IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,694

FILED
SID J. WHITE
JAN 4 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

SAMUEL RIVERA,

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

THE STATE OF FLORIDA, by and through the undersigned counsel, files this Response to the Petitioner's Petition for Extraordinary Relief and for a Writ of Habeas Corpus, and states as follows:

I

PROCEDURAL HISTORY AND FACTS

On November 8, 1986, the Petitioner was charged with the First Degree Murder of Emilio Miyares, with a firearm; the Armed Robbery of Emilio Miyares, with a firearm, the Armed Robbery of Aurora Macias, with a firearm; the Attempted Armed Robbery of Maria Fernandez and/or Gladys Orr, with a firearm; the Armed Burglary of the Dollar General Corporation, with a firearm, Carrying a Concealed Firearm; and the Possession of a Firearm During the Commission of a Felony. All crimes were alleged to

have been committed on November 6, 1986. (R. 1-5A).[1] Jury trial commenced on June 24, 1987, and except that the Petitioner was found guilty of Armed Robbery of Emilio Miyares, without a firearm, and Armed Burglary of the Dollar General Corporation, with a deadly weapon, on July 7, 1987, the Petitioner was found guilty as charged. (R. 272-278). On that date, the Petitioner was also adjudicated guilty on all counts. (R. 279-281).

On July 9, 1987, the penalty phase commenced before the same jury. On that same day, the jury recommended by a vote of seven (7) to five (5) that the Petitioner be sentenced to death for the murder of Emilio Miyares. (R. 2051). On July 14, 1987, the trial court followed the jury's recommendation and sentenced the Petitioner to death. (R. 2076-2092). The trial court rendered its written sentencing order on July 21, 1987. (R. 322-330). The Petitioner was also sentenced to a total of 301 years imprisonment for his other offenses. (R. 315-321).

The Petitioner appealed his convictions and sentences to this Court, alleging the following grounds on appeal:

POINT I

WHETHER THE TRIAL COURT ERRED IN LIMITING THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 SOLELY AND NOT ADVISING THE JURY THAT IT COULD CONSIDER

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[1] The symbol "R" denotes the record on appeal in the Florida Supreme Court, Case Number 71,026. The Respondent, pursuant to Fla. Stat. 90.202(6), hereby requests that this Court take judicial notice of its own file in Case No. 71,026.

NONSTATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

POINT II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

POINT III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

POINT IV

WHETHER COUNSEL FOR DEFENDANT WAS DEFICIENT AT SENTENCING BY FAILING TO INTRODUCE EVIDENCE OUTSIDE SECTION 921.141 THEREBY PREJUDICING THE OUTCOME OF THE HEARING.

POINT V

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE PROSECUTION'S REPEATED IMPROPER ARGUMENT, WHICH SINGULARLY, AND IN THE CUMULATIVE WERE IMPROPER AND PREJUDICED THE DEFENDANT.

POINT VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADVISE THE JURY, DURING THE PENALTY DELIBERATIONS ONCE ASKED BY THE JURY, THE PRISON TIME CALLED FOR BY THE CHARGES FOR WHICH THEY HAD CONVICTED THE DEFENDANT.

See Initial Brief of Appellant, Case No. 71,026.

On June 29, 1989, this Court unanimously affirmed the Petitioner's convictions and sentences, including the death sentence. Rivera v. State, 545 So.2d 864 (Fla. 1989). The following account of the crimes herein was given:

On November 6, 1986, Samuel Rivera and his brother were en route to the Palm Springs Shopping Mall in Hialeah by bus when Rivera's brother purchased a semiautomatic pistol contained in a blue duffel bag. After their arrival, the two entered a Dollar General Store adjacent to the mall. While his brother watched the store employees in the main part of the store, Rivera went into a storage area. After Rivera ransacked the storage area and pried open an unused cash register, both men left the store. Acting on information supplied by suspicious customers, two policemen soon located Rivera and his brother in the mall's parking lot. When the officers began to question the men, Rivera grabbed the blue bag containing the gun and the two brothers ran in different directions. Officer Emilio Miyares chased Rivera into the mall and eventually caught up with him after Rivera tried to escape through doors that could not be opened. The two fell to the ground and, during the ensuing struggle, Rivera shot Miyares with the officer's gun. [footnote omitted]. Witnesses testified that the officer was shot while he was kneeling on the floor with his hands upraised.

Immediately after the shooting, Rivera ran out of the mall and commandeered a car by forcing a woman, her young child, and her elderly mother out of their automobile at gunpoint. Rivera then sped off in the car, driving around rush-hour traffic onto the sidewalk, until he eventually crashed into a parked car. He then ran on foot to a house and hid under a table on the back patio where he was eventually located by the police K-9 unit. After a struggle with the dog, during which Rivera fell and hit his head, he was arrested. Rivera later claimed that he shot Miyares in self defense after the officer hit him in the head with the gun. However, eyewitnesses testified that they never saw Miyares hit Rivera with anything and that Rivera did not have any blood on him when he ran from the scene of the shooting. Additionally, no blood was found inside the stolen car which had a white leather interior.

Rivera, supra, 545 So.2d at 864-865.

This Court held two aggravating factors found by the trial court, that the killing was committed in a cold calculated, and premeditated manner and that it was especially heinous, atrocious and cruel, to be inapplicable. Four other aggravating factors: (1) that the defendant was previously convicted of a violent felony; (2) that the defendant knowingly created a great risk of death to many persons; (3) that the murder was committed while the defendant was engaged in flight after the commission of an attempted robbery and burglary; and, (4) that the murder was committed for the purpose of avoiding lawful arrest, were upheld. Thus, this Court held, "We are convinced that even without these two aggravating circumstances, there was no reasonable likelihood of a life sentence being imposed because of the existence of four other valid aggravating circumstances and no mitigating circumstances." Rivera, supra, 545 So.2d at 866.

On September 24, 1990, the Governor signed a warrant for the Petitioner's execution. The warrant set the execution for the week of November 27, 1990, and the execution was scheduled for November 28, 1990. On October 29, 1990, this Court granted a stay of execution until March 15, 1991, and ordered that the Petitioner file any motions for post-conviction relief on or before December 15, 1990. On December 17, 1990 the Petitioner filed the instant petition in this Court, and a "Motion to Vacate Judgment and Sentence With Special Request for Leave to Amend" in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The following twenty-four (24) claims have been raised in the Circuit Court:

CLAIM I

THE INTRODUCTION OF A "MISDEMEANOR" AS A PRIOR VIOLENT FELONY AGGRAVATING FACTOR SO PERVERTED THE SENTENCING PHASE OF MR. RIVERA'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLA. STAT. SEC. 921.141(5)(b). MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE ZEALOUSLY, IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM II

SAMUEL RIVERA'S JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S.CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

MR. RIVERA'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENTS AND INTENTIONAL DECEPTION OF THE JURY, THE COURT AND DEFENSE COUNSEL.

CLAIM IV

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE PORTION OF HIS TRIAL AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

CLAIM V

MR. RIVERA WAS DENIED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S COMPLETE FAILURE TO CONDUCT ANY PENALTY INVESTIGATION, OR TO OBTAIN EXPERT MENTAL HEALTH ASSISTANCE.

CLAIM VI

MR. RIVERA'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS DENIED WHEN THE COURT LIMITED THE CROSS-EXAMINATION OF THE STATE'S WITNESSES.

CLAIM VII

MR. RIVERA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE OF INADEQUACY IN HIS PRETRIAL EVALUATIONS, AND EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. RIVERA WAS UNABLE TO ESTABLISH DIMINISHED CAPACITY DEFENSES, AND IN THE FAILURE TO CHALLENGE AGGRAVATING CIRCUMSTANCES PROPERLY AND TO ESTABLISH STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES, AND THUS IN THE LACK OF A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

CLAIM VIII

MR. RIVERA'S JUDGE AND JURY AT HIS TRIAL CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S FAMILY IN VIOLATION OF MR. RIVERA'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEEN AMENDMENTS.

CLAIM IX

IT WAS ERROR TO FAIL TO REVERSE MR. RIVERA'S SENTENCE OF DEATH AND REMAND FOR RESENTENCING UPON THE STRIKING OF TWO AGGRAVATING FACTORS, AND MR. RIVERA WAS DENIED THE PROTECTIONS AFFORDED UNDER THE FLORIDA CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM X

MR. RIVERA WAS DENIED HIS EIGHTH AD FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING COURT USED IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES.

CLAIM XI

MR. RIVERA'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO HITCHCOCK V. DUGGER, 107 S.CT. 1821 (1987); CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1985); AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

CLAIM XII

THE TRIAL COURT'S CONSTITUTIONALLY DEFICIENT INSTRUCTIONS WERE FUNDAMENTAL ERROR WHICH VIOLATED MR. RIVERA'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO URGE THIS DISPOSITIVE, CRITICAL CONSTITUTIONAL CLAIM.

CLAIM XIII

SAMUEL RIVERA'S CAPITAL CONVICTION AND DEATH SENTENCE, RESULTING FROM PROCEEDINGS WHICH DID NOT PROVIDE FOR A UNANIMOUS, OR EVEN MAJORITY, VOTE BY THE JURY AS TO WHETHER THE PETITIONER WAS GUILTY OF PREMEDITATED OR FELONY MURDER, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIV

THE TRIAL COURT'S AND DEFENSE COUNSEL'S FAILURES TO ASSURE THAT MR. RIVERA WAS PROVIDED WITH A TRANSLATOR, TO ASSURE THAT MR. RIVERA WAS PROVIDED CONTINUOUS TRANSLATION, AND TO ASSURE THAT ANY TRANSLATOR WHO WAS PROVIDED WAS PROPERLY QUALIFIED VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XV

MR. RIVERA'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

CLAIM XVI

MR. RIVERA'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. RIVERA TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. RIVERA TO DEATH.

CLAIM XVII

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. RIVERA'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XVIII

MR. RIVERA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

CLAIM XIX

THE TRIAL COURT'S AND DEFENSE COUNSEL'S FAILURE TO ASSURE MR. RIVERA'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XX

THE TRIAL COURT'S ERROR IN DISMISSING CERTAIN JURORS FOR CAUSE DEPRIVED MR. RIVERA OF HIS RIGHTS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND WITHERSPOON V. ILLINOIS. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXI

MR. RIVERA'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, THE COMBINATION OF WHICH DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXII

THE APPLICATION OF RULE 3.851 TO MR. RIVERA'S CASE VIOLATES HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIES HIM HIS RIGHT TO REASONABLE ACCESS TO THE COURTS.

CLAIM XXIII

THE HIGHLY VISIBLE PRESENCE OF UNIFORMED POLICE THROUGHOUT THE TRIAL AND INTENSE SECURITY MEASURES AT THE READING OF THE VERDICT DURING MR. RIVERA'S TRIAL IN THE JURY'S PRESENCE ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS IN THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XXIV

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. RIVERA'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On January 2, 1990, the State filed its Response to the Motion to Vacate in the Circuit Court. The State has agreed to an evidentiary hearing on the issue of ineffective assistance of counsel at the sentencing phase of trial. On January 3, 1990, pursuant to the Petitioner's motion for recusal, the original trial judge, the Honorable Martin Greenbaum, recused himself from the post conviction proceedings. An evidentiary hearing has thus not been scheduled as yet, pending transfer to another judge in the Eleventh Judicial Circuit.

II. ARGUMENT

CLAIM I

THE INTRODUCTION OF A "MISDEMEANOR" AS A PRIOR VIOLENT FELONY AGGRAVATING FACTOR AND THE REPEATED REFERENCES TO THE VICTIM'S OCCUPATION SO PERVERTED THE SENTENCING PHASE OF MR. RIVERA'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLA. STAT. SEC. 921.141(5)(B). MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE ZEALOUSLY, IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Petitioner has alleged that the State improperly used a prior conviction for aggravated assault upon a police officer in Puerto Rico, to prove the aggravating factor of a prior violent felony at trial, because, said crime is a misdemeanor under Puerto Rico law. Petitioner has also raised this issue as an instance of ineffective assistance of trial counsel in his Motion to Vacate in Circuit Court. The State in its Response to that motion has disputed the claim that this prior conviction was a misdemeanor, and has agreed to an evidentiary hearing on the ineffective assistance of trial counsel.

In so far as the Petitioner has alleged ineffective assistance of appellate counsel herein, the trial and sentencing records reflect that there was no mention of this conviction being a "misdemeanor," let alone an objection on this basis. The

only objections at trial were, first, "as to the fashion in which it [the charging document from Puerto Rico] is going to be translated." (R. 1971). Trial counsel had stated that normally the "consulate" would translate the documents from Puerto Rico at the time of certification, whereas the State sought and introduced a translation by the official court interpreter. (R. 1969). Second, trial counsel objected that the court case numbers on the charging document and sentencing document did not match. At trial and during these post conviction proceedings there has never been a claim that the translation actually presented by the State was erroneous, or, that the sentencing document was not for the charge document presented, or that the defendant was not convicted or sentenced for the charge translated during the sentencing. Since the error claimed herein, if any, was not preserved at sentencing, the State submits that appellate counsel cannot be ineffective for having failed to raise this issue. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990), wherein this Court held:

> Duest raises several points which he claims involve ineffective assistance of appellate counsel. We find that a number of these were not properly preserved for appeal by trial counsel. Therefore, appellate counsel cannot be deemed ineffective for failing to raise the following issues.
>
> (1) ...
>
> (2) Evidence of other crimes and bad character was improperly introduced by the State
>
> ...

In so far as the Petitioner has alleged fundamental error herein, the State submits that no error has as yet been established, pending an evidentiary hearing below. Moreover, the State would note that at the penalty phase it presented a certified copy of the sentence and conviction for the following prior charge in Puerto Rico, which the Petitioner had pled guilty to, as translated by the Official Court Interpreter:

> Said defendant Samuel Rivera Martinez, on or about April 4, 1984, in Ponce, Puerto Rico, which is under the jurisdiction of the District Court of Ponce, Puerto Rico, County of Ponce, illegally, voluntarily, maliciously and criminally used force or violence against a human being, a police officer, Carlos Irizarry Lugo, with the intent of causing harm, committing said act upon the person of a public servant, during the performance of his duty, or as a result of these, the defendant, having knowledge that the assaulted person was a public official set upon attacking him with a switchblade, cutting weapon, and without consummating the intended aggression due to circumstances other than the will of the defendant. Act against the law.
>
> (R. 1972, 1981-82).

The Petitioner testified that he had pled guilty to aggravated assault upon advice of his counsel in Puerto Rico. (R. 1996-97). The aggravating factor of prior conviction of a felony involving the threat of violence to a person was thus applied, as the trial judge found that the defendant was "convicted of aggravated assault against a police officer in the Commonwealth of Puerto Rico on the 4th day of April, 1984." (R. 2078).

The Petitioner has claimed that the above charge against him was an "attempted aggravated battery against the police officer Carlos Irizarry Lugo", which under Puerto Rico law is a "misdemeanor." See Petition at pp. 10-12. In support of its allegation that the charge was a misdemeanor and not a felony, the defendant has proffered the affidavit of an attorney admitted to the practice of law in the Supreme Court of Puerto Rico, who has made the following analysis of Puerto Rico law.

The affidavit first states that under Article 12 of the Penal Code of Puerto Rico, section 3044 of laws of Puerto Rico, title 33, 33 L.P.R.A. 3044, crimes are classified as misdemeanors and felonies; the former being crimes punishable by imprisonment in jail for a term not exceeding six months or by a fine not exceeding five hundred dollars or by both penalties, and the latter comprising all other crimes:

> **Section 3044 Classification of Crimes**
>
> Crimes are classified in misdemeanors and felonies.
>
> A misdemeanor is a crime punishable by imprisonment in jail for a term not exceeding six months or by a fine not exceeding *five hundred dollars or* by both penalties, at the discretion of the court. Felony comprises all other crimes.
>
> Id. (emphasis added).

The affidavit has then continued to state that aggravated battery upon a police officer is a misdemeanor, by partially quoting 33 L.P.R. 4032 as follows:

> 9. Article 95 of the Penal Code of Puerto Rico, 33 L.P.R.A. 4032(a) reads as follows:
>
> **Section 4032 Aggravated battery:**
>
> Battery shall be considered aggravated and punishable by imprisonment for a term not exceeding six months or a maximum fine of five hundred dollars or both penalties in the discretion of the court, when committed under any of the following circumstances:
>
> (a) when committed upon a public officer in the discharge of his duties, or as a consequence thereof, if it was known or declared to the offender that the person assaulted was a public officer, or in his presence.
>
> See Petition at p. 11.

The defense affidavit has conveniently not quoted the remainder of above section 4032, which establishes that the charge against the defendant herein, even if construed under this section, is in fact a felony under Puerto Rico law due to the possession of a deadly weapon, the switch blade - knife.[2] Section 4032, in its entirety, however, reads as follows:

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[2] For the purposes of assault and battery, a knife is a deadly weapon per se. People v. Diaz, 66 P.R.R. 710 (Puerto Rico S.Ct. 1946).

4032 - Aggravated Battery

Battery shall be considered aggravated and punishable by imprisonment for a term not exceeding six months or a maximum fine of five hundred dollars or both penalties in the discretion of the court, when committed under any of the following circumstances:

(a) When committed upon a public officer in the discharge of his duties, or as a consequence thereof, if it was known or declared to the offender that the person assaulted was a public officer, or in his presence.

(b) When committed in a court of justice, or in any place of religious worship or in a place where persons are assembled for lawful purposes.

(c) When committed by a person of robust health upon one who is aged or decrepit.

(d) When committed by an adult male on the person of a child under 16 years of age.

(e) When committed with the intent to inflict serious bodily injury.

(f) When committed by a public officer under color of authority and without cause.

(g) When committed by one or more persons making use of undo advantage.

Aggravated battery shall be considered as a felony and shall be punishable by imprisonment for a fixed term of 3 years.

(a) When the person enters the dwelling of a person and there commits the assault.

(b) When serious bodily injury is inflicted on the person assaulted.

(c) When committed with deadly weapons under circumstances not amounting to an intent to kill or maim.

The fixed sentence established may be increased to a maximum of five (5) years in case aggravating circumstances are present; in case attenuating circumstances are present it may be reduced to a minimum of two (2) years.

The court may impose the penalty of restitution in addition to the established penalties.

33 L.P.R.A. 4032 (emphasis added).

An attempt, under the laws of Puerto Rico, does not reduce the degree of a crime. Thus an "attempted" aggravated battery does not reduce the felony status of said crime in this case. See 33 L.P.R.A. 3121 and 3122:

Section 3121. Definition of attempt.

An attempt shall exist when the person commits acts or makes omissions unequivocally directed to the execution of an offense, which is not consummated through circumstances extraneous to his will.

Section 3122. Penalty for attempt.

Any attempt to commit crime entails a fixed penalty equal to half of the penalty fixed for the offense committed, but the maximum penalty for attempt to commit a crime shall not exceed ten (10) years.

In determining this fixed penalty, the court must consider the extenuating or aggravating circumstances present in each case. Should there be aggravating circumstances, the fixed penalty shall be increased to a maximum equal to half of the fixed penalty stipulated for the

> offense committed with aggravating circumstances. If there should be extenuating circumstances, the fixed penalty shall be reduced to a minimum equal to half of the fixed penalty stipulated for the offense committed with extenuating circumstances.

Apart from being a felony under the provisions utilized by the Petitioner, the State would note that the charge against the Petitioner also constitutes the felony of aggravated assault under other provisions of the laws of Puerto Rico. This is because any attempt to commit a battery, coupled with an ability to commit same is defined as an "assault." See 33 L.P.R.A. 821:

> **Assault and battery defined**
>
> The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself an immediate intention, coupled with an ability to commit a battery, is an assault.

An aggravated assault occurs when the simple crime of assault is committed with a deadly weapon or committed upon an officer in the lawful discharge of his duties. See 33 L.P.R.A. 826:

> **Aggravated assault and battery**
>
> An assault and battery becomes aggravated when committed under any of the following circumstances:
>
> 1. When committed upon an officer in the lawful discharge of the duties of

his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty;

2. When committed in a court of justice, or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement;

3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery;

4. When committed by a person of robust health or strength upon one who is aged or decrepit;

5. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child;

6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip, cowhide or cane;

7. When a serious bodily injury is inflicted upon the person assaulted;

8. When committed with deadly weapons under circumstances not amounting to an intent to kill or main;

9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury;

10. When committed by any person or person in disguise.

(emphasis added)

Any aggravated assault under the laws of Puerto Rico also constitutes a felony as the maximum punishment is a two year term of imprisonment. See 33 L.P.R.A. 3044, previously quoted herein, at p. 48, and 33 L.P.R.A. 828:

Punishment for aggravated assault

> The punishment for an aggravated assault, or aggravated assault and battery, shall be a fine of not less than fifty nor more than one thousand dollars, or imprisonment in jail not less than one month nor more than two years, or by both such fine and imprisonment.

The State thus respectfully submits that the Petitioner's allegations as to a misdemeanor are apparently based upon the convenient omission of relevant sections of the Puerto Rico Penal Code as above set forth.

Furthermore, the State submits that the elements of the crime and its status under the analogous Florida Statutes should be determinative in this situation. "The various jurisdictions may choose to punish the same acts differently, so the elements of a crime are the surest way to trace that crime." Forehand v. State, 537 So.2d 1031 (Fla. 1989) (emphasis added). In Forehand, supra, the First District Court of Appeal certified the following question to this Court:

> In determining the analogous or parallel Florida Statue for the purpose of scoring prior federal, foreign, military or out-of-state convictions, should a reviewing court base its determination on the degree of crime imposed and the sentence received in the foreign state or should a reviewing court determine the analogous or parallel Florida Statute by ascertaining the elements of the foreign conviction,

> determining whether Florida considers such actions to be criminal and, if so, categorizing and scoring the foreign conviction as the analogous or parallel Florida crime would be categorized and scored?
>
> Id. (emphasis added).

This Court answered the above question by agreeing that the elements of the crime and the analogous Florida Statute were determinative instead of the stated degree and punishment imposed by the foreign jurisdiction. Id.

In this State, an attempted aggravated battery upon a law enforcement officer is a felony. See Fla. Stat. 784.07(2). An aggravated assault upon a police officer is also a felony. (Id.). Thus, Florida law, which requires a prior violent felony conviction before such conviction is considered as an aggravating factor, has not been violated. The State would further note that, "Testimony concerning the events which resulted in the [prior] conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to appropriate sentence." Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989). That another jurisdiction may have chosen to punish the same act differently than Florida should be of no import, as the punishment does not detract from either the substance of the prior offense, or, its value in an individualized sentencing proceeding which evaluates the character of the defendant and the circumstances of the crime.

In addition, the State would note that the defendant was contemporaneously convicted of the armed robbery of Aurora Macias and the attempted armed robbery of Gladys Orr and/or Maria Fernandez (none of whom were the homicide victim). (R. 27-30, 315-321). See also LeCroy v. State, 533 So.2d 750 (Fla. 1988). Moreover, the certified copy of the prior conviction and sentence reflects the concurrent sentencing of the Petitioner for other cases, G84-439, G84-438, G84-436. (R. 283); see also, Petition at p. 10. The records supplied by the Petitioner in his Motion to Vacate reflect that he had admitted to his psychologist that the charges of aggravated assault herein arose when he was fleeing the scene of a robbery. (See Petitioner's Appendix 9 to Motion to Vacate, deposition of Dr. Mary Haber at p. 58). The sentencing documents in Dr. Haber's files, included in the Petitioner's Appendix to his Motion to Vacate, confirm that the Petitioner was in fact concurrently convicted and sentenced to five years for attempted robbery and breaking and entering with intent to commit robbery. (See also, Petitioner's Appendix 10 to Motion to Vacate, the inmate's prior record from Florida State Prison). Thus, even if the use of the aggravated assault herein was not proper, there is still ample basis for the aggravating circumstance of prior conviction of a violent felony, and any error was harmless beyond a reasonable doubt. See Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990); Tafero v. State, 561 So.2d 557, 559 (Fla. 1990).

In Duest v. Dugger, at post-conviction proceedings, Duest demonstrated that his Massachusetts conviction for armed assault with intent to murder had been vacated. He argued that based upon Johnson v. Mississippi, 486 U.S. 578 (1988), he was entitled to a new sentencing hearing as the prior violent felony from Massachusetts had been vacated. This Court rejected this argument and stated, "However, in the instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony. [citations omitted]." Id. This Court further noted that there were "three other valid aggravating circumstances," and even if the prior violent felony factor was inapplicable, the sentence of death was still appropriate. Id.

Likewise, in Tafero, supra, 561 So.2d at 559, this Court stated:

> As a last note on the aggravating factor of previous conviction of violent felony, even if, by some stretch of the imagination, Tafero's prior conviction are ever vacated, this factor has still been established beyond a reasonable doubt. Tafero killed two people, the jury convicted him of both murders, and the court imposed two death sentences. Each conviction supported finding a previous felony conviction for the other sentence. Thus, there is an ample basis for this aggravating factor which overturning those other convictions will not affect.

Similarly, in the instant case there is still ample basis for the aggravating circumstance of prior violent felony.

Moreover, even if that factor is inapplicable, there are still three other valid aggravating circumstances: 1) the defendant knowingly created a great risk of death to many persons; 2) the defendant committed the capital felony while he was engaged in the flight after the commission of an attempted robbery and burglary; and, 3) the defendant committed the capital felony for the purpose of avoiding a lawful arrest or effecting an escape from custody. (R. 323-325). No mitigating evidence was presented and none was found. The trial court in its sentencing order also specifically stated that, "The Court further finds that each of the aggravating circumstances under Subsections (b) through (i) standing alone outweigh any and all possible mitigating circumstances in this case." (R. 328-329). Thus the State submits that even if the application of the prior violent felony factor was erroneous, any error was harmless beyond a reasonable doubt and did not prejudice the defendant.

The Petitioner has also argued that references to the victim herein, Officer Miyares', occupation as a police officer were erroneous because they constituted a nonstatutory aggravating factor. The State submits that the victim's occupation in this case was relevant to the two statutory aggravating circumstances under Sections 921.141(5)(e) and (g), Florida Statutes (1985), whether crime for which the defendant is to be sentenced was committed for the purposes of avoiding or preventing a lawful arrest or effectuating an escape from custody, and whether the crime for which the defendant is to be sentenced was committed to

hinder the lawful exercise of any governmental function or the enforcement of laws; See Riley v. State, 366 So.2d 19 (Fla. 1978); Jones v. State, 440 So.2d 570 (Fla. 1983). Moreover, that portion of the State's penalty phase closing argument quoted as an impropriety by the Petitioner (see Petition at pp. 13-14), was raised as an issue of improper prosecutorial argument in the Petitioner's direct appeal brief. See initial brief of Appellant, Case No. 71,026, at p. 37. The State would note that despite relevance, the trial judge sustained an objection to the argument now complained of and issued a curative instruction. (R. 2020). In any event, a habeas corpus claim of ineffective assistance of appellate counsel fails when the issue was raised by counsel and considered by the court. Johnson v. Dugger, 523 So.2d 161, 162 (Fla. 1988). To the extent that the Petitioner is seeking a second appeal of this issue, he is again foreclosed since, "Habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised ... on direct appeal ...". Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

The Petitioner has also complained of the trial judge's comments about police officers, after the conclusion of sentencing. Again references to the victim's occupation was relevant. Moreover, no objection was raised as to these comments by the trial counsel. (R. 2096). Since this issue was not preserved below, appellate counsel cannot be deemed ineffective for having failed to raise it. Duest, supra, 555 So.2d at 852. Finally, the trial judge's comments were made after the sentence

was pronounced and were an expression of opinion after sufficient aggravating circumstances were found. As such the comment does not constitute error. See Suarez v. State, 481 So.2d 1201, 1210 (Fla. 1985). ("It is thus apparent that the mention of lack of remorse comes after the judge concluded that there was sufficient and great aggravating circumstances existing to justify the sentence of death. The balancing and weighing had already been done. Lack of remorse merely constituted an observation and expression of opinion and philosophy by the trial judge after sufficient aggravating circumstances had been found.").

As seen above this claim is without merit.

CLAIM II

SAMUEL RIVERA'S JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S.CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As in claim one, the Petitioner alleges that the jury and judge were provided with misinformation when they were presented with the defendant's prior conviction for aggravated assault on a police officer, which the Petitioner alleges was a misdemeanor. In addition, the Petitioner has alleged that on December 11, 1990, he, for the first time, began challenging that 1984 conviction in the Puerto Rico courts. The fact that the Petitioner has filed for post conviction relief in the latter

courts does not provide a basis for relief by this Court. At the present time, the conviction is still valid, and the mere fact that the Petitioner has now sought to challenge the conviction is not sufficient in and of itself to question its validity. See, e.g., Tafero, supra, 561 So.2d at 559; Buenoano v. Dugger, 559 So.2d 1116, 1120 (Fla. 1990); Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986); Adams v. State, 449 So.2d 819, 820 (Fla. 1984).

CLAIM III

LACK OF AUTHENTICATION BY ANY WITNESS WITH KNOWLEDGE ALLOWED THE USE OF MISLEADING, IMPROPER AND HIGHLY PREJUDICIAL EVIDENCE BY THE COURT AND JURY TO FIND A NONSTATUTORY AGGRAVATING CIRCUMSTANCE AND TO IMPOSE A SENTENCE OF DEATH IN THIS CASE, RENDERING MR. RIVERA'S SENTENCE ARBITRARY AND CAPRICIOUS AND VIOLATING HIS FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner has first argued that appellate counsel was ineffective for failing to raise the issue of the authenticity of the charging document for the prior violent felony. He has stated that there was "no evidence presented that the documents presented conclusively pertained to the defendant. Except for one of the Denuncias there is no social security number found on the Denuncias and there was likewise no testimony presented that the defendant was the same person charged, convicted, and sentenced subsequent thereto: ..." See Petition at pp. 35-36. The State would first note that the trial counsel specifically stated that he was not objecting to lack of authenticity:

THE COURT: ....

Tell me what is the legal basis for your objection, nothing else.

MR. GURALNICK [defense counsel]: Simply that the legal basis for the objection is not to the authenticity..."

(R. 1971).

Furthermore, as noted in Claim I herein, the Petitioner himself testified that he had pled guilty to the aggravated assault charges presented by State. Moreover, there is no claim herein or in the post conviction proceeding in the Circuit Court, that the documents presented at sentencing do not pertain to the Petitioner! Thus this claim was not preserved below and is without merit. Appellate counsel was thus not deficient and no prejudice has been demonstrated. Duest, supra.

The Petitioner has also claimed that the record does not reflect that the Spanish translator at trial was qualified as to "ability, training or expertise." See Petition at p. 30. The Petitioner has added that the translator was not qualified to explain what the documents meant as he was not an expert in the substantive or procedural laws of Puerto Rico. The State would note that there was never an objection to the qualifications of the translator who was the Official Court Interpreter. (R. 1972). Moreover, the translator never gave an opinion as to the legal ramifications of the charging document under Puerto Rico law. He merely translated the document. (R. 1972, 1981-82). Thus the

translator did not need to be a legal expert on Puerto Rico law. Moreover, there is no complaint herein or in the post conviction proceedings below as to the accuracy of the translation rendered. Appellate counsel was thus not deficient in raising this issue and no prejudice has been demonstrated. This claim of ineffectiveness is therefore also without merit. Duest, supra.

CLAIM IV

> MR. RIVERA'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT (1) PROHIBITED CROSS EXAMINATION OF A STATE'S WITNESS AS TO POSSIBLE STEROID USE BY THE VICTIM, AND (2) DESPITE CONTINUING OBJECTIONS REGARDING CONVERSATIONS OVERHEARD ON THE POLICE RADIOS NOT ONLY ALLOWED SUCH TESTIMONY, BUT ALLOWED A TAPE AND TRANSCRIPT OF THE CONVERSATIONS TO BE PUT BEFORE THE JURY. THIS CONSTITUTED A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, POINTER V. TEXAS, 380 U.S. 403 (1965), AND SPECHT V. PATTERSON, 386 U.S. 605 (1967).

The Petitioner has first argued that he was deprived of the right to present a defense and cross examine witness Valerie Rao, M.D., "as to whether or not the victim was tested for steroids." See Petition at p. 40. The portions of the record on appeal quoted by the Petitioner, expressly reflect that the defense was in fact allowed to ask this question. (R. 1361). The witness answered that she did not know whether there were any steroids present in the victim's body, because, in the drug tests conducted, there was no screening for steroids. There was thus no denial of the right to present a defense or to cross examine witnesses. The Petitioner is apparently complaining about

another question by the defense counsel as to which an objection was sustained: "And isn't it true that steroids can cause personality alterations?" (R. 1361). The State objected on the grounds that there was no evidence of any steroids being present in the victim's body and the answer as to the effects of steroids was thus irrelevant. (R. 1361-63). The trial judge sustained this objection. (Id.). There was no evidence at trial, nor has the Petitioner claimed either herein or in the post conviction proceedings below, that the victim was using steroids. The effects of steroids were thus irrelevant and there was no abuse of discretion by the trial judge in sustaining an objection as to its effects on cross examination. Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 105 (1974); Also see Steinhorst v. State, 912 So.2d 332, 338-339 (Fla. 1982) ("In order to have developed the viable defense theory now asserted, defense counsel would have had to go beyond the scope of direct examination. This is a case in which it would have been proper to require the defendant to develop his theory, to call his own witness, as this theory was clearly a defensive matter well beyond the scope of direct examination.").

The Appellant has next argued that the admission into evidence of a police dispatch tape and the transcript thereof denied him the right of confrontation. The State would first note that the dispatch tape, which contained the victim's communications during his chase and struggle with the Petitioner, was clearly admissible under Sections 90.803(1) and (2), Florida Statutes, as excited utterances or spontaneous statements. The

"unknown voices" on the tape which is complained of herein, was identified at trial and its owner testified. (R. 1255-56). Five eyewitnesses who heard and saw the shots fired also testified. There was thus no denial of confrontation. Moreover, trial defense counsel stipulated to the authenticity of the tape recording (R. 1391), and also stipulated to the transcript of the tape being provided to the jury. (R. 1400). The only objection at trial to the tape was to "the chain of custody." (R. 1391). In fact, both in the proceedings below and herein, the Petitioner has stated that trial counsel was ineffective for having stipulated to the tape and transcript. See Petition at p. 47. Thus appellate counsel was not ineffective for having failed to raise this issue on appeal. Steinhorst, supra, 412 So.2d at 338 ("Since defense counsel did not present this latter argument [the argument on appeal] to the trial court, it is not properly before this Court on appeal"); Duest, supra. Moreover, clearly this was not a point upon which appellate counsel could reasonably rely to reverse Petitioner's conviction, in light of the overwhelming, direct, eyewitness and physical evidence of the Petitioner's guilt. Correll, 558 So.2d 422, 424 (Fla. 1990).

CLAIM V

SAMUEL RIVERA'S CAPITAL CONVICTION AND DEATH SENTENCE, RESULTING FROM PROCEEDINGS WHICH DID NOT PROVIDE FOR A UNANIMOUS, OR EVEN MAJORITY, VOTE BY THE JURY AS TO WHETHER THE PETITIONER WAS GUILTY OF PREMEDITATED OR FELONY MURDER, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Petitioner has argued that the verdict returned by the jury did not specify whether the latter found him guilty of premeditated murder or felony murder. Petitioner has also added the jury was "only told that it must be unanimous as to 'guilty' or 'not guilty,' and as to the degree of each crime, but never told that unanimity or a majority was needed as to either of the State's two theories of first degree murder." See Petition at p. 61. The State submits that this issue was not raised at trial and is thus procedurally barred. Appellate counsel cannot be deemed ineffective for having failed to raise same on appeal. Duest, supra. Moreover this Court has previously rejected this issue. Buford v. State, 492 So.2d 355, 358 (Fla. 1986); Brown v. State, 473 So.2d 1260, 1265 (Fla. 1985). The Petitioner's reliance on other State or federal appellate decisions will not support a finding of a change in the law which would allow consideration of this issue for the first time in these habeas corpus proceedings. See, e.g., Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989) (Ninth Circuit decision, which was pending review in the United States Supreme Court, was not susceptible to the retroactive standards enunciated in Witt v. State, 387 So.2d 922 (Fla. 1980)). Thus this issue is without merit.

CLAIM VI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OBJECTION TO THE FINDING OF TWO AGGRAVATING FACTORS BASED ON THE SAME ESSENTIAL FEATURE OF THE CAPITAL FELONY AND FURTHERMORE RELIEF MUST BE GRANTED BECAUSE SUCH IMPROPER "DOUBLING" IS FUNDAMENTAL ERROR.

The Petitioner has alleged that his appellate counsel was ineffective for failing to argue that the trial court improperly "doubled" the aggravating circumstances of avoiding arrest and hindering law enforcement during its oral pronouncement of sentence. This claim is utterly without merit. During the penalty phase charge conference the defense counsel argued that these two aggravating circumstances were "duplicitous" and should not be considered separately. (R. 1945-1948). The trial judge specifically stated that he was in agreement with defense counsel that both of the factors could not be considered. (R. 1951). The trial court thus, with defense counsel's input, agreed to give the jury an additional instruction as to these two aggravating factors as follows:

> "These two instructions shall be considered by you individually. If, however, you find both applicable, you shall only consider one of them in your determination ... As an aggravating circumstance."
>
> (R. 1953-1954).

The prosecutor too, in his penalty phase closing argument, specifically stated, "... you can't count those [avoiding arrest

and hindering law enforcement] as two." (R. 2008). The trial court in fact read the above agreed upon instruction to the jurors at the penalty phase. (T. 2038-39). Thereafter, in his oral ruling the trial court, in accordance with the agreed upon jury instructions, announced his "findings" as to each of these aggravating factors individually. (R. 2081, 2082). The trial judge, in accordance with his own instruction, did not consider both factors in aggravation. Instead, the trial court stated that he was aware that sentencing was not "a mere arithmetic process" (R. 2089), and that, "each of the aggravating circumstances under sections 'b' through 'i' standing alone outweigh all the mitigating circumstances in this case combined." (R. 2090). In its written order, the trial court further explicitly stated that in light of his finding and consideration of the aggravating factor of the felony having been committed for the purpose of avoiding arrest, he "has not considered" the aggravating factor of the felony having been committed to disrupt law enforcement. (R. 325, 324). Appellate counsel was thus not deficient for failure to raise a "doubling" issue when the record unmistakably refutes such claim. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

CLAIM VII

MR. RIVERA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE AND MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner claims that his death sentence is for felony murder and the use of the underlying felony as an aggravating factor violates the Eighth and Fourteenth Amendment. This issue was not presented at trial and is thus procedurally barred in these habeas proceedings. Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988). Moreover, the claim has been previously decided contrary to the Petitioner's position. Id.

CLAIM VIII

MR. RIVERA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

This claim is the same as Claim VII above. The State thus readopts its previous argument as to Claim VII.

CLAIM IX

THE TRIAL COURT'S ERROR IN DISMISSING CERTAIN JURORS FOR CAUSE DEPRIVED MR. RIVERA OF HIS RIGHTS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND WITHERSPOON V. ILLINOIS.

Petitioner has argued that his appellate counsel was ineffective for having failed to argue the erroneous exclusion of Juror Hernandez for cause, under the dictates of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Petitioner has stated that said juror was excused due to his views concerning the death penalty and that, "No other disqualifying matters were brought to the court's attention." See Petition at p. 79. This is a mischaracterization of the record. The record, with unmistakable clarity, reflects that Mr. Hernandez was not stricken for cause because of his views on the death penalty. Instead, he was excused, without objection, because of his worry that an important job opportunity would interfere with his ability to be a fair and impartial juror. (R. 647-648, 707-710, 749). In fact this juror, in response to defense counsel's questions, stated that he, "may have to rush through to make a determination in this case," due to his pending job offer "up North." (R. 707). He further added that he had "a big conflict in my mind right now," as a result of the job opportunity. (R. 710). Mr. Hernandez's excusal for cause was thus totally proper. See Singer v. State, 109 So.2d 7 (Fla. 1959). Moreover, trial defense counsel did not object to the excusal for cause. Thus appellate counsel was not ineffective for having failed to raise this issue. Duest, supra.

CLAIM X

MR. RIVERA'S JUDGE AND JURY AT HIS TRIAL CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S FAMILY IN VIOLATION OF MR. RIVERA'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The Petitioner has first argued that the trial judge's statements, after the oral pronouncement of sentence and the findings and weighing of aggravating and mitigating factors, reflect that the trial court erroneously considered victim impact in violation of Booth v. Maryland, 482 U.S. 496 (1987). The Petitioner has admitted that trial counsel never objected to the trial court's statements. See Petition at p. 82. This claim is thus procedurally barred. Grossman v. State, 525 So.2d 837 (Fla. 1988); Parker v. Dugger, supra, 537 So.2d at 972; Also see Suarez v. State, supra, 481 So.2d at 1210, and the argument herein at p. 26.

Petitioner has also claimed that his appellate counsel was ineffective for failure to argue victim impact because his trial counsel had objected to the presence of police officers during trial. Petitioner has speculated that at trial, "one-half to three quarters of the courtroom was occupied by police officers."

See Petition at p. 84. This is again a mischaracterization of the record. Prior to trial and before the jurors were brought into the courtroom, defense counsel voiced an objection that, "four police officers in uniform" were in the courtroom at the time. (R. 968, 971, 972). The trial judge declined to bar the police officers from the courtroom, but, specifically instructed that if any officer wished to attend trial, "they are not to wear their uniforms." (R. 972). Thereafter, throughout trial there was no objection to the presence of any uniformed police officer in the courtroom. In fact the record affirmatively reflects that there were no uniformed police officers in the courtroom. (R. 1198). Thus, appellate counsel cannot be deficient for failing to argue the victim impact effect of the presence of police officers when such a claim is not supported by the record. This claim is also without merit.

CONCLUSION

Each and every issue in this petition is without merit. Additionally, as to each issue that this Court finds procedurally barred, the State would request a specific finding to that effect, per Harris v. Reed, 489 U.S. ____, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

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 RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS was furnished by mail to LARRY HELM SPAULDING, Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 3rd day of January, 1991.

FARIBA N. KOMEILY