IN THE SUPREME COURT OF FLORIDA

JOHN ERROL FERGUSON,

Petitioner,

v.

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

Respondent.

Case No. 80,549

PETITIONER'S REPLY TO RESPONSE
TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Petitioner John E. Ferguson ("Ferguson") submits this Reply to the State's Response to his Petition for Writ of Habeas Corpus. As set forth in the Petition and this Reply, Ferguson has been deprived of the fundamental fairness and constitutional due process to which he is entitled because of fundamental, reversible errors committed during his sentencing proceedings. In addition, he has been deprived of the effective assistance of appellate counsel because of numerous acts and omissions by his attorney in proceedings before this Court.

Taken separately or together, these errors of constitutional dimension call into question the fundamental fairness and reliability of Ferguson's death sentence. Each of these issues is properly before this Court. Ferguson therefore asks this Court to grant the habeas relief to which he is entitled.

I. CORBETT MANDATES THAT FERGUSON BE GRANTED A NEW SENTENCING PROCEEDING BEFORE A JUDGE AND JURY.

A. Corbett Applies To The Facts Of This Case.

The State attempts to obscure and circumvent the bright-line rule established by this Court in Corbett v. State, 602 So. 2d 1240 (Fla. 1992), by arguing that Corbett "is only applicable to situations where a judge is substituted before the 'initial trial on the merits is completed,' and not to a resentencing." Response to Petition for Writ of Habeas Corpus

("Response"), at 9 (emphasis in original). While it is true that Corbett did involve the substitution of a judge before sentence had been pronounced for the first time, the legal issue that this Court addressed and resolved in Corbett was whether sentencing procedures in death penalty cases were governed by Florida Rule of Criminal Procedure 3.700(c), which refers only to a "sentence [that] is pronounced" without distinguishing between an initial sentencing and a resentencing. The Court in Corbett held that principles of fundamental fairness dictate that Rule 3.700(c) cannot apply to death penalty cases, and it therefore concluded that a death sentence could not be upheld if it were imposed by a substitute judge who did not hear the evidence that purportedly supported the sentence.

That same issue is presented by this case, and, as in Corbett, the death sentence imposed by the substitute judge must be set aside. As in Corbett, the judge who pronounced sentence did not hear any of the evidence upon which that sentence was based. Moreover, as in Corbett, the judge who ultimately imposed sentence on Ferguson "only rel[ied] on a cold record." Corbett, 602 So. 2d at 1244. Thus, the same evils that rendered the sentencing procedure in Corbett fundamentally unfair mandate that Ferguson receive a new sentencing proceeding before a judge and jury.

As this Court recognized in Corbett, there are "very special and unique fact-finding responsibilities of the sentencing judge in death cases." Id. at 1243. As a result, "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. at 1244. There can be no logical reason for "fairness" to dictate one result in Corbett and another result here; to the contrary, if the "fairness" that compelled this Court's decision in Corbett is to mean anything, it must mean that the holding in Corbett should be applied evenhandedly to this case. 1/

In attempting to distinguish Corbett, the State suggests that "[t]he same judge and juries heard all of the evidence" and that "[t]he juries recommended death and the trial judge imposed the sentence of death." Response, at 10. This is not only factually inaccurate, but it also completely misconstrues the nature of appellate review. When this Court finds that reversible error occurred during trial court

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1/ Nor can this interest in "ensuring fairness and uniformity in individual cases" be outweighed by the State's interest in "ensuring finality of decisions." Witt v. State, 387 So. 2d 922, 925 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980). There are likely to be few capital cases involving a substitution of judges under circumstances similar to those in Corbett and this case.

proceedings, the appropriate course, as occurred in Ferguson's initial appeals, is to vacate the trial court's judgment and remand for new proceedings. Vacating a lower court's judgment renders that judgment a legal nullity -- it is as if the flawed proceeding had never occurred. Ed Ricke & Sons, Inc. v. Green, 609 So. 2d 504, 507 (Fla. 1992); Atlantic Coastline R.R. v. Boone, 85 So. 2d 834, 839 (Fla. 1956). Once this Court vacated the sentences erroneously imposed by Judge Fuller and remanded for a new sentencing proceeding, Ferguson's trial on the merits was rendered incomplete, for at that point Ferguson had been convicted but not sentenced. Ferguson's trial was not completed until after Judge Klein conducted the resentencing. As a result, the sentence of death now looming over Ferguson is not that imposed by Judge Fuller, who heard the evidence, but that imposed by Judge Klein, who made his decision based solely on a cold record. This result directly violates Corbett.

B. Corbett Represents A Fundamental Change In The Law That Must Be Applied Retroactively To Ferguson's Case.

1. The Fairness At Issue In Corbett Is Of Constitutional Dimension.

Contrary to the State's assertion, this Court's holding in Corbett rests on bedrock principles of fundamental fairness and due process. That the Corbett opinion did not specifically refer to the federal or state constitution is not dispositive. This is especially so given that on direct appeal

Corbett specifically invoked "his constitutional rights under the Sixth, Eighth and Fourteenth Amendments as well as Article I Sections 9, 16 and 17 of the Constitution of the State of Florida" when he argued that

> Judge Barron's decision to sentence, based upon findings made from a cold record, deprived Corbett of due process. Corbett was entitled to be sentenced by a judge who had personally heard the important witnesses and who had the opportunity to evaluate the demeanor of the witnesses while testifying. The death sentence is unconstitutionally imposed in this case. [Initial Brief of Appellant, Corbett v. State, No. 76,072 ("Corbett Brief"), at 14, 27.]

Moreover, Corbett emphasized that Rule 3.700(c) could not apply to a death penalty proceeding because it did not "take into consideration the unique fact-finding responsibilities of the sentencing judge in a capital case." Corbett Brief, at 27.

These principles are precisely those upon which this Court rested its decision in Corbett. Indeed, in holding that "fairness * * * dictate[d]" that Corbett be granted a new sentencing before a judge and jury, this Court adopted verbatim Corbett's constitutionally based argument that such a result was mandated by the "unique fact-finding responsibilities of the sentencing judge" in death cases. Corbett, 602 So. 2d at 1243. This requirement that the sentencing judge hear live testimony rather than review a cold record before imposing sentence stems directly from the principle of fundamental fairness and the constitutional guarantee of an individualized,

reliable, non-arbitrary sentencing proceeding. See Lockett v. Ohio, 438 U.S. 586, 604-606, 98 S. Ct. 2954, 2965-2966, 57 L. Ed. 2d 973, 990-991 (1978).

Moreover, in arguing that principles of fundamental fairness are not at issue, the State also contradicts the content of its own filings in this case. The State -- long before Corbett -- asked that Judge Fuller conduct the resentencing not out of some "desire for the expeditious completion of the proceedings on remand," Response, at 12 n.2, but instead out of a recognition that "the best interest of * * * the justice of the cause" mandated such a result. Petition for Appointment of Judge Richard S. Fuller, at 1. Indeed, in seeking the appointment of Judge Fuller for the resentencing, the State conceded that the use of a substitute judge could create "insurmountable" problems "absent a denovo [sic] hearing." Motion for Rehearing, at 1. Implicit in the State's acknowledgement of "the necessity for uniformity required in death penalty cases," id., is a recognition of the stringent constitutional requirements for capital sentencing proceedings.

2. The Change In The Law Represented By Corbett Is Fundamental.

Not only does Corbett rest on constitutional principles, but its holding also represents a fundamental change in the law that must be applied retroactively to

Ferguson's case. See Witt v. State, 387 So. 2d 922, 931 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980). Until Corbett, there had been no hint in this Court's decisions that Rule 3.700(c) could not lawfully be applied to a death penalty sentencing proceeding. The State erroneously compares Corbett with Clark v. State, 460 So. 2d 886, 889 (Fla. 1984), in which this Court merely declared that an amendment to a particular procedural rule did not constitute a fundamental change. In contrast, this Court declared in Corbett that the interests of justice mandate that an existing rule, which on its face appeared to govern capital cases, cannot lawfully be applied to death penalty proceedings because of the fundamental principles that death is different and that the difference is of constitutional proportions. 602 So. 2d at 1243.

Nor is the State's reliance on Campbell v. State, 571 So. 2d 415 (Fla. 1990), well-placed. The State wrongly asserts that Campbell was "the case relied upon by this court in formulating Corbett's holding," Response, at 12, when in fact Campbell was simply cited as an example of Florida law regarding the nature of the required written findings in death penalty cases. Corbett, 602 So. 2d at 1244. Once again, this Court was adopting Corbett's own argument, for Corbett's brief cited Campbell for the limited proposition that the written findings in support of a death sentence "must be clear,

complete, thorough and accurate." Corbett Brief, at 26. Consequently, it is irrelevant that this Court has determined that Campbell does not represent a fundamental change in the law. Turner v. Dugger, No. 75,848, slip op. at 4-5, 9 (Fla. Dec. 24, 1992); Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991).

C. The Corbett Issue Is Properly Before This Court.

Notwithstanding the fundamental change in the law reflected by Corbett, the State nevertheless maintains that the issue is not properly before this Court because Ferguson's counsel failed to raise the issue before the trial court. This argument fails, first because it was not necessary for a specific objection to have been made in the trial court, and second because Ferguson's counsel did in fact preserve the issue for review.

1. It Was Not Necessary That A Specific Objection Be Made In The Trial Court.

a. Corbett Is As Profound A Change In The Law As Hitchcock.

This Court repeatedly has recognized that where a fundamental change in the law is involved, there is no need for the issue to have been raised below in order for this Court to address it. See, e.g., Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989); Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988); Ford v. State, 522 So. 2d 345, 346 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1355, 103 L. Ed. 2d 823 (1989);

Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988); 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). This is so because justice itself demands that a change in the law significant enough to be deemed fundamental be applied to every case coming before the Court, regardless of the case's procedural posture. Id. Moreover, this principle follows from the very nature of a fundamental change, which represents a development in the law that should not reasonably have been anticipated by counsel. See Sims v. State, 612 So. 2d 1253, 1255 (1992), cert. denied, ____ U.S. ____, 113 S. Ct. 1010, 122 L. Ed. 2d 158 (1993). It is for this reason, for example, that this Court routinely has applied the Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), retroactively on habeas review, even if counsel failed to object at sentencing to an instruction that prohibited the jury from considering any non-statutory mitigating factors. See, e.g., Hall, 541 So. 2d at 1126; Cooper, 526 So. 2d at 901; Ford, 522 So. 2d at 346; Mikenas, 519 So. 2d at 602; Thompson, 515 So. 2d at 175.

The State maintains, however, that even if Corbett constitutes a fundamental change in the law, it should not be given retroactive effect unless there was a contemporaneous objection that raised the issue in the trial court. Response, at 16. In so arguing, the State relies on this Court's

decisions regarding Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). This reliance is misplaced, for Corbett has a far more profound effect on sentencing than Booth. 2/ Booth concerns merely the admission of evidence which a jury may choose to accept or disregard, depending on a wide variety of factors. Corbett, on the other hand, involves a situation in which a death sentence is imposed by someone who has relied only on a cold record and therefore has not had the opportunity to assess the credibility of the evidence relating to mitigation and aggravation. Thus, Corbett, like Hitchcock, "implicat[es] the entire capital sentencing scheme," see Response, at 21, in a manner that calls into question the fundamental fairness and reliability of the death sentence, and again like Hitchcock, warrants retroactive application without regard to whether the issue was preserved below.

2/ Although Ferguson here distinguishes this Court's decisions regarding Booth and the necessity of an objection, he by no means concedes that these cases were correctly decided. As noted above, if a change in the law is indeed fundamental, then there is no reason to have expected counsel to have anticipated the change years before it occurred and to have preserved the issue for subsequent review by means of a contemporaneous objection.

b. It Is Not Necessary To Object When Doing So Would Be Futile Or Unreasonable.

This Court has made clear that there is no need for counsel to object when it would be futile to do so. See Thomas v. State, 419 So. 2d 634, 635-636 (Fla. 1982). Here, this Court's order vacating the sentence imposed by Judge Fuller and remanding for a new sentencing proceeding specifically declared that "[a]n additional sentence advisory verdict by a jury is not required." Ferguson v. State, 417 So. 2d 639, 646 (Fla. 1982) ("the Carol City case"); Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982) ("the Hialeah case"). As a result, it would have been futile for Ferguson's counsel to ask the trial court for a jury proceeding, since this Court's mandate had determined that one need not be held.

c. It Is Not Necessary To Object When Objections Are Not Uniformly Required.

The contemporaneous objection rule cannot be used to bar review unless that rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766, 769 (1964); see also Ford v. Georgia, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991). In capital cases, this Court at times has reached the merits of an issue, even absent an objection or a finding of fundamental change or fundamental error. See, e.g.,

Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989); Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977). As a result, it would violate constitutional due process for this Court to deem Ferguson barred from raising a Corbett claim here for lack of a contemporaneous objection.

2. To The Extent Necessary, The Issue Was Properly Preserved For Review.

Even if raising the Corbett issue before the trial court were necessary in order for this Court to review it now, the actions of both defense counsel and the State in this case were sufficient to preserve the issue. The two justifications traditionally offered for requiring a specific objection to be made in the trial court are that the court should be given the opportunity to correct any errors occurring before it and that the appellate court should be able to tell from the record what transpired below. See State v. Heathcoat, 442 So. 2d 955, 956 (Fla. 1983); Thomas, 419 So. 2d at 636; see also State v. Jones, 377 So. 2d 1163, 1165 (Fla. 1979). Both of these goals have been satisfied here.

While the limiting nature of this Court's mandate constrained defense counsel from specifically seeking a new jury proceeding, the record clearly reflects that counsel did seek a new evidentiary hearing. See, e.g., Transcript of Proceedings of Oct. 27, 1982, at 5-6. Indeed, that was the basis for defense counsel's request that he be allowed to

present witnesses at the resentencing. On appeal from the resentencing, counsel stressed to this Court that by refusing to conduct a full-fledged sentencing hearing, Judge Klein "attempted to act almost as a reviewing court, making findings based only on a transcript, fraught with witness inconsistencies and issues of credibility." Appellant's Initial Brief, Ferguson v. State, No. 64,362, at 12; see also Ferguson v. State, 474 So. 2d 208, 209 (Fla. 1985) (appeal from resentencing). This was sufficient to put both the trial court and this Court on notice that defense counsel believed it was inadequate for a substitute judge to conduct the resentencing based solely on a reading of the cold transcript, and that instead a full-fledged sentencing proceeding was necessary.

In addition, the State's own motions that Judge Fuller be recalled notified the trial court that the limited resentencing proceeding mandated by this Court's order could no longer suffice. Likewise, these motions gave this Court notice of the problems caused by the substitution of judges and the opportunity to address the issue on the merits. The State should not be permitted to disavow the effect its own motions had in providing both this Court and the trial court with an opportunity to consider the implications of the substitution of judges.

D. The Corbett Error Should Be Addressed And Corrected By This Court.

1. Ferguson's Resentencing By A Substitute Judge Based Solely On A Cold Record Constitutes Fundamental Error.

Regardless of whether Corbett represents a fundamental change in the law or whether the issue was preserved for review, this Court should grant Ferguson a new sentencing proceeding before a judge and jury because the Corbett error is fundamental. As this Court has recognized repeatedly, such an error should be corrected on appellate review, whether or not the issue has been otherwise preserved. See Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Jones, 377 So. 2d at 1164.

An error is fundamental in nature if it "amount[s] to a denial of due process" so that it deprives a defendant of a fair trial. Ray, 403 So. 2d at 960; see also Hargrave v. State, 427 So. 2d 713, 715 (Fla. 1983); Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978); State v. Smith, 240 So. 2d 807, 810 (Fla. 1970). As discussed above, this Court acknowledged in Corbett that "fairness * * * dictates" that a defendant not be sentenced to death by a substitute judge who relies solely on a cold record. 602 So. 2d at 1244. Because Ferguson was sentenced to death by Judge Klein, who substituted for Judge Fuller and who made his decision based solely on his sporadic reading of the trial transcript over a six-month period, Ferguson was deprived of the fundamental fairness to which he is constitutionally entitled.

That this error is fundamental in nature can hardly be doubted. No one who pronounced a valid sentence of death on Ferguson heard any evidence about him or his alleged crime. Not only does this constitute fundamental error in Ferguson's case, but indeed it calls into question Florida's entire capital sentencing scheme. If this error goes uncorrected, it will suggest that Florida permits the death penalty to be imposed without the individualized sentencing determination to which each capital defendant is entitled, in clear violation of the constitutional principles set forth in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and its progeny.

Nor should this Court ignore the effect of its own rulings. By ordering resentencing without a jury, and by denying the State's motions for the appointment of Judge Fuller, this Court triggered the Corbett error. The Court should grant Ferguson a new sentencing hearing before a judge and jury in order to remedy the error. See Jackson v. Dugger, 547 So. 2d 1197, 1199-1200 & n.2 (Fla. 1989); 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).

2. The Error Is Not Harmless Beyond a Reasonable Doubt.

The profound effect of the Corbett error on Ferguson's sentence cannot be avoided by deeming the error "harmless." It is impossible to know whether Judge Klein would have imposed the death penalty had he heard for himself the witnesses who could provide evidence about the relevant aggravating and mitigating factors. 3/

The State nevertheless asserts that because the aggravating circumstances relied upon by Judge Klein at resentencing were those upheld by this Court in the initial appeal, and because Judge Klein acknowledged that mitigating evidence existed, "there was no possibility that Ferguson could have been prejudiced" by the fact that Judge Klein only read the transcript. Response, at 17. But this Court necessarily rejected similar arguments in Corbett, when it found that resentencing before a new judge and jury was required regardless of the number or status of the aggravating and mitigating circumstances found by the substitute judge. See

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3/ The harm caused by the Corbett error is exacerbated by the fact that, had there been a full-fledged sentencing proceeding before a judge and jury, there would have been an opportunity to consider evidence relating to additional compelling non-statutory mitigating factors that were not presented or considered at the initial sentencing, in violation of Hitchcock. See Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989).

Corbett, 602 So. 2d at 1243-1244; cf. id. at 1244 (Grimes, J., concurring in part, dissenting in part).

On Ferguson's initial appeals, this Court found that Judge Fuller improperly had applied two aggravating circumstances and had misinterpreted the law with regard to two mitigating circumstances. 417 So. 2d at 645-646; 417 So. 2d at 636-638. Had these errors been insufficient to call into question the validity of the death sentence, this Court presumably would have found the combined effect of these errors harmless beyond a reasonable doubt and would not have remanded for resentencing. Instead, this Court properly recognized that it was impossible to tell what effect the erroneous findings had on the death sentence, and therefore remanded the case for resentencing. 417 So. 2d at 646; 417 So. 2d at 638. Now, Corbett makes clear that it is likewise impossible to determine at all -- much less beyond a reasonable doubt -- whether a substitute judge, relying on the testimony of live witnesses rather than on an error-laden record, would have decided that Ferguson should die.

Moreover, the Supreme Court's decision in Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), discussed below, further underscores the degree of harm caused to Ferguson by the Corbett error. As the Supreme Court and this Court have recognized, the judge and jury are co-sentencers under Florida death penalty law. Espinosa, 112

S. Ct. at 2928, 120 L. Ed. 2d at 855-859; Johnson v. Singletary, No. 81,121, slip op., at 2 (Fla. Jan. 29, 1993). Consequently, each bears an equal responsibility for weighing the evidence and assessing the credibility of witnesses. Just as an erroneous instruction unconstitutionally impedes a jury's function as sentencer, so does reliance on a cold transcript prevent a judge from properly "weighing aggravating and mitigating circumstances." Id. Because in this case "the weighing process has been infected" by Corbett error, "the death sentence must be invalidated." See Stringer v. Black, __ U.S. __, 112 S. Ct. 1130, 1137, 117 L. Ed. 2d 367, 379 (1992).

II. ESPINOSA LIKEWISE MANDATES THAT FERGUSON BE GRANTED A NEW SENTENCING PROCEEDING BEFORE A JUDGE AND JURY.

A. Espinosa Represents A Fundamental Change In The Law That Must Be Applied Retroactively To Ferguson's Case.

Before the United States Supreme Court's decision in Espinosa, a plethora of this Court's decisions had declared that the judge, and not the jury, was the sentencer under Florida capital sentencing law. See Petition for Writ of Habeas Corpus ("Petition"), at 28-30 & nn.10-12, and cases cited therein. As a result, this Court had found that errors in sentencing jury instructions were of little consequence, since any error presumably was corrected by the judge's proper interpretation of the law. See, e.g., Smalley, 546 So. 2d at 722. In Espinosa, however, the Supreme Court recognized that

the judge and jury function as co-sentencers, each bearing equal responsibility for the ultimate sentence of death. Espinosa, 112 S. Ct. at 2928, 120 L. Ed. 2d at 858-859. There can be no doubt that this new interpretation of Florida law represents a fundamental change of constitutional proportion. See Witt, 387 So. 2d at 929.

This Court has recognized the profound change wrought by Espinosa. Despite repeated entreaties by the State that this Court reject as erroneous the Supreme Court's interpretation of Florida law set forth in Espinosa, 4/ this Court instead has recognized that Espinosa is a correct interpretation of Florida law. Thus, in Johnson, slip op., at 2, this Court stated that "[b]ecause the Florida penalty-phase jury is a co-sentencer under Florida law, [Sochor v. Florida, ___ U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 326 (1992);] Espinosa v. Florida, 112 S. Ct. 2926, 2928, 120 L. Ed. 2d 854 (1992), the Eighth Amendment prohibition applies with equal

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4/ See, e.g., Hitchcock v. State, No. 72,200, Motion for Reconsideration Upon Remand in Light of Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992), at 9, 14; Gaskin v. State, No. 76,326, Motion for Reconsideration Upon Remand in Light of Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ____, 120 L. Ed. 2d 854 (1992), at 10, 12-13; Henry v. State, No. 73,433, Motion for Reconsideration on Remand from the United States Supreme Court, at 7-8; Espinosa v. State, No. 73,436, Petition for Expeditious Review on Remand, at 10-12.

vigor to what the jury actually weighs in its deliberations." The Court went on to acknowledge that "under Sochor and Espinosa, an error would exist if the jury was instructed improperly on the heinous, atrocious or cruel factor, whether or not the trial court in its written findings found the same factor to be present." Id. at 3. There can be no doubt that this new understanding of the critically important role of the sentencing jury represents a fundamental change in Florida law.

B. The Espinosa Issue Is Properly Before This Court.

As it did with the Corbett claim, the State asserts that the Espinosa claim is not properly before this Court. The State's arguments fare no better here than in Corbett, for not only was there no need for an objection in the trial court regarding the Espinosa claim, but the Espinosa issue in fact was preserved for review.

1. It Was Not Necessary That A Specific Objection Be Made In The Trial Court.

a. Espinosa Is As Profound A Change In The Law As Hitchcock.

As discussed above in connection with Corbett, this Court has emphasized that a fundamental change in the law must be applied retroactively on habeas review, regardless of whether the issue was raised in some form in prior proceedings. See, e.g., Thompson, 515 So. 2d at 175. As it did regarding Corbett, however, the State erroneously relies on

decisions concerning Booth, asserting that Espinosa more closely resembles Booth than Hitchcock. According to the State, in both Booth and Espinosa "the jury [is] being allowed to consider an improper factor in aggravation, either extraneous to the statute or improperly defined," while in Hitchcock, the error is "of an entirely different sort, implicating the entire capital sentencing scheme." Response, at 21. For this reason, the State maintains that even if Espinosa represents a fundamental change in the law, it should not be applied retroactively absent a contemporaneous objection to the unconstitutional "heinous, atrocious, or cruel" ("HAC") instruction. Id. at 21-22.

The State's analogy to Booth fails, for Espinosa represents a change in the law at least as profound as the change wrought by Hitchcock, which this Court has applied retroactively without regard to whether the issue was preserved below. Ford, 552 So. 2d at 346; Thompson, 515 So. 2d at 175. Indeed, the Supreme Court has recognized that "[b]ecause 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, * * * when the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139, 117 L. Ed. 2d at 382. It therefore is impossible to understand the State's assertion that Hitchcock error casts doubt on "the entire

capital sentencing scheme" but Espinosa error does not. See Response, at 21.

Moreover, the distinction between the issues involved in Hitchcock and Espinosa on the one hand, and Booth on the other, is plain. In Booth, the issue was the erroneous admission of victim impact evidence, which the jury could weigh and choose to accept or disregard, depending on a variety of factors. In Hitchcock and Espinosa, however, at issue were jury instructions which erroneously and unconstitutionally defined the law that the sentencing jury was obliged to follow. Errors in jury instructions are likely to have a greater impact on a jury's decision than errors in the admission of a limited category of evidence, precisely because the jury has discretion to decide the weight of evidence but no discretion to interpret the law.

If anything, Espinosa represents a change in the law even more elemental than that in Hitchcock. The Supreme Court's decision in Espinosa did not simply declare a particular jury instruction unconstitutional but also redefined the role of the sentencing jury and, necessarily, the effect of any instructional error on that jury. Thus, as with Hitchcock, this Court should consider claims founded on Espinosa even if the issue was not specifically raised.

b. It Is Not Necessary To Object When Doing So Would Be Futile Or Unreasonable.

As with the Corbett claim discussed above, there is no need for counsel to have preserved an Espinosa claim if an objection would have been futile. See Thomas, 419 So. 2d at 635-636. As to the Corbett claim, the futility stems from the limited and restrictive nature of this Court's mandate regarding the manner in which the resentencing was to be conducted. In the case of the Espinosa claim, to object to the HAC instruction given at Ferguson's trials would have been equally futile, because this Court routinely had rejected challenges to the standard instruction then being given.

Moreover, as this Court has emphasized, counsel is not required to anticipate changes in the law resulting from subsequent court decisions. See Sims, 612 So. 2d at 1255. At the time of Ferguson's trials, the applicable law was Proffitt v. Florida, 428 U.S. 242, 255-256, 96 S. Ct. 2960, 2960, 49 L. Ed. 2d 913, 924-925 (1976), which held that Florida's HAC aggravator is constitutional. There was therefore no reason for counsel to have anticipated the changes to come in such seminal cases as Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), much less the profound alteration in Florida capital sentencing law wrought only recently by Espinosa.

c. It Is Not Necessary To Object When Objections Are Not Uniformly Required.

As discussed in connection with Corbett, a contemporaneous objection rule that is not uniformly applied cannot serve as a bar to review. See Barr, 378 U.S. at 149, 89 S. Ct. at 1736, 12 L. Ed. 2d at 769. Because this Court in reviewing capital cases has sometimes overlooked the lack of an objection in order to reach the merits, see, e.g., Smalley, 546 So. 2d at 722, the contemporaneous objection rule cannot be interposed as a bar to review of Ferguson's Espinosa claim.

2. To The Extent Necessary, The Issue Has Been Properly Preserved For Review By This Court.

Even if raising the issue before the trial court were necessary to preserve the HAC issue for review by this Court, Ferguson's counsel did so. Prior to each trial, counsel filed a motion challenging the constitutionality of Florida's death penalty statute and the vagueness of its aggravating circumstances, including HAC. See Carol City R. 34-38; Hialeah R. 35-39. Because the HAC instruction given at Ferguson's trials tracked the statutory language, this pretrial motion provided the trial court with an opportunity to rule on the constitutionality of the HAC aggravator and hence the

instruction. 5/ Moreover, the issue was raised on appeal through counsel's challenge to the constitutionality of the statute. See Brief of Appellant, Ferguson v. State, No. 55,137, at 6-7 ("Carol City Brief"); Brief of Appellant, Ferguson v. State, No. 55,498, at 9-10 ("Hialeah Brief"). Counsel specifically relied on the dissent in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied 616 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), which criticized "the exercise of discretion necessary in interpreting [the] vague and overbroad [aggravating and mitigating] circumstances," and which declared HAC to be "[t]he most difficult aggravating circumstance to justify" because of its "vagueness." Id. at 17-18 (Ervin, J., dissenting). Thus, the purposes of the contemporaneous objection rule have been served and, contrary to the State's assertion, see Response, at 19-20, the Espinosa issue has not been procedurally defaulted.

5/ This pretrial motion distinguishes Ferguson's case from other cases in which this Court recently has found the Espinosa claim procedurally barred. See, e.g., Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, __ U.S. __, 113 S. Ct. 2, 120 L. Ed. 2d 931 (1992) (only challenge to HAC was as to application, not constitutionality); Occhicone v. Singletary, No. 80,234 (Fla. Apr. 8, 1993) (same); Rose v. State, No. 76,377 (Fla. Mar. 11, 1993) (same); Koon v. Dugger, Nos. 74,245, 75,380 (Fla. Mar. 25, 1993) (same); Johnson, slip op., at 3-4 (no objection "based on vagueness or other constitutional defect"); Henry v. State, No. 73,433 (Fla. Dec. 24, 1992) (defendant proposed HAC instruction that was used). Unlike defense counsel in these cases, Ferguson's counsel challenged the HAC aggravator on constitutional grounds.

The State mistakenly has relied on Sochor in support of its assertion that the pretrial motion was insufficient to preserve the Espinosa claim. Response, at 19. The Florida cases cited in Sochor, however, are only general contemporaneous objection cases. None of them presented a situation in which the constitutionality of an instruction could be challenged by a pretrial motion regarding the constitutionality of the underlying statute. See Vaught v. State, 410 So. 2d 147, 150 (Fla. 1982); Harris v. State, 438 So. 2d 787, 795 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S. Ct. 481, 80 L. Ed. 2d 563 (1984); Vasquez v. State, 518 So. 2d 1348, 1350 (Fla. App. 1987); Walker v. State, 473 So. 2d 694, 697-698 (Fla. App. 1985). 6/

This Court has rejected "a clinical analysis" of the contemporaneous objection rule, Heathcoat, 442 So. 2d at 956, emphasizing that "the objectives of the * * * rule are to 'apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.'" Id. (quoting Thomas, 419 So. 2d at 636). Here, those objectives were satisfied. Indeed, in some instances review is available even

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6/ Indeed, there appears to be no Florida case addressing the issue of whether a contemporaneous objection to an instruction regarding an aggravating circumstance is necessary when there has been a pretrial motion challenging the constitutionality of the aggravating circumstance itself.

if the issue is not raised in any form until appeal. See Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982) (challenge to facial constitutionality of statute). Thus, even if preservation was necessary in this case, the Espinosa issue was preserved for review by this Court. 7/

7/ The same pretrial motion that challenged the HAC aggravator also challenged as unconstitutionally vague the other aggravating and mitigating circumstances. See Carol City R. 34-38, Hialeah R. 35-39. As a result, the State is wrong in asserting that Ferguson's claims as to these other statutory circumstances also are procedurally barred. See Response, at 20.

The State also argues that neither Espinosa nor any other Supreme Court case has held these other statutory factors to be vague. Id. This argument ignores Espinosa's essential holding that, where the sentencing jury has been instructed on the bare statutory language of a circumstance the scope of which previously has been limited by precedent, the jury is left "without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928, 120 L. Ed. 2d at 858. The "great risk of death to many," "under sentence of imprisonment," and "avoid arrest" aggravators have all been limited by decisions of this Court. See Petition, at 24-28 n.8, and cases cited therein. Moreover, the Supreme Court itself has recognized that the principle of Espinosa extends beyond the HAC aggravator, for it remanded for reconsideration in light of Espinosa the case of Hodges v. Florida, ___ U.S. ___, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), which dealt with the "cold, calculated and premeditated" aggravating circumstance. Cf. Hodges v. State, 595 So. 2d 929 (Fla. 1992).

3. This Court's Merits Ruling On The Issue Overcomes Any Procedural Hurdle That Might Otherwise Exist.

Even if a claim normally would be barred from review due to procedural default, a subsequent merits ruling by a court on the issue will obviate the bar. See Daniels v. State, 587 So. 2d 460, 461 (Fla. 1991). During each of Ferguson's initial appeals, this Court addressed the constitutionality of the HAC aggravator on the merits. 417 So. 2d at 641; 417 So. 2d at 634. As a result, any bar that otherwise might prevent this Court from reviewing the Espinosa claim has been overcome by the Court's own actions.

Nor does it matter that this Court's rulings focused on the statutory aggravator itself, rather than the jury instruction, for in fact the constitutionality of the statute and the instruction are inseparable, as this Court recognized in Smalley. While noting that Smalley had not challenged the HAC jury instruction per se, the Court still recognized that "Smalley's claim has broader implications because he contends that the aggravating circumstance of heinous, atrocious, or cruel is unconstitutionally vague under the eighth and fourteenth amendments." Smalley, 546 So. 2d at 722. The Court then proceeded to "discuss the merits of Smalley's argument." Id.

As noted above, Espinosa established that the judge and jury are co-sentencers in Florida. Espinosa, 112 S. Ct. at

2928, 120 L. Ed. 2d at 859. As a result, it can no longer be presumed, as it was in Smalley, that the judicial application of a limiting construction of HAC can correct an error committed by a jury that lacks the guidance of an adequate definition and instead is left to its own devices to interpret this statutory provision. This Court therefore should review its prior ruling on the merits as to the unconstitutionality of the HAC statute and the instruction given at trial.

C. The HAC Instruction Given At Trial Constitutes Fundamental Error.

Despite the State's assertion to the contrary, see Response, at 22 n.5, there can be no real dispute that the HAC instruction given at Ferguson's trials was unconstitutional. The instruction lacked the critical last sentence in the Dixon instruction that serves to limit the construction and application of the HAC factor. Moreover, the HAC instruction given at Ferguson's trials is virtually identical to that which the Supreme Court declared unconstitutional in Shell v. Mississippi, 498 U.S. 1, 2, 111 S. Ct. 313, 313, 112 L. Ed. 2d 1, 4 (1990) (Marshall, J., concurring).

Giving this HAC instruction constituted fundamental error and deprived Ferguson of a fair trial. As this Court has recognized, an error in jury instructions can constitute fundamental error "when the omission is pertinent or material to what the jury must consider in order to convict."

Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S. Ct. 1802, 76 L. Ed. 2d 366 (1983); see also State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Williams v. State, 247 So. 2d 425, 427 (Fla. 1971); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963). In the context of a capital sentencing proceeding, the error must be deemed fundamental where, as here, the instruction omitted material necessary for the jury to find the existence of an aggravating circumstance such as HAC. "It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony." Jones, 377 So. 2d at 1165. It is equally essential that a sentencing jury "not be left to its own devices" to determine the meaning of an unconstitutionally vague statutory aggravator.

Where fundamental error is at issue, there is no need for the issue to have been preserved for review. See, e.g., Walton v. State, 547 So. 2d 622, 625 (Fla. 1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 759, 107 L. Ed. 2d 775 (1990); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Rather, the reviewing court has an obligation to consider the issue because of the profound effect the error has had on the proceedings. Burnette, 157 So. 2d at 67. Thus, even if Ferguson's pretrial motion did not suffice to preserve the issue of the HAC instruction for review, the fundamental nature

of the jury instruction error warrants consideration of the issue by this Court.

The State nevertheless maintains that the error at issue here is not fundamental, asserting that "[w]hereas an allegation of Hitchcock error casts obvious doubt upon the reliability of any prior proceeding, 'Espinosa error,' at most, impacts upon one of eleven statutory aggravating factors * * *." Response, at 21 (footnote omitted). As discussed above regarding why Espinosa represents a fundamental change in the law, the errors at issue in Hitchcock and Espinosa are analogous. In both instances the jury has received an unconstitutional instruction as to the law governing sentencing, which the jury is duty-bound to follow. Thus, both errors have an equal impact on the reliability of the death sentence. Because this Court has recognized the fundamental nature of Hitchcock error, see, e.g., Mikenas, 519 So. 2d at 602; Foster v. State, 518 So. 2d 901, 902 (Fla. 1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2914, 101 L. Ed. 2d 945 (1988); Riley v. Wainwright, 517 So. 2d 656, 659-660 (Fla. 1987), it should do the same with regard to Espinosa.

The State's reliance on Sochor's statement concerning instructional error is not well-founded. See Response, at 21-22; Sochor, 112 S. Ct. at 2312 n.*, 119 L. Ed 2d at 338 n.*. In Sochor, the Supreme Court had not yet determined, as it thereafter did in Espinosa, that judge and jury are

co-sentencers under the Florida capital sentencing scheme. As the Supreme Court has held subsequent to Sochor, an error before the sentencing jury can have such a profound effect that it will invalidate the death sentence. Espinosa, 112 S. Ct. at 2928, 120 L. Ed. 2d at 859; Stringer, 112 S. Ct. at 1139, 117 L. Ed. 2d at 382. Such an error is fundamental.

D. The Espinosa Error Cannot Be Deemed Harmless Beyond A Reasonable Doubt.

Contrary to the State's assertions, the fundamental, constitutional error in the HAC instruction given at trial cannot be deemed harmless beyond a reasonable doubt. Response, at 22. It is impossible to tell whether the jury's consideration of an invalid aggravator affected its sentencing recommendation.

According to the State, the result would have been the same even if the HAC aggravator had been properly defined because this Court already had determined that the evidence supported a finding of HAC, and because this Court was "'influenced by the magnitude of the criminal conduct'" regarding the Carol City crimes. Id. at 23-24 (quoting White v. State, 403 So. 2d 331, 339 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983)). This argument is flawed in two respects. First, in asserting that it is sufficient if this Court found evidence as to HAC, the State depends on cases such as Clemons v. Mississippi,

494 U.S. 738, 110 S. Ct. 1144, 108 L. Ed. 2d 725 (1990), and Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511, 528 (1990), in which the appellate court itself reweighed the evidence. This Court has repeatedly emphasized, however, that it will not conduct such a reweighing, because to do so would exceed its function as an appellate court. See, e.g., Hudson v. State, 538 So. 2d 829, 831 (Fla.), cert. denied, 493 U.S. 875, 110 S. Ct. 212, 107 L. Ed. 2d 165 (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 (1989). Second, in noting the "magnitude" of the crime, the State erroneously relies on White, which concerned another individual convicted in the Carol City incident. It would violate due process to allow findings made in another defendant's case to influence the assessment of the effect of this fundamental error on Ferguson's sentence. See Herring v. State, 580 So. 2d 135, 139 (Fla. 1991).

Even more to the point, this Court recently determined that Espinosa error could not be deemed harmless, regardless of the "magnitude" of the crime, Hitchcock v. State, No. 72,200 (Fla. Jan. 28, 1993). There, the Court remanded for a new sentencing proceeding before a judge and jury because it "[could not] tell what part the instruction played in the jury's consideration of its recommended sentence." Slip op., at 1-2 (emphasis added). This result is noteworthy, since the

trial court had found four aggravating circumstances (one of which was HAC) arising out of Hitchcock's rape, beating, and strangulation of a thirteen-year-old girl, id. at 3 (Grimes, J., dissenting), and since this Court consistently has held that the murder by strangulation of a conscious victim warrants application of the HAC aggravator. 8/ See, e.g., Hitchcock v. State, 578 So. 2d 685, 692-93 (Fla. 1990), vacated, ____ U.S. ____, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992); Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987); Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (1976). Likewise, regardless of the nature of Ferguson's crimes, it is impossible to tell what effect the

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8/ A similar result occurred in James v. State, No. 78,161 (Fla. Mar. 4, 1993). This Court had found on James' initial appeal that there was no evidence to support a HAC finding, but that the trial court's consideration of the aggravator was harmless error, given the presence of four other aggravators. James v. State, 453 So. 2d 786, 792 (Fla.), cert. denied, 469 U.S. 1098, 105 S. Ct. 608, 83 L. Ed. 2d 717 (1984). In post-conviction, however, this Court found that the instruction given at James' trial violated the mandate of Espinosa. Although the Court continued to acknowledge the presence of other aggravators, it nevertheless remanded for a new sentencing proceeding before a judge and jury, admitting that it could not "say beyond a reasonable doubt * * * that the invalid instruction did not affect the jury's recommendation * * *" and acknowledging that it would not be "fair" to deprive James of Espinosa's benefit.

unconstitutional HAC instruction had on the jury deliberations, and thus the error should not be labeled harmless beyond a reasonable doubt.

III. FERGUSON IS ENTITLED TO HABEAS RELIEF BASED ON THE PRECEPTS OF RIGGINS.

A. Riggins Applies To The Facts Of This Case.

The State misinterprets the underlying basis for the Court's decision in Riggins v. Nevada, ___ U.S. ___, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), when it asserts that Riggins does not apply to the instant case. See Response, at 25. Although the effects of antipsychotic medications vary, and little is known about how they work, it has become clear in recent years that most psychiatric drugs affect a patient's memory, emotions, responses, and thinking ability. See generally Peter R. Breggin, M.D., Toxic Psychiatry, ch. 1 (1991). As a result, it is likely to be difficult for a criminal defendant to obtain a fair hearing while under the influence of these drugs, which can affect a defendant's "outward appearance, * * * the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." Riggins, 112 S. Ct. at 1816, 118 L. Ed. 2d at 490. Accordingly, Riggins requires a trial court faced with a defendant on such medication to assess whether "administration of antipsychotic medication [is] necessary to accomplish an

essential state policy" sufficient to warrant this threat to the defendant's fundamental civil rights. Id. at 1817, 118 L. Ed. 2d at 491.

There can be no doubt that Riggins applies here, for throughout his trial and sentencing Ferguson was heavily dosed with mind-altering medication, just as Riggins was. On at least four occasions, Ferguson's attorney made it clear to the trial court that Ferguson was under the influence of these drugs, that counsel was unable to communicate with his client, and that medication with these powerful drugs was impeding Ferguson's right to a fair trial and sentencing proceeding. Accordingly, counsel requested that the court order the jail to cease the medication. See Hialeah R. 1473; Transcript of Sentencing of Apr. 19, 1983, at 11-12; and Affidavit of Michael Stuart Hacker. 9/ Contrary to the State's assertions, see Response, at 29, counsel for Ferguson did indeed request both pre-trial and during trial that Ferguson be removed from the medication because he was unable to communicate with his client. This was a common-sense request made by someone who observed that Ferguson was in a "vegetative state" as a result of the antipsychotic drugs being administered to him. Hialeah R. 1472.

9/ A copy of this Affidavit is included in Appendix A to this Reply; the original has been submitted with a Motion to Supplement Record filed concurrently with this Reply.

It is plainly disingenuous of the State to argue that "the petitioner admitted that the administration of the medication, Haldol, was voluntary, not forced * * *." Response, at 27. For as long as he has been in the custody of the State, Ferguson has been medicated. It is ironic that the State is arguing that Ferguson's medication with Haldol and Thorazine and other psychotropic drugs was "voluntary" when it was the State that initially medicated him with those drugs when he was first committed to a state mental hospital. See Hialeah R. 964.

Indeed, the State's Response only serves to demonstrate that a hearing on this matter should have been conducted by the trial court, for it raises factual questions that cannot be decided in this state habeas proceeding. 10/ Although Ferguson may need the medication to control his psychosis and may depend upon it, that is not the end -- or even the beginning -- of the inquiry as to whether he was taking the medication voluntarily or involuntarily. It is very

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10/ The State asserts that "Petitioner's reliance upon trial counsel's recollections of trial at the resentencing hearing, are unwarranted as said recollections are contrary to the trial records." Response, at 30 n.7. The recollections of Ferguson's counsel are certainly pertinent to the issues raised here. Hacker was at the trial, and, as an officer of the court, his specific recollections are entitled to consideration.

difficult to determine at what point medication with antipsychotics qualifies as "voluntary." When dealing with a man who has been diagnosed as paranoid schizophrenic and medicated for most of his life, it is impossible for this Court to determine on the record before it whether his medication was forced or voluntary. This Court should either appoint a special master to resolve these factual questions or else relinquish jurisdiction and remand to the trial court for a determination of the factual questions presented.

Furthermore, that trial counsel may have stated in passing that "a significant dosage of medication * * * is required for [Ferguson's] condition," Hialeah R. 1472, has no bearing on the issue at hand. Indeed, Riggins is quite instructive on this point. A few days after his arrest, Riggins informed the jail psychiatrist of hearing voices and having trouble sleeping. He told the doctor that in the past he had been successfully treated with Mellaril, an antipsychotic drug, and the doctor prescribed Mellaril again. Riggins, 112 S. Ct. at 1812, 118 L. Ed. 2d at 486. Prior to trial, Riggins' attorney requested that the trial court order the jail to suspend administration of the drug because continued administration of the drug would affect his demeanor and mental state at the trial so as to deprive Riggins of due process. After an evidentiary hearing on the matter, the trial court denied the defense request to cease administering the medication, and the Nevada Supreme Court affirmed. Id.

Upon certiorari, the United States Supreme Court noted first that the parties had agreed that once counsel's request to have Riggins taken off the medication was rejected by the trial court, subsequent administration of the drug was involuntary. Id. at 1814, 118 L. Ed. 2d at 488. As Justice Thomas noted in dissent, see id. at 1823, 118 L. Ed. 2d at 499, Riggins originally had been taking the medication voluntarily.

The Court also presumed that "administration of Mellaril was medically appropriate. Although defense counsel stressed that Riggins received a very high dose of the drug, at no point did he suggest to the Nevada courts that administration of Mellaril was medically improper treatment for his client." Id. Hence, any statement by Ferguson's counsel that administration of antipsychotic drugs was appropriate or required for his condition is irrelevant. Moreover, at no time did the trial court ever make a determination that the medication was medically appropriate and necessary to "accomplish an essential state policy." Id. at 1817, 118 L. Ed. 2d at 491. Nor did the trial court make any inquiry as to whether less intrusive alternatives were available. Here, as in Riggins, the court "allowed administration of [an antipsychotic drug] to continue without making any determination of the need for this course or any findings about reasonable alternatives." Id. at 1815-1816, 118 L. Ed. 2d at 490 (emphasis in original). Nor did the court determine that

"continued administration of [the drug] was required to ensure that the defendant could be tried" or that "safety considerations or other compelling concerns outweighed [defendant's] interest in freedom from unwanted antipsychotic drugs." Id. 11/

B. The Riggins Error Should Be Addressed And Corrected By This Court.

Having been medicated with antipsychotic drugs for the past sixteen years and having been described by his own attorney as a "zombie" throughout the trial, Ferguson was in no position to decide whether the medication should be withdrawn. That decision was made by his court-appointed legal counsel, who made it clear on at least four occasions that due to the heavy dose of Haldol that Ferguson was receiving, counsel and Ferguson were unable to communicate with each other. See Affidavit of Michael Stuart Hacker. "This error may well have impaired the constitutionally protected trial rights [Ferguson] invokes." Riggins, 112 S. Ct. at 1816, 118 L. Ed. 2d at 490.

11/ This Court should reject outright any suggestion the State might make that the pretrial competency hearing remedied the trial court's failure to conduct an inquiry as to whether Ferguson should be taken off the medication. Riggins also had a pretrial competency hearing, after which he was found competent to stand trial. 112 S. Ct. at 1813, 118 L. Ed. 2d at 486. That the trial court conducted a competency hearing has nothing to do with the distinct issue presented here.

The State argues that Ferguson has failed to establish prejudice. But as Riggins makes clear, under these circumstances prejudice must be presumed:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril* * * . Like the consequences of compelling a defendant to wear prison clothing, * * *, or of binding and gagging an accused during trial, * * *, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. [Id. at 1816, 118 L. Ed. 2d at 491.]

The State's argument that any Riggins error was cured at the resentencing, see Response, at 32, should likewise be rejected. 12/ It is impossible to determine whether sentencing might have been different had Ferguson not been rendered a "zombie" as a result of the medication being administered to him. The need for such an assessment was particularly acute because no evaluation had occurred since the trial court proceedings almost five years before. That Judge Klein was

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12/ Not only was the error not cured at resentencing, the issue was again raised at resentencing, but Judge Klein disregarded that argument and proceeded to sentence Ferguson to death.

presiding over a resentencing rather than a trial on the merits makes no difference; sentencing is a critical stage of criminal proceedings. See Fla. R. Crim. P. 3.210(a).

Furthermore, as is clear from the affidavit of trial counsel, counsel requested that Ferguson's medication be withdrawn not only at sentencing before Judge Fuller, but also prior to trial and during the trial. At the very least, trial counsel's assertions at resentencing and his accompanying affidavit raise factual questions suggesting that efforts were made by Ferguson's trial counsel during the trial to have the medication withdrawn.

It is also worth noting that on direct appeal in the Hialeah case, counsel specifically argued that the trial court erred in finding Ferguson competent: "It is clear that the Defendant/Appellant has not improved, and at the time of the trial proceedings, was taking extensive medication throughout, and was unable to assist counsel, and simply sat in a suspended state throughout." Hialeah Brief, at 17. This Court concluded that the trial court did not err in finding Ferguson competent, without addressing the specific claim that Ferguson's medication with antipsychotic drugs made him unable to assist counsel.

The State does not even argue that Riggins should not be applied retroactively, for reasons that are apparent. In Riggins itself the Court made clear that its decision

represented a major change in constitutional law, one that affects the fundamental rights of defendants. See 112 S. Ct. at 1815, 118 L. Ed. 2d at 489 (noting that the Court had not previously had occasion to develop substantive standards for judging forced administration of psychotropic drugs in the criminal trial or pretrial settings); id. at 1817, 118 L. Ed. 2d at 491 (Kennedy, J., concurring) ("[T]he whole subject of treating incompetence to stand trial by drug medication is somewhat new to the law, if not to medicine."); id. at 1818, 118 L. Ed. 2d at 493 (Kennedy, J., concurring) ("This is not a case like Washingon v. Harper, * * * in which the purpose of the involuntary medication was to insure that the incarcerated person ceased to be a physical danger to himself or others."); id. at 503 (Thomas, J., dissenting) (observing that Riggins represents a significant departure from Washington v. Harper).

Riggins establishes Ferguson's fundamental rights were violated, and the writ of habeas corpus lies to correct any such unlawful deprivation of a person's liberty. Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). This is particularly true in cases where, as here, this Court has been presented with the issue and has addressed it on direct appeal. In such cases, this Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental rights* * * ." Kennedy, 483 So. 2d at 426.

Moreover, under this Court's precedents, Riggins must be applied retroactively. This Court has held that it will apply retroactively those decisions of the United States Supreme Court that signify "major constitutional changes of law," i.e., those "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." Witt, 387 So. 2d at 929 (footnote omitted). The change in the law wrought by Riggins is a case of first impression. It establishes for the first time the principle that a State may not, during trial, involuntarily drug a criminal defendant with a powerful antipsychotic medication in the absence of a compelling State interest. In our adversarial system of justice, this principle goes to he heart of the "veracity" and "integrity" of the trial proceeding, for a defendant whose mind has been altered by chemicals administered by the State cannot adequately put to the test the State's case against him. Ferguson is entitled to the retroactive application of this bedrock principle of due process, involving the fundamental fairness of the proceeding in which his life was at stake.

IV. FERGUSON MUST BE GRANTED HABEAS RELIEF BECAUSE HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Regarding the claims of ineffective assistance of appellate counsel, the State argues that Ferguson is attempting

to use this habeas proceeding as a second appeal. Response, at 33. In a sense, that is true, for had Ferguson received effective representation upon direct appeal, there would be no need for him to raise these claims now. Ferguson has presented these claims of ineffectiveness precisely because they were never litigated on direct appeal, as they should have been. Because of his counsel's ineffectiveness, Ferguson was deprived of a meaningful appeal. As a result, he is entitled to raise these issues in this habeas proceeding.

Any one of the acts and omissions of appellate counsel that are set forth in the Petition and this Reply 13/ would be sufficient by itself to warrant a finding by this Court that Ferguson was deprived of the fundamental fairness and constitutional rights to which he is entitled. Taken together, this multitude of errors becomes so overwhelming as to leave no doubt that habeas relief is warranted. See, e.g., Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985); Dougan v. Wainwright, 448 So. 2d 1005, 1006 (Fla. 1984).

13/ This Reply is intended to further address only specific issues regarding ineffective assistance of appellate counsel. By discussing only certain issues in this Reply, Ferguson by no means concedes the State's position on the other issues raised in the Petition but not reiterated here.

A. Appellate Counsel Failed To Challenge On Appeal The Trial Court's Finding That The Capital Offense Was Heinous, Atrocious, Or Cruel.

This Court acknowledged in Wilson, 474 So. 2d at 1165, that its mandatory review of capital cases is no substitute for the zealous advocacy of appellate counsel. Yet regarding both the Carol City and Hialeah cases, the State rests its arguments on this Court's review of the evidence and affirmance the HAC findings. Response, at 34, 38. As previously noted in these proceedings, appellate counsel made no challenges to the sentencing findings at all, and the Court was left to review the case in the absence of adequate appellate advocacy for Ferguson.

In arguing that the trial court did focus on what happened to the murder victims rather than to Wooden, who survived, see id. at 36, the State omits the lengthy portion of the trial court's HAC findings that had no bearing whatsoever on whether the killings were heinous, atrocious, or cruel. See Findings in Support of Death Sentence, at 4-5. Consideration of Wooden's ordeal was plainly improper. See Clark v. State, 443 So. 2d 973, 977 (Fla. 1983), cert. denied, 467 U.S. 1210, 140 S. Ct. 2400, 81 L. Ed. 2d 356 (1984); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978). Where the possibility exists that the sentencer's findings were based on constitutionally impermissible grounds, the sentence should be set aside. See Leary v. United States, 395 U.S. 6, 31-32 (1969); Shell, 498

U.S. at 3, 111 S. Ct. at 314, 112 L. Ed. 2d at 5 (Marshall, J., concurring); See also Stringer, 112 S. Ct. at 1139, 117 L. Ed. 2d at 382.

The State also argues that since this Court upheld the HAC findings in the appeals of Ferguson's codefendants, see Francois v. State, 407 So. 2d 885, 890 (Fla. 1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3511, 73 L. Ed. 2d 1384 (1982); White, 403 So. 2d at 338-339, appellate counsel was not ineffective here in failing to challenge the HAC findings. Response, at 38. Throughout Ferguson's post-conviction proceedings, the State repeatedly has sought to treat the cases of Ferguson and his codefendants as if they were interchangeable. This is directly contrary to the Eighth Amendment principle that those sentenced to death are entitled to an individualized sentencing determination. See generally 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). John Ferguson is not Beauford White or Marvin Francois. As discussed in the initial petition, the evidence indicates that Ferguson did not act with the state of mind necessary for a HAC finding. See Petition, at 40-41. He assured Wooden that she would be all right and attempted to find her asthma medication. The state of mind of one defendant should not be applied to another vicariously. See Archer v. State, No. 78,701 (Fla. Jan 28, 1993); Omelus v.

State, 584 So. 2d 563, 566 (Fla. 1991). Ferguson was -- and still is -- entitled to have his arguments presented by a competent attorney arguing that he was not deserving of the ultimate penalty. As this Court has recognized, the advocacy of one defendant's counsel can mean life, while the advocacy of another defendant's counsel can mean death. See Jackson v. State, 575 So. 2d 181, 193 (Fla. 1991) (specifically noting the seemingly incongruent fact that Jackson's death sentence had been vacated while his brother's had not, even though it could not be determined which brother was the triggerman, and indicating that the Court can only consider the cases as they come before it).

The Hialeah case is a perfect example of the need for zealous advocacy, because the State has failed to point to any evidence to indicate that the State proved, beyond a reasonable doubt, that Glenfeldt was shot in the head after Worley was shot. The HAC finding as to the Glenfeldt killing was based on nothing more than sheer speculation. If anything, the State's penalty phase argument suggested that Glenfeldt was killed first, not second: "Now, sometime, whether it was before the killer went after Belinda or after he had gone after Belinda, we do not really know * * * ." Hialeah R. 1320 (emphasis added).

As to the HAC finding regarding Worley's murder, the State argues that the evidence clearly was sufficient for the

HAC finding. The State's argument ignores the fact that the trial court improperly relied on irrelevant information about the condition of the corpse and the personal characteristics of the victim. Under these circumstances, it cannot be ascertained what weight the sentencing judge gave to these impermissible factors. See Shell, 498 U.S. at 3, 111 S. Ct. at 314, 112 L. Ed. 2d at 5 (1990) (Marshall, J., concurring).

Contrary to the State's assertion, counsel's failure to challenge the HAC findings substantially prejudiced Ferguson's case. In light of the two compelling statutory mitigating factors found in this case, the fact that other aggravating circumstances have already been stricken, and the conceded Hitchcock violation that occurred in this case, 593 So. 2d at 512, it is impossible to conclude beyond a reasonable doubt that, but for this error, the outcome would not have been different. 14/

B. Counsel Was Ineffective In Failing To Appeal The Trial Court's Failure To Hold A Competency Hearing In The Carol City Case.

The State argues that because Ferguson was considered competent prior to trial and three months after trial in a nunc

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14/ The prejudice was only magnified by appellate counsel's inexcusable failure to challenge the finding in the Hialeah case regarding the "avoid arrest" aggravator, which clearly did not apply in this case. See Petition, at 45-48.

pro tunc competency hearing, there was no need for the trial court to conduct an inquiry into his mental condition during trial despite conduct by Ferguson that raised bona fide doubts as to whether he was competent to stand trial in the Carol City case. This ignores the clear import of the Supreme Court's decision in Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), as well as the decision in James v. Singletary, 957 F.2d 1562 (11th Cir. 1992).

Pate specifically rejected the suggestion that the state court could hold a competency hearing nunc pro tunc and instead emphasized the need for a "concurrent determination" due to the "difficulty of retrospectively determining an accused's competence to stand trial." 383 U.S. at 387. The critical inquiry is whether the defendant was competent during the trial, not before or after it. Ferguson's interruption of the proceedings due to his delusional belief that the police officers were making hand signals to the jury, and his stripping off of his shirt and sitting barechested in the courtroom raised sufficient doubts as to his competency to require an inquiry. 15/

15/ The need for a "concurrent determination" of competency was all the greater in light of the nature of Ferguson's mental illness -- paranoid schizophrenia -- in which the afflicted person can have periods of remission.

Furthermore, the burden is on the State to demonstrate that Ferguson was competent during the trial and that his competency could be determined nunc pro tunc. James, 957 F.2d at 1570 & n.12. Pate raises a rebuttable presumption of incompetency upon a showing by the habeas petitioner that the trial court failed to hold a competency hearing sua sponte despite information raising a bona fide doubt as to the petitioner's competence. Id. at 1570. The State has not met its burden. It does not mention the conclusion of Drs. Syril Marquit, Jeffrey Elenewski, and Arthur Stillman that Ferguson did not have the capacity to assist counsel and was not competent to stand trial. Supp. R. 1091-1106, 1107-1108, 1109-1113, 1123-1124. A hearing as to Ferguson's competency was required at the point that he exhibited his bizarre behavior in the courtroom, and the court's failure to conduct an inquiry into competency deprived him of due process.

C. Counsel Was Ineffective In Failing To Argue On Appeal That The Trial Court Committed Error When It Permitted The Jury To Separate Without Instructions After The Cause Had Already Been Submitted.

The State contends that appellate counsel did nothing wrong in failing to argue that the trial court erred in allowing the jury in the Hialeah case to separate without adequate cautionary instructions after the jury had begun deliberations. Response, at 68. The State also asserts that

any harm resulting from this egregious violation of Ferguson's right to a fair trial was cured when the court instructed the jury, just prior to separating:

> The case ought to stay here. Forget about it. Relax for the evening. All of you have transportation home?
>
> * * *
>
> What I would like everybody in here ready to go by nine and I would like you to report here rather than upstairs.
>
> I will instruct the people downstairs that you will come in the front door. Come directly into the courtroom. O.C. will be here. Go directly into the jury room and do not discuss the case until I am with you and tell you to do so. [Hialeah R. 1425-1426.]

Contrary to the State's assertion, it is assuredly not "obvious" that "the judge was admonishing the jurors not to discuss the case [overnight] until they were told to resume their deliberations the next morning." Response, at 60. Indeed, a reasonable juror likely would interpret this statement simply to mean that the jurors were not to begin deliberating with each other the next morning until the court so directed. This statement in no way advised the jurors that they were to refrain from discussing the case with family, friends, or strangers while away from the courthouse, or even with each other that night.

It is the lack of such an admonition that is at the very heart of the decision in Raines v. State, 65 So. 2d 558

(Fla. 1953). Raines, which was the "strict rule" of this State at the time of Ferguson's appeals, stated unequivocally that even absent an objection and a showing of prejudice, the failure to admonish the jury upon separation after deliberations have begun is reversible error. Thus, in this case there was per se reversible error, which should have been raised by any competent appellate counsel.

When this case was on appeal, Pope v. State, 569 So. 2d 1241 (Fla. 1990), on which the State seeks to rely, had not yet been decided. Even if Pope had been the law at the time of appeal, Ferguson still would have been entitled to a new trial. Quoting Pope, the State correctly notes that relief was warranted in Raines because Raines' right to a fair trial had not been safeguarded by a cautionary instruction. Response, at 66. But a comparison of the instructions in Raines, Pope, and this case reveals that the instructions given to Ferguson's jury were even less "adequate" than those given to Raines' jury.

In Raines, the jurors were thoroughly admonished throughout the trial not to discuss the case among themselves or with any third parties and to avoid any exposure to media

accounts of the trial. 16/ See Raines v. State, Record on Appeal filed May 26, 1952, at R. 66, 230, 294. Then, just prior to allowing the jury to separate for the evening, the trial court instructed the jury as follows:

> Any of you who should happen to be together tonight, if any of you are, should not discuss the case because your deliberations must be taken when all six of you are together. Just recess the whole thing and free up your minds until tomorrow morning when you come back at 9:30 when you will have as much time as you need to discharge your duties.
>
> All the other instructions that have been given to you at the other recess intervals are restated here now and with that, we will be recessed until 9:30 in the morning. [Id. at 314 (emphasis added).]

If these instructions were not "adequate cautionary instructions," then certainly the instructions given to Ferguson's jury -- "The case ought to stay here. Forget about it" -- also were not adequate, 17/ particularly since this is a capital case and Raines was not.

16/ Here, unlike in Raines, the jurors were properly and thoroughly admonished only at the very beginning of trial, on September 27, ten days before they separated for the evening on October 6. See Hialeah R. 14-19.

17/ In Pope, the jury was admonished: "I ask you to please not discuss this case between or amongst yourselves until you come back here tomorrow morning." 569 So. 2d at 1244. Contrary to the State's assertion, no such instruction -- nor its equivalent -- was given to Ferguson's jury.

Prejudice should be presumed. Even if not, the prejudice is clear: a capital defendant whose sensational case had been widely and intensely publicized for many months could not hope to receive a fair trial when the jurors were sent home without any hint of an instruction that they were not to discuss the case while away from the courthouse.

D. Ferguson Was Deprived Of His Rights To Counsel And A Meaningful Appeal Because Critical Portions Of The Hialeah Record Were Missing.

Three critical portions of the Hialeah Record on Appeal were missing when this case was before the Court on direct appeal: (1) the entire voir dire transcript; (2) the concluding portion of the charge conference; and (3) the section of the record in which court and counsel were discussing whether Ferguson would testify. 18/

The State's Response is noticeably silent as to whether counsel was ineffective in failing to point out these three serious omissions. Rather, the State merely argues that Ferguson cannot show prejudice under Strickland. On the issue of prejudice, the State mischaracterizes Ferguson's pleadings in stating that "collateral counsel has obtained the previously

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18/ As to this last section, there is no way of determining how many pages of transcript are missing. Even if just one page, it involved the important issue as to whether Ferguson would take the stand.

untranscribed portions of the trial record." Response, at 70. To the contrary, collateral counsel was able to reproduce only one of the three missing sections of the record -- voir dire. The other missing sections cannot be recovered. Furthermore, the fact that collateral counsel was able to arrange for transcription of voir dire does not excuse appellate counsel's ineffectiveness nor does it alleviate the resulting prejudice.

The State argues that Ferguson must demonstrate the prejudice resulting from the lack of a complete record. Yet it is impossible for Ferguson to demonstrate prejudice when he does not know what the missing portions of the record contain. That was precisely the point made by Justice Shaw in Johnson v. State, 442 So. 2d 193, 198 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S. Ct. 2181, 80 L. Ed. 2d 563 (1984) (Shaw, J., dissenting): "Reversible error can turn on a phrase. Did it occur here? We cannot be certain." Here, there is no way to know what occurred at the charge conference, why Ferguson did not testify, or what other matters were discussed. As to the voir dire that has been recorded, the transcript indicates that the jurors' exposure to the pretrial publicity in this case was intense and pervasive. See Petition, at 78-86.

Absent a complete record, it is impossible for appellate counsel to perform effectively, because counsel cannot know what errors occurred or what errors were preserved for appeal. See Dobbs v. Zant, 506 U.S. ____, 113 S. Ct. ____,

122 L. Ed. 2d 103 (1993) (per curiam) (emphasizing the importance of reviewing capital cases on a complete record, and reversing the lower court's failure to consider a recently discovered portion of the trial transcript). As such, even the most effective appellate attorney cannot subject the State's case to meaningful adversarial testing. Thus, the lack of a complete record constitutes "circumstances surrounding [Ferguson's] representation" that justify applying a presumption of prejudice. United States v. Cronic, 466 U.S. 648, 662, 104 S. Ct. 2039, 80 L. Ed. 2d 657, 670 (1984). As Delap v. State, 350 So. 2d 462 (Fla. 1977), makes clear, the only remedy is to remand for a new trial.

E. Appellate Counsel Rendered Ineffective Assistance In Failing To Raise The Issue Of Fundamentally Improper Prosecutorial Argument.

In its penalty phase argument during the Hialeah trial, the State denigrated the jury's sense of responsibility for Ferguson's life and disparaged Ferguson's right to a fair trial. The prosecutor argued:

> 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 Glenfield that much time [indicating]. [Hialeah R. 1444 (emphasis added).]

Now the State cites Dugger v. Adams, 489 U.S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989), in an attempt to excuse the error. See Response, at 72. As this Court repeatedly has recognized, however, it is one thing to tell a jury (as the prosecutor did in Adams) that its sentencing recommendation is merely advisory; it is quite another thing to commit a blatant violation of Pait v. State, 112 So. 2d 380 (Fla. 1959).

This error was fundamental, as was the prosecutor's argument to the jury that keeping Ferguson alive would cost money and serve no purpose. Hialeah R. 1452. Nor was this error harmless, since its effect on the jury cannot be known. But for this error, there might have been a different result, the vote for death was not unanimous, see Hialeah R. 1469; two compelling statutory mitigating circumstances were present; and the prosecutor's appeal focused on the jurors' fears in deciding the fate of another human being and their feelings of resentment in having their tax dollars used to keep Ferguson alive. The prejudice is patent, the error is not harmless, and sentencing relief is warranted.

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 9th day of April, 1993, a copy of the foregoing Petitioner's Reply to Response to Petition for Writ of Habeas Corpus was sent by Federal Express to:

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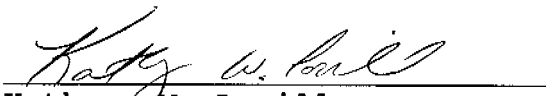

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