IN THE SUPREME COURT OF FLORIDA

JOHN ERROL FERGUSON,

Petitioner,

vs. CASE NO. 80,549

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

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is a consolidated petition for writ of habeas corpus in two capital cases. The first case, **State v. Ferguson**, Eleventh Judicial Circuit in and for Dade County, case No.77-2865D, Florida Supreme Court, Direct Appeal No. 55,137, is hereinafter referred to as the Carol City murders. The second case, **State v. Ferguson**, Eleventh Judicial Circuit in and For Dade County, Case No 78-5428, Florida Supreme Court, Direct Appeal Case No. 55,498, will hereinafter be referred to as the Hialeah murders. The following symbols are used throughout this Response to designate portions of pertinent transcripts and records:

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

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

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

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

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

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

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

R4 - Record on appeal from the consolidated post conviction proceedings in Case No. 76,458 Florida Supreme Court.

SR4 - Supplemental record on appeal from the consolidated post conviction proceedings, Case No. 76,458, Florida Supreme Court.

SR5 - Second Supplemental Record on Appeal from the Consolidated post conviction proceedings, Case No. 76,458, Florida Supreme Court, containing voir dire transcripts.

Pursuant to Fla. Stat. 90.202(6) and **Foxworth v. Wainwright**, 167 So. 2d 888 (Fla. 1964), the Respondent hereby requests that this court take judicial notice of its own records above.

PROCEDURAL HISTORY AND FACTS

A. The Carol City Murders

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

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

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

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

> On July 27, 1977, at approximately 8:15 p.m. the defendant, posing as an employee of the power company, requested permission from Margaret Wooden to enter her Carol City home and check the electrical outlets. After gaining entry and checking several rooms, the defendant drew a gun and tied and blindfolded Miss Wooden. He then let two men into the house who joined the defendant in searching for drugs and money.
>
> Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. The defendant, who identified himself to Miss Wooden as "Lucky," and his cohorts tied, blindfolded and searched the six men. All seven victims were then moved from the living room to the northeast bedroom.
>
> Shortly thereafter, Miss Wooden's boyfriend, Miller, entered the house. He too was bound and searched. Then he and Miss Wooden were moved to her bedroom and the other six victims returned to the living room.
>
> At some point one intruder's mask fell, revealing his face to the others. Miller and Wooden were kneeling on the floor with their upper bodies lying across the bed. Wooden heard shots from the living room then saw a pillow coming toward her head. She was shot. She saw Miller get shot then heard the defendant run out of the room. She managed to get out and run to a neighbor's house to call the police.

> When the police arrived they found six dead bodies. All had been shot in the back of the head, their hands tied behind their backs. One of the victims, Johnnie Hall, had survived a shotgun blast to the back of his head. He testified to the methodical execution of the other men.
>
> On September 15, 1977, the defendant and three co-defendants were indicted for the offense. Adolphus Archie, the "wheel-man", was allowed to plead guilty to second degree murder and a twenty-year concurrent sentence on all counts in exchange for testimony at trial. He testified he'd dropped the defendant, Marvin Francois, and Beauford White in the Carol City area to "rip off" a drug house. He didn't see the actual shooting but later saw weapons and jewelry in Beauford's and Francois' possession.

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

B. The Hialeah Murders

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

Glenfeldt and Belinda Worley; armed sexual battery of Belinda Worley; armed robbery of Brian Glenfeldt; attempted armed robbery of Belinda Worley; use of a firearm during the commission of a felony; and the two counts of possession of a firearm by a convicted felon. (R2. 196-203).

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

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

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

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

Ferguson, supra, 417 So. 2d 636.

On April 19, 1983, the trial court held a hearing on the resentencing. The hearing in the Hialeah case was consolidated with the resentencing in the Carol City case. The trial court again sentenced the defendant to death for both murders in the Hialeah case and the six murders in the Carol City case. (SR2. 1-11; SR2. 12-20). The trial court rendered its written sentencing orders on May 27, 1983. The defendant, in a consolidated appeal, appealed the resentencings in both the

Hialeah and Carol City cases. On June 27, 1985, this Court affirmed the defendant's sentences. Rehearing was denied on September 9, 1985. **Ferguson v. State**, 474 So. 2d 208 (Fla. 1985). Mandate was issued on October 15, 1985.

On October 15, 1987, the defendant, through his mother, Dorothy Ferguson, as next friend, filed a motion for post-conviction relief, attacking his convictions and sentences in both the Carol City and Hialeah cases. (SR4. 4-43). A supplement to said motion was filed on September 8, 1989. (R4. 1105-1362). Rule 3.850 relief was denied on June 19, 1990, after a lengthy evidentiary hearing. (SR4. 320-354). This court then affirmed the denial of post conviction relief. **Ferguson v. State**, 593 So. 2d 508 (Fla. 1992). The defendant has now filed the instant petition for habeas corpus relief.

ARGUMENT

I.

FERGUSON IS NOT ENTITLED TO NEW SENTENCING PROCEEDINGS PURSUANT TO CORBETT V. STATE, INFRA.

The Petitioner contends that pursuant to **Corbett v. State**, 602 So. 2d 1240 (Fla. 1992), he is entitled to sentencing hearings before new juries, because upon remand by this Court from his direct appeals of convictions and sentences in both trials, he was resentenced by a substitute judge who considered the records, transcripts and arguments of counsel. The Petitioner's argument is without merit, because, first, **Corbett**, supra, is only applicable to situations where a judge is substituted before the "initial trial on the merits is completed," and not to a resentencing. **Corbett**, supra, at 1244.

In **Corbett**, the day after the jury concluded its deliberations and recommended the death sentence, the presiding judge was killed in a plane crash. Supra, at 1243. The case was assigned to a substitute judge for sentencing. (Id). The defense objected and requested a new penalty phase proceeding. (Id). The substitute judge denied the request and sentenced Corbett without hearing evidence. (Id). On direct appeal this court reversed and held:

> "we find that a judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial, must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be

> determinative of whether a defendant lives or dies. 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.

Corbett, supra, at 1244.

In the instant case, however, the "initial trial on the merits was completed," without any substitute judges. The same judge and juries heard all of the evidence. The juries recommended death and the trial judge imposed the sentence of death. Corbett, supra, by its own express terms is thus not applicable to the instant case.

Assuming arguendo, that the holding of Corbett, supra does encompass resentencing proceedings, such an application to the instant case during these post conviction proceedings is not warranted. First, Corbett, supra, is not a fundamental constitutional change in the law.

As admitted by the petitioner, there is no mention of the Florida or Federal Constitution in Corbett. Contrary to the Petitioner's representations, there is no mention of "fundamental fairness" or "due process" either. In Corbett, this Court merely found Fla. R. Crim. P. 3.700(c) to be inapplicable to capital cases, when a defense objection had been interposed. Corbett thus did not involve a "major constitutional change of law," so as to constitute a "jurisprudential upheaval" as required in Witt

v. State, 387 So. 2d 922, 929 (Fla. 1980). See also, Clark v. State, 460 So. 2d 888, 889 (Fla. 1984), where this Court held that a change in the Florida Rules of Criminal Procedure was not a change in law sufficient to meet the test announced by this Court in **Witt**, supra. In Clark, this Court specifically held:

> . . . this change [Fla.R.Crim.P. 3.216] does not constitute a fundamental constitutional change in the law. In Witt, we emphasized that only major constitutional changes of law which constitute a development of fundamental significance, such as Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), could be raised for the first time [in post conviction proceedings]. . . . We further explained:
>
> In contrast to these jurisprudential upheavals [such as Coker and Gideon] are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state , fiscally and intellectually, beyond any tolerable limit.
>
> 387 So.2d at 929-30 (footnote omitted). This amendment to the criminal rules does not meet the standards we announced in Witt. . . .

Clark, supra, at 889.

The State would additionally note that the case relied upon by this court in formulating **Corbett**'s holding, i.e., **Campbell v. State**, 571 So. 2d 415 (Fla. 1990)[1] , has itself been expressly held as not constituting "such a major constitutional change in the law as to require retroactive application on collateral attack." **Turner v. Dugger**, 18 Fla. L. Weekly S30, 31 (Fla. Dec. 24, 1992). It is therefore abundantly clear that **Corbett**, supra, does not constitute "a fundamental constitutional change in law" so as to allow retroactive application in post conviction proceedings. **Witt**, **Clark**, **Turner**, supra.[2]

Second, in **Corbett** supra, there was an objection to the substitute judge's review, and an express defense request for a new penalty phase proceeding in the court below. **Corbett**, supra, at 1243. The issue was also raised on appeal. Id. The record in the instant case, however, reflects that there was no such objection or request for a new penalty phase proceeding herein.

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[1] See **Corbett**, supra, at 1244.

[2] The Petitioner's argument, that the state's petition to this Court, filed after the completion of the direct appeal proceedings, which requested the appointment of Judge Fuller to preside over the resentencing, somehow reflects the "State's agreement with fundamental unfairness" as alleged herein, is utterly devoid of merit. See petition for writ of habeas corpus, (petition), at pp. 15-17. Respondent herein did not request a new penalty phase, did not mention "fundamental fairness," and did not in any way, shape or form advocate the inapplicability of Fla. R. Crim. P. 3.700. Id. The Respondent's petition simply reflected its desire for the expeditious completion of the proceedings on remand, and in no way raised or conceded any violation of any fundamental constitutional rights.

On direct appeal of Ferguson's convictions and sentences, this Court found insufficient evidence of the aggravating circumstances §921.141 5(a), pertaining to "a person under sentence of imprisonment", and §921.141 5(c), pertaining to "knowingly created a great risk of death to many persons", in the Carol City case. See **Ferguson v. State**, supra, 417 So. 2d at 645-6. In the Hialeah case, this court found insufficient evidence of aggravating circumstance §921.141 5(a). See **Ferguson v. State**, supra, 417 So. 2d at 636. In both cases, this court further held that, the lower court had "misconceived the standard to be applied in assessing the existence of mitigating factors [921.141] (b) and (f)," pertaining to the defendant's mental status. **Ferguson v. State**, supra, at 638; 645. The lower court had improperly used a "sanity" type analysis in rejecting these circumstances. Id.

As noted by the Petitioner, on remand, the original trial judge had retired and moved from the State of Florida. A substitute judge then painstakingly reviewed all the records and evidence in the two trials during a six month period. After said review of the evidence, the record reflects that on remand the defense never requested a new penalty phase before a jury, nor did they present any argument or request for the lower court to "hear" any of the currently urged evidence pertaining to the penalty phase. (SR3. 8-9).

Rather, the record reflects that the defense was given an opportunity to present evidence, but proffered only speculative evidence pertaining to the guilt phase:

> [Defense Counsel]: I object to counsel [prosecutor] testifying or reviewing this evidence without us having the ability to bring in mitigating evidence to rebut what he is saying.
>
> . . .
>
> [Defense Counsel]: I suggest that you allow Ferguson the opportunity to bring in witnesses to testify in his behalf to rebut.
>
> . . .
>
> The Court: Go ahead and make a proffer of what you intent to show or attempt to prove. . . .

(SR3. p.8)(emphasis added).

In response to the lower court's demand for a proffer of proof, the defense responded as follows:

> [Defense counsel]: Judge, I would like to call the detectives who induced from Mr. Ferguson a confession which proved to be the turning point in the case and now that we had sufficient time to allow their recollection to be refreshed with regard to the freeness and voluntariness of his confession, to bring them in to see, if, number one, he did waive his rights, as per Miranda, his Miranda rights, and whether he did in fact confess, and number three whether in their opinion he is a person who should not be sentenced to the electric chair.

(SR3. 9).

Defense counsel's offer of proof was, however, rejected because counsel was only speculating as to what the "evidence" he offered might show:

> THE COURT: You are proffering to the Court that these detectives will come in

> now and say he should not be sentenced to death and the confession they took was not voluntary and what else?
>
> [Defense counsel]: I am not proffering that they are going to say this. I want to find out if they are going to say this.
>
> THE COURT: Take their depositions, Mr. Hacker. It is not a good proffer. It is guess. Okay, let us get on.
>
> Id.

Subsequently, defense counsel merely made an argument that the mitigating circumstances relating to the Defendant's mental condition, as described in the various "psychiatric reports" already reviewed by the Court, were not rebutted by any State evidence. (SR3. 11-13). Defense counsel was not restricted by the trial court as to any matter in mitigation which he wished to offer:

> THE COURT: Anything further?
>
> [Defense counsel counsel]:
>
> One minute, Your Honor. One last thing I want to say, Your Honor, as far as the mitigating discussion I just had with the Court is concerned, at no time has the State of Florida produced any evidence whatsoever on sentence to rebut this mitigating factor, this psychiatric evidence.
>
> Other than that, Judge, we have nothing further to say.
>
> (SR3. 13).

In view of the foregoing, this Court, on appeal after remand, expressly found:

> on remand, the trial court ordered counsel for appellant to make an offer of proof to enable it to determine whether to conduct an evidentiary hearing. The trial court stated that the given offer of proof was insufficient to warrant reopening the case for such hearing. We find that the trial court did not abuse its discretion in refusing to allow an evidentiary hearing.
>
> Ferguson v. State, supra, 474 So.2d at 209.

Thus **Corbett**, supra, even if found to (a) encompass a remand after the initial trial on the merits is completed, and (b) constitute a fundamental change in the law, cannot be retroactively applied, given Ferguson's failure to contemporaneously object, and request a new penalty phase or that the lower court de novo "hear" the penalty phase evidence, as now urged by the petitioner. See **Jackson v. Dugger**, 547 So. 2d 1197 (Fla. 1989), where this court held that **Booth v. Maryland**, 482 U.S. 496 (1987), was a fundamental change in law, entitled to retroactive application on collateral attack. This Court granted Jackson relief, because she had interposed a contemporaneous objection to the evidence at issue, and presented a claim of error in this regard on direct appeal. By granting habeas corpus relief, this Court in effect, held that its prior disposition of her case had been error. This Court has, however, refused to extend the holding of **Jackson** in other cases, in which the

defendant did not preserve his **Booth** claim through contemporaneous objection and prior presentation of the claim on direct appeal. See **Parker v. Dugger**, 550 So. 2d 459 (Fla. 1989) (habeas corpus relief denied in the absence of a contemporaneous objection in the lower court. This court held: "Although we retroactively applied **Booth** in **Jackson**, we find that **Jackson** is clearly distinguishable from the instant case because Jackson objected to the use of victim impact evidence at trial and raised the issue on appeal and we expressly addressed the issue on appeal. As we indicated in that case, the procedural bar applies when there is no objection at trial.").

Finally, the State would note that the aggravating circumstances relied upon after remand, were those already affirmed by this Court on direct appeal. Moreover, the lower court, on remand, accepted the mitigating circumstances asserted. Therefore, there was no possibility that Ferguson could have been prejudiced by the judge not having personally heard the penalty phase evidence. See **Corbett**, supra, at 1244 (Grimes, J., concerning in part, dissenting in part).

II.

FERGUSON IS NOT ENTITLED TO A NEW SENTENCING PROCEEDING PURSUANT TO ESPINOSA V. FLORIDA.

The petitioner contends that the heinous, atrocious or cruel (HAC) jury instructions herein "lacked the second sentence of the instruction set forth in **State v. Dixon**, 283 So. 2d 1, 19 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)," and thus suffer "from the constitutional defects" identified in **Espinosa v. Florida**, ___ U.S. ___, 112 S.Ct. 22926, 120 L.Ed.2d 854 (1992). See petition at pp. 2-22. The petitioner then argues that **Espinosa**, supra, represents a "fundamental" change in the law which should be applied retroactively to Ferguson's cases. This Court has repeatedly, and in decisions involving State habeas corpus petitions, applied Florida's procedural bar rule to such arguments premised on **Espinosa**. See **Turner v. Dugger**, 18 Fla. L. Weekly S30, S32 (Fla. Dec. 24, 1992), where on petition for writ of habeas corpus, this Court held:

> Finally, we note that although the jury was given an instruction on the aggravating circumstances of heinous, atrocious, or cruel similar to that which was recently ruled unconstitutionally vague by the United States Supreme Court in Espinosa v. State, 112 S.Ct. 2926 (1992), Turner failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue. Turner thus waived the claim. See Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992).

Similarly in **Larry Joe Johnson, Sr. v. Singletary**, ___ So. 2d ___, Case No. 81,121, slip op. at pp. 3-4 (Fla. January 29, 1993), again on petition for writ of habeas corpus, this court held:

> Johnson contends that his penalty-phase jury was instructed contrary to the precepts of Espinosa and Sochor, in part because the trial court later found the heinous, atrocious, or cruel factor inapplicable here. We find that this claim is procedurally barred for Johnson's failure to object to the instruction based on vagueness or other constitutional defect. Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992).

See also **Kennedy v. Singletary**, 602 So. 2d 1285 (Fla. 1992), cert. denied, ___ U.S. ___, 120 L.Ed.2d 931 (1992) (claim based upon **Espinosa** procedurally barred, where only objection to jury instruction was to applicability, and not constitutionality; claim not presented on direct appeal); **Melendez v. State**, 17 Fla. L. Weekly S699 (Fla. November 12, 1992) (claim based upon **Espinosa** procedurally barred, where issue was waived on direct appeal due to lack of an objection at trial); **Sochor v. Florida**, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (pretrial motion attacking constitutionality of aggravating circumstance was insufficient to preserve claim as to constitutionality of jury instruction to which no contemporaneous objection interposed).

In the instant case there were no objections whatsoever to the HAC jury instruction at trial, nor was the issue raised on

appeal. The issue is thus procedurally barred. **Turner**, **Johnson**, **Kennedy**, **Melendez**, **Sochor v. Florida**, supra. Ferguson's arguments apparently as to the vagueness of instructions on Fla. Stat. 921.141(a) and (c) aggravating factors, and on Fla. Stat. 921.141(b) and (f) mitigating factors, are likewise procedurally barred, as no objections on constitutionality grounds were ever raised to the instructions on these factors. Moreover, neither **Espinosa** nor any other United States Supreme Court decisions have ever held said factors to be vague, or the jury instructions thereon to be deficient. See **Johnson**, supra, slip op. 2, n.1 ("The other issues raised [on petition for writ of habeas corpus] are unquestionably barred. They are (1) that Florida's statute setting forth aggravating factors is unconstitutionally vague; (2) that the jury's recommendation was tainted by the consideration of other invalid aggravating factors, including the 'witness elimination factor; ...") (emphasis added); **Turner**, **Kennedy**, **Melendez**, **Sochor v. Florida**, supra.

The State would additionally note that Ferguson's suggestion that, **Espinosa** is "as fundamental as the change wrought by **Hitchcock v. Dugger**, 481 U.S. 393 (1987)", is without merit. See petition at p.28. As previously noted herein, **Hitchcock** does not represent this Court's most recent retroactive application of a precedent on collateral attack. In **Jackson v. Dugger**, supra, this Court concluded that **Booth v. Maryland** was entitled to such application, but limited the class of defendants who could secure relief based upon **Booth** to those who had

interposed contemporaneous objections at the time of trial. See also **Parker**, supra; **Clark**, supra. The error in **Booth** and the alleged error in **Espinosa** would seem to be similar, i.e., the jury being allowed to consider an improper factor in aggravation, either extraneous to the statute or improperly defined. This similarity would seem to dictate that the two precedents be treated alike for retroactivity purposes on collateral attack.

The error in **Hitchcock** is of an entirely different sort, implicating the entire capital sentencing scheme due to "the sentencer [having been] precluded from even considering certain types of mitigating evidence." See **Graham v. Collins**, 52 Cr. L. Rptr. 2114, 2118 (U.S. S.Ct. January 27, 1993). Whereas 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 which, under the facts of a given case, may or may not have played a role of any importance.[3] Indeed, as specifically noted by the United States Supreme Court, such instructional error is not "fundamental". See **Sochor v. Florida**, supra, at 119 L.Ed.2d 338, where the Court specifically stated:

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[3] It must be remembered that the respective roles of aggravating and mitigating circumstances are different. Those in aggravation are essentially limitations upon the sentencer's discretion, i.e., only those factors set forth in the statute can be considered in aggravation. Mitigation, of course, is not similarly limited, and a sentencer's failure to fully appreciate that fact casts serious doubt upon the reliability of any sentence.

> . . .In any event, we know of no Florida authority supporting Justice Steven's suggestion that all federal constitutional error (or even that kind claimed by Sochor) would be automatically 'fundamental'. Indeed where, as here, valid aggravating factors would remain, instructional error involving another factor is not 'fundamental'.[4] [cites omitted]" (emphasis added).

Finally, assuming arguendo, that **Espinosa**, can be retroactively applied to Ferguson, the Respondent respectfully submits that any error in the HAC instructions[5] herein was harmless beyond a reasonable doubt, because the result would been the same had this factor been properly defined in the jury instructions. See **Clemons v. Mississippi**, 494 U.S. 738, 108

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[4] With respect to the HAC instructional error, **Sochor** had argued that, "this error goes to the ultimate sentence, ..., because a Florida jury is 'the sentencer' for **Clemons** purposes, or at the least one of 'the sentencer's' constituent elements... Hence, the argument runs, error at the jury stage taints a death sentence, even if the trial judge's decision is otherwise error free." **Sochor v. Florida**, supra, 119 L.Ed.2d 337.

[5] The **Espinosa** HAC instruction was not given herein. Instead, the penalty juries were specifically advised that this aggravating circumstance contemplated a crime involving a design "to inflict a high degree of pain with utter indifference to, or enjoyment of, the suffering of others; pitiless." (R1; 1072-4; R2 1456-60). Such definition is clearly comparable to the language from **State v. Dixon**, 283 So.2d 1, 9 (Fla. 1973), cert. denied, sub nom, **Hunter v. Florida**, 416 U.S. 943 (1974), approved by the United States Supreme Court in **Profitt v. Florida**, 428 U.S. 242, 256-7 (1976) (". . .The conscienceless or pitiless crime which is unnecessarily torturous to the victim"). Both phrases focus upon the same objective criteria, i.e., the suffering of the victim and the defendant's intention to inflict, or enjoyment of, such suffering. The Respondent respectfully submits that it should not be of constitutional consequence which phrase is used in a given case.

L.Ed.2d 725, 110 S.Ct. 11441 (1990), where the United States Supreme Court expressly approved said standard:

> It is perhaps possible, however, that the Mississippi Supreme Court intended to ask whether beyond reasonable doubt the result would have been the same had the especially heinous aggravating circumstances been properly defined in the jury instructions; and perhaps on this basis it could have determined that the failure to instruct properly was harmless error.

The United States Supreme Court has added that the import of its holding in **Clemons**, supra, is that even if the sentencer applies an improper construction, "a State appellate court may itself determine whether the evidence supports the existence of the [HAC] aggravating circumstance as properly defined", and thus uphold the death sentence. **Walton v. Arizona**, 497 U.S. ___, 111 L.Ed.2d 511, 528, 110 S.Ct. ___ (1990), see also **Richmond v. Lewis**, 506 U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); **Lewis v. Jeffers**, 497 U.S. ___, 111 L.Ed.2d 606, 622, 110 S.Ct. ___ (1990) ("if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State applied the construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' **Cartwright**, 486 U.S. at 362 100 L.Ed.2d 372, 108 S.Ct. 1853, has been satisfied.")

In the instant case, this Court has already itself determined that the evidence herein supports the existence of the

HAC factor. See **Ferguson v. State**, supra, 417 So. 2d 636, 643-4. Thus, because this Court has adopted a constitutionally narrow construction of HAC[6] and applied this construction to the facts of the instant cases, any error in the HAC jury instructions would not have affected the result herein and was harmless beyond a reasonable doubt. **Walton v. Arizona**, **Richard v. Lewis**, **Lewis v. Jeffers**, supra. Indeed, in the Carol City case, this Court in evaluating the factual circumstances of this case in a codefendant's appeal stated: "we note that we are also influenced by the magnitude of the criminal conduct. The calculated slaughter of six individuals and attempted slaughter of two others constitutes an atrocity which sets the capital felonies apart from the "norm" of capital felonies." **White v. State**, 403 So. 2d 331, 339 (Fla. 1981). In the subsequent Hialeah case, the penalty phase jury recommended death without considering, or even knowing about, the six murders of which Ferguson had been convicted in the Carol City case. In view of the foregoing, and in light of the substantial aggravating factors and only "some evidence" of mitigators, the Respondent respectfully submits that any jury instructional error was harmless beyond a reasonable doubt.

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[6] See Proffit v. Florida, 428 U.S. 242 (1976); Sochor, supra, at 119 L.Ed.2d 339; Johnson, supra, slip op. at 4.

III.

THE UNITED STATES SUPREME COURT'S HOLDING IN RIGGINS V. NEVADA IS NOT APPLICABLE TO FERGUSON (Restated).

The Petitioner contends that his Hialeah trial counsel "asked the court to have Ferguson taken off the medication [anti psychotic]," and the trial court "denied the request, without addressing whether the effect of the anti psychotic drugs was to render Ferguson incompetent and to deprive him of his right to a fair trial", in violation of **Riggins v. Nevada**, ___ U.S. ___, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). This claim is without merit, as **Riggins** is not applicable to the instant case.

Riggins, involved certiorari review of the state court's opinion on direct appeal. Both parties and the state Supreme Court had agreed that **Riggins** had received anti-psychotic medication, Mellaril, "over objection" and on an "involuntary" and "forced" basis. 118 L.Ed.2d at 488. In the state trial court, after Riggins had been adjudged competent, trial counsel filed a pretrial motion, requesting a court order to suspend the administration of Mellaril until the end of trial. 118 L.Ed.2d at 486. In his motion, Riggins relied upon "both the Fourteenth Amendment and the Nevada Constitution." Id. Therein, Riggins argued that continued administration of these drugs infringed upon his freedom and that the drugs' effect on his demeanor and mental state during trial would deny due process. Riggins also asserted that, because he would offer an insanity defense at

trial, he had a right to show jurors his true 'mental state'. Id. The trial court then held an evidentiary hearing on Riggins' motion, but denied the motion to terminate medication in an order "that gave no indication of the court's rationale." 118 L.Ed.2d at 487.

At trial, Riggins presented an insanity defense and testified on his own behalf. On appeal to the state court, Riggins then specifically claimed that, "forced administration of Mellaril denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor at trial. This prejudice was not justified, ..., because the State neither demonstrated a need to administer Mellaril nor explored alternatives [thereto] ....", 118 L.Ed.2d at 479.

In resolving Riggins' claim, the United States Supreme Court first noted that in light of the above circumstances, the issue before it was narrow. The Court specifically stated that "Riggins' Eighth Amendment claim that administration of Mellaril denied him an opportunity to show jurors his true mental condition at the sentencing hearing," was not before it, because this argument was not, inter alia, presented to the state court. 118 L.Ed.2d at 488.

The United States Supreme Court then held that, "because the Nevada courts failed to make findings sufficient to support forced administration of the drug, we reverse." Id. at 485. The Court added that, once Riggins moved to terminate the administration of antipsychotic medication, the State became

obligated to establish the need for Mellaril and the medical appropriateness of the drug. Id. at 489. The Court stated that the state courts had not acknowledged Riggins' "liberty interest in freedom from unwanted antipsychotic drugs," and this error may have impaired Riggins' trial rights. Id. at 490. The Court observed that efforts to prove or disprove prejudice from the record were futile, because the expert testimony of the doctors at the evidentiary hearing raised a "strong possibility that Riggins' defense was impaired due to the administration of Mellaril." Id at 491. However, the Court also added that, "[t]o be sure, trial prejudice can sometimes be justified by an essential state interest." Id. The Court explained that, "Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." Id. at 489.

In the instant case, the petitioner has not presented any of the facts or legal issues involved and addressed in **Riggins**. Rather, in the instant case the petitioner admitted that the administration of the medication, Haldol, was voluntary, not forced, and trial counsel conceded the medication's necessity.

First, despite a lengthy pretrial competency hearing, which reflects counsel's awareness that Ferguson was taking antipsychotic medication, petitioner never requested, in any way,

that the Court terminate the medication. Prior to trial, there was never any mention of terminating the medication. Likewise, throughout trial, the petitioner never requested that his medication be terminated. Indeed, at trial, one of the defense's own witnesses established that Ferguson had personally requested the medication - Haldol - which was being administered, and that he would get upset when it was not available! The record reflects the following testimony from witness Ann Bell, the head nurse at the Dade County Jail Clinic. (T2. 949):

> [WITNESS]: When he [Ferguson] came back from Raiford he definitely wanted his medication [Haldol]. He had a little to-do there because they did not receive a medical report from Raiford and it was several days-- I mean, there was a period of time in there when he did want his medication.
>
> Q. That is the Haldol?
>
> A. Yes, and we did not have--the doctor was not there to order it for him. ...
>
> . . .
>
> A. He was upset because he was not getting it [Haldol].
>
> (T2. 955-6).
>
> . . .
>
> A. John was angry that he was not receiving his medication and he was, you know, demanding the same as any other person would be, if you were receiving medication and all of a sudden you couldn't get it.
>
> (T2. 957).

Another, defense witness, Dr. Marquit, testified that the Ferguson is "tremendously dangerous." (T2. 1045). This witness stated that Ferguson is:

> Typical of that type of paranoid schizophrenia which in ordinary, daily operation, breaks out strong so that he does crazy things, irresponsible things, and cannot fit in with out society, does things which violate the law again and again and again.
>
> . . . In the hospital he is in a secluded environment. He is sheltered, given psycho suppresant drugs and in that kind of setting he starts to recover and he reasons more and more. Then he looks pretty good and the hospital authorities let him out. He is out a few days and back he goes, the same outbreak.
>
> (Id).

Throughout trial none of the defendant's experts questioned the medical propriety of Ferguson's medication, and, as noted previously, the defense never requested that the medication be discontinued.

Likewise, during the penalty phase before the jury, the defense never requested that the medication be discontinued. Immediately after the jury's recommendation of death and their discharge, the defense then conceded the medication's necessity. When asked by the Court if there was any reason why sentencing should not take place, defense counsel responded:

> [DEFENSE COUNSEL]: Your Honor, we believe there is and we would renew, as we did earlier, our motions reference to competency of the defendant. Further, as

> testimony was listed by both the hospital nurse and the psychiatrist, he is receiving a significant dosage of medication which is required for his condition. At least the Court should be once again be aware of the conditions.
>
> (T2. 1472).

In the context of the foregoing circumstances, the following then transpired:

> [COURT]: Is there anything else you would like to bring to my attention before I pronounce sentence in this case?
>
> [DEFENSE COUNSEL]: The only thing I would draw to the court's attention is that Mr. Ferguson is right now sedated with Haldol and I would suggest the court might want to sentence him when he has been withdrawn from that medication.
>
> (Id). (emphasis added).

The Respondent respectfully submits that the defense statement, "I would suggest the Court might want to", does not constitute "asking the court to have Ferguson taken off the medication" as represented by the petitioner.[7] See petition p.35. Certainly, the statement, which was made without any further elaboration and was unaccompanied by any legal basis, was insufficient to render the administration of the medication "involuntary" or "forced". The record reflects that the medication was passed into Ferguson's safety cell. (T2. 952).

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[7] 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.

Ferguson "could take it or destroy it or not take it at all." Id.

As there was no "forced" or "involuntary" administration of antipsychotic drugs herein, **Riggins**' premise, that the "'forcible injection of medication into a non consenting person's body,' . . . 'represents a substantial interference with that person's liberty,'" is not implicated. See, **Riggins**, supra, 118 L.Ed.2d at 488.

Assuming, arguendo, that defense counsel's cryptic statement is deemed a request to terminate medication, the Respondent notes that the statement was made after the guilt phase and the penalty phase before the jury had been completed. There was no necessity in the instant case for the trial court to make a determination that treatment with the medication was medically appropriate and essential for the sake of the defendant's own safety or the safety of others, which is the only requirement reflected in **Riggins**. The defense herein conceded the propriety and necessity of the medication, as noted above.

Finally, even if the administration of the medication herein is deemed "forcible," and did require a separate hearing to establish the State's interest in its continuation, no prejudice has been demonstrated. This is because, as noted previously, the statement construed by the Petitioner as a request to discontinue medication, was not made until after the trial and penalty phase before the jury were completed. As admitted by the Petitioner herein, at most the statement may be

construed as requesting that the "judge should not sentence him until he had been withdrawn from that medication." See petition, at p. 35 (emphasis added). Unlike **Riggins**, Ferguson's "fair trial" rights were thus not implicated. As noted by the Petitioner, any error pursuant to **Riggins** only implicated Ferguson's rights during sentencing before the judge. See petition at p. 36, n. 17. As noted previously, the Court in **Riggins**, specifically declined to address this issue. Moreover, Ferguson was subsequently resentenced before Judge Klein, with no indication that he was medicated, let alone "forcibly" medicated at that time. Thus even if any error pursuant to **Riggins** existed, same was cured at the resentencing.

IV.

FERGUSON'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL HAS NOT BEEN VIOLATED.

Contrary to the dictates of **Blanco v. Wainwright**, 507 So. 2d 1377, 1384 (Fla. 1987), Petitioner herein is attempting to use this proceeding as a second appeal, by arguing every conceivable allegation that prior appellate counsel did not argue. The alleged omissions of prior appellate counsel are not "of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance. . . ." **Pope v. Wainwright**, 496 So. 2d 798, 800 (Fla. 1986). Nor do the alleged deficiencies compromise "the appellate process to such a degree as to undermine confidence in the correctness of the result." Id.

As will be seen in the ensuing sections, Petitioner repeatedly attempts to allege that appellate counsel was ineffective for raising unpreserved or meritless issues. Such claims inevitably must fail. **Suarez v. Dugger**, 527 So. 2d 190 (Fla. 1988). Similarly, if any trial court errors were not presented on direct appeal, the ensuing argument herein will reflect that they were harmless errors, and harmless error cannot be the basis for a finding of ineffective assistance of appellate counsel. **King v. Dugger**, 555 So. 2d 355 (Fla. 1990).

IV.A

Alleged ineffective assistance of appellate counsel for failure to raise error as to the HAC findings

1. Carol City case

The Petitioner has argued that on resentencing, Judge Klein, who adopted Judge Fuller's findings, erroneously focused on the surviving victim instead of the murder victims, and there was no evidence that Ferguson "intended to cause the victims pain or suffering." See petition at pp. 39-40. Petitioner thus contends that the HAC factor was not established beyond a reasonable doubt, and, that appellate counsel was ineffective for failing to argue this on the appeal from resentencing.

An allegation of ineffective assistance of appellate counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. **King**, supra, 555 So. 2d 355 (Fla. 1990). On direct appeal in the instant case, this Court stated that, "we have also conducted an independent review of the sentencing proceedings and trial court's findings in aggravation," and affirmed the HAC findings. **Ferguson v. State**, supra, 417 So. 2d at 646. The findings of the trial court with respect to this aggravating factor were recited, in part, by this Court, as follows:

> She [the surviving victim] was blindfolded again and returned to the living room where six men were laying on the floor. Two of them were in the dining area and four in the living room.

Their hands were tied behind their back and the defendant and his co-conspirators were going through their pockets and asking for money and drugs. She watched as a shotgun was brought out of Mr. Stocker's room and one of the men put the shotgun to her head and said, "Give us something or we will kill her". All seven people were then moved into the northeast bedroom where all of them were pleading for their lives. One of the victims was heard to have said that he had been brought up with one of the defendants and shouldn't be hurt.

She next heard Michael Miller scream as he came into the house. She yelled to them not to hurt him. Mr. Miller was then tied, searched and brought into the bedroom. Ferguson then took Miss Wooden and Mr. Miller back to their bedroom with Ferguson again helping her as she moved along. Ferguson told her not to worry that everything was going to be alright and she and Miller were instructed to kneel down next to the bed with their bodies across the bed. She then heard some sounds that sounded like shots from the other part of the house and saw a pillow coming towards her head. She was then shot and then watched Michael get shot. She then heard Ferguson run out of the room. She screamed hysterically for Michael, then got up and got her blindfold and saw the dead men in the other room. She was able to open the front door and ran screaming to the next door neighbor's house.

While the six men remained in Stocker's bedroom Stocker was heard to cry to God for His help in stopping what he thought was going to take place. Stocker was told "Shut up nigger" (all participants and victims of this crime were of the black race) and his prayers were further interrupted by a shotgun blast to the back of his head. The other gentlemen in the room were then methodically shot by either a shotgun or

> a pistol into the backs of their heads. Miraculously one of this group survived as did Miss Wooden. The method of execution used by this defendant and his co-conspirators reflects not only an absolute lack of concern for human life or dignity but also that of a consciousless or pitiless individual.

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

As seen above, contrary to the Petitioner's argument, the trial court did focus on what happened to the murder victims. For a substantial period of time they were bound, threatened with a shotgun, pleaded for their lives, and watched and heard the execution of others in their vicinity, while contemplating their own impending fates. The mention of the surviving victim in the above findings was necessary to establish the murder victims' protracted ordeals and the mental anguish inflicted upon them as they waited for their executions to be carried out. The murder victims, after all, could not recite the details of what took place. The Petitioner's challenge to the sufficiency of the Court's findings is thus without merit.

Moreover, the State would note that not only did this Court review and approve the sufficiency of the HAC factor in this case, but it also reviewed this issue, based upon the same factual scenario, presented in Ferguson's codefendants' appeals. See, **Francois v. State**, 407 So. 2d 885, 890 (Fla. 1981); **White v. State**, 403 So. 2d 331, 338-39 (Fla. 1981). The trial of the codefendants, Francois and White, took place prior to Ferguson's

trials. Their direct appeals were affirmed prior to the decision of this Court remanding Ferguson's sentence. In **White**, the Appellant challenged the sufficiency of the HAC findings, in reliance upon Cooper v. State, 336 So. 2d 1133 (Fla. 1976). In Cooper, a police officer was killed instantly and painlessly when two shots were fired into his head. 336 So. 2d at 338. This Court upheld the sufficiency of the HAC factor in these murders, stating that in contrast to a simple shooting, "the victims in this case were required to submit to a protracted ordeal during which time they undoubtedly agonized over the prospect of being murdered." Id. This Court added:

> We believe that the events surrounding the slayings in this case readily distinguish it from the slaying which occurred in Cooper and hold that the evidence sustains the trial judge's finding that these capital felonies were especially heinous, atrocious or cruel. In reaching our conclusion we note that we are also influenced by the magnitude of the criminal conduct. The calculated slaughter of six individuals and attempted slaughter of two others constitutes an atrocity which sets these capital felonies apart from the 'norm' of capital felonies.

White, 403 So. 2d at 339 (emphasis added); see also, **Francois**, supra, 407 So. 2d at 890 ("The appellant argues that the trial court erred in finding that the capital felonies were especially heinous, atrocious, or cruel. We hold that the finding can be sustained on the basis of the mental anguish inflicted on the victims as they waited for their executions to be carried out.").

Thus, this Court approved the sufficiency of the HAC factor, not only on direct appeal in the instant case, but also in a more detailed manner in the co-defendants' cases, as set forth above. The evidence was clearly sufficient to uphold this aggravator. Accordingly, it cannot be said that counsel on appeal from the resentencing herein was "deficient" in not challenging the sufficiency of this aggravating factor, nor that counsel's failings deprived petitioner of a meaningful appeal.

2. Hialeah Case

The Petitioner contends in this case, as in the Carol City case, that the trial court relied upon irrelevant matters and insufficient evidence in finding the HAC factor. The Petitioner then argues that counsel on appeal from the resentencing was therefore ineffective in failing to raise this issue.

Again, in this case, as in the previous claim, this Court, on direct appeal, approved the trial court's findings of the HAC factor. See, **Ferguson**, supra, 417 So. 2d at 636-37. This Court recited the following from the trial court's findings with respect to this factor:

> The facts reveal that the two victims were seated in an automobile and while seated therein a gunshot was fired through the window striking Brian Glenfeld in the arm and chest area. A significant amount of bleeding followed and this victim's blood was found throughout many areas of the front of the automobile as well as on the

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

Id. at 636.

The State would note that when the sufficiency of an aggravating factor has been approved on direct appeal, this Court has held that it will not address the same issue on appeal from resentencing, where the issue was not a factor in the Court's remand. See, **Magill v. State**, 428 So. 2d 649 (Fla. 1983). Thus, appellate counsel can hardly be deemed "deficient" for not raising the HAC factor herein, where it was

approved on direct appeal and was not a factor in this Court's remand.

Moreover, the evidence of the female victim's extensive and prolonged pain, suffering, and torture, and her knowledge of impending death as demonstrated by her having witnessed the other victim's being shot, the position of her body at the time of death, and the location of her wounds, as recited in the findings cited above, have not been challenged by the Petitioner. This evidence is clearly sufficient for the HAC finding as to the female victim. See, **Francois**, supra (the finding of HAC can be sustained "on the basis of the mental anguish inflicted on the victims as they waited for their 'executions' to be carried out"). The Petitioner has thus not demonstrated any prejudice resulting from appellate counsel's alleged deficiency.

As to the male victim, the physical evidence again sustains the trial court's findings. The physical evidence at trial established that the first shot was fired from outside the victim's vehicle, while the windows to the car were closed. (T2. 134). The glass stippling in this victim's shot gun wound to the arm and chest area confirmed that this first shot merely injured the male victim in his extremities. (T2. 149, 153-54, 187). The medical examiner testified that this injury was not fatal, even though it caused profuse bleeding, and could have been treated if medical help had been provided shortly thereafter. (T2. 149). The testimony further reflected that his

injury caused the male victim to fall over to the passenger side, where the female victim was sitting. (T2. 146, 154-5, 683). The male victim's blood on the right side of the female victim's shirt reflected that he fell over her. (T2. 654, 683). Footsteps consistent with the female victim running from the car, and consistent with male shoe-clad footsteps following her in parallel, were also found. (T2. 260). The physical evidence also established that the defendant must have come back to the victim's car thereafter, because a blanket, which was always kept in the trunk of the car, was found placed over the male victim's fallen body in the front seats. (T2. 46, 54, 66). The car keys were not found at the scene or in the victims' possession. Furthermore, the blood and glass from the wound to the extremities of the male victim were on the underside of the blanket, reflecting that the blanket from the trunk had been placed over the male victim's prone body after the first shot was fired. (T2. 146, 153-54).

The finding that, "following the attack upon Belinda Worley the defendant went back to the car and shot Brian Glenfeld through the head," was thus supported by the evidence. It was also sufficient to find the HAC aggravator because of the victim's pain and anticipation of death. **Francois v. State**, supra. Thus, the Petitioner has again not established any prejudice from the appellate counsel's alleged deficiency, as to this victim either. **Francois v. Wainwright**, supra.

Assuming, arguendo, that appellate counsel may be deemed ineffective and the evidence of this factor is found insufficient with respect to the male victim, the result of the appellate proceeding would not have been different. This is because invalidation of HAC as to the male victim would have no effect upon the death sentence imposed for the female victim. The Respondent submits that the death sentence for the male victim would also still have been imposed in light of: (a) the substantial remaining aggravating factors, (b) only "some evidence" of mitigating factors 921.141(6)(b) and (f), and, (c) the fact that the Hialeah sentencing jury recommended death without considering or even knowing about the six executions for which the defendant was convicted in the prior Carol City case. Any error in finding the HAC aggravator as to the male victim was thus harmless beyond a reasonable doubt.

3. The Avoiding Arrest Factor in the Hialeah Case

The Petitioner contends that in the Hialeah trial there was insufficient evidence that the murders were committed to avoid lawful arrest, and that appellate counsel was ineffective for failing to raise this issue. On direct appeal, this Court approved the applicability of this aggravator, citing the following findings of the trial court:

> It is obvious that the execution style of terminating the lives of the two victims was the result of a thoughtful plan to make certain that there would be no witnesses to the

> robberies and/or the involuntary sexual battery committed. This conduct is a reflection of a well thought out plan to make certain that this defendant would not be discovered or his identity ever revealed.

Ferguson v. State, supra, 417 So. 2d at 636.

In addressing the sufficiency of evidence to uphold this factor, this Court has stated: "Even without direct evidence of the offender's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown." **Swafford v. State**, 533 So. 2d 270, 276 (Fla. 1988), citing **Harich v. State**, 437 So. 2d 1082, 1086 (Fla. 1983), cert. denied, 465 U.S. 105, 104 S.Ct. 1 329, 79 L.Ed.2d 724 (1984) (factor upheld when the defendant offered the two victims a ride in his van, then stopped and held a gun to their heads, performed sexual battery on one victim, then shot this victim in the back of the head, and cut the other victim's throat). "A motive to eliminate potential witnesses to an antecedent crime can provide the basis for this aggravating circumstance. **Menendez v. State**, 419 So. 2d 312, 315, n. 2 (Fla. 1982)." **Swafford**, supra, at 276. In **Swafford**, this Court further noted the history of this aggravator as follows:

> It is not necessary that an arrest be imminent at the time of the murder. See e.g. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Riley v. State, 366 So.2d 19 (Fla. 1978).
>
> Although some decisions have approved findings of motive to eliminate

> witnesses based on admissions of the defendant, Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Bottoson v. State, 443 So.2d 962, 963 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984), in others the factor has been approved on the basis of circumstantial evidence without any such direct statement. Routly v. State, 440 So.2d 1257, 1263 (Fla. 1983) ("express statement" not required), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). While Swafford's statement to Johnson did not contain any clear reference to his motive for the murder specifically, the circumstances of the murder were similar to those in many cases where the arrest avoidance factor has been approved. E.g., Cave v. State, 476 So.2d 180, 188 (Fla. 1985) (evidence left "no reasonable inference but that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery"), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); Routly v. State, 440 So.2d at 1264 ("no logical reason" for the victim's abduction and killing "except for the purpose of murdering him to prevent detection"). Other cases have applied the same reasoning on similar facts. E.g., Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982).

Swafford, supra, at 276.

The murders herein took place in a remote, wooded area. **Ferguson v. State**, supra, 417 So. 2d at 635. The

defendant chased victim Worley, who had witnessed the other victim being shot, to a trash pile. (T2. 260, 98). He raped her. The defendant then shot her in the head at point blank range while she was in a kneeling position facing him. (T2. 111-112). He also additionally shot the other victim through the head, after shooting him in the extremities. This victim's body was then covered with a blanket. Thus, even without direct evidence of the offender's thought processes, the aggravator herein was supported by circumstantial evidence through inference from the facts shown, and in the absence of any other possible motives. **Swafford**, Harich, **Menendez**, Griffin, supra.

As there was sufficient evidence of this factor, no prejudice has been demonstrated by the Petitioner. Moreover, in light of the case law at the time of this Petitioner's direct appeal and appeal from resentencing, noted in this Court's history of this aggravator recited above in **Swafford**, supra, appellate counsels' performance in not raising this issue can not be deemed deficient. See, **Lockwood v. Fretwell**, 52 Cr. L. Rptr. 2107, 2109 (U.S. S.Ct. Jan. 27, 1993) ("it is necessary to 'judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'"); see also, **Magill**, supra.

Finally, even if there was insufficient evidence of this aggravator and counsel is deemed deficient for having failed to raise this issue, the Respondent submits that the sentence of death herein would not have been affected. This is

because, even if this factor is not taken into consideration, other substantial aggravators remained, with only "some evidence" of 921.141(6)(b) and (f) mitigating factors. Moreover, there is no presumption of jury error when an aggravating factor is invalidated for lack of evidentiary support.[8] See, **Sochor v. Florida**. Indeed, the prosecutor herein did not even argue the applicability of this factor to the jury. (T2. 1448). Additionally, Petitioner's penalty phase jury recommended death without considering or even knowing of the six executions for which the Petitioner was convicted in the Carol City case.

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[8] The Petitioner's argument that the jury presumably concluded that this aggravating factor had been established because no limiting instruction was given, is without merit. This aggravator has never been held to be vague, nor have the jury instructions thereon ever been ruled deficient. Any argument at this stage, as to the vagueness of this factor or the deficiency of jury instructions thereon, is procedurally barred for lack of preservation. See, **Johnson**, supra.

IV.B

Failure to Remand for Resentencing Trial After Striking Aggravating Circumstances

The Petitioner contends that, because on direct appeal, this Court struck two aggravating circumstances in the Carol City case and one aggravating circumstance in the Hialeah case, and the trial court subsequently found that two mental statutory mitigating circumstances existed, this Court should have remanded for a full resentencing trial, before a jury, pursuant to the rationale of **Elledge v. State**, 346 So. 2d 998 (Fla. 1977). This Court has previously rejected this claim. **Smith v. Dugger**, 565 So. 2d 1293, 1297, n. 7 (Fla. 1990); **Hamblen v. Dugger**, 546 So. 2d 1039, 1041 (Fla. 1989) ("The **Elledge** error was in allowing the introduction of nonstatutory aggravating evidence that the defendant had admitted committing a murder for which a conviction had not yet been obtained. Subsequent cases have made it clear that a death sentence may be affirmed when an aggravating circumstance is eliminated if the Court is convinced that such elimination would not have resulted in a life sentence. **Rogers v. State**, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). This is so even if mitigating circumstances have been found."). Accordingly, appellate counsel was not ineffective for failing to raise the **Elledge** issue on appeal after remand from resentencing.

IV.C

Failure of Trial Court to Conduct Sua Sponte Competency Hearing and Failure of Appellate Counsel to Raise Issue on Direct Appeal

The Petitioner claims that as a result of Ferguson's bizarre behavior during the Carol City trial, the trial judge had an obligation to conduct a sua sponte competency hearing, and that appellate counsel was concomitantly ineffective for failing to assert this issue on the direct appeal in the Carol City case. A review of the extensive information which the trial court had before it as of the commencement of the Carol City trial, in conjunction with the nunc pro tunc competency hearing held three months after the Carol City trial, compels the conclusion that the trial court did not err in failing to conduct a sua sponte competency hearing, and that appellate counsel could therefore not be ineffective for failing to raise this issue in the Carol City appeal.

On May 8, 1978, two weeks before the Carol City trial, the three court appointed doctors rendered separate written reports. Dr. Graff concluded that Ferguson was not psychotic, but was either suffering from a Ganser syndrome or malingering. He found that Ferguson was able to answer charges against him, aid in his own defense and stand trial. (R4. 809-10).

Dr. Jaslow concluded that Ferguson "was basically competent and capable of answering the charges and assisting in

his defense, despite the fact that he was "presenting a picture of some limitations and inadequacy." Jaslow found nothing to support the "idea of active psychotic disorder" at that time. (R4. 813-14).

Dr. Mutter had examined Ferguson on several occasions between 1971 and 1975, detailing the history in the May, 1978 report. (R4. 802-804). Mutter found that although Ferguson had a prior episode of paranoid schizophrenia and was presently exaggerating his symptoms on a conscious level to make him believe that he was sicker than he actually was, Ferguson had the ability to aid counsel in the preparation of his defense and stand trial. (R4. 803-4). Mutter considered Ferguson extremely dangerous and suggested that Dr. Reichenberg perform psychological testing on Ferguson to help rule out malingering in addition to discovering underlying pathological dynamics that might be in operation. Id.

Reichenberg was then appointed by the trial court and filed his report on May 14, 1978. (R4. 815-817). He found, as a result of various psychological tests, that Ferguson was functioning in the average/bright normal ranges with no suggestion of intellectual impairment. Although there were suggestions that Ferguson was an extremely angry and impulsive individual, there was no suggestion of schizophrenic processes operating at the time. The tests further suggested that Ferguson was aware of his present difficulties and was capable of functioning in an organized and integrated fashion. It was

Reichenberg's opinion that Ferguson was "presently capable of aiding in his own defense and standing trial and any failure to cooperate with his attorney would be on a volitional basis." (R4. 816). Ferguson was a long-standing disturbed, impulsive, acting-out individual. Because his behavior was ego-syntonic, it was unlikely that Ferguson would be motivated for a treatment program. (R4. 815-816).

During the Carol City trial, which commenced on May 22, 1978, Ferguson, during defense counsel's closing argument, indicated to counsel that he felt that police officers and other people in the courtroom were distracting the jury by making signals. (T1. 927). The judge noted that he had been observing Ferguson rotate his head from side to side, and had not seen anyone making signals. (T1. 927). Defense counsel asked the court to instruct the spectators not to talk too loudly as they were distracting him. (T1. 928). The judge responded that he had watched the jury and that they had been watching counsel, but the judge would make certain that there were no problems. (T1. 928).

During the sentencing phase, when Officer Harmon identified Ferguson as being the person convicted in 1969 for robbery, Ferguson removed his shirt and t-shirt. (T1. 1035). Lastly, after the alternate juror was excused during deliberations, Ferguson told the court that the alternate juror knew something about what was happening to him. (T1. 1079-80). The judge responded to Ferguson that it was a matter for counsel to handle. (T1. 1080).

Based on the three isolated incidents at the Carol City trial, it is now argued that the judge should have sua sponte conducted a competency hearing and appellate counsel should have argued about the failure of the judge to do so. The argument lacks merits for numerous reasons. First, in view of the unanimous findings of competency of the four experts, just two weeks prior, there was no need to conduct a competency hearing. See, **Mason v. State**, 489 So. 2d 734 (Fla. 1986); **Card v. State**, 497 So. 2d 1169 (Fla. 1986). In **Card**, the defendant was found competent by two court-appointed psychologists. Subsequently, a court-appointed forensic psychiatrist filed a report also finding the defendant to be competent. This Court noted that "although the various reports filed by the experts indicate bizarre conduct and behavioral problems, the trial court was never presented with evidence providing reasonable grounds to believe that Card was not competent to stand trial." Id. at 1175. Similarly, in **Copeland v. State**, 505 So. 2d 425 (Fla. 1987), this Court held that the trial court did not erroneously fail to hold a competency hearing where the three court-appointed experts found the defendant to be competent.

Nothing which occurred during the Carol City trial was of sufficient magnitude to compel the court to question four expert reports of extremely recent vintage. This is all the more so since Dr. Reichenberg's report suggested that any failure of Ferguson to cooperate with counsel would "be on a volitional basis," thereby indicating that Ferguson might do non-cooperative

things willfully and intentionally, but not out of any state of incompetency.

Furthermore, on August 22, 1978, three months after the Carol City trial, there was a competency hearing which, as noted by the Petitioner, simultaneously served as a pretrial competency hearing for the upcoming Hialeah trial, and a nunc pro tunc competency hearing for the Carol City case. Ferguson was again found competent. The use of a nunc pro tunc competency evaluation has been approved by this Court. **Mason**, supra.

Of further significance is the fact that in the Hialeah direct appeal the competency issue was raised, and this Court specifically found that "there was adequate testimony to support the trial judge's finding that defendant was competent to stand trial." 417 So. 2d at 634. That conclusion had been based on the results of the joint competency hearing covering both the Hialeah trial and the Carol City case (nunc pro tunc). Since this Court has concluded that the joint hearing supported a conclusion of competency for the Hialeah case, it necessarily follows that this Court has also concluded that the joint hearing supports a conclusion of competency, nunc pro tunc, for the Carol City trial. Under such circumstances, Ferguson clearly could not be prejudiced by the failure of appellate counsel to make the same argument in the Carol City appeal when it failed in the Hialeah appeal.

In view of the foregoing, it must be concluded that the trial court had no reason to conduct a sua sponte competency

hearing, and appellate counsel was not ineffective for raising such an issue in the Carol City appeal.

IV.D

Failure to Raise Proportionality Issue

The Petitioner argues that he is entitled to relief because this Court failed to engage in proportionality review in its prior decisions, and, alternatively, because appellate counsel failed to argue that the imposition of the death penalty was not proportionate to other cases in which it had been imposed. Neither contention has merit.

Initially, it should be noted that it is not correct to state that this Court failed to engage in proportionality review. In the original direct appeal for the Hialeah murders, this Court, after striking one aggravating circumstance, and affirming the rest, remanded to the trial court for resentencing, while stating:

> However, in our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.

417 So. 2d at 638. The Court made an identical finding in the Carol City direct appeal. 417 So. 2d at 646. From the quoted passage, it is clear that this Court found that even if the mitigating factors regarding Ferguson's mental state were found to exist, those factors would not invalidate the death sentence.

It therefore necessarily follows that the trial court's subsequent finding of the mitigating factors still resulted in a proportionate death sentence, and the failure of the opinion for the appeal after remand to refer to proportionality does not alter the Court's prior evaluation.

The Petitioner's claim, however, suffers from a much more fundamental flaw. The failure of this Court to refer, in its opinion, to proportionality review does not imply that such review was not conducted. Indeed, the contrary is true. Identical arguments have repeatedly been rejected by this Court. In **Messer v. State**, 439 So. 2d 875, 878-79 (Fla. 1983), the petitioner argued that this Court, in the direct appeal, failed to conduct proportionality review, as reflected by the failure of the opinion to specifically compare Messer's case with other death penalty cases. This Court rejected the notion that the written opinion must set forth the proportionality review:

> . . . We reject the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases.

439 So. 2d at 879. This was reiterated in **Booker v. State**, 441 So. 2d 148, 153 (Fla. 1983), when the defendant claimed that proportionality review had not been conducted because it was not shown on the face of the direct appeal opinion:

> Recently, in Messer v. State, 439 So.2d 875 (Fla. 1983), we specifically stated that just because proportionality is not mentioned in its opinion on direct appeal, that does not mean that

> proportionality review has been omitted. This Court quoted from 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), in which we previously noted that the Court's review process insured proportionality among the various death sentences. Therefore, although we did not specifically mention other capital cases in our decision on Booker's direct appeal, we did in fact undertake proportionality review. That review is an inherent aspect of our review of all capital cases. We need not specifically state that we are doing that which we have already determined to be an integral part of our review process.

441 So. 2d at 153.

As it necessarily follows that this Court already conducted proportionality review and found the imposition of the death sentences to be appropriate, it is also obvious that the failure of appellate counsel to raise the proportionality argument could not constitute ineffective assistance of counsel. In this regard, it should also be noted that the State, in its Supplemental Brief from the prior appeal, had argued that the death penalty was appropriate in comparison to other cases. This conclusion is clearly supported by the relevant case law. Both cases involved multiple homicides and one of the cases involved a mass murder. That mass murder was also an aggravating factor in the Hialeah case (after resentencing), as it was a prior violent felony. Apart from the mass murder aspect of the aggravating factors, each case involved multiple aggravating factors. The sole mitigating evidence found was

"'some evidence to indicate that the felony was committed while the defendant was under the influence of extreme mental disturbance and that the capacity of the defendant to appreciate the criminality of his conduct so as to conform his conduct to the requirements of law may have been substantially impaired.'" 474 So. 2d at 209. The existence of multiple homicides is an aggravating factor which weighs heavily and routinely contributes to the finding that the death sentence imposed was appropriate. See, e.g., **LeCroy v. State**, 533 So. 2d 750 (Fla. 1988); **Cruse v. State**, 588 So. 2d 983, 991 (Fla. 1991) (double murder, four aggravating factors, and mitigating evidence of extreme emotional disturbance, to which judge gave great weight); **Stano v. State**, 460 So. 2d 890 (Fla. 1985) (double murder, six prior murders as aggravating factor among three aggravating factors; several nonstatutory mitigating circumstances found).

None of the cases relied upon by the Petitioner compel a different conclusion. Most significantly, none of them involve multiple or mass murders, either for the sentenced offenses or for aggravating factors for prior violent felonies. **Blakely v. State**, 561 So. 2d 560 (Fla. 1990), and **Wilson v. State**, 493 So. 2d 1019 (Fla. 1986), both found that the death sentence was not warranted because they involved heated domestic confrontations. **Irizarry v. State**, 496 So. 2d 822 (Fla. 1986), is inconsequential because it was an improper jury override, and hence cannot be compared to a sentence which is imposed pursuant

to a jury recommendation of death. See, **Hudson v. State**, 538 So. 2d 829, 831-32 (Fla. 1989); **Lemon v. State**, 456 So. 2d 885, 888 (Fla. 1984).

Interestingly, **Blakely** goes so far as to note that the existence of a prior similar crime would suffice to result in the affirmance of the death sentence under proportionality review. 561 So. 2d at 561. **Blakely** cites numerous cases in support of this proposition. See, **Lemon v. State**, 456 So. 2d 885, 888 (Fla. 1984) (death sentence "is not comparatively disproportionate" for stabbing death of girlfriend where defendant had prior conviction for assault with intent to commit first-degree murder for stabbing another female victim); **King v. State**, 436 So. 2d 50, 55 (Fla. 1983) (death penalty affirmed as comparable where defendant had prior manslaughter conviction for axe-slaying of woman victim); **Williams v. State**, 437 So. 2d 133, 137 (Fla. 1983) (death sentence "is not comparatively inappropriate" where defendant had prior assault convictions for shooting victims); **Pardo v. State**, 563 So. 2d 77 (Fla. 1990), (death sentence appropriate for case involving nine cold-blooded homicides, where defendant found to be under extreme mental or emotional disturbance and where other nonstatutory mitigation existed as well).

Accordingly, it is clear that the Petitioner is not entitled to relief because of this Court's failure to expressly state that it had conducted proportionality review on the appeal after remand, or because of the failure of appellate counsel to raise the proportionality issue.

IV.E

Failure of Appellate Counsel to Raise Issue Regarding Separation of Hialeah Trial Jury During Deliberations

The Petitioner contends that appellate counsel was ineffective for failure to raise a claim that the jury in the Hialeah trial separated during deliberations. As the Petitioner asserts, after the jury deliberated for about four hours, the jury indicated that it wished to break for the evening and resume the next day. The judge permitted the jury to break for the evening and let the jurors go to their own homes. (T2. 1425).

At the time that the judge released the jurors for the evening, the judge gave the jurors cautionary admonitions. (T2. 1425-26). The Petitioner asserts that those admonitions were inadequate, and in setting the admonitions forth in the Petition (p. 61), the Petitioner ignores substantial, more explicit admonitions that were given by the judge. The judge initially advised the jury, as follows:

> 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?

(T2. 1425-26). The Petitioner, however, conveniently ignores the immediately following continuation of the judge's admonitions to the jury:

> 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.

(T2. 1426) (emphasis added). It would be rather bizarre and unrealistic to suggest that the emphasized portion admonished the jurors only to refrain from discussions once they returned to the jury room the next morning. It would not make sense for the judge to permit them to discuss the case throughout the evening, and on their way to the courthouse the next morning, only to stop once they reached the jury room. Therefore, it is obvious that the judge was admonishing the jurors not to discuss the case until they were told to resume their deliberations the next morning.

Not only were the jurors advised, immediately before breaking for the evening, that they should not discuss the case until the judge was with them again and told them to do so, but, the jury had had repeated cautionary instructions throughout the trial. At the outset of the case, the jury was thoroughly advised about the media and refraining from discussions about the case when not in the courtroom:

[THE COURT] ....

Now, the fourteen of you will become very good friends before this case is over. I've seen it happen for years.

I would like to suggest to you that friendships that are made during jury service are life long generally.

You have to be very careful during the course of your relationship that your relationship is not based on what you talk about in this case but on whatever other matters there may be.

I don't want you talking about this case among yourselves.

I don't want you discussing witnesses.

I don't want you thinking about the case when you leave this courtroom.

Nothing about this case is to be discussed by you or in your presence by anyone else when you leave this courtroom.

When you go back in that jury room for a recess and use the toilet or get a drink or whatever it may be, you can talk about whatever you want to except the participants in this case or this case or other cases that may be around that you have heard about.

You don't want me discussing cases at lunch breaks and at dinner breaks with people that are involved in front of me.

I know you'd have my head if I did that and the same holds true with you.

You've got to decide this case on what you hear in this courtroom under oath brought to your attention in front of all the participants and where you are present, not by what you may see or read in the newspaper or TV or any place else.

That's not where this case is being tried.

This case is being tried right here in courtroom 43.

I can't be more serious about a matter than I am about this.

Sometimes we have a tendency to want to see what's going on and so we check the papers and listen to the radio and watch the news station to see what's happening around.

Well, you are involved in what's happening.

I don't know whether this is going to be newsworthy or not.

I say in every case in our courts they are news and I have cautioned every jury that I have that you are to stay away from the seven o'clock news and not pay attention to it.

You are not to get involved in newspaper articles or in radio stations that relate to the news that may cover this case, because to do so you will be in violation of the order of the court.

Now, I can do it two ways that I told you about this morning:

The easy way, which is this way. I'm trained to do it and I hope that you are.

Or I can do it the hard way, and that is to ask you to come back tomorrow and bring a suitcase and I'll find a place for all of us to stay so that I can monitor through our bailiff and other court officers what you hear and what you see.

I'm satisfied that you are a sophisticated group of people and I don't mean to be talking down to you at all and

don't misunderstand me, but I can't tell you how important it is that you remain objective in this case and that you not allow anybody to interfere with your objectivity through the course of this trial.

There will be times when I'll be having hearings outside of your presence and the reason for doing that is to determine whether or not what's going to be offered is for your ears and it would be terrible if I excuse you from the courtroom to hear evidence to determine whether it is admissible or not and I rule it inadmissible and you read about it in the paper at night or in the morning.

It just defeats that which I am trying to accomplish and the same holds true with the news.

I could keep you past the 11 o'clock news. That's no problem, but I don't like to keep people past 11 o'clock because I need my sleep too.

So it's really in your hands.

If you take your job seriously as I have taken your answers to be, then you will do as I tell you and you'll let your family or other people read the newspapers and you'll look at the sports page.

It's just that simple.

The lawyers have a right to discuss this with witnesses before they testify and they may be meeting out in the hallways or down in the lunch room, whatever it may be.

So I caution you, please, you've got to watch where you go carefully and watch what you do during the course of this trial.

I don't want you discussing your jury service with anybody else.

I don't want anybody discussing this case with you.

When you leave here today and you get home and somebody says are you on a case? Yes.

What kind of a case are you on? The answer is, I don't know, because you don't.

I don't care what the lawyers tell you. I haven't told you yet and I won't tell you until I charge you so I don't want you getting any kind of a "kind of case" in mind.

That has a tendency to make you think that's what really happened and that may not be true at all.

If they ask you who the defendant is or anything about it at all, you say, I'm not allowed to discuss the case. Judge Fuller has instructed me specifically not to discuss anything about my service.

That's the end of it.

And you have no qualms because I'm the one that told you not to do it.

It's terribly important. It really is.

Now, are there any other comments that either counsel would like me to make at this time, any additional comments?

(T2. 13-17).

A similar instruction had previously been given at the beginning of voir dire. (SR5. 9-11). In addition to the elaborate and detailed admonitions at the outset of the trial, which are quoted above, and in addition to the explicit

admonition not to discuss the case immediately before the overnight separation, cautionary instructions were repeated throughout the trial. (T2. 39, 156, 314-5, 391, 430, 548, 940).

The Petitioner emphasizes the instruction immediately prior to the commencement of deliberations, advising the jurors to forget about "[m]y earlier discussions with you about not talking about this case," and telling the jurors that "you can talk about it all you want." (T2. 1419). It should, however, be abundantly clear that the judge was simply permitting the jurors to discuss the case among themselves during deliberations. It should have been even clearer that the prohibitions about discussing the case when away from the courthouse were still applicable, especially when the judge told the jurors not to discuss the case, immediately before letting them go for the evening. (T2. 1426).

The foregoing cautionary instructions to the jury are of particular importance, because, when combined with the failure of trial counsel to object to the release and separation of the jurors, it must be concluded that this issue was not preserved for appellate review, and appellate counsel was thus not ineffective for failing to raise the issue. This issue is governed by the principles and facts set forth in **Pope v. State**, 569 So. 2d 1241 (Fla. 1990).

Pope involved a claim that trial counsel was ineffective for failing to object to the separation of the jury during deliberations. It was claimed that this was fundamental

error, cognizable in collateral proceedings, despite the failure of counsel to object at trial or raise the claim on direct appeal. 569 So. 2d at 1243. In analyzing prior case law, this Court noted that in **Livingston v. State**, 458 So. 2d 235 (Fla. 1984), "it was held per se reversible error to allow the jury to separate during deliberations over defense objection, even though the jury had been thoroughly admonished prior to separation . . . ." 569 So. 2d at 1243 (emphasis added). Likewise, 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). The only prior case in which the overnight separation of the jurors was deemed reversible, in the absence any objection, was **Raines v. State**, 65 So. 2d 558 (Fla. 1953). However, the Court in **Pope** noted that although there was no objection in **Raines**, it was also true that the jurors had not been given any cautionary instructions. 569 So. 2d at 1243. Thus, **Pope** observed that "[r]elief was warranted in [**Raines**], despite the lack of objection and the lack of a showing of actual prejudice, because Raines' right to a fair trial had not been safeguarded by cautionary instruction." 569 So. 2d at 1244. Thus, claims regarding the separation of the jury during deliberations are not cognizable, in the absence of a contemporaneous objection, if adequate cautionary instructions are given to the jury:

> . . . Where counsel affirmatively consents to separation or where no objection is made, if adequate

> cautionary instructions were given and there is no other showing that the defendant's right to a fair trial was compromised, the issue will be considered waived.

569 So. 2d at 1244.

In Pope, the instruction given to the jury prior to the separation, stated:

> '[P]ursuant to your wishes, then, we will recess for the evening; and 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. That instruction, in conjunction with the general cautionary instructions given throughout the trial to avoid media coverage and to not discuss the case, was deemed adequate. What is significant here is that the instruction given in Pope, immediately prior to the separation of the jury, is no more explicit, and essentially the same, as that given in the instant case. Moreover, as previously detailed herein, adequate cautionary instructions were given to the jury at the outset of the case and on numerous other occasions during the course of the trial. Thus, the instant case combines the same factors as Pope: no objection at trial; an adequate cautionary instruction prior to the separation of the jury; and several other cautionary instructions to avoid discussions or media coverage.

The Court in Pope also noted that "no actual prejudice has been alleged in connection with the juror who was reading

the newspaper or any other juror." 569 So. 2d at 1244. So, too, in the instant case, there are no allegations or demonstrations of any prejudice regarding any particular juror's conduct during the separation. Accordingly, Pope makes it eminently clear that this issue does not involve fundamental error and that prejudice is not presumed. As such, appellate counsel could not have raised this issue in the direct appeal and was not ineffective for failing to raise it.

IV.F

Failure to Transcribe

The Petitioner claims that his appellate counsel was ineffective because, at the time of preparing the direct appeal, he lacked the benefit of the entire trial record. Thus, the Petitioner points out that certain portions of the Hialeah trial record were not transcribed and were not submitted to this Court for purposes of the direct appeal. The most critical factor here, and one that is admitted by the Petitioner, is that counsel for the direct appeal was the same as trial counsel. See, Petition, p. 71, n. 32. As such, appellate counsel was well aware of what transpired during the trial and was in a position to know whether any nontranscribed portions of the trial proceedings would have contained any arguable error.

More significantly, the test for ineffective assistance of appellate counsel is not whether counsel had the benefit of all of the transcripts of the trial proceedings. Even if not obtaining all of the transcripts were deemed deficient conduct on the part of appellate counsel, the Strickland[9] inquiry for ineffectiveness requires both deficient conduct and prejudice. The Petitioner must therefore carry the burden of showing that the absence of those transcripts prejudiced the Appellant. Prejudice is defined in Strickland as a probability that the outcome of the proceedings would have been different. The

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[9] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Petitioner admits that collateral counsel has obtained the previously untranscribed portions of the trial record. See Petition, p. 72, n. 34. Notwithstanding access to those portions of the trial record, the Petitioner has still been unable to demonstrate how any matters contained in those portions of the record reflected any matter which would have resulted in a reversal if presented during the direct appeal. Adhering to the foregoing analysis, the court, in **White v. State of Florida, Department of Corrections**, 939 F.2d 913, 914 (11th Cir. 1991), cert. denied, 112 S.Ct. 1274, 117 L.Ed.2d 500 (1992), held that state appellate counsel was not ineffective for failing to discover an error in the suppression hearing transcript, as the defendant had "failed to show any prejudice resulting from the defect in the transcript."

The Petitioner relies on **United States v. Cronic**, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), for the contention that prejudice should be presumed from counsel's failure to order the limited portions of the transcripts which had not been transcribed. **Cronic** does not support the applicability of any such presumption. **Cronic** suggested that such a presumption might be warranted "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ." 466 U.S. at 659. Furthermore, "[c]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could

provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." 466 U.S. at 659-660. Such a presumption is clearly unwarranted, and unsupported by any case law, when appellate counsel was fully aware of what transpired in the trial court proceedings, and collateral counsel has the full benefit of the previously non-transcribed portions of the proceedings, for the purpose of pointing out any reversible errors that appellate counsel missed in the direct appeal.

Accordingly, since the Petitioner has failed to demonstrate any prejudice under **Strickland**, this issue is lacking in merit.

IV.G

Failure to Appeal Prosecutorial Comments

The Petitioner claims that the prosecutor committed fundamental error, through several comments in closing argument in the penalty phase of the Hialeah trial. As a result, it is argued by the Petitioner that appellate counsel was ineffective for failing to raise such matters in the direct appeal.

The first claim is that the prosecutor erroneously advised the jury that the judge "will have to make the ultimate decision based on the law and facts" and that the defendant is afforded "review boards and appellate review and clemency boards. . . ." (T2. 1444). As there was no objection to this comments, the issue was not preserved for appellate review, and direct appeal counsel was thus precluded from raising it. Nor did the comment constitute "fundamental error," for the purpose of evading the contemporaneous objection requirement. In **Dugger v. Adams**, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the judge had instructed the jury that the ultimate responsibility for the sentence rested on the judge, and that the jury was just an advisory group. 489 U.S. at 403. The Court found that the claim was procedurally barred, as there had been no objection at trial.

Furthermore, even if the claim had been preserved and raised on direct appeal, any error would have been deemed harmless. The comment, when read in its entirety, in no way denigrates the responsibility or function of the jury, and thus

avoids the defect contained in **Caldwell v. Mississippi**, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The comment is clearly intended to impress upon the jury the seriousness of its task, by relating the great lengths to which the State goes to ensure that the defendant receives full and fair consideration of his case. The comment does not "lead the jury to shirk responsibility for its decision." Commentary to ABA Standard 3-5.8, ABA Standards for Criminal Justice, "The Prosecution Function." Not only does the comment lack the denigrating aspect that was fatal in **Caldwell**, but when the comment is considered in the context of the strength of the aggravating circumstances, it would ultimately be deemed harmless even if erroneous. Most significantly, among the multitude of aggravating factors is the factor that this defendant had previously been found guilty of committing a mass murder. Few aggravating factors can tilt the scales as overwhelmingly as the existence of a prior mass murder conviction.

The Petitioner next focuses on the prosecutor's comment that incarcerating the defendant would "cost you money" and "will serve no purpose, no purpose whatsoever. . . ." (T2. 1452). In the absence of any objection, this issue, too, was unpreserved, and is not fundamental; thus, appellate counsel could not be ineffective for failing to present this issue. See, **Waterhouse v. State**, 596 So. 2d 1008, 1016, 1017 (Fla. 1992) (prosecutorial argument that 15 years in prison insufficient punishment in capital prosecution did not present fundamental error; and,

comments diluting jury's sense of responsibility did not present fundamental error). Furthermore, any error, as noted above, would be subject to harmless error analysis, and, as set forth above, in the context of the multitude of aggravating circumstances, including the prior mass murder, any error in the comment would not have been reversible.

The Petitioner's reliance on **Tucker v. Zant**, 724 F.2d 882 (11th Cir. 1984), does not compel the conclusion that the instant comment constitutes fundamental error. In **Tucker**, the federal appellate court concluded that Tucker was entitled to a new sentencing trial because of numerous improper prosecutorial comments. 724 F.2d at 888-890. Moreover, **Tucker** does not contain any suggestion that the issues regarding the comment regarding the cost of incarceration was not properly preserved. Thus, counsel was not ineffective for failing to raise this issue on appeal.

The final comment about which the Petitioner complains is the prosecutor's statement that the jury should "[th]ink about under what circumstances a person does not deserve pity, does not deserve consideration, does not deserve any thought of compassion. . . ." (Hialeah R. 1441). Once again, this comment was not objected to during the trial. The Petitioner asserts that the prosecutor was advising the jury that it could not consider sympathy or compassion. A careful review of the comment reveals no such construction. The essence of the prosecutor's comment is that certain circumstances - i.e., aggravating

factors - exist, which are so substantial, that sympathy and compassion cannot possibly outweigh them. The prosecutor did not speak of pity or compassion in the abstract; he spoke of it only in the context of particular aggravating circumstances which could not be outweighed by pity.

The Petitioner attempts to argue that the comment somehow advises the jury to ignore the mitigating evidence. See Petition, p. 77. The comment does not even remotely advise the jury to ignore any mitigating evidence presented. Indeed, since there is never any "evidence" presented to the effect that the jury can, if it chooses, consider compassion, there is obviously no mitigating evidence of that nature which the jury can be told to disregard and not consider.

Furthermore, in the absence of any objection, this issue, too, was unpreserved, and does not constitute fundamental error. The Petitioner has not presented any case law holding that any such comment constitutes fundamental error. In the absence of any such case law, the general principle, that comments must be objected to for preservation for appeal, must apply. The absence of any fundamental error is strongly supported by the opinion of the United States Supreme Court in California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). There, the trial court had instructed the jury not be swayed by "'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" 479 U.S. at 542. Such an instruction was found to be valid. While the Supreme

Court did not accept the defendant's argument that the jury had been solely cautioned not to be swayed by "sympathy," the Court noted that even if the instruction could be read in such a manner, the Court would disagree with the defendant's "conclusion that the instruction is unconstitutional." 479 U.S. at 542. In view of the Court's conclusion in **Brown**, even if any error exists in the comment, it is clearly not a situation of fundamental error.

Alternatively, and as was the case with the other comments at issue, harmless error analysis would be applicable if there is any error, and once again, in view of the other aggravating circumstances, including the prior mass murder, any error would have to be deemed harmless. See, **Bertolotti v. State**, 476 So. 2d 130, 133 (Fla. 1985) ("In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." Multiple improper comments, including comment on defendant's exercise of right to remain silent, a Golden Rule argument, and an argument urging jury to consider the message that a verdict would send to community at large, did not, either individually or jointly, arise to level of reversible error.).

Accordingly, numerous reasons support the conclusion that appellate counsel was not ineffective for raising issues regarding the alleged impropriety of unpreserved prosecutorial comments.

IV.H

Failure to Appeal Venue Issue

Petitioner claims that appellate counsel was ineffective for failing to argue, in both the Hialeah and Carol City cases, that venue should have been changed due to pretrial publicity. Appellate counsel was not ineffective because: (1) in the Hialeah case, the issue was not properly preserved for appellate review; and (2) in neither case was the level of publicity or exposure of the jurors sufficient to require a change of venue.

On May 12, 1978, in the Carol City case, Petitioner filed a Motion for Change of Venue. (R1. 52-79a). The murders in that case had occurred on July 27, 1977. The motion alleged that the defendant "had received an enormous amount of publicity appearing both in the newspapers and on television and radio." It further alleged that "there has been excessive news coverage surrounding this whole crime" and that the prior trials of the codefendants had been widely publicized. The motion attached eight newspaper articles from The Miami Herald and The Miami News.

The motion to change venue was denied in the Carol City case on May 12, 1978. (R1. 79a). On July 31, 1978, a one page Motion for Change of Venue was filed in the Hialeah case, generally alleging extensive pretrial publicity, while referring to the Carol City motion. (R2. 62). No newspaper articles were attached to the motion. In the Hialeah case, after argument on

the motion, the judge indicated that he would hold it in abeyance until he could determine whether an impartial jury could be chosen. (ST2. 3). Most significantly, the motion was held in abeyance at the express request of defense counsel, who said: "I would suggest to the Court that you hold this motion in abeyance until we determine whether or not we can pick a jury that has been untainted and is unbiased, etc." Id. (emphasis added). No ruling was ever made on the motion, as same was not renewed at voir dire or thereafter. Defense counsel never complained, either before, during, or after jury selection, that no ruling had been made on the motion to change venue.

Insofar as defense counsel sought the deferral of the ruling on the motion, and insofar as defense counsel never again sought a ruling on the motion, the Hialeah case motion must be deemed waived and unpreserved for appellate review. Any contrary conclusion would elevate defense counsel's tactics to the status of sandbagging - i.e., leading the court to believe, through silence after jury selection, that the jury is believed to be impartial and acceptable, while secretly attempting to obtain a free trial while holding back on this issue until appeal.

It is well established that issues involving changes of venue are not fundamental and must be preserved for appellate review. **Stone v. State**, 378 So. 2d 765, 768 (Fla. 1980), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980). Moreover, an appellate court "must confine itself to review of only those questions which were before the trial court and upon

which a ruling adverse to the defendant was made." Id., 378 So. 2d at 768 (emphasis added). See also, **Richardson v. State**, 437 So. 2d 1091 (Fla. 1983); **State v. Barber**, 301 So. 2d 7 (Fla. 1974); **Herrera v. State**, 532 So. 2d 54, 57 (Fla. 3d DCA 1988) (where trial court did not rule on pretrial severance motion, and Herrera did not adopt codefendant's renewed motion at trial, issue not preserved for appellate review).

Thus, the Hialeah venue issue was not preserved for appellate review, and, as the issue is not one of fundamental error, appellate counsel was not ineffective for failing to raise the issue on direct appeal.

In the Carol City case, only three of the 12 actual jurors had previously heard anything about the case. (R1. 123-24). None of those three - Mr. Stern, Mr. Sacks and Mr. Crouse - believed that the pretrial publicity would affect them. (R1. 123-24). Mr. Stern expressly said that what he heard or read would not affect him. (R. 123). Mr. Sacks had "seen something in the paper", and did not believe that the defendant was guilty. (R1. 124). Mr. Crouse had seen something about the case "a long time ago" and could not remember anything about it. (R1. 124).

Additional information regarding jury selection is enlightening. Forty-one (41) venire members were questioned. (R1. 18-38). Of these 41, only 9, including the three who served on the jury, had previously heard anything about the case. At the commencement of voir dire by the prosecution, the panel was asked whether any members had heard anything about the case that

might affect their ability to serve as jurors, fairly and impartially. (R1. 42). Six panel members responded affirmatively: Kaye, Southard, Fairchilds, Mann, Molinary and Givens. (R1. 42-45).

These six were then questioned individually. Kaye had some prior knowledge, but it would not prevent him from being fair. (R1. 47). His verdict would be based only on the evidence in the case. (R1. 47). He had never heard of Ferguson before, but was aware that codefendants had been convicted. (R1. 47-8). If the State did not prove its case beyond a reasonable doubt, he would find Ferguson not guilty. (R1. 49).

Southard had heard about the case from her son-in-law, a police officer. (R1. 51). Her answers about the effect of her prior knowledge wavered: she was not sure how it would affect her. (R1. 53). Her problems were not solely due to information about the case. She was simultaneously affected by the fact that her son had been killed and by her friendship with police officers. (R1. 50-56).

Fairchilds had heard some news about the case. She thought she could follow the court's instructions and be fair and impartial. (R1. 59-60). She could hold the State to its burden. (R. 60). She had seen Ferguson on television when he was arrested, and she read an article about Ferguson. (R. 62-63).

Mann knew about the case because he knew one of the victims, Stocker. (R1. 64-5).

Givens was worried whether she would be fair. (R1. 66). She would not find the defendant either guilty or not guilty because of what she knew. (R. 67). She thought she could be fair. (R. 68). If the prosecution did not prove its case, she would find the defendant not guilty. (R1. 69).

Molinary had heard about the case through television news. (R1. 71). He would be fair and impartial despite the television information. (R1. 73). He could definitely put the television information out of his mind. (R1. 74). He did not know about the codefendants' prior trials. (R1. 75). His knowledge was rather vague, basically recalling that it was a drug-related case in which there was a survivor; he did not recall anything about anyone identifying any perpetrators. (R1. 76).

The court granted cause challenges as to Southard, Givens, Mann and Fairchilds, while denying challenges for Kaye and Molinary. (R1. 79, 57). Thus, of the six panel members who had initially indicated that they had problems based on what they had previously heard about the case, four were excused for cause, and the remaining two did not serve on the jury - Kaye was peremptorily excused by defense counsel, and Molinary was at the end of the panel list and was not even reached. In subsequent voir dire proceedings, when the prosecutor inquired whether anyone had problems being impartial, there were no response. (R1. 83, 108).

Thus, of 41 panel members, only six indicated any potential problems, and of those six, not a single one expressed any preconceived belief in the defendant's guilt; the worst that could be said of any of them was that there was uncertainty and wavering. Only a total of nine of 41 members had heard anything about the case.

Given the foregoing history of jury selection, when the facts are considered in the context of the pertinent legal principles, it is quite clear that even if appellate counsel had raised this issue on direct appeal, it would not have succeeded, as it is clearly without merit. As set forth in **Murphy v. Florida**, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), "[q]ualified jurors need not, however, be totally ignorant of the facts and issues involved." Pretrial publicity did not render Murphy's trial fundamentally unfair, even though there was extensive media coverage of his case, including his prior offenses. Of 78 panel members, 20 were excused as having prejudged the defendant. Voir dire did not reflect any hostility by the jurors who actually served in the trial; some had a vague recollection of Murphy's prior cases, but none believed it had any relevance to the current case. 421 U.S. at 800; See also **Mu'min v. Virginia**, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 493 (1991).

Cases which have required reversal due to either excessive pretrial publicity or failure to change venue, have uniformly involved egregious circumstances which have no remote

comparison to those of Ferguson's case. For example, in **Irwin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), eight of the 12 jurors who served in the case had formed an opinion that the defendant was guilty before the trial even began. In **Rideau v. Louisiana**, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 751 (1963), a 20 minute film of the defendant's confession had been broadcast on local television in a medium sized community of 150,000, and tens of thousands of community members had thus seen the defendant admit his guilt. By contrast, in the instant case, Dade County, in 1978, had a population of approximately 1.75 million, and was part of a larger South Florida community of over 3 million. There was no publicity of any confession by Ferguson, few among the venire had even heard of the case, and of those who did, few could recall any significant details. Other cases involving pretrial publicity have troubled the Supreme Court because of the circus atmosphere in the courtroom. **Estes v. Texas**, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

A review of the case law from this Court further compels the conclusion that the venue issue, even if presented in the direct appeal, would have been found to be lacking in merit. A determination of whether venue should be changed rests in the discretion of the trial court and will not be reversed absent a palpable abuse of discretion. **Davis v. State**, 461 So. 2d 67, 69 (Fla. 1985). In **Davis**, of over 40 venire members, several had

previously heard of the case. Some were peremptorily excused, but some of the final jurors did have prior knowledge of the case. All of the final jurors with such knowledge indicated that the prior knowledge could be put aside and that they could serve with open minds. Id.

In **Mills v. State**, 462 So. 2d 1075, 1078-79 (Fla. 1985), a few potential jurors had extensive knowledge or expressed bias or preconceived opinions regarding the case, which occurred in a small rural community. The judge struck for cause any juror who expressed partiality or detailed knowledge of the case. Thus, this Court concluded that the ultimate jury was fair and impartial, finding that the trial court did not abuse its discretion.

In **Oats v. State**, 446 So. 2d 90, 93 (Fla. 1984), 13 articles appeared in local newspapers in a relatively small community. One of the ultimate jurors knew nothing of the case and the remainder either vaguely saw or read "something", but could not remember specific details. None had any fixed opinions about guilt or innocence and they could set aside the publicity and be fair and impartial. Thus, the motion for change of venue was properly denied.

In **Jackson v. State**, 359 So. 2d 1190, 192 (Fla. 1978), 22 prospective jurors had prior knowledge of the case and nine knew one of the victims or witnesses. The prospective jurors stated that they could base their verdict upon the evidence adduced. This Court found no abuse of discretion in denying the motion for change of venue.

The principal Florida case upon which Petitioner relies, **Manning v. State**, 378 So. 2d 274 (Fla. 1980), is clearly distinguishable. There, in a small rural county, as a result of extensive pretrial publicity, every member of the jury panel had prior knowledge of the alleged offenses. This was compounded by the racial overtones, of the black defendant being accused of killing two white law enforcement officers, and the fact that the defendant was an "outsider" from the community. Under those circumstances, it was concluded that venue should have been changed.

In view of the foregoing principles, had the issue been presented in the Carol City direct appeal, it is clear that it would have been denied as being without merit. Appellate counsel was thus clearly not ineffective for failing to raise the issue.

When the facts regarding jury selection in the Hialeah case are considered, it also becomes clear that the venue/publicity issue was clearly lacking in merit, and would have been denied had appellate counsel raised it in the direct appeal. In the Hialeah case, of 53 panel members (SR5. 15-61), approximately 20 had some prior knowledge of the case. (SR5. 50-54; 119-140). When the prosecutor first inquired about those familiar with the defendant, five spoke up, indicating that they could not be fair. (SR5. 50-54). All five - McCrimmon, Coburn, McDaniel, Yoder and Chilton - were excused by the Court for cause.

The record further reflects that the venire men who the Petitioner complains about had, at most, minimal knowledge. Mahfuz, who served on the jury, was not sure whether he heard abut the case, just vaguely remembered something, which he could not identify, and said that he would be fair. (SR5. 121, 126-27). Payne, who served on the jury, said that he had a vague recollection of an article, but recalled no facts. (SR5. 140) Pestcoe, who did not serve on the jury, (T2. 21-22) read an article which he would disregard and would give the defendant a fair trial. (SR5. 134).

Chauser recalled reading about the case in the Miami Herald. She did not recall any details. (SR5. 136). She stated that she would give the defendant a fair and impartial trial. (SR5. 137).

Klotz was not sure, but thought he heard something on television. (SR5. 138-39). He might have been thinking of another case, but, in any event, he could ignore everything. (SR5. 139). Alternate juror, Russell, initially thought she would be prejudiced due to sympathy from having seen an interview with the victims' parents, but subsequently concluded that she could eliminate such sympathy and emotion from her mind. (SR5. 135). Russell did not sit through deliberations.

Thus, it can easily be seen, in view of the limited knowledge of the panel members, and the judge's readiness to strike for cause all who expressed problems about being impartial, that this issue, even if raised on direct appeal, and

even if properly preserved, would not have resulted in a reversal.

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS was furnished by mail to RICHARD H. BURR, III, 99 Hudson Street, 16th Floor, New York, New York 10013 and E. BARRETT PRETTYMAN, JR., Hogan & Hartson, 555 Thirteenth Street, N.W., Washington, D.C. 20004 on this 5 day of February 5, 1993.

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