IN THE SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE,
Petitioner,

v.

RICHARD L. DUGGER, Superintendent, Florida State Prison and LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections
Respondent.

Case No. 69,210

RESPONSE IN OPPOSITION TO PETITION FOR HABEAS CORPUS

COMES NOW Respondent, RICHARD L. DUGGER and LOUIE L. WAINWRIGHT, by and through undersigned counsel, and files this their Response, in opposition, to Petitioner's Petition for Writ of Habeas Corpus, as follows:

INTRODUCTION

On August, 5,]986, Governor Bob Graham of Florida signed a death warrant, authorizing Respondent, RICHARD L. DUGGER, to carry out Peitioner's execution between noon Thursday 28,]986, and noon, Thursday September 4,]986. Petitioner's execution has been scheduled for Wednesday, September 3,]986 at 7 a.m.

In view of the late nature of this pleading, in proximity to Petitioner's scheduled execution, Respondents reserve the right to move fully respond to the allegations in Petitioner's present pleading at oral argument, if scheduled, or in a subsequent responsive pleading, if necessary.

In this pleading, "OR" will refer to the trial and sentencing record of Petitioner's first trial, as contained in Rose v. State, Case No. 5], 774 and "R", will refer to the sentencing record contained in Rose v. State, Case No. 63,996.

JURISDICTION

The nature of Petitioner's claims, of ineffective

assistance of appellate counsel, Louis Carres, Esquire, on both direct appeals to this Court, appropriately involves this Court's jurisdiction under Article V, Section 3 (b)(9) of the Florida Constitution (]980), and or under Rule 9.030 (a)(3), Florida Rules of Appellate Procedure (]984). Respondents clearly continue to maintain that Petitioner is not entitled to any relief.

PROCEDURAL HISTORY

On or about November 9,]976, Petitioner was indicted for the kidnapping andd first degree murder of an eight year old girl, Lisa Berry, on or about October 22,]976. (OR, 9-]0). After the initial trial proceedings, the trial ended in a hung jury. (OR, 77-78)

On March, 30,]977, the Circuit Court in and for Broward County, Florida, granted Petitioner's motion for change of venue, and the cause was tried, by jury in Hillsborough County, Florida. (OR. 77-79). After the trial, Petitioner was found guilty on both counts. (OR.]07), the trial court entered factual findings and sentenced Petitioner to death on May]3,]977. (OR.]3]-]37).

On direct appeal, Mr. Carres raised fourteen (]4) issues. See Initial Brief, Appellant, Rose v. State, Case No. 5], 724. Petitioner's challenges to his conviction, were, as follows:

>]. The trial court erred in denying a defense pre-trial motion, to have the bloodstain evidence produced for independent expert examination, and have such an examination conducted;
>
> 2. That there was insufficient circumstantical evidence, to prove Petitioner's guilt of first-degree murder;
>
> 3. That there was legally insufficient evidence to prove Petitioner was guilty of kidnapping, and/or felony-murder;
>
> 4. That the trail court erred in ruling that the jurors could not ask questions during the presentation of testimony;
>
> 5. That the admission of Petitioner's pre-trial statement to police was eroneous, because Petitioner was

improperly further questioned, after he had allegedly invoked his Miranda rights;

6. That the trial court erred in permitting opinion testimony by a lay witness-police officer, as to scratches on Petitioner's leg, and the existence or absence of marks or impressions left by a human being in the sand;

7. That the trial court erred, in giving the jury an "Allen"[1] charge during deliberations at the guilt phase;

8. That the trial court improperly admitted irelevant and prejudicial gruesome photographs of the deceased;

9. That the trial court wrongfully denied Petitioner's motion for mistrial, when the police officer testified as to Petitioner's parole status;

]0. That the trial court erred in refusing to compel the State to give notice to Petitioner, by a statement of particulars, the factual theory of the State's murder charges;

]]. That prosecutorial comments, during the State's opening statement improperly required Petitioner to prove his innocence, warranting a new trial.

Petitioner's challenge to his death sentence, consisted of the following;

]2. That the trial court erred ingiving the jury an Allen charge during deliberations at sentencing, in reponse to a note seeking advice from the trial court;

]3. That the trial court erred by wrongfully excluding jurors for cause, who expressed doubts and concerns on the death penalty, under Witherspoon v. Illinois, U.S. 5]0 (]968);

]4. That the trial court erred in it application and evaluation of aggravating and mitigating circumstances, and in determining that the death penalty should be imposed;

]5. That Petitioner's sentences, for both murder and the felony charge of kidnaping, violated his rights against double jeopardy.

This Court rejected all challenges to the validity of Petitioner's conviction and further concluded that the evidence was sufficient to support Petitioner's first-degree murder and kidnapping convictions. Rose v. State, 425 So.2d 52], 523 (Fla.]982). However, this Court found that the trial court's giving of

---

[1] Allen v. United States,]64 U.S. 492 (]896).

an "Allen" charge at the sentencing phase, was reversible error, and vacated for a new sentencing hearing. Rose, supra, at 524-525. This Court denied rehearing February 8,]983. Peititioner subsequently sought certiorari review, in the U.S. Supreme Court, on March 9,]983. Certiorari was denied on April 25,]983. Rose v. Florida, 46] U.S. 909,]03 S.Ct.]383, 76 L.Ed. 2d. 8]2 (]983).

On remand from this ourt, the Circuit Court in and for Broward County, held a new sentencing hearing in July,]983, in Broward County, Florida. At the completion of the sentencing proceeding, the jury delivered an advisory recommendation of death, by an]]-] margin. (R, 934).

On July]5,]983, the trial court made specific factual findings and imposed the death penalty upon Petitioner, in accordance with the jury's recommendation. (R. 944-947). specifically, the trial court found three aggravating circumstances to be supported by the evidence: that the murder occurred while Petitioner was "under sentence of imprisonment" (on parole for a]97] conviction and eight year sentence, for breaking and entering a dwelling with intent to commit rape); that Petitioner had been previously convicted of a prior violent felony (the]97] conviction, as aforementioned); and that the murder was committed during the commission of a felony (kidnapping). (R. 945-946). The trial court concluded that, based on the weighing of these circumstances, against the finding of no mitigating circumstances, "to weigh against" the aggravating circumstances, the death penalty was apropriate. (R. 946).

On direct appeal from this death sentence, Petitioner raised seventeen (]7) issues. Initial Brief, Appellant, Rose v. State, Case No. 63, 996. Those challenges were as follows:

>]. That Petitioner was denied an impartial trial, by allegedly improper peremptory excusal of a juror, by the State, based on Witherspoon, supra.
>
> 2. That the trial court erred, in denying a request for an instructon on the defintions of felony murder;
>
> 3. That the trial court erred, in denying a request for an instruction on the nature and effect of circumstantial evidence;
>
> 4. That fundamental error was committed, by prosecutorial comments made by the State in opening

argement, which allegedly referred to Petitioner's silence;
5. That gruesome autopsy photographs were improperly admitted, in light of defense stipulation to the nature of the victim's injuries, as established by evidence at Petitioner's first trial;

6. That the trial court committed error in sustaining State objections to evidence from a defense witness, concerning conversations between Petitioner and the witness about the crime for which Petitioner was paroled;

7. That this court should have interpreted the jury's note to the trial court, at the first trial, as a binding sentencing recommendation of life imprisonment;

8. That the court erred in sustaining the State's objections to questions posed by defense counsel of a defense witness, as to his ability, as a medical examiner, to make a determination on the object which caused the victim's death;
9. That the trial court erred in overruling defense objection to the State's introduction of a certified copy of a parole certificate, on the basis of lack of notice;

]0. That the trial court erred in denying Petitioner appointment of counsel of his choice, to represent him at sentencing;

]]. That the trial court should have granted Petitioner's motion for an updated pre-sentence investigation report, for consideration at sentencing;

]2. That the trial court committed error, in denying Petitioner's motion for a continuance of his sentencing hearing;

]3. That the trial court should not have instructed the jury, on the aggravating circumstances of commission of murder while under sentence of imprisonment;

]4. That the trial court should have instructed the jury, as to all possible statutory aggravating circumstances;

]5. That prosecutorial comment, made during closing argument denied Petitioner a fair trial;

]6. That this court should reduce Petitioner's sentence to life imprisonment, on the basis of the jury's note during deliberations at the first sentencing proceeding;

]7. That the trial court erred in admitting evidence of Petitioner's prior convictions and in finding that Petitioner and been convicted of a prior violent felony.

This Court rejected all such arguments, and affirmed Petitioner's death sentence, specifically finding that the jury's note, at the original sentencing, did not constitute a "life" sentencing recommendation. Bush v. State, 46] So.2d 84, 86 (Fla.]984). The Court denied rehearing on January 24,]985.

Petitioner filed for certiorari review on March 22,]985, to the U.S. Supreme Court. Certiorari was denied on June 3,]985. Bush v. Florida, __U.S.__ (]985). Executive clemency was denied by the Governor and cabinet, in]986.

FACTS

In this pleading, Petitioner's factual allegations, in correction with his argument, are self-serving, and Respondent will address such allegations as well as other relevant facts, in their argument on the issues.

PETITIONER'S LEGAL CLAIMS

Petitioner raises three grounds for relief in his present Petition. Initially, Petitioner claims he was denied his right to appeal, as an indigent, by the trial court's refusal to grant him transcripts of his first trial proceeding, (which ended in a hung jury), so as to allow him to challenge the sufficiencey of the State's evidence, in an effort to gain the benefit of double jeopardy.

Petitioner has also maintained that the Florida death penalty is applied in an arbitrary and disctiminatory manner, based on the race of the victim, the sex of the defendant, and/or geographocal location of the capital crime.

Petitioner has further alleged ineffective assistance of appellate counsel, by said counsel's failure to request sequestration and/or challenge separation of the jury during deliberations; failure to challenge the trial court's comments, during the re-sentincing hearing; and failure to raise the issue of Petitioner's lack of person waiver of his presence, during voir dire of the jury.

POINT I

DEFENDANT HAS NOT BEEN DENIED, SOLELY BECAUSE OF HIS INDIGENCY, THE OPPORTUNITY FOR FULL APPELLATE REVIEW OF HIS CONVICTION.

In the case sub judice, defendant claims error in that he was disallowed the right to appeal his denial of a motion for judgment of acquittal when the mistrial was granted based upon the jury's inability to reach a verdict (Habeas, p. 5). However, defendant's argument is based upon a faulty premise. The law is clear that defendant has no right to appeal the denial of said motion, as it does not constitute a final judgment under the facts of the instant case.

Article V, Section 3(b)(1) Florida Constitution sets forth the jurisdiction of this court. It provides solely for appeals from final judgments in cases where the death penalty is imposed. See also Fla.R.Crim.P. 9.140(b)(1); State v. McInnes, 147 So.2d 519, 521 (Fla. 1962).

It is also clear that a mistrial based upon the jury's inability to reach a verdict is not the functional equivalent of a final judgment on the merits. In State v. Lane, 209 So.2d 873, 874 (Fla. 2d DCA 1968) it was stated that jeopardy would not attach where there was an inability of the jury to agree on a verdict after due and proper deliberation. Clearly, if a hung jury was the equivalent of a final judgment jeopardy would attach, see North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Carlson v. State, 405 So.2d 173 (Fla. 1981).

Further in U.S. v. Martin Linen Supply Co., 430 U.S. 564 (1977), it was found that the defendant's interest is "essentially identical both before the jury is allowed to come to a verdict and after the jury is unable to reach a verdict. In either case, the defendant has neither been condemned nor exculpated by a panel of his peers and, in the absence of intervention by the trial judge, his vindication must await further action by a jury" (emphasis supplied).

Martin at 51 L.Ed.2d 653.

Defendant cites to Richardson v. U.S., 82 L.Ed.2d 242 (1984), to "squarely confirm" his position. However, Richardson does not prove the order to be a final judgment. In fact, Richardson held that the "failure of the jury to reach a verdict is not an event which terminates jeopardy." (emphasis supplied).

Further, and again contrary to defendant's position, it was found that an appellate court is not required to rule on the sufficiency of the evidence [solely] because retrial might be barred by the Double Jeopardy Clause, Richardson at 82 L.Ed.2d 249. Clearly, there is no merit to this claim.

POINT II

Arbitary and Discriminatory Imposition of the Death Penalty in Florida

Despite the consistent rejection by this Court, the Eleventh Circuit and the United States Supreme Court of this claim, Petitioner has maintained that the imposition of the death penalty, in an allegedly disproportionate and discriminatory manner, based on the race of the victim as white, violated his Eighth and Fourteenth Amendment rights. Petitioner presently relies, for support of his claim, as in past cases, on the Gross and Mauro studies, and on the United States Supreme Court's grant of certiorari, and scheduling of oral argument early next term, in a case where the issue was raised. Hitchcock v. Wainwright, Case No. 85-6756 (cert. granted June 9, 1986); (oral argument set for October 15, 1986). However, the mere granting of certiorari in Hitchcock does not alter the binding and consistent precedent from this Court, as well as the Eleventh Circuit, and the United States Supreme Court itself, which continues to mandate rejection of this claim.

It is clear that this Court has consistently and repeatedly rejected the claim, based on the Gross and Mauro studies, that the Florida death penalty is arbitrarily and/or discriminatorily imposed, based on the race of the victim, sex of the defendant, or the geographical locale of a particular homicide. Harvard v. State, 486 So.2d 537, 540 (Fla. 1986); Sireci v. State, 469 So.2d 119 (Fla. 1985); O'Callaghan v. Wainwright, 461 So.2d 1354, 1355 (Fla. 1984); Tafero v. State, 459 So.2d 1034, 1037 (Fla. 1984); Smith v. State, 457 So.2d 1380 (Fla. 1984); State v. Washington, 453 So.2d 389 (Fla. 1986); Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983). Furthermore, these conclusions have been reiterated by the Eleventh Circuit. Thomas v. Wainwright, 767 F.2d 738, 747 11th Cir. 1985); Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984); Washington v. Wainwright, 737 F.2d 922 (11th

Cir. 1984); Hitchcock v. Wainwright, 745 F.2d 1332, 1342 (11th Cir. 1984), reinstated as en banc opinion, 770 F.2d 1514, 1516 (11th Cir. 1985)(en banc); Sullivan v. Wainwright, 721 F.2d 3160 (11th Cir. 1983); see, also McClesky v. Kemp, 753 F.2d 877, 897 (11th Cir. 1985)(en banc). As noted recently in McClesky, supra, the existence of generalized statistical studies, which do not even pretend to demonstrate evidence that Petitioner herein was the subject of discrimination, and a demonstration of mere general disparities, which could not possibly account for race-neutral variables, does not warrant an evidentiary hearing, or habeas relief. McClesky, supra, at 892-894; Ross v. Kemp, 756 F.2d 1483, 1491 (11th Cir. 1986)(en banc). Furthermore, the degree of disparity in the Gross and Mauro studies, as noted most recently in McClesky, does not compel an inference of intent to discriminate. McClesky, at 897; Ross, supra, at 1491.

Significantly, the United States Supreme Court's rulings in Wainwright v. Adams, ___U.S.___, 104 S.Ct 2183, 80 L.Ed.2d 809 (1984); Wainwright v. Ford, ___U.S.___, 104 S.Ct 3498, 82 L.Ed.2d 911 (1984); and Sullivan v. Wainwright, 464 U.S. 109 (1983), indicate that Petitioner can draw no support, or demonstration of substantial likelihood of success on the merits, from the Supreme Court's review of Hitchcock, supra. In Wainwright v. Ford, supra, a clear majority of the Court (5 justices in Adams; 6 justices in Ford), rejected the "race of the victim" discrimination claim, based on the same Gross and Mauro studies, that has been proffered herein. Adams, 80 L.Ed.2d, supra, at 809; Ford, supra, at 911. The Court specifically held in Ford, citing its prior rulings in Sullivan v. Adams, that the Gross and Mauro studies were insufficient to raise a substantial ground upon which relief could be granted. Id. It is particularly significant that in two of the three cases, the Court refused to grant stays of execution,[FN] and allowed the executions in Sullivan and Adams to proceed, even when, in Adams, the decision in

McClesky was pending. Adams, at 809; Sullivan, 82 L.Ed.2d, supra, at 111. In view of the consistent rejection of this claim, not only by several Eleventh Circuit panels, but by the United States Supreme Court at the "eleventh hour," preceding imminent executions, Petitioner's various claims for habeas relief, an evidentiary hearing, or a stay of execution, pending Hitchcock, should be denied.

It is further significant that in relying on a statistically-based argument in support of this claim, Petitioner advocates the granting of habeas relief, in an Unconstitutional manner. As implicitly noted in McClesky, death penalty statutes, such as in Florida, were validated in decisions like Proffitt, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), on the express basis that sentencing discretion was exercised and appropriately channelled, by appropriate guidelines and circumstances. Proffitt, supra. Petitioner challenges the results of the very exercise of the type of channelled discretion that makes such statutes Constitutionally valid. McClesky, at 898-899. The logical result of Petitioner's argument, would be a mechanistic application of the death penalty, based on statistical showings, that would in effect make death penalty mandatory in certain statistical circumstances, and eliminate discretion, in a manner which violates the Constitution. Woodson, supra; Roberts, supra.

Finally, Petitioner's argument requires the absurd conclusion, in this case, that the jury somehow discriminated against Petitioner because his victim was white, yet did not so discriminate against Petitioner because of his white racial status. It would appear to be totally illogical to conclude,

---

FN In Adams, the Court vacated the Eleventh Circuit's entry of a stay; in Ford, the Court granted a stay on different grounds, but expressly stated there was abuse of discretion by the 11th Circuit in granting a stay, on the "race of victim" issue; in Sullivan, the Court noted no basis for contesting the rejection of said claim by the Florida Supreme Court, Federal District Court, and 11th Circuit in that case.

in order to find validity in Petitioner's claim, that the jury would effectively distinguish between the defendant and his victim, when of the same race, and apply racism to one and not the other. This inherent inconsistency compels the conclusion that if the jury in this case, advised that a white defendant be put to death, then both the jury, and the operation of the Florida death penalty in this case, cannot be considered racially discriminatory. This result, and the rejection of Petitioner's claim, is further mandated by the complexity and existence of numerous race-neutral variables at work in the Florida death penalty legislative scheme, which cannot be statistically reduced. McClesky, at 896-899.

Therefore, Petitioner's claim in this issue, and request for a stay of execution and/or evidentiary hearing, does not warrant relief from this Court. Petitioner's arguments present nothing new,[FN] and do not warrant or mandate re-visiting of the prior precedent of this Court, or of Federal courts, in rejecting this claim.

FN Petitioner acknowledges, in his own pleadings, that even with purported "recent developments," this claim does not represent a "change in the law" as defined in Witt v. State, 387 So.2d 922 (Fla. 1980). Petition, at 16, n. 11.

POINT III

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL.

In the present habeas corpus petition, Petitioner alleges that his appellate counsel, Louis Carris, Assistant Public Defender, rendered ineffective assistance by not raising various issues on his appeal. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

In Strickland v. Washington, supra, the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, at trial whose result is reliable.
>
> 80 L.Ed2d at 693.

In explaining the appropriate test for proving prejudice the Court held that "[t]he defendant must show that there is a reasonable probility that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698.

In reviewing the Strickland standards as it applies to ineffectiveness of counsel on appeal, this Court has held that a Petitioner in a habeas corpus proceeding must show:

> . . . first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell

> outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

Johnson v. Wainwright, supra, 463 So.2d at 209. See also Wilson v. Wainwright, 474 So.2d 1162m 1163 (Fla. 1985).

Specifically, in reviewing claims of ineffective assistance of appellate counsel, it is recognized that a habeas corpus petitioner's allegations of ineffective assistance of counsel should not be allowed to serve as a means for circumventing the rule that habeas corpus proceedings do not provided a second or substitute appeal. Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). See also Smith v. State, 457 So.2d 1380, 1384 (Fla. 1984). Appellant counsel is not required to press every conceivable claim under appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The Supreme Court recognized that experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one control issue if possible, or at most on a few key issues..." A brief that raises every colorable issue runs the risk of burying good arguments... in a verbal mound made up of strong and weak contentions." 77 L.Ed.2d at 994. Thus, the Court held that "for judges to second guess reasonable professional judgements and impose on appointed counsel a duty to raise every colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders v. California, 386 U.S. 738 (1967)." 77 L.Ed.2d at 995. See also Johnson v. Wainwright supra; Cave v. State, 476 So.2d 180, 183 n. 1 (Fla. 1985).

Counsel is also not required to raise issues which are not properly preserved by trial counsel for appeallate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), or raise issues

reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be denied ineffective. See Smith v. State, supra; McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

1. Defendant alleges that appellate counsel was ineffective in not raising as error on direct appeal the fact that the jury was permitted, during deliberations, to separate for an overnight recess. However, counsel could not have raised said issue as it was not preserved for appellate review.

Defendant argues that "any objection by counsel would have been futile because, during voir dire, the trial judge told the jury that he would not under any circumstances sequester the jury once it had begun deliberations." (Habeas, p. 34). The record, however, does not support defendant's claim. It is true that the court indicated a preference to separate the jury during deliberations, stating that it never had needed to "lock up" a jury in the past (OR. 1605). Albeit the court indicated that it would sequester the jury under the correct set of circumstances:

> I have been a judge over seven years, and
> I know I will probably do it at sometime;
> but I have never yet.
> (OR. 1606)

Clearly an appropriate defense objection was necessary to preserve this issue for appeallate review.[fn]

As no objection was raised by trial counsel (T. 1273), fundamental error would need to be found. Albeit neither Raines v. State, 65 So.2d 558 (Fla. 1953) nor Livingston v. State, 458 So.2d 235 (Fla. 1984) establishes the instant separation as fundamental error.

Raines, supra, where fudamental error was in fact found, is relied upon here by defendant. However, the decision in Raines, is unapplicable to the instant case. Said decision was based solely upon two specific statutory provisions not in effect at the time of Mr. Rose's trial in 1977. §919.01(1) Florida Statutes (1953) and §919.02, Florida Statutes provided for mandatory sequestration during deliberation. These statutory provisions were repealed in 1970 by Chapter 70-339, section 180

[fn] Defendant also argues that there is "no indication from the record that Mr. Rose was personally present when the jury was permitted to separate" (Habeas, p. 34). However, there is no requirement that defendant personally consent to the jury's separation, see, Powell v. Spalding, 679 F.2d 163, 166 (9th Cir. 1982). See also, n.3.

Laws of Florida and replaced by Rule of Criminal Procedure 3.370, in effect at the time of defendant's trial and the the present. Said rule provides no definitive rule of procedure for the trial court to follow regarding separation after deliberations have begun, see, Livingston, supra.

As to Livingston, supra, proving the instant separation of the jury during deliberation to be fundamental error, such is not the case. In Livingston there were repeated objections by trial counsel to the separation of the jury. Initially counsel voiced a specific objection. When the court reconvened after separation counsel renewed his objection and moved for a mistrial. Counsel then asked the court to conduct individual voir dire of the jurors as to the possibility of any outside influence, Livingston at 236. Clearly said issue was reserved for appellate review.[fn1,2]

Engle v. State, 438 So.2d 803 (Fla. 1983), cert den, 465 U.S. 1074 (1984), falls into the gap between Raines and Livingston: Livingston had not yet been rendered and the Statutes relied upon in Raines had been repealed. In Engle, a case identical to the instant case, it was found that defendant was not denied his due process and fair trial rights when defendant's trial counsel agreed to the jurors separation for the evening during their deliberations.[fn] See also, Ulloa, supra, a

---

[1] See also, Ulloa v. State, __So.2d__ (Fla 3rd DCA 1986), April 15, 1986, Case No. 85-474, 11 F.L.W 883, 883 where it was explained that "In 1984, the Supreme Court of Florida decided in Livingston v. State, 458 So2d 235 (Fla. 1984), a capital case, that if the defendant objected, it was per se reversible error to allow a jury which had begun it deliberations to separate for the weekend" (Emphasis supplied).

[2] Assuming arguendo that Livingston did create fundamental error it could not be applied retroactively to the instant case. Said alleged change in the law would not be a juris prydential upheaval but merely a refinement of the law already in existence, see, Witt v. State, 387 So.2d 922 (Fla. 1980). Neither appellate not trial counsel could be said to be ineffecteive for failing to anticipate said alleged change in the law, see, Spaziano v. State, 489 S0.2d 720, 721 (Fla. 1984); Strickland v. Washington, 466 U.S. 668 (1984).

[fn] Defendant argues that his counsel did not agree to the separation but only to "not having the proceeding reported" (Habeas, p. 34). The state submits that counsel did in fact agree to the separation. Had counsel refused to consent he certainly would not have agreed that the proceedings be unreported as he would have required his objection to be placed on the record. However assuming arguendo that defendant's agreement went to the failure to report the proceedings alone, the absence of a transcript on the instant issue would preclude

(con't on next page)

"gap" case where the court refused to apply the fundamental error rule. And, Fowler v. State, __So.2d__ (Fla. 5th DCA 1986) Jan. 30, 1986, Case No. 85-889, 11 F.L.W. 302 (concurring opinion).

Federal law is in accord. There is no federal constitutional right to sequestration, Powell v. Spalding, 679 F.2d 163 (9th Cir. 1982); Young v. Alabama, 443 F.2d 854, 856 (5th Cir. 1971). Clearly a defendant must object in order to preserve said issue for appeal, U.S. v. Phillips, 664 F.2d 971, 997 (5th Cir. 1981); U.S. v. Muscarella, 585 F.2d 242, 254 (7th Cir. 1978(; U.S. v. Arciniega, 574 F.2d 931, 933 (7th Cir. 1977).

A federal trial court has a wide range of discretion in which to determine whether the jury should be allowed to separate during deliberations, Powell, supra; U.S. v. Almonte, 594 F.2d 261 (1st Cir. 197); U.S. v. Arciniega, 574 F.2d 931 (7th Cir. 1978); U.S. v. Phillips, 540 F.2d 319 (8th Cir. 1976). No special reason need be present for the trial court to permit separation, U.S. v. Carter, 602 F.2d 799 (7th Cir. 1979). And a deliberating jury may even be allowed to separate when defendant objects to said separation, Carter, supra; Almonte, supra at 267; U.S. v. Harris, 458 F.2d 670, 674-675 (5th Cir. 1971) and cases cited therein.

In order to establish an abuse of discretion defendant must prove that there is a substantial likelihood that prejudice did result by reason of separation, Phillips, supra. Proof of prejudice is required upon a petition for writ of federal habeas corpus, Powell, supra at 166 and publicity during trial in an of itself will not prove prejudice, see, U.S. v. Ricardo, 619 F.2d 1124 (5th Cir. 1980). In fact a jurors exposure to news accounts about a particular trial or to information about a defendant's prior convictions does not presumptively deprive defendant of due process, Murphy v. Florida, 421 U.S. 793, 799 (1975).

Clearly, in the instant case counsel is not shown to be ineffective.

---

appellate review, Appellgate v. Barnett Bank of Tallahassee, 377 So.2d 1151 (Fla. 1979), Bruce v. State, 419 S).2d 749 (Fla. 2nd DCA 1982).

2. Petitioner has further maintained that his appellate counsel was ineffective, for failing to challenge the trial court's references to prior proceedings in the case, as violative of the principles espoused in Caldwell v. Mississippi, ___U.S.___,]05 S.Ct. 2633, 86 L.Ed.2d 23] (]985). In view of the apparent lack of merit to this claim, appellate counsel was not ineffective for failing to raise it.

Petitoner's reliance on Caldwell, supra, suggests the position that the trial court's comments, on prior proceedings in the case, effectively minimized the jury's sentencing role, and/or mislead the jury into believing that the responsibility for determining the appropriate sentence lay not with the jury, but elsewhere. Caldwell, 8605 S.Ct. 2633, 86 L.Ed.2d 23] (]985). In view of the apparent lack of merit to this claim, appellate counsel was not ineffective for failing to raise it.

Petitoner's reliance on Caldwell, supra, suggests the positive that the trial court's comments, on prior proceedings in the case, effectively minimized the jury's sentencing role, and/or mislead the jury into believing that the responsibility for determining the appropriate sentence lay not with the jury, but elsewhere. Caldwell, 86 L.Ed.2d, at 240; Darden v. Wainwright, Case No. 85-53]9, 39 Cr L R 3]69, 3]73, n.]5(June 23,]986). Appellate counsel's review of the record, could clearly and reasonably have led him to the conclusion that no such meritorious claim existed. The trial court's comments, reflected the fact of this Court's reversal of Petitioner's original sentence, and the reason for such reversal, in an accurate manner. (R 96); Bush v. State, 425 So.2d, at 524-525. The trial court's further comments that the effects of this Court's ruling

was to be followed, and that the ruling meant that the trial court had been mistaken, (R 96), is anything but a "minimization" of the sentencing jury's role in sentencing, and does not even approach statements by a court to a jury that it should not regard itself as bearing any responsibility for capital sentencing. Caldwell, at 239, 240, 246. The trial court's subsequent instruction that the jury should "listen to the testimony and law as I give it to you", and not be influenced by a prior jury recommendation or Florida Supreme Court ruling, (R 97,98,89]), substantiates the absence of any record showing that the jury was encouraged to believe that any mistakes the jury made in sentencing, would be corrected by an appellate court. Caldwell; Darden, supra. Finally, the trial court's sentencing instructions, impressing upon the jury the signiture of their deliberations and the "gravity" of the proceedings (R 869-870), certainly did not create the basis for an appellate claim that Petitioner was deprived of a fair and reliable sentencing proceeding. Strickland; Jackson; Francois.

It is clearly reasonable that appellate counsel would have further regarded any possible claim in this regard, as "invited error", given the fact that present counsel now suggests that the curative instruction, requested by defense counsel and given by the trial court (R 97-98) did not use the alleged erroneous comments. Such a conclusion could clearly have reasonably led appellate counsel to tactically avoid raising an issue which would be procedurally barred, as being induced by defense counsel. McCrae, supra; Smith v. State, 457 So.2d]380 (Fla.]984); Demps v. State, 4]6 So.2d 808 (Fla.]982).

Since this potential claim had no merit, and clearly would not have undermined confidence in the outcome of Petitioner's case on direct appeal, no basis for taking relief is thus stated. Johnson, supra; Strickland.

3. Petitioner lastly complains that his appellate counsel was ineffective for failing to argue on appeal that Petitioner's absence during the questioning of two prosective jurors on voir

dire constituted fundamental error. Respondent maintains however that Petitioner's argument is totally without merit.

First of all, Respondent would point out that there is absolutely no factual basis in the record to support Petitioner's primary contention that he was not present when Ms. Gregory and Ms. Fiorenzi were question outside of the presence of the jury. Nowhere in the record is there any indication that Petitioner was anything but present at all times during the proceedings below (R]]2-]]5, 205-207). Thus, the record itself fails to establish that reversible error occured below. Applegate v. Barnett Bank of Tallahassee, 377 So.2d]]50 (Fla.]980). Because this alleged error is unsupported by the record, appellate counsel cannot seriously be considered ineffective for failing to raise it as an issue on appeal. Palmes v. State, 425 So.2d 4 (Fla.]983); Johnson v. Wainwright, 463 So.2d 207 (Fla.]985).

Even if Petitioner's contention was supported by the record, Respondent would submit that Petitioner's appellate counsel was not ineffective for not raising this issue on appeal since Petitioner's trial counsel never objected to Petitioner's alleged absence during portions of voir dire. Jackson v. State, supra. Respondent would further submit that Petitioner's appellate counsel was also not ineffective for the reason that he could have reasonably concluded under Francis v. State, 4]3 So.2d]]75 (Fla.]982), that any error was harmless due to the fact that Petitioner was not prejudiced when the two jurors who were allegedly questioned outside of his presence were subsequently excused. The record indicates that Ms. Gregory was excused for cause by the trial court after she stated that she could be inclined to vote for death in any first degree murder case (R]]6). Ms. Fiorenzi was excused after she admitted to having been exposed to pre-trial publicity (R 207). Clearly, the excusal of these two jurors did not prejudice Petitioner and in fact benefitted him. Thus, it must be said that under Francis, supra, appellate counsel could have reasonably concluded that any error would be harmless since no prejudice existed sub judice. This

strategic reason for not raising this issue on appeal thus, cannot be considered as constituting ineffective assistance of counsel. McCrae v. Wainwright, 422 So.2d 824 (Fla.]984). Petitioner has therefore failed to show that but for appellate counsels alleged errors, the result of the proceedings would have been different. Clearly, Petitioner has not been different. Clearly, Petitioner has not been denied effective assistance of counsel. In conclusion, Respondent submits that this Court's remarks in Downs v. State, 453 So.2d]]02 (Fla.]984), are particularly appropriate to the instant case where there were twenty-seven issues raised on appeal:

> In Florida, there has been a recent proliferation of ineffectiveness of counseling challenges. Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.
>
> 453 So.2d at]]07.

Based on the foregoing, the Respondent submits that this Court should deny Petitioner's petition for writ of habeas corpus due to ineffective assistance of appellate counsel.

WHEREFORE, Respondents respectfully request that Petitioner's Petition for Writ of Habeas Corpus and any other further relief be DENIED.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida
Richard G. Bartmon
RICHARD G. BARTMON
Assistant Attorney General
Diane Leeds
DIANE LEEDS
Assistant Attorney General
Carolyn V. McCann
CAROLYN V. McCANN
Assistant Attorney General
]]] Georgia Avenue, Suite 204
West Palm Beach, Florida 3340]
(305) 837-5062

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response In Opposition To The Application For Writ Of Habeas Corpus has been furnished by courier to: CRAIG S. BARNARD, Attorney for Petitioner, 224 Datura St/]3 Floor, West Palm Beach, Florida 3340], on this 26th day of August, 1986.

Richard G. Bardmar

Of Counsel