tim was probably eight.

Id. at 137-38.

Another "internal inconsistency" that the State alleges concerns the testimony of Ivory Baker, who "suggested that the Robinson family seemed 'well-adjusted' when the father was 'taken out of the equation'" and "indicated that Robinson's mother and her children could obtain sanctuary at his family's house." Answer Brief of Appellee, 42. First, the State's claim that Mr. Baker suggested that the Robinson family seemed well-adjusted was taken out of context. The applicable section of the transcript during the State's cross examination of Mr. Baker and reads as follows:

> Q: All right. Now if I understood your testimony correctly earlier on, if you take Edward Robinson out of the equation, the family seemed pretty normal and well-adjusted; is that right?
>
> A: Well-adjusted.

Q: Yeah, okay.

Evid. Vol. I, 37. Furthermore, unfortunately for Mr. Robinson, his father **was** in the equation, and Mr. Baker did not testify to the contrary. In fact, Mr. Baker's testimony recounted Edward Robinson Sr.'s violent, explosive, abusive, and bizarre behavior, as well as his drug use. *Id.* at 6-39. The very reason why the Robinson family sought sanctuary in the Baker house was to escape Edward, including one occasion when the family stayed with Mr. Baker and his mother for approximately one month after Mr. Robinson's father threatened them with a gun. *Id.* at 9, 51. Mr. Robinson's brother, Edward, also testified that Mary and the children would sometimes stay with neighbors for several days until they thought Edward Sr. had calmed down, only to have the cycle start all over again. *Id.* at 140. The State does not explain how any of Mr. Baker's testimony is inconsistent with any other testimony that was presented during postconviction, or how this testimony is in any way prejudicial to Mr. Robinson. On the contrary, Mr. Baker's testimony constituted powerful mitigation which, by itself, would have provided a reasonable basis for the jury's life recommendation.

Additionally, the State argues that Dr. Dunn's testimony undermines Mary Robinson's trial testimony because he indicated that "although she was a loving mother, he was unsure whether the mother was 'significantly important as an

emotional support system.'" Answer Brief of Appellee at 42. When he was asked to characterize Mrs. Robinson's relationship with her children, Mr. Robinson's uncle, Richard Delancey, described the relationship as:

> Very loving, understanding. But she was fearful. She was fearful of their being mistreated by somebody she loved.

Evid. Vol. I, 115. Gloria Baker described Mrs. Robinson as both a good, loving mother, *Id.* at 64, and a "battered woman." *Id.* at 64, 48. Dr. Dunn explained how being a battered woman affected Mrs. Robinson's ability to protect her children:

> She loved her children dearly. But she was a passive, ineffective, battered woman, who did not have the strength, emotionally or in any other way, to protect her children from the ongoing trauma that they lived all their young lives.

Evid. Vol. II, 284. The fact that Mrs. Robinson was a victim of domestic violence who, as a result of her own situation, was unable to protect her children, does nothing to undermine Mrs. Robinson's trial testimony or the fact that she loved her children. Instead, it provides a much clearer understanding of the dynamic in the Robinson household.

The State also cites Mr. Robinson's "terrible" attendance at school, his lack of interest in school, and his being "thrown out" of junior high for fighting as weaknesses in Mr. Robinson's postconviction evidence. Answer Brief of Appellee, 42. Dr. Dunn explained at the evidentiary hearing that the Dade County

public school system "has a miserable record of reaching African-American youngsters who come from a background similar to Mr. Robinson's." Evid. Vol. II, 264. The schools were overcrowded. *Id.* at 264. The dropout rate was high, and the literacy rate was low. *Id.* at 264. Alternative schools, one of the worst of which was attended by Mr. Robinson, were "dumping grounds," where students were "contained" rather than educated. *Id.* at 265. Mr. Robinson's brother, Edward, testified that Jan Mann Opportunity School, which he and Mr. Robinson attended, was "just like the hood." Evid. Vol. I, 129. Some of the worst teachers in the school system taught at alternative schools. Evid. Vol. II, 265. Violence in the schools involved both students and teachers. *Id.* at 265. Many alternative schools did not even notify parents when their children were absent. *Id.* at 268. The alternative schools provided the students an opportunity to learn crime, and did nothing to help their students, like Mr. Robinson, who were desperately in need of intervention. *Id.* at 268.

Expert testimony further established how Mr. Robinson's environment contributed to his poor academic performance and excessive absences from school. Exposure to violence at home and in the community interfered with his ability to be a good student because he could not focus on his school work. Evid. Vol. II, 189. Additionally, he did not receive the support he needed to succeed in school.

Id. at 196. His mother did not have time to make sure Mr. Robinson went to school and did his homework. *Id.* at 196. Additionally, she could not help her children with their school work because she was not educated. Evid. Vol. I, 134. His father told him that he was stupid. *Id.* at 80. He was not interested in Mr. Robinson's schooling, and his insults discouraged Mr. Robinson. *Id.* at 196-97. He did not encourage his children to go to school, *Id.* at 134, and he did not teach his children to value education. *Id.* at 80. The disorganization in the Robinson home further contributed to Mr. Robinson's excessive absences. Evid. Vol. II, 267.

Another alleged "weakness" in the evidence presented during postconviction was Mr. Robinson's "uncoorperative and belligerent" attitude with Dr. Larson. Answer Brief of Appellee, 31, 42. Dr. Larson testified that it is not uncommon for defendants to be suspicious on a first meeting with an expert. Evid. Vol. II, 342. Although he considered Mr. Robinson to be an unreliable source, *Id*. at 33, Dr. Larson failed to speak with third party witnesses, who could have either corroborated what Mr. Robinson told him or provided additional information. At the time Dr. Larson evaluated Mr. Robinson, he had little understanding of what was mitigating and what was not mitigating, and he did not understand that non statutory mitigation was admissible in capital cases. *Id.* at 324, 347. Additionally,

Mr. Beroset testified that, given the indications in Dr. Larson's report that Mr. Robinson was guarded and that he was not a reliable reporter with regard to his own history, additional investigation or corroboration needed to be done. *Id.* at 381. Thus, instead of prejudicing Mr. Robinson, the testimony of Dr. Larson at the postconviction evidentiary hearing actually highlighted the deficiencies in his evaluation of Mr. Robinson, which Dr. Dunn described as "superficial" and "inadequate," *Id.* at 246, and the need for additional penalty phase investigation.

In the case at hand, trial counsel did not complete a reasonable penalty phase investigation despite indications in Dr. Larson's report that a follow-up investigation was necessary. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Mr. Beroset acknowledged at the postconviction evidentiary hearing that Dr. Larson's report basically addressed competency and did not go into mitigation. Evid. Vol. II, 381. He received the report right at the time of trial, and he did not conduct any follow-up investigation, *Id.* at 381, despite the fact that the report, which was not admitted to the trial court, stated that "[i]t was miserable for him during early childhood, and he likely experienced considerable abuse and neglect." PC-Ex. Vol. I, 46. Defense counsel did not retain a mitigation expert, and they did not obtain any institutional records regarding Mr. Robinson or examine the court files of his prior record. Evid. Vol. II, 385, 381-82.

Furthermore, trial counsel's failure to investigate mitigation cannot be attributed to Mr. Robinson, as the State suggests in its answer brief:

> Here, defense counsels did a reasonable and constitutionally effective job of harvesting mitigating evidence, given what Robinson created. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) ("If Landrigan issued such an instruction [to "his counsel not to offer any mitigating evidence"], counsel's failure to investigate further would not have been prejudicial under Strickland").

Answer Brief of Appellee at 61. First, Mr. Beroset testified that Mr. Robinson was cooperative with trial counsel when they were preparing for trial. Evid. Vol. II, 355. There is absolutely no evidence that Mr. Robinson instructed his attorneys not to offer mitigating evidence, as the State suggests. The State also argues that there was no reason for trial counsel to pursue an investigation regarding child abuse because Mr. Robinson did not report child abuse to Dr. Larson. Answer Brief of Appellee at 59. Although Mr. Robinson may not have reported child abuse to Dr. Larson, Dr. Larson testified that he could not recall whether or not he asked Mr. Robinson if he was abused. Evid. Vol. II, 345. Moreover, counsel has a duty to investigate even when the defendant indicates that no mitigating evidence is available. *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). The fact that Mr. Robinson reported to Dr. Larson a lot of bitterness about his father, but related very little about him, R. Vol. XI, 1998, should have been a red flag for trial counsel

that additional investigation was needed to determine why Mr. Robinson harbored these negative feelings toward his father.

The State argues that "Mr. Beroset's decision making is entitled to special deference due to his extensive experience." Answer Brief of Appellee at 54. However, Mr. Pitts, who at the time of Mr. Robinson's trial had limited experience and had not tried any major cases, Evid. Vol. II, 365, was responsible for what little mitigation investigation was done on the case. *Id.* at 353. Furthermore, because trial counsel did not conduct a reasonable investigation, they were not even aware of the evidence presented during postconviction, and they could not have made a strategic decision not to present this evidence. *See Heiney v. State*, 620 So. 2d 171, 173 (holding that trial counsel did not make a strategic decision not to present mitigation because they did not know that mitigation evidence existed). According to Mr. Beroset, his strategy during penalty phase was to "present whatever you can the best you can," Evid. Vol. II, 393, not to "cherry pick" as the State suggested was the case. Answer Brief of Appellee, 66.

The State argues in its brief that "the result of producing that postconviction evidence at trial would have been a jury recommendation of death." Answer Brief of Appellee, 46. However, even if trial counsel was aware of the evidence that was presented during postconviction (which they were not) and they were concerned

that some of this evidence might be prejudicial to Mr. Robinson (which it is not), they could have chosen to present this evidence only at the *Spencer*[13]-type hearing, and not in front of the jury. As this Court held in the case of Mr. Robinson's co-defendant, Ronald Williams, "defense counsel simply had nothing to lose in presenting this evidence at the *Spencer* hearing, thereby ensuring that such evidence could be in the record on appellate review." *Williams*, 987 So. 2d at 13.

2. THE STATE'S ARGUMENT THAT THE MITIGATION OFFERED IN POSTCONVICTION IS NOT ENOUGH TO OVERCOME THE "EXTREMELY WEIGHTY AGGRAVATION"

The State argues in its brief that the mitigation presented during the evidentiary hearing does not overcome the "extremely weighty aggravation of HAC, CCP, and with four dead victims, prior violent felony in the extreme." Answer Brief of Appellee, 2. In support of its argument, the State cites numerous cases, which were not jury override cases, in which the mitigation presented during postconviction would not have overcome the aggravation in the case. *Id*. at 46-47, 51-54. In weighing the aggravating circumstances of the crime against the mitigation presented at the evidentiary hearing, the State repeatedly recounts the facts of what it refers to as "Robinson-led mayhem." *Id.* at 2, 7-13, 30, 44-45. Likewise, as the State points out in its brief, "the trial court considered not only the

[13] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

postconviction evidence . . . but also the trial evidence showing Robinson's leadership role in the heinous mayhem, quadruple murders, rapes, and attempted murder, and other felonies in 1988 . . ." *Id.* at 43.

First, it is important to note several important facts regarding the role of the victims in the events that transpired on November 19-20, 1988. Mr. Robinson's trial counsel argued in his Sentencing Memorandum, and Mr. Robinson maintains, that the following circumstances provide non statutory mitigation:

> - That all four of the deceased victims had cocaine residue in their systems at the time of their deaths.
>
> - That two of the deceased victims, DEREK DEVAN HILL and MORRIS ALFONSO DOUGLAS, by the State's own proof, were not without fault as they had purportedly committed a burglary and a grand theft of cocaine and money.

R. Vol. XIV, 2531. Additionally, this Court previously found that victims Derek Hill and Morris Douglas stole the safe containing drugs and money from the home of victim Michael McCormick, and subsequently gave the drugs and money to victim Darlene Crenshaw for safekeeping. *Coleman v. State*, 610 So. 2d 1283, 1283 (Fla. 1992). Based in part on "the circumstances of the killings," Justice Barkett wrote in a separate opinion on direct appeal that she could not "say that no reasonable person could have recommended a life sentence here." *Robinson*, 610 So. 2d 1288, 1292 (Barkett, J. dissenting).

There is no question that, as this Court has noted, "It is apparent that all killings are atrocious." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). However, the Legislature did not intend for the death penalty to be imposed in all cases of first degree murder. *See Id.*

As Mr. Robinson explained, *supra*, in Initial Brief of Appellant, a jury override case is dramatically different from a case in which the jury recommends death:

> "[T]he jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Keen v. State*, 775 So. 2d 263, 285 (Fla. 2000). In contrast to the weighing process that a judge conducts after a jury returns a recommendation of death, when a jury recommends life the trial court's singular focus is whether there is a reasonable basis for that recommendation . . . *Id.* at 283.

Initial Brief of Appellant, 79-80. "[T]he narrow inquiry to which we are bound honors the underlying principle that the jury's advisory sentence reflected the 'conscience of the community' at the time of this trial." *Keen*, 775 So. 2d at 283. Even in cases where there is substantial aggravation, a "vast" amount of mitigation is not required to provide a reasonable basis upon which a reasonable jury could reply to support a life recommendation. *Id.* at 287.

In *Keen v. State*, for example, the defendant planned to marry an unsuspecting girl, insure her life, murder her, and invest the proceeds from the life

insurance policy so that he could retire before the age of forty. *Keen*, 775 So. 2d at 267. In keeping with the plan, he married the victim, and when she was pregnant he and his co defendant took her out on a boat, where Keen pushed her into the water and watched her drown. *Id.* The mitigation included the disparate treatment of the other principal in the crime and the other principal's credibility problems, as well as Keen's largely productive life and good prison record. *Id*. at 284-287. The jury recommended a life sentence for Keen, but the trial judge overrode the jury's recommendation and sentenced Keen to death. *Id.* at 282. In his sentencing order, the judge wrote that "The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence." *Id.* at 283. This Court held, however, that the trial judge applied the wrong standard in light of the jury's life recommendation and held that there was a reasonable basis in the record to support the jury's life recommendation. *Id.* at 283.

The proper standard for establishing prejudice under *Strickland* in jury override cases is "whether the omitted evidence would have provided a reasonable basis for a life recommendation and sentence." *Williams*, 987 So. 2d at 11. In *Torres-Aroboleda v. Dugger*, for example, this Court granted postconviction relief and concluded that, "[h]ad these factors been discovered and presented to the court at Torres-Arboleda's original sentencing, there would have been a reasonable basis

in the record to support the jury's recommendation and the jury override would have been improper." *Torres-Alboleda v. Dugger*, 636 So. 2d 1321, 1326 (Fla. 1994). Likewise, in Mr. Robinson's case, because the jury recommended a life sentence, this Court must consider whether the mitigation presented during postconviction would have provided a reasonable basis for the jury's life recommendation.

The State argues that this case is distinguished from the *Williams* case in part because, unlike Mr. Robinson, Mr. Williams was not at the crime scene. Answer Brief of Appellee, 64. However, in *Williams v. State*, this Court did not consider Mr. Williams' relative role in the crime. *Williams*, 987 So. 2d at 10-14. Instead, this Court's singular focus was whether the mitigation presented at the evidentiary hearing would have provided a reasonable basis for the jury's life recommendation. *Id.* Such an analysis is likewise required in the case at hand.

3. THE STATE'S ARGUMENT THAT THE EVIDENCE OFFERED DURING POSTCONVICTION WAS "LARGELY REPETITIOUS" OF THE EVIDENCE OFFERED DURING PENALTY PHASE

The State echoes the trial court's finding that the evidence Mr. Robinson presented during postconviction was "largely repetitious" of the evidence presented during the penalty phase. Answer Brief of Appellee, 33. As Mr. Robinson demonstrated in his Initial Brief, the evidence presented during

postconviction went far beyond the evidence that was presented at trial and provided the substantial non statutory mitigating evidence that the trial court found lacking at trial. Unlike the very limited mitigation evidence presented at trial, much of the evidence presented during postconviction is corroborated by multiple sources. This evidence would have informed the judge and jury about "the kind of troubled history [the United States Supreme Court has] declared relevant to assessing a defendant's moral culpability." *Porter*, 130 S.Ct. at 454 (quoting *Wiggins*, 539 U.S. at 535). Although not an exhaustive list, the following are examples of evidence that was presented during postconviction, which was not established at the penalty phase trial, and which would have provided a reasonable basis for the jury's life recommendation.

- Mr. Robinson's father regularly used marijuana, alcohol, and other drugs in the home when Mr. Robinson was growing up, often in front of the children. PC-R. Vol. XI, 2120; Evid. Vol. I, 10-12, 85, 136, 145; Evid. Vol. II, 185-187, 253.

- Mr. Robinson's brother, Edward Robinson, Jr., exposed Mr. Robinson to drugs, and they used drugs together, including alcohol, marijuana, cocaine, and Quaaludes. Evid. Vol. I, 125; Evid. Vol. II, 253. The brothers also smoked marijuana with their father from the time they were twelve or thirteen years old. Evid. Vol. I, 136.

- Mr. Robinson's father glorified drugs and criminal activity in front of Mr. Robinson and his siblings. Evid. Vol. I, 79-80, 97-98; Evid. Vol. II, 271.

- Mr. Robinson's father, brother, and mother exposed him to a variety of criminal acts, including burglary, robbery, and petit theft. Evid. Vol. I, 130, 148; Evid. Vol. II, 191, 273.

- Mr. Robinson's father was a violent man. Evid. Vol. I, 12, 17, 19-20, 46, 83, 137.

- On several occasions, Mr. Robinson's father threatened to kill his entire family. Evid. Vol. I, 19, 51, 144.

- When Mr. Robinson's father became violent, the family often left the home and stayed with friends and relatives. Evid. Vol. I, 17, 140, 187. On one occasion, Mary Robinson and her children stayed with Ivory and Gloria Baker for several weeks after Edward Robinson, Sr. threatened the family with a gun. Evid. Vol. I, 21, 51.

- Mr. Robinson's father was physically and verbally abusive toward Mr. Robinson's mother in front of Mr. Robinson and his siblings. PC-R. Vol. XI, 2121-22, 2117; Evid. Vol. I, 9, 15, 77, 81, 94, 111, 137, 139-140, 161; Evid. Vol. II, 279.

- Mr. Robinson and his siblings attempted to intervene when their father physically abused their mother. PC-R. Vol. XI, 2117-18, 2124-25; Evid. Vol. II, 187, 194-195, 285. This often led to violent confrontations between Mr. Robinson and his father. Evid. Vol. II, 285.

- Once when Mr. Robinson's father was under the influence of drugs, he chopped up the furniture and other items in the home with a bowie knife while the children watched. Evid. Vol. I, 93-96, 140.

- Mr. Robinson's father verbally abused, embarrassed, and insulted his children because of the profound and lasting effect that verbal abuse had on him as a child. PC-R. Vol. XI, 2128; Evid. Vol. I, 9, 73, 76-77, 136-137; Evid. Vol. II, 281.

- Mr. Robinson's father beat Mr. Robinson and his siblings with two-by-fours, sticks, extension cords, and his fists until the children were black and blue.

Evid. Vol. I, 137-138; Evid. Vol. II, 188, 281. One day he slapped Mr. Robinson so hard that he knocked two teeth out of his mouth. *Id*.

- The Robinson family was poor, and they received government assistance. Evid. Vol. I, 72, 126; Evid. Vol. II, 186.

- Mr. Robinson grew up in the James E. Scott Housing Project in Liberty City, where he was exposed to violence, drugs, and prostitution. Evid. Vol. I, 125; Evid. Vol. II, 188.

- When Mr. Robinson was approximately seven years old, his family moved to Opa Locka, which was experiencing some of the same problems as Liberty City, including drugs, violence, and failing schools. Evid. Vol. II, 249.

- Mr. Robinson attended Jan Mann Opportunity School, which was an alternative school that had many of the same problems as the projects, including violence and drugs. Evid. Vol. I, 129; Evid. Vol. II, 198, 265.

- Mr. Robinson attended Okeechobee Boys' Home, where the conditions were unsanitary and children were exposed to physical abuse, sexual abuse, profound isolation, and hog tying. Evid. Vol. I, 131-133; Evid. Vol. II, 201, 224, 287.

- Mr. Robinson's father did not encourage his children to go to school, and he did not teach his children to value education. Evid. Vol. I, 80, 134; Evid. Vol. II, 197, 266.

- When Mr. Robinson was a child, his father took him to a man he did not know and told him that the stranger was his father. Evid. Vol. I, 91-92; Evid. Vol. II, 192-193, 281. As a result, Mr. Robinson experienced a loss of belonging. *Id.*

The State is critical of the fact that Mr. Robinson did not present a mental health expert who had psychologically tested Mr. Robinson after the trial and did

not introduce competent evidence supporting any statutory mitigation. Answer Brief of Appellee, 33. While statutory mitigation can certainly be very powerful mitigation, Florida Statute 921.142 (7) (h) states that mitigating circumstances shall include "[t]he existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty." In fact, the United States Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *See also, Porter*, 130 S.Ct. at 454-55 (holding that "[i]t was unreasonable to discount to irrelevance the evidence of Porter's abusive childhood"). There is no requirement that a jury's life recommendation be based on statutory mitigation or the results of psychological testing. This Court has considered non-statutory mitigation similar to that presented during Mr. Robinson's postconviction evidentiary hearing in other jury override cases and found that this evidence would have provided a reasonable basis for the jury's life recommendation. *See, e.g., Stevens v. State*, 552 So. 2d 1082, 1085-88 (Fla. 1989); *Williams*, 987 So. 2d at 12.

The State defends trial counsel's performance during the penalty phase and argues that "trial counsel did significantly more than the requisite reasonable job in the penalty phase of the case, as substantiated by the jury's life recommendation."

Answer Brief of Appellee, 13. The State cites trial counsel's "reasonable theme" of humanizing Defendant Robinson, in the mother's trial-testimony words, as a "sweet child." *Id.* at 41, 60. The State also points to a number of letters from family and friends submitted by trial counsel at the *Spencer*-type hearing, including a number of letters from New Jersey that re-asserted Mr. Robinson's alibi. *Id.* at 19-20. The State further defends trial counsel's performance during the penalty phase by arguing that part of trial counsel's strategy was to argue lingering doubt concerning whether Mr. Robinson was the triggerman. *Id.* at 62. The evidence presented by trial counsel during the *Spencer*-type hearing, particularly the letters that re-asserted Mr. Robinson's alibi, reiterated the evidence presented to the jury that Mr. Robinson was a "sweet child," and reasserted Mr. Robinson's innocence of the crimes for which he had already been convicted. *Id.* at 19-20.

The evidence presented during Mr. Robinson's penalty phase trial and the *Spencer*-type hearing did not constitute a "reasonable theme," as the State suggests. First, this Court has repeatedly held that lingering doubt is not an appropriate mitigating circumstance. *Reynolds v. State*, 934 So. 2d 1128, 1152 (Fla. 2006); *Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002). Furthermore, because trial counsel did not conduct a thorough investigation into Mr. Robinson's

background, they were not in the position to make a "tactical decision" to pursue a particular mitigation theory in this case. *Sears*, 130 S.Ct. at 3264. As the United States Supreme Court held in *Sears*, "A 'tactical decision' is a precursor to concluding that counsel has developed a 'reasonable' mitigation theory in a particular case." *Id*.

In contrast to the wealth of mitigation presented during postconviction, the sparse evidence presented during penalty phase that depicted Mr. Robinson as a "sweet child" and relied on lingering doubt did not provide a reasonable basis for the jury's life recommendation. *Robinson*, 510 So. 2d at 1292. Because the jury returned a life recommendation, Mr. Robinson cannot demonstrate prejudice for trial counsel's failure to present mitigation to the jury. *See Williams*, 987 So. 2d at 11. On the other hand, in light of the extensive case law that requires a reasonable basis in order to bar a jury override, as well as the trial judge's previous jury override in the Vernon Cooper case, trial counsel provided prejudicial ineffective assistance when they failed to present additional evidence at the *Spencer*-type hearing that would have provided a reasonable basis for the jury's life recommendation and prevented a jury override. *See Williams*, 987 So. 2d at 12.

ARGUMENT II

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. ROBINSON'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS SHACKLED THROUGHOUT HIS TRIAL AND TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO INQUIRE INTO THE NECESSITY FOR SHACKLING.

The State argues in Answer Brief of Appellee that Mr. Robinson's claim that trial counsel provided ineffective assistance by failing to inquire into the necessity for shackling is procedurally barred because (1) Mr. Robinson never alleged any specificity in his postconviction motion concerning ineffective assistance of counsel on this subject and, therefore, this issue is not the same claim that was raised in the trial court and (2) even if ineffective assistance of counsel was alleged with specific specificity in the postconviction motion it would be procedurally barred by the direct appeal. Answer Brief of Appellee at 70. Mr. Robinson explained, *supra*, in his Initial Brief why this claim is not procedurally barred by the direct appeal. In this Reply Brief, Mr. Robinson will respond to the State's allegation that he is procedurally barred from raising this claim because it was not raised in the trial court.

In Claim XII of Defendant's Third Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend, Mr.

Robinson acknowledges that trial counsel "strongly objected to the shackling throughout the proceedings." PC-R. Vol. V, 930. That being the case, Mr. Robinson alleges that "[t]o the extent defense counsel failed to inquire into the secret intelligence conveyed to the trial judge, counsel were ineffective." *Id.* at 931. Mr. Robinson also states in his postconviction motion that "to the extent that Mr. Robinson's attorney failed to properly preserve this claim for appeal Mr. Robinson received ineffective assistance of counsel." *Id.* at 934. As a result of trial counsel's ineffectiveness, "Mr. Robinson was shackled without a hearing on the necessity of shackling" and Mr. Robinson's due process rights were violated. *Id.* at 929. Mr. Robinson's claim of ineffective assistance of counsel for failing to inquire into the necessity for shackling was clearly considered by the trial court in its order denying postconviction relief, in which the trial court addresses Mr. Robinson's argument that trial counsel was ineffective for failing to properly preserve this claim for appeal. PC-R. Vol. XIV, 2521.[14] Thus, this claim was raised and decided in the trial court and should be decided on its merits.

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[14] As the trial court stated in its order denying postconviction relief:

> He also notes that defense counsel vigorously objected to the procedure employed by the trial court, but argues "[t]o the extent Mr. Robinson's attorney failed to properly preserve this claim for appeal Mr. Robinson received ineffective assistance of counsel."

PC-R. Vol. XIV, 2521.

Additionally, the State argues that trial counsel is not deficient because [m]ost of the cases cited in Issue II were decided after the May-June 1989 trial of this case." Answer Brief of Appellee at 78. In fact, case law regarding the shackling of criminal defendants had been decided prior to Mr. Robinson's trial. *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986), which prohibits routine shackling and holds that there must be an "essential state interest" to justify the practice, was decided three years before Mr. Robinson's 1989 trial. Likewise, Mr. Robinson relies of *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.) (*per curiam*), *receded from on other grounds*, 833 F.2d 250 (11th Cir. 1987) (*per curiam*), *cert. denied*, 485 U.S. 1014 (1988), a 1988 case in which the Eleventh Circuit held that the shackling of a defendant during the penalty phase of his trial without a prior finding of necessity violates a defendant's Due Process rights. Trial counsel should have been aware of this case law and, as a result, they should have inquired about the secret intelligence conveyed to the trial judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on September ___, 2010**.**

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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