IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,458

JOHN ERROL FERGUSON, or DOROTHY FERGUSON,
Individually and as Next Friend on Behalf of
JOHN ERROL FERGUSON

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Florida Bar No. 0375934
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases — Pages

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

Cases — Pages

TABLE OF CITATIONS CONT'D.

Cases — Pages

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

Cases — Pages

OTHER AUTHORITIES

INTRODUCTION

This is a consolidated appeal from a denial of postconviction relief in two capital cases. The first case, State v. Ferguson, Eleventh Judicial Circuit in and for Dade County case No.77-2865D, Fla Sup.Ct. Direct Appeal No. 55,137, is hereinafter referred to as the Carol City murders. The second case, State v. Ferguson, Eleventh Judicial Circuit in and For Dade County, Case No 78-5428, Fla. Sup. Ct. Direct Appeal Case No. 55,498, will hereinafter be referred to as the Hialeah murders. The following symbols are used throughout this Brief of Appellee to designate portions of pertinent transcripts and records:

R - Record on Appeal for the current appeal from post-conviction proceedings

SR - Supplemental Record on Appeal for the current appeal from post-conviction proceedings

R1 - Record on Appeal from prior direct appeal in the Carol City murders, Case No. 55,137, Florida Supreme Court

T1 - Transcripts of lower court proceedings from the direct appeal in the Carol City murders, Case No. 55,137, Florida Supreme Court

R2 - Record on Appeal from prior direct appeal in the Hialeah murders, Case No. 55,498, Florida Supreme Court

T2 - Transcripts of lower court proceedings from the direct appeal in the Hialeah murders, Case No. 55,498, Florida Supreme Court

ST2 - Supplemental Transcripts of suppression hearings from the direct appeal in the Hialeah murders, Case No. 55,498, Florida Supreme Court.

R3 - Record on Appeal from prior appeal of resentencing, consolidated Case Nos. 64,362 and 65,961 Florida Supreme Court.

SR3 - Supplemental Record on Appeal from prior appeal of resentencing, consolidated Case Nos. 64,362 and 65,961, Florida Supreme Court.

The parties have had difficulties in obtaining various exhibits, such as the transcripts of voir dire in the Hialeah murder case, which was previously ordered to be included in the supplemental record on appeal herein by this court. The Appellee has been able to obtain said transcript on July 22, 1991. Thus an additional volume of supplemental record on appeal will be shortly filed by the clerk of the court in and for Dade County, Florida.

STATEMENT OF THE CASE AND FACTS

1. The Carol City Murders

On September 13, 1977, the defendant was charged with six counts of first degree murder of Gilbert Williams, Michael Miller, Livingston Stocker, Henry Clayton, Randolph Holmes, and Charles Stinson; the attempted first degree murders of John Hall and Margaret Wooden; the armed robbery of John Hall, Margaret Wooden, Michael Miller; and in one count the armed robbery of John Hall, Gilbert Williams, Charles Stinson, Randolph Holmes, Henry Clayton, and Livingston Stocker. All crimes were alleged to have been committed on July 27, 1977. (R1.1-7) Jury trial commenced on May 22, 1978. On May 25, 1978, the defendant was found guilty as charged, with the exception of the last count of armed robbery for which he was acquitted. (R1.137-148).

The defendant was adjudicated guilty and on May 25, 1978, after an advisory sentencing hearing, the jury recommended that the defendant be sentenced to death for the murders of Gilbert Williams, Michael Miller, Livingston Stocker, Henry Clayton, Randolph Holmes, and Charles Stinson. (T1.1082) Following the jury's recommendation, the trial court on May 25, 1978, sentenced the defendant to death for the first degree murders of Gilbert Williams, Michael Miller, Livingston Stocker, Henry Clayton, Randolph Holmes, and Charles Stinson. (R1.149-150) A written order imposing the death penalty was subsequently entered by the trial court. (SR1. 1-8).

The defendant appealed his convictions and sentences to this Court, which on July 15, 1982 affirmed the convictions, but reversed the death sentences on the basis of trial court's failure to properly consider and weigh mitigating factors. The Court remanded the cause to the trial court for the purpose of determining an appropriate sentence. A new advisory jury verdict was not required. Ferguson v. State, 417 So.2d 639 (Fla. 1982).

The pertinent facts regarding the offenses in this case are detailed in this Court's opinion:

> On July 27, 1977, at approximately 8:15 p.m. the defendant, posing as an employee of the power company, requested permission from Margaret Wooden to enter her Carol City home and check the electrical outlets. After gaining entry and checking several rooms, the defendant drew a gun and tied and blindfolded Miss Wooden. He then let two men into the house who joined the defendant in searching for drugs and money.
>
> Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. The defendant, who identified himself to Miss Wooden as "Lucky," and his cohorts tied, blindfolded and searched the six men. All seven victims were then moved from the living room to the northeast bedroom.
>
> Shortly thereafter, Miss Wooden's boyfriend, Miller, entered the house. He too was bound and searched. Then he and Miss Wooden were moved to her bedroom and the other six victims returned to the living room.
>
> At some point one intruder's mask fell, revealing his face to the others. Miller and Wooden were kneeling on the floor with their upper bodies lying across the bed. Wooden heard shots from the living room then saw a pillow coming toward her head. She was shot. She saw Miller get shot then heard the defendant run out of the room. She managed to get out and run to a neighbor's house to call the police.
>
> When the police arrived they found six dead bodies. All had been shot in the back of the head, their hands tied behind their backs. One of the victims, Johnnie Hall, had survived a shotgun blast to the back of his head. He testified to the methodical execution of the other men.
>
> On September 15, 1977, the defendant and three co-defendants were indicted for the offense. Adolphus Archie, the "wheel-man", was allowed to plead guilty to second degree murder and a twenty-year concurrent sentence on all counts in exchange for testimony at trial. He testified he'd dropped the defendant, Marvin Francois, and Beauford White in the Carol City area to "rip off" a drug house. He didn't see the actual shooting but later saw weapons and jewelry in Beauford's and Francois' possession.

Ferguson, supra, 417 So.2d at 640-641; see also the findings on the aggravating factor of heinous, atrocious, and cruel, recited at 417 So.2d 643-644.

2. The Hialeah Murders

On April 13, 1978, the defendant was charged with two counts of the first degree murder of Brian Glenfeldt and Belinda Worley; armed sexual battery on Belinda Worley; armed robbery of Brian Glenfeldt and Belinda Worley; use of firearm during the commission of a felony; and possession of a firearm by a convicted felon. All crimes were alleged to have been committed on January 8, 1978. (R2. 1-5) The defendant was also charged with possession of a firearm by a convicted felon, which was alleged to have occurred on April 5, 1978. (R2. 5) Jury trial commenced on September 27, 1978. On October 7, 1978, the defendant was found guilty of the first degree murders of Brian Glenfeldt and Belinda Worley; armed sexual battery of Belinda Worley; armed robbery of Brian Glenfeldt; attempted armed robbery of Belinda Worley; use of a firearm during the commission of a felony; and the two counts of possession of a firearm by a convicted felon. (R2. 196-203)

The defendant was adjudicated guilty, and on October 7, 1978, after an advisory sentencing hearing, the jury recommended that the defendant be sentenced to death for the murders of Brian Glenfeldt and Belinda Worley. (T2. 1468) Following the jury's recommendation, the trial court on October 7, 1978, sentenced the defendant to death for the first degree murders of Brian Glenfeldt and Belinda Worley. (T2. 1473) A written order imposing the death penalty was subsequently entered by the trial court.

The defendant appealed his convictions and sentences to this Court, which on July 15, 1982, affirmed the convictions, but reversed the death sentences on the basis of the trial court's failure to properly consider and weigh mitigating factors. The Court remanded the cause to the trial court for the purpose of determining an appropriate sentence. A new advisory jury verdict was not required. Ferguson v. State, 417 So.2d 631 (Fla. 1982).

The pertinent facts regarding the Hialeah offenses are detailed in the portion of this Court's opinion which recites the trial court's findings on the other aggravating factor of especially heinous, atrocious, and cruel:

> The facts reveal that the two victims were seated in an automobile and while seated therein a gunshot was fired through the window striking Brian Glenfeld in the arm and chest area. A significant amount of bleeding followed and this victim's blood was found throughout many areas of the front of the automobile as well as on the clothing of Belinda Worley. Following the shooting, the female victim ran many hundreds of feet from the car in an attempt to allude [sic] the defendant and was finally overtaken in some rather dense overgrowth and trees. She was subjected to many physical abuses by this defendant, including but not limited to, sexual penetration of her vagina and anus. The discovery of embedded dirt in her fingers, on her torso both front and back and in many areas within her mouth and the findings of hemorrhaging around her vagina and anal cavity would indicate that she put up a significant struggle and suffered substantially during the perpetration of these indignities upon her body. Expert testimony indicates that she was a virgin at the time of the occur[r]ence of this crime. The position of her body and the location of the wounds on her head would indicate that she was in a kneeling position at the time she was shot through the top of the head. She was left in a partially nude condition in the area where the crime was committed to be thereafter fed upon by insects and other predators. Physical evidence would substantiate that following the attack upon Belinda Worley the defendant went back to the car and shot Brian Glenfeld through the head.

Ferguson, supra, 417 So.2d 636.

On April 19, 1983, the trial court held a hearing on the resentencing. The hearing in the Hialeah case was consolidated with the resentencing in the Carol City case. The trial court again sentenced the defendant to death for both murders in the Hialeah case and the six murders in the Carol City case. (SR2.1-11; SR2. 12-20) The trial court rendered its written sentencing orders on May 27, 1983. The defendant, in a consolidated appeal, appealed the resentencings in both the Hialeah and Carol City cases. On June 27, 1985, this Court affirmed the defendant's sentences. Rehearing was denied on September 9, 1985. Ferguson v. State, 474 So.2d 208 (Fla. 1985). Mandate was issued on October 15, 1985.

On October 15, 1987, the defendant, through his mother, Dorothy Ferguson, as next friend, filed a motion for post-conviction relief, attacking his convictions and sentences in both the Carol City and Hialeah cases. (SR.4-43) The defendant also filed a motion for stay of the proceedings on the ground that the defendant was incompetent to proceed or assist counsel in the post-conviction motion. (SR.44)

After numerous doctors examined the defendant and multiple neurological and psychological tests were performed (R.1903-2018), the lower court held an extensive evidentiary hearing as to the defendant's competency to assist counsel in the post-conviction proceedings, on August 24-25, 1988, and on October 21, 1988. (R.2019-2734). The trial court on February 23, 1989, entered its order denying the motion to stay post-conviction proceedings. (R.1000-1013) In its order, the lower court made extensive factual findings and specifically ruled that the defendant was competent, and "has the present ability to understand the [post-conviction] proceedings and to assist counsel if he so chooses." (R.1003-1008) The lower court further ordered that the defendant "file any amendments he desires in order to support the six claims raised in his motion for post-conviction relief" within thirty-five (35) days from the date of the order. (R.1012)

Subsequently, the defendant was granted until April 25, 1989, in which to file his supplemental pleadings. Instead of filing those pleadings, on March 23, 1989, the defendant filed a motion to disqualify the Honorable Judge A. Snyder, and to vacate prior orders. (R.1014). On April 12, 1989, the lower court denied the motion to disqualify, and on May 1, 1989, denied the defendant's motion for reconsideration. (R.1066-77, 1079, 1094)

On May 19, 1989, the defendant filed a petition for writ of prohibition in this Court seeking disqualification of the judge. See Ferguson

et. al. v. The Honorable Arthur I. Snyder, Florida Supreme Court Case No. 74,186.[1] On June 1, 1989, this Court issued a Rule to Show Cause, automatically staying the trial court proceedings on the motion for post-conviction relief. On July 19, 1989, this Court unanimously denied the petition for writ of prohibition.

On July 24, 1989, the defendant filed a motion for stay of post-conviction proceedings pending application for certiorari to the United States Supreme Court. (R.1099). On July 28, 1989, the lower court denied the motion and gave the defendant until September 8, 1989, to file any further pleadings. (R.1104) On August 23, 1989, the Florida Supreme Court denied the defendant's motion for stay. On September 5, 1989, the United States Supreme Court denied the defendant's application for stay, and on October 30, 1989 that Court denied the defendant's petition for writ of certiorari. Ferguson v. Snyder, 107 L.Ed.2d 341, 110 S.Ct. 353 (1989).

On September 8, 1989, the defendant filed his supplement to the motion for post-conviction relief, wherein the original issues were embellished and additional claims were raised. (R.1105-1362). On December 21, 1989, after hearing argument from both parties as to the scope of an evidentiary hearing (R.2765-2873), the lower court entered an order striking some of the defendant's claim (Issues IIIA through G herein) on procedural grounds. (R.1510-1513). On May 17, 1990 the trial court conducted an evidentiary hearing on the remainder of the defendant's claims (Issues IIA through E herein). (R.2874-3187). The lower court on June 15, 1990 entered an order denying the motion for post-conviction relief and supplement thereto. (SR.319-355) The defendant did not file a motion for rehearing. However, on

---

[1] Pursuant to Fla.Stat. 90.202(6), the Appellee requests that this Court take judicial notice of its own files and records.

July 17, 1990 he filed another "motion to supplement 3.850 petition." (claim IID.1 herein) (R.1707-1718) The lower court denied this motion to supplement on the grounds of untimeliness. (R.3199). This appeal ensues.

SUMMARY OF THE ARGUMENT

I.A. Appellant's claim that Judge Snyder should have recused himself from the Rule 3.850 proceedings is barred because the claim was already adjudicated adversely to the Appellant, by this Court, in its denial of the defendant's petition for writ of prohibition. Alternatively, the motion to disqualify the judge was properly denied for several reasons: the motion had technical defects; the motion was untimely; and the ex parte communication had not established a well-grounded fear that the judge would be unfair, as the communication was limited to the problem of scheduling a psychological examination.

I.B. Although the lower court found that Appellant was competent for the Rule 3.850 proceedings, it was also correct in stating that there is no right to competency to assist counsel in a Rule 3.850 proceeding. Such proceedings are civil in nature and are not critical stages of criminal proceedings.

I.C. The lower court's determination that Appellant was competent to proceed with the Rule 3.850 proceedings, was made after a full evidentiary hearing, and is explicitly supported by the opinions of several experts who testified at said hearing. While there was conflicting testimony, that creates a credibility issue which rests solely in the discretion of the lower court as the fact-finder.

II.A. The lower court properly determined that trial counsel at the Carol City and Hialeah cases was not ineffective. This determination was made after a full evidentiary hearing and properly considered everything that

was done during the course of the trial proceedings. Counsel in both cases had considered using, and in the Hialeah case did use, psychological evidence. That evidence was contradictory at best, and further pursuit of such tactics would have opened the door for massive rebuttal by the State. Family background evidence was presented in both cases. Further such evidence, adduced at the Rule 3.850 hearing, was insignificant. None of the foregoing alleged omissions would have affected the outcome of the lower proceedings if such evidence had been adduced at trial.

II.B. In the Carol City case, there was no Hitchcock error, as the jury was explicitly told that there was no limitation on the matters which it could consider as nonstatutory mitigating factors. Alternatively, if any error did exist, it must be deemed harmless, in light of the extensive aggravating factors of these six murders, when compared to the minimal nonstatutory mitigating evidence adduced by the Appellant.

In the Hialeah case, there was a Hitchcock violation, but that error must also be deemed harmless, when viewing the extensive aggravating factors of the double murder and the minimal nonstatutory mitigating evidence adduced at the Rule 3.850 hearing.

II.C. The Appellant claims that Officer Harmon falsely testified at the Carol City penalty phase regarding one of Ferguson's prior convictions for a violent felony. All of the pertinent information for this claim exists in the trial record. It should have and could have been raised on direct appeal, or certainly in the original Rule 3.850 motion. It was not raised until after the lower court denied all pending claims in the Rule 3.850 proceeding, and was thus untimely. Moreover, the claim is refuted by the record. The statement in question was clearly an inadvertent misstatement, which was promptly corrected, when the prosecutor introduced into evidence the

actual court documents, showing the correct nature of the prior conviction in question.

II.D. Appellant claims that the failure to disclose investigations of three of the officers who testified against Appellant constitutes a Brady violation. The identical claim was recently rejected by this Court in Breedlove v. State, infra. The alleged wrongful acts of the officers were totally unrelated to the instant offenses. There was no showing that any investigations of those officers were under way at the time of Appellant's trials, or, alternatively, that either the officers or prosecution were aware of the pendency of any such investigations as of the times of the trials herein.

II.E. Appellant claims that the failure of his counsel to object on the basis of Batson - Neil, infra, in the 1978 trials constituted ineffective assistance of counsel. Counsel can not be deemed ineffective for failing to object or raise issues which only later gain judicial recognition. Moreover, Appellant was unable to prove his allegations of exclusion of black jurors by the prosecution at the evidentiary hearing below.

III. A-G. The lower court properly found these claims to be procedurally barred as they should have been raised, if at all, on direct appeal. The Appellant's current claim of ineffective assistance of counsel for failure to preserve these claims was not contained in either the initial motion for post-conviction relief or the supplement thereto. The ineffectiveness claim in this regard was belatedly asserted more than four (4) years after the completion of the direct appeal process, with no proffer as to why it could not have been discovered or raised within the time limits of Fla. R. Crim. P. 3.850.

ARGUMENT

ISSUE I (A)

THE LOWER COURT PROPERLY DENIED FERGUSON'S MOTION TO DISQUALIFY JUDGE, WHICH MOTION WAS BASED ON ALLEGED EX PARTE COMMUNICATIONS BETWEEN THE JUDGE AND PROSECUTOR.

The Appellant maintains that Judge Snyder should have recused himself as a result of ex parte communications with the prosecutor. This claim has previously been presented to this Court, and denied, through a petition for writ of prohibition. That ruling established the law of the case, is binding on the parties, and presents no cause for reviewing the issue.

The situation of which the Appellant now complains arose out of problems in scheduling the multitude of psychological examinations, tests, etc., which the court had previously ordered. The scheduling of those tests was raising some difficulties. Thus, at the May 19, 1988 hearing, the conversation turned to difficulties of making all of the necessary appointments. (R.1961) Defense counsel complained to the court about a prosecutor's ex parte call to the previous judge, the Honorable R. Friedman, regarding the scheduling of a psychiatric examination. (R.1967) After defense counsel sought further testing to be ordered (R.1976), the prosecutor noted the problem that defense counsel was in Washington, D.C., and could not be flown down to Florida every time a scheduling question needed to be asked of the court. (R.1978) After further discussions of scheduling difficulties, Judge Snyder stated:

> I know who to call and I know how to get the examinations done the next day. All you have to do and I am not worried about Mr. Prettyman saying you can't talk to me. You want something done that I have ordered you to do and you want my help in doing it, just call me, okay. He doesn't like it, that's okay. I never worry about ex parte because I don't ex parte anybody. If there is anything that ever has to be done, Mr. Prettyman, you'll be notified immediately.

(R.1985)

One week later, at a hearing on May 26, 1988, defense counsel complained about an ex parte communication between a prosecutor and Judge Snyder. (SR. 84, 89-91) It is therefore obvious that defense counsel knew of the communication in question as early as May 26, 1988, at which time counsel asserted that he considered it an error of constitutional dimension. (SR. 91) Notwithstanding counsel's admitted knowledge of the ex parte communication in May, 1988, defense counsel did not file any Motion to Disqualify until March 23, 1989. (R.1014) Counsel admitted, in the certificate in support of the Motion, that the prosecutor, prior to May 26, 1988, had advised him of the conference which the prosecutor had had with the judge on the day preceding their phone conversation. The Motion to Disqualify was filed almost one year after counsel learned of the ex parte communication, and over five weeks after the judge had conducted an extensive evidentiary hearing and denied counsel's motion to stay the post-conviction proceedings. That motion to stay was based on allegations of Ferguson's incompetency; the order denying the motion to stay was dated February 27, 1989. (R.1000)

After the lower court denied the motion to disqualify, the Appellant filed a Petition for Writ of Prohibition in this Court, seeking the issuance of a writ directing the recusal of Judge Snyder due to the ex parte communication. Ferguson v. Snyder, Florida Supreme Court Case No. 74,186. The State filed a Response therein, presenting several alternative arguments, all of which went to the propriety of Judge Snyder's denial of the motion to disqualify. That Response asserted: (1) that there were technical deficiencies in the motion to disqualify; (2) that the motion had been filed in an untimely manner; (3) that the motion failed to establish a well-

grounded fear that Judge Snyder would not resolve the case fairly; and (4) that the denial of disqualification did not result in a denial of due process.

A.1. Effect of this Court's Denial of Petition for Writ of Prohibition

This Court's denial of the Petition for Writ of Prohibition constituted a ruling on the merits of the issue regarding the disqualification of Judge Snyder. The ruling on the merits constitutes the law of the case, and there is no cause for relitigating that which has already been fully reviewed and addressed by this Court.

A denial of a petition for writ of prohibition by the Supreme Court should be deemed a denial on the merits, thereby precluding subsequent relitigation. See, Obanion v. State, 496 So.2d 977, 980 (Fla. 3d DCA 1986), review denied, 504 So.2d 768 (Fla. 1987) (denial of petition for writ of prohibition constitutes ruling on the merits of claim unless otherwise indicated). As in Obanion, this Court has shown its inclination to expressly indicate that a petition is being denied for procedural grounds when that is the case. See, State ex rel. Carter v. Wigginton, 221 So.2d 409, 410 (Fla. 1969) ("The writ of prohibition is denied on procedural grounds without adjudicating the merits of the basic question. . . ."). Thus, the lack of any explicit reference to any non-merit arguments, in this Court's denial of the prior petition, suffices to indicate that the decision rests solely on the propriety of the lower court's denial of the motion to disqualify. That is especially true in this case, where all of the State's responses to the petition, as noted above, went to the propriety of the denial of the motion to disqualify. The response did not assert that prohibition was an improper remedy to pursue, that jurisdiction was lacking, that the petition was

procedurally defective, or any other similar matter which would even have enabled this Court to deny the petition for some reason unrelated to the propriety of the denial of the motion to disqualify.

A. 2. Propriety of Denial of Motion to Disqualify
a) Technical deficiencies in Motion

The Appellant asserts that the motion to disqualify satisfied all of the technical requirements. Brief of Appellant, p. 11. This is erroneous, as the motion was not accompanied by two or more affidavits and was not sworn to by either the defendant or his attorney. (R.1014-1015). Rule 3.230, Florida Rules of Criminal Procedure, controls the process of disqualification of a trial judge in a criminal case, and requires the motion to be accompanied by two or more affidavits setting forth the facts relied upon, and a certificate of counsel of record that the motion is made in good faith. See, Keenan v. Watson, 525 So.2d 476 (Fla. 5th DCA 1988); Hammon v. Eastmoore, 513 So.2d 770 (Fla. 5th DCA 1987); McGibney v. State, 511 So.2d 1083); Roberts v. State, 507 So.2d 761 (Fla. 1st DCA 1987). Thus, the absence of the affidavits rendered the motion defective.[2] Appellant's contention that the motion complied with the technical requirements is apparently based upon his motion for reconsideration, filed approximately twelve days after the order denying the motion to disqualify. (R.1079) Technical rules cannot simply be remedied by a motion for reconsideration filed after disposition of the matter, however. To so hold would render the rules a nullity.

---

[2] Even if Rule 1.432, Fla. R. Civ. P. applied, on the grounds that post-conviction proceedings are civil in nature, the motion would still be deficient, since that Rule requires verification by the party, which was lacking in the instant case, as the defendant signed neither the motion nor supporting memorandum, and the motion was unsworn. See, Cardinal v. Wendy's of South Florida, 529 So.2d 335 (Fla. 4th DCA 1988).

The Appellant claims that the technical requirements of the rule need not be strictly complied with where the alleged bias is the result of ex parte communications made in private. Brief of Appellant, p. 11, n. 3. The Appellant relies upon Layne v. Grossman, 430 So.2d 525 (Fla. 3d DCA 1983), where the court held that when a prejudicial communication is alleged to have been made by the judge in private, it is impossible for other affiants to attest to the fact of the communication. As such, the failure to attach attesting affidavits would not render the motion legally insufficient. In response to the argument that anything less than strict adherence to the rule would invite abuse, the court determined that such abuse would be controlled by laws prohibiting perjury in judicial proceedings and rules regulating the conduct of attorneys. In the instant case, however, the control for abuse is not present, as the motion was unsworn, and would not subject either the defendant or counsel to the penalty of perjury for any false allegations. In such a case, the complete lack of control for abuse and the complete lack of recourse against a party for false claims, precludes suspension of the technical rules. See, McGibney, supra; Collins v. State, 465 So.2d 1266 (Fla. 2d DCA 1985). Furthermore, counsel clearly had the ability to file an affidavit in the instant case, as he admittedly had spoken to the prosecutor and counsel could thus swear to what the prosecutor had indicated about the ex parte communication. This, in fact, is what transpired, when counsel submitted affidavits in conjunction with the motion for reconsideration. (R.1079). Thus, the failure to comply with technical requirements furnished one proper basis for denial of the motion.

b. Untimeliness of Motion

As previously noted, the motion to disqualify was filed about ten months after counsel learned of the ex parte communication, and five weeks

after the court denied the motion to stay the Rule 3.850 proceedings. Rule 3.230(c), Florida Rules of Criminal Procedure requires that a motion to disqualify be filed "no less than ten (10) days before the time the case is called for trial unless good cause is shown for failure to so file within such time." That rule was not complied with in this case. Counsel waited until the completion of the evidentiary hearing on the competency issue, and until after the court's denial of the motion for stay, before seeking disqualification. Clearly, the delay in seeking relief precluded Appellant from obtaining any disqualification. Jones v. State, 411 So.2d 165 (Fla. 1982); Alder v. State, 382 So.2d 1298 (Fla. 3d DCA 1980). In Fischer v. Knuck, 497 So.2d 240, 243 (Fla. 1986), this Court construed the time requirements of Rule 1.432, Fla.R.Civ.P., the civil counterpart to Rule 3.230, and held as follows:

> In the instant case, despite the fact that virtually every incident contained in the motion occurred during the evidentiary portion of the proceeding, which concluded on April 4, no mention was made of these concerns at final arguments on April 11, at which time the judge announced his ruling. Further, the asserted bias and prejudice did not 'dawn on' petitioner until she suffered the adverse ruling by the judge. In these circumstances, the motion was not timely filed and the judge clearly had the authority to reduce his ruling to writing subsequent to the filing of the motion for disqualification.

The same principles apply in the instant case, where even with knowledge of the ex parte communication, counsel intentionally waited for ten months, until after a lengthy evidentiary hearing and ruling thereon, before seeking disqualification. Such tactics smack of sandbagging - take a chance with the judge you have and then seek a free second proceeding with another judge.[3]

---

[3] The Appellant also complains about an ex parte communication with Judge Friedman, in January, 1988, before Judge Snyder took over the case. Brief of Appellant pp. 10 at n. 11 and 12 at n. 13. Counsel never objected to any ex parte communication before Judge Friedman and never filed any motion to disqualify Judge Friedman. The motion to disqualify Judge Snyder obviously

The Appellant asserts that the motion to disqualify was timely because it was filed "the first time counsel detected prejudice." Brief of Appellant, p. 10. The test for recusal, however, is not whether there is prejudice, but whether the movant has a well-grounded fear, based upon specific facts, that he will not receive a fair trial at the hands of the judge. See, Livingston v. State, 441 So.2d 1083 (Fla. 1983). A claim that a judge is biased or prejudiced against a movant cannot be based upon adverse rulings, however. See, Suarez v. State, 115 So. 523 (1928); Tafero v. State, 403 So.2d 355 (Fla. 1981). Indeed, the Appellant's argument is inherently inconsistent. After asserting that he had to wait until the denial of the motion for stay showed the first signs of prejudice, the Appellant goes on to argue that prejudice is not a requirement for recusal. Brief of Appellant, p. 14.

The Appellant claims that the court placed him in the untenable position of having to seek disqualification before knowing whether there would be any actual prejudice from the ex parte communication. Brief of Appellant, p. 10. The "untenable position", however, resulted not from the order denying the motion for stay, but from the insufficiency of the facts to support a claim that Appellant had a well-grounded fear that the court would not fairly resolve the case. The fact that Appellant waited ten months before seeking disqualification, inherently suggests that the ex parte communication did not lead counsel to believe that the judge would in any way be unfair.

---

had no bearing on Judge Friedman, who was already off of the case. The Appellant certainly has no standing to complain about a judge who was already off the case, when the Appellant never even filed a motion to seek that judge's recusal.

Thus, the motion to disqualify was clearly untimely. See, Jones v. State, 411 So.2d 165 (Fla. 1982) (motion to disqualify judge from sentencing phase of capital trial should be filed more than ten days prior to guilt phase, not after guilt phase, as it is desirable to maintain continuity of judge; so, too, continuity of judge in lengthy Rule 3.850 proceedings is desirable).

c. Failure to Establish a Well-Grounded Fear that Judge Would be Unfair

The Appellant asserts that the mere appearance of bias or prejudice should compel recusal. Brief of Appellant, p. 15, n. 18. Neither the facts of the instant case, nor the case law determining whether a well-grounded fear exists, warranted recusal. Applicable case law consistently supports the notion that something more than a mere ex parte communication is required to furnish the basis for a belief in a well-grounded fear. For example, in Micale v. Polen, 487 So.2d 1126 (Fla. 4th DCA 1986), the movant alleged awareness of a private conversation between the judge and opposing counsel, and the trial court granted the motion to disqualify. Upon mandamus review, the Fourth District Court of Appeal held that the motion to disqualify did not contain reasons which were adequate to require the judge's recusal. Thus, there was no per se rule of recusal based solely upon the existence of an ex parte communication; additional facts must be present which support the claim that the movant has a well-grounded fear that he will not receive a fair hearing. See, Deren v. Williams, 521 So.2d 150 (Fla. 5th DCA 1988) (disqualification warranted where respondent and opposing counsel maintained long-standing friendship and had engaged in ex parte communications during two prior trials, and where respondent had a grandchild who suffered from the same disease as the child involved in the suit and expressed sympathy towards patients suffering from the disease); Turner v.

State, 100 Fla. 1078, 130 So. 617 (1930) (allegations sufficient where communications contained prejudicial information); Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986) (disqualification proper where opposing counsel was co-chairman of judge's ongoing reelection campaign and the attorney had written a letter to the judge explaining his reasons for requesting a hearing on a motion). See also, Power Authority of the State of New York v. F.E.R.C., 743 F.2d 93, 110 (2d Cir. 1984):

> . . . the mere existence of such [ex parte] communications hardly requires a court or administrative body to disqualify itself. Recusal would be required only if the communications posed a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. . . . In resolving that issue, one must look to the nature of the communications. . . .

In the instant case, the record clearly established that the limited ex parte communication related to the scheduling of a psychological examination, and that counsel knew beforehand that the judge would let the attorneys approach him about such scheduling problems. A communication regarding a scheduling problem in no way suggests any possible unfairness regarding the adjudication of the pending claims. Thus, the well-grounded fear required by law was not factually established, and was clearly refuted by the record. Recusal was therefore not required.

d. Lack of Due Process or Constitutional Violations

The Appellant asserts that the ex parte communication in the instant case resulted in a due process violation. That argument is also without merit. In Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749, the Supreme Court recognized that personal bias of a trial judge alone, without some showing of an additional interest, does not rise to the level of a due process violation. The Appellant relies on Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 016 S.Ct. 1580, 89 L.Ed.2d 823 (1986), for the

propositions that a due process violation existed and that prejudice is not required. Lavoie is of no benefit to the Appellant. Lavoie did not involve ex parte communications. Rather, it involved conflicts of interest and alleged conflicts of interest. In state court litigation over insurance proceeds, including a tort claim for bad-faith refusal of an insurer to pay, it was discovered that one of the State Supreme Court justices who was deciding the case, had personally brought a class-action suit, which was then pending, involving very similar claims and issues. It was therefore concluded that this justice had a direct personal or pecuniary interest in the Supreme Court case in which he was participating, as that decision could, and did, benefit the class action suit which he himself had brought. "Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U.S. at 824. It was therefore concluded that his participation in the State Supreme Court case violated the due process rights of the insurance company which sought his disqualification. Id. at 825.

Lavoie involved another enlightening claim. The insurer in the case had sought the justice's disqualification because the justice, in his own class action suit, gave a deposition expressing frustration with insurance companies. Id. at 820-21. This claim was held not to implicate the due process clause:

> We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required and appellant's arguments here fall well below that level. . . . Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.

Id. at 821. Moreover, "most matters relating to judicial disqualification [do] not rise to a constitutional level." FTC v. Cement Institute, 333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

Appellant also relies on Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), in support of his contention that the alleged due process violation warrants a retroactive remedy. Once again, that case does not involve an ex parte communication. Rather, the facts showed that after a trial was completed, a plaintiff learned that the judge had been a member of the Board of Trustees of Loyola University, while the opposing party, Liljeberg, was negotiating with Loyola to purchase a parcel of land on which to construct a hospital. The benefit of the negotiations to Loyola was contingent upon Liljeberg prevailing in the litigation before the judge, who was a trustee of the university. 486 U.S. at 850. Thus, a conflict of interest, not an ex parte communication was involved. Secondly, the case does not involve due process analysis, as the holding hinges on the construction of proper remedies under a federal statute - 28 U.S.C. 455(a) - and a federal rule - Rule 60(b), Fed. R. Civ. P. Thirdly, the Court approved harmless error analysis. 486 U.S. at 862. Fourthly, one factor to consider in applying the federal statute was "the risk of injustice to the partners," a factor which is fully consistent with assessments of the likelihood of future fairness. 486 U.S. at 864.

In view of the foregoing case law, the due process clause is in no way implicated in the instant case. Nor has the Appellant established that his right to meaningful access to post-conviction remedies has been denied. The State would note, however, that after this Court denied the petition for writ of prohibition, the Appellant filed a "Motion to Vacate or for Reconsideration of Orders Entered Prior to Disqualification," again

asserting the impropriety of Judge Snyder presiding on the rule 3.850 proceedings regarding the issues of competency and a stay of those proceedings. (R.1784) This motion was denied by Judge Fuller, who now had the case, noting that "a review of the transcripts of the various hearings before Judge Snyder, shows no indication of bias or prejudice for or against either party." (SR.317-18). Thus, not only did this Court previously deny this claim on the merits in the prohibition proceedings, but the Appellant obtained the independent review of yet another trial court judge, who similarly found no indicia of bias or prejudice. Furthermore, it was Judge Fuller, not Judge Snyder, who ultimately conducted an evidentiary hearing, ruled on and denied all of the claims in the Rule 3.850 motion and supplement thereto.

ISSUE I (B)

THERE IS NO RIGHT TO COMPETENCY TO ASSIST COUNSEL IN POST-CONVICTION PROCEEDINGS.

The Appellant claims that Judge Snyder erred in determining that a capital defendant need not be competent to assist counsel in post-conviction proceedings. The Appellant's claim is misleading, as it ignores that Judge Snyder conducted a full-blown evidentiary hearing regarding Ferguson's competency to assist counsel in the post-conviction proceedings. In the order of February 23, 1989, denying the motion to stay post-conviction proceedings, Judge Snyder provides the details as to all of the psychiatrists and psychologists who were appointed to evaluate Ferguson's competency during the post-conviction proceedings. (R.1002-3). The order then spends five pages summarizing the evidence presented at the August 24-25, 1988 and October 21, 1988 hearing, on the question of Ferguson's competency to participate in the post-conviction proceedings. (R.1003-7). After summarizing the evidence and setting forth the standards for determining competency, the order then makes explicit findings that Ferguson was competent to proceed with the Rule 3.850 proceedings. (R.1007-8). It was only after making detailed findings that Ferguson was competent that the judge made the alternative finding that competency is not at issue in Rule 3.850 proceedings:

> Although this Court has determined that the Defendant is competent to proceed with these post-conviction proceedings, this Court finds that the Defendant's motion to stay the post-conviction proceedings should be denied on the alternative grounds that incompetency is not an issue for a court to address when a motion for post-conviction relief is filed.

(R.1008). Thus, if the evidence supports the court's initial conclusion that Ferguson was competent, the issue of whether competency is required for Rule 3.850 proceedings is little more than an unnecessary academic exercise in this

case. It would be significant only if this Court rejects the lower court's conclusion that Ferguson was competent. The propriety of the ruling on competency, and the details of the evidence adduced at the competency hearing, are fully addressed in the next section of this Brief of Appellee.

In any event, the State maintains that the lower court's alternative ruling is correct. In Jackson v. State, 452 So.2d 533, 536-37 (Fla. 1984), this Court held that the rules pertaining to incompetency are inapplicable to Rule 3.850 proceedings:

> Second, appellant requests a judicial determination of his competency to understand the nature of and assist his counsel in post-conviction proceedings. Appellant relies on section 916.11 and 916.12, Florida Statutes (1983), and Rule 3.210, Florida Rules of Criminal Procedure to support his argument. This reliance is misplaced, however, because the statutes and the rule both address the issue of a judicial determination of competency related to criminal trial proceedings. These do not apply to a 3.850 motion because the designation of the criminal procedure rule is a misnomer in that the proceeding is civil in nature, rather than criminal, and is likened to a combination of the common-law writ of habeas corpus and a motion for writ of error coram nobis. Dykes v. State, 162 So.2d 675 (Fla. 1st DCA 1964). Therefore, we hold that appellant is not entitled to a judicial determination of his competency to assist counsel in either preparing a 3.850 motion or a petition for writ of habeas corpus.

See also, Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 96 L.Ed.2d 539 (1987) (post-conviction proceeding "is not a part of the criminal proceeding itself, and it is in fact considered to be civil in nature.").

The amendments to Rule 3.210, Florida Rule of Criminal Procedure, effective January 1, 1989, have not altered the holding of Jackson. The current version of Rule 3.210 is applicable to "[a] person accused of an offense...who is mentally incompetent to proceed at any material stage of a criminal proceeding." See Rule 3.216(a). As Rule 3.850 proceedings are civil in nature, they are not a material stage of a criminal proceeding. Thus, Rule

3.210 is inapplicable. Rule 3.210(a)(1), which defines "material stage of a criminal proceeding", makes no reference to post-conviction proceedings under Rule 3.850. This analysis is corroborated by the Committee Note to the amended Rule 3.210:

> This new provision defines a material stage of a criminal proceeding when an incompetent defendant may not be proceeded against. This provision includes competence to be sentenced which was previously addressed in Rule 3.740 and is now addressed with more specificity in the new 3.214. Under the Florida Supreme Court decision of Jackson v. State, 452 So.2d 533 (Fla. 1984), this definition could not apply to a motion under Rule 3.850.

(emphasis added). It should also be noted that in federal habeas corpus proceedings, which are comparable in nature to state collateral proceedings, federal courts have routinely permitted habeas corpus petitions to be litigated by persons as next of friend for allegedly incompetent prisoners, without suspending the proceedings pending a restoration of competency. See, Lenhard v. Wolff, 443 U.S. 1306 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976); Rees v. Reyton, 384 U.S. 312 (1966); Groseclose ex rel. Harrier v. Dutton, 594 F. Supp. 949 (M.D. Tenn. 1984).

The Appellant suggests that a lack of competency during post-conviction proceedings would raise due process concerns, yet the Appellant cites no authority for this proposition. Drope v. State of Missouri, 420 U.S. 162, 171 (1976), explicitly applies only to competency "to stand trial." Ford v. Wainwright, 477 U.S. 349, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), prohibiting the execution of an insane defendant, is based on either the need for the defendant to understand why he is being executed, or the protection of the dignity of society. Ford is in no way based on the need for the defendant to assist counsel with further litigation. Indeed, Ford, while prohibiting the execution of an insane person, did not prohibit further collateral litigation even if Ford was insane.

A ruling that competency evaluations apply to Rule 3.850 proceedings would open the floodgates to a never-ending deluge of post-conviction competency litigation, along with the excessive delays and costs inherent in such a ruling. That must be viewed in light of the minimal likelihood that defendants could significantly assist counsel at the post-conviction stage. Most work, at that stage, rests upon legal review by counsel of transcripts and other court proceedings. Trial attorneys are capable of providing collateral counsel with information furnished by the defendant prior to trial and sentencing. Independent investigators can obtain a wealth of information from a defendant's school records, employment records, other public records, as well as from relatives, friends, employees, teachers, doctors, etc., regardless of the defendant's competency at the collateral review stage. Thus, little reason exists from which to justify the creation of such a new constitutional right.

Accordingly, the lower court's alternative ruling, that competency is not at issue in Rule 3.850 proceedings, was correct.

ISSUE I (C)

THE LOWER COURT'S DETERMINATION THAT FERGUSON WAS COMPETENT TO PROCEED WITH THE RULE 3.850 PROCEEDINGS IS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

During the course of the evidentiary hearing on Ferguson's competency to proceed with the Rule 3.850 proceedings, the lower court heard conflicting testimony, including that of several court appointed experts who found that Ferguson was competent. Based upon the conflicting expert opinions, the lower court found that Ferguson was competent. As there was conflicting testimony on this issue, this became an issue of the credibility of the witnesses, the determination of which rests solely with the lower court. Zeigler v. State, 473 So.2d 203 (Fla. 1985).

After the filing of Ferguson's motion for stay of the Rule 3.850 proceedings due to his alleged incompetency, Judge Ronald Friedman, during a status hearing, appointed Dr. Charles Mutter, Dr. Albert Jaslow and Dr. Harry Graff to evaluate the defendant at Florida State Prison to determine his competency. (R.1916-22)

On December 24, 1987, Drs. Mutter, Jaslow and Graff went to Florida State Prison to interview Ferguson. (R.1932) The doctors found the defendant to be malingering, relying in part on the testimony of two corrections officers, and Ferguson's prison records. (SR.97-8; R.1942) Due to miscommunications, defense counsel was not notified of the date of the examination and was not present for those evaluations. (R.1932-3, 1938)

On February 1, 1988, another status hearing was held before Judge Friedman. Judge Friedman, without ruling on whether the December 24th evaluations were void due to the absence of defense counsel, ordered the same doctors to conduct new evaluations. (R.1949)

On May 19, 1988, at a status hearing before Judge Snyder, to whom the case had been transferred, defense counsel again objected to the appointment of Drs. Mutter, Jaslow and Graff. (R.1986) The court, without ruling on the validity of the prior evaluations, appointed different doctors - Lloyd Miller, William Corwin, and Norman Reichenberg - to conduct the evaluations. (R.1986-89, 1994-96) On June 21, 1988, after Dr. Reichenberg advised the court that he could not do the evaluation, the court appointed Dr. Leonard Haber. (SR.98) Additionally, Judges Friedman and Snyder both ordered numerous physical tests to be conducted on the defendant, including a magnetic resonance imaging of the brain (MRI), a CAT scan, an electroencephalogram (EEG), a complete neurological sensory examination, a complete physical, and complete blood tests, including tests for AIDS. (SR.98)

On May 24, 1988, the court also appointed Dr. Erwin Lesser to conduct complete neuropsychological testing on Ferguson, including the administration of the Halstead Reiten and Luria Batteries, the Wexler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory (MMPI), and the Peabody Picture Vocabulary (PPVT). (R.31) Dr. Lesser filed his report with the court on June 2, 1988. Dr. Lesser stated that either the defendant could not or would not cooperate with the requirements needed for a complete neuropsychological evaluation. (SR.98) He concluded that the defendant "was clearly functioning at an extremely low level, a level so low that his history and other examinations should quickly and easily show neurological impairment. In the absence of such information, it must be concluded that his low level of functioning is not the result of cerebral impairment, but rather the result of either a psychosis or a willful effort to appear impaired." (SR.98)

The remaining evaluations and tests were completed and on August 24-25, 1988 and October 21, 1988, the lower court conducted an evidentiary

hearing to determine whether Ferguson was competent to participate in the post-conviction proceedings.

EVIDENTIARY HEARING

1. Defendant's Case

The defendant presented three witnesses in support of his claim of incompetency: Drs. James Merikangas, William Corwin and Jeffrey Elenewski. Dr. Corwin, a court-appointed psychiatrist, first saw the defendant in 1974, when he found him to be suffering from schizophrenia. (R.2167). At that time, he found the defendant to be psychotic and incompetent. (R.2167) Corwin next saw the defendant in June, 1988. He reported that the defendant made statements which were consistent with a paranoid schizophrenic, but also that he, more frequently than not, did not reply to questions in a manner which was consistent with schizophrenia. (R.2172) Dr. Corwin admitted that although he felt the defendant has an active psychosis going back to 1971, at the same time, some of the defendant's actions were more in the direction of conscious exaggeration. (R.2174). Dr. Corwin believes that it was possible to have partial malingering on top of the psychosis and to be incompetent. (R.2174) He testified that it would be difficult for the defendant to consult with his attorneys. (R.2175) Dr. Corwin admitted that it was possible that the defendant has contrived to exaggerate his condition for his own purpose, to escape the electric chair. (R.2177) He concluded, in his report, that "with this combination of events it would be difficult for his attorneys to consult with him and for him to participate in trial proceedings." (R.799) Since this difficulty of consultation could be based on the defendant's contrived attempts to exaggerate his condition, Corwin's conclusions are highly qualified, and do not find the defendant incompetent during the post-conviction proceedings. Dr. Corwin did not find that the defendant did not have the ability to assist counsel or to understand the legal proceedings.

Dr. Elenewski, a clinical psychologist, had previously found the defendant incompetent in 1978, prior to the trial in the Hialeah case. (R.2251) Elenewski was a defense-retained expert at that time, and prior to the 1978 evaluation, had advised the defendant that he was conducting the evaluation at the request of defense counsel and that the information might be useful to the court with respect to the charges. (R.1579-81) At that time, Elenewski found that the defendant had a severely limited capacity to comprehend counsel's instructions and advice and to collaborate with counsel in maintaining a consistent legal strategy. (R.1582-3) Yet, less than two weeks after that 1978 opinion was rendered, the defendant testified at a suppression hearing in a rational and understandable manner. (ST2.67-113) His suppression hearing testimony in 1978 was highly detailed and extensive. (ST2.67-113) That suppression hearing testimony directly contradicted Elenewski's 1978 findings and thereby raised serious questions regarding Elenewski's credibility in 1988.

Elenewski examined the defendant on January 1, 1988, at defense counsel's request, at Florida State Prison. Once again, Elenewski found the defendant to be incompetent. Elenewski based this conclusion, in part, on the defendant's protestations that he was in a mental hospital, not at Florida State Prison, that the guards were trying to poison his food, and that he did not watch any television because they were sending messages over the television. (R.2223-4) Although Elenewski believed that the defendant was giving him an accurate reflection of a serious disturbance, there was no independent corroboration of the defendant's alleged symptoms. Indeed, Sergeant Barrick, a corrections officer at Florida State Prison, who observed the defendant on a regular basis from 1984 until January 1988, observed none of the strange behavior which the defendant showed Dr. Elenewski. (R.2259-63)

Barrick said that the defendant acted like the average prisoner, listened to the radio, watched television, talked to other prisoners, answered correction officers in an appropriate manner, and played chess or checkers with other prisoners. (R.2261-63) There was no corroboration of any refusal to eat food. The defendant's "hunger strike" occurred on February 22, 1988, in the Dade County Jail, one month after Elenewski saw him. (R.2518)

Dr. Elenewski also found that much of the defendant's behavior had an organic flare to it. (R.2231) This was refuted even by the other defense expert, Dr. Merikangas, who, although finding subtle organic brain damage, found that such organic brain damage was not the cause of the defendant's schizophrenia. (R.2144)

Dr. Merikangas, a defense-retained psychiatric and neurologist, found that defendant suffers from schizophrenia, chronic paranoid type, and that he was incompetent to participate in the post-conviction proceedings. (R.2112-13) Merikangas first saw the defendant on January 30, 1988, conducted a physical examination, neurologic examination, and physical interview. (R.2044) After these examinations and a review of various prior records, Merikangas concluded that the defendant had a paranoid psychosis with signs of brain damage. (R.1533-35) He specifically stated that a neurologic condition was leading to the defendant's further deterioration. (R.1533-35) As a result of these findings, which were contained in Merikangas's written report, the lower court had ordered further tests to be performed on the defendant. These other tests, the CAT scan, magnetic resonance imaging test, the EEG and blood tests, revealed no brain tumors, strokes, or anatomic malfunctions, and were all generally within normal limits. (R.2053)[4] Thus, Dr. Merikangas was forced

---

[4] Merikangas, from the physical examination, believed that a dent on the side of the skull came from an earlier bullet wound. (R.2053-54) Yet, the pertinent medical records showed a 1969 x-ray of the skull, which was after

to concede that although he still believed that the defendant had some neurological damage, he was not suffering from a progressive neurologic disease. (R.2053-54)

Dr. Merikangas, however, had been so sure of his original finding of a progressive neurologic disease, that when he discovered that Dr. Donald Thomas, of Jackson Memorial Hospital, did not wish to perform the MRI and EEG because of findings by Dr. Peter Scheinberg,[5] he wrote Dr. Thomas a letter which, despite Merikangas' denials (R.2138), threatened to refer the case to the ethics committee of the Florida Medical Society. (R.795) That letter was a strong indication of Merikangas' lack of objectivity with respect to his diagnosis of the defendant, as he was totally unable to accept that another doctor disagreed with his findings, and he resorted to tactics which bordered on intimidation of other potential witnesses.

Dr. Merikangas' lack of objectivity was manifested in other respects. For example, he relied heavily on the report of a prison psychologist, Dr. Moore, finding a Kent I.Q. test score, in 1978, of 57, which was in the mentally defective range. (R.2045, 2098-99) Yet, Moore noted the possibility of a conscious attempt by the defendant to fake his symptoms. (R.679-80) Furthermore, as noted by Dr. Haber, letters written by the defendant in 1978, while in prison, complaining about his treatment (R.777-85)

---

the time when the defendant had been shot, and which showed a normal skull, with no evidence of abnormal intracranial clarifications. (Defendant's Exhibit 2-C, 11/5/69, 1/26/70, R.471, et seq.)

[5] Dr. Scheinberg, a neurologist with the University of Miami, performed a neurologic examination and found no evidence or symptoms of neurologic disease. (R.2486) Scheinberg could not find the "neurological soft signs" that Merikangas had found. (R.2052, 2487-88). As Dr. Scheinberg noted, Dr. Merikangas' findings were obviously dependent upon the defendant's participation and cooperation in the process. (R.2488) The defendant either wouldn't or couldn't perform simple arithmetic for Scheinberg, despite his ability to fill out commissary sheets and read instructions while in jail. (R.2497-98)

demonstrated a mind that was fairly well focused, as the letters were fairly well written, organized and easily understood. (R.2388) Dr. Jaslow, in a report from 1978, similarly found that the letters showed good thinking and thought processes. (R.801-17) The letters were inconsistent with a person with an I.Q. of 57, yet Merikangas insisted that the letters were consistent with his testimony about the defendant. (R.2623-4)

Merikangas also misread prison medical files. He initially found that the defendant made suicidal gestures in 1982 by eating broken glass and cutting his wrists and legs. (R.1533) However, those incidents were taken out of context from a history of the defendant taken in 1982. In reality, the defendant, in 1982, denied suicidal tendencies. (R.2146)

2. The State's Case

Dr. Leonard Haber, a court-appointed psychologist, found that the defendant was malingering, not giving a true, factual and actual recital of his symptoms and condition. (R.2303-4) Haber saw the defendant at the Dade County Jail, in July 1988, and expressed his opinion on the basis of that evaluation, as well as the various materials, including defendant's prior history, that he reviewed. (R.2284-5, 839) Although the defendant may suffer from some disorders, Haber believed that he was competent. (R.2303-4) Symptoms of disorder included significant memory failures, and reports of hallucinations. (R.2290-1) Assuming that all of the defendant's responses were accurate and that he had the sickness that those symptoms suggested, then the defendant would likely be so chronically disabled as to remain basically unintelligent, uncommunicative in any coherent sense, and would be relatively non-functional. (R.2292) He would be unable to coherently discuss current events with correctional officers or play chess or checkers. (R.2292, 2310-12) His responses were therefore inconsistent with his actual, observed prison

behavior. Moreover, memory impairment and olfactory hallucinations are normally indicative of organic illness - not mental illness. (R.2291-2) And, Dr. Scheinberg, as previously noted, found no evidence to support organic brain damage.

Dr. Haber described the I.Q. score of 57 as unlikely and remote, emphasizing the coherence and skills exemplified in the 1978 letters previously discussed. (R.2295, 2382-3, 2387-8, 2467-8) The letters, some of which were written in 1987, reflect a person who can write, spell, use proper grammar, and use language that is commensurate with average intelligence. Id. (See also R.2295, 2382-3, 2387-8, 2467-8) Similarly, the defendant's testimony at the 1978 suppression hearing was not consistent with the opinions of those doctors who, in 1978, claimed that the defendant was incompetent. (R.2289) The defendant's 1978 testimony suggested a person who was goal oriented, able to understand questions, able to formulate responses, able to think about what he wants to say, and able to discern the response from another. (R.2435-6)

Haber said that a paranoid schizophrenic's memory is usually very good. (R.2296) He should know if he is married, how many children, brothers and sisters he has, his birth date, and the spelling of his mother's name. (R.2296-7, 2365-70) Haber found the defendant's lack of memory for the above factors to be signs of lack of cooperation. (R.2297) He noted psychiatric notes of Drs. Sotomayer and Parado from October 1986, in which Sotomayer found the defendant to be alert, coherent, rational, cooperative, and cheerful, and Parado, when evaluating for clemency, found the defendant to be paranoid, delusional, not knowing what clemency meant, and schizophrenic. (R.2301) Although reversion to symptoms in a disorder of this type can occur, the symptoms usually do not include massive memory interference. Thus, Haber

found that the 1986 history did not reflect a credible pattern. (R.2301) Haber also would not expect a paranoid schizophrenic who is complaining about food poisoning to continue eating on a regular basis. (R.2302)

The defendant's behavior was consistent with sickness or remission of convenience. This is when a person who is feigning symptoms of mental and/or emotional disorder finds it convenient, for whatever reason, to recover the abilities that were allegedly lost; this occurs as a matter of will and not on the basis of the remission of the disorder. (R.2302-3, 2309)

Thus, Haber concluded that the defendant: was malingering; was in need of treatment for the malingering; had an antisocial personality disturbance; was capable of assisting counsel with the legal proceedings, as he was capable of fulfilling the eleven factors under Rule 3.211(a)(1), Florida Rules of Criminal Procedure; and was competent for these proceedings. (R.2313)

Dr. Miller, a court-appointed forensic psychiatrist, found that the defendant was competent and able to assist his counsel if he wanted to. (R.2563) The symptoms exhibited in the mental status exam which he conducted suggested a mental deficiency and/or organic brain damage. (R.2547) The defendant's memory was vague and spotty. (R.2547-8) But, as previously noted, the neurological tests did not support a conclusion of brain damage. (R.2486) This lack of findings was inconsistent with some of the defendant's symptoms. (R.2549)

The defendant's responses were indicative of psychiatric illness as well as organic brain damage. However, a paranoid schizophrenic's memory should not have been impaired as to basic background matters, as was the defendant's memory. The defendant's failure to provide such information was inconsistent with paranoid schizophrenia. (R.2550)

Miller found that the 1978 suppression hearing testimony was not consistent with a person with poor memory of recent events, and was inconsistent with the opinions of those doctors who found that the defendant had a significant memory deficit. (R.2453) Memory does not float in and out for schizophrenic people. (R.2553) Similarly, the letters written from 1976 to 1987 could not have been written by a person displaying all of the symptoms which the defendant displayed to Miller. (R.2561, 2564) A person who has the significant memory problems which the defendant displayed to Miller, could not have organized those responses. (R.2561, 2564) Miller did not believe that the defendant suffered from any major mental illness, but if he was mentally ill, he presented an exaggerated set of symptoms far beyond any that he might in fact have. (R.2563, 2599)

The testimony of Dr. Scheinberg, finding no evidence or organic brain damage, has previously been discussed. Additionally, the State presented several lay witnesses, who described their observations of the defendant's behavior. Officer Barrick's testimony has previously been discussed. Four correction officers from the Dade County Jail, Janice Smith, Eddie Ford, Kenneth Williams and Mark Ford, testified that they had normal conversations with the defendant about what was on television, that he would act rationally, that he would usually eat his food, and that he was very aware of his telephone privileges. (R.2502-4, 2510, 2511-18, 2226-30, 2538-40)

The lower court's order denying the motion to stay the Rule 3.850 proceedings, after extensively summarizing the evidence, makes explicit credibility findings on the basis of the evidence:

> This Court finds that there is substantial competent evidence to find that the Defendant does not suffer from a major mental illness, and that he has the present ability to understand the proceedings and to assist counsel if he so chooses.

> This Court finds that the more credible evidence demonstrates that the Defendant is malingering, and as Dr. Miller stated, is trying to portray himself as a "very sick puppy" without any lucid moments. The evidence of the Defendant's behavior in prison and jail shows otherwise, and is consistent with what Dr. Haber described as a sickness or remission of convenience. Drs. Haber's and Miller's opinions are logical and supported by the testimony of the lay witnesses.
>
> This finding is based on a review of all the evidence and testimony presented and necessitates an acceptance of Drs. Haber's and Miller's findings that the defendant is competent to proceed with those post-conviction proceedings and a rejection of Drs. Merikangas, Elenewski and Corwin's findings to the contrary.

(R.1008)

As can be seen from the foregoing, the lower court heard conflicting evidence and found the opinions of competency to be the more credible evidence.[6] This was a determination which was within the scope of the fact-finder's functions and is beyond attack on appeal. Zeigler, supra; Byrd v. State, 297 So.2d 22 (Fla. 1974) (with conflicting evidence as to insanity, jury, as fact finder, must determine credibility); Ferguson v. State, 417 So.2d 631, 634-35 (Fla. 1982) (trial court did not err in determining that defendant was competent to stand trial after hearing conflicting opinions of expert witnesses); Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986) (same); Hall v. State, 293 So.2d 776 (Fla. 2d DCA 1974).

The Appellant has suggested to this Court that the opinions of Drs. Haber and Miller should be ignored because they have merely equated malingering with competency. That is a disingenuous summary of their opinions. As detailed above, those doctors found that the Appellant's

---

[6] To the extent that the Appellant may be relying upon Appendix I and II to his brief for the mental history and evidence of delusions of the defendant, the State notes that same is not permissible under the Florida Rules of Appellate Procedure and that the Appendices contain selective, out-of-context, and misleading portions of the defendant's numerous evaluations.

behavior was not consistent with the symptoms he was displaying; that his behavior was inconsistent with the opinions of the defense experts; that his behavior reflected intelligence, understanding and rational actions. They emphasized his letter writing skills, testimony which he had given, and observations of the Appellant by corrections officers. On the other hand, if any testimony deserved to be ignored, it was certainly that of the defense experts; especially Dr. Merikangas. His diagnosis of progressive neurologic disease was destroyed by neurologic testing which showed an absence of neurologic disease or neurological soft signs. He resorted to efforts to intimidate other prospective witnesses with threats of professional ethics complaints because they had the audacity to disagree with his outstandish, repudiated opinions. Other defense experts were similarly undermined, as they had a total lack of credibility based upon the clear repudiation of their original, 1978 opinions of incompetency.

The Appellant also suggests that he must be incompetent since he is mentally ill. Mental illness, however, is not the test for competency. James v. State, 489 So.2d 737, 739 (Fla. 1986) ("The possibility of organic brain damage, which James now claims he has, does not necessarily mean that one is incompetent or that one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society."). The ability to assist counsel is the appropriate test, and many mentally ill people are fully capable of going through criminal proceedings. The Appellant still maintains that he suffers from chronic schizophrenia, notwithstanding the testimony of Drs. Haber and Miller that his behavior, especially signs of memory loss, was inconsistent with a diagnosis of schizophrenia. Similarly, a paranoid schizophrenic complaining of food poisoning would not regularly eat

the food provided to him. The lower court was in no way compelled to accept the discredited diagnosis of paranoid schizophrenia, coming from a hired gun earning $200 per hour, who exhibited many biases.

Accordingly, the lower court's determination of competency is supported by substantial, competent evidence.

ISSUE II (A)

THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE AT THE SENTENCING PHASES OF THE CAROL CITY AND HIALEAH CASES.

The Appellant contends that trial counsel provided ineffective assistance in failing to properly investigate and in failing to adequately present evidence of the defendant's mental impairment and family background during the penalty phases of both trials. The lower court, after conducting an evidentiary hearing, found that the defendant had failed to establish that trial counsel had provided ineffective assistance. The applicable criteria for determining ineffective assistance claims, as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) are whether counsel's performance was deficient, and if so, whether that deficiency would probably have affected the outcome of the proceedings.

1. The Carol City Trial

At the evidentiary hearing, trial defense counsel, Mr. Robbins, testified that he requested psychiatric examinations of the defendant. (R.3034). He remembered reviewing the reports of all the doctors, speaking to the doctors, and taking Dr. Mutter's deposition. (R.3041-2). He admitted that he did not obtain any additional doctor's reports, hospital records, school records or court records concerning the defendant's mental history. (R.3035) Counsel had reviewed the reports of Drs. Mutter, Graff, Jaslow and Reichenberg, which indicated that counsel knew of the defendant's mental history dating back to 1971. (R.3041)[7] Thus, the lower court found that "this

[7] Robbins requested psychiatric examination in 1978 and reviewed the reports, which referred to Ferguson's prior mental history back to 1971. (R.3033-4, 3045) The reports included information that Ferguson was a malingerer, a sociopath, an antisocial personality, and a dangerous person. (R.801-17, 3038, 3046) Robbins admitted that he would not want a jury to hear such

is not a case in which Mr. Robbins conducted no investigation into the Defendant's history of emotional or mental illness. An attorney has a duty to conduct a reasonable investigation of the defendant's background for possible mitigating evidence, Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), and the Court finds that Mr. Robbins' investigation was reasonable." (SR.329) The investigation regarding the defendant's family background was similarly reasonable. Mr. Robbins did speak to the defendant's mother and other family members. (R.3041) The defendant's mother did, in fact, testify at the sentencing hearings. One sister, Patricia Blue, did not want to cooperate, and was unwilling to testify, because she felt that her job with the State Attorney's Office was jeopardized. (R.3017-20) Another sister was similarly uncooperative, due to her work as a nurse. (R.3060, 3067-69) With respect to the adequacy of the investigations, it should also be noted that defense counsel had the benefit of four (4) court-appointed doctors, two of whom found that the defendant was psychotic or paranoid schizophrenic in the past (Mutter and Jaslow), and two of whom found no evidence of psychosis or schizophrenia, but found only that the defendant had an antisocial personality. (R.802-17)

With respect to the failure to present evidence of mental illness, the lower court found that this failure was a tactical decision. (SR.329) The court continued: "Although Mr. Robbins, after 12 years, cannot remember his reasons for doing or not doing things, the record and his testimony reflect

---

information. (R.3038, 3046) Indeed, Dr. Mutter's report was admitted to be harmful to his case (R.3044), and Robbins admitted that it "could very well be true" that the penalty arguments he presented were better than reliance upon doctors who would bring out such damaging testimony. (R.3049) He definitely thought of calling Dr. Mutter, and while unsure of the reason for not doing so, admitted it was possible that his reason was due to the harm inherent in Mutter's report and potential testimony. (R.3046-7, 3044-6) He was not sure that he took the best alternative. (R.3049-50)

that it can only be concluded that he considered putting on psychiatric testimony, but ultimately chose not to. The Court also finds that even if Mr. Robbins had actually received the doctor's reports and hospital reports from 1971 to 1975, they would not have changed his strategy." (SR.329) As noted above, the reports of the court-appointed experts were highly contradictory, and if defense counsel had pursued such testimony, the court and jury would have heard all the contradictions. They would have heard that the defendant's problem was merely that of an antisocial personality,[8] and that he was a sociopath and an extremely dangerous person. Furthermore, once the defense started introducing the defendant's prior mental history, including a prior insanity finding, the jury would have heard that the defendant committed additional violent felonies, robberies for which he was not punished, as those facts would have been matters considered by the various experts testifying for the defense, and the State would be able to cross-examine those experts as to all matters forming the basis for their opinions. Parker v. State, 476 So.2d 134 (Fla. 1983); Valle v. State, 16 F.L.W. S303, 304 (Fla. May 2, 1991); § 90.705, Florida Statutes. A decision not to present this contradictory evidence would be a sound strategy. See, United States v. Spenard, 438 F.2d 717 (2d Cir. 1971); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

Additionally, counsel was still arguing to the jury residual doubt about the defendant's guilt." In light of this strategy, it was reasonable for counsel not to present evidence regarding mitigating factors which imply guilt but which attempt to excuse that culpable conduct." Funchess v.

---

[8] An antisocial person is the same as a sociopath - "They are usually people with defective egos concerned with gratifying their own needs and impulses regardless of future consequences, who function on an extremely narcissistic basis." (T1.1212)

Wainwright, 772 F.2d 683, 690 (11th Cir. 1985). See also, Smith v. Dugger, 840 F.2d 787, 795 (11th Cir. 1988)

The record further supports the lower court's conclusion that the failure to present mental illness evidence was not a deficiency. Counsel apparently decided that although Dr. Mutter's testimony would be helpful in showing the defendant's past diagnosis of mental illness, Mutter would also have presented harmful testimony - i.e., that the defendant was not suffering from active psychosis, that he had regenerated his thought and personality problems, and that he was a malingerer and a very dangerous person. (R.3043-4) The opinions of Drs. Graff and Reichenberg, denying evidence of psychosis or schizophrenia, would ultimately have come in through the State's rebuttal case.

In lieu of presenting contradictory mental health evidence, and opening the door for extremely damaging rebuttal, defense counsel presented testimony from Mrs. Ferguson, emphasizing the defendant's helpfulness at home and his appreciation of art. (T1.1052) She also testified about his prior mental problems and his stay in a mental hospital. (T1.1053) Defense counsel argued lingering doubt as to who the third person in the house really was, the process of electrocution, and the prospects for a 150 year prison sentence, along with the contributions that the defendant could make to society while incarcerated. (T1.1065-70) Mr. Robbins testified that he did what he thought was the best alternative, and that he would have had to make a choice as to what to do with the evidence. (R.3050, 3059) Thus, in view of the foregoing, it is clear that conscious strategic choices were made and that they were sound. The lower court explicitly rejected Mr. Link's testimony to the contrary, noting that Mr. Link had very little experience in death penalty cases in 1978 and appeared to be engaging in the kind of hindsight strategy that is condemned in Strickland, supra. (SR.330-1)

Similarly, the failure to present additional family background evidence - i.e., that the family was poor, the mother worked most of the time, the father was an alcoholic who died when the defendant was 13, and that one of the mother's boyfriends abused the mother but not the children - did not constitute a deficiency. As noted above, the mother did testify and the two sisters were uncooperative.

The lower court also found that even if counsel's failure to present mental illness testimony or further family background evidence was a deficiency, any such deficiency had no reasonable probability of affecting the outcome of the proceedings. (SR.331-2) That conclusion is supported by the record. The aggravating circumstances found by the trial court were: (1) that the defendant had been previously convicted of a felony involving the use of violence (assault with intent to commit rape, robbery, and the resistance of an officer with violence); (2) that the homicides were committed to prevent a lawful arrest; (3) that the homicides were committed during the course of a robbery for pecuniary gain; and (4) that the homicides were especially heinous, atrocious or cruel. On resentencing, the court also found that the homicides were committed in a cold, calculated and premeditated manner, without the pretense of moral justification. The facts of the six homicides were horrible. The defendant has failed to demonstrate that the introduction of the conflicting psychiatric evidence, or additional family background evidence, would have explained or justified the defendant's actions in committing these six murders so as to warrant life sentences. Strickland, supra. See, e.g., Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988) (attorney's decision not to introduce expert psychiatric testimony at sentencing hearing did not constitute ineffective assistance given the existence of the aggravating circumstances that the defendant was previously

convicted of many prior violent felonies, including four murders, that the murder was committed during the commission of a robbery or kidnapping, and that the murder was committed for pecuniary gain); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), modified on other grounds, 833 F.2d 250 (11th Cir. 1987) (counsel's failure to present psychiatric expert testimony was not ineffective assistance where the testimony was conflicting and there were three strong aggravating circumstances, that the homicide was committed to avoid a lawful arrest, and that the homicide was committed during the commission of a sexual battery); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986) (counsel's failure to present psychiatric evidence that the defendant had a personality disorder, was a drug abuser, was of low intelligence with poor motor skills did not affect the outcome of the sentencing hearing in light of the overwhelming evidence of aggravating circumstances, in particular the heinous, atrocious and cruel nature of the murder); Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984) (counsel's failure to produce any evidence of defendant's mental condition was not prejudicial in light of the brutality of the murder and defendant's prior convictions); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989) (counsel's failure to present psychiatric testimony, which would have been strongly disputed by the State's expert witnesses would not have affected the outcome of the sentencing proceeding in light of three aggravating circumstances, including prior felonies and the especial heinousness, atrocity and cruelty of the murder). Thus, the State submits that trial counsel provided effective assistance at the sentencing phase.[9]

---

[9] The State would note that the defendant seems to be under the misapprehension that the introduction of psychiatric mitigating evidence would have automatically precluded the death sentences. However, the Florida Supreme Court has upheld death sentences where these or other valid mitigating circumstances have been found to exist, even in cases of jury recommendations

2. Hialeah Case

The defendant alleged that trial counsel in the Hialeah case was ineffective at the sentencing hearing where counsel failed to ask for a continuance to enable the defendant's mother to compose herself and testify to various nonstatutory mitigating circumstances. The defendant also alleged that counsel's closing argument constituted ineffective assistance of counsel because it suggested to the jury that their choice was either death or giving the defendant "a few pills and letting him go."[10] At the evidentiary hearing, the defendant also made the allegation that defense counsel was ineffective in failing to have mental health experts testify in terms of the statutory mitigating evidence, failing to call other family members, and for failing to object to various statements made by the prosecutor in his closing argument.

The lower court found that the failure to seek a continuance in order for Mrs. Ferguson to testify was not deficient performance. (SR.342) The Appellee relies on the argument contained in the Court's order:

> Despite Mr. Link's opinion to the contrary, it is clear from the record that counsel, Mr. Phelps, initially wanted to

---

of life. See, e.g., Thomas v. State, 456 So.2d 454 (Fla. 1984) (jury override upheld, where aggravating circumstances outweighed mitigating circumstances and no significant prior criminal activity and the defendant's age of twenty); Spaziano v. State, 433 So.2d 508 (Fla. 1983) (jury override upheld where aggravating factors outweighed mitigating evidence of bizarre behavior of defendant); McCrae v. State, 395 So.2d 1145 (Fla. 1980) (jury override upheld where aggravating factors outweighed mitigating evidence of mental or emotional disturbance); Kenney v. State, 455 So.2d 351 (Fla. 1984) (finding that defendant was under extreme duress outweighed by other aggravating factors); Mann v. State, 453 So.2d 784 (Fla. 1984) (finding that defendant suffered from psychotic depression and feelings of rage outweighed by three aggravating circumstances, including that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, outweighed by three aggravating circumstances).

[10] This claim does not appear in the Brief of Appellant and therefore appears to have been abandoned. The State relies on the trial court's order as to the issue of defense counsel's closing argument. (SR.342)

> call Mrs. Ferguson to testify, but she obviously was having difficulty in doing so. (T2. 1432) Mrs. Ferguson became hysterical and was almost going to faint. (PCH 287) The Court finds that the jury was not left with the impression that she could have nothing good to say about the defendant.

(SR.342)

Similarly, the decision not to call the mental health experts to testify in the sentencing hearing was not deficient. The doctors had already testified regarding insanity and related matters during the guilt phase. Mr. Hacker testified that counsel considered recalling the experts, but concluded that it would be cumulative. (R.3161) Even Mr. Link recognized that it is a poor tactic to recall the same doctors for mitigation. (R.3141) Link incorrectly believed that it would not have been objectionable to ask mitigation type questions during the guilt phase. However, such evidence would have been inadmissible at the guilt phase, as evidence of diminished capacity. See, Chestnut v. State, 538 So.2d 820 (Fla. 1989). Likewise, there was no deficiency in failing to call other family members to testify.[11] According to Mr. Hacker, Phelps had spoken to the defendant's sisters. (R.3160) Mrs. Blue was unwilling to testify. (R.3017-20) The same appears to be true for a second sister as well. (R.3067-69)

With respect to the failure of counsel to object to the prosecutor's statements during closing argument (see Brief of Appellant, pp. 58-59 at n. 48), the lower court's conclusion, that there is no deficiency (SR.343), is supported by the record. A decision to object, or not to object, is a strategic decision. As found by the lower court, the prosecutor's

---

[11] The Appellant asserts that Hacker acted under the belief that he could not present nonstatutory mitigating evidence. While Hacker acknowledged that, he admitted that co-counsel Phelps, who died in 1980, was responsible for the sentencing phase and made the sentencing decisions. (R.3159) Mrs. Ferguson did recall meeting with, and speaking to, Hacker. (R.2946-47) When Ferguson's sisters called the office, Phelps would speak to them. (R.3160)

statements regarding the victims were not objectionable, as they were proper arguments regarding the heinous, atrocious and cruel nature of the homicides. As to the other comments, the lower court agreed with Mr. Link's statement, that sometimes counsel reasonably refuses to object in order to avoid having the jury hear the remark two more times - during the objection and during the curative instruction to the jury to disregard. (R.3147) See, Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982).

Finally, the lower court found, and the State maintains, that even if counsel's above failures were deficiencies in performance, they were clearly ones in the absence of which there is no reasonable probability that the outcome of the sentencing proceedings would have been changed. Thus, the defendant has not satisfied the requirements of Strickland, supra. The following facts, as found in the lower court's order, are supported by the record, and support the lower court's conclusions:

At trial, counsel presented various lay witnesses and experts to support his defense of insanity. Ann Bell, a nurse at the jail, testified as to the medication the defendant was taking (T2. 949-951), and that the defendant had suicidal indications. (T2. 958) She also testified that the defendant did not act abnormally, that his conversations made sense (T2. 955), and that he was not violent or erratic. (T2. 957)

Dr. Paul Jarrett, a psychiatrist testified as to his first examining the Defendant in 1971 and concluding that the Defendant was suffering from paranoid schizophrenia (T.962-964), that the defendant was committed to Florida State Hospital (T2. 969), and that in 1978, although it was possible that the defendant was exaggerating some of his experiences, in his opinion, the defendant was emotionally disturbed (T2. 968), suffering from paranoid schizophrenia. (T2. 973) Dr. Jeffrey Elenewski, a clinical

psychologist, testified as to the results of the psychological tests that he gave the defendant, and in his opinion the defendant was a grossly disturbed paranoid individual, suffering from paranoid schizophrenia.

Dr. Syvil Marguit, a psychologist, also tested and interviewed the defendant. He also found that the defendant was a paranoid schizophrenic (T2. 1030), that the defendant had used alcohol and drugs (T2. 1031), that the defendant liked art (T2. 1034), had finished the 9th grade formally, but had completed his high school equivalency while he was in South Florida State Hospital (T2. 1034), that the defendant was never able to hold a steady job (T2. 1035), that he was the middle child of nine children (T2. 1035), that at 17, he had been injured from a bullet fired by a policeman (T2. 1036), that he had been hit on the head with a pipe (T2. 1036), that when the Defendant escaped from South Florida State Hospital, he enrolled at Miami Dade Community College, and that his intelligence is high average. (T2. 1055)

Dr. Arthur Stillman, a psychiatrist, testified that he first examined the defendant in 1975 and concluded that he was a grossly disturbed individual suffering from paranoid schizophrenia. (T2. 1075-1076) Dr. Stillman again saw the defendant in 1976, and though he found him to be legally sane, the defendant was still psychiatrically disturbed. (T2. 1082) Dr. Stillman testified that in 1978, the defendant was still a seriously disturbed person, psychotic, insane and incompetent. (T2. 1089, 1088)

In rebuttal, the State called Dr. Charles Mutter, a psychiatrist who first saw the defendant in 1971. Dr. Mutter concluded that the defendant was a paranoid schizophrenic. (T2. 1107) He saw the defendant again in 1973 and 1975 at South Florida State Hospital and made the same diagnosis. (T2. 1108) Dr. Mutter testified that when he saw the defendant in 1978, he felt that there was some disturbance in the defendant' thinking, but it was

different than in 1975. (T2. 1109) Dr. Mutter found signs of malingering. (T2. 1111) He felt that the defendant was in a state of remission, and still had an underlying schizophrenic process, but the defendant was not actively suffering from that condition. (T2. 1117, 1141)

Dr. Harry Graff, a psychiatrist, testified that he saw the defendant in 1978. He testified that the defendant was not psychotic and was malingering. (T2. 1159-1160) He believed that the defendant would lie or fake a mental disorder to avoid the consequences of the charges against him. (T2. 1159) Dr. Graff referred to a report by Dr. Ogburn at South Florida State Hospital in which the final diagnosis was a personality disorder, antisocial type with a secondary diagnosis of drug abuse. (T2. 1165)

Dr. Norman Reichenberg, a clinical psychologist, testified that he first saw the defendant in 1971. He diagnosed an emotional disturbance commensurate with the impulse disorder disfunctioning. (T2. 1240) He did find the defendant to have severe personality problems, including an antisocial personality. (T2. 1205-1206) Dr. Reichenberg testified that in 1978, defendant's behavior was consistent with an antisocial personality, not a paranoid schizophrenic. (T2. 1217)

Dr. Albert Jaslow, a psychiatrist, testified that he first saw the defendant in 1973 when he found the defendant to be psychotic. (T2. 1260) He saw the defendant again in 1978. Dr. Jaslow found that the defendant was no longer be psychotic (T2. 1260), and that there were signs of malingering. (T2. 1263)

Virginia Polk, the defendant's girlfriend, testified at the guilt phase that the defendant acted normal, and that most of the time the defendant was introverted and did not like to talk much. (T2. 733) She admitted that at her deposition she had said that something was wrong with the defendant, that

he was mentally sick. (T2. 734) The State also presented the testimony of Detective Zatrepalek that the defendant stated that he felt bad about the two kids, that he didn't want to kill them. (T2. 828)

In view of the foregoing facts, it is unreasonable to believe that the jurors, who were aware of the defendant's mental history as presented in the guilt phase, would totally ignore it in the sentencing phase. The jurors obviously did not believe that as a mitigating circumstance, either statutory or nonstatutory, that it was sufficient, when weighed against the aggravating circumstances, to convince them to recommend a life sentence. See, e.g., Booker v. Dugger, 520 So.2d 246 (Fla. 1988) (it is unreasonable to conclude that even though the jurors did not find mental and emotional mitigating evidence strong enough as statutory mitigating factors to offset the aggravating circumstances and thereby recommend life imprisonment, they would have done so had they realized that the same evidence could be considered as nonstatutory as well as statutory mitigation). The lower court also found that any additional evidence concerning the defendant's background was so insignificant that there is no reasonable probability that it would have affected the outcome of the proceedings. (SR.346)

The facts of these two brutal homicides are set forth in Ferguson v. State, 417 So.2d 631 (Fla. 1982). Four aggravating circumstances were found: that the defendant had three prior violent felonies (excluding the Carol City murders), that the murders were committed in the course of the commission of a rape and/or robbery, that the murders were committed to prevent a lawful arrest, and that the murders were especially heinous, atrocious and cruel. On resentencing, the trial court found the additional aggravating factor of cold, calculating, and premeditated without a pretense

of moral justification.[12] In light of the aggravating factors present, and the mitigating evidence which was presented, counsel's omissions were not such, that but for them, there is a reasonable probability that the outcome of the proceedings would have been different. See, e.g., Provenzeno v. State, 561 So.2d 541 (Fla. 1990); Glock v. Dugger, 537 So.2d 99 (Fla. 1989); Doyle v. State, 526 So.2d 909 (Fla. 1988); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990) See also cases cited supra, in discussion of Carol City case.

---

[12] It should be noted that although the trial court did not allow the jury to consider the defendant's conviction for the Carol City homicides as aggravating factors, such convictions and the facts relating to those convictions would be admissible in any resentencing. See Lara v. State, 464 So.2d 1173 (Fla. 1985); Delap v. State, 440 So.2d 1242 (Fla. 1983); Elledge v. State, 346 So.2d 998 (Fla. 1977)

ISSUE II (B)

THE DEFENDANT IS NOT ENTITLED TO NEW SENTENCING HEARINGS UNDER HITCHCOCK V. DUGGER, 481 U.S. 145, 107 S.CT. 1821, 45 L.ED.2D 347 (1987).

The Appellant claims that in both the Carol City case and the Hialeah case, the trial court had impermissibly limited both the jury's and its own consideration of nonstatutory mitigating circumstances in violation of Hitchcock v. Dugger, 481 U.S. 145, 107 S.Ct. 1821, 45 L.Ed.2d 347 (1987). This claim is without merit as it applies to the Carol City case, and is clearly harmless beyond a reasonable doubt as it applies to the Hialeah case.

1) Carol City Case

After the prosecution presented its evidence in support of the aggravating factors, the defendant presented nonstatutory mitigating evidence through the testimony of his mother, Dorothy Ferguson. (T1.1051-53) She testified that in 1977 the defendant was going to school at Lindsey Hopkins, studying art and music, and that he also worked construction and helped to support her. (T1.1082) Mrs. Ferguson testified that the defendant liked music and art and had always been a good son. She also testified that the defendant had mental problems during his life and had been in South Florida Mental Hospital. (T1.1053) A defense witness, during the guilt phase, had also testified that the defendant was against drugs. (T1.850)

The defendant's counsel in closing argument argued nonstatutory mitigating factors to the jury: that the defendant if given consecutive life sentences would be serving 150 years in prison without parole (T1.1067), what it was like to be electrocuted (T1.1068), that there was a residual doubt as to the defendant's guilty (T1.1065-70), and that the defendant could contribute to society while in prison. (T1.1070)

The trial court then instructed the jury that their verdict should be based upon the evidence that they heard while trying the guilt or innocence of the defendant and the evidence which had been presented in the sentencing proceedings. (T1.1072) The Court then instructed the jury that:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence.
>
> (Listing the statutory factors). (T1.1072)
>
> The mitigating circumstances which you may consider, if established by the evidence are these:
>
> (Listing the statutory factors). (T1.1072)
>
> The aggravating circumstances which you may consider are limited to those upon which I have just instructed you. However, there is no such limitation upon the mitigating factors which you may consider. (T1.1075) (emphasis added)

The lower court found, and the State maintains, "that the jury was clearly and unambiguously told by the trial court that it was not limited to the statutory mitigating factors. See Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989)." (SR.333) The lower court also found "that the trial court did not limit its consideration of nonstatutory mitigating circumstances" as "[a] judge is presumed to follow its own instructions to the jury on the consideration of nonstatutory evidence." (SR.333)

Even if the prosecutor's argument could be construed as an improper effort to limit the jury's consideration, although his comments were ambiguous at best, then the jury was clearly and definitely told by the court that it was not limited to the statutory mitigating factors. This was corroborated by defense counsel's presentation and argument of nonstatutory mitigating evidence.

In Adams v. State, supra, this Court was presented with circumstances which are almost exactly what occurred in this case. At

sentencing, Adams presented, without objection, some nonstatutory mitigating evidence. Defense counsel requested a special jury instruction which would explain that the jury was not limited to consideration of the nonstatutory mitigating circumstances. The trial court initially denied the instruction, but following the prosecutor's closing argument which made reference to the fact that the jury could only consider the statutory mitigating circumstances, reversed itself and after outlining the statutory aggravating and mitigating circumstances, instructed the jury as follows:

> The aggravating circumstances which you may consider are limited to those upon which I've just instructed you. However, there is no such limitation upon the mitigating factors you may consider.
>
> 543 So.2d at 1247.

This Court held that this instruction, which is identical to the one given in the instant case, "was not misleading concerning its ability to consider nonstatutory mitigating circumstances." Id. at 1248. The Appellant asserts that the identical instructions from the Carol City case were found to violate Hitchcock in Aldridge v. Dugger, 925 F.2d 1320, 1328-30 (11th Cir. 1991). That is not so, as Aldridge lacked the Carol City instruction that "there is no such limitation upon the mitigating factors which you may consider."

The defendant also argues that the trial judge also limited its consideration of nonstatutory mitigating circumstances. In its written sentencing order, the trial court stated:

> A careful consideration of all matters presented to the Court compels the following Findings of Fact relating to mitigating circumstances as specified by Section 921.141(6), Florida Statutes:

Ferguson v. State, 417 So.2d at 644.

The trial court then went through each statutory mitigating circumstance and made findings as to them. No specific findings were made as to the nonstatutory mitigating evidence that was presented. However, the trial court stated:

> Upon consideration, it was at the time of sentencing, and is now, during the formulation of the written Order, the inescapable conclusion of the Court that sufficient aggravating circumstances exist and that no mitigating circumstances exist which could possibly outweigh the aggravating circumstances.

Ferguson v. State, 417 So.2d at 645.

The State submits that the mere failure of the order to make specific reference to the nonstatutory mitigating factors does not indicate that the trial court failed to consider them.[13] In Johnson v. Dugger, 520 So.2d 565 (Fla. 1988), this Court was presented with the same argument. In Johnson, the court's instruction to the jury permitted them to consider nonstatutory mitigating circumstances. The Court held that there was nothing in the record to indicate that the judge failed to consider nonstatutory mitigating evidence. The Court stated, "We must presume that the judge followed its own instructions to the jury on the consideration of nonstatutory evidence." 520 So.2d at 566. The presumption is equally applicable in the instant case. The trial court properly instructed the jury that it was not limited in its consideration of mitigating evidence. There is no reason to believe that the trial court did not follow its own instruction. Thus, it is clear that the trial court did not limit its consideration of the nonstatutory mitigating evidence.

---

[13] The requirements of Campbell v. State, 571 So.2d 415 (Fla. 1990), pertaining to itemizing nonstatutory mitigating factors have been held not to apply retroactively, even to direct appeal pipeline cases. Gilliam v. State, 16 F.L.W. S292 (Fla. May 2, 1991)

Furthermore, even if the original trial judge believed that he was limited in his consideration of the nonstatutory mitigating evidence, there has been no allegation or proffer of proof that the resentencing judge, Judge Herbert Klein, in 1983, felt so constrained. Thus, because the jury was properly instructed in 1978, Judge Klein could properly rely on its recommendation in 1983. Compare Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), and Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (where original jury recommendation tainted by Hitchcock error, trial court cannot by considering nonstatutory mitigating evidence, cleanse such a jury recommendation). Thus, the lower court properly found that "because the jury was properly instructed in 1978, the resentencing court could properly rely on its recommendation in 1983." (SR.333)

Finally, the State maintains, and the lower court found, "that any error in the sentencing instruction was harmless beyond a reasonable doubt, in that the instruction did not contribute to the jury's recommendation or sentence." (SR.333) A Hitchcok error may be deemed harmless if, for example, "the defense produces no nonstatutory mitigating evidence," or "where the nonstatutory mitigating evidence present was so insignificant that it would not have altered the jury's decision" Jones v. Dugger, supra, 867 F.2d at 1279-1280. See also Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); Adams v. State, supra, Alvord v. Dugger, 541 So.2d 598 (Fla. 1989); Jackson v. State, 529 So.2d 1081 (Fla. 1988); Smith v. State, 529 So.2d 679 (Fla. 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); Delap v. Dugger, 513 So.2d 659 (Fla. 1987).

Because nonstatutory mitigating evidence was presented in the Carol City trial, the harmless error analysis falls within the second category, i.e., the nonstatutory mitigating evidence was so insignificant that it would not have altered the jury's decision. In the Carol City trial, four aggravating circumstances which were found by the original trial court were upheld on appeal, i.e., the defendant had been previously convicted of three violent felonies (assault with intent to commit rape, robbery, resisting officer with violence); the murders were committed to avoid or prevent a lawful arrest; the murders were committed while the defendant was engaged in a robbery for pecuniary gain; and the murders were especially heinous, atrocious and cruel.[14] The original trial court found no mitigating factors. However, on resentencing the trial court indicated that there was "some evidence to indicate that the murders were committed while the defendant was under the influence of extreme mental disturbance and that the capacity of the defendant to appreciate the criminality of his conduct so as to conform his conduct to the requirement of the law may have been substantially impaired." Ferguson v. State, 474 So.2d at 209.

The facts of the brutal homicide are set forth in detail in the Statement of the Case and Facts, supra, as well the direct appeal opinion. Ferguson v. State, 417 So.2d 639, 643-44 (Fla. 1982)

The nonstatutory evidence which was presented to the jury that the defendant was a good son, was going to school to learn art and music, worked construction, helped support his mother, and had a history of mental problems and commitments to the mental hospital, as well as defense counsel's arguments as to residual doubt, the term of 150 years in prison without parole, and that

---

[14] On resentencing, the trial court found the additional aggravating circumstances that the murders were committed in a cold, calculated and premeditated manner without the pretense of moral justification.

the defendant could be useful in prison, were quite insubstantial in light of the quantity and quality of the aggravating circumstances. The same is true if the additional nonstatutory mitigating factors which the defendant raises for the first time are considered, i.e., that his mother was briefly married to his alcoholic father who abused her,[15] but that the children remained in touch with him until he died, that the defendant lived in Overtown and came from a large family,[16] and that the defendant had an extensive evidence of the defendant's prior mental health history.

As the lower court concluded, "[t]hese nonstatutory mitigating circumstances would not have resulted in a different advisory sentence." (SR.335) In Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985), involving one of the co-defendants in the Carol City case, the Court held that the evidence of nonstatutory mitigating evidence of Francois' sordid and impoverished childhood, along with the testimony of behavioral scientists, would not have affected the outcome of the sentencing. See also Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) (nonstatutory mitigating factors of residual doubt, disparate treatment of co-defendant and defendant's parenthood would not have offset four aggravating factors); Alvord v. Dugger, 541 So.2d 598 (Fla. 1989) (nonstatutory mitigating factors of capacity for rehabilitation, history of mental illness within defendant's family, traumatic life experiences in mental institutions would not have offset three aggravating factors involved in the three homicides, even when there were already two statutory mitigating circumstances); Jackson v. State, 529 So.2d

---

[15] There was no proffer that the defendant himself was ever abused and in fact the family testimony at the evidentiary hearing indicated that he was not abused. (R.2923, 2926, 2934-5, 2945-9, 2952)

[16] There is no proffer that his background caused the defendant to be deprived of any of the necessities of life, be it material or non-material.

1081 (Fla. 1988) (nonstatutory mitigating factors of defendant's being a religious person, nonviolent, good to other people, would not have offset the four aggravating circumstances); Smith v. State, 529 So.2d 679 (Fla. 1988) (nonstatutory mitigating factors of remorse, traumatic and unstable childhood, childhood illness, father's sudden death, physical abuse and neglect from stepfather, victim of sexual abuse and rape while in prison, psychological responses of immaturity and weak emotional controls did not offset the two aggravating factors in the two homicides); Ford v. State, 522 So.2d 345 (Fla. 1988) (nonstatutory mitigating factors that the defendant helped his mother support the family, that defendant was frustrated by his dyslexia, the possibility of rehabilitation, that the defendant had contemplated suicide, and was using cocaine and heroin, did not offset the five aggravating circumstances); Demps v. Dugger, 514 So.2d 1092 (Fla. 1989) (nonstatutory mitigating factors of prior addiction to narcotics, and good prisoner did not offset the two aggravating factors found); Delap v. Dugger, 513 So.2d 659 (Fla. 1987) (nonstatutory mitigating factors of remorse, acceptable trial and prison conduct, and mild organic brain disorder did not offset five aggravating factors).

Furthermore, to the extent that the presentation of the defendant's prior mental history would have risen to a nonstatutory mitigating circumstance, it also, along with the other nonstatutory factors, would not have possibly resulted in a life recommendation. The fact that the defendant personally committed two of the homicides and attempted to kill one of the survivors, and was directly responsible for the other four homicides and attempted murder of the other survivor, as well as the manner in which the homicides were committed, would have without doubt outweighed the slight and unsubstantial mitigating evidence which defendant now claims he was precluded

from introducing and having the jury consider. As further evidence of the harmless nature of this alleged error, there is the fact that this mental mitigating evidence was introduced in the defendant's subsequent Hialeah trial as statutory mitigating evidence. The jury rejected it in that case, and there is no reason to believe that the jury in this case would have accepted it as substantial nonstatutory or statutory mitigating evidence such as to recommend life sentences. See Booker v. Dugger, 520 So.2d 246 (Fla. 1988) (it is unreasonable to conclude that even though the jurors did not find mental and emotional mitigating evidence strong enough as statutory mitigating factors to offset the aggravating circumstances and thereby recommend life imprisonment, they would have done so had they realized that the same evidence could be considered as nonstatutory as well as statutory mitigation). The Eleventh Circuit Court of Appeals has disagreed with the Supreme Court of Florida in Booker, see Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), but certiorari proceedings in Booker are currently pending in the Supreme Court of the United States.[17]

Therefore, the State submits that no Hitchcock error occurred or that any error must be deemed harmless beyond a reasonable doubt.

2. Hialeah Case

The State has conceded that unlike the Carol City case, the jury in the Hialeah case was not properly instructed that it could consider

---

[17] With respect to the Eleventh Circuit's position on harmless error analysis of Hitchcock errors, that Court has essentially admitted that its own decisions are impossible to reconcile: "It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in this [Hitchcock] situation." Gore v. Dugger, 5 F.L.W. Fed C 947 (11th Cir. 1991).

nonstatutory mitigating evidence. Thus, the issue for the court to determine is whether the error is harmless beyond a reasonable doubt.

At the guilt phase of the trial, the defense adduced substantial psychological/psychiatric testimony regarding Ferguson's state of mind. That testimony, as well as the State's rebuttal evidence, is detailed in the preceding section of this brief, at pp. 48-50, in the argument concerning ineffective assistance of counsel at the penalty phase of the Hialeah trial. As detailed previously, the court and jury already heard much conflicting evidence over whether Ferguson was paranoid-schizophrenic or whether he was not afflicted and was malingering. The court also heard other guilt phase evidence which simultaneously related to potential nonstatutory mitigating evidence - i.e., the testimony of the girlfriend, Virginia Polk, that Ferguson was introverted and that she thought that he was mentally ill. (T2. 733-34) Thus, much of the guilt phase evidence served defense purposes of nonstatutory, mitigating, penalty-phase evidence as well.

Prior to the sentencing phase, the trial court instructed the jury that it was to consider the evidence now presented along with what they already heard to determine whether aggravating and mitigating circumstances exist. (T2. 1437) At the sentencing hearing, the defense called the defendant's mother, Dorothy Ferguson, to testify. The State objected and the trial court overruled the objection. (T.1438) The Court asked trial counsel to ask Mrs. Ferguson if she felt that she could testify. Mrs. Ferguson said she would try. (T2. 1438) Defense counsel then stated that they would withdraw her at that time. (T2. 1439)

During closing arguments, the State focused strictly on the aggravating circumstances. Defense counsel argued the evidence of the defendant's mental illness, as well as the defendant's remorse. (T2. 1452)

In instructing the jury, although the trial court gave an improper Hitchcock instruction, the Court also told the jury that before they vote, they should, "carefully weigh, sift and consider the evidence and all of it, realizing that a human life [was] at stake." (T2. 1463-1464)

The State submits that the error in the sentencing instruction was clearly harmless beyond a reasonable doubt. The present case is similar to Booker v. Dugger, supra, in which this Court held that it was unreasonable to believe that the jurors, who did not find the mental and emotional mitigating evidence strong enough as a statutory mitigating factor to offset the aggravating circumstances, and thereby recommend life imprisonment, would have done so if they realized that the same evidence could also be considered as nonstatutory mitigating evidence. Like Booker, it is unreasonable to believe that the jury, if they did not find the mental mitigating circumstances as testified to by the various witnesses to rise to the level of a statutory mitigating factor and recommend a life sentence for the two homicides, would have altered its recommendation if they had received a proper instruction on nonstatutory mitigating circumstances.

As previously noted, the Eleventh Circuit Court of Appeals has disagreed with this Court's Booker decision. Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991). However, certiorari review is currently pending in the United States Supreme Court, and the Eleventh Circuit, in Gore, supra, has recently admitted that its own decisions on harmless error and Hitchcock are beyond reconciliation and that that Court has no coherent policy as to that issue.

The State also submits that the other nonstatutory mitigating circumstances presented or argued by counsel were so insignificant that it would not have altered the jury's decision. The evidence of the defendant's

remorse could hardly offset the four aggravating circumstances as found by the trial court and upheld on appeal. These four were the defendant's three prior violent felonies, that the murders were committed in the course of the commission of a rape and/or robbery, that the murders were committed to prevent a lawful arrest, and that the murders were especially heinous, atrocious, and cruel. On resentencing, the trial court also found that the murders were cold, calculating and premeditated, without any pretense of moral justification.

The facts of these two brutal homicides are set forth in the original trial court's sentencing order, recited in this Court's direct appeal opinion, Ferguson v. State, 417 So.2d 631 (Fla. 1982), and in the Statement of the Case and Facts herein. Clearly, the conflicting evidence of the defendant's mental condition and his remorse would not have offset the aggravating factors and the enormity of the defendant's crime. See, Francois v. Wainwright, supra; Tafero v. Dugger, supra; Alvord v.Dugger, supra; Jackson v. State, supra; Smith v. State, supra; Delap v. Dugger, supra. Thus, any erroneous instruction limiting the jury's consideration of nonstatutory mitigating evidence would clearly be harmless.

II (C)

THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S CLAIM THAT THE STATE USED FALSE TESTIMONY IN THE SENTENCING HEARING IN THE CAROL CITY CASE.

The Appellant asserts that the prosecution in the Carol City case used false testimony, and knowingly failed to correct it, when Officer Harmon testified that "in the wake of an October 1969 shooting incident involving himself and Ferguson, Ferguson was convicted and sentenced on the charge of assault with intent to commit murder." Brief of Appellant, p. 71. Since Ferguson was acquitted of that charge, the Appellant maintains that the prosecutor had a burden to correct that false testimony. The lower court found that this claim was procedurally barred. Furthermore, a careful review of the record shows that the officer's testimony arose out of inadvertent confusion of various charges and that the misstatement was in fact corrected.

At the outset of the penalty phase proceedings, the prosecutor called a deputy clerk of the court to identify files and documents pertaining to Ferguson's prior convictions, including those from case no. 69-9963. (T1.1023-26). The clerk indicated that Ferguson was tried and convicted for robbery in that case. (T1.1026). When the prosecutor sought to introduce the records of conviction from that case (and others), defense counsel objected on the grounds of an improper predicate. (T1.1028). The court sustained that objection, as there was an inadequate predicate of identification. (T1.1028-29).

In an effort to properly identify Ferguson as the person convicted in case no. 69-9963, the prosecutor called Edward Harmon, the police officer involved in that case. (T1.1012). Harmon testified that he had been in contact with Ferguson and as a result of that contact, a court case was filed against Ferguson, whom he identified in court. (T1.1032-33). The questioning continued:

> Q. Is this the one and the same individual who was present at the time John Errol Ferguson was convicted and sentenced in case 69-9963 on the charge of assault with intent to commit murder?
>
> A. Yes.
>
> Q. You were present at the time of the conviction?
>
> A. Yes, sir, I was.

(T1.1033). After questioning other witnesses to identify Ferguson as the defendant in other prior convictions, the State moved into evidence, as Exhibits 1-3, composite exhibits including the various prior records of convictions. (T1.1047-1050). Among the admitted documents was the court's docket sheet from case no. 69-9963, which reflected that Ferguson was found not guilty of assault with intent to commit murder, resisting arrest without violence and auto theft, but guilty of robbery. (R1.135). The original booking record for those offenses, notes all four charges and has a reference to the 69-9963 case number. (R1.131). It further appears that substitution of copies was permitted for the originals at the end of the proceedings. (T1.1050-51).[18] In closing arguments, the prosecutor never refers to a prior conviction for assault with intent to commit murder.

Ferguson raised the claim regarding Harmon's false testimony in a Motion to Supplement 3.850 Petition, filed on July 17, 1990. (R.1707). The lower court denied the Motion to Supplement, finding that it was "untimely as the issue raised in the motion is predicated on facts which could have been raised at an earlier time." (R.3199). The Motion to Supplement was filed

---

[18] The record on appeal from case no. 55,137 includes State's Exhibits 1 and 2 from the penalty phase. (R1. 129-36). Exhibit 3, which was a composite, and apparently included additional documents reflecting the nature of the prior convictions, was admitted into evidence (T1. 1050), but was omitted from the record on appeal.

three weeks after the court, by order dated June 29, 1990, had already denied all of the issues previously presented in the Rule 3.850 motion and original Supplement to said motion, after a full evidentiary hearing. (SR.320).

The lower court correctly ruled that this claim was presented in an untimely manner. First, it was presented after the lower court had conducted an evidentiary hearing and had entered an order denying all claims pending. There is no procedural mechanism for amending a Rule 3.850 motion with a new claim after all other claims have been heard and denied. Indeed, no motion for rehearing had been filed from the June 29, 1990 order denying all claims and the time for a motion for rehearing had expired, prior to the filing of the motion to supplement. As such, there was no jurisdiction for any further proceedings. See Preston v. State, 528 So.2d 896 (Fla. 1988) (trial court in post-conviction proceedings properly declined to rule on motions which were filed after the evidentiary hearing and which sought to inject new issues into the case).

In effect, since the rule 3.850 proceeding was fully completed, Ferguson's Motion to Supplement was essentially an effort to file a new, subsequent Rule 3.850 motion with a new issue. The issue obviously could have been presented in the prior Rule 3.850 motion and was not, thus resulting in a procedural bar. Bertolotti v. State, 565 So.2d 1343 (Fla. 1990) (successive Rule 3.850 motion resulting in procedural bar). Alternatively, this claim could have and should have been raised on direct appeal. Once the docket sheet from case no. 69-9963 was admitted into evidence showing that the conviction was for robbery, and that Ferguson was acquitted on the assault with intent to commit murder, defense counsel clearly had actual knowledge of the discrepancy and the error in Harmon's testimony. Thus, the claim could have and should have been raised on direct

appeal. Lambrix v. State, 559 So.2d 1137 (Fla. 1990) (claim based on information contained in original record of case must be raised on direct appeal). Furthermore, the effort to raise the claim, for the first time, in July, 1990, when no other proceedings were still pending, clearly violated the two year filing deadline of Rule 3.850, which expired in 1987. Adams v. State, 543 So.2d 1244 (Fla. 1989). The Appellant maintains that "Ferguson's counsel had no reason to suspect that Hartman's testimony was false until June 1990." Brief of Appellant, p. 72. That claim is patently false, as the inconsistency between the testimony and the conviction records was a matter of record at the 1978 trial and in the direct appeal record from the 1978 trial. Thus, no possible excuse for any dilatory filing of the claim exists.

Furthermore, the claim is clearly repudiated by the record. The essence of the claim is that the prosecutor has a duty to correct testimony known to be false. Lee v. State, 324 So.2d 694, 697 (Fla. 1st DCA 1976). As noted above, the prosecutor did correct the misstatement by admitting the actual records into evidence, which showed the correct nature of the conviction and the acquittals. It is also obvious that the prosecutor's original question, referring to the assault with intent to commit murder, must have been an inadvertent reference to the charge for which there was an acquittal. The prosecutor had already had the deputy clerk testify that the conviction in 69-9963 was for robbery. Moreover, in closing argument, the prosecutor never refers to any assault with intent to commit murder. Thus, the prosecutor clearly confused the various charges and promptly corrected any confusion by admitting the documents which accurately reflected the proper conviction as well as the acquittal for the assault.

Lastly, even if the prosecutor somehow failed to correct the misstatement, a failure to correct testimony which is known to be false will

result in a reversal only if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). That is clearly not the case here. Not only did the jury have the corrected information through the actual court records, but the aggravating factor of prior violent felonies was supported by several prior felonies - the robbery in 69-9963, as well as a 1965 assault with intent to commit rape and a 1976 resisting arrest with violence. (T1.1024-27; R1.129-36; T1.1035-50). Mixing up an assault to commit murder with a robbery was not going to affect the outcome of a case involving six homicides, especially given the substantial history of other violent felonies, the numerous aggravating factors, and the minimal mitigating evidence. Thus, this claim was properly denied as being untimely, and was further refuted by the record.

II (D)

THE STATE'S FAILURE TO DISCLOSE EVIDENCE OF INVESTIGATIONS OF THREE OFFICERS INVOLVED IN THE CAROL CITY AND HIALEAH TRIALS DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.

The Appellant claims that the State failed to disclose that three police officers who testified at Ferguson's trials - Officers Derringer, Zatrepalek and MacDonald - were under investigation for involvement in drug trafficking, and theft of narcotics and cash from the scene of drug-related killings. The Appellant claims that the State's failure to furnish this information in response to Ferguson's demands for discovery constitutes a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The lower court rejected this claim for several distinct reasons: (1) the defendant did not offer any proof that the officers were involved in any criminal activity at the time they testified at the trials; (2) evidence concerning the officers' involvement in unrelated criminal activities is not material under United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); (3) the evidence was not in the State's possession for purposes of Brady, as there was no showing that the State Attorney's Office or other investigating agency had actual knowledge of the officers' alleged criminal activity at the time of the defendant's trials; and (4) there was no reasonable probability that the evidence, even if admissible, would have affected the outcome of the proceedings. (SR.337-40, 438-53).

1. Background Facts

Ferguson's Carol City trial was held in May, 1978; the Hialeah trial in September, 1978; and the suppression hearing in the Hialeah case in August, 1978. Ferguson attached various documents to the Supplemental Motion to Vacate, regarding criminal investigations of Officers Derringer,

Zatrepalek and MacDonald, although those documents were never offered into evidence at the post-conviction evidentiary hearing. (R.1257-1362). Those documents pertained to the federal prosecution in United States v. Alonso.

The documents attached to the Supplemental Motion included the indictment in the Alonso case, in which only Detective Derringer, of the above-named officers, appears. (R.1257). According to the indictment, the first alleged criminal act by Derringer occurred on or about September 11, 1978. (R.1260, 1270). The other alleged acts by Derringer occurred between October 26, 1978 and October, 1979. (R.1257, et seq.).

Another attachment was a reference to the grand jury testimony of Roy Tateishi, at the Alonso trial, that he overheard Officer Ojeda making statements about killing people. (R.1296-7). Ojeda, although a member of the homicide division, had no major involvement in the defendant's cases, and did not testify in either case. The next attachment to the Supplemental Motion is a portion of Zatrepalek's testimony at the Alonso trial, concerning a conversation between Ojeda and MacDonald in June, 1979, involving arrangements to get cocaine. (R.1297-1304).

The next attachment is the Alonso trial testimony of Captain McCarthy, the officer who was in charge of the Internal Review Section of the Public Safety Department in 1981. (R.1305-24). He was subpoenaed to bring to the Alonso trial certain internal affair files: IR-78-007, involving the complaint of Eduardo Lavin, regarding Officer Charles Rivas; IR-77-366, IR-76-619, IR-75-107, and IR-73-347, apparently involving Officer Fabio Alonso. (Id.) Neither Rivas nor Lavin testified at Ferguson's trials and neither had any major involvement.

The next document attached to the Supplemental Motion is the sworn statement of Ojeda, dated January 26, 1978, taken by the Internal

Review Section, regarding the complaint by Officer Lavin. (R.1325-38). That statement contains no references to Officers Derringer, Zatrepalek or MacDonald. Another attachment, the sworn statement of Lavin, also makes no references to those three officers. (Id.). Lastly, a summary of the Lavin allegations by Sgt. Bellerdine of the Internal Review Section, dated June 6, 1978, also makes no references to the three officers, and further concludes that the investigation was being suspended, because Bellerdine could not develop any evidence to substantiate the allegations by Lavin. (R.1339-53).

The Brief of Appellant, citing IR-78-007, claims that the various investigations into the above matters began as early as January, 1978, well prior to Ferguson's discovery demands in the two cases. None of the documents attached to the Supplemental Motion showed any investigation of the three officers prior to the testimony of those officers in Ferguson's trials. None of the attached documents showed any awareness of the three officers of any pending investigations as of the time of their testimony. Those documents were never offered into evidence at the post conviction hearing, and the Appellant did not adduce any other evidence, at the hearing, showing that an investigation of the three officers was under way, and that the officers and prosecution were aware of the pending investigation, at the time of the officers' testimony. The lower court in no way prevented the Appellant from offering any of the above-described documents into evidence at the hearing. The lower court in no way prevented the Appellant from offering any other evidence which would have shown when the investigations were under way, who was being investigated at any given time, when the three officers and prosecution herein became aware of the investigations, etc.

2. Prosecution not on notice of Detectives' crimes

This Court, in Breedlove v. State, 16 FLW S371 (Fla. May 9, 1991), has recently addressed the same Brady claim, arising out of the Alonso prosecution, in the context of Breedlove's 1979 jury trial and conviction. This Court concluded that the prosecution, at the time of the trial, was not on notice of the detectives' crimes:

> This Court has previously stated that "the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor." Arango v. State, 467 So.2d 692, 693 (Fla.), vacated on other grounds, 474 U.S. 806 (1985). The detectives' personal knowledge of their criminal activities, however, was not readily available to the prosecution. Their right not to incriminate themselves protected them from having to disclose their actions to the prosecution. See Wallace v. State, 41 Fla. 547, 26 So. 713 (1899). Thus, the prosecution cannot be held to have had constructive notice of the detectives' crimes.
>
> The same holds true for Breedlove's claims that an assistant state attorney and a police officer asserted that they had seen Ojeda using cocaine and that Ojeda and Zatrepalek must have known that they were being investigated by internal affairs. As noted by the trial court, the internal review files do not support the prosecution's having any knowledge of the detectives' criminal activities at the time of Breedlove's trial. Furthermore, at Ojeda's trial Zatrepalek testified that he did not know he was being investigated until November 1979, well after Breedlove's trial, and an informant who testified that Ojeda knew of an investigation could not say when Ojeda acquired that knowledge. Again, as noted by the trial court, the confidential internal review files do not show that Zatrepalek and Ojeda were being investigated at the time of Breedlove's trial.
>
> Thus, there is no support for Breedlove's claim that the prosecution knew, either actively or constructively, of Ojeda and Zatrepalek's criminal activities. This Court has repeatedly observed that "'[i]n the absence of actual suppression of evidence favorable to an accused . . . the state does not violate due process in denying discovery.'" Delap v. State, 505 So.2d 1321, 1323 (Fla. 1987) (quoting James v. State, 453 So.2d 786, 790 (Fla.), cert. denied, 469 U.S. 1098 (1984)). Breedlove has not met the first part of the Brady rule because he has not demonstrated that the prosecution "suppressed" evidence.

16 F.L.W. at S372. So, too, in the instant case, the Appellant did not demonstrate any suppression, as there is no showing that the prosecution, or

the three officers, knew of any investigation of those officers - Derringer, Zatrepalek and MacDonald - at the time of their testimony at Appellant's trials. While other officers may have been investigated in early 1978, there is no showing that these three officers were, or that either they or the prosecution herein knew of those investigations. Thus, there was no suppression by the prosecution in the instant case, and Brady was not violated.

3. Evidence not "material" under Brady

A Brady violation will be found only if the suppressed evidence is "material." 373 U.S. at 87. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). Reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-110 (1976). The evidence in the instant case, even if "suppressed", would not satisfy the standards for materiality.

Most significantly, the Alonso prosecution and related investigations involved collateral matters which did not involve the Carol City or Hialeah cases herein. In Breedlove, this Court held that where the detectives' criminal activities had nothing to do with Breedlove's cases, questioning of those officers, at Breedlove's trial, about the investigations of their own offenses, would not have even been permitted, and hence would not have been material:

> In the instant case the detectives' criminal activities had nothing to do with Breedlove's case. Allowing Breedlove

> to question the detectives on such matters, at the suppression hearing and at trial, would have done nothing more than raise the possibility that they had engaged in bad acts. "Bias on the part of a prosecution witness is a valid point of inquiry in cross-examination, but the prospect of bias does not open the door to every question that might possibly develop the subject." Hernandez v. State, 360 So.2d 39, 41 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1367 (Fla. 1979). Evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact. Therefore, inquiry into collateral matters, if such matters will not promote the ends of justice, should not be permitted if it is unjust to the witness and uncalled for by the circumstances. Wallace.
>
> If the detectives had been formally charged with or tried for the activities Breedlove now complains about and, thus, arguably curried favor by their testimony or if they had been under investigation for police brutality or using excessive force, questions designed to impeach them by showing bias, motive, or prejudice would have been relevant to whether they coerced Breedlove's confessions. In fact, however, the detectives' criminal activities were collateral to any issues in Breedlove's trial, and questions about them would not have been permissible, and, thus, there is no reasonable probability that the outcome of the suppression hearing or the trial would have been different. Breedlove, therefore, has also failed to satisfy Brady's materiality requirement. . . .

16 F.L.W. at S373. So, too, the evidence in the instant case was not material. The allegations pertained to collateral matters, just as in Breedlove. Nor was there any proof that the detectives had been formally charged or tried as of the time of Ferguson's trials, and it is clear that they were not. Breedlove carves out an exception that would permit questioning for a pending investigation for police brutality or excessive force, as that would be relevant to a claim that a confession was coerced. While the Appellant alleges that Detective Derringer was investigated for threatening to kill a drug dealer, that would have no bearing on Ferguson's claim of a coerced confession in the Hialeah case, as Derringer had nothing to do with obtaining the confession from Ferguson. The confession was obtained by Zatrepalek and MacDonald; the claims of physical and

psychological coercion were for acts alleged to have been committed by Zatrepalek and MacDonald, not Derringer. (T2. 70-77). There are no allegations in the Alonso matter that either Zatrepalek or MacDonald ever resorted to excessive force. Thus, the exception in Breedlove would be inapplicable here.

The general claim of materiality posited by the Appellant herein is that "the police officers had a possible motive to entrap, or fabricate testimony about Ferguson." Brief of Appellant, p. 80. As previously noted, mere "possibilities" do not suffice to establish materiality under Brady. Ferguson was granted a full evidentiary hearing on his Brady claim and did not adduce evidence to support any of his allegations. Ferguson, in his Brief of Appellant, attempts to exonerate his own failure to adduce evidence at the evidentiary hearing: "And to the extent that the record does not include all of the facts necessary to substantiate such a charge, this is because the trial court refused in 1987 to grant Ferguson's motion for a hearing, and for funds to enlist the help of lay and expert testimony, to develop and prove every aspect of the police corruption and its relationship to this case." Brief of Appellant, p. 80. To the contrary, Ferguson was awarded a full evidentiary hearing and the lower court never prevented him from presenting any testimony he wished to with respect to this claim.

So, too, with respect to the allegation that Derringer threatened to kill a drug dealer, - Brief of Appellant, p. 78 - that is nothing more than an unproven allegation, as there was no evidence in the lower court's post-conviction evidentiary hearing to establish such an occurrence. Counsel for Appellant attempts to exonerate the failure to prove this allegation in the lower court's hearing: "The man who testified to these facts before a grand jury has entered the federal witness program, and defense counsel have

been unable to locate him." Brief of Appellant, p. 78. The lower court record contains no indicia of any efforts of counsel to locate and/or subpoena this alleged witness. Counsel for the Appellant never even attempted to introduce the witness's testimony from the Alonso trial into evidence in the lower court's proceedings. Thus, there is absolutely no proof in the lower court to establish that Derringer or any of the other officers who testified ever resorted to excessive force, and the exception contained in Breedlove has not been established in the instant case.

4. Hialeah Suppression Hearing

In the Hialeah suppression hearing, the Appellant claimed that: (1) Detectives Zatrepalek and MacDonald questioned Ferguson after Ferguson's attorney's instructed the police not to question Ferguson in the absence of counsel; and (2) Detectives Zatrepalek and MacDonald obtained the confession by physical and psychological coercion. The Appellant's claim of "materiality" is that the judge accepted the detectives' testimony over the testimony of counsel and Ferguson, that the judge's denial of suppression turned exclusively on credibility determinations, and that those credibility determinations "would have been affected by a disclosure that each of those detectives, at the time of the suppression hearing, was under investigation for serious drug-related criminal offenses." Brief of Appellant, p. 84. Since such cross-examination of the officers would have done no more than bring out collateral bad acts, under Breedlove, the evidence would have been inadmissible, and materiality is not established.

Furthermore, the lower court's order makes it clear that the suppression ruling was not merely a credibility determination:

> The ruling on the motion to suppress did not turn exclusively of [sic] the "positive evaluation of the credibility of the testimony of Detectives Derringer, Zatrepalek and MacDonald, and a negative evaluation of the

> credibility" of Robbins and Nameroff. There is no real conflict between the testimony of the officers and the lawyers. Robbins testified that although he told various detectives not to talk to the Defendant, he did not testify that he specifically told that to Zatrepalek, Derringer, or MacDonald. Nameroff also testified that he told several detectives not to talk to the Defendant and although he believed Derringer and MacDonald were present (T2. 395), he did not testify that he specifically told them. As such, the detectives' testimony did not conflict with that of the lawyers. The lawyers' statements could not have invoked the Defendant's rights. Valle v. State, 474 So.2d 796 (Fla. 1985). Therefore, there is no reasonable probability that the outcome of the suppression hearing would have been different if the impeachment evidence had been admissible.

(SR.351-2)

5. Carol City Trial - Guilt Phase

Detective Derringer testified about the investigation of the Carol City homicides. The Appellant's claim of materiality is that if the jury had been informed of his drug-related activities, "critical aspects of his testimony would have been discredited or rejected altogether." Brief of Appellant, p. 84. The Appellant does not identify what those "critical aspects of his testimony" are. Once again, under Breedlove, evidence of the investigation of collateral drug-related activities would only be evidence of collateral bad acts and would be inadmissible. Thus, the materiality of this evidence is not established with respect to the Carol City trial.

The lower court's order contains a more detailed analysis as to why such evidence would not have been material in the Carol City case:

> Detective Derringer testified at the trial as to the investigation which led to the arrests of the four suspects, Marvin Francois, Beauford White, Adolphus Archie and the Defendant. (T.454-509; 658-715). Besides the general investigation, Derringer testified that after the Defendant was arrested he denied any knowledge or involvement in the murders. (T.674). The Defendant stated that Livingston Stocker's (one of the victims) gun which had been found in the Defendant's possession at the time of his arrest by the FBI, was given to him two weeks before by a friend whom the Defendant refused to name. (T.675). Detective MacDonald brought into the courtroom the murder weapon, and testified as to his possession of it for chain of custody purposes.

> The testimony of Detectives Derringer and MacDonald were not of "critical importance." What was of "critical importance" was the identification of the Defendant by one of the surviving victims, Margaret Wooden (T.349), the testimony of the wheelman, Adolphus Archie (T.718-785), which clearly and unequivocally implicated the Defendant, and the fact that the Defendant was arrested with one of the murder victim's gun in his possession. (T.513, 597, 600).

(SR.339-40).

6. Hialeah Trial - Guilt Phase

The Appellant claims that the evidence of the detectives' drug-related activities would be material for two reasons: (1) Derringer testified at the Hialeah trial, connecting the murder weapon to Ferguson, and in so doing, indirectly linked Ferguson to the Carol City murders, since the gun was taken from one of the Carol City victims; and (2) the drug-related activities were the only effective means counsel would have to discredit the testimony of Zatrepalek and MacDonald. Brief of Appellant, pp. 84-85. These contentions are conclusively rebutted in the lower court's order:

> Clearly, the outcome of the trial would also not have been affected. Detective Derringer was not the only person to connect the Defendant with the murder weapon used. FBI Agent Bruner was the person who initially found the gun in the Defendant's possession. (T2. 339) Robert Hart, the firearms identification specialist, identified the gun as being the murder weapon. (T2. 404-405). Furthermore, Derringer was not the only witness to connect the gun to the Defendant and to the Carol City homicides. Both Margaret Wooden and Johnnie Hall, the two Carol City survivors, testified briefly as to the Defendant's presence when Stocker was killed and that Stocker kept the gun at his house. (T2. 885-889).
>
> Although only Zatrepalek and MacDonald testified about the Defendant's incriminating statements, there is still no probability that the alleged impeachment evidence would have affected the outcome of the trial. Besides the very incriminating evidence of the murder gun being found in the Defendant's possession, the State had other circumstantial evidence of the Defendant's guilt. Barry Byrd, the serologist, testified that sperm was found in Belinda Worley's vagina and anus, that it was consistent with a group A secretor (T2. 516-517), that Belinda was a group A,

> and that the person who deposited the sperm in the anus would be either an A or O or a nonsecretor (T2. 519), and that the person who deposited the sperm in the vagina would probably be an O, that the same person deposited both (T2. 521) and the Defendant was an O secretor. (T2. 574-575). Byrd also testified that pubic hair found in Brenda's crotch area was also consistent with a black person's (T2. 585-586), and that a hair fragment found on her stomach was consistent with the Defendant's. (T2. 586). Byrd further testified that glitter found in the Defendant's apartment exhibited the same characteristics as glitter found in the victim's car. (T2. 64). Virginia Polk, the Defendant's girlfriend, testified that the Defendant would carry the gun whenever he would go out, (T2. 696-697), and that on the night of the homicides the Defendant went out, came home around 11:00 p.m. - 12:00 a.m., and then washed his clothes the next day, which was unusual. (T2. 698-699).

(SR.352-3) Not only does the foregoing corroborate the lack of materiality, but once again, at the Hialeah trial, the evidence would have been inadmissible under Breedlove, as it would only pertain to collateral bad acts.

7. Hialeah and Carol City Penalty Phases

With respect to the sentencing phases, the Appellant claims that the evidence of the officers' drug-dealing activities would be material because "Ferguson lived in a community in which the police tolerated the killing of drug dealers and then profited from their elimination" and therefore Ferguson "might well have failed to grasp the full significance of the law which he already violated." Brief of Appellant, p. 86. Apart from the Appellant's total failure to prove anything in the lower court hearing, such perverse reasoning as proffered by the Appellant has no place in any rational legal system. This is little more than a speculative fantasy to condone lawlessness. Most emphatically, this is not the type of argument which would probably affect the outcome of the proceedings. The same holds true to Appellant's equally ludicrous assertion that with such evidence defense counsel "might have succeeded in portraying Ferguson as a seriously-impaired

man caught on a treadmill of violence set in motion by others." Brief of Appellant, p. 86. Nowhere is it written that the law must take leave of its senses and throw common sense to the wind. As noted in the lower court's order, "[t]here can be no question that evidence of the officer's unrelated criminal activities is irrelevant at sentencing. It bears only on the police officer's character, not the Defendant's. Furthermore, there being absolutely no link established between those activities and the murders, it would have no bearing on the circumstances of the offense. Bad acts by police officers in unrelated cases simply have no relevancy to the degree of the Defendant's culpability for the eight murders in the two cases." (SR.340).

ISSUE II (E)

THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED UPON FAILURE TO OBJECT TO PROSECUTION'S USE OF RACIALLY BASED PEREMPTORY CHALLENGES.

In its "Supplement to 3.850 Petition," the defendant alleged that a "[c]omparison of the Florida voting rolls with the voir dire records in Ferguson's two trial" established a "pattern of race based peremptory challenges by the prosecution" and resulted in "entirely white juries in both Ferguson cases in violation of his rights to equal protection and a fair and impartial jury." (R.1123) The defendant admitted that the race of some panel members could not be identified, "because the voting rolls from that time listed both blacks and whites with the same name." (Id.) Nevertheless, the defendant also argued that his counsel were ineffective because they should have objected to the "systematic exclusion of blacks" pursuant to Swain v. Alabama, 380 U.S. 202 (1965), Batson v. Kentucky, 476 U.S. 77 (1986) and State v. Neil, 457 So.2d 481 (Fla. 1984). (R.1124-26)

In so far as the defendant's claim was based upon Batson and Neil, supra, the court below found that: "the substantive issue of whether there was a violation of Batson or Neil is not fundamental error or retroactive, under Allen v. Hardy, 478 U.S. 295 (1986), Teague v. Lane, 109 S.Ct. 1060 (1989), Penry v. Lynaugh, 109 S.Ct. 2934, 2944 (1989), and State v. Neil, supra, 457 So.2d at 488; such that this issue cannot be raised for the first time on a motion for post-conviction relief. See James v. State, 489 So.2d 737, 738 (Fla. 1986); Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985)." (R.1511) The trial court was correct in its ruling. James, supra, Lightbourne, supra; see also State v. Safford, 484 So.2d 1244 1245 (Fla. 1986) ("our comment that Neil was not to be applied retroactively was intended to forestall the use of

Florida Rule of Criminal Procedure 3.850 in collateral attacks on final judgments."); Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990) (claim of improper peremptory excusal of black prospective jurors by the prosecution was found to be procedurally barred where, "This Neil issue was not raised on appeal and Batson and Slappy are not fundamental changes in the law which would allow collateral consideration of the issue").

The trial court did grant an evidentiary hearing as to the ineffectiveness claim prong of this issue. However, the State would note that trial counsel cannot be deemed deficient for failing to object or raise issues that only later gain judicial recognition. Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982); Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983). Moreover, the Appellant has never pointed to an objectionable juror or demonstrated, that he was deprived of a fair and impartial jury in either of his cases. He has thus not shown any prejudice.[19] See Ross v. Oklahoma, 287 U.S. 81, 101 L.Ed.2d 80,

---

[19] When a defendant claims that counsel was ineffective for failing to raise a Neil or Batson claim, the defendant must satisfy the prejudice prong of Strickland. A defendant's inability to demonstrate that the actual jury was in any way biased, or was not impartial, precludes a finding of prejudice. For example, if counsel had objected, the State would have had the opportunity to present race-neutral reasons for the challenges. Thus, the Strickland prejudice prong must require a showing that the State would not have demonstrated race-neutral reasons. The rationales of Neil and Batson are not based upon any inherent or actual unfairness in the jurors that remain after there has been a racially-based peremptory challenge. Those cases are based on the evil of the discrimination in and of itself; the wrongful exclusion of those who should be permitted to serve; the victimization of those who have been peremptorily excused due to their race. That evil exists and warrants reversal, when properly preserved in the trial court, even if the remaining jury is completely fair and unbiased. Yet, even though the evil of such discrimination warrants condemnation, it is not a fundamental error and must be preserved in the lower court. See, e.g., State v. Silva, 259 So.2d 153, 158 (Fla. 1972); Frazier v. State, 107 So.2d 16 (Fla. 1986); Neil, supra (requiring timely objection); Francois v. State, 407 So.2d 885 (Fla. 1982); Valle v. State, 16 F.L.W. 5303 (Fla. May 2, 1991), (Neil claim unpreserved). Indeed, counsel can consciously choose not to raise the issue or to waive it for reasons which counsel deems beneficial to the defendant - i.e., a belief that the excluded jurors would be bad for the defense, and that the remaining

90, 108 S.Ct. 2273 (1988) (where there is nothing in the record to show that any of the jurors who ultimately heard the case were objectionable or partial, the defendant's Sixth and Fourteenth amendment rights are not violated so as to require reversal of the conviction and sentence); Trotter v. State, 576 So.2d 691, 692-93 (Fla. 1991) (same). Therefore any ineffective assistance of counsel claim under Strickland, supra, fails on both prongs of deficiency and prejudice.

In any event, at the evidentiary hearing the Appellant was unable to prove any of his allegations. First, the only evidence presented as to the racial makeup of the juries was the testimony of Mr. Roberts, a law clerk scheduled to graduate law school in June 1991. (R.2885) Roberts testified that he had reviewed voter registration records to determine the prospective jury members' ethnicity as reflected in said records. (R.2888) Roberts admitted that in some instances he had found there was more than one person with the same name registered to vote according to said records. (R.2888-9) None of these records were presented at the hearing, nor were they entered into evidence. Moreover, Roberts also admitted that two of the prospective jurors' ethnicity could not be confirmed. (R.2891) Neither the defense

---

jurors are good for the defense. Thus, since the evil involved does not implicate the fairness of the actual jury, and since the issue is nonfundamental and must be preserved, an ineffectiveness claim must require a showing of partiality of the actual jury in order to demonstrate prejudice under Strickland. Furthermore, such ineffectiveness claims should be discouraged to the fullest extent possible. Just as this Court, in Bryant v. State, 565 So.2d 1298, 1301 (Fla. 1990), has indicated that the prosecution cannot tender reasons for challenges for the first time, on appeal, so too, the prosecution is unjustly hampered when it must reconstruct what the reasons for the challenges were many years earlier. Passing, and perhaps momentary, mental impressions of jurors during voir dire, in an adversarial environment, are matters which are often not recorded, or recalled, long after a trial is over. The problem becomes all the more acute when those passing faces of the venire become a mere blur, as the prosecution, over the years, goes through scores of trials and thousands of venire members. Permitting such an ineffective assistance claim, if it should even be permitted at all, calls for a truly most compelling burden on the defendant, in view of the foregoing.

counsel nor the prosecutor could recall the racial makeup of the juries herein. (R.3124, 3035, 3157) Thus the lower court found that, "the Defendant has not proven that the jury which was seated was all white ... the court does not find Mr. Roberts' testimony concerning his review of the trial record and the voter registration records to be sufficient proof of the race of the jurors. Such testimony was hearsay and not subject to any evidence exception." (SR.327, 341)

The lower court also found a lack of proof of the allegation that the prosecution had exercised its peremptory challenges to excuse prospective black jurors solely on the basis of race in Ferguson's cases. (Id.) Again the only proof on this issue consisted of Mr. Roberts' testimony. Roberts first testified that he had reviewed the voir dire transcripts from the two trials, in order "[T]o determine the ethnicity of the jury members, the potential jury members, reasons that they were not selected to be on the jury, and an analysis of that." (R.2887). He then stated that in the Carol City case, of the tweny-nine prospective jurors, four were black and three of these had been peremptorily challenged by the State. (R. 2891). Roberts added that from his review, none of these excused prospective black jurors indicated any moral, religious or conscientious objection to imposing the death penalty. (R.2892) In the Hialeah case, Roberts stated that of a total of 36 prospective jurors, six were "conclusively" black, and five of these jurors had been peremptorily challenged by the State. (R.2893-2894) On cross examination, Mr. Roberts, in response to whether he had read the caselaw on peremptory challenges, stated that he had been "exposed" to such caselaw, (R.2899), but that despite his earlier testimony, he was <u>not</u> "suggesting that there was no valid reason" for the exercise of peremptory challenges by the prosecution in the instant cases. (Id.) In fact, Mr. Roberts admitted that the transcript of voir dire in the

Carol City case demonstrated that two of the prospective black jurors had been stricken because of transportation problems (R.2901-2902), and another was employed at South Florida State Hospital where the defendant was committed prior to trial in 1978. (R.2902) Likewise, the transcript of voir dire in the Hialeah case[20] reflects that of the five prospective black jurors challenged by the State, one had witnessed an unrelated first degree murder, and stated that he did not wish to be on the jury, and, added that he had religious or moral objections to the death penalty. (R.2893-94 and, transcript of voir dire dated September 27, 1978, at pp. 92, 91, 66-67) Another prospective black juror had read the facts in the newspaper (Id. at pp. 121-122). Yet another stated that he would have a "problem" with the death penalty (Id. at p. 89) in addition to being "claustrophobic" and unable to sit in the "jury room [which] is a small closed-in room" for several hours, despite taking pills. (Id. at p. 96) This transcript also reflects numerous other jurors, identified only as "prospective jurors" without names or other indication of race, having had a wide variety of problems from hearing trouble (Id. at 56), and heart problems (Id. at 93), and reservations at Disney World at the scheduled time of trial (Id. at 94), to being unable to "send anybody to the death chair" (Id. at 77) and inability to return a verdict of first degree murder. (Id. at 72) As no other proof of racially-based peremptory challenges was offered by the defendant, it is abundantly clear that the lower court's finding of insufficiency was valid in this regard.

Finally, the Appellant's allegations of prior systematic exclusion of black jurors by the prosecution, and routine practice of Dade County defense

---

[20] As noted in the Introduction herein, said transcript has not as yet been made part of the record, but will be included in the Supplemental Record on Appeal to be submitted by the Clerk of the Circuit Court, in and for Dade County, Florida.

counsel in objecting to such practice also remained unproven. The Appellant presented the testimony of James McGuirk, an attorney since 1967, with a practice limited to criminal law in state and federal courts. (R.2908-2909) Mr. McGuirk stated that at the time of the trials herein, during 1978, some state attorneys "would be very conscious of the race of the juror based upon the nature of the case to be tried." (R.2910) However, McGuirk added: "Yes, although I'm not comfortable characterizing it as the State Attorney's Office as a whole, I believe this was a practice that varied from individual attorneys and certainly wouldn't reflect any general policy of the State Attorney's Office." (Id.) McGuirk also stated that he was not prepared to say that the prosecutor in the Ferguson cases had systematically excluded black potential jurors. (R.2914). In fact, one of the trial defense counsel, Mr. Robbins, testified that he had tried cases, prior to those in Ferguson and in 1978 with this prosecutor, and that the latter had not engaged in any exclusion of jurors on racial grounds. (R.3039) Moreover, Mr. McGuirk could not recall any instances where he or other attorneys had objected to systematic exclusion of black jurors in 1978; the earliest such objection was made by him, in one case, in 1980. (R. 2917, 2913) Thus, the lower court found insufficient proof of the Appellant's allegations in this regard as well. (SR.327-328) It is therefore clear that the Appellant's claim of ineffective assistance of counsel is entirely without merit, as he has shown no deficient conduct or prejudice.

ISSUE III

THE TRIAL COURT PROPERLY FOUND CLAIMS WHICH WERE NOT RAISED AT TRIAL OR ON DIRECT APPEAL TO BE PROCEDURALLY BARRED.

A. FAILURE TO CONDUCT A PRETRIAL COMPETENCY HEARING.

In his motion for post-conviction relief, the defendant claimed that he was denied due process by the trial court's failure to conduct a "fair and reliable inquiry" into his competence to stand trial in both cases. (SR. 7-13) The defendant relied solely upon matters presented at trial of both cases and included in the direct appeal records. Id. The lower court thus found this claim procedurally barred pursuant to Bundy v. State, 497 So.2d 1209, 1210 (Fla. 1986) (R. 510) ("that the first claim [denial of a full and fair hearing or competency to stand trial] could have been raised on direct appeal, as it was in Scott v. State, 420 So.2d 595 (Fla. 1982) and Lane v. State, 380 So.2d 1022 (Fla. 1980), and is therefore not now properly before this Court for further consideration. [cites omitted]." The Appellant has stated that the lower court's reliance on Bundy was erroneous because there is a conflict between Bundy, supra, and Hill v. State, 473 So.2d 1253 (Fla. 1985). There is no conflict between Hill and Bundy, supra. As pointed out by the Appellant, in both cases the issue of competency was not raised on direct appeal. However, in Hill, supra, the defendant at post-conviction presented "facts and circumstances that were not presented in the initial court proceedings and that are critical to the issue of Hill's competency to stand trial." Hill, supra, at 1234. These factual circumstances included an extensive prior history of mental illness that had not been discovered or presented at trial, the fact that prior to trial no competency evaluation of Hill had been conducted, and, that at the post-conviction stage Hill proffered two mental health experts who opined that Hill "was about as incompetent to stand trial,

in my professional opinion, as anyone that I have seen except for several people who are actively hallucinating at the time of the interview." Hill, supra, at 1255. In contrast to Hill which involved circumstances not presented in the initial court proceedings, the Appellant herein merely relied upon the circumstances presented at the trials and reflected in the records on appeal. The trial judge was thus correct in relying upon Rule 3.850 and Bundy, supra and ruling that the claim based upon the record on direct appeal could and should have been presented in direct appeal to this Court. See also, Lambrix v. State, 559 So.2d 1137, 1138 (Fla. 1990) (claim based on information which was contained in the original record of the case must be raised on direct appeal).

Moreover, the State would note that the lower court granted an evidentiary hearing on the Appellant's claim of ineffective assistance of counsel for failure to request a competency hearing in the Carol City case[21] (SR.13-17) and made extensive findings of fact on this claim. (SR.322-326) The Appellant has not briefed this issue and thus abandoned same, Duest v. Dugger, 555 So.2d 849 (Fla. 1990). However, the findings of the lower court on this issue further demonstrate the lack of any prejudice to the Appellant in the failure to conduct a pretrial competency hearing in the Carol City case. As admitted by the Appellant and noted by the lower court, all four court-appointed psychologists and psychiatrists, who were familiar with the prior background of the defendant, concluded that he was competent and three of these experts found him to be malingering prior to trial in the Carol City case. (SR.8-10) Immediately after the conclusion of trial, the trial judge discharged trial counsel and appointed new counsel for purposes of appeal.

---

[21] In the Hialeah case a full competency hearing was held, the defendant was found competent and that finding was appealed and upheld by this Court. Ferguson v. State, supra, 417 at 634.

(SR.325) New counsel, within ten days of appointment, filed a motion for new trial, alleging that defendant was incompetent to stand trial and could not assist in the appellate process. Id. On the same day new counsel also filed for additional psychiatric evaluations and requested a competency hearing. Id. On August 22, 1978, prior to the commencement of the Hialeah case, the trial court held a competency hearing for both the Carol City and the upcoming Hialeah case. Three defense experts testified that Ferguson was not competent and four other experts testified that he was competent and capable of aiding and assisting counsel. (SR.325-326) The trial court found the defendant to be competent to stand trial on August 28, 1978. (SR.326) The findings resulting from the competency hearing were appealed to this Court in the Hialeah case. Ferguson v. State, supra, 417 So.2d at 634. This Court expressly ruled: "Although the medical evidence was conflicting, there was adequate testimony to support the trial judge's finding that defendant was competent to stand trial." Id. The Appellant at the evidentiary hearing below presented no additional evidence to support a claim of incompetency in 1978 or cast any doubt as to the 1978 competency finding. There has thus been no showing of prejudice to the defendant by failing to have a "pretrial" competency hearing in the Carol City case.

B. JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING ROLE

The Appellant contends that the Florida Standard Jury Instructions prejudicially diminished the jury's sentencing responsibility pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985). The lower court properly found this claim procedurally barred: "under the authority of Combs v. State, 525 So.2d 853, 855-857 (1988), this issue is not one of error or fundamental

error, and therefore cannot be raised for the first time in a motion for post-conviction relief. See, e.g., Woods v. State, 531 So.2d 79 (Fla. 1988); Doyle v. State, 526 So.2d 909 (Fla. 1988); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987)." (R.1510-1511) The Appellant has also contended that this claim should not have been procedurally barred because he had alleged that trial counsel was ineffective for failing to object to the Caldwell violation but that the circuit court "inexplicably" struck this allegation. See Brief of Appellant at p. 92. The State would note that contrary to the Appellant's assertions, he did not allege ineffective assistance of counsel on this issue in either his 1987 motion for post-conviction relief or his 1989 supplement thereto. Rather, the Appellant belatedly added this claim of ineffectiveness, more than four (4) years after the completion of the direct appeal proceedings, with no proffer of why it could not have been discovered or raised earlier. The State argued that this claim of ineffectiveness was outside the two year limitation of Fla.R.Crim.P. 3.850 (R.2784-86) and the lower court struck same. (R.2774, 1511). See also, Kight v. Dugger, 574 So.2d 1066 (Fla. 1990) (a procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel).

C. THE BATSON - NEIL CLAIM

The State has already addressed this issue exhaustively in its argument II(E) herein at pp. 81-86 of this brief. The Appellee will thus rely on its previous argument for the position that the trial court properly found this issue to be procedurally barred.

D. CLAIM THAT JURY INSTRUCTIONS SHIFTED THE BURDEN OF PROOF AS TO SANITY

The Appellant did not raise any issue as to the jury instructions on sanity in his motion for post-conviction relief. In his Supplement, filed two years after the initial motion, defendant claimed that the trial court's instructions to the jury on the issue of sanity in the Hialeah case unconstitutionally relied upon a rebuttable presumption and thus shifted the burden of proof. (R.1152). In Smith v. State, 521 So.2d 106 (Fla. 1988), this Court held that the jury instruction on insanity disapproved in Yohn v. State, 476 So.2d 123 (Fla. 1985), was not fundamental error which could be raised for the first time on appeal. This Court approved the decision in State v. Lancia, 499 So.2d 11 (Fla. 5th DCA 1986), which held that this issue could not be considered on a motion to vacate judgment. Smith, supra, at 108. In addition, in Martin v. Wainwright, 497 So.2d 872, 874 n.2 (Fla. 1986), this Court held that this claim as to jury instructions, if objected to, should have been raised, if at all, on direct appeal. The lower court herein relied upon Smith, Martin, Lancia, supra and thus properly found this claim to be procedurally barred. (R.1511). As in Argument III(B) herein, no claim of ineffective assistance of counsel was raised in either the initial motion for post-conviction relief or the Supplement thereto. The State argued that the ineffective assistance claim in regard to this issue was asserted belatedly, more than four years after the completion of the direct appeal proceedings, and without any proffer as to why it could not be discovered or raised earlier. The trial court thus struck ineffectiveness claim. (R.1511)

E. UNCONSTITUTIONALITY OF HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

In claim eight of his Supplement, the Appellant alleged that both juries were instructed and the trial court relied upon an unconstitutionally vague aggravating circumstance, HAC, in violation of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The lower court found this claim to be procedurally barred as it could or should have been raised on direct appeal. (R.1512) This Court has repeatedly upheld such a finding. See Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990); Adams v. State, 543 So.2d 1244, 1249 (Fla. 1989); Harich v. State, 542 So.2d 980, 981 (Fla. 1988); Buenoano v. State, 559 So.2d 1161 (Fla. 1990), Atkins v. Dugger, 541 So.2d 1165, 1166 n.1 (Fla. 1989).

F. FAILURE TO NARROW SENTENCING DISCRETION

The defendant claimed that his resentencing was unconstitutional in that the Florida sentencing scheme failed to channel sentencing discretion. The lower court found this claim to be procedurally barred as it could or should have been raised on direct appeal. (R.1512) This Court has previously affirmed such findings of procedural bar. Atkins v. Dugger, supra, Bertolotti v. State, 534 So.2d 386, 387 n.3 (1988); Roberts v. State, supra, Smith v. Dugger, 525 So.2d 1293 (Fla. 1990).

G. UNCONSTITUTIONALITY OF SCHEME FOR WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES

In his Supplement the defendant alleged that the sentencing instructions regarding weighing of aggravating and mitigating factors were unconstitutional as they created a presumption that death was the appropriate penalty, and they unconstitutionally shifted the burden to defendant to show that life was the

appropriate sentence. The lower court found this claim to be procedurally barred as it could and should have been raised on direct appeal. (R.1512-13) This Court has previously affirmed such a finding of procedural bar. Harich v. Dugger, 542 So.2d 980, 981 (Fla. 1989); Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989); Atkins v. Dugger, supra.

CONCLUSION

Based upon the foregoing facts and citations of authorities, the Appellee respectfully requests that this Court affirm the lower court's order denying the Motion to Vacate Judgment and Sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Florida Bar #0375934
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to RICHARD H. BURR, III, Esq., 99 Hudson Street, 16th Floor, New York, New York 10013; and E. BARRETT PRETTYMAN, JR., Esq., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, on this 22 day of , 1991.

FARIBA N. KOMEILY
Assistant Attorney General