

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO3-1229

MICHAEL L. ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of post-conviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R. __" -- record on direct appeal to this Court;

"PCR. __" -- record on instant appeal to this Court;

"Supp. PCR. __" -- supplemental record on appeal to this Court;

"T __" -- transcripts of hearings in instant appeal.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Robinson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Robinson, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE

On January 23, 1995, Mr. Robinson pled guilty to first-degree murder and, after waiving a penalty phase jury, the trial court imposed the death penalty on April 12, 1995. Mr. Robinson requested the death penalty and asked that no mitigating factors be considered. This Court in *Robinson v. State*, 684, So.2d 175 (Fla. 1996), vacated the sentence and remanded, finding that the trial judge (this Court did not permit a jury to consider mitigation) was required to weigh and consider mitigating evidence. Upon remand, Mr. Robinson attempted to withdraw his plea, but counsel's oral motion to withdraw Mr. Robinson's previously entered plea was denied. After a penalty phase hearing, the trial court again imposed the death penalty on August 15, 1997. This Court affirmed in *Robinson v. State*, 761 So.2d 269 (Fla. 1999), *cert. denied*, 529 U.S. 1057 (2000).

On February 21, 2001, Mr. Robinson filed his original Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend (PCR104-137),¹ and the State thereafter moved to strike the motion without prejudice

¹After being informed by the Capital Collateral Regional Counsel–Middle Region office that it could not accept Mr. Robinson's case, the trial court, on February 14, 2000, appointed attorney Christopher L. Smith from the capital attorney registry (PCR6). On February 22, 2000, attorney Smith filed a Notice of Appearance, Waiver of Arraignment, Written Plea of Not Guilty, Demand for Discovery, and Request for Jury Trial (PCR11). On September 6, 2000, Mr. Robinson filed a *pro se* request for the removal of Smith and for the appointment

(PCR140). The court denied the State's motion to strike, but granted Mr. Robinson up to and including October 4, 2001, to file a complete amended Rule 3.850 motion (PCR174). On October 3, 2001, Mr. Robinson filed his final amended Rule 3.850 motion, which raised twenty-seven (27) claims (PCR182-261). On November 8, 2001, the State filed its response, objecting to an evidentiary hearing (PCR262-289). After the circuit court held a *Huff*² hearing on June 7, 2002 (T437-469), the court ordered an evidentiary hearing on Claim III of Mr. Robinson's amended motion involving allegations of ineffective assistance of counsel at the penalty phase by failing to accurately and properly withdraw Mr. Robinson's previously entered guilty plea (PCR485).

The evidentiary hearing was conducted on January 29-30, 2003 (T1-377). In support of his allegations, Mr. Robinson presented testimony from a neuro-

of other counsel, alerting the court to the fact that Smith, despite having been appointed over six (6) months earlier, had yet to personally meet with Mr. Robinson or communicate with him in any fashion (PCR68). By order dated September 12, 2000, the lower court entered an order requiring Smith to personally visit with Mr. Robinson on death row (PCR75). Following a telephonic hearing after Smith had visited with Mr. Robinson, the court, after considering Mr. Robinson's continued dissatisfaction with a lawyer who had not done anything on his case in some six (6) months, appointed attorney James Lewis off of the registry (T379-393). Mr. Lewis thereupon entered his appearance on behalf of Mr. Robinson (PCR77). Mr. Lewis continued to represent Mr. Robinson without incident.

²*Huff v. State*, 622 So. 2d 982 (Fla. 1993).

psychologist, Dr. Wiley Mittenberg, Dr. Jonathan Lippman, a neuropharmacologist, Dr. John Spencer, forensic psychologist, Robert Swift, prison ministry volunteer, Barbara Judy, Mr. Robinson's mother, and lead trial counsel Mark Bender. The State presented Harry McClaren, forensic psychologist.³ After both the State and Mr. Robinson submitted post-hearing memoranda (PCR521; 533), the circuit court issued an order on May 15, 2003, denying relief (PCR540). After timely filing his Notice of Appeal (PCR561), this appeal follows.

STATEMENT OF FACTS ADDUCED AT EVIDENTIARY HEARING

Mark Bender. Bender has been an attorney licenced in Florida since 1985 (T4). After spending four (4) years in the employ of the Orange County State Attorney's Office, Bender went into private practice focusing primarily on criminal defense (T4). Mr. Robinson's case was the first death penalty case he had handled either as a prosecutor or as defense counsel (T5). Shortly after his appointment, Bender requested the appointment of co-counsel, Mr. Irwin, which is a customary practice in Orange County (T6). Ultimate responsibility for Mr. Robinson's case, however, rested with Bender (T6). Since it became clear early on that Mr.

³Following the granting of the evidentiary hearing, the State had moved for the appointment of Dr. McClaren to conduct an evaluation of Mr. Robinson (PCR500). The court granted the motion for the State to have access to Mr. Robinson for purposes of conducting a mental health examination (PCR504).

Robinson did not want to mount a defense to the charges, the normal division of labor among the attorneys between guilt and penalty phase did not need to be made (T6-7).

Bender “honestly believed” that he and Irwin did their best to convince Mr. Robinson to prepare a defense and save his life, but recognized that “[t]here really was no defense that we could mount” given Mr. Robinson’s confession (T8). Mr. Robinson was “very sure” and “positive” that “this was the path that he had chosen” (T8). Mr. Robinson’s position was “unique” and would “clearly” set off alarms in terms of potential mental health issues (T9). To Bender, Mr. Robinson appeared “competent” and his decision to seek his death “in a perverse way made sense” (T9). Bender explained that Mr. Robinson was “devoutly religious” and “wanted to kill himself” but that was against his religion (T9-10). Mr. Robinson expressed that he did not want to spend the rest of his life in prison (T10).

Bender did not discuss the voluntariness of or the circumstances surrounding Mr. Robinson’s confession “at length or with due diligence,” although it appeared to Bender that it was unlikely that the confession would be excluded (T10). He nonetheless sought to have Mr. Robinson evaluated by mental health experts “to see if there might be some mental issues that we could utilize” (T10), and did not believe he ever filed a motion to suppress Mr. Robinson’s statements

to law enforcement (T11). The issue of voluntary intoxication “may have been discussed” with Mr. Robinson but “it was not a viable defense that we strategized” (T11). Discussion defense options with Mr. Robinson “seemed fruitless” given his desire to plead guilty, and so “we focused on what little mitigation we could gather prior to the sentencing hearing” (T11). Bender and/or Irwin also would have discussed with Mr. Robinson the issue of presenting a defense in order to lessen the charge from first-degree murder to second-degree murder or manslaughter, but they were not “long discussions” given Mr. Robinson’s desire not to have a trial (T12).

Based on the “facts and circumstances” of the offense, Bender “knew that there was a [mental health] problem” with Mr. Robinson (T14-15). From what Bender saw from Mr. Robinson, he would “never have guessed” that he was capable of committing a crime under these circumstances, and the more Bender spoke with Mr. Robinson and the mental experts, “some things became apparent to me” (T15). Although Bender felt in his “gut” that Mr. Robinson was not insane or incompetent, “there were a lot of issues inside his head, and we learned about that as time went on” (T15).

Bender recalled that Dr. Berland and Dr. Antoinette Appel were initially involved in evaluating Mr. Robinson (T16). Bender believed that Dr. Appel had

held herself out to be a neuropsychologist and she was selected because of the possibility that Mr. Robinson suffered from brain damage (T17). Bender believed that Dr. Appel conducted various tests on Mr. Robinson (T18). He did not recall what her conclusions were, as that area would have been one in which co-counsel Irwin was responsible for handling (T18). Bender did recall, however, that he believed that Dr. Appel had a mental illness (T19). As for Dr. Berland, he was someone with whom the defense team “had some contact” but “not a substantial amount of contact” (T19). Dr. Berland believed that Mr. Robinson suffered from mental illness but not to a degree which rendered him incompetent or insane at the time of the murder (T20). It would be fair to say that it was the information provided by Dr. Berland alone which Bender relied upon in order to determine that Mr. Robinson was competent to enter his plea (T21).

After reviewing some transcripts of the proceedings at the time, Bender further recalled that Dr. Appel had “dropped the ball” in terms of being able to assist with Mr. Robinson’s case in that she was difficult to reach after she conducted her evaluation and did not provide a report (T24). Thus, the only evidence they had about Mr. Robinson’s mental illness at that time was the information provided to them by Dr. Berland (T24). Bender also recalled asking the trial court to enter a provisional plea of guilty on behalf of Mr. Robinson

pending another evaluation by Dr. Kirkland (T30). Requesting such a provisional or contingent guilt plea was “unusual” particularly in a first-degree murder case where the death penalty was still on table as a possible penalty (T30). Bender recalled that there was some sort of “time constraint” which forced him to enter the contingent plea before having the second mental health evaluation performed by Dr. Kirkland (T31). Bender re-emphasized that the sole source of information about Mr. Robinson’s mental health at the time of the entry of the plea was that provided by Dr. Berland (T31). However, the report authored by Dr. Berland was dated January 24, 1995, and the guilty plea was entered on January 23, 1995, the day before Dr. Berland’s written report (T32). Bender explained that perhaps the date on the report was incorrect, for he did believe he reviewed a written report prior to going forward with the guilty plea (T32).

Bender recalled that Mr. Robinson was very stoic when he was sentenced to death the first time, but he did not recall when Mr. Robinson had a change of heart and wanted instead to live and to withdraw his plea (T33). Bender’s memory was refreshed with a letter from Mr. Robinson dated January 30, 1997, in which Mr. Robinson requested that Bender seek to have his plea withdrawn and to attempt to get him off of death row (T37).

After Mr. Robinson’s death sentence was vacated, Bender was re-appointed

to his case for the resentencing proceeding (T40). Prior to the sentencing hearing before the court, Bender made no efforts to seek to have Mr. Robinson's plea withdrawn because he did not feel it "would be very effective" and that if it were to be granted, Mr. Robinson would be "back to square one" in terms of facing a guilt and penalty phase (T43-44). Because, in Bender's view, Judge Russell had heard the facts of the case and "was somewhat numbed by it," Mr. Robinson's best chance for a life sentence was to remain in front of Judge Russell and present a full case in mitigation (T44). While Bender discussed with Mr. Robinson the matter of keeping Judge Russell on the case, they did not talk at length about the withdrawal of the plea (T44). While he did not think that a motion to withdraw the plea would be successful, Bender acknowledged that "a better job could have been done presenting a written motion to preserve the issue" (T45-46). Six (6) months had gone by between the time that Mr. Robinson expressed his desire to seek to have his plea withdrawn and the date of the sentencing hearing (T47). No written motion to withdraw the plea was ever filed, nor was an evidentiary hearing requested on the issue (T47).

On July 24, 1997, Bender did make an *ore tenus* motion to attempt to withdraw Mr. Robinson's plea (T47). Bender acknowledged that this was "not a very effective method" of raising the issue, but he believed that Judge Russell

would have denied any such motion and he “felt it best just to concentrate on the penalty phase” and this is why “we didn’t focus strongly on” the issue of withdrawing the plea (T48). Bender conceded that whether a defendant wants to withdraw his plea is not a matter of strategy but a decision for the client to make (T48). Mr. Robinson’s instructions were “clear and unambiguous” that he wanted Bender to seek to have his plea withdrawn, and Bender admitted that “it’s the client’s—if the client wishes to withdraw his plea an effort should be made to do that, regardless of whether it will be granted or not” (T48-49). It would have been a far more effective course to have filed a motion with supporting testimony from Dr. Berland that Mr. Robinson suffered a mental illness back at the time of the entry of the plea in 1995 (T49).

On cross-examination, Bender testified that prior to the 1995 plea proceedings, he had had discussions with Dr. Berland about Mr. Robinson although Dr. Berland had not actually written a formal report (T50-51). Mr. Robinson was able to articulate his reasons for his decision which did not indicate any break with reality, in Bender’s view (T52). Bender’s discussions with Dr. Berland satisfied Bender as to Mr. Robinson’s ability to enter a plea (T53). He did, however, request a second mental health expert “to have one more person make an evaluation to make sure we are correct” (T54). Even though he felt

comfortable with Mr. Robinson's competency, Bender explained that there's "always that little bit of feeling that there could be a little bit more done to make sure all the rights are preserved" (T55). His request for an additional mental health evaluation was not based on any actual doubt that he had as to Mr. Robinson's competence to enter a plea, but on the fact that "perhaps, we needed an additional opinion before we proceed" (T55).

When Mr. Robinson's case came back for the resentencing in 1997, Bender could not recall what discussions he may have had with Mr. Robinson about proceeding before a jury or the court, but Bender "probably felt" that it was better to proceed before the court alone because Mr. Robinson and Judge Russell got along well and "[there were so many bad facts about this case" (T56-57). Bender was "not sure it was the right decision to make" but it was "the best one" (T57). In terms of voluntary intoxication at the time of the offense, while Bender explained his belief that he could not "in good faith" go forward with that defense since Mr. Robinson was not under the influence, he acknowledged that Mr. Robinson, while not drinking at the time, "was mostly consuming cocaine" but not within hours of the murder itself (T58-59).

In 1997, Bender had Mr. Robinson evaluated again by mental health experts (T60). Nothing in the 1997 evaluation led him to believe that the 1995 evaluation

was in error (T60). Dr. Upon, the expert involved in the 1997 evaluation, would have been provided with the reports from 1995 and should have and probably did review those reports (T62). In 1997, there was an issue of obtaining a PET scan due to Dr. Borland's belief as a result of his 1995 evaluation that there was "the possibility" of brain damage (T62-63).

Bender's purpose in moving *ore tends* in 1997 to withdraw Mr. Robinson's plea was a "futile attempt to undo what I believed was an error in not presenting it earlier in a more proper fashion, despite my feelings that it had no success, so in order to preserve the issue before we began the penalty phase, I made an *ore tends* motion (T64). Bender did not believe knowing that such a motion had to be made in writing (T64). There were no witnesses to be called to support the *ore tends* motion since Bender did not believe that anything in the conclusions of Drs. Borland, Kirkland, Upon, or Lippman would have been relevant (T64). Hence, Bender's *ore tends* motion was made "sort of last minute and it was not effective presentation, but it did preserve the issue somewhat" (T65). If he had "better" evidence from the experts in support of the motion, even though it was presented *ore tends*, he would have presented it (T65). Upon was physically present to testify on the date of the *ore tends* motion (T65).

On redirect examination, Bender acknowledged that Drs. Upon and Lippman

were retained in 1997 for purposes of mitigation, not to evaluate Mr. Robinson's ability to voluntarily enter his plea in 1995 (T66). Bender was familiar with Florida Rule of Criminal Procedure 3.170 (f) which provides that the court, in its discretion, can permit a guilty plea to be withdrawn (T66-67). Bender conceded that the manner in which he raised the issue of Mr. Robinson's request to withdraw his plea was not appropriate:

I regret that to preserve the issue and to make an argument before the court that this was not done in a more common and professional manner by myself. I still stick by my earlier statements that I don't think—I didn't think it was going to be granted and I was looking further toward the penalty phase in trying to get him a life sentence than the expectations of having the plea withdrawn.

There's no doubt that the motion to withdraw the plea was not done in a competent manner, not that it would have resulted in being granted. So I have to say that I could have at least filed a written motion, at least had a hearing prior to the hearing and make some attempt to preserve the record better than I did.

(T67).

Dr. Wiley Wittenberg. Dr. Wittenberg is a clinical neuropsychologist and professor of clinical psychology at Nova Southeastern University (T72). He has been a neuropsychologist for fifteen (15) years at Nova, two (2) years at the Medical College of Wisconsin, and one (1) year at the Medical Center in Phoenix,

Arizona (T72). Dr. Mittenberg's practice consists primarily of seeing patients with known or suspected neurological and psychiatric disorders in both a forensic and clinical setting (T73). He has evaluated over 100 criminal defendants and has been qualified to testify as an expert for both the State and the defense in courts of the State of Florida (T74). Without objection from the State, Dr. Wittenberg was admitted as an expert by the lower court in the field of neuropsychology (T75).

In January, 2001, Dr. Wittenberg was requested to conduct an evaluation of Mr. Robinson (T75). Prior to conducting the evaluation, he reviewed a "pretty big stack" of records, including previous psychological evaluations, neuropsychological evaluations, and other similar records (T76). For example, Dr. Wittenberg reviewed records from (1) the Nevada State Hospital in Missouri in 1987, (2) the Hale County Hospital in Greensboro, Alabama, in 1987, (3) Alice County Service Center in 1982, (4) Regional Medical Center in Ocala, and (5) Orange County, Florida, Department of Corrections (T76-77). Based on these background materials, Dr. Wittenberg compiled an appropriate test battery which his technician administered to Mr. Robinson over the course of some eight (8) or nine (9) hours (T77). Once those results came back, Dr. Wittenberg himself spent some four (4) additional hours with Mr. Robinson for additional tests and a clinical diagnostic interview (T77).

Dr. Wittenberg explained that Drs. Borland and Upon came to the same diagnostic conclusions that he did, but they used tests that were precursors to the more updated ones used in the 2001 evaluation (T83). Dr. Wittenberg first administered a test to determine if Mr. Robinson was malingering, and the test revealed that he was not faking (T84). The Minnesota Multiphasic Personality Inventory (MMPI) test also established that Mr. Robinson's symptoms were valid and not exaggerated (T84-85). On the WAIS intelligence battery, Mr. Robinson scored a full scale IQ of 119, although there were variances between the verbal and performance aspects of the exam, variances which are indicative of organic impairment (T86-88). The Weschler Memory Scale test also revealed scores indicative of longstanding organic brain damage (T88-90). These findings were consistent with those obtained on the California Learning Test (T90). The neuropsychological screening test showed an inability on Mr. Robinson's part to voluntarily inhibit his behavior on the test, which is very sensitive to damage to the front part of the brain, and indicated a 70% probability of brain damage (T90-91). On the Rorschach test, Mr. Robinson likewise performed in a manner indicative of a thought disorder consistent with psychosis and/or brain damage as well as mania or manic depressive psychosis (T92). The MMPI test, in addition to validating Mr. Robinson's psychological profile, also was demonstrative of someone suffering

with manic depression (T93).

As a result of his testing and evaluation, Dr. Mittenberg's diagnosis of Mr. Robinson is bipolar mood disorder due to brain damage (T94). This is consistent with the diagnoses offered by Drs. Berland and Upson, and also is the same diagnosis given to Mr. Robinson by the Florida Department of Corrections in 2000 (T94). Dr. Mittenberg explained how Mr. Robinson's mental illness would affect him and did affect him at the time of the entry of his plea in 1995:

[] This is a severe mental disorder, one that has an unknown cause but can be caused by brain damage either by developmental origin, one that occurs in childhood or brain damage that occurs later, but once a person has manic depressive disorder, can be treated with medication, but it never goes away. It is a perfect condition, the most typical onset and course is that the symptoms first appear in early adolescence and then the patient remains with intractable manic depressive disorder for the rest of their life. They take the appropriate medication, as Mr. Robinson did not, then the symptoms can be controlled most of the time.

But without medication, the symptoms cannot be controlled and are permanent and those symptoms are the symptoms of a severe mental disorder, that is, the person cannot think rationally, they cannot form rational judgments, they are subject to bouts of severe depression that can be characterized by suicidal impulses and a wish to die that can't be resisted.

The syndrome cycles from being very depressed to being euphoric or manic. The individual is impulsive

and will do the first thing that crosses their mind without giving it any thought, and if a person is somewhere in between the manic and depressive cycles, then they may have milder depressive symptoms or milder manic symptoms, but those symptoms are always present. It's not as if they would stop off in the middle and have a period of perfect normalcy.

(T95-96). It "may or may not be apparent" to a layperson that someone is in a major depressive episode and "you can't tell just by talking to a person or looking at them" (T96).

Dr. Mittenberg's conclusions were buttressed by the records about Mr. Robinson's background that he reviewed (T97). Those records indicated, for example, that Mr. Robinson had been receiving psychotherapy and medication since the age of three (3) until nine (9), at which time he stopped therapy because he entered a special school for the emotionally disturbed which required that no medications be given (T97). Records from the Nevada hospital discussed Mr. Robinson's longstanding history of substance abuse, including stimulants and depressants, as well as alcohol abuse beginning at the age of fourteen (14) (T97-98). The use of such substances reflects a "very common pattern" among people such as Mr. Robinson who suffer from manic depressive disorder (T99).

Dr. Mittenberg's opinion is that in 1995, Mr. Robinson was not able to make

a knowing and intelligent decision to voluntarily enter a plea:

It's my opinion that Mr. Robinson entered his plea in a condition of mental weakness that was caused by permanent and long-standing brain damage and manic depressive psychosis, and once those conditions are diagnoses as I did, then one knows that the patient had the condition permanently for a long time and so it is possible, although it may be contrary to common sense, to go back in time and understand how a person thought in the past.

Once you know that they have a permanent impairment such as a mental disorder caused by brain damage or a psychotic condition, that is well-known not to go away. So, again, it's my opinion that he wasn't able to knowingly and intelligently plea because in the months, after he was incarcerated he would have been expected to have a depressive phase that was exacerbated by a withdrawal from cocaine use.

(T103). According to Dr. Mittenberg, because there is unanimity among the experts, including the State's expert, that Mr. Robinson suffers from manic depressive disorder and organic brain damage, "it is illogical and impossible to say that such a person who suffers from manic depressive psychosis or who suffers from brain damage didn't labor under mental weakness" (T104-05).

On cross-examination, Dr. Mittenberg explained that he reviewed the transcript of the 1995 plea, but "you can't tell from reading a transcript whether somebody has a mental disorder" because it involves "trained questioning and

specific examination” (T105-06). He also reviewed Dr. Kirkland’s 1995 report in which Mr. Robinson was found sane and competent; Dr. Mittenberg was not impressed with Dr. Kirkland’s evaluation which consisted of merely a cursory interview with Mr. Robinson and no psychological or neuropsychological testing (T107). Kirkland did not come to the same conclusion as did Dr. Mittenberg or Dr. Berland with respect to Mr. Robinson’s diagnosis (T108). With appropriate treatment, a person with bipolar disorder can function well, but without appropriate treatment, it is “unlikely” that there would be “periods of time where such a person would function quite well” (T113). The severity of symptoms does vary from time to time and can be cyclical (T114).

Dr. Mittenberg’s opinion is not that Mr. Robinson was not able to make any decisions due to his mental illness, but rather decisions that involve much larger and important, complicated consequences (T121-123). From what Dr. Mittenberg reviewed, it was clear that Dr. Berland had addressed Mr. Robinson’s competency to stand trial, not to enter a plea (T128). He never spoke with Dr. Berland but did review his report (T128).

Dr. Jonathan Lipman. Dr. Lipman is a neuropharmacologist, which involves the understanding of drugs and abusive toxins on an individual’s nerves, brain, and behavior (T133). After receiving his education credentials in Great

Britain, Dr. Lipman served on the faculty at Vanderbilt University in the Department of Medical Surgery and Psychology, and, in 1993, moved to Illinois, where he currently practices (T133-34). Without objection from the State, Dr. Lipman was admitted as an expert in the field of neuropharmacology (T137).

In 1997, Dr. Lipman had been requested to evaluate Mr. Robinson by his trial counsel, but his personal interaction with Mr. Robinson was by telephone because the visit with the jail was never authorized (T138). The lack of personal interaction with Mr. Robinson hindered his ability to conduct a through evaluation (T138). A personal interview would have assisted him “immeasurably” in reaching an accurate diagnosis (T138). The scope of his 1997 evaluation was to render opinions on neuropharmacological influences relative to the pending proceedings, including potential mitigation (T139). He did not recall being asked to evaluate Mr. Robinson for the express purpose of assessing Mr. Robinson’s mental state in 1995 when the plea was entered (T139). In furtherance of the work he performed in 1997, Dr. Lipman had been provided with background materials from trial counsel and a mitigation specialist (T140).

Based on that information and his telephonic conversation with Mr. Robinson, Dr. Lipman was able to chronicle Mr. Robinson’s history of drug and alcohol abuse (T142). Mr. Robinson was prescribed Ritalin between the age of six

(6) and nine (9) ostensibly for hyperactivity; he began to smoke marijuana at a high intensity beginning at age fourteen (14) (T142). From there, Mr. Robinson began to abuse his father's prescribed Valium and drink alcohol on top of the Valium tablets (T142). His alcohol consumption included beer, tequila, rum, and vodka (T142). At around the age of sixteen (16), Mr. Robinson began abusing LSD and speed (T143). At the age of seventeen (17), he met the woman who would become his wife, and she introduced him to the use of intravenous drugs including speedballs and crank (T144). After his wife left him when he was nineteen (19), Mr. Robinson went on a month-long cocaine binge (T145). For a short period, Mr. Robinson's substance abuse diminished, but at the age of 21, he described having a "death wish" while using intravenous cocaine (T145). After that experience, Mr. Robinson stayed away from the use of intravenous drugs (T145-46).

A significant experience in Mr. Robinson's history consisted of him having an adverse reaction to Prozac, a drug which had not been prescribed to him (T146). This episode is significant in light of the fact that Mr. Robinson has been diagnosed with bipolar disorder (T146-48). At the time of his 1997 evaluation, Dr. Lipman had not been provided with Dr. Berland's 1995 report (T147). The adverse reaction to the Prozac was significant because it is a "characteristic of

people who have bipolar disorder and therefore his reaction to that drug is diagnostically interesting” (T148).

When Mr. Robinson was 26 years old, his records reflect depression and he began at that time to smoke crack cocaine “uncontrollably” when he was released from an incarceration (T149). In 1991-1992, Mr. Robinson was placed into drug treatment in Ocala for three (3) months, but soon after he began again to abuse crack cocaine, a pattern which continued for some time (T150). In the months immediately preceding the murder of the victim, Mr. Robinson was abusing cocaine on a daily basis; the only time he was without cocaine during this period of time was the day before the offense and, in fact, the offense was related to him stealing items from his girlfriend in order to swap them for cocaine (T150-51). Mr. Robinson did use crack moments before the actual act of the killing and had been without it for several hours prior to that (T151). Mr. Robinson told Dr. Lipman that he had earlier lied to police about his drug use at the time of the offense because “he didn’t want to say anything that might prevent him from being executed” (T151).

Had he been asked in 1997 to opine as to Mr. Robinson’s state of mind to knowingly enter a plea in 1995, Dr. Lipman testified that even in people without an underlying mental disorder, when cocaine is used to the point of severe addiction,

the effect is to produce a withdrawal state characterized by depression (T153). Indeed, the craving for cocaine increases with time rather than decreases, which explains the high rate of relapse even after up to seven (7) months of discontinuation of the abuse (T153). In light of Mr. Robinson's diagnoses of bipolar disorder and schizoaffective disorder, Dr. Lipman explained how the withdrawal symptoms would have affected him:

. . . The answer to that is twofold and it comes to an understanding of what is meant by schizoaffective and what is meant by bipolar.

The schizoaffective individual has many features of the psychotic without actually being schizophrenic. They are close to the psychotic edge most of the time and in his interview with me he revealed many of the symptoms. He would see things moving when they are not, seeing things when they are not, he's fearful, he's paranoid, and this is, course, was in 1997. This is his underlying schizoaffective problem, in that he has problems of reality testing.

In addition, he has this psychotic mood. The drug is going to cause a catastrophic failure in his five years, going to precipitate, would precipitate anyone into a depressive state.

In a person who is bipolar it would exacerbate—we could expect that he would have been, and in fairness, he does admit to having experienced subjectively depressed and suicidally depressed, and he explained his terms, his choice of action as being his waiver of a plea, as being part of that suicidal depression.

However, we cannot ignore the fact that he is also very close to the psychotic border most of the time. So the things that he thinks is normal, the presence of God and the demons, these things would populate his depressive environment at that time and would have made it a much more severe disorder

(T153-54).

This process would have been present in Mr. Robinson even six (6) months after the last episode of drug usage at the time of the entry of his plea (T155). Had he been asked in 1997 to opine as to Mr. Robinson's state of mind when he entered his plea in 1995, Dr. Lipman would have testified that the "mind that was having these thoughts and was making these volitional acts, was deranged by organic toxicity due to drug use. His actions described now are [consistent] with the idea of a suicidal wish" (T155).

On cross-examination, Dr. Lipman explained that his notes reflected that he had a 20-minute conversation with trial counsel Bender in 1997 (T156). He did not have the opportunity to actually assess Mr. Robinson's condition by talking with him in 1995 (T157). However, based on his review of the records, his own testing, and his telephonic interview with Mr. Robinson in 1997, Dr. Lipman again explained that, in 1995, Mr. Robinson would have been suicidally depressed and, as a result, made the choices that he made (T160 *et. seq.*).

Dr. John Spencer. Dr. Spencer is a clinical and forensic psychologist (T179). After explaining his educational and work credentials (T179-81), Dr. Spencer explained that he has performed thousands of forensic evaluations and has done several in death penalty cases mostly for the prosecution (T181).

Mr. Robinson's collateral counsel had asked Dr. Spencer to evaluate Mr. Robinson at death row (T182). Prior to and after meeting Mr. Robinson, Dr. Spencer reviewed a number of background records, including prior hospital records, penalty phase transcripts, and the reports of other experts involved in the case (T182). His evaluation of Mr. Robinson consisted of a clinical interview as well as some testing (T183). He performed an MMPI test, the results of which were essentially consistent with the prior administrations of the test by other experts (T185). Based on all of his testing, Dr. Spencer testified that it "was obvious early on that Mr. Robinson has a severe chronic mental disorder" (T186). This disorder manifested itself in Mr. Robinson in his late teens, and comprises a schizo affective disorder or bipolar disorder (T187). The bottom line is that Mr. Robinson has a "disturbance of his affective processes, meaning his emotional arousal processes that interferes with his ability to think rationally. It could be another name is bipolar disorder manic type" (T187). Dr. Spencer explained:

My conclusions are that Mr. Robinson suffers

from an affective process which makes his brain go[] at 10,000 performance, when the rest of us is going at a hundred, and that in order for him to—he can respond to specific things but he can’t do so rationally because he can’t hold his brain still long enough to form a gestalt, and I think the test results, I think, are consistent with that.

(T189).

Indeed, within ten (10) minutes of talking with Mr. Robinson, Dr. Spencer realized there was something “majorly wrong” with him (T189). He is a “classic case of a person who is suffering from a serious severe clinically significant mental disturbance” which he exhibited during his interview with Dr. Spencer (T190-97). This would have a significant impact on Mr. Robinson’s ability to be rational or make decisions at the time he entered his plea in 1995 (T200-205). Dr. Spencer is not saying that it is not always irrational to want to die, but rather that “every clinical indicator [with Mr. Robinson], all the clinical indicia says this man has a serious chronical [sic] illness, he’s had it since birth and manifested itself later” (T205). Mr. Robinson’s interactions with Dr. Upson in 1997 were like a “billboard” for Mr. Robinson’s mental illness and further supported the notion that Mr. Robinson’s ability to knowingly enter a plea in 1995 was severely compromised due to mental illness (T206-11). While Mr. Robinson was not insane at the time he committed the crime, “any individual decision he makes is necessarily, was necessarily, absolutely,

without question, compromised” (T212-13).

On cross-examination, Dr. Spencer testified that he did not advise collateral counsel on the issue of whether Mr. Robinson was incompetent to proceed because he was not asked to do so (T215-16). There would, however, be “a question” about his competence (T216). Dr. Spencer does not think that Mr. Robinson has a major mental illness, he *knows* he has a major mental illness (T217). Mr. Robinson cannot provide a rational reason for his belief system because “he’s not rational”; he “can say things that appear to you to be rational because you fit them in your framework of rationality” (T219). As he explained:

I think Mr. Robinson has been suffering for a long time from a chronic mental illness which significantly impairs his judgment, which I certainly wouldn’t have any confidence in his ability to participate in something of a life or death, of any nature, let alone a life and death nature. So if you are saying do I disagree with this doctor or that doctor, I think all the doctors say he’s mentally ill. Do you want a chronically mentally ill person who has got a major mental illness making life and death decisions, I don’t

(T230).

On redirect examination, Dr. Spencer reviewed the diagnostic conclusions reached in 1995 by Dr. Berland, which included evidence of chronic psychotic disturbance involving thought disorder, basic paranoid thinking, mood disorder of

a manic nature, all of which are consistent with Dr. Spencer's conclusions (T251). However, according to a letter by Dr. Berland dated January 27, 1997, when trial counsel was requesting his assistance for the 1997 proceedings, Dr. Berland indicated that he had not completed his examination of Mr. Robinson (T251-52).

Robert Swift. Swift is a member of the congregation of St. Mary Margaret Catholic Church in Winter Park (T259). He also works under the authority of the Orange County Jail Chaplain and volunteers at the jail in that capacity (T260).

Swift came into contact with Mr. Robinson at the Orange County Jail in the latter half of 1994, and had personal interaction with him in his capacity as a volunteer chaplain (T260). Mr. Robinson presented himself as an intelligent and articulate person, but his conversations were very circumstantial and tangential:

In my conversations with Michael we would start out talking about an issue, talking about a certain period and he would start to tell me a story and he would go along in the story and then there would be a detail in the story and he would forget the rest of the story and talk about that and then it would be a detail and detail and he would go into that and it was somewhat difficult when you had an idea in mind where you kind of wanted to go with him because he would always lead you off, and Michael talked rather rapidly, he talked—you had to kind of just stop him and take him back and then he would go along for a while and then he would go off again.

(T261-62).

Mr. Robinson had informed Swift of his decision to actively seek the death penalty, but he really did not ask Swift's opinion, "he said this is what I want to do" (T262). Swift testified that Mr. Robinson was "deeply remorseful" and "ashamed" about what he had done (T263). But Mr. Robinson did not leave room for an open discussion about this; for Mr. Robinson it was "kind of black and whitish" (T263). By the time of the plea proceedings in early 1995, Swift believed that Mr. Robinson "was pretty much locked into what he was doing" (T264). In other words, "it was like a railroad track that sort of led that way and he was on that and that was where he was going without any questioning or evaluation" on Mr. Robinson's part (T264).

After he was sent to death row in 1995, Swift maintained contact with Mr. Robinson in the capacity of spiritual advisor (T265). When Mr. Robinson was returned to Orange County for the 1997 proceedings, Swift sensed a change in Mr. Robinson in terms of his wanting to live (T265-66). During his time on death row, Mr. Robinson had been receiving, through friends and acquaintances, a sense of worth and "personal feedback that made him start to feel a little bit better about himself" which "gave him a sense of value of his own worth or own potential self worth" that he had not had "until that point" in his life (T267). This type of reflection and thought process by Mr. Robinson was absent in the time leading up

to the 1995 plea:

. . . In 1995 when he would—he walked me through different parts of his life and he would take me through these stories and although I was impressed with his articulateness, I was impressed with his memory, which is quite extraordinary.

I was appalled at the terrible decisions he was making. One dumb mistake after [another], drugs, stealing. They just seem to be some kind of contradiction between this level of apparent intelligence and at the same time he saw himself as a Christian and aware of Christian morality and aware of the laws of the land as well. In the more recent conversation that I had with him, he seems to be a little more reconciled.

(T269-70).

On cross-examination, Swift testified that the church of which he is a member is opposed to the death penalty although, from a religious perspective, Swift is a “little bit on the fence” on the issue of capital punishment (T271). The church did assist in raising funds to pay for a private P.E.T. scan for Mr. Robinson in his collateral proceedings (T271-72). Swift cares deeply for what happens to Mr. Robinson (T272).

Barbara Judy. Judy resides in North Carolina and is Mr. Robinson’s mother (T280). She testified at the 1997 penalty phase hearing (T280). When she was giving birth to Michael, Judy explained that it was a long delivery and forceps

had to be used; the shape of his skull was pointed for several weeks and the prints of the forceps were on the side of his face (T281). From a very early point, Judy realized there was something wrong with her son:

Almost from the beginning I knew that something was wrong. I'm the oldest of six children, so I was around young children growing up, and Michael cried just almost continuously and they could find no physical reason for it, didn't want to sleep, pediatrician said to put him in the bed and let him cry.

After hours of that we would put him in the car and drive until he fell asleep. He didn't want to be held.

When you would try to hold him and feed him he would fight, just scream and kick. He was very active.

He was climbing out of his crib by the time he was nine years [sic] old and wouldn't stay in the bed at that point.

(T281).

Mr. Robinson was eventually, as a young child, prescribed Ritalin due to what was perceived as his "hyperactivity" (T282). He was six (6) years old when they started at ten (10) milligrams, and at age nine (9), his dosage was increased to sixty (60) milligrams (T283). Judy was told that they could not increase the dosage any further, and the school told her that while they would not tell her that her son could not come back to school, "they told me it would be disastrous for everybody if he did" (T282-83). Mr. Robinson was then sent to various school

settings, from military to special schools for attention-deficit disordered children, all without much success (T283).

Michael's mind "raced all the time" and he was "always doing things that were dangerous either to himself or to other people around him" (T284). As Judy explained, "You couldn't keep him concentrating on anything" (T284). A series of self-destructive episodes as a child reinforced in Judy the fact that her son "never considered the consequences of anything, ever. If a thought came to him, he just reacted" (T285).

When Michael was arrested in late 1994, he had telephonic and written communication with his mother, but no personal contact (T285). Judy first became aware of Michael wanting to plead guilty and seek the death penalty through his attorney and Dr. Berland (T286). It was "difficult" for her because Dr. Berland would tell her that "he wasn't sure that he wouldn't opt for the same thing if he was in Michael's position" and also, she was the one responsible for turning in her son to the police (T286-87). Hence, it was difficult for her to advise him on the choices he was making under the circumstances (T287).

On cross-examination, Judy explained that Mr. Robinson engaged in "unusual" behavior "continuously" throughout his life, and the more pressure he was under from peers and school situations, "the worse problems got" (T288). In

terms of the period leading up to the 1995 plea, all that Judy can say was that from the phone calls and letters and “erratical [sic] things that he discussed” she knew that “he was not thinking rationally” (T294).

Dr. Harry McClaren. Dr. McClaren specializes in criminal forensic psychologist (T305). After explaining his educational background and training, Dr. McClaren was admitted as an expert in the field of forensic psychology (T305-10).

Dr. McClaren was asked to evaluate Mr. Robinson by the State, and he reviewed a number of documents provided to him by the State, including records from Mr. Robinson’s incarceration on death row, transcripts of the prior legal proceedings, and depositions and reports of other mental health experts (T311-13). In addition, Dr. McClaren spoke with Lisa Wiley, who is a psychological specialist at Union Correctional Institution responsible for death row inmates, as well as Mr. Robinson’s mother and Mr. Smith, Mr. Robinson’s spiritual advisor (T314). Dr. McClaren also met with Mr. Robinson on two occasions and administered two psychological tests (T314-16).

Dr. McClaren testified that he had reviewed the reports authored by Drs. Berland and Kirland, both of whom opined that Mr. Robinson was competent at the time Mr. Robinson entered his plea in 1995 (T320). Dr. McClaren agreed with the prosecutor that “that would mean” that Mr. Robinson, despite any mental

illness, was able to make a knowing and rational waiver of his rights (T320). He has not seen any reports to the contrary (T321). He also listened to the testimony of Drs. Lipman and Spencer, as well as that of Ms. Judy and Mr. Swift and, based on that testimony in addition to his own evaluation, Dr. McClaren did not believe that, in 1995, Mr. Robinson was unable to knowingly enter a plea (T322). Dr. McClaren does agree that Mr. Robinson has some degree of brain dysfunction and suffers from bipolar disorder, but, in his view, Mr. Robinson was “in a somewhat more up mood” rather than a “terribly depressed” mood at the time he entered his plea in 1995 (T322). Despite the fact that Dr. McClaren agrees that Mr. Robinson is bipolar and is “circumstantial and tangential” and has been that way for some time, he could appreciate what he was giving up when he entered his plea (T323). In terms of Mr. Robinson’s polysubstance addiction, Dr. McClaren opined that the passage of nearly six (6) months between Mr. Robinson’s arrest and the entry of his plea would have “much improved” his mental state due to the prior drug addiction” (T324).

In Dr. McClaren’s experience, he would expect that prison psychological assessments would have noted incidents of sever disturbance of behavior (T326). While the UCI psychological reports did reflect a diagnosis of “rule out” bipolar or schizo effective disorder in 2000, he did not see any other reference to those

disorders in the records (T326). There “may” have been some other references to it but Dr. McClaren “couldn’t independently find it” (T326). One of the diagnoses that would be appropriate for Mr. Robinson would be antisocial personality disorder (T327). In Dr. McClaren’s view, people with antisocial personality disorder often engage in behaviors which cause them to have brain damage (T330). He conceded that “[a]lmost every psychiatrist has thought that [Mr. Robinson] had a degree of brain dysfunction” (T331). In Dr. McClaren’s opinion, however, the degree of brain dysfunction in Mr. Robinson was not to such a degree where he was being paralyzed to one side of his body (T333).

On cross-examination, Dr. McClaren acknowledged that Mr. Robinson was not engaging in malingering during his evaluation and gave him valid testing (T335-36). He also admitted that, based on the testing of Dr. Berland in 1995, it was a “viable possibility” that Mr. Robinson was “underreporting” his symptoms of mental illness (T336-37). The typical onset of bipolar disorder is in the early twenties for a given individual (T338). In Dr. McClaren’s view, it was impossible to pinpoint the exact onset of Mr. Robinson’s mental illness particularly given his drug usage, which could “mimic” the symptoms of the bipolar disorder (T339). In terms of 1995, Dr. McClaren agreed that Mr. Robinson could be diagnosed as suffering from “mental disorders” and “mental weakness” (T340). Despite these

disorders, Mr. Robinson has high average intelligence which may have been brought down a bit by his level of cognitive impairment (T343). Of course, bright people still can suffer from mental illness (T344). Whether or not Mr. Robinson was able to make a knowing, intelligent, rational decision would depend on “the degree of the mania” (T344; 350).

SUMMARY OF ARGUMENTS

1. Mr. Robinson maintains the necessity of an evidentiary hearing and/or relief in the form of a new trial or penalty phase on numerous claims raised in his Rule 3.850 Motion. Mr. Robinson's motion raised facially sufficient claims of ineffective assistance of counsel which were improperly denied without an evidentiary hearing. Mr. Robinson alleged that trial counsel failed to (1) adequately investigate and present available mitigating evidence, as well as ensure that Mr. Robinson received the competent assistance of mental health experts, (2) adequately investigate and notify the trial court of Mr. Robinson's desire for a jury penalty phase, not a judge-only penalty phase, (3) move to recuse the trial court due to bias upon this Court's remand for a new penalty phase hearing, and (4) object to constitutional error. Because the files and records do not conclusively refute these allegations, an evidentiary hearing is warranted, and the lower court's summary denial of these issues was erroneous.

2. The lower court erred in denying Mr. Robinson's claim of ineffective assistance of counsel for counsel's failure to properly withdraw Mr. Robinson's plea. The lower court denied relief notwithstanding evidence adduced at the evidentiary hearing which demonstrated that, under the proper test for assessing ineffectiveness in a guilty plea case, Mr. Robinson was entitled to relief. The lower

court's order rested primarily on prejudice grounds, but failed to cite any legal authority and indeed the lower court applied an improper prejudice test. Based on the evidence adduced at the hearing, this Court should reverse, permit Mr. Robinson to withdraw his plea of guilty, and remand Mr. Robinson's case for a new trial.

3. In his Rule 3.850 motion, Mr. Robinson raised a number of issues that are required to be raised for preservation purposes in the event of future developments in the law. Pursuant to the Court's suggestion in *Sireci v. State*, Mr. Robinson herein raises these issues in one argument in order to properly preserve them.

ARGUMENT I

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

In his amended motion for postconviction relief brought pursuant to Fla. R. Crim. P. 3.851, Mr. Robinson made several claims involving ineffective assistance of counsel. These claims were denied without an evidentiary hearing. Mr. Robinson submits that the lower court erred in summarily denying these claims.

The law attendant to the granting of an evidentiary hearing in a postconviction motion is oft-stated and well-settled: “[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief.” *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). Factual allegations as to the merits of a Rule 3.850 claim must be accepted as true, and an evidentiary hearing is warranted if the claim involves “disputed issues of fact.” *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). This Court has also, on repeated occasions, “strongly urged” lower courts to err on the side of granting evidentiary hearings when capital defendants raise allegations of ineffective

assistance of counsel. *See Floyd v. State*, 808 So. 2d 175, 183 (Fla. 2002); *Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J., concurring).

Moreover, in order to establish ineffective assistance of counsel, Mr. Robinson must allege and establish both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In his motion, Mr. Robinson plead what he was required to in order to establish, at a minimum, his entitlement to an evidentiary hearing. This Court's review both as to the sufficiency of the allegations warranting an evidentiary hearing as well as the actual constitutional issue presented under the Sixth Amendment are reviewed by this Court *de novo*. *See Stephens v. State*, 748 So. 2d 1028 (Fla. 1999); *McLin v. State*, 827 So. 2d 948 (Fla. 2002).

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

In Claim IV of his amended motion for postconviction relief, Mr. Robinson alleged that his counsel's failure to present available evidence of mitigation undermined confidence in the outcome of his penalty phase proceedings (PCR208-216). In a related claim, Claim V, Mr. Robinson alleged that the result of his sentencing proceeding was rendered unreliable due to the fact that he was deprived of the effective assistance of mental health experts in violation of the Sixth, Eighth,

and Fourteenth Amendments and *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). The lower court summarily denied Claim IV, concluding that it was refuted by the record in that counsel did present mitigation which was found and considered by the trial court and that “[t]here is no reasonable probability that additional evidence would have resulted in a different sentence” (PCR550). The Court also summarily denied Claim V, noting that was largely subsumed within the allegations in Claim IV and was likewise refuted by the record (PCR550). Mr. Robinson submits that the lower court erred in concluding that the record refuted his allegations in both Claims IV and V, and also erred in its prejudice analysis as to Claim IV.

In his motion, Mr. Robinson alleged that trial counsel, without a reasonable tactic or strategic decision, inadequately investigated and thus failed to present available evidence of mitigation to the trier of fact (PCR208-09). In terms of specific witnesses who Mr. Robinson alleged were available and could have been called to testify had they been asked, Mr. Robinson’s motion alleged:

Mr. Robinson’s counsel failed in their duty to provide effective legal representation at the penalty phase by presenting only extremely limited mitigation evidence. The most glaring and troubling aspect of the penalty phase was that counsel shockingly called such few witnesses. Mr. Robinson’s counsel had hired an investigator who by all accounts was doing all the work. She obtained documents, attempted to interview witnesses, put together a life time line, provided the

experts with documentation and much more. The sentencing court was so distraught about paying the investigator that she refused to turn over her findings and had to retain counsel to represent her interests.^[4]

Because of the time constraints under which the court had counsel working, the investigator was unable to finish the investigation. Additionally, counsel failed to present the necessary evidence to convince the court to sentence Mr. Robinson to a life sentence. Had counsel been prepared he would have presented testimony from many witnesses to prove both statutory and non-statutory mitigation. The only witnesses presented by counsel were two doctors and Mr. Robinson's mother.. The investigator had discovered or could have discovered numerous others willing to testify on Mr. Robinson's behalf and who were never called to do so. Some of those witnesses include 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), John Carraway (owner of special school), to name a few. These witnesses would have testified to the facts surrounding Mr. Robinson's life yet uncovered by [counsel] that would have caused the court to find mitigation which she did not.

(PCR212-13). Similar allegations were made in support of Mr. Robinson's entitlement to an evidentiary hearing as to Claim V (PCR220-23).

As the allegations made by Mr. Robinson clearly set forth more than

⁴As noted in the trial court's order denying this claim, the bill for the investigator's services was cut nearly in half by the court (PCR547 n.3).

sufficient allegations of deficient performance and prejudice, the lower court erred in summarily denying this aspect of Mr. Robinson's motion. Indeed, by providing the names of specific witnesses who Mr. Robinson alleged were not investigated by counsel and presented to the court, Mr. Robinson's motion alleged more than was required in order to obtain an evidentiary hearing. *Gaskin*, 737 So. 2d at 513 n.10 (noting that defendant is not required to provide names of witnesses in order to make out a legally sufficient claim of ineffective assistance of counsel for purposes of obtaining an evidentiary hearing).

The lower court's order denying this claim without a hearing focuses on the prejudice prong. Because, in the lower court's view, trial counsel did present mitigation which was found and considered by the court, the record refuted Mr. Robinson's claim and "[t]here is no reasonable probability that additional evidence would have resulted in a different sentence" (PCR550). Mr. Robinson submits that both of these legal conclusions are in error.

First, the lower court improperly concluded that the mere presentation of some mitigation at the penalty phase precluded a finding of ineffectiveness. This is not correct. While certainly the absence of *any* presentation of mitigation at a capital penalty phase is certainly a factor to be considered in assessing whether, at a minimum, an evidentiary hearing is warranted, the fact that some mitigation *was*

presented does not equate into a presumptive conclusion that no prejudice exists. For example, in *Harvey v. Dugger*, 636 So. 2d 1253 (Fla. 1995), this Court was faced with a summary denial of a Rule 3.850 motion in which the defendant alleged ineffective assistance of counsel at the penalty phase. Despite the fact that the trial record established that defense counsel, at the penalty phase, presented seventeen (17) witnesses, including a mental health expert, the Court reversed and remanded for an evidentiary hearing based on the defendant's allegations of additional mitigation that went undiscovered and unrepresented by counsel. *Harvey*, 656 So. 2d at 1257. *Accord Rivera v. State*, 717 So. 2d 477, 485 (Fla. 1998). Mr. Robinson's Rule 3.850 motion is just as legally sufficient, if not *more* than, the motion and circumstances presented in *Harvey*. *See also Cook v. State*, 792 So. 2d 1197 (Fla. 2001) (summary denial of ineffective assistance of counsel claim reversed even though defendant presented mitigation at the original penalty phase).

The lower court's prejudice analysis is also erroneous in that it focused merely on the fact that the "additional" mitigation alleged by Mr. Robinson would not "have resulted in a different sentence" (PCR550). As the Supreme Court has made clear, however, a proper prejudice analysis demands that a reviewing court "reweigh the evidence in aggravation against the *totality* of available mitigating evidence." *Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003) (emphasis added).

See also Williams v. Taylor, 120 S. Ct. 1495 (2000) (court is required to conduct an “assessment of the totality of the omitted evidence” and then “evaluate the totality of the available mitigation—both that adduced at trial, and the evidence adduced in the habeas proceeding”). If “the available mitigating evidence, taken as a whole, `might well have influenced the [fact-finder’s] appraisal’ of [the defendant’s] moral culpability,” *Wiggins*, 123 S. Ct. at 2544 (quotation omitted), then prejudice has been established. Because the court did not properly evaluate the totality of the mitigation when it concluded that Mr. Robinson had not established prejudice, the lower court’s order should be reversed with directions to conduct an evidentiary hearing.

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.

In Claim XI of his amended motion for postconviction relief, Mr. Robinson alleged that, after this Court vacated his death sentence and remanded the case to the trial court for a renewed sentencing phase, trial counsel failed to assert Mr. Robinson’s entitlement to have his sentencing phase conducted before a jury, not just the court (PCR239-40). The lower court summarily denied this claim, concluding that it was refuted by the record due to this Court’s opinion remanding

only for a judge sentencing (PCR554).

In its first opinion addressing Mr. Robinson's case, this Court vacated Mr. Robinson's death sentence and remanded the case "to the trial court to conduct a new penalty-phase hearing before the judge alone . . . " *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1999).⁵ This conclusion was premised on the fact that, during his initial proceedings, Mr. Robinson had waived his right to a jury at the penalty phase. *Id.* at 176. However, despite the Court's opinion indicating that the remand was to be for a judge-sentencing only, Mr. Robinson submits that counsel had an obligation to bring to the trial court's attention Mr. Robinson's desire to have his case heard by a duly-empaneled jury given that this Court had in fact vacated the sentence of death and remanded for a "new penalty phase hearing." Moreover, as alleged in his motion, Mr. Robinson's "decision" to waive his right to a jury at the penalty phase was premised upon the same mental infirmities which existed and which also vitiated his prior "decision" to plead guilty (PCR239-40). As Mr. Robinson's collateral counsel elaborated at the *Huff* hearing, the allegations contained in Claim XI overlapped those alleged in Claim III except that Claim XI

⁵It is important to note that this Court did *not* remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). Such reweighings do not afford defendants to the same panoply of rights as do plenary sentencing proceedings. Rather, the Court remanded for a new, plenary, penalty phase hearing.

addressed the voluntariness of the jury waiver as opposed to the guilty plea (T441-42). Despite the fact that the trial court granted an evidentiary hearing on Claim IV and noted that raised allegations “similar to those set forth in Claim III,” it summarily denied⁶ Claim XI because this Court on appeal authorized only a judge-sentencing penalty proceeding, not a jury resentencing.⁷

When this Court vacates a sentence of death and remands for a resentencing proceeding, the proceedings are *de novo*.⁸ See *Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997) (a resentencing is a “completely new proceeding”). Hence, notwithstanding Mr. Robinson’s earlier waiver of his right to a jury trial at the

⁶Mr. Robinson submits that the court’s decision rested on a merits denial, although the order is not a model of clarity. Before reaching the ultimate conclusion that “[t]his claim lacks merit, and it is summarily denied,” the court, in the preceding paragraph, also indicates that the claim is procedurally barred because it was raised on direct appeal (PCR554) (citing *Robinson*, 761 So. 2d at 274). The portion of the Court’s opinion referenced by the trial court, however, did not address any issue regarding Mr. Robinson’s waiver of a penalty phase jury but rather whether the court had erred in denying the oral motion made by counsel at the resentencing to withdraw Mr. Robinson’s guilty plea. The two issues are, of course, not the same. Hence, the lower court’s conclusion that the issue had been raised on direct appeal was in error.

⁷To the extent that the trial court and counsel felt obligated by the language employed in this Court’s decision remanding only for a judge resentencing, Mr. Robinson submits that the Court’s direct appeal conclusion was in error. This error will be addressed in Mr. Robinson’s petition for habeas corpus.

⁸Again, as noted above, this case did not involve a reversal for the trial court to confirm a sentencing order to the requirements of *Campbell*.

penalty phase, the Court's remand for a *de novo* penalty phase afforded him the right to decide anew whether or not he wished to have a penalty phase jury or to validly waive that right. Here, Mr. Robinson was given no such choice, despite the fact that, as this Court noted in the appeal from the resentencing, Mr. Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 So. 2d 269, 275 n.5 (Fla. 1999).

For example, by way of analogy, when the Court on direct appeal vacates a guilty plea and remands for a new trial, a defendant still has the choice upon retrial to either go to trial or again plead guilty; the Court's decision vacating the plea and remanding for a new trial does not obligate the defendant to have a jury trial on remand. Compare *Thompson v. State*, 351 So. 2d 701 (Fla. 1997), with *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). When this Court remands for a new penalty phase, the State is not precluded from presenting an aggravating circumstance at the resentencing that had been found inapplicable in the prior proceeding. See *Phillips*, 705 So. 2d at 13; *King v. Dugger*, 555 So. 2d 355, 358-59 (Fla. 1990). Mr. Robinson's case is no different in the sense that, when this Court reversed and remanded for a new penalty phase proceeding, Mr. Robinson was not and should not have been bound by his prior waiver of a jury, particularly given the allegations set forth in his Rule 3.850 motion as to the mental illnesses he

unquestionably suffered when making the “decision” to waive a penalty phase jury in the first proceeding. A defendant has a right to “change his mind” when afforded a second chance at a resentencing proceeding, yet Mr. Robinson’s counsel never informed Mr. Robinson of his right to assert his desire to have a jury hear his case in mitigation.

The significance of this issue must be assessed in the context of the “fundamental and cherished right of trial by jury” that vests with all criminal defendants. *Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956). In *Pangburn v. State*, 661 So. 2d 1182 (Fla. 1995), this Court addressed a situation where a trial court failed to provide the jury with separate verdict forms for each victim. After the error had been discovered in the trial court, the parties entered into a stipulation providing that the jury’s recommendation would be accepted as one for the death of one victim and one of life for the other. Before the defendant was sentenced, however, he moved to withdraw his consent to the stipulation. On appeal, this Court found error in the verdict form issue and reversed for a new penalty proceeding. The State, however, urged that no new penalty phase was warranted because the trial court denied the defendant’s withdrawal request. This Court held that the trial court should have granted the withdrawal request and thus the “stipulation” could not be enforced. Noting that the discretion vested with trial

courts in determining a waiver of a jury by a capital defendant at the penalty phase “is to be exercised liberally in favor of granting a defendant’s request to withdraw,” *id.* at 1189, the Court wrote:

In this case, the trial judge rejected appellant’s withdrawal request because he found “no legal basis . . . that would warrant the right to withdraw.” Although the trial judge is to be commended for attempting to resolve an obviously untenable situation, we find that he applied the wrong standard in determining whether to grant appellant’s request. As we noted in *Floyd*,

It would appear to us that the fundamental and cherished right of trial by jury will be best protected and be cause to ‘remain inviolate’ if the withdrawal of the waiver to such a trial is refused by a court only when it is not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public.

90 So. 2d at 106. Applying that liberal standard to the facts of this case, we find that the trial judge should have granted appellant’s request to withdraw. The record reflects that the withdrawal request was made before appellant was sentenced, that it was not made to obtain a delay, and that no substantial harm would have been done by the granting of this request. In fact, a new penalty phase proceeding was one of the options initially presented to appellant. Given that the right to a jury in the penalty phase proceeding is such a substantial right, we conclude that a new penalty phase proceeding is required under these circumstances.

Pangburn, 661 So. 2d at 1189. Applying the “liberal standards” discussed in *Floyd* and *Pangburn*, Mr. Robinson submits that, at a minimum, an evidentiary hearing is warranted on the issue of trial counsel’s failure to apprise Mr. Robinson and the court of his desire for a jury resentencing and to investigate and present evidence as to Mr. Robinson’s inability to knowingly waive that right in the earlier proceeding.

C. Failure to move to recuse trial court upon remand.

In Claim XVI of his amended motion for postconviction relief, Mr. Robinson alleged that after this Court remanded for a new penalty phase proceeding before the court only, trial counsel performed deficiently by failing to move to recuse the court on grounds that he had a reasonable belief that the court could not provide him with a fair and impartial resentencing proceeding (PCR254). The lower court summarily denied this claim, concluding that a claim of “actual bias” had been raised on direct appeal and thus was procedurally barred (PCR558). In the alternative, the court summarily rejected the claim, relying on evidence adduced at the evidentiary hearing granted on *another* claim to reject the recusal claim. In all respects, the lower court erred in denying this claim.

In his motion, Mr. Robinson alleged that based on evidence in the record of the original proceedings, the trial court had demonstrated such a bias as to require

recusal, and that trial counsel failed to seek the court's recusal:

The trial court's bias in favor of the State and her predisposition to sentencing Mr. Robinson to death is evident in the record. On numerous occasions, the trial court stated its dissatisfaction with the way the case was moving, constantly blamed the defense, was obsessed by what she thought was an overabundance of money spent on defending Mr. Robinson and made improper remarks on the record as follows:

(Defense counsel): When our experts come to us and say, "we need more time," we are stuck between a rock and a hard place.

(The Court): And they asked for more money than they were awarded to start with, too. I think they have gone too far with this. I don't think I am going to be granting any continuance (Supp. R. Vol. 4, pg. 45).

* * *

(The Court): I think it sounds like your mitigation specialist has gone a little too far (Supp. R. Vo. 4, pg. 51)

* * *

(The Court): I don't want to throw Mr. Irwin and Mr. Bender in the box with the C.R.R. [sic] attorneys. I believe these guys are a whole lot better than that, and they are not ever deceptive to me. I think their doctors and their experts are going further than they need to go or, like you've said, they are going to fill up the gap that they've got' and

that's why I don't even want to continue it any further. We have already got one extension. We've got them asking for another extension. These doctors will never continue as long as they see that pot of money at the end (Supp. R. Vol. 4, pg. 70-71)

* * *

(Defense counsel): It's a lot of money, no question. It's a lot of money. But we're talking about the ultimate penalty and a person's right to have that evidence presented and that, I think, is not a lot of money when we're looking at taking another person's life.

(The Court): But if this person had money, let's say he could afford his own, I don't think he would be spending this much money and having two doctors and an expert mitigation specialist (2d Supp. Vo. VI, pp. 108-109)

* * *

(The Court): I can see getting the \$500 test done. I can see that because that's something tangible, something I can understand maybe, and that's reasonable. And if that's what you have to do for today, I think that's fair. If the state—if the county wants to say anything about that, go ahead. The \$500 makes sense to me for that test, but it's this nebulous, you know, touchy-feely stuff that is getting too far out of hand.

I'm afraid (2d Supp. Vol. VI, pp. 110-11).

* * *

(Defense Counsel): . . . The Court can't do this, because he wanted to know if he could request lethal injection.

(The Court): I have got enough things to worry about.

(Defense counsel): He saw something on T.V. about the electric chair, but he wants me to make the request.

(The Court): Well, tell him that I wasn't real crazy about the hammer and the knife, either (R104)

* * *

(Defense counsel): Judge, we're going on the 24th. You're not going to hear anything from us.

(The Court): I've heard that before. I want this done, and I think this guy has had absolutely an incredible defense here. A millionaire, J. Paul Getty couldn't afford what this man has already gotten.

(Defense counsel): That may be carrying it a little bit too far.

(The Court): I don't think so. I'm not even far off on that (Vol. I, p. 12)

(PCR251-52).

As noted above, the lower court denied the claim on alternative grounds. As to the procedural grounds, the lower court concluded that this claim had been raised and rejected on direct appeal and was thus procedurally barred (PCR558). It is correct that the underlying substantive issue of the court's bias was raised on direct appeal and rejected by the Court. *Robinson*, 761 So. 2d at 273 n.4 “(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”). The issue on appeal, however, is not the same as the issue presented in Mr. Robinson's Rule 3.850 motion. On appeal, the issue of the actual bias of the court was raised, and the manner in which the Court denied the claim established that the Court was employing an “actual bias” standard. To the contrary, in his Rule 3.850 motion, Mr. Robinson made an allegation of ineffective assistance of counsel in that trial court failed to file a motion to recuse. Had such a motion been filed, Mr. Robinson would not have been required to show “actual prejudice” but rather only a reasonable fear that he could not be provided with a fair and impartial tribunal due to the comments of the court in the earlier proceedings. *See, e.g. Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988); *Chastine v. Broome*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). The trial court thus erred in failing to

distinguish between the issue raised on appeal and the issue raised in Mr.

Robinson's postconviction motion. As this Court recently wrote:

The trial court concluded that this claim was barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question on a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and—of necessity—have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2002). Under the analysis of *Bruno*, Mr.

Robinson submits that the lower court in his case similarly erred in concluding that his claim was procedurally barred.

In the alternative, the lower court summarily denied the ineffectiveness component of the claim, relying on testimony adduced at the 2003 evidentiary hearing on an entirely different claim (PCR558). The lower court never granted an evidentiary hearing on Claim XVI, the hearing was limited to Claim III. Thus, the lower court erred in relying on evidence taken on another claim in denying the

instant claim; no notice by the court was given that the Court would be taking testimony on Claim XVI or that testimony from the hearing would be used by the court to deny other claims. Thus, due process was violated by the trial court's unannounced reliance on the testimony adduced on an entirely separate claim, and reversal is warranted.

D. Failure to object to constitutional error.

In his amended motion for postconviction relief, Mr. Robinson alleged that trial counsel failed to object and preserve issues of constitutional error particular to death penalty cases. For example, he alleged that counsel failed to preserve by objection and/or pretrial motion the unconstitutionality of Florida's death penalty statute (PCR237-38), as well as the unconstitutional manner in which the Florida statute impermissibly shifts the burden from the prosecution to the defense to demonstrate that mitigating circumstances outweigh aggravating circumstances (PCR230-32). The lower court concluded that these claims in substance were procedurally barred and, as to the ineffectiveness aspects, without merit based on prior rejection by this Court of these claims in other capital cases (PCR551-53).

Mr. Robinson asserts his right to an evidentiary hearing on his allegations of ineffective assistance of counsel. He does, however, acknowledge that these claims have been rejected, but he raises them herein in order to preserve them. *See*

Sireci v. State, 773 So. 2d 34 at n.14 (Fla. 2000).

ARGUMENT II

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.

In Claim III of his amended motion for postconviction relief, Mr. Robinson alleged that his trial counsel rendered prejudicially deficient performance due to his failure to adequately investigate and properly move to withdraw Mr. Robinson's previously-entered plea of guilty. The lower court granted an evidentiary hearing on this issue, and ultimately denied relief (PCR543-47). Because this claim involves mixed questions of law and fact, this Court's standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999); *McLin v. State*, 827 So. 2d 948 (Fla. 2002).

In order to prevail on his claim of ineffective assistance of counsel, Mr. Robinson must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Because this claim involves one addressing the entry of a plea, the prejudice prong is a bit different than the one governing more usual claims of ineffectiveness, as this Court has just recently clarified:

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the United States

Supreme Court established a two-pronged test for determining claims of ineffective assistance of counsel relating to guilty pleas. The first prong is the same as the deficient performance prong of *Strickland*. See *Hill*, 474 U.S. at 58-59. Regarding the second prong, the Supreme Court in *Hill* held that a defendant must demonstrate “a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

Grosvenor v. State, 2004 Fla. LEXIS 458 at *5-*6 (Fla. March 24, 2004). In other words, prejudice in the context of a guilty plea case is established when there is a reasonable probability that “the outcome of the `plea proceedings’ would have been different had competent assistance of counsel been provided.” *Id.* at *12 (citations omitted).

Mr. Robinson submits that the evidence adduced below establishes his entitlement to relief under the *Strickland/Hill/Grosvenor* line of cases. The lower court’s order largely, if not exclusively, addressed the prejudice prong, concluding that Mr. Robinson 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” (PCR547).

As to the deficient performance prong—not addressed by the court—Mr. Robinson submits that he more than has established that trial counsel failed to

prepare himself to properly move, in writing and supported by available witness testimony, to withdraw Mr. Robinson's guilty plea. Indeed, as this Court noted on the appeal from the resentencing in Mr. Robinson's case, "Robinson's counsel orally moved to withdraw Robinson's guilty plea on the ground that "'Robinson was not able to form an intelligent waiver of his rights.'" No further explanation was offered as to why Robinson could not form an intelligent waiver." *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999). The Court also noted that, after the lower court denied the oral motion, counsel "did not move for rehearing or attempt to further argue to the court reasons why his initial plea was not intelligently made. *Id.* at 274.

Trial counsel's effort to move to withdraw Mr. Robinson's plea was formulaic and boilerplate and fell far short of a meaningful attempt to provide a legally sufficient motion, supported by evidence, on the very important issue of whether Mr. Robinson would be allowed to withdraw his previously-entered plea of guilty to first-degree murder. That counsel performed deficiently is supported by the testimony adduced at the evidentiary hearing. Counsel acknowledged that Mr. Robinson's instructions were "clear and unambiguous" that he wanted an attempt made to withdraw his plea, but he did not discuss the issue at length with Mr. Robinson (T48-49). As trial counsel explained, "if a client wishes to withdraw his

plea an effort should be made to do that, regardless of whether it will be granted or not (T48-49). He also acknowledged that “if you are going to file a motion, having it ready to go and having it prepared and having testimony from experts is a more effective procedure” (T49). Trial counsel felt, however, that “filing his motion, right or wrong, was not going to get us anywhere, so I didn’t file it” (PCR65). Then, counsel had “regrets” about not abiding by Mr. Robinson’s request to make efforts to withdraw his guilty plea and so counsel “did it sort of last minute and it was not effective presentation” (PCR65). At the 1997 proceeding, counsel also made no attempt to call Dr. Berland on the issue of Mr. Robinson’s mental ability to withdraw his plea in 1995, nor did he call those experts who were physically present or available telephonically to testify regarding mitigation, to discuss the issue of Mr. Robinson’s plea in 1995 (PCR65). These facts more than establish deficient performance.

As to prejudice, Mr. Robinson also submits that, under a proper analysis, postconviction relief should issue, as he more than established a reasonable probability that the outcome of the plea process would have been different but for counsel’s deficient performance. At the evidentiary hearing, counsel presented abundant evidence establishing that, when he entered his plea in 1995, Mr. Robinson was mentally ill and thus incapable of making such a complicated

decision in a truly knowing and voluntary fashion.

As a result of his testing and evaluation, Dr. Wiley Mittenberg's diagnosis of Mr. Robinson is bipolar mood disorder due to brain damage (T94). Dr. Mittenberg explained how Mr. Robinson's mental illness would affect him and did affect him at the time of the entry of his plea in 1995:

[] This is a severe mental disorder, one that has an unknown cause but can be caused by brain damage either by developmental origin, one that occurs in childhood or brain damage that occurs later, but once a person has manic depressive disorder, can be treated with medication, but it never goes away. It is a perfect condition, the most typical onset and course is that the symptoms first appear in early adolescence and then the patient remains with intractable manic depressive disorder for the rest of their life. They take the appropriate medication, as Mr. Robinson did not, then the symptoms can be controlled most of the time.

But without medication, the symptoms cannot be controlled and are permanent and those symptoms are the symptoms of a severe mental disorder, that is, the person cannot think rationally, they cannot form rational judgments, they are subject to bouts of severe depression that can be characterized by suicidal impulses and a wish to die that can't be resisted.

The syndrome cycles from being very depressed to being euphoric or manic. The individual is impulsive and will do the first thing that crosses their mind without giving it any thought, and if a person is somewhere in between the manic and depressive cycles, then they may have milder depressive symptoms or milder manic

symptoms, but those symptoms are always present. It's not as if they would stop off in the middle and have a period of perfect normalcy.

(T95-96). It "may or may not be apparent" to a layperson that someone is in a major depressive episode and "you can't tell just by talking to a person or looking at them" (T96).

Dr. Mittenberg's conclusions were buttressed by the records about Mr. Robinson's background that he reviewed (T97). Those records indicated, for example, that Mr. Robinson had been receiving psychotherapy and medication since the age of three (3) until nine (9), at which time he stopped therapy because he entered a special school for the emotionally disturbed which required that no medications be given (T97). Records from the Nevada hospital discussed Mr. Robinson's longstanding history of substance abuse, including stimulants and depressants, as well as alcohol abuse beginning at the age of fourteen (14) (T97-98). The use of such substances reflects a "very common pattern" among people such as Mr. Robinson who suffer from manic depressive disorder (T99).

Dr. Mittenberg's opinion is that in 1995, Mr. Robinson was not able to make a knowing and intelligent decision to voluntarily enter a plea:

It's my opinion that Mr. Robinson entered his plea in a condition of mental weakness that was caused by permanent and long-standing brain damage and manic

depressive psychosis, and once those conditions are diagnoses as I did, then one knows that the patient had the condition permanently for a long time and so it is possible, although it may be contrary to common sense, to go back in time and understand how a person thought in the past.

Once you know that they have a permanent impairment such as a mental disorder caused by brain damage or a psychotic condition, that is well-known not to go away. So, again, it's my opinion that he wasn't able to knowingly and intelligently plea because in the months, after he was incarcerated he would have been expected to have a depressive phase that was exacerbated by a withdrawal from cocaine use.

(T103). According to Dr. Mittenberg, because there is unanimity among the experts, including the State's expert, that Mr. Robinson suffers from manic depressive disorder and organic brain damage, "it is illogical and impossible to say that such a person who suffers from manic depressive psychosis or who suffers from brain damage didn't labor under mental weakness" (T104-05).

At the evidentiary hearing, Mr. Robinson also presented the testimony of Dr. Jonathan Lipman. In 1997, Dr. Lipman had been requested to evaluate Mr. Robinson by his trial counsel, but his personal interaction with Mr. Robinson was by telephone because the visit with the jail was never authorized (T138). The lack of personal interaction with Mr. Robinson hindered his ability to conduct a thorough evaluation (T138). A personal interview would have assisted him "immeasurably"

in reaching an accurate diagnosis (T138). The scope of his 1997 evaluation was to render opinions on neuropharmacological influences relative to the pending proceedings, including potential mitigation (T139). He did not recall being asked to evaluate Mr. Robinson for the express purpose of assessing Mr. Robinson's mental state in 1995 when the plea was entered (T139). In furtherance of the work he performed in 1997, Dr. Lipman had been provided with background materials from trial counsel and a mitigation specialist (T140).

Based on that information and his telephonic conversation with Mr. Robinson, Dr. Lipman was able to chronicle Mr. Robinson's history of drug and alcohol abuse (T142). Mr. Robinson was prescribed Ritalin between the age of six (6) and nine (9) ostensibly for hyperactivity; he began to smoke marijuana at a high intensity beginning at age fourteen (14) (T142). From there, Mr. Robinson began to abuse his father's prescribed Valium and drink alcohol on top of the Valium tablets (T142). His alcohol consumption included beer, tequila, rum, and vodka (T142). At around the age of sixteen (16), Mr. Robinson began abusing LSD and speed (T143). At the age of seventeen (17), he met the woman who would become his wife, and she introduced him to the use of intravenous drugs including speedballs and crank (T144). After his wife left him when he was nineteen (19), Mr. Robinson went on a month-long cocaine binge (T145). For a short period,

Mr. Robinson's substance abuse diminished, but at the age of 21, he described having a "death wish" while using intravenous cocaine (T145). After that experience, Mr. Robinson stayed away from the use of intravenous drugs (T145-46).

A significant experience in Mr. Robinson's history consisted of him having an adverse reaction to Prozac, a drug which had not been prescribed to him (T146). This episode is significant in light of the fact that Mr. Robinson has been diagnosed with bipolar disorder (T146-48). At the time of his 1997 evaluation, Dr. Lipman had not been provided with Dr. Berland's 1995 report (T147). The adverse reaction to the Prozac was significant because it is a "characteristic of people who have bipolar disorder and therefore his reaction to that drug is diagnostically interesting" (T148).

When Mr. Robinson was 26 years old, his records reflect depression and he began at that time to smoke crack cocaine "uncontrollably" when he was released from an incarceration (T149). In 1991-1992, Mr. Robinson was placed into drug treatment in Ocala for three (3) months, but soon after he began again to abuse crack cocaine, a pattern which continued for some time (T150). In the months immediately preceding the murder of the victim, Mr. Robinson was abusing cocaine on a daily basis; the only time he was without cocaine during this period of time

was the day before the offense and, in fact, the offense was related to him stealing items from his girlfriend in order to swap them for cocaine (T150-51). Mr. Robinson did use crack moments before the actual act of the killing and had been without it for several hours prior to that (T151). Mr. Robinson told Dr. Lipman that he had earlier lied to police about his drug use at the time of the offense because “he didn’t want to say anything that might prevent him from being executed” (T151).

Had he been asked in 1997 to opine as to Mr. Robinson’s state of mind to knowingly enter a plea in 1995, Dr. Lipman testified that even in people without an underlying mental disorder, when cocaine is used to the point of severe addiction, the effect is to produce a withdrawal state characterized by depression (T153). Indeed, the craving for cocaine increases with time rather than decreases, which explains the high rate of relapse even after up to seven (7) months of discontinuation of the abuse (T153). In light of Mr. Robinson’s diagnoses of bipolar disorder and schizo effective disorder, Dr. Lipman explained how the withdrawal symptoms would have affected him:

. . . The answer to that is twofold and it comes to an understanding of what is meant by schizo effective and what is meant by bipolar.

The schizo effective individual has many features

of the phrenic without actually being schizophrenic. They are close to the psychotic edge most of the time and in his interview with me he revealed many of the symptoms. He would see things moving when they are not, seeing things when they are not, he's fearful, he's paranoid, and this is, course, was in 1997. This is his underlying schizo effective problem, in that he has problems of reality testing.

In addition, he has this psychotic mood. The drug is going to cause a catastrophic failure in his five years, going to precipitate, would precipitate anyone into a depressive state.

In a person who is bipolar it would exacerbate—we could expect that he would have been, and in fairness, he does admit to having experienced subjectively depressed and suicidally depressed, and he explained his terms, his choice of action as being his waiver of a plea, as being part of that suicidal depression.

However, we cannot ignore the fact that he is also very close to the psychotic border most of the time. So the things that he thinks is normal, the presence of God and the demons, these things would populate his depressive environment at that time and would have made it a much more severe disorder

(T153-54).

This process would have been present in Mr. Robinson even six (6) months after the last episode of drug usage at the time of the entry of his plea (T155). Had he been asked in 1997 to opine as to Mr. Robinson's state of mind when he entered his plea in 1995, Dr. Lipman would have testified that the "mind that was

having these thoughts and was making these volitional acts, was deranged by organic toxicity due to drug use. His actions described now are [consistent] with the idea of a suicidal wish” (T155).

At the evidentiary hearing, Mr. Robinson also presented the expert testimony of Dr. John Spencer. Mr. Robinson’s collateral counsel had asked Dr. Spencer to evaluate Mr. Robinson at death row (T182). Prior to and after meeting Mr. Robinson, Dr. Spencer reviewed a number of background records, including prior hospital records, penalty phase transcripts, and the reports of other experts involved in the case (T182). His evaluation of Mr. Robinson consisted of a clinical interview as well as some testing (T183). He performed an MMPI test, the results of which were essentially consistent with the prior administrations of the test by other experts (T185). Based on all of his testing, Dr. Spencer testified that it “was obvious early on that Mr. Robinson has a severe chronic mental disorder” (T186). This disorder manifested itself in Mr. Robinson in his late teens, and comprises a scats affective disorder or bipolar disorder (T187). The bottom line is that Mr. Robinson has a “disturbance of his affective processes, meaning his emotional arousal processes that interferes with his ability to think rationally. It could be another name is bipolar disorder manic type” (T187). Dr. Spencer explained:

My conclusions are that Mr. Robinson suffers from an affective process which makes his brain go[] at 10,000 performance, when the rest of us is going at a hundred, and that in order for him to—he can respond to specific things but he can't do so rationally because he can't hold his brain still long enough to form a gestalt, and I think the test results, I think, are consistent with that.

(T189).

Indeed, within ten (10) minutes of talking with Mr. Robinson, Dr. Spencer realized there was something “meagerly wrong” with him (T189). He is a “classic case of a person who is suffering from a serious severe clinically significant mental disturbance” which he exhibited during his interview with Dr. Spencer (T190-97). This would have a significant impact on Mr. Robinson's ability to be rational or make decisions at the time he entered his plea in 1995 (T200-205). Dr. Spencer is not saying that it is not always irrational to want to die, but rather that “every clinical indicator [with Mr. Robinson], all the clinical indicia says this man has a serious chronicle [sic] illness, he's had it since birth and manifested itself later” (T205). Mr. Robinson's interactions with Dr. Upon in 1997 were like a “billboard” for Mr. Robinson's mental illness and further supported the notion that Mr. Robinson's ability to knowingly enter a plea in 1995 was severely compromised due to mental illness (T206-11). While Mr. Robinson was not insane at the time he committed the

crime, “any individual decision he makes is necessarily, was necessarily, absolutely, without question, compromised” (T212-13). As he explained:

I think Mr. Robinson has been suffering for a long time from a chronic mental illness which significantly impairs his judgment, which I certainly wouldn't have any confidence in his ability to participate in something of a life or death, of any nature, let alone a life and death nature. So if you are saying do I disagree with this doctor or that doctor, I think all the doctors say he's mentally ill. Do you want a chronically mentally ill person who has got a major mental illness making life and death decisions, I don't.

(T230).

As noted earlier, the trial court's order denying this claim focused on prejudice. Notably, the lower court made no findings of fact with respect to the credibility of the expert and lay witness testimony presented by Mr. Robinson. Indeed, the court barely mentioned the substance of the evidence presented by Mr. Robinson. Rather, the court, after setting forth the allegations made by Mr. Robinson, simply discussed the record from the 1995 and 1997 proceedings which did not, in the court's view, call into question Mr. Robinson's mental ability to enter a knowing and voluntary plea (PCR544-46). The fundamental problem with the lower court's prejudice analysis—aside from the lack of analysis of the evidence

presented at the hearing or the application of any facts to the law⁹—is the lower court’s implicit conclusion that Mr. Robinson’s evidence would not have changed the mind of Judge Russell herself in terms of whether she would have allowed Mr. Robinson to withdraw his plea. This is *absolutely not* the test for assessing prejudice under *Hill* and *Strickland*. As this Court recently made clear, predictions as to whether the defendant has established prejudice in the outcome of the plea process “should be made objectively, without regard for the idiosyncracies of the particular decisionmaker.” *Grosvenor*, 2004 Fla. LEXIS 458 at *15 (citations omitted). What this means is that Mr. Robinson did not have to establish that Judge Russell herself would have granted Mr. Robinson’s motion to withdraw his plea had counsel performed competently. To require any defendant to so establish transforms the objective standard for prejudice into a subjective one. By transforming the objective test into one requiring Mr. Robinson to prove to Judge Russell that *she* would not have granted the motion to withdraw his plea, Judge Russell made her own decisionmaking “idiosyncracies” part of the legal analysis and, in essence, made herself a *de facto* witness on the issue of prejudice. This is clearly not an appropriate burden to place on a defendant. The proper standard

⁹Notably, the lower court’s order is devoid of citation to any legal authority, much less the controlling legal authority.

attendant to Mr. Robinson's claim "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 695. *Accord Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993). Just as "[a] defendant has no entitlement to the luck of a lawless decisionmaker," *Strickland*, 466 U.S. at 695, the opposite is also true. "[E]vidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered" *Id.*

The lower court also improperly required Mr. Robinson to establish "a more favorable outcome" in terms of the prejudice analysis (PCR547). As *Hill* and *Grosvenor* make clear, however, this is not the proper standard for assessing prejudice in the context of a guilty plea. All that Mr. Robinson is required to demonstrate is "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U. S. at 59; *Grosvenor*, 2004 Fla. LEXIS 458 at *5-*6. In other words, prejudice in the context of a guilty plea case is established when there is a reasonable probability that "the outcome of the `plea proceedings' would have

been different had competent assistance of counsel been provided.” *Id.* at *12 (citations omitted). This is not the test employed by the lower court.

In conclusion, after the required *de novo* review by this Court, Mr. Robinson submits that he has established his entitlement to relief, and the lower court’s order should be reversed.

ARGUMENT III

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

In Claim II of his amended motion for postconviction relief, Mr. Robinson alleged that public records in his case may remain undisclosed by state agencies (PCR201-03). The lower court summarily denied this claim as legally insufficient (PCR543). As noted in his motion, Mr. Robinson is unable to specify the nature of records which may remain undisclosed. However, Mr. Robinson preserves this issue in the event that, in the future, public records relevant to his case are disclosed to him, records which should have been disclosed at this time. *See Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000).

In Claim VI of his amended motion for postconviction relief, Mr. Robinson alleged that he was innocent of the death penalty (PCR223-29). The lower court denied this claim as having been raised on direct appeal and thus procedurally barred (PCR551). Mr. Robinson herein preserves this issue in the event of future changes in the law. *See Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000).

In Claim X of his amended motion for postconviction relief, Mr. Robinson alleged that he was insane to be executed and that he was preserving the issue as

the law required him to (PCR238). *See Ford v. Wainwright*, 477 U.S. 399 (1986); *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618 (1998). The lower court summarily denied the claim as premature and legally insufficient (PCR553). This is a claim, however, that must be preserved for potential review in future litigation. *See Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000).

In Claims XII and XV of his amended motion for postconviction relief, Mr. Robinson alleged that the Eighth and Fourteenth Amendments were violated by the trial court's restriction on consideration of mitigating circumstances and the failure to find mitigating circumstances (PCR240; 249). The lower court found these claims to be procedurally barred (PCR554; 557). These are claims, however, that must be preserved for potential review in future litigation. *See Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000).

In Claim XIII of his amended motion for postconviction relief, Mr. Robinson alleged that his execution by lethal injection violated the United States and Florida Constitutions, as well as international law (PCR242-43). The lower court summarily denied this claim as lacking merit (PCR555-56). This is a claim, however, that must be preserved for potential review in future litigation and in the event of a change in law. *See Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000).

CONCLUSION

Based on the foregoing arguments, Mr. Robinson requests that the Court reverse the lower court and grant an evidentiary hearing, and/or grant his request for a new trial and/or sentencing proceeding before a duly-empaneled jury.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to Douglas Squire, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida, 32118, this 31st day of March, 2004.

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CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font, a font that is not proportionately spaced.

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