IN THE SUPREME COURT OF FLORIDA

ROBERT DALE HENDERSON,

Petitioner,

v. CASE NO. 71,981

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS, ETC.

COMES NOW respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100(h), and responds to Henderson's Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari, filed on or about February 26, 1988, and moves this honorable court to deny all requested relief, for the reasons set forth in the instant pleading.

I. PRELIMINARY STATEMENT

Henderson was convicted of three counts of first-degree murder and sentenced to death on all three counts on November 22, 1982. He appealed such judgments and sentences to this court, and his appeal was styled Henderson v. State, Florida Supreme Court Case Number 63,094. On appeal, Henderson raised seven (7) issues, including: (1) admission into evidence of his statements, in alleged violation of the Sixth Amendment; (2) allegedly improper finding of two aggravating circumstances as part of the sentences of death, to-wit - those that the homocide was heinous atrocious or cruel and committed in a cold or calculated manner; (3) alleged improper consideration of a non-statutory aggravating circumstance, to-wit - Henderson's lack of remorse and (4) unconstitutionality of section 921.141 (see, Initial Brief of August 2, 1983 at 8-16, 32-37, 38-41). This court rejected these contentions, and affirmed Henderson's convictions and sentences in all respects. See, Henderson v. State, 463 So.2d 196 (Fla. 1985). Henderson

subsequently sought certiorari review in the United States Supreme Court and, at such time, presented his claim concerning the admission of his statements; the high court denied certiorari on July 1, 1985. See, Henderson v. Florida, 473 U.S. 916, 105 S.Ct. 3542, 87 L.Ed.2d 665 (1985).

On July 1, 1987, Henderson filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, in the circuit court; as of the composition of this pleading, such motion is still pending. In such motion, Henderson raised seventeen (17) claims for relief, including a contention that admission into evidence of his statements had violated the Sixth Amendment (Motion to Vacate at 16-24; Consolidated Memorandum at 13-25); Henderson argues that the subsequent decision of the United States Supreme Court, Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), constitutes a "substantial, retroactive, change in the law announced by the United States Supreme Court", cognizable on 3.850 pursuant to Witt v. State, 387 So.2d 922 (Fla. 1980) (Motion to Vacate at 24; Consolidated Memorandum at 25). Henderson also argues that his death sentence is premised upon the improper consideration of such non-statutory aggravating circumstances as his lack of remorse (Motion to Vacate at 45-46). As noted above, this pleading is currently pending in the circuit court.

On or about February 26, 1988, Henderson filed the instant petition for relief in this court, seeking vacation of his convictions and sentences and/or a new appeal and/or a stay of execution and/or a stay of execution following any denial of other relief, so that a petition for writ of certiorari could be filed in the United States Supreme Court. Henderson raises seven (7) claims for relief, six of which he apparently perceives as involving ineffective assistance of appellate counsel (Petition at 22); the State of Florida would respectfully contend that claims VI and VII contain no allegation of ineffective assistance of appellate counsel. Henderson's claims are as follows: (1) he was convicted of murder and sentenced to death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, by virtue of the admission into

evidence of his statements contrary to, inter alia, Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); (2) he received ineffective assistance of appellate counsel, due to counsel's failure to argue on appeal the denial of his renewed motion for change of venue, denial of his motion for individual and separate voir dire and the trial court's limitation in the scope of defense voir dire; (3) he received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal the denial of a requested jury instruction regarding the significance of the advisory verdict; (4) he received ineffective assistance of appellate counsel due to counsel's failure to argue on appeal that the sentencing court had considered the same facts as constituting two separate aggravating circumstances; (5) he received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal the denial of his requested jury instruction on the burden of proof at the penalty phase; (6) this court has interpreted the aggravating circumstances set forth in section 921.141(5)(h) & (i) in an unconstitutionally overbroad manner and has applied them unconstitutionally and overbroadly in this case and (7) the prosecutor improperly presented and argued and the sentencing judge and jury improperly considered Henderson's lack of remorse.

II. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED, IN THAT HENDERSON HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND, AS TO THE OTHER CLAIMS, HAS IMPROPERLY PRESENTED ISSUES WHICH EITHER COULD HAVE BEEN RAISED ON APPEAL OR ACTUALLY WERE RESOLVED AGAINST HIM BY THIS COURT.

A. Procedurally Barred Claims

Of the seven claims presented, all but those involving ineffective assistance of appellate counsel are improperly raised. This court has consistently held that habeas corpus cannot be used as a vehicle for presenting issues which should have been raised at trial and on appeal or for relitigating issues already actually decided on direct appeal. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Witt v. State, 465 So.2d 510 (Fla. 1985); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); James v. Wainwright, 484 So.2d 1235 (Fla. 1986);

Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Accordingly, the state maintains that claims I, VI and VII should be stricken or summarily denied. Each claim will briefly be addressed.

CLAIM I

In this claim, Henderson seeks to re-argue the admission into evidence of his statements, allegedly in violation of the Sixth Amendment. This claim was raised, and rejected, on direct appeal and cannot be presented again at this juncture. See, Messer, supra; James, supra. While Henderson argues that there has been a change in law, as exemplified by the subsequent decision of the United States Supreme Court, Michigan v. Jackson, supra, the proper vehicle for raising such claim, based upon change of law, is, unquestionably, a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980). Indeed, as noted, Henderson has a pending 3.850 and has included this identical claim therein. Henderson is not entitled to a "triple" "bite of the apple" as to his claim, and this court should apply its procedural bar and refuse to address this issue on the merits. Such a result would not prejudice Henderson, in that the issue of whether any change in law exists as to this claim can properly be raised on appeal from the circuit court's ruling on the pending 3.850.

Assuming that this court desires any discussion of the merits, the state would contend that, in any event, no relief is warranted. Initially, it must be noted that Henderson has felt it necessary to go outside the record for "factual" "support", relying upon deposition testimony, as opposed to that actually presented to the circuit court at the suppression hearing. It should go without saying that this type of "extra-record" argument is completely improper and should be disregarded. The state would also note that Henderson has failed to establish that Jackson, even if applicable, constitutes a fundamental change in law, entitled to retroactive application on collateral relief, either as a matter of state or federal law.

Respondent submits that Michigan v. Jackson, is not a change in the law justifying retroactive application under federal or

state law standards. The United States Supreme Court in Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) rejected a claim that Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should be applied retroactively to a collateral proceeding. See also, Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986). Since Jackson is an extension of the Edwards bright line rule to the Sixth Amendment context respondent submits that it likewise should not be applied retroactively.

In Witt v. State, supra, this court recited standards for retroactive review in the rule 3.850 context comparable to those applied in Solem and Hardy and determined that in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding no such review would be authorized. Here, the prophylactic rule of Jackson does not go to the truthfinding function and does not justify retroactive application under Witt or Solem.

It is, however the state's primary position that the Jackson decision is simply not applicable.

The Jackson decision presents no basis for review of this cause given this court's correct determination that it was the petitioner, not the police, who initiated the "interrogations" at issue. In addition, despite the petitioner's redundant assertions to the contrary, no Sixth Amendment right to counsel had in fact attached with reference to the Putnam County statements, since no adversary judicial proceedings had in fact begun against Henderson for the Hernando County murders.

Although the petitioner cites the leading Supreme Court decisions outlining Sixth Amendment rights and protections, he incorrectly asserts that the "'critical stage' Sixth Amendment right to counsel" attached prior to transportation of Henderson to Putnam County (Petition, pg. 18). Henderson had not been arrested or charged with the Hernando County murders when he was transported to Putnam County and volunteered the statements to the Putnam

County deputies; in fact, his Charlotte County arrest did not relate to any Florida murders, and his later arrest by Putnam County authorities related only to one of the Putnam County murders. Indeed, since the Hernando County victims had not yet even been located, it is obvious that the police could not conclude that the murders had in fact been committed.

As correctly noted by Henderson, the United States Supreme Court has made clear that the Sixth Amendment right to counsel attaches only upon the initiation of adversary judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Moran v. Burbine, 106 S.Ct. 1135, 1145 (1986); United States v. Gouveia, 467 U.S. 180, 187-188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984); Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 1881-1882, 32 L.Ed.2d 411 (1972). Analysis of the Michigan v. Jackson decision upon which Henderson places such reliance itself reveals that that case involved post-arraignment custodial interrogation which, as the Court noted, did trigger the Sixth Amendment guarantee of the assistance of counsel, inasmuch as arraignment of the defendant signaled the "initiation of adversary judicial proceedings". 106 S.Ct. at 1407, quoting United States v. Gouveia, 467 U.S. 180, 187, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984).

It is also interesting to note that Jackson is based in part upon the Supreme Court decision in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 85 L.Ed.2d 139 (1985), wherein the Supreme Court reaffirmed that where a defendant's Sixth Amendment right to counsel has attached, the government through its agents may not circumvent the right to counsel through investigative techniques which are the functional equivalent of interrogation. In doing so, the Court noted the principle established in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and applied in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); however in each of those cases, unlike Henderson's, the defendant had already been arrested and indicted for the specific criminal conduct for which statements were elicited through interrogation. Indeed, in Moulton the Court

specifically noted that the Massiah exclusion applied only to evidence pertaining to charges as to which the Sixth Amendment right to counsel had specifically attached at the time the evidence was obtained, and that the government was free to continue investigation of an individual suspected of committing other offenses for which he had not been formally charged, in that there was no Sixth Amendment bar to the admission of evidence obtained from the accused on the uncharged offenses. Such a restriction "would unnecessarily frustrate the public's interest in the investigation of criminal activities". 106 S.Ct. at 489. Since "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses", Henderson's Sixth Amendment challenges confessions made to the Putnam County officers is without legal basis. Maine v. Moulton, supra, 106 S.Ct., at 490 n. 16; Kuhlmann v. Wilson, ___ U.S. ___, 106 S.Ct. 2616, 2630 n. 21 91 L.Ed.2d 364 (1986).

Similarly, Henderson's various confessions to Hernando County Detective Perez do not run afoul of any Sixth Amendment protection. Henderson's broad assertion of his right to counsel for any and all offenses and future investigations was prepared by an attorney who was not appointed to represent him with reference to the murders at issue, and was made well before the state had even discovered the bodies of the three victims so as to confirm that a crime had in fact occurred. In that it was executed months before Henderson was in fact charged with the offenses, it cannot serve as a basis for constituting a legitimate assertion of Sixth Amendment rights in regard to this case, which could not in fact even arguably exist until actual "adversary judicial criminal proceedings" had been initiated. In United States v. Gouveia, supra, the Court noted that it had never held that the Sixth Amendment right to counsel attaches at the time of arrest. 467 U.S. at 190; 104 S.Ct. at 2298. As the Gouveia Court explained, it is only at the time the government has committed itself to actually prosecute a case that the adverse positions of government and defendant have "solidified", such that the Sixth Amendment right to

counsel attaches. Henderson was not actually indicted for the three murders at issue until June 16, 1982, well after he was transported to Hernando County and volunteered to Detective Perez the statements admitted against him at trial (R 1662-1663).

Even if it is assumed that Henderson's Sixth Amendment right to counsel attached upon being taken into custody for purposes of transfer to Hernando County, the record nevertheless reveals that he was advised of his right to counsel at that time, and at no time indicated that he wished to speak with an attorney. To the contrary, and as correctly noted by this court, Henderson, of his own volition made the voluntary choice to speak with Detective Perez and knowingly, intelligently and voluntarily waived the presence of counsel for the statements. To accept Henderson's position, that his written "invocation of rights" acted to foreclose any communication between him and the authorities, even if initiated at Henderson's own request, as here, would truly be a ludicrous construction of the facts. Cf. Connecticut v. Barrett, ____ U.S. ____, 107 S.Ct. 828 (1987). No violation of Michigan v. Jackson, supra, through police-initiated interrogation after an assertion of the Sixth Amendment right has been shown. Despite this argument's patent lack of merit, the state's primary response to it relates to its improper presentation. As this claim was presented, and correctly decided on direct appeal and as Henderson already has, and is utilizing, other means to present his argument that a change in law exists as to this claim, this court should find the instant claim procedurally barred.

CLAIM VI

In this claim, Henderson argues that this court has interpreted the aggravating circumstances relating to a homicide being especially heinous, atrocious or cruel or committed in a cold and calculated premeditated manner in an unconstitutionally overbroad manner and has applied them unconstitutionally and overbroadly to this case. Although Henderson moved in the trial court to have section 921.141 declared unconstitutional, he never included any argument therein relating to the construction or application of these two aggravating circumstances (R 17-18).

Additionally, although Henderson contended on appeal that these two aggravating circumstances should not have been found, he never argued that they had been unconstitutionally applied; similarly, although he argued on appeal that this statute was unconstitutional, aside from the simple cursory allegation, "the aggravating circumstances in the Florida Capital Sentencing Statute had been applied in a vague and inconsistent manner" (Initial Brief at 38), no specific mention was made of the two aggravating circumstances now under attack.

This court has held that while the facial constitutionality of a statute is a fundamental matter which can be raised on appeal, even in the absence of objection at the trial level, attacks upon a statute as applied are matters which require adequate preservation. See, Trushin v. State, 425 So.2d 1126 (Fla. 1982); Eutzy v. State, 458 So.2d 755 (Fla. 1984). Because Henderson has procedurally defaulted this claim, it is not now cognizable on habeas corpus. See, McCrae, supra; Ford, supra; Kennedy, supra. Should this court find proper presentation, the state would certainly note that this claim has repeatedly been rejected, see, Maqill v. State, 428 So.2d 649 (Fla. 1983), Smith v. State, 424 So.2d 726 (Fla. 1982), and that application of these two aggravating circumstances to this case is in accordance with prior precedent. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Mills v. State, 462 So.2d 1075 (Fla. 1985).

CLAIM VII

In this claim, Henderson argues that improper evidence was presented at the penalty phase regarding his lack of remorse and that such evidence was argued to the jury and considered by the judge in sentencing. In his petition, Henderson concedes that appellate counsel argued on appeal that it had been error for the judge and jury to consider lack of remorse (Petition at 49-50), but points to a later decision of this court, Robinson v. State, 13 F.L.W. 63 (Fla. Jan. 28, 1988), in which this court reversed the sentence, noting, inter alia, that lack of remorse, as well as racial bias, had impermissibly been argued by the prosecution.

It is unclear upon what theory Henderson is presenting this

claim on habeas corpus. If he is arguing that Robinson is a fundamental change in law, then, as in Claim I, his remedy is to seek relief under rule 3.850; as noted, he has included this claim in his pending 3.850. If he is re-arguing a claim already raised on direct appeal, then, such re-presentation is improper. See, Messer, supra; James, supra. Suffice it to say, that ever since 1983 and this court's decision in Pope v. State, 441 So.2d 1073 (Fla. 1983), it has been improper for a judge or jury to consider lack of remorse in aggravation. However, any error therein can clearly be harmless, the result in Pope itself. See also, Phillips v. State, 476 So.2d 194 (Fla. 1985) (disregarding language in sentencing order relating to lack of remorse, where evidence obviously sufficient to establish aggravating circumstance); Stano v. State, 460 So.2d 890 (Fla. 1984); Doyle v. State, 460 So.2d 353 (Fla. 1984). In this case, while the lack of remorse was mentioned in the sentencing order, as the judge was quoting all the evidence presented at sentencing, there has been no showing that such was actually considered in aggravation. This claim was correctly resolved on appeal, and it must be considered procedurally barred at this juncture.

B. Henderson's Claims of Ineffective Assistance of Appellate Counsel

Henderson argues that he received ineffective assistance of appellate counsel on direct appeal in this court, in the following respects: (1) counsel's failure to raise on appeal denial of his renewed motion for change of venue and motions regarding scope and handling of voir dire; (2) counsel's failure to raise on appeal the denial of requested jury instruction regarding the significance of the advisory verdict; (3) counsel's failure to raise on appeal the fact that the same factual predicate allegedly existed as to two aggravating circumstances and (4) counsel's failure to raise on appeal the denial of a requested jury instruction on the burden of proof at the penalty phase. Henderson also seems to argue, in the alternative, that these claims should be considered on the merits, as they respresent "fundamental error and/or are predicated upon significant changes in the law." (Petition at 24) Because each of these issues represents one which could have been raised on

appeal, it is improper to consider them on habeas corpus, except in the context of ineffective assistance of appellate counsel. See, McCrae, supra; Kennedy, supra. Before turning to the merits of the ineffective assistance of appellate counsel claims, it is worthwhile to briefly examine the prevailing standards.

As this court held in Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla. 1985),

> When counsel makes a choice not to argue an issue due to his unfavorable evaluation of his chance for success comparing his set of facts with the principles of prevailing law, and his evaluation is reasonably accurate, reflecting reasonable competence, the omission cannot be characterized as ineffectiveness of counsel.

Such holding is in accordance with those of the United States Supreme Court, to the effect that one of appellant counsel's primary duties is to "winnow out" weaker arguments on appeal and to focus on those most likely to prevail, given the fact that appellate counsel is not constitutionally required to raise on appeal every non-frivolous point arguably supported by the record, or even requested by his client. See, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2661, 91 L.Ed.2d 454 (1986). Additionally, in order to merit relief, a petitioner must demonstrate, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Downs v. Wainwright, 476 So.2d 654 (Fla. 1985), not only that appellate counsel performed deficiently, acting as no reasonable attorney would have under the circumstances, but also that such deficient performance prejudiced him to the extent that it can be said that the result of his appeal has been rendered unreliable; as to the latter, Henderson must show that there is reasonable probability that, absent these errors, this court would have reversed his convictions and sentences. It is clear that Henderson has failed to sustain his burden in this regard, and the instant petition for writ of habeas corpus should be denied.

1 (CLAIM II) HENDERSON'S CLAIM OF

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REGARD TO COUNSEL'S FAILURE TO RAISE ON APPEAL THE DENIAL OF HIS RENEWED MOTION FOR CHANGE OF VENUE AND OTHER MOTIONS PERTAINING TO VOIR DIRE.

In his petition, Henderson argues that appellate counsel was ineffective for failing to raise on appeal the denial of his renewed motion for change of venue and for individual and sequestered voir dire, as well as the trial court's limitation on the scope of voir dire. Henderson contends that details of his confession and other crimes "literally inundated the local media" and that such coverage was by major market newspapers "with circulations of hundreds of thousand and covering large areas of east central and central Florida." (Petition at 24, 26). Despite the change in venue from Hernando to Lake County, Henderson contends that he was still denied a fair trial, especially given the fact that the trial court allegedly denied him an opportunity to make adequate inquiry of the jurors. The state suggest that Henderson is entitled to no relief as to this claim.

The record reflects that venue was changed to Lake County after inability to pick a jury in Hernando County. Once in Lake County, Judge Huffstettler conducted a general voir dire of each panel, comprising of either six or twelve jurors, as to their prior knowledge of Robert Dale Henderson or the case; those indicating no knowledge were excused, whereas those indicating some knowledge were examined by the judge and attorneys. By the state's count, seven panels of prospective jurors were examined, for a total of seventy-nine (79) individuals. Of these, forty-six (46) or over half, indicated absolutely **no** knowledge of Henderson or the case and, significantly, Henderson's jury was composed **solely** of jurors from this group. Of the thirty-three (33) jurors who indicated some knowledge of the case, twelve (12) indicated positively that they were aware of the fact that Henderson had confessed to these murders; all twelve were successfully stricken for cause by the defense (R 624, 634, 658, 663, 685, 700, 754, 765, 767). Likewise, of these thirty-three, fourteen (14) indicated express knowledge of Henderson's other crimes, and three of these jurors were excused for cause (R 658,

769); of the remaining eleven, seven were excused for cause due to their knowledge of Henderson's confession, and the defense successfully used peremptories to remove any of the remaining jurors (R 624, 634, 685, 700, 765, 767; 846, 1018). Three other jurors were successfully stricken for cause due to their opinion as to Henderson's guilt (R 658, 703, 753).

Following the voir dire as to publicity, the jurors were then examined as to their views as to the death penalty and other qualfications for service. During the course of this examination, defense counsel used fourteen (14) of his twenty (20) peremptory challenges (R 2321; 846,887, 945-946, 954, 996, 1006, 1018, 1022); many of these jurors represented those whom the defense had previously unsuccesfully moved to challenge for cause. After the state announced that it would accept the jury, defense counsel stated that he wished to renew his motion for change of venue (R 1029). Counsel conceded that he had not exhausted his peremptory challenges, and stated that he did not wish to waive the point for appellate review (R 1030); the judge stated that he had seen nothing during the examination which would have warranted granting a change in venue (R 1030). Defense counsel filed a previously-prepared written motion for change of venue for purposes of preserving the record (R 1031, 2060-2061, 2069, 2070). The motion was denied, and Henderson then accepted the jury (R 1031). Henderson subsequently indicated his personal concurrence in the decisions made in jury selection (R 1052-1053).

Considering the prior precedents of this court, it is easy to understand why appellate counsel chose to forego raising this point in direct appeal. Trial counsel's "renewed" motion for change of venue was made more for purposes of preserving the record, than from any sincere belief that a fair trial was impossible in Lake County. Trial counsel was quite correct in noting that the fact that he had not exhausted all of his peremptory challenges would, at minimum, undercut, if not waive, his argument regarding the need for a change of venue. As this court held in Provenzano v. State, 497 So.2d 1177, 1182 (Fla.

1984),

> More importantly, the fact that the defense did not use all of its peremptory challenges is the best evidence that Provenzano was personally satisfied with the jury selected.

See also, Davis v. State, 461 So.2d 67 (Fla. 1984); Straight v. State, 397 So.2d 903 (Fla. 1981). Interestingly, the Eleventh Circuit has held that a defendant's failure to exercise all peremptory challenges indicates the absence of juror prejudice in this context. See, United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985).

Further, Henderson's appellate counsel most likely read the record on appeal with greater care than do present counsel. Despite the current allegations of "a constant sensational barrage of pre-trial publicity", which allegedly meant that the citizens of Hernando, Putnam, Lake and surrounding counties were reading daily the details of Henderson's confessions and crime spree, the record does not support such assertions nor does it contain any newspaper circulation figures, despite present counsels' allegations that such coverage was by "major market newspapers" with circulations in the hundreds of thousands; the omission of these circulation figures from the record is significant, in that such omission apparently deprives the defense of any "presumption of prejudice" argument. Cf. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976): Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). Further, despite the current allegations, Henderson has failed to point to any specific inflammatory or inaccurate news accounts, see, Oats v. State, 446 So.2d 90 (Fla. 1984), and this court has repeatedly recognized that the existence of publicity concerning a defendant's confession does not mandate a change in venue. See, e.g, Holsworth v. State, 13 F.L.W. 138 (Fla. Feb. 18, 1988); Provenzano, supra; Straight, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977).

Given the prior numbers cited, which indicate that less than

half of the prospective jurors had even heard of Robert Dale Henderson, these numbers do not convincingly demonstrate that a change of venue was warranted. The percentage of jurors already knowing something about the case would not seem excessive and, as noted, Henderson's actual jury was composed exclusively of those who indicated that they knew absolutely nothing about the case. This is a higher standard than that required by the United States Supreme Court, in that such court has observed that it is not necessary that a jury be totally ignorant of the facts and issues involved, as long as they can be impartial and decide the case solely on the evidence presented. See, Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Such standard, of course, is in accordance with this court's own precedents, in that, additionally, it cannot be said that the general state of mind of the inhabitants of Lake County was so infected by knowledge of this incident that the jurors could not possibly put such matters out their minds. See, Provenzano, supra; Davis, supra; Copeland v. State, 457 So.2d 1012 (Fla. 1984). Because any point on appeal regarding the denial of the renewed motion for change of venue would have lacked merit, it was not ineffective assistance of appellate counsel not to have raised such. See, e.g., Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986) (where a particular legal argument, had it been argued, would in all probability had been found without merit, the omission to raise such will not be deemed a deficiency of counsel).

Henderson's subsidiary point regarding the scope of voir dire permitted the defense and the alleged lack of individual voir dire is similarly devoid of merit. In order to prevail on appeal, appellate counsel would have had to demonstrate that the trial court abused its discretion as to these matters. See, e.g., Stone v. State, 378 So.2d 765 (Fla. 1979); Davis, supra; Stano v. State, 473 So.2d 1282 (Fla. 1985). On the basis of this record, there is not a reasonable probability that appellate counsel would have succeeded. Cf. Thomas, supra. As to the matter of individual voir dire, the record reveals that the trial court

conducted collective voir dire **only** as to the first four panels of prospective jurors (R 610-614; 620-624; 627-634; 641-658); after that, those who indicated prior knowledge of Henderson were examined individually (R 661-663; 663-670; 670-673; 674-685; 685-686; 690-694; 694-696; 696-698; 699-700; 700-703; 703-710; 711-712; 731-741; 741-745; 745-753; 753-754; 758; 759-762; 762-764; 765-767; 767-769; 769-772; 772-775). If there was any error in the manner in which the initial group voir dires were conducted, it was surely harmless. As to the first panel, only one prospective juror, Dotson, indicated knowledge; his voir dire was, thus, individual, and, in any event, he was subsequently stricken on a defense peremptory (R 846). As to the second panel, while the two jurors who indicated knowledge were examined collectively, both were successfully challenged for cause (R 624); the same result obtained as to the third panel (R 634). The fourth panel represents the only incidence in which a prospective juror could arguably be said to have been "tainted" by a collective voir dire. Five jurors indicated prior knowledge and were examined collectively, four of whom where subsequently successfully challenged for cause (R 658); the remaining juror, Christe, who had indicated only vague knowledge of the case, but who had been present during examination of the others, was subsequently excused on a defense peremptory (R 954). Given the fact that the defense did not exhaust all of its peremptories and the fact that none of these jurors sat on Henderson's trial jury, it is easy to understand why appellate counsel did not raise this point.

As to the matter of the scope of voir dire allowed the defense, it is likewise difficult to see what claim of error could have been raised. Judge Huffstettler examined the jurors in some detail as to their knowledge of the case, reminding them to consider what they might have read or heard by way of newspaper, television or radio, excusing those who indicated no knowledge (R 602, 615, 624-625, 637-638, 658-659, 687, 725-726). Although Henderson contends that defense counsel should have been allowed to examine those jurors who indicated no

knowledge in greater detail, so as to assure that they had not spoken too quickly, the record indicates that, in the early portions when defense counsel was allowed to conduct such questioning, no "malingerers" were uncovered (R 603-610; 616-620; 626). Further, the jurors were scrupulously honest in adhering to the court's instructions and many stayed for the "second round" of questioning even if they had only the barest or vaguest knowledge of Henderson (R 646, 663, 674, 690, 694, 696, 711, 759, 769, 772). It cannot be said that Henderson had a reasonable probability of demonstrating on appeal that the trial court abused its discretion in this regard. Cf. Stano, supra. Because none of these putative appellate points possess even arguable merit, it was not a deficiency, let alone a prejudicial one, for appellate counsel to have failed to raise such on appeal. See, Thomas, supra. The instant petition for writ of habeas corpus should be denied.

2 (CLAIM III) HENDERSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REGARD TO COUNSEL'S FAILURE TO RAISE ON APPEAL THE DENIAL OF A REQUESTED JURY INSTRUCTION ON THE JURY'S ROLE IN SENTENCING.

In his petition, Henderson argues that appellate counsel was ineffective for failing to raise on appeal the denial of a defense requested instruction on the jury's role in sentencing. Prior to the penalty phase, the trial counsel submitted a proposed jury instruction based upon Tedder v. State, 322 So.2d 908 (Fla. 1975), which would have advised the jury that the fact that their recommendation was advisory did not relieve them of their "solemn responsibility", in that the court was required to give great weight and serious consideration to such advisory verdict (R 2106); the court denied this requested instruction, in that it constituted a depature from the standard jury instructions (R 1577). As Henderson notes, the judge then advised the jury, in accordance with the standard jury instructions, that the final decision as to what punishment should be imposed was the responsibility of the court, although

it was the duty of the jury to return an advisory verdict based upon their determination of the aggravating and mitigating circumstnaces (R 1579-1580, 1616). While conceding that the standard instruction does not constitute reversible error (Petition at 31), Henderson argues that this case presents an issue not hitherto resolved, and that had appellate counsel asserted the denial of this requested jury instruction as error on appeal, Henderson "would have been entitled to a new sentencing hearing." (Petition at 38).

This contention is patently erroneous. This court resolved, and rejected, an identical claim of ineffective assistance of appellate counsel in Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1980). There, as here, trial counsel had submitted a proposed penalty phase instruction "based on certain language used by this court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)". This court found appellate counsel's failure to raise such contention on appeal not to constitute any evidence of ineffective assistance, noting,

> We have never held such an instruction to be mandatory and, contrary to petitioner's assertions, the standard instruction which was given at petitioner's trial accurately informed the jury of its role in penalty phase proceedings. Hardwick at 798.

The instant petition should be resolved in accordance with Hardwick.

Further, no different result is dictated sub judice, due to any allegedly misleading statements during voir dire. While it is true, as Henderson points out in his petition, that Judge Huffstettler did, apparently, tell a prospective juror that he could disregard the jury's advisory verdict and that the jury in any event would not be putting Henderson to death (R 527-528), such statement, even if inaccurate, was not made in open court. After some general questioning of the venire, the judge adjourned to the jury room where individual jurors, one by one, were presented to proffer their basis for excusal (R 525). Thus, it would seem that prospective juror Hodges was the only juror who

heard these remarks, and he was subsequently stricken by the state due to his oposition to capital punishment (R 947). Additionally, while there were other not impermissible comments by the judge and prosecutor during voir dire to the effect that sentencing was "up to the court", (R 786, 863), defense counsel repeatedly advised the jurors, in accordance with his proposed instruction, that their sentencing recommendation was important and that the judge by law had to consider such advisory verdict (R 844, 883, 914). Significantly, despite the denial of the proposed instruction, defense counsel, during his closing argument in the penalty phase, included the following,

> The whole proceeding was designed to guide your discretion because your recommendation to the Court -- I want you to recall back to the day when we were questioning you at the very initial stage of this trial -- a couple of statements were made by Mr. McCabe and perhaps Mr. Springstead that indicated that the Judge is going to be the one that imposes the sentence, and that's true. But I want to impress upon you, ladies and gentlemen, that your recommendation by law to the Judge has to be accorded a tremendous amount of weight and deference by him. If that wasn't the case, we wouldn't go through this right now. It would just go directly to the Judge. It's a solemn responsibility that you have. (R 1608).

There is no reason to think that the jury disregarded this argument, in that the prosecutor during his preceding closing argument had advised them that recommending a death sentence was "a heavy responsibility" (R 1606). In short, appellate counsel, pursuant to her obligation to "winnow out" weaker appellate arguments no doubt concluded that this point contained little, if any, arguable merit. Cf. Thomas. The requested instruction was unnecessary under Florida law, and the record in this case fails to indicate any basis to conclude that the jury was misinformed as to their responsibility in sentencing. Cf. Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988). The instant petition for writ of habeas corpus

should be denied.

3 (CLAIM IV) HENDERSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DUE TO COUNSEL'S FAILURE TO RAISE ON APPEAL THE ALLEGED DOUBLING OF TWO AGGRAVATING CIRCUMSTANCES.

In this claim, Henderson argues that his appellate counsel was ineffective for failing to argue on appeal that the trial court had allegedly relied upon the same factual predicate as the basis for two distinct statutory aggravating circumstances. Henderson argues that appellate counsel "failed his client by ignoring this issue" (Petition at 39)* Henderson claims that because the state allegedly argued the same facts involving the victims' being bound hand and foot as the basis for both findings and because the sentencing judge quoted such argument in his sentencing order, fundamental non-harmless error occurred; it is claimed that because the sentencing judge, in his order, concluded that "the non-statutory circumstances that the defense presented and argued are of little if any weight" (R 2168), any error in aggravating circumstances could not be harmless under Elledge v. State, 346 So.2d 998 (Fla. 1977).

As with Henderson's other omitted points on appeal, it is easy to see why this one was not raised. Appellate counsel did argue on appeal that each of these aggravating circumstances had been improperly found (Initial Brief of Appellant at 32-37). The same "doubling" argument which Henderson now asserts should have been raised has previously been rejected in other cases and found to be without merit, as to these two aggravating circumstances, as long as there does in fact exist sufficient distinctive proof as to each. See, Hill v. State, 422 So.2d 816 (Fla. 1982); Mason v. State, 438 So.2d 374 (Fla. 1983); Squires v. State, 450 So.2d 208 (Fla. 1984); Stano v. State, 460 So.2d 890 (Fla. 1984); Mills v. State, 462 So.2d 1075 (Fla. 1985); Johnson v. State, 465 So.2d 499 (Fla. 1985). In this case, the prosecutor's argument, cited

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* The state would note that Henderson's appellate counsel, Assistant Public Defender Brynn Newton, is not of the male gender.

by the judge, to the effect that the victims were bound hand and foot prior to their deaths and that they experienced great mental anguish as they "joked" with Henderson, no doubt in realization of their impending demise, is a proper factual predicate for a finding that the homicides were especially heinous, atrocious or cruel (R 2158). See, e.g., Francois v. State, 407 So.2d 885 (Fla. 1981); Mills v. State, supra; Cooper v. State, 492 So.2d 1059 (Fla. 1986). Further, the prosecutor's argument, cited by the judge, to the effect that Henderson cold-bloodedly executed these victims, by shooting each one in the back of the head at point blank range while they were bound and helpless, is a proper factual predicate for a finding that the homicides were committed in a cold, calculated and premeditated manner (R 2158-2159). See, e.g., Mills, supra (Mills takes shotgun and stalks a bound and injured victim through the underbrush, then finds and executes him; cold, calculated and premeditated murder found).

This court has repeatedly held that the aggravating circumstance of a homicide being especially heinous, atrocious or cruel pertains to the nature of the killing and the surrounding circumstances, whereas that aggravating circumstance relating to a cold and calculating homicide relates more to the killer's state of mind, intent and motivation. See, Mason, supra; Stano, supra. It can be said, as in Mills,

> The finding of fact set out the proof necessary to establish the victim's mental anguish for the aggravating circumstance for heinous, atrocious, or cruel, while also containing sufficient, distinct facts to demonstrate that [Mills] committed the murder in a cold, calculated and premeditated manner. Id. at 1081.

Additionally, as this court noted in Echols v. State, 484 So.2d 568, 575 (Fla. 1985)

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravated factors are themselves separate and distinct and not merely restatements of each other . . .

See also, Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985) (while there may well be some overlap on these two factors it is not a complete doubling and, in any event, the sentencing process is not a mere mathmatical exercise of counting up aggravating circumstances).

On the basis of these precedents, it cannot be said that appellate counsel's failure to raise this issue, repeatedly rejected by this court under comparable circumstances, was a substantial prejudicial deficiency that undermines confidence in the result of the appeal. See, Washington, supra; Thomas, supra. Henderson has failed to demonstrate ineffective assistance of appellate counsel, and the instant petition for writ of habeas corpus should be denied.

4 (CLAIM V) HENDERSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REGARD TO COUNSEL'S FAILURE TO RAISE ON APPEAL THE DENIAL OF A REQUESTED JURY INSTRUCTION ON BURDEN OF PROOF AT THE PENALTY PHASE.

In this claim, Henderson argues that appellate counsel was ineffective for failure to argue on appeal the denial of a requested defense jury instruction on the burden of proof at the penalty phase. As Henderson noted, there were two proposed jury instructions submitted as to this matter. Defense instruction # 5 included language to the jury to the effect that if the jury found sufficient aggravating circumstances to justify the death penalty, they should additionally consider the evidence in mitigation; the jury was then advised that it was their duty to determine whether there were sufficient aggravating circumstances to outweigh the mitigating circumstances beyond a reasonable doubt (R 2112). Defense instruction # 8 was similar, containing language to the effect that the jury must determine whether the aggravating circumstances outweighed the mitigating beyond a reasonable doubt (R 2115). When defense counsel presented these instructions at sentencing, Judge Huffstettler denied them, finding them to be a departure from the standard instructions (R 1568-1570; 1574; 1577). Subsequently, the judge instructed the jury in accordance with the standard instructions, to the effect,

inter alia, that if they should find that the aggravating circumstances did not justify the death penalty, then they should return an advisory verdict of life (R 1617); the jury was similarly advised that an aggravating circumstance had to be established beyond a reasonable doubt before it could be considered (R 1617). Additionally, the jury was told that if one or more aggravating circumstances were established, they should consider all the evidence tending to establish one or more mitigating circumstances and give such evidence such weight as they felt it should receive in reaching their conclusion as to what sentence should be imposed (R 1617-1618).

The state would note that this identical claim of ineffective assistance of appellate counsel was rejected in Thomas v. Wainwright, 421 So.2d 160 (Fla. 1982). In such case, Thomas had argued that his appellate counsel was ineffective for failing to raise on appeal a contention that the penalty phase jury instructions had unconstitutionally shifted the burden to the defense to prove the existence of mitigating circumstances and/or that his life should be spared. This court held that because the instructions were in conformity with State v. Dixon, 283 So.2d 1 (Fla. 1973), there was no improper shifting of the burden. Since there had been no trial court error, this court found that there had been no deficiency in not arguing the question on appeal. While Thomas apparently did not request a special instruction, the state cannot see how a different result would be called for sub judice See also, Francois v. State, 423 So.2d 357 (Fla. 1982) (no ineffective assistance of trial counsel due to counsel's failure to object to the penalty phase instruction which advised the jury, in part, that it should consider whether mitigating circumstances outweigh the aggravating; this court found the instructions as a whole to be proper); Kennedy v. State, 455 So.2d 351 (Fla. 1984) (no error in trial court refusing to instruct the jury that the aggravating circumstances must outweigh those in mitigation, as standard instruction sufficient). The state does not find Arango v. State, 411 So.2d 172 (Fla. 1982), decided prior to all of the

above cases, to dictate a different result.

On the basis of the above precedents, appellate counsel could well have concluded that this argument stood little chance of success. Cf. Steinhorst, supra; Thomas, supra. Looking to the instructions as a whole, it is clear that the jury was told that its initial task was to determine whether sufficient aggravating circumstances existed to justify the death penalty, and that if such did not in fact exist, that an advisory sentence of life imprisonment was called for (R 1616, 1617); the jury was similarly advised that each aggravating had to be proven beyond a reasonable doubt, whereas those in mitigation did not need to be proven to such an extent (R 1617-1618). As in Thomas, the instructions were in accordance with Dixon. Because Henderson has failed to demonstrate ineffective assistance of appellate counsel, the instant petition for writ of habeas corpus should be denied. See, Washington, supra.

III. NO STAY OF EXECUTION IS WARRANTED IN THIS CASE

Henderson has additionally requested a stay of execution, not only on the grounds that such is required for this court to resolve the instant petition for writ of habeas corpus, but also so that he can seek review in the United States Supreme Court. Henderson points out that the latter court has granted certiorari in the case of Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 693 (1988), which he suggests presents an issue as to the allegedly unconstitutional application of the heinous, atrocious or cruel aggravating circumstance. The pendency of such case should be of little benefit to Henderson because, as previously argued, his claim in this regard has been procedurally defaulted. Cf. Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). Because it cannot be said that reasonable men could differ as to whether a writ of certiorari should be granted, see, McCall v. State, 136 Fla. 343, 186 So. 667 (1939), and because the instant petition for writ of habeas corpus is without merit, the instant request for stay of execution should be denied in all respects.

IV. CONCLUSION

WHEREFORE, for the aforementioned reasons, the State of Florida moves this honorable court to deny the instant petition in all respects. Of the seven claims presented, three are procedurally barred due to their improper presentation. As to the remaining four, which raise ineffective assistance of appellate counsel, Henderson has failed to demonstrate that he merits relief.

Respectfully submitted,

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ATTORNEY GENERAL

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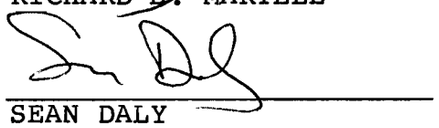

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Petition for Extraordinary Relief and for Writ of Habeas Corpus, etc. has been furnished by mail, to Billy H. Nolas, counsel for petitioner, at the Office of the Capital Collateral Respresentative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 11 day of March, 1988.

Richard B. Martell
Of Counsel