IN THE SUPREME COURT OF FLORIDA

JOHN ERROL FERGUSON,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary, Department of Corrections, State of Florida,

Respondent.

Case No. 80549

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION AND STATEMENT OF JURISDICTION

This is an original action for habeas corpus relief brought by Petitioner John E. Ferguson ("Ferguson") pursuant to Fla. R. App. P. 9.100(a). This is Ferguson's first petition for the writ. This Court has jurisdiction over the action pursuant to Fla. R. App. P. 9.030(a)(3) and Fla. Const. art. V, § 3(b)(9). The action is the proper means for Ferguson to raise the claims presented herein because the fundamental constitutional errors alleged involve the appellate process. See, e.g., Riley v. Wainwright, 517 So. 2d 656, 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987); Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985); Smith v. State, 400 So. 2d 956, 960 (Fla. 1981); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969).

As set forth below, two kinds of issues are raised in this petition. The first challenges the fundamental fairness and reliability of Ferguson's sentencing hearings and the resulting death sentences. These challenges rest on very recent decisions of this Court and the United States Supreme Court that are constitutional in nature and that have overruled this Court's precedents in effect at the time of Ferguson's direct appeals. See Corbett v. Florida, ___ So. 2d ___ No. 76,072, 1992 WL 125113, 17 F.L.W. S355 (Fla. June 11, 1992); Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Riggins v. Nevada, ___ U.S. ___, 112 S. Ct. 1810, 74 L. Ed. 2d 294 (1992). Such fundamental changes in the

law warrant the exercise of this Court's habeas corpus jurisdiction and the granting of the relief sought. See, e.g., Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), cert. denied, 485 U.S. 960, 108 S. Ct. 1224, 99 L. Ed. 2d 424 (1988); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); cf. Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980).

The second set of issues raised in this petition address the ineffective assistance of appellate counsel. Because the challenged acts and omissions of counsel occurred before this Court, this Court has jurisdiction. Smith, 400 So. 2d at 960; Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). Furthermore, this Court has recognized that a petition for a writ of habeas corpus is the proper means for seeking relief when the right of appeal is undermined due to the omissions or ineffectiveness of appointed counsel. See Wilson, 474 So. 2d at 1163.

PROCEDURAL HISTORY

Following his conviction for murder, Ferguson was sentenced to death in 77-28650-D ("the Carol City case") on May 25, 1978, and in 78-5428 ("the Hialeah case") on October 7, 1978. Hon. Richard Fuller presided over both trials and sentencing proceedings. On July 15, 1982, this Court affirmed Ferguson's convictions but reversed all of the death sentences

because the trial court improperly failed to consider and weigh statutory mitigating factors and because it relied on invalid statutory aggravating factors. Ferguson v. State, 417 So. 2d 631 (Fla. 1982) (the Hialeah case); Ferguson v. State, 417 So. 2d 639 (Fla. 1982) (the Carol City case).

On remand for resentencing, a different judge, Hon. Herbert Klein, without empanelling a jury and without any evidentiary hearing, sentenced Ferguson to death in both cases. On appeal, this Court affirmed. Ferguson v. State, 474 So. 2d 208 (Fla. 1985).

Through volunteer counsel, Ferguson timely filed a petition for relief under Fla. R. Crim. P. 3.850 on October 15, 1987, and a supplement thereto on September 8, 1989. The petition was denied on June 19, 1990. On appeal, this Court affirmed. Ferguson v. State, 593 So. 2d 508 (Fla. 1992). No petition for federal post-conviction relief has yet been filed.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner John E. Ferguson asserts that his convictions and death sentences were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Sections 9, 16, 17 and 22 of Article I of the Florida Constitution, for

each of the reasons set forth herein. Substantial and fundamental errors occurred in Ferguson's capital trials that not only went uncorrected but in fact were exacerbated during this Court's appellate review process. Accordingly, as demonstrated below, habeas corpus relief is appropriate.

SUMMARY OF ARGUMENT

Three recent decisions have significantly changed the law concerning the fundamental requirements of a full and fair trial and capital sentencing proceeding in Florida. None of these requirements was satisfied in this case.

First, this Court's decision in Corbett v. Florida, ___ So. 2d ___ No. 76,072, 1992 WL 125113, 17 F.L.W. S355 (Fla. June 11, 1992), makes clear that where a new sentencing is ordered in a capital case and the original trial judge has become unavailable, a substitute judge cannot independently perform that role merely by reading the original trial transcript; instead, a new hearing before a new advisory jury is required. In both the Carol City and Hialeah cases, Corbett was violated because a substitute judge merely read the transcript of the original trial proceedings before imposing the death penalty on remand.

Second, in Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court declared not only that the jury instructions on the

"heinous, atrocious, or cruel" aggravating circumstance were improper, but also that the impropriety could not be cured by the fact that the sentencing judge, unlike the jury, presumably was aware of this Court's precedents concerning the application of the aggravator. Rather, in Florida -- where both judge and jury must be correctly advised and make independent assessments -- the effect of the erroneous instruction on the jury's sentencing recommendation must be taken into account in reviewing the propriety of a death sentence. Here, as with the Corbett error, the error in the instructions can be cured only by a new hearing before a new judge and jury.

The third recent decision that was violated is Riggins v. Nevada, ___ U.S. ___, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). Even without Corbett and Espinosa, the decision in Riggins mandates that a new sentencing hearing be conducted because the State interfered with Ferguson's defense, in violation of due process, by continuing to medicate him with powerful antipsychotic drugs, over his objection, during the sentencing proceedings. Separately and together, the violations of Riggins, Corbett, and Espinosa make it clear that Ferguson has been deprived of his fundamental rights to a full and fair hearing before both judge and jury. These three decisions must be applied retroactively to this case and, when they are, the only appropriate remedy is a new sentencing hearing before a new judge and jury.

Finally, not only was Ferguson deprived of a full and fair hearing, but he was also deprived of effective assistance of counsel on appeal -- both from the original sentencing and the resentencing. As will be shown, counsel failed to raise so many prejudicial errors that it undermined the fairness of this Court's review and further underscores that the petition for habeas corpus relief must be granted.

I. FERGUSON IS ENTITLED TO A NEW SENTENCING PROCEEDING BEFORE A NEW JUDGE AND JURY BECAUSE HIS RESENTENCING VIOLATED THIS COURT'S MANDATE IN CORBETT v. STATE

A. A Substitute Judge Sentenced Ferguson Based Solely on a Review of a Cold Record

On the initial direct appeals from the convictions and sentences in both the Carol City case and the Hialeah case, this Court found that the trial judge (Judge Fuller) had erroneously applied to Ferguson the statutory aggravating circumstance pertaining to "a person under sentence of imprisonment," Fla. Stat. Ann. § 921.141(5)(a). 417 So. 2d at 646 (the Carol City case); 417 So. 2d at 636 (the Hialeah case). As to the Carol City case, this Court also found that Judge Fuller had erroneously found that Ferguson "knowingly created a great risk of death to many persons," Fla. Stat. Ann. § 921.141(5)(c). 417 So. 2d at 645. This Court further determined that in both cases Judge Fuller had improperly applied the M'Naghten test for insanity to the statutory mitigating factors set forth in Fla. Stat. Ann. § 921.141(6)(b)

and (f). 417 So. 2d at 645; 417 So. 2d at 638. Finding that it was impossible to tell what effect these errors had on Judge Fuller's weighing of the aggravating and mitigating factors, this Court ordered that Ferguson's death sentences be vacated and that the cases be remanded for resentencing. 417 So. 2d at 646; 417 So. 2d at 638.

Following the remand by this Court, Ferguson's cases were reassigned to Judge Klein, because Judge Fuller had retired from the bench. A full six months intervened between the initial proceeding before Judge Klein and the date on which he finally pronounced sentence in a consolidated hearing on both cases. At the numerous status conferences held during that six-month period, Judge Klein reported on his piecemeal progress in reading the transcripts. On one occasion, he noted that he would need to postpone sentencing yet again because he still had 1,000 pages to read. Transcript of Proceedings of Dec. 3, 1982, at 3. When Judge Klein eventually finished reviewing the transcript of both trials, he commented, "It was an awful lot of material for me to read." 1/ Transcript of Proceedings of Mar. 18, 1983, at 5.

1/ It is also apparent that it was difficult for Judge Klein to proceed in this manner. In a capital case, a piecemeal review of transcripts over a six-month period is no substitute for sitting and hearing the evidence.

It is apparent from his comments at these proceedings that Judge Klein did not believe it was necessary for him to conduct a full and independent reassessment of the sentence. Rather, Judge Klein stated his belief that "all I have to do is read the transcript of the trial * * * [and] the transcript of the sentencing phase of the trial in both cases." Transcript of Proceedings of Oct. 27, 1982, at 3-4. Accordingly, he specifically rejected defense counsel's contention that a new evidentiary sentencing hearing was required. Id. at 5.

Consistently, at the sentencing proceeding itself Judge Klein stated that "[t]he supreme court said it just wanted the trial Judge to take into consideration and apply correctly the standard of 921.141(6)(B) and (F) which is impairment and take that into consideration in making a determination." Transcript of Sentencing of Apr. 19, 1983, at 4. Judge Klein further emphasized, "It was my understanding that the supreme court specifically ruled I do not need another advisory opinion." Id. at 5-6. Judge Klein then reimposed the death penalty, finding that the two mental health statutory mitigating factors at issue in the initial appeals applied. Id. at 14; Findings in Support of Death Sentence, at 9; 474 So. 2d at 209 (consolidated appeal from resentencing).

When Judge Klein later issued his written sentencing findings as to the aggravating and mitigating circumstances, it became clear that he had read and relied heavily on the

findings previously made by Judge Fuller. For example, as discussed in Claim IV.A, infra, his findings regarding the "heinous, atrocious, or cruel" statutory aggravating circumstance, see Fla. Stat. Ann. § 921.141(5)(h), tracked the findings of Judge Fuller almost verbatim. Compare Findings in Support of Death Sentence, at 4-5 (Judge Klein) with Findings in Support of Death Sentence, at 4-6 (Judge Fuller). Thus, Judge Klein did not even attempt to undertake an independent assessment of the appropriate sentence based on the cold record he read, much less conduct a new evidentiary sentencing hearing at which he could assess for himself the witnesses and evidence.

B. In Corbett v. State, This Court Declared that Fundamental Fairness Dictates that the Same Judge Preside Over the Entire Capital Sentencing Proceeding

In its recent decision in Corbett v. State, ___ So. 2d ___, No. 76,072, 1992 WL 124113, 17 F.L.W. S355 (Fla. June 11, 1992), this Court held it reversible error for a death sentence to be imposed by a judge other than the one who presided over the penalty phase proceedings before the jury. In so holding, this Court specifically found that Fla. R. Crim. P. 3.700(c), which permits a sentence to be imposed "by a judge

other than the judge who presided at trial," is inapplicable in capital sentencing cases. 2/

In Corbett, the defendant was tried on charges of first-degree murder, kidnapping, armed robbery, and use of a firearm during the commission of a felony, arising from the robbery of a liquor store. 1992 WL 125113, at *1. The jury convicted him on all counts. Following additional testimony during the penalty phase, the jury recommended the death sentence for the murder charge. Id. at *2.

The day after the jury returned its advisory verdict, but before the trial judge could impose sentence, the judge died in an airplane crash. Id. at *3. The case was then reassigned to a new judge for sentencing. The new judge denied Corbett's motion for a new sentencing hearing, "'reviewed the entire record and personally examined the evidence submitted during the course of the trial and penalty phase of this case,'" and sentenced Corbett to death after finding the

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2/ The Rule provides:

> In those cases where it is necessary that sentence be pronounced by a judge other than the judge who presided at trial, or accepted the plea, the sentencing judge shall not pass sentence until he shall have acquainted himself with what transpired at the trial or the facts, including any plea discussions, concerning the plea and the offense. [Fla. R. Crim. P. 3.700(c).]

existence of five aggravating factors and two mitigating ones. Id. (quoting the sentencing order). Corbett appealed, arguing inter alia that the new sentencing judge, who presided over neither the trial nor the sentencing, erred in sentencing him after merely reviewing the trial transcript. Id. at *4.

This Court found that claim dispositive, vacated the sentence, and remanded the case for a new sentencing proceeding before a new jury. Id. at *4, *5. While the Court "[did] not fault the circuit court for applying rule 3.700(c)," which on its face covered Corbett's situation, the Court acknowledged that "in adopting this rule, we did not take into account death penalty cases and the very special and unique fact-finding responsibilities of the sentencing judge in death cases." Id. at *4. Finding it imperative in a capital sentencing proceeding that both the judge and the jury be able to assess the evidence regarding the aggravating and mitigating circumstances, this Court held that when there is a substitution of judges in such a proceeding, the new judge must conduct a sentencing hearing before a new jury "to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies." Id. In reaching this holding, the Court reasoned as follows:

> To rule otherwise would make it difficult for a substitute judge to overrule a jury that has heard the testimony and the evidence, particularly one that has recommended the death sentence, because the judge may only rely on a cold record in making his or her

> evaluation. We conclude that fairness in this difficult area of death penalty proceedings dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase proceeding. [Id.]

C. Corbett is Directly Applicable to This Case

This Court's decision in Corbett mandates that Ferguson be granted a new sentencing hearing before a new judge and jury. Just as Corbett's sentence was infirm because it was imposed by a judge other than the one who had supervised the jury deliberations as to the sentence, so too does the substitution of Judge Klein for Judge Fuller following this Court's vacating of Ferguson's initial sentences render the resentencing fundamentally unfair. In neither case was the substituted judge able to assess for himself the witnesses who testified and the evidence that was presented relating to aggravating and mitigating circumstances, and in both cases the ultimate sentence was imposed based only on a review of a cold record. Thus, just as in Corbett, Judge Klein simply was not in a position to review effectively the jury's sentencing recommendations and to assess independently whether they should be accepted or rejected.

D. Corbett Represents a Fundamental Change in the Law That Is Constitutional in Nature and That Must be Applied Retroactively to Ferguson's Sentences

Although this Court did not specifically invoke either the United States Constitution or the Florida Constitution in rendering its decision in Corbett, it is clear that the rule announced in Corbett is constitutional in dimension. As this Court recognized, "fairness * * * dictates" the Corbett rule. 1992 WL 125113, at *4. Implicit in this statement is an acknowledgement that this fairness is a component of the due process and fundamental fairness mandated by the Eighth and Fourteenth Amendments of the United States Constitution, as well as by Article I, Section 9 of the Florida Constitution, in order to assure that a capital defendant receives the requisite individualized sentencing. See, e.g., Lockett v. Ohio, 438 U.S. 586, 605-06, 98 S. Ct. 2954, 2965-66, 57 L. Ed. 2d 973, 990-91 (1978); Walls v. State, 580 So. 2d 131 (Fla. 1991); Scull v. State, 569 So. 2d 1251 (Fla. 1990); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), cert. denied, ___ U.S. ___, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991).

Furthermore, in overturning this Court's precedents and a rule of criminal procedure, Corbett effected a "sweeping change of law," represents a "major constitutional change[]," and "constitutes a development of fundamental significance." Witt, 387 So. 2d at 925, 929, 931. Indeed, prior to Corbett no

decision of this Court had even hinted that Rule 3.700(c) did not apply to capital sentencing procedures. In addition, the holding of Corbett directly involves the need to "ensur[e] fairness and uniformity in individual adjudications." Moreland v. State, 582 So. 2d 618, 620 (Fla. 1991). It is therefore a change in law similar to that created by Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), which this Court held to apply retroactively. See, e.g., Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988), Riley, 517 So. 2d at 659; Thompson, 515 So. 2d at 175.

For all these reasons, fairness demands that Corbett should be applied to this case, just as "fairness" dictated that this Court vacate Corbett's own improperly imposed death sentence. See 1992 WL 125113, at *5. Moreover, the State's interest in finality in no way outweighs Ferguson's interest in fundamental fairness. See Witt, 387 So. 2d at 925. Indeed, given the unusual circumstances surrounding both Corbett and Ferguson's resentencing, there is little risk that affording Corbett retroactive application here will disturb the finality of numerous other death sentences. 3/

3/ Absent the death, debilitating illness, or retirement of the original sentencing judge, such a substitution of judges is unlikely.

In fact, the State itself has already recognized that it was fundamentally unfair for a different judge to preside at Ferguson's resentencing without the benefit of a new jury. Following this Court's remand, the State filed identical petitions in both the Carol City and Hialeah cases asking that Judge Fuller, who had retired from the bench and moved from Florida, be specially appointed to conduct the resentencing, stressing that "it is in the best interest of sound judicial administration and the justice of the cause that the original trial judge be reappointed for purposes of reconsideration of the death penalty in the present cause." Petition for Appointment of Judge Richard S. Fuller, at 1. This Court denied the petition on the ground that "[t]his Court has previously determined that as a matter of policy it would not approve retired non-resident judges for judicial service." In Re: Appointment of Retired Judge, Pursuant to Rule 2.030 Florida Rules of Judicial Administration (Oct. 27, 1982).

The State then filed a Motion for Rehearing, asking that "in view of the extraordinary litigation and the necessity for uniformity required in death penalty cases, this court should reconsider its 'policy' with respect to death penalty litigation." Motion for Rehearing, at 1. The State recognized that "[t]he problems of not having the original trier of fact reconsider the matter presented to it in a subsequent hearing

may be insurmountable absent a denovo hearing." Id. 4/ This Court denied the motion without comment. In Re: Appointment of Retired Judge, Pursuant to Rule 2.030 Florida Rules of Judicial Administration (Nov. 22, 1982). In view of the fact that this Court itself directed that the Corbett error at issue take place, it is now incumbent upon this Court to revisit the issue and grant Ferguson relief. See, e.g., Herring v. State, 580 So. 2d 135 (Fla. 1991) (issue addressed where court later receded from its prior decision); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (revisiting issue previously addressed on merits); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986) (court will "revisit a matter previously settled" if it

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4/ In both its original Petition and its Motion for Rehearing, the State cited cases concerning administrative proceedings and the use of magistrates, but none of the cases relied upon by the State emanated from this Court, and none of them concerned capital cases. Nor were they based on an assertion that Rule 3.700(c) was inapplicable to capital cases. See United States v. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980); Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980); United States v. Marshall, 609 F.2d 152 (5th Cir. 1980); United States v. Bergera, 512 F.2d 391 (9th Cir. 1975); State v. Garcia, 422 So. 2d 926 (Fla. 3d DCA 1982); Earman v. State, 253 So. 2d 481 (Fla. 4th DCA 1971), decision quashed, 265 So. 2d 695 (Fla. 1972). Thus, there is nothing to suggest that this Court's precedent at the time of Ferguson's resentencing required that the motion be granted.

is claim of "error that prejudicially denies fundamental constitutional rights").

These circumstances underscore not only the State's own agreement with the fundamental unfairness of Ferguson's resentencing proceedings, but also that Corbett marks a complete departure from this Court's prior law. Indeed, by denying the State's prior repeated requests that Judge Fuller conduct the resentencing, and thereafter declaring the fundamental unfairness of those denials in Corbett, the Court has made plain that the requirements for retroactive application of that decision have been met.

E. The Corbett Error Was Particularly Egregious in This Case Because It Continued and Compounded Errors from the Initial Sentencings and Direct Appeal

The Corbett error alone mandates that Ferguson be resentenced before a new judge and jury. The presence of countless other errors at trial and on appeal, however, further exacerbated the effect of the Corbett error. While some of these errors were identified sua sponte by this Court on the initial appeals and formed the basis for vacating the death

sentence, 5/ additional errors that were never challenged by appellate counsel remained part of the record and were relied upon by Judge Klein when he resentenced Ferguson. See Claim IV.A, infra.

For example, Judge Fuller failed to make contemporaneous findings regarding the aggravating and mitigating circumstances in both the Carol City case and the Hialeah case. He imposed sentence on May 25, 1978, immediately after the jury returned its advisory verdict, but no findings were entered on the docket until March 12, 1979, when findings dated June 2, 1978 were entered. In the Hialeah case, Judge Fuller imposed sentence on October 7, 1978, immediately after the jury returned its advisory verdict, but he did not enter written findings until November 24, 1978, more than a month and a half later. This absence of contemporaneous findings reveals a lack of reasoned judgment after weighing of the aggravating and mitigating circumstances, and a lack of the individualized,

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5/ These errors were so apparent from the record that this Court, without the benefit of any advocacy from Ferguson's counsel, sua sponte concluded that two aggravating circumstances -- great risk of death to many and under sentence of imprisonment -- were improperly found by the trial court. Additionally, the Court concluded, again without the benefit of any advocacy, that the trial court incorrectly applied the M'Naghten test in determining whether the two mental statutory mitigating circumstances applied. See Fla. Stat. Ann. § 921.141(6)(b) & (f).

non-arbitrary sentencing to which Ferguson was entitled. See Nibert v. State, 508 So. 2d 1, 3-4 (Fla. 1987); Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986). Because these findings remained part of the record in this case upon which Judge Klein subsequently relied in imposing his sentence of death on resentencing, the Corbett error of allowing Judge Klein to resentence Ferguson based only on the cold record was further exacerbated.

Likewise, as to the Hialeah case, Judge Fuller made inappropriate findings regarding aggravating factors. For example, in finding that the crime was "heinous, atrocious, or cruel," Judge Fuller relied on irrelevant facts concerning what happened to one of the victim's bodies after death. Supplemental Record on Appeal from Resentencing ("Supp. R.") 15 (Findings in Support of Death Sentence, at 4). The presence of these erroneous findings in the transcript upon which Judge Klein relied further compounds the Corbett error.

It cannot be disputed that Judge Klein was influenced by Judge Fuller's erroneous reasoning as to the appropriate sentence. Indeed, some of Judge Klein's findings track those of Judge Fuller almost verbatim. For example, Judge Klein's lengthy findings on the "heinous, atrocious, or cruel" aggravating factor in the Carol City case are worded almost identically with the findings of Judge Fuller. Thus, it is clear that Judge Klein did not make his own independent

decision regarding the aggravating and mitigating factors (which is itself Corbett error), but instead relied on the erroneous findings of Judge Fuller in determining Ferguson's sentence. As with the other cited factors, this reliance further demonstrates the pervasive and serious effect that the Corbett error had on Ferguson's resentencing. Together, these factors require that he be granted a new sentencing proceeding before a new judge and jury -- a conclusion underscored by the violation of Espinosa v. Florida. See Claim II, infra.

II. FERGUSON IS ENTITLED TO A NEW SENTENCING PROCEEDING BECAUSE THIS COURT FAILED TO ASSESS THE INDEPENDENT EFFECT OF NUMEROUS ERRORS AT SENTENCING ON THE JURY'S ADVISORY VERDICT, IN VIOLATION OF ESPINOSA v. FLORIDA

A. This Court Failed to Evaluate the Effect of Constitutional Errors in the Jury Instructions Preceding Ferguson's Sentencings

At each of Ferguson's trials, an identical erroneous, instruction was given to the jury regarding the "heinous, atrocious, or cruel" aggravator:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: * * *
>
> * * * That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Now, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless * * * . [Record on Appeal in the

Carol City Case ("Carol City R.") 1072-74; Record on Appeal in the Hialeah Case ("Hialeah R.") at 1456-60.]

This instruction was constitutionally infirm because it lacked the second sentence of the instruction set forth in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), which explains to the jury that the "heinous, atrocious, or cruel" aggravator is not meant to apply to every murder and prevents them from finding the factor based on the insufficiently defined terms "heinous" and "atrocious":

> What is intended to be included are those capital crimes where the 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 conscienceless or pitiless crime which is unnecessarily torturous to the victim. [Id.]

It is this language from Dixon that the United States Supreme Court found provided adequate guidance to the jury in a Florida capital case. Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S. Ct. 2960, 2968, 49 L. Ed. 2d 913, 924-25 (1976). 6/ Without this limiting language, the instruction given at Ferguson's trials suffers from the constitutional defects identified in

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6/ Unlike the present case, the instruction given in Power v. State, No. 77,157, 1992 WL 205517, 17 F.L.W. S572 (Fla. Aug. 27, 1992), was not unconstitutionally vague, because it was the full Dixon instruction approved by the United States Supreme Court in Proffitt. 1992 WL 205517, at *8 & n.10.

Espinosa, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Shell v. Mississippi, ___ U.S. ___, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Indeed, the instruction at Ferguson's trials was virtually identical to that held unconstitutional in Shell, 111 S. Ct. at 313, 112 L. Ed. 2d at 4 (Marshall, J., concurring).

Espinosa specifically holds that the weighing of an aggravating circumstance violates the Eighth Amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Supreme Court stressed that it previously had held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id. Accordingly, it was Eighth Amendment error for Ferguson's juries to be given the unconstitutionally vague "heinous, atrocious, or cruel" instruction quoted above.

Nor can this error be cured by any trial court's "independent" weighing of aggravation and mitigation, even if the trial court did not improperly weigh the aggravator; rather, it must be "presume[d] that the trial court followed Florida law * * * and gave 'great weight' to the [jury's]

resultant [death] recommendation." Espinosa, 112 S. Ct. at 2928 (citations omitted). Espinosa therefore made it undeniable that, when a Florida jury recommends death after receiving an instruction that suffers from the defects identified in Godfrey, Maynard, or Shell, the resulting death sentence is infected with Eighth Amendment error because the jury presumably weighed an invalid aggravating factor, thus placing a "thumb [on] death's side of the scale." Stringer v. Black, ___ U.S. ___, 112 S. Ct. 1130, 1137, 117 L. Ed. 2d 367, 379 (1992). 7/ Indeed, in Stringer, the Supreme Court held that relying on an invalid aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighting process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that

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7/ Nor can it be presumed that the jury ignored the "heinous, atrocious, or cruel" instruction that was flawed as a matter of law simply because it may have been properly instructed on other aggravators. See Sochor v. Florida, ___ U.S. ___, 112 S. Ct. 2114, 2122, 119 L. Ed. 2d 326, 340 (1992).

> there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated. [112 S. Ct. at 1139, 117 L. Ed. 2d at 382 (emphasis added)].

In its initial review of Ferguson's sentence, this Court struck two aggravating circumstances that Judge Fuller had improperly counted in the calculus -- the aggravator regarding a defendant under a sentence of imprisonment, Fla. Stat. Ann. § 921.141(5)(a), and that regarding the knowing creation of a great risk of death to many persons, id. at (c). See 417 So. 2d at 645-46; 417 So. 2d at 636. The jury had also been instructed to consider these invalid aggravating factors. Carol City R. 1072-73; Hialeah R. 1059. In assessing the effect of these errors, however, the Court focused only on Judge Fuller's sentence, not on the jury's recommendation. See 417 So. 2d at 646; 417 So. 2d at 636. 8/

8/ Under the rationale of Espinosa, where the jury has been instructed on the bare statutory language of an aggravating circumstance that has been limited in its scope by the precedents of this court, the jury is left "without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. Accordingly, when the jury was instructed on the bare statutory language of the "great risk of death to many" and "under sentence of imprisonment" aggravators, the trial court left the jury "with the kind of open-ended discretion which was held invalid in Furman," Maynard, 486 U.S. at 361-62, 108 S. Ct. at 1857-58, 100 L. Ed. 2d at 380, for both of these aggravators have been limited by case law. See State v. Kampff, 371 So. 2d 1007 (Fla. 1979) ("'Great risk' means not a mere possibility but a

[Footnote continued]

In addition, this Court found that Judge Fuller had improperly applied two mitigating factors relating to Ferguson's mental state and his appreciation of the nature of his acts. See Fla. Stat. Ann. § 921.141(6)(b), (f); 417 So. 2d at 645; 417 So. 2d at 637-38. But again, this Court did not address whether the jury likewise misapplied the mitigating factors, as Judge Fuller did. At the sentencing phase, the jury was instructed only on the bare statutory language of the mitigating factors, Carol City R. at 1074-75; Hialeah R. at 1461-62, while at the guilt phase in the Hialeah trial, the jury had been instructed on the M'Naghten test for insanity. Hialeah R. 1379-80. Obviously, if Judge Fuller mistakenly

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8/ [Footnote continued]

likelihood of high probability * * * . By using the word 'many' the legislature indicated that a great risk of death to a small number of people would not establish this circumstance."); Elledge v. State, 346 So. 2d 998, 1004 (Fla. 1977) ("It is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether the defendant 'knowingly created a great risk of death to many persons.'"); Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981) ("Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase 'person under sentence of imprisonment' as set forth in section 921.141(5)(a)."). There is thus an unreasonable risk that the jury recommended a death sentence based on aggravating factors that did not apply in this case. See also Claim IV.A, infra, regarding the fact that no limiting instruction was given to the jury regarding the "avoiding arrest" aggravating factor.

applied that test at the sentencing phase, it is likely -- or, at the very least, possible -- that a jury unskilled in the law did so as well 9/.

Thus, as to several key factors, the jury was unconstitutionally misled regarding sentencing, and yet no correction of the error has occurred.

B. The United States Supreme Court's Decision in Espinosa v. Florida Requires That This Court Assess Errors in the Capital Sentencing Process in Light of Their Effect on Both the Sentencing Jury and the Sentencing Judge

In Espinosa, the Supreme Court declared that under Florida law, the jury and the judge share the sentencing obligation. Thus, the Constitution mandates that when Eighth Amendment error occurs before either the sentencing jury or the sentencing judge, a reviewing court must assess the effect of that error on both the judge and the jury. Espinosa, 112 S. Ct. at 2929; see also Sochor, 112 S. Ct. at 2123, 119 L. Ed. 2d at 341-42.

As the Supreme Court declared:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the

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9/ Because this error concerned the appropriate legal standard to be applied, rather than the mere application of law to the facts, it must be presumed that the jury relied on the improper standard. Sochor, 112 S. Ct. at 2122, 119 L. Ed. 2d at 340.

> jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 1249, 99 L. Ed. 2d 447 (1988); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377, 108 S. Ct. 1865, 1866-67, 100 L. Ed. 2d 384 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382, 105 S. Ct. 2727, 2733, 86 L. Ed. 2d 300 (1985), and the result, therefore, was error. [Espinosa, 112 S. Ct. at 2928.]

Espinosa effectively overruled decisions of this Court holding that the judge's sentencing process could somehow cure error before the jury. Thus, Espinosa flatly rejected this Court's declaration in Smalley v. State, 546 So. 2d 720 (Fla. 1989), that the Supreme Court's decision in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), does not apply in Florida because "[i]n Oklahoma the jury is the sentencer, while in Florida the jury gives an

advisory opinion to the trial judge, who then passes sentence." Smalley, 546 So. 2d at 722. Instead, Espinosa stressed that "neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 112 S. Ct. at 2929.

C. Espinosa Represents a Fundamental Change in the Law that Must be Applied Retroactively to Ferguson's Case

Espinosa represents a dramatic change from prior decisions of this Court concerning the role of the jury in the Florida capital sentencing scheme and the scope of review to be applied to errors before the jury regarding aggravating and mitigating circumstances. In overturning this Court's precedents, Espinosa has brought about a "sweeping change" of constitutional law that "constitutes a development of fundamental significance," Witt, 387 So. 2d at 925, 929, 931, and is as fundamental as the change wrought by Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).

It is beyond dispute that Espinosa overruled prior decisions of this Court. 10/ Indeed, as set forth above,

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10/ This Court's prior rule, originating with Dixon, had been consistently applied by the Court. See, e.g., Espinosa v. State, 589 So. 2d 887, 894 (Fla. 1991), rev'd, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991), vacated, ___ U.S. ___, 112 S. Ct. 3021, 120 L. Ed. 2d 893 (1992); Engle v. Dugger,

[Footnote continued]

Espinosa overturned two longstanding principles. First, the Supreme Court specifically overturned this Court's precedent that Eighth Amendment error before the jury could be cured or insulated from review by the judge's sentencing decision. Espinosa, 112 S. Ct. at 2929. 11/ Thus, the standard which this Court previously applied to the evaluation of jury instructional error at the penalty phase of a capital trial was found constitutionally lacking in Espinosa. Second, the

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10/ [Footnote continued]

576 So. 2d 696, 704 (Fla. 1991); Robinson v. State, 574 So. 2d 108, 113 n.6 (Fla.), cert. denied, ___ U.S. ___, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 731, 112 L. Ed. 2d 471 (1991); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, ___ U.S. ___, 111 S. Ct. 537, 112 L. Ed. 2d 547 (1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991); Randolph v. State, 562 So. 2d 331, 339 (Fla.), cert. denied, ___ U.S. ___, 111 S. Ct. 538, 112 L. Ed. 2d 548 (1990); Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 239 (1977).

11/ In light of Espinosa, the United States Supreme Court vacated and remanded five other decisions of the Florida Supreme Court. See Beltran-Lopez v. Florida, ___ U.S. ___, 112 S. Ct. 3021, 120 L. Ed. 2d 893 (1992); Davis v. Florida, ___ U.S. ___, 112 S. Ct. 3021, 120 L. Ed. 2d 893 (1992); Gaskin v. Florida, ___ U.S. ___, 112 S. Ct. 3022, 120 L. Ed. 2d 894 (1992); Henry v. Florida, ___ U.S. ___, 112 S. Ct. 3021, 120 L. Ed. 2d 893 (1992); Hitchcock v. Florida, ___ U.S. ___, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992).

Supreme Court soundly rejected this Court's belief that Proffitt insulated Florida's "heinous, atrocious or cruel" aggravating circumstance from Maynard error. Espinosa, 112 S. Ct. at 2928. Thus, Espinosa made it clear that Florida jury instructions must comply with Maynard and Godfrey. 12/

There can be no question under Espinosa that the Eighth Amendment error in this case invalidates the death sentence. Stringer, 112 S. Ct. at 1136-37, 117 L. Ed. 2d at 377-78. And as with Corbett, there can be no question that Espinosa is entitled to retroactive application. It was announced by the United States Supreme Court; it is constitutional in nature; and it is a new development of fundamental significance that directly involves the need to "ensur[e] fairness and uniformity in individual adjudications." Moreland, 582 So. 2d at 619-20; Witt, 387 So. 2d at 925, 931. This "substantial change in the law,"

12/ Specifically, Espinosa overruled precedent finding the "heinous, atrocious, cruel" instruction constitutionally appropriate, see, e.g., Cooper, 336 So. 2d at 1140-41; Smalley, 546 So. 2d at 722; precedent rejecting vagueness challenges to the instruction, see, e.g., Occhicone, 570 So. 2d at 906; Brown, 565 So. 2d at 308; and precedent evaluating the effect of error regarding the "heinous, atrocious, or cruel" aggravator solely on the basis of the judge's findings, see, e.g., Cooper, 336 So. 2d at 1140-41; Smalley, 546 So. 2d at 722; Robinson, 574 So. 2d at 112-13 & n.6.

Cooper, 526 So. 2d at 901, must therefore be applied here 13/ and must override whatever interest the State has in finality. Moreland, 582 So. 2d at 619-20; Witt, 387 So. 2d at 925. As this Court recognized in Witt, "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" Id. (quoting ABA Standards Relating to Post-Conviction Remedies 37 (Approv. Draft 1968)).

D. The Only Appropriate Remedy in This Case is a New Sentencing Proceeding Before a New Judge and Jury

This Court has made it clear that it will not independently reweigh aggravating and mitigating factors itself, because it has determined that it is not the function of an appellate court to conduct such a reweighing. Hudson v. State, 538 So. 2d 829, 831 (Fla.), cert. denied, 493 U.S. 875, 110 S. Ct. 212, 107 L. Ed. 2d (1989); Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla.), cert. denied, 454 U.S. 1000, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981); see Sochor, 112 S. Ct. at 2122-23, 119 L. Ed. 2d at 340-42; Parker v. Dugger, ___ U.S.

13/ See Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989); Riley, 517 So. 2d at 659; Downs, 514 So. 2d at 1070-71; Thompson, 515 So. 2d at 175.

___, 111 S. Ct. 731, 738, 112 L. Ed. 2d 812, 824-25 (1991). Consequently, that mechanism is not available for correcting the numerous errors at issue here.

Nor is a harmless error analysis a viable alternative. When a jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 3057, 111 L. Ed. 2d 511, 528 (1990) (emphasis added); see also, Espinosa, 112 S. Ct. at 2928. "[E]valuation of the consequences of an error" on the jury at sentencing is, after all, "difficult" because of the discretion that is afforded the sentencers. Satterwhite v. Texas, 486 U.S. 249, 258, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284, 295 (1988). It is even more difficult where, as here, there exists mitigation on which the jury could rely to vote for life, see Hall, 541 So. 2d at 1128, 14/ and where, as here, there were errors

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14/ At the resentencing, Judge Klein specifically found the two mental health statutory mitigating factors. Transcript of Sentencing of Apr. 19, 1983, at 14; Findings in Support of Death Sentence, at 9; 474 So. 2d at 209 (consolidated appeal from resentencing). This Court has recognized the significance of the two mental statutory mitigators of extreme emotional disturbance and diminished capacity in determining whether the defendant should live or die. See, e.g., Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Long v. State, 529 So. 2d 286, 293 (Fla. 1988); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S. Ct. 1994, 68 L. Ed. 2d 308 (1981); Burch v. State, 343 So. 2d 831, 834 (Fla. 1977); Jones v. State, 332 So. 2d 615, 619 (Fla. 1976).

involving numerous aggravating and mitigating circumstances.

For this reason, the Eleventh Circuit Court of Appeals has held that reviewing courts should avoid "speculat[ing] as to the effect" of constitutional error in capital sentencing involving a jury, Booker v. Dugger, 922 F.2d 633, 636 (11th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 277, 116 L. Ed. 2d 228 (1991). Likewise, this Court has noted that where, as here, mitigation is present, it would be "speculative" to find jury sentencing error harmless beyond a reasonable doubt. Hall, 541 So. 2d at 1128; see also Preston v. State, 564 So. 2d 120, 123 (Fla. 1990). Because errors such as those involved in Ferguson's case firmly press the thumb on "death's side of the scale," Stringer, 112 S. Ct. at 1137, 117 L. Ed. 2d at 374, such errors cannot properly be found harmless beyond a reasonable doubt.

Indeed, given that two aggravators were stricken in the first appeal, and given the error regarding the statutory mitigators, it is impossible for this Court to conduct a meaningful harmless error analysis regarding the effect of these errors on the jury's recommendation of death. It would be difficult enough to determine accurately that the effect of any one of these errors on the jury's sentencing recommendation was harmless beyond a reasonable doubt. It is unthinkable that

the cumulative effect of these errors 15/ on the jury's recommendation could be deemed harmless beyond a reasonable doubt. 16/ Cf. Sochor, 112 S. Ct. at 2123, 119 L. Ed. 2d at 341-42. Taken together, these errors -- particularly those under Corbett and Espinosa -- require a new sentencing hearing. See Derden v. Michael, 938 F.2d 605 (5th Cir. 1991) (granting habeas corpus relief where the cumulative errors resulted in a deprivation of due process).

15/ Nor are these the only errors that occurred at Ferguson's sentencing proceedings. Counsel for Ferguson have previously briefed for this Court numerous errors. See Brief of Appellant, Case No. 76458, at 60-113. Among these are the Hall/Hitchcock errors that occurred at both the Carol City and the Hialeah sentencings. Although this Court concluded that the jury was adequately instructed in the Carol City case and that the conceded Hitchcock error in the Hialeah case was harmless, 593 So. 2d at 512, it did so prior to the time it was aware of the Corbett and Espinosa errors.

16/ The difficulty in conducting a meaningful harmless error analysis is further demonstrated by the fact that the Hialeah jury did not vote unanimously in favor of death. When the jury returned with its sentencing recommendation, it was polled. Two of the first four jurors polled indicated that they had voted against the death penalty before the judge interrupted to explain that the jurors were being asked not how they had voted individually, but whether the verdict reflected the vote of a majority of the jurors. Hialeah R. 1469. There is no indication as to the division among the Carol City jurors.

III. THE UNITED STATE SUPREME COURT'S HOLDING IN RIGGINS v. NEVADA REQUIRES THAT FERGUSON BE GIVEN A NEW SENTENCING HEARING

A. The Facts of Ferguson's Case Fall Squarely Within The Holding of Riggins

The United States Supreme Court recently held that the forced administration of antipsychotic medication during a criminal trial violates the defendant's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Riggins v. Nevada, ___ U.S. ___, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). The Supreme Court ruled that once a defendant, through counsel, requests that the presiding judge order the State to terminate antipsychotic medication during trial, the medication must be stopped unless the State can show an essential state interest in continuing it.

At Ferguson's original sentencing in the Hialeah case before Judge Fuller, the court inquired if there was any reason why sentence should not be imposed. Counsel then asked the court to have Ferguson taken off the medication, stressing that "Mr. Ferguson is right now sedated with Haldol," and that the judge should not sentence him until he had been withdrawn from that medication. Hialeah R. at 1473. The court denied the request, without addressing whether the effect of the antipsychotic drugs was to render Ferguson incompetent and to deprive him of his right to a fair trial:

> Well, I have observed and listened to him and watched his conduct throughout the

> course of this trial and preceding proceedings and have determined that he is competent for the purposes of trial and I have determined that he had competent counsel throughout the course of the trial and had been able to assist and aid counsel. [Id.]

The court then imposed the sentence of death upon Ferguson.

At the resentencing proceeding following this Court's remand, the issue was raised again. When asked if he wished to make any argument on his client's behalf, Ferguson's counsel stressed:

> Throughout [the Hialeah] trial Mr. Ferguson was heavily sedated on a drug known as Thorazine, I believe. On more than one occasion I asked Judge Fuller to order the jail to stop administering this drug to him, the medication, because he was totally vegetated. He just did nothing but sit in trial and stare. That request was denied. [Transcript of Sentencing of Apr. 19, 1983, at 11-12.]

Judge Klein made no response to that argument. Indeed, the record of the entire proceeding is devoid of any suggestion that Judge Fuller or Judge Klein made any inquiry at all into this issue. There is certainly no indication that the trial court conducted the necessary balancing of the interests of Ferguson and the State. 17/

17/ The defendant's interests include the possible effect of the medication on his demeanor before the sentencing judge; his capacity to understand the nature of the proceedings; and his ability to communicate effectively with counsel and with the

[Footnote continued]

In Riggins, the Supreme Court noted that the lower court in that case had not acknowledged "the defendant's liberty interest in freedom from unwanted antipsychotic drugs" and that "this error may well have impaired the constitutionally protected trial rights Riggins invokes." Riggins, 112 S. Ct. at 1816. Here, as in Riggins, the judge failed to consider Ferguson's rights in denying the request to discontinue the medication. Indeed, as is clear from the absence of a record on the point, the trial judge was unaware that these rights were even implicated. 18/

On appeal in the Hialeah case, counsel specifically argued that Ferguson's medication with antipsychotic drugs rendered him incompetent to stand trial. "It is clear that the Defendant/Appellant has not improved, and at the time of trial proceedings, was taking extensive medication throughout, and was unable to assist counsel, and simply sat in a suspended

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17/ [Footnote continued]

trial judge. See Riggins, 112 S. Ct. at 1816. The State's interests include preventing extreme risks to the safety of the defendant or others. See id.

18/ The resentencing of Ferguson by Judge Klein would in no way have cured the constitutional violations resulting from Ferguson's forced medication with antipsychotic drugs. It is simply impossible to say that the record would have been the same had Ferguson been competent and able to assist his trial counsel.

state throughout." Brief of Appellant at 17. This Court denied the competency issue without considering the effect of the medication on Ferguson's ability to assist his trial attorney. The Court should revisit the issue in light of the Riggins decision.

B. Riggins Represents A Fundamental Change in the Law That Is Constitutional in Nature and That Must be Applied Retroactively to Ferguson's Sentences

In Riggins, the Supreme Court recognized for the first time the dramatic effects antipsychotic medication can have on a criminal defendant's right to a fair trial. To safeguard this right, the Court devised procedural steps that must be taken in all situations in which a defendant in a criminal trial is medicated with antipsychotic drugs and requests to have that medication withdrawn. See Riggins, 118 L. Ed at 489-90, 496.

As with Corbett and Espinosa, the new law announced in Riggins is a "sweeping change of law" that represents a "major constitutional change[]" in the law and "constitutes a development of fundamental significance." Witt, 387 So. 2d at 925, 929, 931. In sum, the holding in Riggins must be applied retroactively because: it was announced by the United States Supreme Court; it is constitutional in nature; and it is a development of fundamental significance. Moreland, 582 So. 2d

at 619; Witt, 387 So. 2d at 931. Ferguson therefore is entitled to a new sentencing hearing.

IV. NUMEROUS OTHER TRIAL ERRORS WENT UNREVIEWED AND THEREFORE UNCORRECTED ON BOTH DIRECT APPEAL AND APPEAL FROM RESENTENCING BECAUSE OF APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUES, THUS DEPRIVING FERGUSON OF HIS RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS TO MEANINGFUL APPELLATE REVIEW AND THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. The Trial Court Erred in Finding that the Murders Were Heinous, Atrocious or Cruel on the Basis of Irrelevant Facts and in Concluding that the Hialeah Killings Had Been Committed to Avoid Lawful Arrest; Counsel's Failure to Raise this Issue on Appeal Constituted Ineffective Assistance of Counsel

When the Carol City and Hialeah cases were remanded for resentencing, Judge Klein, adopting Judge Fuller's earlier findings, concluded that the murders were heinous, atrocious, or cruel and, in the Hialeah case, that the murders had been committed to avoid lawful arrest. As discussed herein, the trial court erred in so concluding, and appellate counsel rendered ineffective assistance in failing to challenge these findings on appeal from resentencing.

1. The "Heinous, Atrocious, or Cruel Findings Were Improper

a. The Carol City Case

In concluding that the Carol City murders were heinous, atrocious and cruel, Judge Klein, adopting Judge Fuller's written findings almost verbatim, focused not on what happened to the murder victims, but rather, on what happened to

Margaret Wooden, who survived. See Findings in Support of Death Sentence at 4-5. The inquiry under section 921.141(5)(h) is whether the capital felony was especially heinous, atrocious, or cruel. Wooden's ordeal is simply irrelevant to whether the capital crime was unnecessarily torturous to the people who were killed. See Clark v. State, 443 So. 2d 973, 977 (Fla. 1983) ("as pitiable as were [the survivor] Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor") (emphasis added)); Riley v. State, 366 So. 2d 19, 21 (Fla. 1979) (improper to consider a son's having to see his father's execution death, as there was nothing atrocious done to the victim, who died instantaneously from a gunshot to the head). See generally Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. 1985) (cautioning against the sentencer's consideration of matters irrelevant to the decision whether to impose the death sentence).

Moreover, there is no evidence that Ferguson intended to cause the victims pain or suffering. In Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991), this Court held that the aggravating factor of "especially heinous, atrocious, or cruel" does not apply unless the crime is one that "was meant to be deliberately and extraordinarily painful."

(Emphasis in original.) See also Shere v. State, 579 So. 2d 86, 96 (Fla. 1991) (finding of heinousness aggravator improper where "there was no prolonged apprehension of death," and there was no evidence that the defendant desired to inflict a high degree of pain); Brown v. State, 526 So. 2d 903 (Fla.) (evidence disproved that crime was committed so as to cause the victim unnecessary and prolonged suffering), cert. denied, 488 U.S. 944, 109 S. Ct. 371, 102 L. Ed. 2d 361 (1988); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984) (fact that victim of fatal shotgun wound lived for a few hours in pain and facing imminent death did not establish this aggravating factor).

In fact, if what happened to Wooden is a proper subject for consideration, this Court should also consider the fact that Ferguson attempted to locate Wooden's medication when she complained of having an asthma attack. Carol City R. 322-23. He brought her medication from the medicine cabinet and asked if it was the right medication. When she said it was not, he went back and tried to find the right medicine. Carol City R. 324. Ferguson also sought to reassure Ms. Wooden that she would be all right. Carol City R. 343. The evidence simply does not establish that he intended the victims to suffer.

Consequently, the facts upon which Judge Klein relied do not support the conclusion that the heinous, atrocious, or cruel aggravating factor had been established beyond a reasonable doubt in the Carol City case.

b. The Hialeah Case

Similarly, in the Hialeah case, Judge Klein also considered factors having nothing to do with whether the killings were heinous, atrocious, or cruel. The court, again adopting Judge Fuller's findings verbatim, observed that Belinda Worley's body "was left in a partially nude condition in the area where the crime was committed to be thereafter fed upon by insects and other predators." Supp. R. 15 (Findings in Support of Death Sentence, at 4). It is well settled that what happened to the murder victim after death is simply irrelevant in determining whether the heinousness aggravating circumstance applies. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) ("[e]vents occurring after death are irrelevant to the atrocity of the homicide").

Nor was it established beyond a reasonable doubt that Brian Glenfeld received the fatal shot to the head later on, after Worley was killed. The court, again adopting Judge Fuller's prior finding, stated that "[p]hysical evidence would substantiate that following the attack upon Belinda Worley the defendant went back to the car and shot Brian Glenfeld [sic] through the head." Findings in Support of Death Sentence,

at 4. In fact, there was no physical evidence to substantiate this conclusion. The only basis for this finding was the prosecutor's speculation in his arguments to the jury that the offense might have happened in that way. Even the prosecutor conceded that the shot to the head might have occurred before Worley was attacked:

> Now, sometime, whether it was before the killer went after Belinda or after he had gone after Belinda, we do not really know, but sometime the Killer had the car keys in his possession and opened the trunk of the car and took out the blanket unknown to him that the blanket was covered with glitter or had glitter specks on it. He used that green blanket to put over the body of Brian and maybe he shot him through the head while he was lying there before he covered him up, or maybe he put the blanket on him and then shot him although there are no bullet holes in the blanket. Then he went after Belinda Worley because Belinda Worley had some sparkles on her body . . . . [Hialeah R. 1320.]

Indeed, there was testimony suggesting that the perpetrator remained, however briefly, at the car after firing the initial shot into the car. Due to the lack of any evidence that Glenfeld suffered a long and drawn-out death, there simply is no basis for finding that his murder was heinous, atrocious, or cruel. In such circumstances, this Court has repeatedly held that without more, death by shooting is not heinous, atrocious, or cruel. See Brown, 526 So. 2d at 907 ("Nor is an instantaneous or near-instantaneous death by gunfire ordinarily a heinous killing."); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983) ("Directing a pistol shot to the head of the victim does

not establish a homicide as especially heinous, atrocious, or cruel."). 19/ Counsel failed as an advocate in not challenging this finding on appeal.

In addition to adopting Judge Fuller's erroneous findings in support of this aggravating circumstance, Judge Klein went one step further and, in so doing, considered matters having no proper place in his sentencing decision:

> Aside from the manner in which the defendant eventually brought about the death of Brian Glenfeld [sic] and Belinda Worley, the capital felony was especially heinous, atrocious and cruel in that two attractive, vibrant youngsters (both were 17) in love with life and God, were deliberately and mercilessly brutalized, and murdered.

Sentencing Findings at 5. Just as "[t]he mere fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance," Brown, 526 So. 2d at 907, the mere fact that the victims were young, attractive and religious does not establish that the crime was heinous, atrocious, or cruel. See Brooks v. Kemp, 762 F.2d 1383, 1408

19/ As in Brown, "the evidence indicated that the fatal shot[] came almost immediately after the initial shot to the arm. The murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering." 526 So. 2d at 907.

As in Clark, "there was no evidence of whether [the victim] was conscious after being shot, nor did the medical examiner indicate how long [the victim] survived or what degree of pain, if any, [the victim] suffered." 443 So. 2d at 977.

(11th Cir. 1985) (cautioning against the sentencer's consideration of matters irrelevant to the decision whether to impose the death sentence).

Hence, Judge Klein erred in finding the killing of Glenfeld to be heinous, atrocious, or cruel and in relying on irrelevant matters in deciding that the aggravator applied to the Hialeah and Carol City murders.

2. Judge Klein Erred in Concluding that the Hialeah Killings were Committed to Avoid Arrest

Judge Klein also concluded that the Hialeah murders were committed to avoid lawful arrest. In support thereof, the judge merely stated:

> The evidence established beyond a reasonable doubt that the two execution style murders were committed for the purpose of eliminating the only witnesses to the crime of robbery and rape in order to avoid lawful arrest. This type of action is clearly encompassed within this aggravating factor. [Supp. R. 14.]

There was not one shred of evidence to support this finding, merely saying that this aggravator was established beyond a reasonable doubt does not make it so. The fact that the victims were shot in the head does not establish that they were killed for the purpose of avoiding arrest. The case law is clear that much more is needed to establish that the killings were committed for the purpose of avoiding lawful arrest when

the victim is not a law enforcement officer. 20/ Most significantly, an "execution style" killing does not automatically qualify as proof of this circumstance. Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986) (aggravator not established where showing was made that the dominant or sole motive in execution murder was the elimination of witnesses), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); Bates v. State, 465 So. 2d 490, 492 (Fla. 1985) (must be clearly shown that the dominant or only motive for the murder was the elimination of witness), cert. denied, 484 U.S. 873, 108 S. Ct. 212, 98 L. Ed. 2d 163 (1987). Compare Clark v. State, 443 So. 2d 973 (Fla. 1983) (factor established where defendant told cell mate that victim knew and could identify defendant).

Although the evidence was insufficient to support this finding, the jury -- lacking the benefit of a limiting instruction as to when this aggravator applies -- also presumably concluded that this aggravating factor had been established. For the reasons discussed in Claim II, supra,

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20/ See Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) (when victim is not law enforcement officer, there must be "strong proof of the defendant's motive" and it must be clearly shown that the dominant or only motive for the murder was the elimination of the witnesses to avoid detection).

there is an unreasonable risk that the jury recommended the death sentence based on this inapplicable aggravating factor.

3. Appellate Counsel Inexcusably Failed to Raise These Errors on Appeal, Thereby Undermining Confidence in the outcome of Ferguson's Sentencing

Although there was no factual basis for concluding that the Hialeah murders were committed to avoid arrest and despite Judge Klein's reliance on irrelevant matters in concluding that the Carol City and Hialeah murders were heinous, atrocious, or cruel, appellate counsel neglected to challenge these findings on appeal. Counsel was ineffective in failing to do so. 21/

The resulting prejudice is patent. Given the existence of two statutory mitigating factors, 22/ and the

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21/ In the original appeals, counsel failed to present any substantive challenge to the trial court's sentencing findings. On appeal from resentencing, appellate counsel raised only two issues. Neither original counsel nor counsel on appeal from resentencing provided Ferguson with the effective assistance of counsel to which he is entitled under the Constitution, and it is obvious that the failings of original appellate counsel infected the resentencing appeal as well. The lack of advocacy on the part of both original and subsequent appellate counsel undermines confidence in the correctness and fairness of the sentence in this case. See Wilson, 474 So. 2d at 1165.

22/ It should be noted that additional compelling nonstatutory mitigating factors existed but were never presented or

[Footnote continued]

Court's striking of two aggravating circumstances on appeal, counsel's failure to raise these additional errors on appeal undermines confidence in the outcome of the sentencing, see Elledge v. State, 346 So. 2d 998 (Fla. 1977), cert. denied, 459 U.S. 981, 103 S. Ct. 316, 74 L. Ed. 2d 293 (1982), and requires a new sentencing before the jury, Jones v. State, 569 So. 2d 1234, 1240 (Fla. 1990).

B. On Appeal from Resentencing, This Court Should Have Remanded For a New Sentencing Trial Pursuant to Elledge v. State due to the Striking of Two Aggravating Factors on Direct appeal and Finding of Two Statutory Mitigating Circumstances Upon Resentencing; Counsel's Failure to Raise the Elledge Issue on Appeal From Resentencing Deprived Ferguson of the Effective Assistance of Counsel.

On direct appeal, this Court struck two aggravating circumstances in the Carol City case and one aggravating circumstance in the Hialeah case. 417 So. 2d at 636, 645-46. Unable to determine whether mitigating circumstances had been established, this Court remanded for resentencing before the

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22/ [Footnote continued]

considered in violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and Hall v. State, 541 So. 2d 1125 (Fla. 1989). Although this Court rejected Ferguson's Hall/Hitchcock claims in Ferguson v. State, 593 So. 2d 508 (Fla. 1992), in light of the other serious errors set forth in the present petition, the Court should consider the cumulative prejudice suffered by Ferguson and grant a new sentencing proceeding before a new jury.

trial judge. On resentencing, Judge Klein concluded that the two mental statutory mitigating factors did indeed apply. At that juncture, on appeal from resentencing, this Court should have remanded for a new sentencing trial in light of the striking of two aggravating factors and the existence of two mitigating factors.

In Elledge v. State, 346 So. 2d 998 (Fla. 1977), cert. denied, 459 U.S. 981, 103 S. Ct. 316, 74 L. Ed. 2d 293 (1982), this Court held that if improper aggravating circumstances are found,

> then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factors going into the equation which might tip the scales of the weighing process in favor of death. [Id. at 1003.]

Where aggravating circumstances are stricken and mitigating circumstances are present, under Elledge, the appropriate remedy is a remand for a new sentencing trial before a jury.

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [improper aggravating factor] shall not be considered. [Id.]

As Tedder v. State, 322 So. 2d 908 (Fla. 1975), Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and now Espinosa v. Florida make clear, a

Florida capital jury is treated as a sentencer for Eighth Amendment purposes. The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental," Riley, 517 So. 2d at 657-58, representing the judgment of the community. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Id. In Long, 529 So. 2d at 293, in which the judge and jury considered an invalid aggravating factor, and in which "two firm statutory mitigating circumstances concerning Long's mental condition" were present, the Court concluded that it had no choice but to remand for a new sentencing trial:

> [W]e find we are unable to say there is no reasonable probability that the elimination of this factor would change the weighting process of either the jury or the judge, particularly in view of the mitigating circumstances * * *. Under the particular facts of this case, we are compelled to conclude appellant is entitled to a new sentencing proceeding. [Id. at 293.]

The same result was required here. This Court's limited remand for resentencing before the judge but not the jury was insufficient to protect against the risk that the death sentence was imposed in an arbitrary, capricious and unreliable manner. See, e.g., Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Counsel's failure to raise the Elledge issue on appeal from resentencing deprived Ferguson of the effective assistance of counsel. For the reasons

discussed in Claim II, supra, Ferguson is entitled to a new sentencing hearing.

C. The Trial Court Clearly Erred in Finding That Ferguson Was Competent to Stand Trial and in Failing to Conduct a Pate v. Robinson Inquiry; Counsel's Failure to so Argue on Appeal Deprived Ferguson of the Effective Assistance of Counsel

1. The Trial Court Violated Ferguson's Procedural Due Process Rights under Pate v. Robinson in Failing to Conduct a Competency Hearing on Its Own Initiative

Ferguson's conduct at the Carol City trial was such that it raised a bona fide doubt as to his competency to stand trial, and the trial court erred by failing sua sponte to conduct a competency hearing as required by Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). 23/ The trial court was aware of Ferguson's history of mental illness and hospitalization in mental wards, as counsel filed a motion for the appointment of mental health experts to examine Ferguson pretrial. See Carol City R. 45, 51, 80. This knowledge, combined with Ferguson's paranoid and bizarre

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23/ The trial court should have conducted an inquiry into Ferguson's competency at the time of trial, and the post-trial competency hearing held on August 22, 1978 was no substitute for determining Ferguson's competency at trial. See James v. Singletary, 957 F.2d 1562 (11th Cir. 1992) (burden is on the state to demonstrate that petitioner's competency at the time of trial could be determined ex post facto).

behavior during the trial, raised strong doubts as to his competency during that trial. 24/

Ferguson's mental illness manifested itself on a number of occasions. For example, in the midst of defense counsel's closing argument at the guilt-innocence phase of trial, Ferguson interrupted his own attorney's argument to tell him that the courtroom spectators were making hand signals to the jury.

> MR. ROBBINS: * * * What does he do? What does Adolphus Archie do---
>
> THE COURT: Your client wants to speak with you. Please speak to him.
>
> MR. ROBBINS: Can we have a brief recess?
>
> THE COURT: Folks, why don't you go in the jury room for a couple of minutes. Please do not discuss the case.
>
> [Thereupon, the jury retired from the courtroom and the following proceedings were had:]
>
> THE COURT: Does he have to go the men's room?
>
> MR. ROBBINS: No, he does not have to go to the men's room.

24/ The constitutional rule prohibiting states from trying and convicting a mentally incompetent defendant, see Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); Pate, 383 U.S. at 384-86, 86 S. Ct. at 841-43, 15 L. Ed. 2d at 821-23 (1966), has been codified in the Florida Rules of Criminal Procedure. Pursuant to Rule 3.210(a), a criminal defendant who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while he is incompetent.

THE COURT: This is the only break, so now is the time to go.

Counsel, this is the second time that your client has caused some disruption. He apparently is concerned because of the police officers here.

MR. ROBBINS: He is, because these people, these police officers over here and the people in the audience are distracting the jury, making signals. I would ask these people -- not the news people -- but these people seated over here --

THE COURT: I have watched your client rotate his head from side to side, waiting for him to do something. I have watched the other people who are over here who have not been making signals, not been making any signs, sitting there listening to your brilliant closing arguments.

I disagree with you if you say they are making signals.

MR. ROBBINS: My client says they were disturbing him and making signals.

THE COURT: I have been watching them and they have been sitting there carefully listening to your gems of wisdom.

Ask the jury if they are ready. [Carol City R. 926-27.]

This was the second time that Ferguson interrupted the proceedings because of his paranoia that spectators and police officers were sending signals to the jury. Carol City R. 926.

During the penalty phase proceeding, as a witness was leaving the stand, the record indicates:

THE COURT: So the record is clear, the record should reflect Mr. Ferguson has removed his shirt and T-shirt and is presently seated here bare chested.

[Witness excused].

Thereupon:

PAUL STORER

was called as a witness on behalf of the State and, having been duly sworn, was examined and testified as follows:

THE COURT: The record will now reflect that Mr. Ferguson has now redressed. [Carol City R. 1034-35 (emphasis added).]

Upon the jury retiring for penalty phase deliberations, as the court was excusing alternate juror Lang, Ferguson interjected:

THE DEFENDANT: I believe this man is a witness as to what's been happening to my -- whatever they call these people here.

THE COURT: We can take it up with your counsel * * * . Does the state stipulate that the evidence can be submitted to the jury in your absence?

MR. KAYE: We have agreed to stipulate to substitution, but you can make your own.

THE COURT: I have no idea what your client was saying to me, Mr. Robbins.

MR. ROBBINS: I did not hear. He was trying to make friendly conversation with your Honor.

THE COURT: He is saying that the juror knew something about what somebody was trying to do to him.

MR. ROBBINS: Okay.

THE COURT: I said it would be a matter that you could handle.

Do you waive his presence for our conversation here?

MR. ROBBINS: Yes, I do. [Carol City R. 1079-81.]

It was inexcusable for the court to allow this trial to proceed despite Ferguson's obvious paranoid delusions that people in the courtroom were out to get him, that spectators were sending signals to the jury, and that the alternate juror was a witness to this conspiracy. Under these circumstances, the atmosphere in the courtroom was more like a circus than a trial. To continue under these circumstances without any renewed inquiry was incomprehensible and a clear violation of Pate. Pursuant to Pate and James, Ferguson is entitled to a new trial or, if the Court deems it appropriate, a remand for an evidentiary hearing on the issue of his competency to stand trial in the Carol City case.

2. Ferguson's Substantive Due Process Rights were Violated When He was Tried While Incompetent

The evidence of Ferguson's mental illness and inability to assist counsel is abundant. A number of mental health experts testified at the post-trial competency hearing that Ferguson was incompetent to stand trial, that he suffers from paranoid schizophrenia, actively hallucinates, has persecutory delusions, and has been actively psychotic, both on and off the psychotropic medication. See Carol City R. 1091 et seq. See, e.g., Dr. Marquit's testimony at 1100; Dr. Elenewski's testimony at 1111; Dr. Stillman's testimony at 1123, 1126 (discussing Ferguson's active psychotic process,

delusions and hallucinations, and indicating that Ferguson presents a classical picture of schizophrenia, paranoid type). See also Dr. Jarret's testimony at 1243 (indicating that he had previously diagnosed Ferguson as paranoid schizophrenic). 25/

25/ The evidence of Ferguson's severe mental illness is legion. For example, in 1973, Ferguson told Dr. Jaslow that if there was anything wrong with his mind, "it's the roaches that did it." See 3.850 Appeal Brief, Appendix I, at 1. Ferguson reported having "headaches because roaches went through his ears into his brain and then he said the roaches really weren't true roaches but they had a way of making people very small and putting them in this form and he could even hear them talking when they were in his head." Id. He had repeated fears that people were trying to kill him. Id. at 2.

In the middle of an interview with Dr. Graff, "[t]here was a man in the adjoining room and at one point following this discussion, Ferguson said, 'why does he keep looking at me like that?'" Id. at 3. In 1978, Dr. Mutter reported in an"underlying persecutory delusional trend." Id.

In an interview with Dr. Stillman in 1978, in response to a question about the charges against him, Ferguson "stated that they're going to kill him at this point since all the people want him to die, they don't like him, they keep sending him little things inside his cell and he opens a number of small pieces of Kleenex within which he has parts of the bodies of cockroaches he apparently has caught. He states in a laughing voice that he has all of them, all these things that were sent to do him harm." Id. at 4. He believed that jail personnel were putting poison in his food. Id.

In an interview with Dr. Marquit in 1978, Ferguson "expressed the thought that prison officials or persons were placing detectives to see what he was doing and to watch him. By way of evidence, he took a piece of tissue paper, like a kleenex, out of his pocket and showed me he had a little, dead cockroach in it which he asserted was sent by the prison people. He was saving it to show the things that were sent to

[Footnote continued]

3. Counsel's Failure to Raise These Issues on Appeal Deprived Ferguson of the Effective Assistance of Counsel

Inexplicably, counsel failed to appeal the trial court's determination that Ferguson was competent to stand trial, although this same counsel did appeal that determination in the Hialeah case. The failure to do so is particularly inexcusable in light of the fact that the competency hearing held by Judge Fuller was a joint hearing covering both the Carol City and Hialeah cases. See Hialeah Supplemental Record, Volumes I and II; Carol City R. at 1091.

The testimony at the competency hearing, combined with Ferguson's prior history of mental illness and particularly his manifestations of illness during the trial itself, provided a compelling argument that Ferguson was incompetent to stand

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25/ [Footnote continued]

his cell to annoy him. An ant appeared on the examination table. He called my attention to it and indicated that they sent in to him too. Carefully, he picked it up and put it into the paper with the cockroach remains." Id. at 5.

Dr. Mutter reported in 1973, "He looked around the room frequently as though he was hearing voices. I feel that he was actively hallucinating." Id. at 9. In 1978, Dr. Elenewski reported that Ferguson "showed me several marks on his leg which he said were inflicted when the angels told him to open up his skin and let out the people who had gotten under it." Id. at 12. Dr. Mutter noted that in 1975 that Ferguson was autistic and that his affect was flat and inappropriate. Id. at 19.

trial, and counsel's performance fell below the range of accepted professional competence in failing to raise this issue on appeal. Ferguson was significantly prejudiced thereby, for the State's criminal proceedings against him while incompetent were a patent violation of his due process rights. Accordingly, habeas corpus relief is warranted.

D. On Appeal From Resentencing, This Court Failed to Engage in a Proportionality Analysis After Counsel Likewise Had Failed to Raise the Issue of Proportionality, Thereby Depriving Ferguson of Meaningful Appellate Review and the Effective Assistance of Appellate Counsel

In every capital case, this Court "engage[s] in a proportionality review . . . to ensure rationality and consistency in the imposition of the death penalty." Sullivan v. State, 441 So. 2d 609, 613 (Fla. 1983). The need for this Court's proportionality review is apparent from the nature of the penalty imposed:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. [Furman v. Georgia, 408 U.S. 238, 306 92 S. Ct. 2726, 2760, 33 L. Ed. 2d. 346, 388 (1972).]

When this Court considered the two cases on direct appeal, its proportionality review was limited by the trial court's failure to give proper consideration to the factors.

Accordingly, this Court stated: "In the absence of any mitigating factors, the death sentence would be held appropriate on review * * * . However, in our review capacity we must be able to ascertain whether the trial judge properly considered and weighted [the] mitigating factors." 417 So. 2d at 638 (citations omitted) (the Hialeah case); see 417 So. 2d at 646 (the Carol City case). Yet when the consolidated case was before the Court on appeal from resentencing, counsel failed to raise the issue of proportionality, and this Court in turn, failed to consider it. Instead, the Court merely stated: "We affirm appellant's sentence of death." 474 So. 2d at 210.

Had this Court conducted a proportionality review, it might well have concluded that due to Ferguson's long and documented history of disabling mental illness, the death penalty was inappropriate under these circumstances. This Court has found the defendant's "emotional or mental disturbance" especially compelling in overturning the death penalty. See Blakely v. State, 561 So. 2d 560 (Fla. 1990); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (vacating death sentence and imposing life sentence where defendant had a long history of mental illness, including "symptoms resembling schizophrenia"); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); See Ford v.

Wainwright, 477 U.S. 399, 407, 106 S. Ct. 2595, 2600, 91 L. Ed. 2d 335, 345 (1986).

Because "[t]his Court's review of the propriety of death sentences and the proceedings in which they are imposed 'is no substitute for the careful, partisan scrutiny of a zealous advocate,'" Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986) (quoting Wilson, 474 So. 2d at 1164), the Court cannot know what the outcome would have been had appellate counsel properly raised and argued this issue. Counsel's failure to raise the issue was inexcusable.

In light of the foregoing, and in light of the fundamental sentencing errors that occurred in this case, see Claims II and IV.A supra, Ferguson should be granted a new appeal, Wilson, 474 So. 2d at 1163, or alternatively, this Court should vacate Ferguson's death sentence and impose a sentence of life imprisonment.

E. The Trial Court Committed Reversible Error When the Jury in the Hialeah Trial was Permitted to Separate and Return to Their Homes for the Evening After the Cause had Already Been Submitted For Deliberations; Counsel's Failure to Raise This Issue on Appeal Constituted Ineffective Assistance of Counsel

The jury in the Hialeah case began its guilt-innocence deliberations at 4:55 p.m. on October 6, 1978. At 8:50 p.m., after almost four hours of deliberating, the jury informed the court that it had not yet reached a verdict and wished to break

for the evening and continue in the morning. In violation of longstanding precedent and the defendant's right to a fair trial, the trial court released the jury, failing even to give admonitions not to discuss the case and to avoid reading the newspapers or watching television:

> The Court: Okay, folks. The last communication I got from you was to the effect that you would like to call it quits for the evening.
>
> There are some special admonitions that, of course, I think are appropriate.
>
> The case ought to stay here. Forget about it. Relax for the evening. All of you have transportation home? * * * [Hialeah R. 1425.]

Thus, the jurors were improperly allowed to separate and return to their homes for the evening after deliberations had begun; they were not even admonished to avoid discussing the case with anyone, reading the newspaper, or watching the news; and defense counsel was not asked to, nor did he, consent to this procedure.

Appellate counsel failed to raise this egregious error on appeal. This failure to do so was inexcusable in light of the rule announced in Raines v. State, 65 So. 2d 558 (Fla. 1953), that once the case has been submitted to the jury, even where no objection is voiced by counsel and there is no evidence of juror misconduct or prejudice, the jury's separation during its deliberations is reversible error requiring a new trial. As stated in Raines, a non-capital case:

> There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. [Id. at 559 (emphasis added).]

Raines was reaffirmed in Livingston v. State, 458 So. 2d 235 (Fla. 1984) in which this Court held that "in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so." Id. at 239. The Court emphasized that in Florida "[t]he right of a defendant to have the jury deliberate free from distractions and outside influences is a paramount right, to be closely guarded." Id. at 237. In Livingston, the jury was separated for a weekend, over objection, after beginning deliberations in a capital case. 26/ Despite the elaborate safeguards taken by the trial court, this Court reversed, reaffirming the strict rule requiring jury sequestration after it begins deliberations:

> The reason for such a rule is, of course, quite simply, to safeguard the defendant's right to a trial by an impartial jury. This right is fundamental and is guaranteed by

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26/ Before recessing for the weekend, however, the trial court had admonished the jury to avoid media reports or discussions about the trial. Then, when the jury reconvened, each juror was individually voir dired -- each reporting that he or she had not discussed the case or seen any news reports about the trial. 458 So. 2d at 238.

> the sixth amendment to the United States Constitution and article I, section 16 of the Florida Constitution. There is no way to insulate jurors who are allowed to go to their homes and other places freely for an entire weekend from the myriad of subtle influences to which they will be subject. Jurors in such a situation are subject to being improperly influenced by conversations, by reading material, and by entertainment even if they obey the court's admonitions against exposure to any news reports and conversations about the case that they have been sworn to try. [Id. at 238 (emphasis added).]

Subsequent decisions followed the "strict rule" of Raines and Livingston. In Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), cert. denied, 481 U.S. 1016, 107 S. Ct. 1894, 95, L. Ed. 2d 500 (1987), this Court held that appellate counsel rendered ineffective assistance by failing to argue on appeal that the trial court committed reversible error in allowing the jury to separate overnight after deliberations had begun, even though Livingston had not yet been decided at the time of appeal, since Raines embodied the law at the time of appeal. Relief was also granted in Tyler v. State, 507 So. 2d 660 (Fla. 4th DCA 1987), on the same ground. And in Taylor v. State, 498 So. 2d 943 (Fla. 1986), this Court extended the

Livingston rule to non-capital cases. See also Wiley v. State, 508 So. 2d 1336 (Fla. 1st DCA 1987). 27/

The continued vitality of Raines was reaffirmed by this Court in Pope v. State, 569 So. 2d 1241, 1244-45 (Fla. 1990). While this Court there rejected a claim of ineffective assistance of trial counsel based on counsel's failure to object to the separation of jurors for the evening, the Court stressed that the critical inquiry is whether the jury was properly and adequately admonished. Indeed, in Pope this Court stated that the Raines decision turned on the fact that "Raines' right to a fair trial had not been safeguarded by cautionary instructions." 569 So. 2d at 1244.

This Court concluded that Pope's jury had been admonished prior to separating overnight, and moreover,

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27/ Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 753 (1984), and Brookings v. State, 495 So. 2d 135 (Fla. 1986), are not to the contrary. In both Engle and Brookings, this Court declined to grant a new trial despite the jury's separation during deliberations because defense counsel had been consulted and had expressly agreed to the separation. The Court reasoned that a defendant cannot invite -- indeed agree to -- constitutional error and then be heard to complain on appeal. Engle, 438 So. 2d at 808; Brookings, 495 So. 2d at 141, 142. The other critical factor in both cases was that prior to separation, the jury had been thoroughly admonished not to discuss the case with anyone or to expose themselves to media accounts of the trial. Under these circumstances, this Court held that the failure to sequester the jury was not a denial of due process or the right to a fair trial.

> the jurors had been repeatedly instructed throughout the trial not to discuss the case amongst themselves or with others and not to come into contact with media coverage of the trial. Although it is preferable for jurors to receive full admonition not to discuss the case amongst themselves or with others and to avoid media accounts of the trial prior to each recess, the instruction complained of in conjunction with the numerous prior instructions was adequate to ensure Pope's due process and fair trial rights. [569 So. 2d at 1244 (emphasis added).]

Here, in marked contrast, Ferguson's jury was merely told:

> The case ought to stay here. Forget about it. Relax for the evening. All of you have transportation home? [Hialeah R. 1425].

This statement to the jury is not an admonition at all. The jurors were not told not to discuss the case. They were simply told that the case "ought to stay here."

Nor was Ferguson's jury repeatedly and properly admonished throughout the trial. Rather, the jury was admonished only at the very beginning of trial, ten days before they separated for the evening on October 6. See Hialeah R. 14-19. Thereafter, the jury was sporadically, not consistently and repeatedly, advised not to discuss the case

with anyone or to avoid media accounts of the trial. 28/ Hence, a review of the record in Pope in comparison with this case reveals that, unlike Pope, admonishments were not repeatedly and consistently given to the jury throughout the trial.

To the extent that this Court nevertheless finds the trial court's early and sporadic admonitions sufficient, any protection that might have been afforded by those admonitions vanished when, just prior to retiring to deliberate, the jury was told in effect to disregard those earlier admonitions:

> You may now retire to the jury room. My earlier discussions with you about not talking about this case you can forget about and you can talk about it all you want. [Hialeah R. 1419 (emphasis added).]

Although it may appear obvious to this Court and to counsel that the trial court meant that the jurors were now free to

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28/ Between the commencement of trial on September 27 and the submission of the case to the jury on October 6, there was an intervening three-day weekend. Before breaking for the weekend, the jury was told not to discuss the case. See Hialeah R. 547. But upon their return to court after the long weekend, no inquiries were made of the jurors, and at the end of that first day back, no admonitions whatsoever were given to the jury. See Hialeah R. 802. At the end of the next day, October 4, the jury was told not to discuss the case and to avoid the media. Hialeah R. 940. But at the end of the following day, October 5, the jury again was given no admonitions at all. Finally, on October 6 -- the day the case was submitted to the jury -- no admonitions were given to the jurors upon the close of all the evidence and prior to closing arguments while they were in recess.

discuss the case among themselves, reasonable jurors, having received that instruction, could well have believed that they were free to discuss the case among themselves and with third parties. Jurors, untrained in the law and the rules of court, cannot be presumed to know when the admonitions apply and when they do not. The effect of Judge Fuller's statement was to say that all bets were off -- that the jury was now free to discuss the case and that any prior admonitions no longer applied. From that point on, the jury was never again admonished not to discuss the case. Certainly, the judge's statement to the jury upon separating four hours later that the case "ought to stay here" did nothing to revive the earlier admonitions.

In a case such as this, in which the publicity surrounding the crime and the trial was constant, intense and highly damaging, see Claim IV.H, infra, the trial court's admonitions early on in this eleven-day trial, its instruction to forget about the earlier admonitions not to discuss the case, and its cryptic statement that the case "ought to stay here" deprived Ferguson of his right to a trial free from improper outside influences when the jury separated in the midst of deliberations.

Consistent with Raines, Ferguson should not be required to establish prejudice; rather, it should be presumed under these circumstances. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). A

requirement that Ferguson prove prejudice would also be completely at odds with Raines, which this Court purported to reaffirm in Pope. 29/ Nonetheless, if a showing of prejudice is required, the Court should assign a special master or remand for an evidentiary hearing in order to allow Ferguson an opportunity to prove prejudice.

At the time of Ferguson's appeal, Raines set out the unqualified law in Florida that, even absent an objection or a showing of prejudice, a defendant is entitled to a new trial when the jury in a criminal case separates during deliberations without proper admonition. It was therefore inexcusable for counsel to have failed to raise this claim on appeal, and his performance thus fell below the range of reasonable professional assistance. 498 So. 2d at 939. Furthermore, the law as it existed at the time of appeal provided that separation of the jury after deliberations was a violation of the defendant's fundamental right to a fair trial and was per se prejudicial. Thus, there is more than a reasonable probability that had this issue been raised on appeal, this

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29/ Moreover, the Court's statement in Pope that "[t]he per se harmful error adopted in Livingston was not intended to relieve a defendant of [the] burden" of providing prejudice, Pope, 569 So. 2d at 1245, makes no sense. If error is per se harmful, then it must be presumed. See Black's Law Dictionary (5th ed. 1979) (defining "per se" as, inter alia, "inherently").

Court would have vacated the conviction and sentence and remanded for a new trial. 30/ Certainly under the particular circumstances of this case, prejudice must be presumed. Counsel's failure to safeguard Ferguson's fundamental rights, by failing to raise this error on appeal, requires a new trial. See Johnson, 498 So. 2d at 939 (in light of the commission of reversible error, it would be futile to grant a new appeal; the appropriate remedy is to grant a new trial).

F. Critical Portions of the Hialeah Trial Record Were Missing When the Court Reviewed This Case on Direct Appeal, Thereby Depriving Ferguson of Meaningful Appellate Review and the Effective Assistance of Appellate Counsel

Under the death penalty procedures enacted by the legislature, this Court has the duty to review the judgment and sentence of death "after certification by the sentencing court of the entire record." Fla. Stat. Ann.§ 921.141(5) (emphasis added). The statute therefore contemplates that in reviewing a capital case under its mandatory jurisdiction, this Court must have before it a complete record of the trial. In the Hialeah

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30/ The well-established rule is that a criminal defendant gets the benefit of any decision that is rendered before the defendant's conviction becomes final. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649, 661 (1987). Accordingly, this Court should apply the rule announced in Raines, which was the law in effect at the time of Ferguson's appeal. Under Raines, separation of the jury in the midst of deliberations is per se prejudicial.

case, however, a very serious error occurred when three critical sections of the record were not transcribed. Thus, for some unexplained reason, the court reporter never transcribed the voir dire proceedings, but merely described the fact that jury selection had occurred. See Hialeah R. 9-10. The record is also defective in that only the concluding portion of the charge conference was transcribed. Third, at a crucial juncture in the defense's case, when defense counsel was discussing with the court its plan to have Ferguson take the stand, the transcript is cut off. The next thing to appear is the last three pages of the charge conference. See, Hialeah R. 1185-86. Due to this error, not only is the charge conference incomplete, but it cannot be ascertained why Ferguson did not testify and what else occurred before the charge conference began. 31/ (It is apparent that Ferguson never testified because he is not listed in the index of witnesses and because the jury was instructed on the defendant's right not to take the stand. See Hialeah R. 2-6, 1406.)

31/ It should be noted that Ferguson had a fundamental right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Pressure or coercion by a trial court on a defendant to waive that right would likely constitute reversible error. See United States v. Scott, 909 F.2d 488 (11th Cir. 1990).

Remarkably, appellate counsel never brought any of these material defects in the record to the Court's attention. The fact that the problem with the record was never raised on direct appeal suggests that appellate counsel did not read the record or, at the very least, did not read the entire record. 32/ Failure to read the entire record would be a breach of counsel's duty to scrutinize carefully the record to discover and highlight possible error, see Wilson, 474 So. 2d at 1165, and would constitute ineffectiveness per se. In such circumstances, prejudice should be presumed. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Had the issue been raised on appeal, the appropriate remedy would have been for this Court to remand the case in order to reconstruct the record. But that was never done. As Justice Shaw noted in Johnson, "[r]eversible error can turn on a phrase. Did it occur here? We cannot be certain." 442 So.

32/ In light of the fact that appellate counsel was also the trial attorney in this case, it is certainly conceivable that he relied upon his memory of the trial proceedings and perhaps his notes from the trial in framing the appeal issues rather than reading the entire record.

2d at 198 (Shaw, J., dissenting). See Johnson v. State, 442 So. 2d 193, 195 (Fla. 1983). 33/

In light of the substantial pretrial publicity in this case, it is particularly troubling that the voir dire was missing from the record on appeal, since appellate counsel -- except from his memory of trying the case -- would therefore be unable to assess whether the publicity infected the jury and made it impossible for Ferguson to receive a fair trial. See Claim IV.H, infra. 34/

33/ In Delap v. State, 350 So. 2d 462 (Fla. 1977), despite trial court orders requiring transcription of the entire trial, portions of the trial were not transcribed. These included transcripts of the jury charge conferences, the jury charges themselves, voir dire, and closing arguments. On appeal, this Court vacated Delap's conviction and sentence and remanded for a new trial. The Court ruled that "since the full transcript of the proceedings requested by the defendant is unavailable for review by this Court, and since the omitted requested portions of the transcript are necessary to do a complete review of this cause, this Court has no alternative but to remand for a new trial of this cause." Id. at 463 (footnote omitted).

34/ The fact that post-conviction counsel obtained the court reporter's notes and had the voir dire transcribed does not change the fact that Ferguson was deprived of an effective appellate advocate and meaningful appellate review, see Record on 3.850 Appeal ("3.850 Appeal R."), Exhibit A to 3.850 Motion.

G. The Prosecutor's Improper Penalty Phase Argument In the Hialeah Trial Deprived Ferguson of His Fundamental Right to a Fair Trial; Counsel's Failure To Raise This Issue on Appeal Constituted Ineffective Assistance of Counsel

The prosecutor committed fundamental error in the penalty phase closing argument at the Hialeah trial when he told the jury to consider matters that shifted the focus away from constitutional capital sentencing considerations. First, the prosecutor improperly argued to the jury that any error committed would be reviewed by the Governor and the courts:

> How far can we allow mankind to go in its inhumanity to man without taking some definitive action? That is why we have this total system of having a jury decide whether a person is guilty or not, having a jury decide whether there is enough evidence to impose a death sentence, why you have the judge who will have to make the ultimate decision based on the law and facts, and why you have review boards and appellate review and clemency boards, all this afforded to John Ferguson who gave Belinda Worley and Brian Glenfeld that much time [indicating]. [Hialeah R. 1444 (emphasis supplied).]

See California v. Ramos, 463 U.S. 992, 1011, 103 S. Ct. 3446, 3458-59, 77 L. Ed. 2d 1171, 1187 (1983) (advising jurors that a death verdict is modifiable and thus not final may cause them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility imposed on them); Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 2639-40, 86 L. Ed. 2d. 231, 238-40 (1985) ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer

who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere"); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc) (applying Caldwell to Florida's sentencing instruction that the jury's decision is only advisory and that the judge bears the responsibility for sentencing the defendant to death), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L. Ed. 2d 821 (1989).

The Commentary to ABA Standard 3-5.8 directly addresses this issue:

> References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision. [ABA Standards for Criminal Justice, "The Prosecution Function," Standard 3-5.8, Commentary, at 3-90 (1986).]

At the time of trial, argument of this type had long been considered reversible error in Florida. In Pait v. State, 112 So. 2d 380 (Fla. 1959), a capital case, the prosecutor had argued to the jury, inter alia, that the defendant had an opportunity to appeal, whereas the State did not. This Court observed:

> No objection was interposed by the appellant to the remarks of the prosecutor with reference to right of appeal. In the first place we consider it was highly inappropriate for the prosecuting officer to make that statement to the jury. In Blackwell v. State, 76 Fla. 124, 79 So. 731, 1 A.L.R. 502, which was also a murder case, we held that it was improper for the prosecutor in his argument to the jury to state: "If there is any error committed in this case,

> the Supreme Court, over in the capital of our state, is there to correct it, if any error should be done." It is true that in Blackwell v. State, supra, the defendant objected to the remark and the trial judge overruled the objection. However, this court held that the remark of the prosecutor injected reversible error into the record. Such remarks therefore can hardly be treated as harmless. This is so because the jury is being told that in some measure they could disregard their own responsibility in the matter and leave it up to the Supreme Court. [Pait, 112 So. 2d at 384.]

Nor was this one isolated instance of misconduct by the assistant state attorney. He also argued that keeping Ferguson alive instead of putting him to death would cost the taxpayers money:

> Oh, you will say that putting John in jail for the rest of his life is eliminating cancer. It is not. Putting John [in jail] will cost you money and putting John away will cost you time and will serve no purpose, no purpose whatsoever * * *. [Hialeah R. 1452.]

As stated in Tucker v. Zant, 724 F.2d 882, 890 (11th Cir. 1984), it is plainly improper "to influence the jurors by appealing to their pocketbooks." In Tucker, the prosecutor:

> pointed out that a life sentence would require "spending thousands and thousands of taxpayers' dollars to support [the defendant] for the rest of his life." It is impermissible to invite a jury to put a man to death because of the financial cost of incarcerating him. Protection of the public fisc is not a proper justification for capital punishment. [Id.]

It is axiomatic in Florida that the judge and jury may consider in aggravation only those factors that are expressly set forth in the capital sentencing statute. Fla. Stat. Ann.

§ 921.141(5). Elledge, 346 So. 2d at 1003. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) ("[w]e admonish the state to confine its evidence during the penalty phase to those matters provided by statute") (citing Elledge), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988); Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1979). In telling the jury that keeping Ferguson alive would cost money, the prosecutor argued a nonstatutory aggravating factor, thereby prejudicing Ferguson's right to a fair and reliable sentencing determination. See Brooks, 762 F.2d at 1408 ("arguments outside the realm of recognized sentencing concerns * * * run the risk of being improper because they urge death for possibly irrelevant reasons").

Finally, the prosecutor told the jurors to disregard any sympathy or compassion they may have felt for Ferguson:

> We are talking about the taking of a human life and you say to yourselves, "I could never do it." Think about it. Think about under what circumstances a person does not deserve pity, does not deserve consideration, does not deserve any thought of compassion * * *. [Hialeah R. 1441.]

The effect of this argument was to undermine the jury's ability to weigh and evaluate the mitigating evidence presented. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), rev'd on other grounds sub nom. Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). See Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985) (improper to tell jury that they

should abjure mercy in deciding the death penalty), cert. denied, 476 U.S. 1153, 106 S. Ct. 2258, 90 L. Ed. 2d 703 (1986).

The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d. 973 (1978). An admonition to disregard the consideration of sympathy or compassion improperly suggests to the sentencer "that it must ignore the mitigating evidence" arguing in favor of life. California v. Brown, 479 U.S. 538, 546, 107 S. Ct. 837, 841-42, 93 L. Ed. 2d 934, 942-43 (1987) (O'Connor, J., concurring). Furthermore,

> [S]ympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." * * * [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears. [Parks, 860 F.2d at 1555-57.]

Fundamental error, though not properly preserved in the trial court, may be urged on appeal when it amounts to a denial of due process. Steele v. State, 561 So. 2d 638 (Fla. 1st DCA 1990) (citing Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978). These comments taken individually as well as collectively violated Ferguson's right to due process and

utterly destroyed the reliability required by the Eighth Amendment in capital cases. The prosecutor's improper argument was not invited error, cf. Darden v. State, 329 So. 2d 287 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S. Ct. 1671, 51 L. Ed. 2d 751 (1977), and was not otherwise relevant to any matter in issue. See Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 484 U.S. 882, 108 S. Ct. 39, 98 L. Ed. 2d 170 (1987). As such, the comments complained of constituted fundamental error.

Appellate counsel failed to argue this error on appeal. That omission fell below the accepted standard of attorney competence and sufficiently undermined confidence in the outcome such that a new sentencing is required.

H. Ferguson Was Deprived of His Right To A Fair Trial in Both the Carol City and Hialeah Cases due to the Intensive and Pervasive Pretrial Publicity; Counsel's Failure to Appeal the Denial of the Motion for Change of Venue Deprived Ferguson of the Effective Assistance of Counsel

A defendant in a criminal case is entitled to a fair trial by an impartial jury that will render its verdict based on the evidence and the law without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). Under Florida law, a trial court must grant a change of venue when:

> the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. [Manning v. State, 378 So. 2d 274, 276 (Fla. 1980).]

In Manning, the Court reaffirmed its decision in Singer v. State, 109 So. 2d 7, 14 (Fla. 1957), that

> [e]very reasonable precaution should be taken to preserve to a defendant trial by a [fair and impartial] jury and to this end if there is a reasonable basis shown for a change of venue a motion therefor properly made should be granted. [Manning, 378 So. 2d at 277.]

The motions for change of venue in the Hialeah and Carol City cases set forth, inter alia, that:

> (1) John Ferguson had received "an enormous amount of publicity appearing both in the newspapers and on television and radio";
>
> (2) The Carol City case had been referred to as "the biggest mass murder in Dade County history";
>
> (3) Two of the codefendants in the Carol City case, Francois and Beauford White, had already been tried and sentenced to death and that both trials were extensively publicized, including media coverage during the trials;
>
> (4) In Francois' trial, the defense sought to show that Ferguson committed all the murders, and this was widely publicized;
>
> (5) There were many articles reporting that Ferguson was arrested holding the gun that killed Glenfeld and Worley;

(6) On numerous occasions, Ferguson's picture appeared both in the newspapers and on television; and

(7) There was no way that he could receive a fair trial. [Carol City R. 52-53; Hialeah R. 62-63, 75-76.]

The news articles attached to the motion for change of venue indicate that the details of Ferguson's arrest, his alleged role in the Carol City case, and his status as an alleged fugitive were front page news in the Miami Herald. Carol City R. 55-65; Hialeah R. 62-63, 75-76. Various news articles also discussed his prior record and the fact that he had escaped from mental hospitals. Id.

Attached to the motion were the affidavits of fourteen attorneys who, in their professional opinion and based upon their knowledge of the citizens of Dade County, the local newspaper coverage, and the nature of the charges, believed that Ferguson could not receive a fair and impartial trial. Carol City R. 66-79; Hialeah R. 62-63, 75-76.

The publicity surrounding Ferguson and these two cases extended from the time of the Carol City killings in July 1977 through the May 1978 Carol City trial and up to and including the October 1978 Hialeah trial -- in other words, for over a year. As stated in the motion for change of venue, there is no way in which Ferguson could have received a fair trial with this kind of publicity.

The pervasive and intensive pretrial publicity in Dade County concerning Ferguson easily met or exceeded the requirement in Manning. The newspaper accounts and affidavits submitted in support of the motion for change of venue indicate that the publicity surrounding the crime, the case and Ferguson's background was so overwhelming and so prejudicial "'that jurors could not possibly put these matters out of their minds and try the case solely on the evidence.'" McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977) (quoting Kelly v. State, 212 So. 2d 27, 28 (Fla. 2d DCA 1968)).

Particularly in the Hialeah trial, the voir dire transcript indicates that a substantial number of prospective jurors were exposed to television and newspaper coverage concerning the case. 35/ Of 53 prospective jurors, about half of them were familiar with the case. See 3.850 Appeal R., Exhibit A to 3.850 Motion. Of the twelve jurors and two

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35/ The voir dire transcript in the Hialeah case was not available to appellate counsel or to this Court on direct appeal, see Claim IV.F, supra, but was reconstructed by post-conviction counsel in preparation for the 3.850 proceedings. See 3.850 Appeal R., Exhibit A to 3.850 Motion.

alternates seated to hear the case, six of them had been exposed to pretrial publicity. 36/

Alternate juror Russell indicated that she had seen the victims parents on television:

> Prospective Juror [Russell]: * * * I recall seeing a film interview with the parents of the victims on television and, you know, the basics of the crime, but I think notwithstanding other objections that I've already raised, I think on that basis alone I would be prejudiced.
>
> The Court: Well, would you be able to disregard that particular occurrence? In other words, viewing this particular emotional interview on television?
>
> Prospective Juror: It put a certain prejudice in my mind undoubtedly but I think I could still judge the facts as they stand.
>
> The Court: The problem we are concerned with is that we have to disregard questions of sympathy and emotion and judge the facts that pertain to this particular individual. Are you able to do that without remembering this emotional occurrence that the two parents displayed. Can you eliminate that from your mind?
>
> Prospective Juror: I think so. [3.850 Appeal R. 247 (emphasis added).]

36/ They were: Wayne Mahfuz, Robert Payne, Jean Chauser, Herbert Pestcoe, Thomas Klotz, and Robert Russell. 3.850 Appeal R., App. A at 232, 233, 238, 239, 246, 247, 248-50, 250-52. In the Carol City case, three of the twelve jurors had been exposed to pretrial publicity. Carol City R. 123-24.

Alternate juror Payne, who remembered reading about the case, was never asked whether he could disregard what he knew and give the defendant a fair trial. 3.850 Appeal R. 252.

Juror Chauser read about the case in the Miami Herald. Defense counsel then inquired whether she could be impartial despite having read about the case and despite having a daughter, to which she replied, "There are lots of things I'm worried about and that is one more thing." 3.850 Appeal R. 249. When asked if she was "absolutely certain" that she could put aside any prejudice, Ms. Chauser responded, "I would do everything that I could to be fair." 3.850 Appeal R. 250 (emphasis added). Despite Chauser's expressed fear that she might not be able to put aside any prejudice, the trial court denied a defense challenge for cause. 3.850 Appeal R. 284. At that point, trial counsel sought to exercise a peremptory challenge but was advise that he had no challenges left:

> The Court: I don't think you have a challenge. You have used ten.
>
> Mr. Hacker: Judge, in that case I would ask the court to extend additional challenges to us. We have two [murder] counts * * * here in one indictment and I think in the interest of justice it would require that we have additional challenges inasmuch as the man is not facing just one sentence of death but two and in that case each count has to be considered separately and individually by these jurors.

The Court: Your motion is denied, counsel. 3.850 Appeal R. 284-285.] 37/

In light of the substantial pretrial publicity in this case, the jurors' exposure to this publicity, and the fact that Ferguson was charged with eight felony counts -- two of them capital -- it was a clear abuse of discretion for the trial court to deny the defense challenge for cause and the request for additional peremptory challenges. It should be noted that along with Chauser, Pestcoe (who was also exposed to pretrial publicity) was also seated as a juror after the trial court denied defense's motion for additional preemptories. See 3.850 Appeal R. 285-86.

When counsel filed the motion for change of venue, Judge Fuller indicated that he would hold that motion in abeyance until he could determine whether an impartial jury could be chosen. Hialeah Supplemental Record, Vol. 1, at 3. 38/ It is apparent from the record that Ferguson's jury was not free of the taint of the inflammatory and extensive pretrial publicity surrounding this case.

37/ In the Carol City case, a motion for additional peremptory challenges was filed pretrial, Carol City R. at 81, and denied on May 23, 1978, Carol City R. 84A.

38/ In the Carol City case, Judge Fuller denied the motion for change of venue on May 12, 1978 rather than holding it in abeyance pending the selection of a jury. Carol City R. 79A.

Prejudice is appropriately presumed where the record demonstrates, as it does here, that the community in which the trial was held was saturated with prejudicial and inflammatory media about the crime and where it infected the jury. Rideau, 373 U.S. at 724-25, 83 S. Ct. at 1418-19, 10 L. Ed. 2d at 664-65; Murphy v. Florida, 421 U.S. 794, 798-99, 95 S. Ct. 2031, 2035-36, 44 L. Ed. 2d 589, 593-94 (1975). Even in a large metropolitan area like Dade County, front page articles regarding the "biggest mass murder in Dade County history" certainly put this case -- and Ferguson -- out of the norm of every day criminal cases and suspects in Dade County.

The fact that the jury was not sequestered and that the trial received extensive coverage by the media only exacerbated the prejudice in this case. This is a case in which the general atmosphere in the community and the courtroom was sufficiently inflammatory so as to render suspect any assurances by the jury panel as to their impartiality. Cf. Murphy, 421 U.S. at 802, 95 S. Ct. at 2037, 44 L. Ed. 2d at 596.

In light of the foregoing, the trial court abused its discretion in denying Ferguson a change of venue in both the Hialeah and the Carol City cases, and appellate counsel was plainly ineffective in failing to raise this issue on appeal, to Ferguson's great prejudice. He is entitled to a new appeal

or, alternatively, to a new trial free from such prejudicial pretrial publicity.

Taken together, these numerous prejudicial errors not raised by appellate counsel deprived Ferguson of effective assistance and require that the findings against him be set aside.

CONCLUSION

For all the foregoing reasons, the Court should set aside the findings and sentence, and either remand for a new sentencing hearing, or remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 1992, a copy of the foregoing Petition for Writ of Habeas Corpus was sent by Federal Express to:

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