IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,382

JERRY LEON HALIBURTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

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PROCEDURAL HISTORY AND FACTS

The petitioner has petitioned this Court for habeas corpus relief in conjunction with his appeal of the trial court's denial of his post-conviction motion seeking relief from his conviction and sentence of death. Petitioner was charged in the Fifteenth Judicial Circuit Court, Palm Beach County, with the murder, on August 9, 1981, of Don Bohanon during a burglary of Bohanon's home in West Palm Beach. Petitioner was convicted of first degree murder and burglary and sentenced to death.

On direct appeal of the above convictions and sentence, appellate counsel, Mr. Musgrove, raised twelve (12) issues, two of which were addressed on the merits by this Court. Haliburton v. State, 476 So. 2d 192 (Fla. 1985). This Court rejected the petitioner's speedy trial claim for discharge. This court, did, however, conclude that certain of petitioner's statements to the police should have been suppressed, and remanded for a new trial. *Id.*, at 193-94.

On petition for writ of certiorari, the United States Supreme Court remanded the case to this Court for reconsideration in light of its decision in *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). *Florida v. Haliburton*, 475 U.S. 412, 106 S. Ct. 1452, 89 L. Ed. 2d 711, (1986). On remand, this court reaffirmed its holding regarding Defendant's speedy trial claim, and also reaffirmed its holding on the suppression issue, based upon the Florida Constitution. *Haliburton v. State*, 514

So. 2d 1088 (Fla. 1987). Petitioner was still being represented by Mr. Musgrove.

On retrial, in 1988, at issue herein, petitioner was again convicted of burglary and first-degree murder. On direct appeal from this second trial, this Court summarized the facts of the crime:

> In the early morning of August 9, 1981, appellant burglarized the home of Donald Bohannon and attacked Bohannon with a knife as he slept. Bohannon died as a result of thirty-one stab wounds over his neck, chest, arms, and scrotum. After the murder appellant told his brother, Freddy, that he had killed Bohannon just to see if he could kill another human being.

Haliburton v. State, 561 So. 2d 248, 249 (Fla. 1990). A detailed statement of the evidence presented by the State has been set forth in the argument with respect to claim III herein.

On the above direct appeal, the petitioner was again represented by Mr. Musgrove. This court rejected Petitioner's guilt-phase claims: (1) that he was entitled to a special verdict on the issue of whether the jury found him guilty of felony or premeditated murder, *Id.*, at 250; (2) that defense counsel should have been permitted to comment on the State's failure to call a witness where the witness was equally available to both sides, *Id.*; (3) that the trial court erred in rereading testimony requested by the jury, *Id.*; (4) that several photographs should not have been admitted into evidence, *Id.*, at 250-51; (5) that petitioner's brother should not have been

permitted to testify regarding petitioner's statements,[1] *Id.*, at 251; (6) that another witness, Sharon Williams, should not have been permitted to testify about threats petitioner made to her,[2] *Id.*; and (7) that the prosecution attempted to shift the burden of proof to the defense. *Id.* The Court further found harmless beyond a reasonable doubt petitioner's brother's brief reference to an appeal and Williams' testimony that petitioner had raped her. *Id.*

At the conclusion of the penalty phase, the trial court had, in accordance with the jury's recommendation, sentenced petitioner to death, finding that the State had proven four aggravating circumstances: (1) the capital felony was committed by a person under sentence of imprisonment; (2) the petitioner was twice previously convicted of violent felonies; (3) the capital felony was committed while engaged in

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[1] These statements were: "Well, if you ever want to kill someone, to kill them with a knife because a knife is more harder to trace than a gun"; in response to Freddy's question "[W]hy did you kill him," "He [Defendant] said to see if he had the nerve to kill someone this way, meaning with a knife"; and during an argument in a bar, "That nigger must don't know who I am, I'll kill him just like I killed that cracker." *Id.*, at 251, n. 4.

[2] In ruling on admissibility, the trial judge had the benefit of the following proffer:

> Question [by State]: Sharon, had you at any time other than this night heard Jerry Haliburton make any statements about this murder?
>
> A: "One time we was walking to school, [appellant] and I ... he was saying that he was on a murder rap.... As we were walking to school he said they got him on a murder rap but they can't prove it, but he actually did it."

Id., at 251, n. 6.

a burglary; and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification (CCP); and that the aggravating circumstances presented outweighed the nonstatutory mitigation presented. Haliburton, 561 So. 2d at 249-50, n. 1. On appeal, this Court rejected several challenges to the sentence: (1) that the capital sentencing statute was unconstitutional, *Id.*, at 251; (2) that the evidence did not support a jury instruction on the heinous, atrocious, or cruel (HAC) aggravating factor, *Id.*, at 252; (3) that petitioner was not under sentence of imprisonment at the time of the crime,[3] *Id.*; (4) that the CCP factor was not applicable to the facts herein. *Id.* This Court accordingly affirmed both the conviction and sentence on April 5, 1990. *Id.*

Petitioner sought certiorari review in the United States Supreme Court, which was denied on June 28, 1991. *Haliburton v. Florida*, ___ U.S. ___, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991). Thereafter, on January 17, 1992, the Governor signed a death warrant scheduling petitioner's execution for the week of March 24-31, 1992. (R. 397).[4]

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[3] Defendant was on conditional release at the time of the murder.

[4] The symbol "R. ___" refers to the post-conviction record on appeal herein, Florida Supreme Court Case No. 83,479; said record contains the transcripts and the record on appeal of the second trial, in addition to the transcripts and record proceedings in the post-conviction action below.

On February 16, 1992, petitioner filed a motion to vacate judgment and sentence in the circuit court. (R. 410-535). On February 17, 1992, the petitioner served his Petition for Extraordinary Relief, For a Writ of Habeas Corpus (hereinafter referred to as "Petition"), at issue herein. A Supplemental Memorandum of Law in Support of Petition for Extraordinary Relief and for a Writ of Habeas Corpus (hereinafter "Memorandum") was served on July 27, 1995.

On December 9-10, 1993, the trial court conducted an evidentiary hearing on the defendant's post-conviction claims, and denied relief. The defendant appealed said denial of relief. He is now before this Court on the consolidated appeal of the denial of his motion for post-conviction relief, and his petition for writ of habeas corpus. The claims on appeal of the denial of post-conviction relief have been set forth and extensively addressed in the State's answer brief in this Court's case no. 83,479. This response addresses the claims set forth in the petition and memorandum.

ARGUMENT

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE AND DID NOT DID NOT CAUSE A LACK OF "RELIABLE ADVERSARIAL TESTING" ON THE DIRECT APPEAL HEREIN.

As noted in the Procedural History and Facts section herein, appellate counsel on direct appeal of the second trial had represented the defendant in the extensive appellate proceedings from his first trial in this case. On appeal of the first trial, appellate counsel raised twelve claims[5] and was successful in obtaining a reversal of the conviction and sentence. Haliburton, 471 So. 2d at 194. Upon reversal and remand from the United States Supreme Court, appellate counsel was again successful in reinstating this Court's reversal on the first direct appeal. Haliburton, 514 So. 2d at 1090. On direct appeal of the second trial herein, appellate counsel raised nine (9) arguments, as noted in the procedural history section herein. Petitioner contends that appellate counsel was ineffective, primarily because the latter emphasized one of his nine arguments, with respect to denial of defendant's constitutional right to a unanimous jury as a result of the trial court's denial of a request for special verdict forms, requiring the jury to state if they had found premeditated or felony murder. See,

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[5] See Brief of Appellant, Florida Supreme Court Case No. 64,510.

Brief of Appellant, Florida Supreme Court Case No. 72,277. The State would initially note that said issue was being argued by other competent counsel, at approximately the same time, in both this Court and the United States Supreme Court. See, e.g., Young v. State, 579 So. 2d 721, 724 (Fla. 1991); Schad v. Arizona, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed. 2d 555 (1991). Appellate counsel herein was persuasive enough to convince at least one member of this Court of the merits of his argument. Haliburton v. State, 561 So. 2d at 252 (Barkett, J., concurring). The failure of appellate counsel, on the second direct appeal, however, to convince this Court to rule in appellant's favor, on the issues raised is not ineffective performance. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

In any event, in order to evaluate the petitioner's claim of ineffective assistance of appellate counsel,

> . . . this Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed. 2d 801 (1987).

Ferguson v. Singletary, 632 So. 2d 53, 57 (Fla. 1993). As will be seen in the ensuing sections herein, the current claims, which the petitioner urges should have been argued on direct appeal, are devoid of merit, unpreserved, or both. The failure of appellate

counsel to raise such claims thus can not be deemed ineffective assistance of counsel. Swafford v. Dugger, supra.

CLAIM II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO RAISE A CLAIM AS TO THE TRIAL COURT'S ALLEGED PRECLUSION OF MITIGATION WITNESSES WHERE NO SUCH PRECLUSION EXISTED.

The petitioner claims that the trial judge did not permit two prison guards from Florida State Prison to testify before the jury, during the sentencing phase proceedings, that the defendant had no disciplinary violations while on death row, in between his two trials. Petition at p. 13. Petitioner thus argues that the trial judge precluded the jury's consideration of mitigating evidence, in violation of Lockett v. Ohio, 438 U.S. 586 (1978), Skipper v. South Carolina, 476 U. S. 1 (1986), and Hitchcock v. Dugger, 481 U.S. 393 (1987), and that appellate counsel was ineffective for failing to raise such a claim. The instant claim is, however, based upon a mischaracterization of the record. The petitioner has neglected to mention those portions of the record which reflect that said guards were present and available to testify before the jury, prior to the conclusion of the defense's sentencing case, but that trial counsel expressly stated that he did not wish to present their testimony to the jury; instead, trial counsel requested that the trial judge hear said testimony outside of the jury's presence. (R.

3239). The record is abundantly clear that there was no "preclusion" of mitigating evidence. As this claim is entirely devoid of merit, appellate counsel can not be deemed ineffective for failing to raise the claim. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

The record reflects that on the morning of the penalty phase before the jury, trial defense counsel informed the court that he had subpoenaed two prison guards who would be arriving at the courthouse at "about 3:30 this afternoon." (R. 3084-5). As noted by the petitioner, the trial court responded, "If it's a problem at the end of the day, we'll have to deal with it at that time." (R. 3087). Subsequently, when the State rested, defense counsel asked for a recess prior to presenting the defense case, which request was granted. (R. 3167-68).

After the recess, the defense wished to address some legal matters with respect to the jury instructions, prior to proceeding with the testimony to be presented.(R. 3169). The trial court stated that the defense would probably finish with its witnesses prior to the arrival of the prison guards, that he would have to order a recess at that point anyway, to "wait for them," and that he would address the legal matters at said recess. (R. 3169-70).

Subsequently, after presenting the testimony of the medical examiner and several family members, the defense requested another recess, because, "this is the

point where I want to call the two prison guards." (R. 3211). The trial judge refused to delay the trial at that point; he stated, "I'd like to go ahead and proceed with who you've got here, Mr. Bailey. Work them in." Id.

Defense counsel presented more family member testimony. (R. 3211-23). The trial judge then asked defense counsel whether he wanted a break at that point, to which counsel responded in the affirmative. (R. 3223). After taking up the previously mentioned legal matters, the trial court declared a recess until 3:30 p.m. (R. 3232), the time previously mentioned for the arrival of the prison guards. After the recess, defense counsel then presented testimony from the defendant. (R. 3233, et seq.).

At the conclusion of testimony from the defendant, defense counsel informed the court that the prison guards had arrived, but that their testimony was "primarily" for the court's information; he thus did not wish to present the guard's testimony to the jury:

> MR. BAILEY [defense counsel]: Here's what I'd like to do. I've got the two guards here. To be quite honest, I'm going to need primarily -- for the Court's information, because of the changes since the last time he was sentenced to death, what I'd propose is that we wrap up here, have the guards testify on record, if you would permit, in advance as part of the sentencing proceeding for the Court's information without the jury present.
>
> MS. BROOME [prosecutor]: No objection.
>
> MR. BAILEY: Or I can bring them back later.

MS. BROOME: I think it's senseless to bring them back.

THE COURT: Sure. . . .

(R. 3239) (emphasis added).

The defense then rested its case before the jury. (R. 3240). After closing arguments and instruction to the jury were completed, the defense then presented the prison guards' testimony to the trial judge, in accordance with the above request by trial counsel. (R. 3267-74).

The record is thus abundantly clear that the trial judge did not preclude the presentation of any evidence. The prison guards did not testify before the jury, because the defense counsel expressly stated he did not wish them to do so,[6] despite their being present and available.

The petitioner's reliance upon Lockett v. Ohio, Skipper v. South Carolina, Hitchcock v. Dugger, and their progeny is unwarranted, as none of those cases

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[6] It should be noted that the prison guards merely testified that the defendant had no disciplinary violations while incarcerated on death row, in between his two trials. (R. 3268-74). The prosecutor had previously informed defense counsel that she would elicit from said prison guards testimony as to the heightened security conditions under which the defendant was incarcerated. (R. 3085-86). "An adjustment under those conditions does not generally correlate with an adjustment to a regular prison sentence." (R. 3086). It should also be noted that defendant had committed the instant crime while on conditional release from prison.

propose forcing defense counsel to present alleged mitigation evidence to the jury. See also, Bolender v. Singletary, 16 F. 3d 1547, 1562-66 (Fla. 1995) (there is no violation of Lockett, Hitchcock and progeny, when defense counsel knows of and has relevant mitigation evidence available to present to the jury, but decides not to do so). As the record herein does not support any claim that defense counsel was precluded from presenting any mitigation testimony, appellate counsel can not be faulted for failing to raise such a claim. Swafford v. Dugger, supra.

CLAIM III

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO RAISE A CLAIM OF SUFFICIENCY OF EVIDENCE OF GUILT.

The petitioner contends that his appellate counsel was ineffective for failure to challenge the sufficiency of evidence of his guilt. According to the petitioner, the "only piece of physical evidence of the burglary was a fingerprint on the outside of a door in a porch area. The only evidence of the murder charge was the fingerprint and Freddie Haliburton's statement." Petition at pp. 18-19. Petitioner then discounts Freddie Haliburton's testimony as "per se incredible," and states that the fingerprint evidence was insufficient to prove a burglary, as it was consistent with reasonable hypotheses of innocence. The State submits that, in light of the "compelling evidence of the State's case," noted by this Court on direct appeal, any claim of insufficiency

of evidence is without merit. See, Haliburton, 561 So. 2d at 251. Appellate counsel can not be deemed ineffective for failure to argue non-meritorious claims. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

The victim herein was murdered sometime between shortly after midnight and the early morning hours of August 9, 1981. On Saturday night, August 8, 1991, the victim had a party at his apartment with his brother, friends, and neighbors. Those present at the party, in addition to the victim, were all accounted for. (R. 2546-47, 2556, 2561, 2858). The defendant was not one of them. Id.; see also, R. 2683. Indeed, the victim's brother, who had previously resided with him, the victim's live-in girlfriend, who had moved out approximately a week before the murder, and one of the victim's friends and neighbors, who had daily contact with the victim, all testified that they did not previously know the defendant and that they had never seen him at the victim's apartment. (R. 2857, 2643, 2545-47, 2560-61). There was also testimony that the victim, at said party, had shown one of his guests $400 in money that he had been saving to purchase a car. (R. 2859-60).

The last person to leave the party on Saturday night, prior to the murder, was the victim's brother. (R. 2860). He testified that the party broke up and he left at approximately midnight, and that the victim was going to bed at that time. (R. 2860-61).

At least three witnesses who had been present at the above party testified that at the time, the front entry door to the victim's apartment was intact. (R. 2862, 2564, 2551). This front entry door had glass jalousies and a screen mesh. (R. 2699). Indeed, the victim had told these witnesses that he had replaced the jalousies on this door either the day before or the day of the party. (R. 2551, 2556, 2564, 2566-67).

The crime scene technician testified that upon discovery of the victim's stabbed body in his bedroom, on the next day, Sunday, the point of entry to the apartment was established to be the above-described front door. The door's metal lath had been pushed in, metal screws and washers popped loose. Several jalousies had been removed from this door and placed upon the porch area outside it; the mesh screen had been pushed in and created an opening large enough for an adult to enter through it. (R. 2441-44, 2700, 2705, 2646). The door was otherwise well secured with four (4) dead-bolt locks on it (R. 2443, 2445), and there was evidence of blood on one of these bolts. (R. 2443, 2445, 2473, 2779).

The defendant's fingerprints were found on the removed jalousies from said front door. (R. 2711, 2723, 2749). The location of the fingerprints was such that the prints were consistent with having been placed there when "someone were lifting a jalousy out." (R. 2717, 2750). The money, which, as noted above was previously in the possession of the victim during the party, was missing from the apartment. (R. 2473-75, 2651). It was also established that the defendant was in a position to

overhear a conversation by the victim's girlfriend, in which she stated that she was removing her dog, which was usually at the victim's apartment, for the weekend. (R. 2645).

Sharon Williams had previously been married to Freddie Haliburton, but had divorced the latter at the time of the instant trial. (R. 2835). She testified that the defendant, subsequent to the murder herein, during the course of an attack on her, was twirling a knife in his hand, stating, "I do you just like I did that man. . . ." (R. 2829). The defendant also stated that a knife was harder to trace than a gun. (R. 2830).

Freddie Haliburton, the defendant's brother, testified that subsequent to the murder herein, the defendant confessed to him. The defendant started talking about the "cracker" whom he had killed. (R. 2888). The defendant first pointed out the victim's house. Id. He then stated that he entered the victim's house by "taking the jalousies out." Id. The victim, according to the defendant, was sleeping. The defendant walked into the room where the victim was asleep and started stabbing him; "he said the guy woke up and tried to defend himself." (R. 2889). The defendant stated that he had stabbed the victim "about 28" times, and that he had tried "to cut his penis off and stick it in his mouth."[7] Id. The defendant had attacked the victim,

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[7] The medical examiner testified that there was a stabbing injury on the victim's

"to see if he had the nerve to kill someone this way, meaning with a knife." (R. 2890). In a subsequent conversation, the defendant, after a barroom argument, had also stated, "That nigger must don't know who I am, I'll kill him just like I killed that cracker." (R. 2891).

The State respectfully submits that in light of the above overwhelming evidence of guilt, through both physical evidence and statements of the defendant, any claim of sufficiency of evidence is entirely devoid of merit. The petitioner has first dismissed the defendant's confessions to Sharon Williams and Freddie Haliburton as "per se incredible." Petitioner has relied upon Freddie Haliburton's prior recantation of his statement, his past and potential future criminal charges, and his shooting of the defendant. However, extensive impeachment of Freddie with all said circumstances, was before the jury. (R. 2902-4, 2917-25, 2931-35, 2896-97, 2917-18, 2925-31, 2940-41). The jury had all of this information and returned a verdict of guilty. Neither petitioner now, nor appellate counsel on direct appeal, could invade the province of the jury by simply declaring testimony by competent witnesses, and supported by physical evidence, to be per se incredible. See, e.g., Johnson v. State, 380 So. 2d 1024, 1026 (Fla. 1979) ("credibility of a witness and the weight his testimony is to be given is a matter to be determined by the trier of fact."); Atwater v. State, 626 So. 2d 1325 (Fla. 1993) (once State meets its threshold burden of introducing competent evidence,

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scrotum. (R. 2594).

question of whether evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury). Indeed, the State notes that petitioner has not cited any authority for his novel proposition. Petitioner's reliance upon State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976) and Williams v. State, 308 So. 2d 595 (Fla. 1st DCA 1975), is misplaced. Unlike the instant case, neither of those cases involved any statements from the defendant admitting the crimes charged. Moreover, both cases involved situations where the defendants could be said to have had legitimate prior access to the locations where their fingerprints were ultimately found.

Likewise, contrary to petitioner's argument, the fingerprint evidence herein is inconsistent with any reasonable hypothesis of evidence. Petitioner has first relied upon a witness's testimony that she heard, from a friend of hers, that defendant had claimed to be present at the aforementioned party on Saturday night, hours before the murder. (R. 2683, 2685). The same witness, however, also testified that petitioner was not in fact present. (R. 2683). As previously noted, three other witnesses, who had been present at said party for the duration thereof, accounted for everyone at the party; defendant had not been present. Moreover, the State fails to see how, even if the defendant had attended the party, his fingerprints could have been found on the side of removed jalousies, a location consistent with the removal of the jalousies from the door. Socializing at a party does not normally entail dismantling the host's front door. It should also be noted that the witnesses present at the party, including the last to leave, all testified that the front door and its jalouises had been intact throughout

the party. Petitioner's contention that he could have assisted with the replacement of the jalousies is equally without merit. The testimony at trial reflected that the victim did not know or socialize with the defendant, and that the victim himself replaced his jalousies. Finally, although there was evidence that the victim's home had been burglarized a month prior to the murder herein (R. 2674), there was absolutely no evidence connecting the defendant with that burglary.

If the petitioner cared to take responsibility for a prior burglary, or neighborly assistance, or explain his "partying"-with-the-victim theory, he was free to so testify at trial. Of course, the defendant would have been promptly impeached with his prior statements to the police, admitting that he had in fact burglarized the victim's apartment on the night of the murder. See, Haliburton v. State, 476 So. 2d at 193. Although these statements had been excluded from the trial by this Court, they were made voluntarily and thus could have been utilized in impeaching the defendant if he had recounted the above stories. See, Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971); Michigan v. Harvey, 494 U. S. 344, 110 S.Ct. 1176, 108 L.Ed. 2d 293 (1990).

In sum, the instant claim of insufficiency of evidence is devoid of merit. Appellate counsel can not be deemed ineffective for raising meritless issues. Swafford v. Dugger, supra.

CLAIM IV

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO APPEAL IMPROPER CLOSING ARGUMENT BY TRIAL DEFENSE COUNSEL.

Petitioner contends that appellate counsel was ineffective for failure to appeal the State's objection to a portion of defense counsel's closing argument. At the guilt phase closing argument, defense counsel was arguing: "The fact is, from the evidence you heard from this stand, you know that the grand jury did not and could not charge Jerry --" (R. 3016). The State's objection at that point was sustained by the trial judge. (R. 3017). Petitioner states that his jury had the right to know that, "when the case was presented to the grand jury based solely upon the fingerprint evidence, an indictment was not returned." Petition at p. 27. According to Petitioner, without Freddie Haliburton's testimony, "there was no case as the grand jury held. Freddie knew this. In evaluating his testimony, the jury needed to know this." Id. Petitioner thus argues that sustaining the objection to the aforesaid closing argument was a denial of his right to present a defense and to confront witnesses.

The State submits that this claim is without merit. The purpose of closing argument is to comment on the evidence presented during trial. There was no evidence presented as to what the grand jury had done, and on what basis. Furthermore, the grand jury's assessment of the evidence presented to it is irrelevant at trial. This is especially so in the instant case, where petitioner paints an incomplete

picture of what in fact had been presented to the grand jury. Moreover, petitioner was not precluded from presenting evidence; the instant claim is grounded upon the sustaining of an objection to the defense counsel's closing argument. There was thus no denial of a right to present a defense, nor any violation of the right to cross-examine or confront witnesses. Finally, defense counsel was allowed to, and did, argue that Freddie Haliburton had testified in front of the grand jury, "in order to get Jerry charged with this murder. From all the evidence in this case, you know that the state's case rests totally upon Freddie Haliburton." (R. 3017). Thus, no prejudice has been demonstrated either. As the claim herein lacks merit, appellate counsel can not be deemed ineffective for failure to raise same. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

On direct appeal of the first trial herein, this Court noted that the grand jury initially did not return an indictment when presented with fingerprint evidence and the defendant's statements, wherein he admitted breaking into the victim's house and seeing his body, but denied committing the murder. Haliburton v. State, 476 So. 2d at 192. This Court, however, reversed and remanded for retrial without the use of the defendant's statements. Haliburton v. State, 476 So. 2d at 194; Haliburton v. State, 514 So. 2d at 1090. Prior to presentation of evidence at the second trial, defense counsel acknowledged that in his statement to the police, presented before the grand jury, the defendant had, in effect, stated, "Look, I am a burglar. You guys know I am a burglar. I burglarized that apartment and went in to unplug the TV and stereo and

got out of there. That was oversimplified. . . ." (R. 2286). Defense counsel then stated that the grand jury returned an indictment subsequently, only after testimony from Freddie Haliburton and Sharon Williams that defendant had admitted committing the murder to them. Id. Defense counsel stated that Freddie Haliburton "knew" that the grand jury had not previously indicted the defendant, and, as part of his motive, Freddie then had testified before the grand jury. (R. 2287). Defense counsel thus wished to argue at opening argument, that the "grand jury had all that evidence" and refused to indict for murder initially. (R. 2286). The prosecutor responded that, a) the testimony would reflect that Freddie did not know about the grand jury's initial failure to indict on murder; and, b) that the grand jury, and what it had previously determined, were irrelevant. (R. 2287). The trial judge ruled that defense counsel's argument would be limited to the "scope of the knowledge" of the witnesses, i.e., if defense counsel could establish "Freddie and Sharon knew the grand jury had not returned an indictment." (R. 2288).

At trial, there was no testimony or evidence as to what was initially presented to the grand jury; indeed, the defense was careful not to open any doors as to the defendant's statements to the police (which statements had been presented to the grand jury). During the cross-examination of Sharon Williams, the defense did not in any way delve into the latter's knowledge of what she knew about the grand jury's actions prior to going to the police or the grand jury with the defendant's confessions. Likewise, during the cross-examination of Freddie Haliburton, defense counsel was

unable to establish whether Freddie had known that the grand jury had not initially indicted the defendant for murder. (RII. 543-49).[8] Defense counsel did, however, elicit from Freddie that the latter's "purpose" in testifying in front of the grand jury was "to give facts to get Jerry charged with that murder." (RII. 544).

In light of the above evidence actually presented, the trial court sustained the state's objection to defense counsel's statement at closing argument that, "The fact is, from the evidence you heard from this stand, you know that the grand jury did not could not charge Jerry --" (R. 3016-17). Defense counsel was, however, allowed to and did comment on the evidence presented as follows:

> MR. BAILEY [defense counsel]: You had testimony from Freddie Haliburton that sometime after he went to the police in March of 1982 and related events about a crime that occurred in August of 1981, sometime after he went to the police in March, he testified here that he did that in front of the grand jury in order to get Jerry charged with this murder. From all the evidence in this case, you know that the State's case rests totally upon Freddie Haliburton. And I am simply suggesting to you the obvious, you cannot believe Freddie Haliburton beyond a reasonable doubt.

(R. 3017) (emphasis added).

It is axiomatic that the purpose of closing argument is to comment upon the

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[8] The symbol "RII. ___" refers to the record page numbers on direct appeal of the second trial. This limited use of "RII. ___" was necessitated because the page numbers referenced were inadvertently not copied and not made a part of the post-conviction record which otherwise included all other transcript pages of the trial.

evidence presented. See, e.g., Pope v. Wainwright, 496 So. 2d 798, 803 ("Comments on matters outside the evidence are clearly improper."); United States v. Iglesias, 915 F. 2d 1524, 1529 (11th Cir. 190) ("The sole purpose of closing argument is to assist the jury in analyzing the evidence."). Petitioner's argument herein, that Freddie "knew" that the defendant had not been initially indicated is not grounded in the evidence presented. Defense counsel fully cross-examined Freddie Haliburton and was unable to establish any such knowledge. Nor, as seen above, was there any evidence in front of the jury as to what the grand jury had done and based upon what. The trial judge thus properly sustained an objection to defense counsel's argument at issue herein. Pope v. Wainwright, supra. The petitioner's reliance upon Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 483 U.S. 44 (1987); and Olden v. Kentucky, 488 U.S. 227 (1988), is unwarranted. All of those cases involve limitations on the presentation of evidence or cross-examination of witnesses. No such limitation exists in the present case. The petitioner's complaint is that defense counsel was not allowed to argue non-existent evidence.

The State would also note that what the grand jury initially determined, what it "did not and could not charge," is irrelevant. Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985) ("An indictment or information is not evidence against an accused, but rather, is nothing more or less than the vehicle by which the state charges that a crime has been committed"); Riechmann v. State, 581 So. 2d 133, 139, n. 12 (Fla. 1991) (informing the jury that defendant was indicted by "23 grand jurors" was improper).

Determinations in prior proceedings, based upon different evidence than that presented at trial, are irrelevant. See, e.g., Sireci v. State, 587 So. 2d 450, 452-53 (Fla. 1995) (prosecutor's reference, at retrial, to defendant's prior death sentence from conviction reversed on appeal, was error, although harmless under facts of case). This is especially so in the instant case, where petitioner now contends that the grand jury was presented "solely" with fingerprint evidence, when it did not initially indict the defendant for murder. As noted previously, however, the grand jury initially was also presented with the defendant's exculpatory statement that he was a burglar by profession and had burglarized the victim's apartment but had not killed him. The defense at trial successfully kept out those statements, which placed the defendant at the scene of the crime on the day of the murder. The petitioner should not be allowed to reap the benefit of keeping out evidence and then mischaracterize the nature of the evidence presented. Indeed, had defense counsel been permitted to present such an argument which had no evidentiary basis, the only way in which the prosecutor would be able to fully respond to such an argument would similarly be through an improper argument, without evidentiary basis, apprising the jury of the other evidence which the grand jury had considered - i.e, the defendant's own exculpatory statement regarding the burglary - and which defense counsel had no intention of mentioning.

Finally, as noted above, defense counsel was allowed to fully argue that Freddie Haliburton testified before the grand jury in order to get the defendant indicted and

that the State's case thus solely rested upon Freddie's statements. (R. 3017). As such, even if the trial court had erroneously sustained the state's objection, no prejudice has been demonstrated. Appellate counsel thus can not be deemed ineffective for failure to raise the instant claim. Swafford v. Dugger, supra.

CLAIM V

PETITIONER'S CLAIMS OF ERRONEOUS JURY INSTRUCTIONS AT SENTENCING ARE UNPRESERVED AND DEMONSTRATE NO PREJUDICE.

A) CONSTITUTIONALITY OF JURY INSTRUCTIONS ON HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTOR.

The petitioner contends that the jury instruction on the Heinous, Atrocious or Cruel (HAC) aggravator was unconstitutionally vague and overbroad, pursuant to Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). This argument was neither preserved at trial nor raised on direct appeal. It is thus procedurally barred. James v. State, 615 So. 2d 688 (Fla. 1993); Street v. State, 636 So. 2d 1297 (Fla. 1994). Appellate counsel cannot be deemed ineffective for failure to raise this issue, as the trial court instructed the jury in accordance with an expanded jury instruction specifically requested by defense counsel, and the failure to raise a claim that would have been rejected at the time of appeal does not amount to deficient performance. Henderson v. Singletary, 617 So. 2d 313, 317 (Fla. 1993). Moreover, as will be seen below, the error in the instruction was harmless beyond a reasonable

doubt in light of the evidence presented, argument of counsel on this aggravator, and the balance of the aggravators and mitigation presented. Id.

1). **Preservation At Trial.**

The instant jury instruction claim is not cognizable on collateral attack unless a contemporaneous objection, on constitutional grounds, was made to the wording of the instruction actually given at sentencing or a proposed instruction, pursuant to State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), was requested and rejected. The unconstitutionality of the jury instruction must then be raised on direct appeal. James v. State,supra; Henderson v. State, supra; Street v. State, supra.

Petitioner contends that he requested a complete Dixon instruction, although admitting that he has been "unable to locate the proposed instructions discussed in the record", and that the trial court rejected same. See Petitioner's memorandum at p.5. The record does not support petitioner's contention. Instead, the record reflects that defense counsel, at sentencing, while not objecting on constitutionality grounds, argued that the HAC aggravator was not applicable due to insufficency of evidence. Defense counsel also submitted a proposed expanded instruction which contained the definitions of the terms heinous, atrocious and cruel, in addition to references to the petitioner's background. The trial court, in accordance with defense counsel's request, deferred ruling on the applicability of the aggravator until after hearing the evidence presented. The trial court then determined that there was sufficient evidence for the

aggravator to be presented to the jury, and, also agreed to further define the aggravator, as requested by defense. Defense co-counsel Musgrove, after conferring with trial defense counsel Bailey, then requested that the trial judge define only the terms "atrocious" and "cruel" for the jury. (R. 3260). The trial court did so, with no objection from the defense. As the defense only sought an expanded instruction containing the definition of the terms "atrocious" and "cruel", the issue was not preserved. Street, 636 So. 2d at 1303. ("Street only sought to have the definitions of heinous, atrocious, or cruel added to the instruction. Thus the instruction as requested also would have been constitutionally deficient. Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). As a consequence, we find that Street did not preserve the issue [of constitutionality of the HAC jury instruction] for appeal."). A detailed account of the record has been set forth below.

The record reflects that during the sentencing phase jury instruction conference, defense co-counsel Musgrove submitted various proposed instructions, without any argument as to the unconstitutionality of the standard jury instructions on the grounds of vagueness. (R. 3090-3092). With respect to the HAC aggravator, defense counsel submitted a proposed instruction "relating to what is the definition of heinous", but first argued that the jury should not be instructed on the aggravator at all because it was not applicable to the facts; defense counsel also requested that the applicability of the instruction would be better decided after presentation of evidence on the matter:

MR. MUSGROVE [defense counsel]: We would -- I am submitting the next one relating to what is the definition of heinous. However, we object to any instruction at all on heinousness because we just don't think it fits this crime. We can hear argument on that now or we can wait until the evidence is in. But this was -- the evidence that's going to come out today I think is going to show that the deceased was asleep or unconscious at the time the attack commenced. He may have thrown his arms up quickly but he died rather quickly and not unusually torturous. We have some case law to cite on it; however, it may be better to take this up at the conclusion of the evidence.

MS. BROOME [prosecutor]: I would prefer just to deal with the jury instructions at this time, Judge.

THE COURT: Well, I mean, that is one of the things we have to deal with on the jury instructions.

MS. BROOME [prosecutor]: What I mean -- well, I also have some case law if you want to go into it now.

THE COURT: I may reserve ruling until I've heard the evidence, but I'd like to hear your argument at this point and see your case law on it.

MR. MUSGROVE [defense counsel]: All right.

(R. 3099-3100).

The parties and the judge then discussed extensive case law as to the applicability of HAC to the facts herein; Dixon was not mentioned.[9] (R. 3100-3104).

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[9] The State would note that State v. Dixon was expressly relied upon during prior arguments on other proposed instructions which had nothing to do with the HAC aggravator, and are not at issue herein. (R. 3095, 3096). There was no mention of the additional language contained in Dixon, i.e. "the aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, applies only where the

The trial court then, in accordance with the previous defense suggestion, reserved ruling on the applicability of the HAC and the proposed instruction thereon, until after the conclusion of evidence. (R. 3104).

Immediately before a recess after the completion of some defense witnesses' testimony, the trial judge then stated that he would consider defining the terms of the HAC aggravator, as requested by defense counsel, and pursuant to Maggard v. State, 399 So. 2d 973 (Fla. 1981). The defense-requested instruction contained such definitions in part, and referenced the defendant's "background"[10] in another part."

> **THE COURT:** Before we recess, I'm seriously considering giving some type of definition along the lines set forth in State v. Davis, I think it is.
>
> **MR. MUSGROVE [defense counsel]:** Lewis, Your Honor. The heinousness?
>
> **THE COURT:** Yeah, defining heinous and cruel. The Supreme Court defined it a couple times in their opinions, and I'm -- those terms at least to me are vague enough so that I think some further definition would be appropriate. So I'm giving some consideration

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actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conciousless or pitiless crime which is unnecessarily torturous to the victim," anywhere in the jury instruction conference herein.

[10] During interim arguments the defense had requested another special instruction as to "background in early life" being considered in mitigation. (R. 3111). Upon the court's grant of said request, defense counsel, after conferring with his co-counsel, withdrew and waived said instruction, as there was a "question of opening some doors." (R. 3112).

to doing that.

And I looked at your instruction, the first portion of which seems to be the actual definition which would be "Heinous means extremely wicked or shockingly evil, atrocious means wicked and vile and cruel means infliction of a high degree of pain with utter indifference to or even enjoyment of the suffering of others."

That's the definition I'm contemplating giving.

Do you have any further argument on that particular matter, Ms. Broome.

MS. BROOME [prosecutor]: No, sir. What number is that, Judge:

THE COURT: That is D-10. And that language appears in Davis. It also appears in Lewis.

No, it's not Lewis --

MR. MUSGROVE [defense counsel]: I'm sorry. Lewis is the one relating to crimes of violence.

THE COURT: It also appears in Maggard v. State at page 977 where they say, "We define heinous to mean extremely wicked or shockingly evil, atrocious to mean wicked and vile, and cruel meaning infliction of a high degree of pain with utter indifference or even enjoyment of suffering of others."

MS. BROOME [prosecutor]: Judge, where do you want that in the jury instructions?

. . .

[discussion as to retyping the instructions with triple spacing in between, for ease of use]

MR. MUSGROVE [defense counsel]: That would come right after four, I would think.

THE COURT: Yeah, in between four and five.

MS. BROOME [prosecutor]: These are the two pages I already had retyped.

THE COURT: Okay. If I could just have your other page back.

Okay. So that would be -- I'm working off of that D-10 and we're using -- that portion right there (indicating), yeah. Okay.

I thought I decided to give one about the background and then you decided to withdraw that?

MR. MUSGROVE [defense counsel]: You were considering one about his background which was withdrawn.

THE COURT: But that's in this one too. You might talk to Mr. Bailey [defense co-counsel] and see what he wants.

MR. MUSGROVE [defense counsel]: Is Your Honor saying you want this one or we'll be modifying this one?

THE COURT: I want to know what you want. Is that the instruction you want?

MR. MUSGROVE: We would request this instruction as written.

MS. BROOME: I would object to anything other than the definition.

THE COURT: Okay. Let me look at this.

(R. 3223-3227). Thereupon, the trial court having deferred ruling as set forth above, granted a short recess for the defendant's benefit. After the recess, the trial court overruled the objection to the applicability of the HAC aggravator, but agreed to define the aggravator as requested by the defense: "I'll give the definition that you previously asked for relative to that [HAC]." (R. 3224).

At the conclusion of the evidentiary portion of the penalty phase and arguments of counsel, the trial judge then informed counsel that the then standard jury instruction on HAC did not refer to the term "heinous", whereas the proposed instruction defined

said term. (R. 3260). The standard jury instruction at the time set forth the following, which was invalidated in Espinosa: "the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." See Florida Standard Jury Instructions in Criminal Cases (1988). The trial court asked defense counsel whether they wished to make changes. Defense counsel, after conferring with each other, requested that the jury be instructed only on the definitions of the terms "atrocious" and "cruel", and the trial judge agreed:

> **THE COURT:** Apparently the standard instruction is not termed heinous -- apparently heinous is not in the instructions. I defined heinous. It seems to me maybe we should delete that and just define atrocious and cruel.
>
> **MS. BROOME:** I just copied what was given last time, Judge. Evidently it's been changed since then. I didn't realize heinous had been marked out.
>
> **THE COURT:** You want heinous put in there? Is that what you want?
>
> **MR. MUSGROVE [defense counsel]:** Especially heinous, wicked, evil and atrocious. So take out the first part of the definition. Just define cruel.
>
> **MR. BAILEY [defense counsel]:** I prefer atrocious.
>
> **MR. MUSGROVE:** Atrocious too. Just take out the first part. I request it in the first paragraph where you give them the instruction, forget about giving great weight to the verdict --
>
> **THE COURT:** Okay. I'll charge them, and then maybe we could just have that page retyped.

(R. 3260). The jury was thus instructed in conformity with the above: "The aggravating circumstances that you may consider are limited to ... the crime for which

the defendant is to be sentenced was especially wicked, evil, atrocious or cruel, atrocious means outrageously wicked and vile and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others;". (R. 3262). The trial also confirmed that there were no objections to the instructions as read:

> **THE COURT:** Counsel, I'm sending back the introductory instruction as well as the instructions I've just read.
>
> Okay. Any objections to the instructions as read other than what we previously discussed?
>
> **MR. BAILEY [defense counsel]:** None that I'm aware of.
>
> **MS. BROOME:** No, sir.

(R. 3266).

It is abundantly clear from the record discussions set forth above that the defense requested an expanded instruction containing the definitions of the terms "atrocious" and "cruel", but did not in any way request or refer to the critical language that the aggravator applies only to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Petitioner's argument, that the trial judge's reference to a "portion" of the instruction means that a complete Dixon instruction was requested, is refuted by the record set forth above, which reflects that the other portion of the proposed instruction contained references to the defendant's "background" and not the critical language in Dixon. See pp. 29-31 herein. Likewise, petitioner's reliance upon a pretrial motion, which cited had Dixon, is without merit.

See petitioner's memorandum at pp. 5-6, n.3. Said motion reflects that trial counsel was raising the constitutionality of the HAC factor itself. (R. 127-34). Dixon was cited in support of the argument that the HAC factor was unconstitutional because it had not been consistently applied by this Court. (R. 130-33). There was no mention of the constitutionality of the jury instructions on this factor, nor did the motion contain any proposed jury instructions. Thus, the issue of the constitutionality of the HAC jury instruction was not preserved at trial as there was no contemporaneous objection on this ground and the expanded instruction requested was not complete. Street 636 So. 2d at 1303 (requesting an expanded instruction which only contains the definition of the terms in the HAC aggravator, does not preserve the issue of the constitutionality of the jury instructions on said factor); See also Sochor v. Florida. ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (recognizing Florida law that filing a pretrial motion attacking vagueness of aggravating factor itself is insufficient to preserve alleged jury instruction error); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993) (defendant's pretrial motion in limine, seeking to preclude jury's consideration of HAC aggravating factor, due to constitutional vagueness, insufficient to preserve attack upon wording of jury instruction; Espinosa v. State, 626 So. 2d 165 (Fla. 1993) (same). Petitioner's reliance upon Atwater v. State, 626 So. 2d 1325, 1328, n. 3 (Fla. 1993), is misplaced, as the record in that case, unlike that herein, clearly reflected that defense

counsel requested a correct instruction which was denied by the trial court.[11]

2). Preservation on Direct Appeal

On direct appeal, there was no issue or mention of the wording of the HAC instruction, either. Appellate counsel, on direct appeal, challenged the constitutionality of Florida's capital sentencing statute, stating, inter alia:

> Section 921.141(5)(h) Fla. Stat. is vague, overbroad, arbitrary and capricious. (R. 985-992). . . . The grounds are set forth in detail in motions and are self explanatory. Appellant is aware that this Court has repeatedly affirmed validity of Florida's law, and will rely on the arguments below without further comment, except to note that the trial judge had trouble with (5)(h) himself, first letting it go to the jury and then rejecting it (see Point VIII) . . . .

See Brief of Appellant, Florida Supreme Court No. 72,277, at p. 19. Appellate counsel, in issue VIII on direct appeal, argued that the HAC aggravator should not have been considered by the jury due to insufficiency of the evidence. See Brief of Appellant, Florida Supreme Court No. 72,277, at p. 20. This Court rejected the challenge to the constitutionality of Florida's capital sentencing statute. Haliburton, 561 So. 2d at 651. This Court also found there was in fact sufficient evidence of the

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[11] The mention of Davis by the trial judge herein does not mean a Dixon instruction was requested by the defense counsel, especially when, a) the only mention of a case by the defense was Lewis, b) it was clear that the trial judge was quoting from Maggard, c) the proposed defense intruction contained references to background, and, d) the defense specifically requested that the court only define the terms atrocious and cruel.

HAC aggravator for presentation to the jury:

> . . . We disagree with appellant's contention that the court erred in allowing the jury to consider whether this homicide was heinous, atrocious, or cruel and in allowing the state to display a color photograph to the jury. There was evidence that the victim was sleeping or drunk in his home in his bed when attacked without provocation and vainly attempted to defend himself. This evidence was sufficient to present a jury question on the issue of heinous, atrocious, or cruel. *Cf. Hansborough v. State*, 509 So.2d 1081, 1086 (Fla. 1987) (evidence of defensive wounds and that victim did not die instantly supported finding that murder was heinous, atrocious, or cruel).

Haliburton, 561 So. 2d at 252.

This Court has repeatedly held that neither a challenge to the constitutionality of the aggravator itself nor a challenge to the applicability of the HAC factor to the facts is sufficient to preserve the issue of the constitutionality of jury instructions in post-conviction proceedings such as that in the instant case. Henderson v. Singletary, 617 So. 2d 315 (Fla 1993) (direct appeal challenge to the capital sentencing statute, without a specific challenge to the HAC jury instructions, is insufficient to preserve the issue of the constitutionality of the HAC instructions in post-conviction proceedings); Ferguson v. Singletary, 632 So. 2d 56 (Fla. 1994) (pretrial motion challenging the constitutionality of Florida's death penalty statute and the vagueness of its aggravating circumstances, including the HAC factor, does not preserve the issue of constitutionality of the HAC jury instruction in the absence of a specific objection to the instruction); Turner v. Dugger, 614 So. 2d 1074, 1081 (Fla. 1993) (objection as

to the applicability of the HAC factor to the facts was insufficient to preserve the issue of constitutionality of the jury instruction); Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Occhicone v. Singletary, 618 So. 2d 730 (Fla. 1993).

Petitioner's reliance upon appellate counsel's testimony at the evidentiary hearing below, as to what he raised on direct appeal, is unwarranted. The State would first note that the appellate briefs are the best evidence of what issues were raised and argued. Moreover, the petitioner has mischaracterized appellate counsel's testimony. The latter testified that with respect to the HAC factor, the record reflected that "an expanded jury instruction" was requested. (T. 334-335).[12] There was no mention of a complete Dixon instruction having been requested. (T. 334-338). Furthermore, counsel testified that he had only raised the applicability of the HAC factor and the denial of the aforementioned pretrial motions on direct appeal:

> Q. [Post-conviction counsel] Now when you filed your appeal brief on, with the Florida Supreme Court, did you raise an objection to the Florida Supreme Court that this jury instruction the way the heinous, atrocious and cruel jury instruction is phrased is vague and overbroad? That is the objection raised.
>
> A. [Appellate counsel] Well, you know, I challenged the fact that the jury was allowed to consider that particular aggravator, at all. But I don't think it applied to this case. The Judge had found it initially in the second trial, he let the issue go to the jury but then he didn't find, find it.

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[12] The symbol "T." refers to the transcripts of the evidentiary hearing contained in the post-conviction record on appeal, Florida Supreme Court Case No. 83,749.

> I know I had a number of pretrial motions had been filed. Perhaps one of them had addressed that. I did make a point on appeal about the denial on all those motions. I don't believe I made an elaborate argument because the Supreme Court had rejected the challenge like time again.
>
> Q. You say challenge like that, it's challenged, this is a vague and overbroad statute?
>
> A. I think that maybe one of the motions that was filed. If so, I made the point of challenging it again on appeal.

(T. 335-336). Petitioner's claim of preservation on direct appeal is thus completely without merit.

3). Ineffective Assistance of Appellate Counsel

Petitioner has also argued that he received ineffective assistance of appellate counsel, in the event that this Court finds the issue was not raised on direct appeal. This claim is also without merit.

As noted in the first section of this claim, the issue of the constitutionality of the HAC jury instruction was not preserved at trial. Appellate counsel can not be ineffective for failing to raise claims which were not preserved at trial. Ferguson v. Singletary, 632 So. 2d at 58. Furthermore, the failure to raise a claim that would have been rejected at the time of the appeal establishes neither deficient performance nor any prejudice. See, Henderson v. Singletary, 617 So. 2d at 317 (appellate counsel can not be deemed ineffective in failing to raise the issue of constitutionality of the HAC

instruction, even when same had been preserved at trial, because the claim likely would have been rejected on direct appeal); see also, Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995) ("trial counsel cannot be deemed ineffective for failure to object to HAC instructions when this Court had previously upheld the validity of those instructions). Moreover, as will be seen below, the instructional error in the instant case was harmless beyond a reasonable doubt.

4). Harmless Error

Finally, in the event that this Court deems that Petitioner's Espinosa claim was properly preserved, relief is not appropriate unless the error was not harmless. The State submits that the instructional error in the instant case was harmless beyond a reasonable doubt in light of the weighty aggravation and relatively weak mitigation presented; the evidence submitted as to the HAC aggravator; and, the arguments of counsel thereon.

First, the existence of other aggravation and the relative weakness of mitigation are relevant considerations in the determination of whether the error was harmless. Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992); Sims v. Singletary, 622 So. 2d 980, 981 (Fla. 1993); State v. Breedlove, 655 So. 2d 74, 77 (Fla. 1995). In this case there were four other aggravating circumstances, including the two weighty factors of prior violent felonies and committing the crime while under a sentence of imprisonment. There was no evidence of any statutory mitigators. The jury was only presented with evidence from petitioner's relatives that he had brought friends and strangers home for meals while he was growing up, had been helpful, and had counseled his family members against following his criminal example. (R. 3184-3220). The defense had separately presented the trial judge with evidence that petitioner had not been a disciplinary problem while incarcerated on death row. (R. 2322; 3267-

3274). Because, inter alia, there was other weighty and valid aggravation and minimal mitigation, the jury instruction error herein was harmless. Ragsdale, supra; Breedlove, supra. Petitioner's reliance upon Kearse v. State, 20 Fla. L. Weekly S300 (Fla. 1995), is unwarranted. In Kearse, this Court held that the HAC factor had been improperly found by the trial judge, and that the latter had also erroneously duplicated two of the three remaining aggravators. Kearse had also established two statutory mental mitigators in addition to three substantial nonstatutory mitigators. Under those circumstances, this Court, having noted that the CCP aggravator was not applicable, held that jury instructional error as to CCP was not harmless beyond a reasonable doubt.[13] The two aggravators of prior violent felonies and commission of the murder while under a sentence of imprisonment, were absent in Kearse. Unlike Kearse, no statutory or nonstatutory mental mitigators are present either. Furthermore, as will be seen below, there was sufficient evidence of the HAC factor in the instant case.

This Court has also previously found vagueness in the HAC jury instruction to be harmless, based upon a determination that under the facts presented, this aggravator clearly existed. Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert.

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[13] This Court, on occasion, has found Espinosa error to be harmless, even when the aggravating circumstance itself was not applicable. See, e.g., Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 2, 120 L.Ed. 2d 931 (1992); Johnson v. State, 608 So. 2d 9, 13 (Fla. 1992); Occhicone v. Singletary, 618 So. 2d 730, 731 (Fla. 1993).

denied, ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed. 2d 378 (1993); Henderson, supra; Foster v. State, 614 So. 2d 455, 462 (Fla. 1992); Marek v. Singletary, 626 So. 2d 160 (Fla. 1993); Atwater v. State, supra; Gorby v. State, 630 So. 2d 544 (Fla. 1993); Chandler v. Dugger, 634 So. 2d 1066 (Fla. 1994).

The instant case, much like Breedlove, supra, involved the stabbing of a sleeping victim in his own house. The medical examiner characterized it as a "savage killing," "carried out in a very forceful manner." (R. 2607). The victim sustained 31 stab injuries (R. 2593), with at least four defensive wounds to various parts of both of his arms (R. 2544-45) and a defensive wound to his leg. (R. 2629). The medical examiner, at the penalty phase, testified that the attack on the victim "commenced while he was asleep and he woke during the attack." (R. 3174). The medical examiner also found that, "during the course of the attack that Donald Bohannon made attempts to protect himself by placing his arms up in front of his face and body and by lifting at least his right leg to protect his body." (R. 3175). He added that the defensive injuries on the victim reflected that he was not unconscious at the time, and "realized he was being attacked." (R. 3177, 3175). The medical examiner also stated, "I think this would be generally accepted without any argument, that cutting injuries, sharp instrument injuries to the body result in pain. And to the extent that Donald Bohannon became conscious during the course of the attack, there was at least a period of time

when he was suffering." (R. 3176).[14] Although stating that the victim's consciousness was probably not of a long duration, the medical examiner concluded, "but I'm definitely not prepared to give a definite time because I'm unable to do that." (R. 3177-78).

The State recognizes that the trial court in his sentencing order did not address the HAC factor.[15] However, as noted previously, this Court, on direct appeal, specifically noted that:

> [t]here was evidence that the victim was sleeping or drunk in his home in his bed when attacked without provocation and vainly attempted to defend himself. This evidence was sufficient to present a jury question on the issue of heinous, atrocious, or cruel. Cf. Hansborough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) (evidence of defensive wounds and that victim did not die instantly supported finding that murder was heinous, atrocious, or cruel).

Haliburton, 561 So. 2d at 252. This Court not only noted the sufficiency of the evidence of this aggravator on direct appeal, but has repeatedly and consistently held killings such as that in the instant case to be heinous, atrocious and cruel, beyond a reasonable doubt. State v. Breedlove, supra; Foster v. State, 614 So. 2d 455, 457 (Fla. 1993) (knife used to inflict death upon a "quite intoxicated" victim); Davis v. State, 620 So. 2d 152 (Fla. 1993) (multiple stab wounds, and although victim was

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[14] As noted previously, the defendant's own statement to his brother also reflects that the victim woke and was defending himself.

[15] The trial court had found HAC to be applicable at the first trial.

intoxicated, he was alive and conscious when each injury was inflicted); Finney v. State, 660 So. 2d 679, 685 (Fla. 1995) ("While the medical examiner could not say how long she lived, he made it clear that the victim was conscious and able to feel at least the first few stab wounds."); Morgan v. State, 415 So. 2d 6, 12 (Fla. 1982) (Death was caused by one or more of ten stab wounds inflicted upon the victim by Appellant); Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (victim received three stab wounds and bled to death); Duest v. State, 462 So. 2d 446, 449 (Fla. 1985) (victim was stabbed eleven times); Floyd v. State, 497 So. 2d 1211 (Fla. 1986) (victim sustained twelve stab wounds, including a defensive one to the hand); Hansborough v. State, 509 So. 2d 691, 694 (Fla. 1990) (Several defensive stab wounds, indicating victim was aware of what was happening to her); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (victim stabbed seven times);Hannon v. State, 638 So. 2d 39 (Fla. 1994) (victim brutally stabbed numerous times); Atwater v. State, 626 So. 2d at 1329 (victim sustained forty stab wounds). The facts in the instant case are in accordance with those in the above cited cases and clearly reflect sufficient evidence of the aggravator, such that the jury instructional error was harmless beyond a reasonable doubt. State v. Breedlove, supra; Henderson, supra; Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994); Foster, supra; Atwater, supra.

Finally, the arguments of counsel also reflect the harmless nature of the instructional error herein. See, Occhicone v. Singletary, 618 So. 2d 730, 731 (Fla.

1993) (arguments of counsel considered as part of the harmless error analysis of Espinosa claim); Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992) (same); United States v. Linn, 889 F. 2d 1369, 1373 (5th Cir. 1989) (failure to give an instruction harmless, where information in the instruction was itemized by defense counsel and government concurred in same).

In the instant case, the focus of the medical examiner's penalty phase testimony was on the pain and suffering actually suffered by the victim, as noted above. During the penalty phase arguments of counsel, with respect to the HAC aggravator, the prosecutor argued that the victim had wakened, tried to defend himself and suffered pain. (R. 3246-47). She also added that the repeated stabbing was chosen by the defendant with "an utter disregard for [the victim's] suffering." (R. 3257). The defense counsel in turn argued that the victim "wasn't tortured" (R. 3251); that the HAC aggravtor's focus was on the victim, whom he argued, "lived a matter of seconds, and probably was not even conscious completely of what was happening." (R. 3252). The victim's pain and suffering were thus the sole emphasis of both counsel's arguments to the jury. The juror's focus was therefore upon its proper object. Had they been instructed properly, their focus would not have changed. The jurors herein either weighed in the victim's suffering, as they were entitled to do, or they did not, in which case the defendant certainly was not prejudiced by the instructional error. In sum, the instructional error herein was harmless beyond a reasonable doubt.

B. **Constitutionality Of The Cold, Calculated And Premeditated Aggravator And Jury Instruction Thereon.**

The petitioner initially contends that the "aggravating circumstance 5(i) of Section 921.141, Florida Statutes is unconstitutionally vague, overbroad, arbitrary, and capricious on its face." Petition at p. 40. The petitioner also argues that the jury instructions on this factor were erroneous. Both of said contentions are procedurally barred.

First, on direct appeal, in Point VII, the petitioner argued that Florida's capital sentencing statute is unconstitutional, inter alia, because [S]ection 921,141(5)(I) Fla. Stat. is vague, overbroad, arbitrary and capricious." Brief of Appellant on direct appeal, Florida Supreme Court Case No. 72,272 at p.19. Said contention was based upon a pretrial motion attacking the constitutionality of Florida's death penalty statute. Id. The motion did not propose or request any jury instruction. This Court found that the "argument that Florida's capital sentencing statute is unconstitutional is without merit." Haliburton, 561 So. 2d at 251. Thus, the portion of the petitioner's argument with respect to facial vagueness and overbreadth of the statute is procedurally barred, as it was raised and rejected on direct appeal. Henderson v. Singletary, 617 So. 2d at 315. Moreover, the Court has found the cold, calculated and premeditated (CCP) aggravator to be constitutional. Jackson v. State, 648 So. 2d 85, 87 (Fla. 1994) ("we reject the challenge [unconstitutional vagueness], to the [CCP] aggravating factor itself,"); Fotopoulos v. State, 608 So. 2d 784, 794 (Fla. 1992); Klokoc v. State, 589

So. 2d 219, 222 (Fla. 1991) ("we reject the claim that section 921.14(5)(l), Florida Statutes [CCP], is unconstitutionally vague)"; see also Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 163 L.Ed.2d 188 (1993) (Idaho Supreme Court's interpretation of an aggravator as referring to a "cold blooded" murderer, does not violate the Eighth Amendment to the Federal Constitution and is not vague); Walls v. State, 641 So. 2d 381, 387, n. 3 ("...the limiting construction imposed by the Idaho Supreme Court [in Arave v. Creech] is in harmony with the [Florida Supreme Court's] requirements of Jackson;").

Second, the Petitioner's claim of erroneous jury instructions on said aggravator is procedurally barred for failure to object to the instructions at trial or raise the issue on direct appeal. The jury instruction given in the instant case was the previously standard one, invalidated in Jackson, supra. (R. 3263). A claim of erroneous jury instruction on the CCP aggravator is cognizable in these proceedings, only when the defendant has: a) contemporaneously objected to the instruction at trial, b) requested a legally sufficient alternative instruction, and c) raised the issue on direct appeal. James v. State, supra, 615 So. 2d at 669 n.3; Harvey v. Dugger, 656 So. 2d at 1258; Jackson, 648 So. 2d at 87-88; Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993).

In the instant case, Petitioner did not object to the jury instruction on CCP. At the penalty phase charge conference there was no objection to the standard

instruction, nor any request for an additional or expanded jury instruction as the CCP aggravator. (R. 3118-3121; 3266). At the penalty phase charge conference, defense counsel only argued that the CCP aggravator is not applicable to the facts in the instant case, and the jury should not be instructed on said aggravator at all. (R. 3118-3120). Upon consideration of the case law with respect to applicability of the CCP aggravator, the trial judge determined that there was sufficient evidence upon which to instruct the jury on said aggravator. (R. 3229). Again there was no objection to the standard instruction or any request for an expanded instruction. Id. At the conclusion of the instructions to the jury, the trial judge also specifically asked for any objections to the instructions as read; there were none. (R. 3266).

Likewise, on direct appeal, no issue with respect to the constitutionality of jury instructions on CCP was raised. Apart from raising the facial validity of the statute, as previously noted, appellate counsel challenged the applicability of the CCP aggravator, i.e., arguing that the trial court erred in finding said aggravator applied to the facts herein. See Brief of Appellant, Point IX, at pp. 21-22, Florida Supreme Court Case No. 72,277. This Court rejected the challenge and held:

> Appellant's ninth point asserts that two of the four aggravating factors were improperly found. ...
>
> We disagree that this murder was not cold, calculated, and premeditated. Appellant broke into the victim's home and attacked him while he slept. He confessed to his mother that he killed Bohannon just to see

> if he could kill. These facts support the heightened premeditation and calculation required for a finding that the murder was cold, calculated and premeditated. Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725.

Haliburton, 561 So. 2d at 252.

It is thus abundantly clear that no challenge to the constitutionality of the CCP jury instructions was raised at either trial or on direct appeal. The instant claim is thus procedurally barred. James, supra; Jackson, supra; Harvey, supra; Hodges, supra.

To the extent that petitioner claims ineffective assistance of appellate counsel, he has shown neither deficient performance nor any prejudice. As noted above, there was no objection to the standard jury instruction herein, nor any request for an additional instruction. The issue was thus not preserved for direct appeal. Hodges, supra. Appellant's counsel can not be deemed ineffective for failure to raise unpreserved jury instruction issues. Squires v. Dugger, 564 S.2d 1074 (Fla. 1990). Moreover, even if the instant jury instruction claim had been properly preserved, appellate counsel's performance in failing to raise such a challenge will still not be deemed deficient. Henderson v. Singletary, 617 So. 2d at 317. "[T]he failure to raise a claim that would have been rejected at the time of the appeal does not amount to deficient performance. See, e.g., Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (rejecting claim that Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel were unconstitutionally vague)". Id.

Moreover, as this Court has already upheld the finding of this factor in the instant case, and, as previously noted, in light of the three remaining aggravators, including the weighty factors of prior violent felonies and under sentence of imprisonment, and the minimal mitigation presented herein, any instructional error herein was harmless beyond a reasonable doubt. Henderson v. Singletary, Hodges, supra.

C. Under Sentence of Imprisonment Jury Instruction

Petitioner contends that the jury was given "unbridled discretion" because they were not told "that the weight of this aggravator [under sentence of imprisonment] was less if the defendant had not committed the homicide after escaping." Petition at p. 41. This claim was not raised at trial; it was not raised on direct appeal either. It is thus procedurally barred. Roberts v. State, 568 So. 2d 1255, 1257-58 (Fla. 1990).

To the extent that petitioner claims ineffective assistance of appellate counsel, no deficient performance has been demonstrated, as appellate counsel can not be deemed ineffective for failure to raise the instant unpreserved issue. Roberts, supra, 568 So. 2d at 1261; Squires v. Dugger, 561 So. 2d 1074 (Fla. 1990). Petitioner has also failed to demonstrate any prejudice, as the instant claim is entirely without merit. The State would first note that there is no federal constitutional requirement to instruct the jury how to weigh the factors in their sentencing decision. Tuilaepa v. California, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed. 2d 750, 764 (1994) ("A capital sentencer

need not be instructed how to weigh any particular fact in the capital sentencing decision. . . . , in Proffitt v. Florida, we upheld the Florida capital sentencing scheme even though 'the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them.' 428 U.S., at 258, 49 L.Ed. 2d 913, 96 S.Ct. 2960. . . . In sum, 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process."). Likewise, this Court has never held that the jury be instructed as suggested by the petitioner. Reliance upon Songer v. State, 544 So. 2d 1010 (Fla. 1989), is unwarranted. In Songer, the trial court had found one aggravator, under sentence of imprisonment, for a conviction in Oklahoma which had been subsequently vacated by that State. Songer, 544 So. 2d at 1012. The trial court had also found three statutory mitigating factors, including the two weighty mental mitigators, in addition to extensive non-statutory mitigation. This Court, in the course of its proportionality review, stated:

> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (*see, e.g., LeDuc v. State*, 365 So. 2d 149 (Fla. 1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed. 2d 114 (1979)), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release

> job. In contrast, several of the mitigating circumstances are particularly compelling.

Songer, 544 So. 2d at 1011. This Court's proportionality review, which engages in a comparison of the aggravating and mitigating circumstances in other capital cases, is not applicable to the jury. The latter does not engage in proportionality review, nor is it equipped to do so. Appellate counsel can not be faulted for failure to advance theories not grounded in the law.

D. In-the-Course-of-a-Burglary Jury Instructions

Petitioner contends that the jury was not told that the commission-in-the-course-of-a-felony aggravator, standing alone, was insufficient to support a death sentence. Petitioner also contends that this aggravator constitutes an impermissible automatic aggravating circumstance. These claims were not raised at trial nor presented on direct appeal. They are thus procedurally barred. Parker v. Dugger, 537 So. 2d 969, 973 (Fla 1989) (where the issue of the use of the underlying felony as an aggravating factor was not raised at trial, it was found procedurally barred; moreover, this Court noted that such an issue is only cognizable under rule 3.850); Roberts, supra, 568 So. 2d at 1255, 1257-58; Johnson v. Singletary, 612 So. 2d at 576, n. 1.

No ineffective assistance of appellate counsel has been demonstrated either, as the above claims were unpreserved at trial. Roberts, supra, 568 So. 2d at 1261 (appellate counsel "not ineffective for failing to raise the following unpreserved and meritless claims: 1) his death sentence was based on the finding of an automatic aggravating circumstance;"). The State would also note that petitioner's reliance upon Proffitt v. State, 510 So. 2d 596 (Fla. 1987), is unwarranted. This Court, in Proffitt, did not hold that the jury must be instructed that the felony murder aggravator, standing alone, is insufficient to support a death sentence. Petitioner has again relied upon this Court's proportionality analysis. In Proffitt, this Court noted there was one

aggravator, during commission of a felony, and statutory and non-statutory mitigation. In the course of its proportionality review, this Court then stated, "To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty." Proffitt, 510 So. 2d at 898. Again, this Court's comparisons of the balance of the aggravating and mitigating circumstances in its proportionality review of capital cases does not translate to a requirement that the jury be instructed to do the same. Appellate counsel can not be faulted for failure to raise meritless issues.

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be denied, as the petitioner has failed to demonstrate that prior appellate counsel was ineffective.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, was mailed this 18th day of December, 1995, to MARTIN J. McCLAIN, Esq., and TODD SCHER, Esq., P.O. Drawer 5498, Tallahassee, Florida 32314-5498.

FARIBA N. KOMEILY