IN THE SUPREME COURT OF FLORIDA

TED HERRING, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 67,524

ANSWER BRIEF OF APPELLEE

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TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES CITED (cont'd)

AUTHORITIES CITED (cont'd)

AUTHORITIES CITED (cont'd)

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts the Statement of the Case and Facts presented by appellant, with the following additions and corrections:

1. Contrary to appellant's assertions, the medical examiner specifically could not determine whether the lethal shot was fired first or second, (TR 349),[1] and felt that the victim died within one minute of the lethal shot (TR 352). In fact, appellant's statement to police indicates the lethal shot was fired second:

> ...The Defendant stated he shot the clerk once in the head or he shot him once. He stated at this time as the Defendant -- as the clerk was lying on the floor, he could observe that he was still living; and he shot him a second time to prevent him from being a witness against him, at which he time he stated that he observed his body twitch; and he then left the store.

(TR 416-417).

2. Contrary to appellant's assertions, he was not interrogated for eight hours. Although the interrogation continued intermittently over approximately an eight hour period (from 12:57 p.m. to his final statement at 7:50), during this time he was also writing out statements, copying notes, repeating previous statements, and participating in a live lineup at a different location. (Supp. 1/15/82 12-13; 17; 33; 41-2); (Supp. 1/22/82 8-9;

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[1]The transcript available to appellee is apparently paginated differently from that of appellant. The record citations used herein are referenced as follows:

ROA - Record on Appeal
TR - Trial Transcript (2/22/82-2/26/82)
SUPP(date) - Transcripts of Suppression hearings (date)
SR - Transcript of sentence proceeding
A - Appellant's appendix

10; 16). Actually, appellant's taped a statement at 5:30 p.m., but had to repeat the same statement at 6:25 because the tape was erased. (Supp 1/22/82 11, 19). Between 6:50 and 7:50, appellant initiated a statement, which was recorded at 7:50 (Supp 1/22/82 12). Thus, any actual questioning by police was over by 5:30.

3. Contrary to appellant's assertions, Miranda warnings were not only renewed, but reaffirmed repeatedly by four different officers (Supp 1/15/82 6; 11-13; Supp 1/22/82 6; 26), and appellant himself reconfirmed the voluntary nature of his statements, and his waiver of counsel, during the taped statement at 7:50 p.m. (Supp 1/22/82 74-75).

4. Although Herring did allege that he shot the clerk "by mistake", he also admitted intending to "put the gun to his head", and, also, intentionally shooting the clerk in the head a second time while the clerk was lying on the floor alive. (TR 416-417).

5. For clarification, appellee would point out that the reason the state presented no other evidence at sentencing was that defense counsel successfully precluded presentation of any evidence not specifically within the enumerated aggravating factors, (SR 3-4), and prevented the testimony of Dr. Friedenberg. (SR 7).

SUMMARY OF ARGUMENT

None of appellant's claims are cognizable by 3.850 motion except the claim of ineffective assistance of counsel.

Appellant's arguments regarding the summary denial of his ineffective assistance claim rely on misrepresentations of fact, make unwarranted assumptions, or overlook the record.

POINT I

WHETHER CARUTHERS V. STATE, 465 So.2d 496 (Fla. 1985) REQUIRED REVERSAL OF APPELLANT'S DEATH SENTENCE.

ARGUMENT

A. Proportionality.

Appellant first claims that the facts of Caruthers v. State, 465 So.2d 496 (Fla. 1985) are identical to those of the instant case, and, therefore, the reversal of the death sentence in Caruthers mandates reversal here based on a proportionality requirement. However, appellant overlooks the obvious distinction that three aggravating circumstances present in the instant case were absent in Caruthers,[2] and that Caruthers had no significant history of prior criminal activity (along with other non-statutory mitigating factors), while appellant's factors in mitigation were of minimal weight. Additionally, appellant misapprehends that nature of Florida Law regarding proportionality. A prior case is not reviewable in light of a subsequent decision, as he suggests here. Iafero v. State, 459 So.2d 1034, (Fla. 1984). Sullivan v. State, 441 So.2d 609 (Fla. 1983). Contrary to appellant's assertions, the proportionality he urges is not required by Gregg v. Georgia, 428 U.S. 153 (1976), nor by Spaziano,[3] Zant v. Stephens,[4] Proffitt,[5] Furman,[6] or any other case. Pulley v.

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[2]Herring had a prior robbery conviction; he murdered to eliminate a witness, and the murder was committed in a cold, calculated, and premeditated fashion. Additionally, as in Caruthers, the murder was committed during a robbery. (ROA 73-74).

[3]Spaziano v. Florida, 104 S.Ct. 3154 (1984)

[4]462 U.S. 862, 103 S.Ct. 2733 (1983)

[5]Proffitt v. Florida, 428 U.S. 242; 96 S.Ct. 2960; 49 L.Ed. 2d 913 (1976)

[6]Furman v. Georgia, 408 U.S.238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Harris, 104 S.Ct. 871 (1984).

B. Erroneous Application of Two Statutory Factors

1. Cold, Calculated, Premeditated

Appellant re-argues that there was insufficient evidence to support this aggravating factor. This issue was addressed in the direct appeal, and is "foreclosed in this proceeding for collateral review." Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). As appellant notes in his brief, the cases and principles he discusses were merely routinely applied in Caruthers, and no new priniciple was there announced or even intimated. See generally, Witt v. State, 398 So.2d 922 (Fla. 1980). Matters settled by the direct appeal are not proper grounds for collateral challenge. Johnson v. Wainwright, 463 So.2d 207, 213 (Fla. 1985).

2. Avoiding or Preventing Lawful Arrest.

Once again, this is a matter that was raised and addressed on direct appeal, thus is not cognizable here. Appellee notes in passing that any comparison to Caruthers on this issue is also factually frivolous, since Herring specifically stated he killed the clerk to eliminate him as a witness.

3. Impermissibly Counting both Cold, Calculated Premeditated and Elimination of Witness.

This issue should have been raised on direct appeal, thus is not cognizable by 3.850. Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Sireci v. State; Smith v. State, 457 So.2d 1380 (Fla. 1984).

POINT II

WHETHER AN EVIDENTIARY HEARING WAS NECESSARY TO DECIDE APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel is cognizable by 3.850 motion. However, when the motion is insufficient or the record affirmatively demonstrates counsel was not legally ineffective, the motion may be denied without an evidentiary hearing. Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985).

Appellant begins this battery of complaints with general denigration of his counsel's qualifications and hyperbolic derision of his performance, none of which is warranted or remotely supportable. For example, appellant boldly asserts that his sentencing counsel had no capital case experience, completely ingoring the fact that:

1. He was represented by two attorneys at sentencing (as well as trial); attorney Howard Pearl, who actively conducted the trial, was also present to assist;

2. Attorney Quarles "handled approximately 5 to 10 cases in which the death penalty was legal possibly" prior to Herring's trial. (Appellant's appendix, P. A-157).

As discussed more specifically hereinafter, factual misrepresentations and the intensity of appellant's insults do not make his case any stronger.

A. The Trial Court's Standard of Review

In order to sustain a claim of ineffective assistance, the defendant must show that he was prejudiced by counsel's errors. "Prejudice" refers to the probability of a different

outcome; while a defendant need not show that a different outcome was "more likely than not," neither may he merely show that the error "had some conceivable effect." Rather, the burden on the defendant is to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. 2052, 2067-8 (1984).

Appellant attacks the language of the trial court because it does not mimic the Strickland words. In fact, rather than a "reasonable probability" of a different outcome, appellant did not even establish such a possibility. The trial court determined not the slightest chance of a different result: as Herring notes, the court found that, in fact, the changes suggest by appellant below would have had no effect whatsoever on the result. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, at 2067. While appellant is not required to prove "in fact" a different outcome, he cannot prevail by the sophistic trick of turning this principle on its head.

B. WHETHER AN EVIDENTIARY HEARING WAS NECESSARY

1. Counsel's failure to introduce psychological reports.

Appellant's counsel had in his possession psychological reports that when he was 12 years old, Herring suffered from "neurological dysfunction" and a "psychoneurotic disorder." [The reports did not show he was "mentally retarded" as alleged in his brief. In fact, there were indications of "at least normal if not above normal functioning." (A-114)].

Appellee is unaware of any basis to conclude, as appellant does here, that these outdated reports provide evidence "that Herring was under extreme mental and emotional disturbance at the time of the homicide." (Brief of Appellant, p. 23). Seven year old reports hardly constitute "strong mitigating evidence;" legally speaking, the reports were "inconsistent with the defense presented," and "give no indication as to the defendant's psychological state at the time of the trial or the crime and would therefore have been of minimal value." Middleton v. State, 465 So.2d 1218, 1224 (Fla. 1985).

An evidentiary hearing on this issue is unnecessary, because failure to offer the reports was not "ineffective," as a matter of law. The reports were before the court. Appellee accepts arguendo that defense counsel possessed them. The only possible function of a hearing would be to put defense counsel on the stand to ask why he didn't present them to the jury, which is an essentially irrelevant inquiry:

> 1. The record already provides ample grounds to conclude exclusion of the material was intentional, strategic, and benefitted appellant, to-wit:
>
> a. The state specifically sought to introduce the testimony of Dr. Friedenberg as to appellant's anti-social character at the time of the crime. (SR-7). Defense counsel kept this material from the jury by avoiding such evidence as appellant now claims should have been offered. Had appellant relied on his psychological state in mitigation, the state would be entitled to rebuttal,

and the state had much more current, and probative, data;

b. The reports were not particularly favorable. There are indications throughout that appellant had the ability and intelligence to succeed, but lacked "nurturing" (or some other equally nebulous attribute of success).

c. The reports impeached appellant's mother, who "was an effective defense witness" (A-161), by indicating she did not pursue appointments or assist her son as she claimed. When a decision appears reasonable or supportable on the record, the inquiry need go no further.

2. Irrespective of what defense counsel would have testified on the stand, intentionally excluding the reports was, objectively, a reasonable tactical move. Where one attorney declares he acted intentionally and another states he simply didn't think about it, the effect on the trial remains the same; such testimony should not change the result for two identically situated defendants. Such testimony from a defense attorney who "rolls over" when his client is faced with execution is simply not probative. Johnson v. Wainwright, 463 So.2d 207, 211 N. (Fla. 1985); Demps v. State, 416 So.2d 808 (Fla. 1982). As long as the decision is within the realm of objectively reasonable trial strategy, the strong presumption of competence makes the attorney's actual reasoning

irrelevant. Strickland, at 2066, citing Michel v. New York, 350 U.S. 91, 101; 76 S.Ct. 158, 164; 100 L.Ed. 83 (1955). In Strickland itself, there was no state evidentiary hearing, and the testimony taken in the federal district court was deemed "irrelevant", 104 S.Ct. at 2071; in Michel, no testimony was considered in deeming failure to file a motion possible strategy; in Armstrong v. State, 429 So.2d 287 (Fla. 1983), no evidentiary hearing was necessary to declare these matters within the realm of trial strategy, not subject to question.

An evidentiary hearing is also unnecessary, because failure to introduce the reports resulted in no prejudice. Judge Foxman, who was also the sentencing judge, declared the result would have been no different had all the purportedly mitigating evidence been admitted. Further, appellant's mother testified to these same matters, and the reports were merely "cumulative." (A-160). This case is virtually identical to Middleton, where the matters alleged in mitigation were already before the court, and were of minimal value; no evidentiary hearing was necessary; the trial judge determining he would have imposed the same sentence anyway. 465 So.2d at 1224.

2. Failure to investigate and present other mitigation evidence.

Appellant's present counsel secured statements from early teachers and people in New York who would have testified regarding Herring's better qualities when he was a child. (See A-126-137).

It is not at all clear what effect such evidence would have had on a jury, since, once again, such psychological data merely reveals Herring had every chance to avoid a life of robberies and murder, and has no one to blame but himself. Further, as the trial judge points out, the testimony of the teachers was very dated and "of doubtful value." Additionally, calling such witnesses is "frought with peril" since the state may cross-examine or rebut defendant's supposed "good character" and "vulnerable" traits. It is quite possible that the failure to open up the defendant's character to attack should never be susceptible to a claim of ineffectiveness. The claim is certainly frivolous here, where Herring sought to avoid introduction of his numerous prior robberies, his prior drug involvement, his current anti-social psychological makeup, and any other negative information which could have been used to rebut the alleged mitigating factors. (See, SR-2-11).

The state had witnesses who would have testified adversely to the defendant had mitigation evidence on these matters been offered. Wisely, defense counsel avoided this damaging evidence, but still presented the identical information to the judge and jury through use of the defendant's mother's testimony. (SR 25-36). The state attempted to impeach her, but could not. (See, SR 37-39). Use of the defendant's relatives would have been merely cumulative, and would have revealed such information as the fact that appellant's mother kicked him out of the house, thus destroying the best witness he had. Failure to present additional witnesses to the same facts does not constitute ineffective assistance, Middleton v. State, 465 So.2d 1218 (Fla. 1985), and the decision not to present witnesses in mitagation is a tactical one. Magill v. State, 457 So.2d 1367

(Fla. 1984); Armstrong v. State, 429 So.2d 287 (Fla. 1983). This point is especially meritless in view of the fact that these matters were in fact before the court, and "the trial court did list and consider these matters as mitigating factors." (A-160); Middleton; Lightbourne v. State, 471 So.2d 27 (Fla. 1985).

3. Failure to contest the aggravating factor of heightened premeditation.

Appellant here re-argues the applicability of the heightened premeditation aggravating factor to his case. This issue was already discussed in this court's opinion on direct appeal, and cannot be re-raised in the guise of ineffective assistance. Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985); Sireci v. State, 469 So.2d 119 (Fla. 1985).

4. Lack of knowledge and skill.

This allegation is patently unsupported and unsupportable in the record, and the judge who conducted the trial found no deficiency in counsel's performance. The utterly frivolous nature of this claim is exemplified by appellant's statement that counsel "did not even represent Herring at trial," when he knows full well that attorney Quarles filed many of the pre-trial motions, conducted hearings, and was present throughout the trial. Likewise, the active trial attorney, Howard Pearl, was present during sentencing. Needless to say, this general attack on Quarles' ability states no omission or error in itself.

a. "Admission of prejudicial testimony" regarding lack of remorse.

Appellant's attack here is particularly unsupportable, since counsel did, in fact, object to the testimony on the grounds that lack of remorse is not admissible, which

is exactly the grounds alleged by his present counsel. Basically, appellant disputes the ruling allowing admission of the testimony. This is an issue for direct appeal, not cognizable by collateral attack. Quince v. State, 10 F.L.W. 493 (Fla. 1985); Clark v. State, 460 So.2d 886 (Fla. 1984). Appellee notes in passing that failure to succeed in his argument does not mean counsel was inadequate. Steinhorst v. State, 10 F.L.W. 536 (Fla. September 26, 1985). The fact that counsel did not need to review Sireci during the hearing proves nothing, except perhaps that he was already familiar with the case.

b. Admission of highly prejudicial testimony on cross-examination.

As noted above, when a witness is offered to provide mitigating evidence, he is subject to cross-examination and rebuttal; this is one reason why the decision to offer witnesses in mitigation is virtually always immune from attack. See Armstrong v. State. Here, the state asked Herring's mother why he had gone to Florida, eliciting information about drug activity in New York. However, there is no basis whatever to conclude counsel's failure to object prejudiced the defendant. The trial judge has announced he would have allowed the questioning as proper. (A-161). The questions and answers themselves display no prejudice, contrary to the misrepresentations in appellant's brief. Herring's mother testified that Herring helped the

police against drug dealers in New York, and was in danger from the dealers. (SR 33). The state's attempt to impeach this testimony (on proffer) failed, (SR 35-39), and the testimony came out in Herring's favor rather than to his disadvantage.

c. Failure to introduce the psychological reports

Counsel attempted to read a poem written by Herring (when he was a child) from an old psychological report, and was prevented from doing so because the report was not in evidence. Aside from the obvious lack of prejudice in excluding this fundamentally irrelevant poem, the many reasons why counsel would not want the report introduced are outlined above and by the trial judge in his order. That counsel attempted to get the poem to the jury without prejudicing his case with introduction of the report helps demonstrate the diligence of his representation rather than detract from it.

d. Exclusion of proportionality evidence.

Counsel attempted to present evidence of other murder cases where the death penalty was not imposed. There were no cases to support introduction of the evidence, so counsel was candid enough to so admit. This is an ethical obligation of Florida lawyers. The issue was appealed, and addressed by this court. It was not ineffective to decline to make the frivolous argument presented now, which was specifically rejected in this court's opinion. Herring v. State, 446 So.2d 1049 (Fla. 1984). The issue is not cognizable by 3.850.

e. Counsel's argument regarding Herring's age.

This argument has no basis in fact. Counsel did argue that Herring's age "is a very definite mitigating circumstance in this case you have to consider" (SR 57). It is more than apparent from the context of the argument (SR 57) that the statement-"that certainly does not apply"-is an error - either counsel misspoke, or the court reporter erroneously injected the word "not". The trial judge, in his order, observes that the "not" was a court reporter error. This point, like many others appellant argues, is totally without merit in that:

1. The context of the misprint makes clear that age was in fact argued in mitigation, and

2. The trial judge in fact found age to be a mitigating factor (ROA 76).

As the order herein states, "Mr. Quarles definitely did argue to the jury that age was a mitigating factor, and this court found it to be so." (A 162).

In sum, none of the specific acts or omissions appellant delineates constitutes a deficiency in representation. Several are simply untrue, and many overlook the strategic choices counsel pursued as evidenced by the record. All of appellant's claims, taken together, fail to make the necessary showing of prejudice, given the minimal nature of the suggested changes and the overwhelming burden faced by the defense in this case. As noted by the trial judge,

> This court must view trial counsels' alleged errors and omissions in light of the case as a whole. It

> was a difficult case from the defense standpoint. The defendant confessed to the crime. Efforts to suppress the confession failed. The defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch," robbed and shot the clerk. Frankly, this preposterous story doomed the defendant not only as to a conviction but as to a sentence as well. There was little the defense could do to save the defendant after that.

(A 162-163). Judge Foxman, who was the sentencing judge, also noted that "the aggravating factors in this case strongly outweighed the mitigating factors," and that "even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the defendant, the result would be no different." (A 163). An evidentiary hearing would make no difference. Assuming each and every fact alleged is proven exactly as Herring says, the trial judge's order would be the same. The record, on its face, supports the trial judge's conclusions; no ineffectiveness of counsel is shown. Middleton v. State, 465 So.2d 1218 (Fla. 1985); Armstrong v. State, 429 So.2d 287 (Fla. 1983).

POINT III

WHETHER THE TRIAL JUDGE APPLIED A NON-STATUTORY AGGRAVATING FACTOR IN SENTENCING HERRING TO DEATH.

The findings of fact supporting Herring's death sentence are at (ROA 73-77). No non-statutory aggravating factor is mentioned. The fact that Judge Foxman, in this later 3.850 hearing, observes the difficulty of the defense position does not mean he relied on any improper consideration. Appellant might as well argue the judge relied on the fact that he confessed, or that his "counsel tried to 'sneak' in the poems," or that he put his mother on the stand; all are mentioned in the order. None warrant an assumption of impropriety.

POINT IV

MISCELLANEOUS NON-COGNIZABLE CLAIMS

After forty (40) pages and about a dozen claims, appellant recognizes that matters which were or could have been raised on appeal are not cognizable in a collateral attack. He then proceeds to expound various admittedly improper issues, labelling this court "arbitrary" if it fails to consider them. Appellee respectfully suggests this court has consistently refused to address claims which were or could have been brought on direct appeal, absent fundamental error. See, Porter v. State, 10 F.L.W. 573 (Fla. October 25, 1985); Quince v. State, 10 F.L.W. 493 (Fla. 1985); Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Francois v. State, 470 So.2d 687 (Fla. 1985); Sireci v. State, 469 So.2d 119 (Fla. 1985); Raulerson v. State, 462 So.2d 1085 (Fla. 1985); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Clark v. State, 460 So.2d 886 (Fla. 1984); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984); Smith v. State, 457 So.2d 1380 (Fla. 1984); Magill v. State, 457 So.2d 1367 (Fla. 1984); Adams v. State, 456 So.2d 888 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Smith v. State, 453 So.2d 388 (Fla. 1984); Zeigler v. State, 452 So.2d 537 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Funchess v. State, 449 So.2d 1283 (Fla. 1984); Adams v. State, 449 So.2d 819 (Fla. 1984); Jones v. State, 446 So.2d 1059 (Fla. 1984), Smith v. State, 445 So.2d 323 (Fla. 1983); Booker v. State, 441 So.2d 148 (Fla. 1983); Messer v. State, 439 So.2d 875 (Fla. 1983); McCrae v. State, 439 So. 2d 868 (Fla. 1983); McCrae v. State, 437 So.2d 1388 (Fla. 1983); Raulerson v. State, 437 So.2d 1105 (Fla. 1983); Miller v. State,

435 So.2d 813 (Fla. 1983); Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Armstrong v. State, 429 So.2d 287 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Thomas v. State, 421 So.2d 160 (Fla. 1982); Hall v. State, 420 So.2d 872 (Fla. 1982); Raulerson v. State, 420 So.2d 567 (Fla. 1982); Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Thompson v. State, 410 So.2d 500 (Fla. 1982); Antone v. State, 410 So.2d 157 (Fla. 1982); Goode v. State, 403 So.2d 931 (Fla. 1981); Hargrove v. State, 396 So.2d 1127 (Fla. 1981); Alvord v. State, 396 So.2d 184 (Fla. 1981); Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spinkelink v. State, 350 So.2d 85 (Fla. 1972).

Nor do appellant's alleged "exceptions" help him. The fact that an issue, although foreclosed as a vehicle for relief, may warrant discussion to assist bench and bar does not mean that Florida is now required to forgo its procedural rules for Mr. Herring's benefit. Nothing fundamental is even suggested by appellant. These claims are properly summarily denied.

A. THE PROBATION OFFICER'S TESTIMONY

Prior to Pope v. State, 441 So.2d 1073 (Fla. 1983), lack of remorse was admissible evidence. There is no fundamental error in these previous trials as a result. See, e.g., Stano v. State, 460 So.2d 890 (Fla. 1984). Appellee notes that the heinous, atrocious and cruel factor was considered close by the judge. (ROA 74). The admission of this testimony, in addition to being proper at the time, is not susceptible to collateral attack.

B. THE JURY INSTRUCTIONS

The propriety of the jury instructions given has not only

been affirmed innumerable times, but the fact that this attack is not cognizable is also well established. See, e.g., Middleton v. State, 465 So.2d 1218 (Fla. 1985); Smith v. State, 457 So.2d 1380 (Fla. 1984); Adams v. State, 456 So.2d 888 (Fla. 1984).

C. PROPORTIONALITY

This issue was addressed on direct appeal. Herring v. State, 446 So.2d 1049 (Fla. 1984).

D. IMPROPER COMMENTS OF THE PROSECUTOR

Allegedly improper comments must be appealed directly, and are not subject to collateral attack. Francois v. State, 470 So.2d 687 (Fla. 1985); Downs v. State, 453 So.2d 1102 (Fla. 1984).

POINT V

WHETHER THERE WAS FUNDAMENTAL ERROR IN THE JURY SELECTION

A. WITHERSPOON

As appellant notes, his Witherspoon objections were already addressed at length in Herring v. State, 446 So.2d 1049 (Fla. 1984).

B. THE JURY REPRESENTED A REPRESENTATIVE CROSS-SECTION

Contrary to appellant's assertions, alleged errors in selection of the jury must be raised on direct appeal, and are not susceptible to collateral attack. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985)(pre-empting blacks; Witherspoon). That "the jury does not represent a fair cross-section" is not a fundamental issue outside the procedural requirements of objection and appeal. Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984).

C. THE JURY WAS BIASED IN FAVOR OF THE STATE

Once again, this is an issue which was raised on direct appeal, or should have been.

POINT VI

WHETHER APPELLANT'S CONFESSION WAS ERRONEOUSLY ADMITTED

This issue is not cognizable by 3.850 motion and was properly dismissed.

POINT VII

WHETHER THE TRIAL JUDGE SURRENDERED HIS ROLE OF SENTENCER TO THE JURY

There is no factual basis for this claim at the cited record reference or anywhere else in the record. Appellee cannot determine to what appellant refers, thus cannot respond further.

POINT VIII

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS RACIALLY DISCRIMINATORY

Appellant should have raised this claim on direct appeal; it is procedurally foreclosed at this point. Further, this court has already held that no racial discrimination exists. Sireci v. State, 469 So.2d 119 (Fla. 1985); Adams v. State, 449 So.2d 819 (Fla. 1984); see also Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983). Appellant's allegation that the death penalty is more frequently applied when the victim is black does not show such discrimination in his case, since his victim was white.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Jeremy G. Epstein, Esquire, 53 Wall Street, New York, New York, 10005 this 9th day of December, 1985.

Ellen D. Phillips

Of Counsel
Ellen D. Phillips