

IN THE SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS,
Petitioner,

v.

CASE NO. 81,330

HARRY SINGLETARY, ETC.,
Respondent.

FILED

SID J. WHITE

MAR 23 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, pursuant to this court's March 8, 1993 order, responds to Sims' petition for writ of habeas corpus, and requests this court deny all relief for the following reasons:

STATEMENT OF THE CASE AND FACTS

This case involves the murder of George Pfeil on December 29, 1977. Sims was tried before a jury on January 30 through February 1, 1979, was found guilty as charged of first degree murder and robbery, and was sentenced to death on July 24, 1979. Sims appealed his convictions and sentence to this court, which affirmed them on November 3, 1983. *Sims v. State*, 444 So. 2d 922 (Fla. 1983).

Sims raised nine claims on direct appeal: 1) the trial court erred in summarily curtailing cross examination of a prosecution witness; 2) the trial court erred in denying a mistrial after a reference to Sims' "mug shot"; 3) the trial court erred in excluding relevant evidence; 4) fundamental error occurred during the prosecutor's closing argument; 5) Sims was denied due process when the trial court refused his request for

an evidentiary hearing to establish prosecution proneness of a death qualified jury; 6) the trial court erred in cutting off inquiry of a juror in a post trial interview; 7) the trial court erred in allowing the jury to return verdicts on multiple and inconsistent counts; and, 8) the trial court erred in its imposition of the death sentence. In this last point, Sims argued that the trial court improperly doubled the during a robbery and pecuniary gain aggravators; that there were no "additional acts" to support the heinous, atrocious, or cruel aggravator; that there was error in the court's weighing of Sims' common law robbery" conviction as an aggravating factor; that the judge had improperly found the hinder law enforcement aggravator since it had not been presented to the jury; that the evidence did not support the avoid arrest aggravator; that the during the course of a robbery aggravator was an "automatic aggravator"; that the judge failed to weigh nonstatutory mitigating evidence; that Sims was precluded from presenting mitigating evidence regarding his accomplices; and, that there was improper and inflammatory argument by the prosecutor when he "implored" the jurors to think of the victim.

Prior to filing his initial brief, Sims had filed a "Motion to Remand for Clarification of Record", which was granted by this court May 14, 1981. Sims sought to clarify whether there was a transcript of charge conferences, whether there had been a ruling on the motion for new trial, whether there was a transcript of the hearing on the application to withdraw as counsel, and whether there was a transcript of the December 11, 1978 pretrial hearing on defense motions.

Sims then filed a "Motion to Allow Filing of Initial Brief While Cause is on Remand and Pending Reconstruction of Record", which was granted without prejudice to file a supplemental brief; Sims initial brief was served on June 24, 1981. On February 26, 1992, the trial court rendered an order on the motion for clarification of the record. The court found that there was no court reporter present at the charge conferences nor was Sims present, and that only arguments of law were made at the conference and objections were put on the record subsequently. The court further determined that the motion for new trial had been denied and that neither the defendant nor a court reporter were present at the hearing on pretrial motions.

On April 21, 1982, Sims filed a "Motion to Relinquish Jurisdiction for Reconstruction of the Record". Sims stated that since the trial court had found that there was no court reporter present at the jury charge conferences, the hearing on the pretrial motions, or the application to withdraw, transcripts were not available. He requested jurisdiction be relinquished so the trial court could determine whether the record could be adequately reconstructed. The state responded, pointing out that there had been no objection on the record to the absence of a court reporter at the proceedings, and that reconstruction was appropriate only when the matters omitted from the transcript were in some way relevant to or determinative of the matters on appeal, and that this had not been demonstrated. The state noted that whatever occurred at the pretrial hearing on the motions was irrelevant as the motions and orders thereon spoke for

themselves; that whatever was discussed at the guilt phase charge conference was irrelevant since there were no objections to the instructions as given and no written requests for special instructions, so no jury instruction issues could be raised on appeal in any event;, and, that whatever was discussed at the penalty phase charge conference was likewise irrelevant since the only objection was to "the reading of the charge with respect to aggravating circumstances", which would have been insufficient to preserve any appellate issues. The state also pointed out that counsel had thoroughly briefed on appeal the propriety of the aggravating circumstances found by the judge. The state further argued that failure to object to the absence of a court reporter constituted a waiver of such issue. This court denied the motion on May 25, 1982.

On or about March 5, 1986, Sims filed a petition for writ of habeas corpus in this court, in which he raised a claim pursuant to *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985). Following rendition of *Lockhart v. McCree*, 475 U.S. 162 (1986), Sims voluntarily dismissed the petition. On or about July 23, 1986, Sims filed a motion for post conviction relief, which was amended on or about December 30, 1986. On or about October 19, 1987, Sims filed a an "Application for Relief Pursuant to *Hitchcock v. Dugger*" in this court. On June 28, 1989, this court ordered the case to be transferred to the circuit court for consideration as a motion for post conviction relief. On or about March 22, 1990, Sims filed an amended motion for post conviction relief, wherein he alleged eight claims for relief.

In his motion for post conviction relief Sims alleged: A) he was denied effective assistance of counsel at the guilt phase because counsel (1) failed to object to the use of shackles, (2) failed to effectively challenge the testimony of three eyewitnesses, (3) failed to confront witness Baldree on his deliberate misidentification and failed to proffer additional areas of impeachment, (4) failed to adequately investigate and present additional evidence supporting the defense theory, (5) failed to object to statements by the trial court and the prosecutor¹, (6) counsel failed to ensure the recording and transcription of pretrial proceedings and charge conferences; B) the use of hypnotically induced testimony against Sims violated his rights; C) the prosecutor knowingly use perjured testimony; D) *Hitchcock* claim; E) use of victim impact evidence; F) ineffective assistance of counsel at the penalty phase;² G) use of unconstitutionally obtained prior violent felony convictions; and, H) cumulative error.

¹ There were nine contentions under this claim-the judge interfered with voir dire, the prosecutor pandered to jurors, the court belittled defense counsel, the prosecutor elicited sympathy for the victim, the trial judge told that jurors they would not want to waste the taxpayers money, the prosecutor referred to defense witnesses being contacted by the defense, the prosecutor's closing argument.

² This contained five claims-failure to investigate and develop mitigating evidence, failure to investigate prior violent felonies, failure to inform the jury of the import of its recommendation, failure to object to victim impact evidence, and failure to object to judicial and prosecutorial argument, comment and instructions.

The trial court rendered an order denying relief February 18, 1991. This court affirmed the denial of relief on June 11, 1992. *Sims v. State*, 602 So. 2d 1992. Sims served the instant petition on February 26, 1993, wherein he has presented eight claims for relief.

ARGUMENT

CLAIM 1

SIMS' CLAIM THAT HE WAS DENIED THE RIGHT TO COMPLETE REVIEW ON DIRECT APPEAL IS PROCEDURALLY BARRED.

Sims claims that he was denied his right to complete review on direct appeal because hearings on pretrial motions and charge conferences were not transcribed, and that he is entitled to a new trial as a result. This is a claim which could and should have been raised on direct appeal. *See, e.g., Delap v. State*, 350 So. 2d 462 (Fla. 1977). Further, in his motion for post conviction relief Mills alleged that counsel was ineffective for failing to insure complete transcription. Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other post conviction motions. *Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991). Consequently, the claim is procedurally barred.

Even if this claim had been cognizable in post conviction proceedings, respondent submits that the proper vehicle for raising it would have been the motion for post conviction relief, since it would require factual determinations as to the sufficiency of the record and the reconstruction that was done in the trial court. Even though a pleading may be labeled a habeas

petition, if it raises claims that should be presented in a 3.850 motion they will be found procedurally barred. *White v. Dugger*, 511 So. 2d 554 (Fla. 1987). Sims' conviction and sentence have been final for almost nine years now, so this claim is clearly barred.

Even if the claim were cognizable, Sims would not be entitled to relief, as he cannot demonstrate prejudice. Sims filed twelve pretrial motions (RD 876-927) which speak for themselves, as do the trial court's rulings on them (RD 952-54). Of the twelve motions, two were granted, ruling was reserved on four, and six were denied.³ The motions that were denied raised purely legal issues that were not related to the specific facts of the case.

Sims alleges that the motion for a hearing regarding prosecution proneness of death-qualified jurors was an issue on appeal, but without a record of the hearing on the motion he was unable to demonstrate the proffered expert witness. In actuality, the motion Sims filed was a request for an evidentiary hearing on this issue, and the trial court reserved ruling until after the trial (RD 952-54). At the conclusion of the penalty phase, counsel renewed his motion and request for a hearing, which were denied by the trial court (RD 830-31). As such, there was no hearing to be transcribed. In any event, the underlying claim had been rejected by this court, and has been rejected by

³ The motions that were denied are: 1) motion to confine in the Seminole County Jail; 2) motion to vacate the death penalty; 3) motion to produce grand jury testimony; 4) motion to voir dire grand jurors; 5) motion in limine; and 6) motion to vacate the death penalty on the basis of *Lockett*.

the United States Supreme Court. See, *Lockhart v. McCree*, 476 U.S. 162 (1986).

Sims also states that he was precluded from raising an issue on direct appeal regarding the production of grand jury testimony. As stated, the motion and order speak for themselves, and if appellate counsel had felt this was a viable issue, the claim could have been raised. Respondent submits that this clearly was not a viable issue, so no prejudice can be demonstrated in any event. The motion for the production of the testimony simply alleged that the testimony "may include" exculpatory evidence and "may include" impeachment evidence (RD 916-17). There is no pretrial right to inspect grand jury testimony, and holding an *in camera* inspection of such is within the trial court's discretion. *Jent v. State*, 408 So. 2d 1024 (Fla. 1981). Mere speculation regarding prior inconsistencies in testimony is not a proper predicate for securing access to grand jury testimony. *Id.* The trial court correctly denied Sims' speculative, nonspecific motion, so prejudice could not be demonstrated. Respondent would also point out that there has been no allegation or demonstration as to who exactly testified before the grand jury, and there was no renewal of a request for the testimony at trial when any of the witnesses testified, so the claim was waived in any event.

As to the charge conference held during the guilt phase of Sims' trial, it is irrelevant what was discussed. Following the judge's charge to the jury, Sims made no objection and indicated that he requested no further instructions in addition to those

given (RD 767). Similarly, the record contains no written requests for special instructions, nor any indication that any were denied (RD 996-1030). Since either an objection to an instruction as given or a written request for a special instruction is required under Florida law to preserve a jury instruction claim, and there were no objections or special requests, there were no issues to present on appeal.

Prejudice cannot be demonstrated as to the penalty phase charge conference for the same reasons. While Sims states that the issue on the trial court's charge regarding mitigating circumstances was lost, that issue was addressed during previous post conviction proceedings. See, *Sims v. State*, 602 So. 2d 1253 (Fla. 1992). Sims also claims that the record contains no challenge to the jury instruction on heinous, atrocious or cruel, but the record shows that counsel did object "to the reading of the charge with respect to aggravating circumstances" (RD 830), and more thoroughly argued this issue in the motion for new trial (RD 1044-46), and at the hearing on the motion for new trial. Specifically, counsel argued that the jury should not have been instructed on this aggravator since it was not applicable (RD 1134-35).⁴ As with the guilt phase, there are no written

⁴ Counsel argued:

Also, Your Honor, raised in point five, that the Court erroneously instructed the jury on matters of law over the Defendant's objection during the bifurcated portion of the trial as concerns the heinous nature of the event. I think the death in this case was swift and no heinous activity taking place in respect to that particular

requests for special instructions for the penalty phase, so under Florida law no other issues would be cognizable on appeal. Relief is not warranted.

CLAIM 2

SIMS' CLAIM THAT THE JURY WEIGHED
INVALID AND VAGUE AGGRAVATING
CIRCUMSTANCES IS PROCEDURALLY BARRED.

Sims claims that the jury weighed invalid and unconstitutionally vague aggravating factors. As stated, habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on direct appeal. *Medina, supra*. Since there were no objections to any of the instructions other than to the applicability of the heinous, atrocious or cruel aggravator, and the claims were never raised on direct appeal, they are procedurally barred at this point. Further, Sims never objected to the instruction on heinous, atrocious or cruel based on vagueness or other constitutional defect, so this claim is likewise procedurally barred. *Johnson v. Singletary*, 18 Fla. L. Weekly S90 (Fla. January 29, 1993); *Kennedy v. Singletary*, 602 So. 2d 1285 (Fla. 1992); *Turner v. State*, 18 Fla. L. Weekly S30 (Fla. December 24, 1992). This is true even though this factor was stricken by this court on direct appeal. *Johnson, supra; Kennedy, supra*. Counsel thoroughly attacked the applicability of all aggravating factors on direct appeal, and as stated, habeas is not an opportunity to present a second appeal.

aspect of it.

(RD 1134-35).

While Sims contends that appellate counsel was ineffective for failing to raise these claims, this court has consistently held that appellate counsel is not ineffective for failing to raise claims that were not preserved for appellate review. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). Further, appellate counsel cannot be faulted for failing to raise an issue where controlling case law is against him, *See, Herring v. Dugger*, 528 So. 2d 1176, 1177 (Fla. 1988), and this court had at all times viewed its sentencing scheme as one in which the judge is the sentencer, as had the United States Supreme Court. *See, Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984) (an advisory recommendation does not become a judgment simply because it comes from a jury; if a judge is vested with sole responsibility for imposing the death penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury); *Wainwright v. Goode*, 464 U.S. 78 (1983); *Proffitt v. Florida*, 428 U.S. 939 (1976) (jury verdict is only advisory; the actual sentence is determined by the trial judge); *Walton v. Arizona*, 497 U.S. ____ (1990) (a Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona).⁵ As stated, appellate counsel thoroughly attacked the applicability of the aggravating factors, and his performance cannot be deemed deficient for failing to

⁵ The trial court's order reflects that, pursuant to Florida law, it independently weighed the aggravating and mitigating factors, and did not weigh the jury recommendation.

raise every conceivable aspect of a claim. *Scott v. Dugger*, 17 Fla. L. Weekly S545 (Fla. September 23, 1992).

Respondent would also point out that even though this court combined the during the course of a robbery and pecuniary gain aggravators on direct appeal, there is no improper doubling in the instant case. Sims robbed two victims; significantly, he was ostensibly there to rob the pharmacy, and decided to separately rob one of the customers as well. Since there were two separate incidents of robbery, respondent submits that both aggravators were applicable, or if not, that the combined factors were entitled to double the weight. It must also be remembered that the jury was not instructed on the hinder law enforcement aggravator.

Even if this court determines that the claim is cognizable and that error somehow occurred, respondent submits that it was harmless. The trial court found no mitigating factors in the instant case, and there are at least three valid aggravating factors which are entitled to great weight. Further, on appeal from the denial of Sims' motion for post conviction relief, this court stated that while there was some nonstatutory mitigating evidence that should have been weighed, it was "insubstantial compared to the aggravating factors". *Sims v. State*, 602 So. 2d 1253, 1257 (Fla. 1992). Death is the appropriate penalty.

CLAIM 3

THIS COURT'S HARMLESS ERROR ANALYSIS AFTER AGGRAVATING FACTORS WERE STRICKEN DID NOT VIOLATE SIMS' CONSTITUTIONAL RIGHTS; THE CLAIM IS PROCEDURALLY BARRED; REVERSAL IS NOT WARRANTED IN ANY EVENT.

Sims claims that this court applied a rule of automatic affirmance of the death penalty on direct appeal. This claim is procedurally barred for failure to raise it on direct appeal or in previous post conviction proceedings. *Mills v. Singletary*, 606 So. 2d 622 (Fla. 1992). This court made a finding on direct appeal that the consolidation of two aggravating factors and the striking of one aggravating factor was harmless error. *Sims v. State*, 444 So. 2d 922, 926 (Fla. 1983). The court went on to find that death was still the appropriate penalty, as there were no mitigating factors and several remaining aggravating factors properly found which support the death sentence. *Id.* Further, as noted in the previous point, on appeal from the denial of post conviction relief this court found that the proffered mitigation was "insubstantial" when compared to the aggravating factors.

Even if this court were to determine that it had not applied the appropriate harmless error analysis on direct appeal, the remedy is not reversal. This court can simply reweigh the factors, as it appears to have done on at least two previous occasions, and determine once again that death is the appropriate penalty. Reversal is not warranted. *See, Mills, supra.* *See also, Parker v. Dugger*, 111 S.Ct. 731 (1991) (remand for district court to enter order directing the State of Florida to initiate appropriate proceedings in state court so that sentence may be reconsidered in light of entire record of trial and sentencing hearing and the trial court's findings).

CLAIM 4

MILLS' CLAIM THAT THE TRIAL COURT
COMMITTED FUNDAMENTAL ERROR BY
REPEATEDLY CHASTISING DEFENSE COUNSEL IS
PROCEDURALLY BARRED.

Mills claims that the trial court committed fundamental error by repeatedly chastising defense counsel in the jury's presence. This is a claim that could and should have been raised on direct appeal, and was raised under the guise of ineffective assistance of counsel for failure to object in 3.850 proceedings, so is procedurally barred in this habeas proceeding. *Medina, supra;* *White, supra.*

CLAIM 5

SIMS' CLAIM THAT HE WAS DENIED THE RIGHT
TO BE PRESENT AT HIS TRIAL IS
PROCEDURALLY BARRED.

Sims claims that he was denied the right to be present at the charge conferences in violation of his federal and Florida constitutional rights. Sims acknowledges that this fact was apparent at the time of direct appeal, and since it was not raised at that time it is procedurally barred in habeas proceedings. *Medina, supra.* Even if the claim were cognizable, relief would not be warranted. A defendant has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence, and this right derives from the Confrontation Clause. *Peede v. State*, 474 So. 2d 808 (Fla. 1985). Florida Rule of Criminal Procedure 3.180 sets forth a list of times and places where the defendant *shall* be present, and the charge conference is not included. A defendant has no

federal constitutional right to attend a conference between the trial court and counsel concerned with the purely legal matter of determining what jury instructions the court will issue. *Jones v. Dugger*, 888 F.2d 140, 1343 n. 3 (11th Cir. 1989); *United States v. Graves*, 669 F.2d 964, 972 (5th Cir. 1982). See also, *Howard v. State*, 484 So. 2d 1319 (Fla. 3d DCA 1986); *Maugeri v. State*, 460 So. 2d 975 (Fla. 1984). Sims has not demonstrated that his confrontation rights were affected in any way.

CLAIM 6

SIMS' CLAIM THAT THE FAILURE TO REQUIRE A SPECIAL VERDICT VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT IS PROCEDURALLY BARRED.

Sims claims that the failure to require a special verdict violated his right to a unanimous jury verdict under the federal and Florida constitutions. This claim is procedurally barred for failure to raise it in direct appeal. *Medina, supra*. Further, Florida law does not require the use of special verdict forms for guilt or penalty, *Turner v. State*, 18 Fla. L. Weekly S30 (Fla. December 24, 1992); *Buford v. State*, 492 So. 2d 355 (Fla. 1986), nor does federal law. *Schad v. Arizona*, 111 S.Ct. 2491 (1991); *Hildwin v. Florida*, 490 U.S. 638 (1989).

CLAIM 7

SIMS' CLAIM THAT THE REQUIREMENT THAT HE PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT IS PROCEDURALLY BARRED.

Sims claims that placing the burden of proof on him to show that the mitigating circumstances outweighed the aggravating circumstances denied him a reliable, nonarbitrary sentencing

proceeding. This court has regularly and consistently found these claims procedurally barred in post conviction proceedings. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Roberts, supra*. Even if the claim were cognizable, it is without merit. See, *Blystone v. Pennsylvania*, 110 S.Ct. 1078 (1990). Sims alternatively argues that appellate counsel was ineffective for failing to raise this claim, but since there was no objection below, appellate counsel cannot be deemed ineffective for not raising a claim that was not preserved, nor can appellate counsel be deemed ineffective for not raising a claim that has no merit. *Roberts, supra*; *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988).

CLAIM 8

APPELLATE COUNSEL RENDERED EFFECTIVE ASSISTANCE.

Sims first claims that appellate counsel was ineffective for failing to brief and argue the appeal without a complete record, for failing to file a supplemental brief after this court denied his motion for reconstruction of the record, and for failing to proffer a statement of the record. In order to prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). Respondent first contends

that Sims has failed to sufficiently allege either deficient performance or prejudice. His claim is nothing more than conclusory allegations as to what counsel should have done, with no demonstration as to how the outcome would have been affected. Sims alleges that counsel briefed the case without "critical portions of the record", but does not say what those portions are, what claims should have been raised on the basis of these portions of the record, or how the outcome would have been affected. Sims alleges that counsel should have filed a supplemental brief but does not allege how this would have affected the outcome. Sims alleges that counsel should have proffered a statement of the record, but does not allege what was missing from the record, what issues this would have permitted counsel to raise, or how the outcome would have been affected. Consequently, this claim is insufficiently pled and respondent would request this court to so find.

Even if Sims has set forth sufficient allegations, relief is not warranted. Appellate counsel attempted to supplement the record, and succeeded in reconstructing the record as far as possible. The fact that he did not file a supplemental brief indicates that there were no additional issues to raise after receipt of the trial court's order on reconstruction, and in no way indicates that counsel abdicated his responsibility to Sims. While Sims alleges that counsel "could and should have at least attempted arguments on the issues flagged in the motion for new trial and existing partial record", he does not allege how this would have affected his case. Further, all of the issues raised

in the motion for new trial are on the record, since the hearing on this motion was transcribed.

If there is no chance of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is not a substantial and serious deficiency. *Scott v. Dugger*, 17 Fla. L. Weekly S545 (Fla. July 23, 1992). As was demonstrated in Point 1, *supra*, counsel had a complete record, but none of the issues now raised by Sims would have entitled him to relief on appeal. Counsel's performance was not deficient and Sims has failed to demonstrate prejudice.

Sims next alleges that appellate counsel was ineffective for failing to argue the denial of his right to be present at all stages of his trial. Again, Sims has failed to demonstrate why this was deficient performance or how he was prejudiced. As demonstrated in Point 5, *supra*, Sims did not have a constitutional right to be present at the charge conference, and as stated, appellate counsel is not ineffective for failing to raise issues that are without merit. Sims has neither alleged nor demonstrated how he was prejudiced by not attending the charge conference or by counsel's failure to raise this issue on appeal.

Sims next claims that appellate counsel was ineffective for failing to challenge the denial of the motion for change of venue. The record demonstrates that the trial court originally reserved ruling on this motion, and reflects no further objections to venue by Sims. As Sims notes, a jury was quickly seated in this case, without objection by the defense. Even if this claim was preserved for appellate review, this court has

held that appellate counsel's failure to raise a claim on direct appeal does not result in prejudice where the act complained of is within the parameters of the trial judge's discretion. *Tompkins v. Dugger*, 549 So. 2d 1370 (Fla. 1989). An application for a change of venue is addressed to the trial court's sound discretion, and its ruling will not be reversed absent a palpable abuse of discretion. *Davis v. State*, 461 So. 2d 67 (Fla. 1985). Respondent submits that appellate counsel would have had an impossible job in demonstrating a palpable abuse of discretion where a jury was seated so quickly with very few challenges being exercised and no objection to the jury as seated.

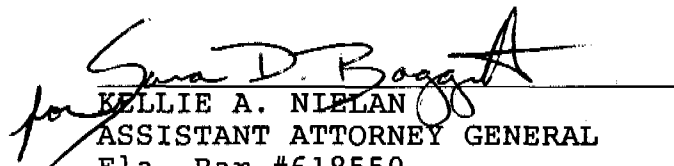
Sims next claims that counsel was ineffective for failing to challenge the denial of the motion to suppress identification testimony. Sims states that due process requires the exclusion of identification testimony following unnecessarily suggestive out of court identification procedures. In his motion for post conviction relief, Sims argued that trial counsel was ineffective for failing to object to the identification in order to preserve the issue for appellate review. As stated, appellate counsel cannot be ineffective for failing to raise claims that on direct appeal which were not properly preserved. *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988). Further, as stated, failure to brief an issue that is without merit is not deficient performance, and even if the identification issue was preserved it was clearly without merit. Seven witnesses were shown the photo line up, and Sue Kovec was the only one to identify Sims (RD 849-50). The line up consisted of forty head and torso photos of white men who

were all approximately the same age (RD 1205). The fact that Kovec was the only witness who was able to identify Sims indicates that the line up was anything but suggestive, and when there is not a very substantial likelihood of misidentification, such evidence is for the jury to weigh *See, Manson v. Brathwaite*, 423 U.S. 98 (1977); *Perez v. State*, 539 So. 2d 600 (Fla. 3d DCA 1989). Appellate counsel rendered extremely effective assistance in this case; neither deficient performance nor prejudice has been demonstrated.

WHEREFORE, Respondent respectfully requests this court deny Sims' petition for writ of habeas corpus.

Respectfully submitted,

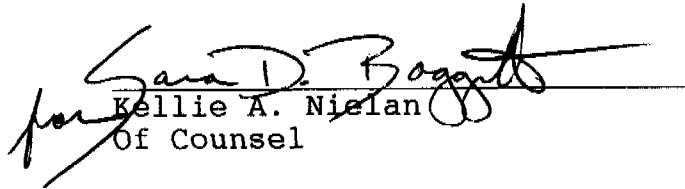
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Response to Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to Steven H. Malone, Office of the Public Defender, Fifteenth Judicial Circuit, 421 Third Street, 6th Floor, West Palm Beach, FL 33401, and to Gwendolyn Spivey, Post Office Box 14494, Tallahassee, FL 32317, this 23rd day of March, 1993.


Kellie A. Nielan
Of Counsel