IN THE SUPREME COURT OF FLORIDA

ROBERT DALE HENDERSON,

Petitioner/Appellant,

v. CASE NO. 72208

STATE OF FLORIDA,

Respondent/Appellee.

_____/

STATE'S RESPONSE TO APPLICATION FOR STAY OF EXECUTION/ ANTICIPATORY ANSWER BRIEF ON APPEAL FROM DENIAL OF MOTION FOR POST-CONVICTION RELIEF

COMES NOW, State of Florida, by and through the undersigned counsel, in response to Henderson's Application for Stay of Execution, filed in this cause on or about April 6, 1988, and in response to any appeal taken from the denial of his Motion to Vacate Judgment and Sentence, such denial on or about April 6, 1988, follwoing evidentiary hearing held March 23 through 25, 1988 and March 31, 1988 and April 1, 1988, and moves this honorable court to deny all relief requested, for the reasons set forth in the instant pleading.

Execution is presently scheduled for 7 a.m., April 7, 1988, although the death warrant in this case remains active through noon, April 13, 1988.

PRELIMINARY STATEMENT

As is customary in circumstances such as these, this pleading was prepared in anticipation of that to which it responds, as well as in anticipation of certain rulings by the lower court. Accordingly, the state would request leave to supplement this pleading, as necessary, either ore tenus or in writing as circumstances permit.

STATEMENT OF THE CASE

Henderson was charged by indictment in Hernando County Circuit Court on June 16, 1982, with three counts of first degree murder, in violation of section 782.04, Florida Statutes (1981). Following the change of venue, he was tried before a jury in Lake County Circuit Court on November 16 through 20, 1982, and found guilty as charged on all counts. A separate

penalty phase was held on November 22, 1982, and the jury, by votes of 11 (eleven) to 1 (one) subsequently returned an advisory verdict recommending death on all counts, and Henderson was sentenced in accordance with this recommendation.

Henderson appealed such judgments and sentences to the Florida Supreme Court on January 14, 1983, and raised seven (7) points on direct appeal. These points included the following contentions: (1) The trial court erred in denying Henderson's motion to suppress his confession; (2) The trial court erred in denying Henderson's motion in limine to preclude admission of evidence relating to his other crimes; (3) Henderson was deprived of a fair trial by virtue of the trial judge's reference to a "penalty phase" prior to the guilt phase; (4) The trial court erred in admitting into evidence allegedly gruesome photographs; (5) Henderson was deprived of his right to be tried by a fair and impartial jury drawn from a representative cross-section of the community; (6) Henderson was improperly sentenced to death and (7) The Florida capital sentencing statute was unconstitutional on its face and as applied. In regard to the sentencing point, Henderson contended that, of the three aggravating circumstances found, two were improper - the finding that the homicides had been especially heinous, atrocious or cruel and that they had been committed in a cold, calculated and premeditated manner, as set forth in section 921.141(5)(h) and (i); Henderson also argued that the judge had improperly considered lack of remorse as an aggravating circumstance.

In its opinion of January 10, 1985, Henderson v. State, 463 So.2d 196 (Fla. 1985), the Supreme Court of Florida unanimously affirmed the convictions and sentences in all respects. In the course of recounting the facts of the case, the court found that Henderson "volunteered" to show the authorities the location of the bodies of the three victims in this case. Henderson at 198. The court also found that there was sufficient evidence "to support the finding that he knowingly and intelligently waived his right to have counsel present when making [these] statements." Id. at 199. The court found, as to the second claim

on appeal, that while it had not been proper for evidence concerning Henderson's admission to being wanted in other states to have come in, any error therein was harmless, noting,

> The amount of evidence against Henderson is simply overwhelming. There were at least four confessions to four different police officers. There was also substantial circumstantial evidence linking him to the crime and corroborating his confession. Id. at 200.

The court found the other three challenges to the convictions to be without merit, and further found the death sentences "appropriate under the law established in similar cases", and premised upon correctly-found aggravating circumstances. Id. at 201. Henderson's motion for rehearing was denied on February 28, 1985, and he thereupon sought relief in the United States Supreme Court, raising two claims - one pertaining to the admissions of his confession and the other as to the selection of the jury. The Court denied review 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 in the state circuit court, raising seventeen (17) claims for relief. These claims included: (1) error in denial of Henderson's motion to suppress his statements; (2) error in allegedly conducting portions of the trial in his absence; (3) error in denial of his renewed motion for change of venue; (4) error in the fact that the jury was allegedly aware that he was in custody during the trial; (5) error in the manner in which the jury was selected; (6) error in the admission into evidence of testimony regarding Henderson's being wanted for other offenses; (7) ineffective assistance of psychiatric expert; (8) Henderson's alleged incompetency to stand trial; (9) ineffective assistance of trial counsel at both guilt and sentencing phases; (10) error in utilizing Henderson's prior convictions from Putnam County as the basis for finding an aggravating circumstance at sentencing; (11) error in the judge's alleged reliance upon non-statutory factors in aggravation; (12) error in the fact that the jury was allegedly misled as to the alternative to death, in that they were not specifically told

that three consecutive life terms could be imposed; (13) error in the fact that the sentencing court did not order a pre-sentencing investigation report; (14) error in the fact that the jury was allegedly not advised that they could consider mercy in their advisory verdict; (15) error in the fact that the jury was allegedly not advised that only six votes would suffice for a life recommendation; (16) error in the fact that the jury instructions and prosecutor's argument allegedly misled the jury as to their responsibility in sentencing; (17) error in the use of jury instructions at the penalty phase which allegedly shifted the burden of proof onto the defense. Although Henderson requested sixty days in which to amend the pleading, he never filed any further pleadings or attempts at amendment, despite the fact that the state did not formally respond until well more than sixty days had elapsed. On February 24, 1988, the state filed a response, asserting, inter alia, that all claims except those pertaining to Henderson's competence and ineffective assistance of both the attorney and psychiatric expert, were improperly presented, in that such represented issues which, under Florida law, could and should have been raised on direct appeal.

An evidentiary hearing was held in the circuit court as to these matters on March 23 through 25, 1988 and on March 31, 1988 and April 1, 1988. At the hearing, Henderson called eight (8) witnesses and the state called two (2). These witnesses included: (1) Dr. Joyce Carbonnell, a psychologist who had examined Henderson in 1987 and 1988; (2) Dr. Robert Pollack, the psychiatrist who had examined Henderson, at defense request pursuant to Florida Rule of Criminal Procedure 3.216, in October of 1982 in reference to this case; (3) Dr. Archibald Hampton, a psychiatrist who had examined Henderson in reference to his prior murder charges in Putnam County in 1982; (4) Dr. Robert David, a psychologist retained under identical circumstances in regard to the 1982 Putnam County offenses; (5) Dr. Barbara Mara, a psychologist associated with Dr. Pollack, who had interpreted Henderson's MMPI, administered as part of the psychiatric examination and (6) David Cunningham, a mental health counselor

associated with Dr. Pollack, who, likewise, had assisted in interpretation of Henderson's MMPI. The defense additionally called attorney Jack Springstead, who had been lead counsel at Henderson's trial on these charges in Hernando County in 1982 and attorney Michael Johnson who had assisted him on the penalty phase. The state called Dr. Leslie Garrett, who had interpreted the results of a CAT scan taken of Henderson in 1982, and David Franklin, an investigator with the Public Defender's office who had assisted the defense team at Henderson's trial.

Following the presentation of this evidence, the parties were directed to file memoranda by 5 p.m. on April 5, 1988, with ruling to be made at or by noon on April 6, 1988. The district court denied all relief at such time.

STATEMENT OF THE FACTS

The state would rely upon the facts as set forth in the opinion of the Supreme Court of Florida, Henderson v. State, 463 So.2d 196 (Fla. 1985).

SUMMARY OF ARGUMENT

Henderson presents, in essence, four claims for relief and/or bases for a stay of execution; the other thirteen claims presented in his motion for post-conviction relief and/or application for stay of execution must be considered procedurally defaulted under Florida law, due to their improper presentation, as argued in the state's response of February 24, 1988. Henderson's initial claim, that his confessions were improperly admitted into evidence, was, in large part, already raised, and rejected, on direct appeal; to the extent that any portions of Henderson's Fifth or Sixth Amendment claims were not presented on direct appeal, such must be considered defaulted. See, McCrae v. State, 437 So.2d 1388 (Fla. 1983). Henderson's contention that the subsequent decision of the United States Supreme Court in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), entitles him to relief is without merit. There has been no showing that such case is entitled to retroactive application, on collateral proceedings, and, further, the holding of that case is inapplicable to the facts of this case. The record is

compatable with a finding that Henderson himself, rather than the police, initiated any interrogation which led to the confessions at issue; Jackson presupposes police-initiated interrogation. In any event, the Sixth Amendment right to counsel had not yet attached. Jackson provides no basis for reconsideration of the prior finding that Henderson validly waived his rights to have counsel present prior to making any statement.

Henderson's other three claims were all resolved through the testimony presented at the evidentiary hearing. Although the defense psychologist offered her opinion that Henderson was a paranoid schizophrenic and allegedly incompetent, apparently at the time of trial, her testimony was largely discredited by testimony of other mental health experts, all called by the defense. A cornerstone of the defense attack upon the expertise of Dr. Pollack, who had examined Henderson in 1982 in reference to this offense, was that no reasonably competent mental health professional would have found the MMPI which Henderson took at such time to be invalid; yet, again, every other mental health professional who testified, all called by the defense, stated that such was a permissible conclusion, within the bounds of reasonable competence. As to the claims of ineffective assistance of trial counsel, Henderson totally failed to sustain his burden under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), of establishing either deficient performance of counsel or resultant prejudice. The record is clear that, given the actual facts of this case, no defense based upon intoxication or mental incompetence was available to be raised. Similarly, the record indicates that, contrary to Henderson's allegations, the defense sought to elicit and bring forth as much background information as could be obtained, given Henderson's refusal to allow his family to be contacted.

POINT I

THE VARIOUS CONSTITUTIONAL CHALLENGES TO THE ADMISSION OF HENDERSON'S CONFESSIONS INCLUDED IN CLAIM I CANNOT BE RAISED IN A MOTION FOR POST-CONVICTION RELIEF; NO FUNDAMENTAL CHANGE IN LAW JUSTIFYING RELIEF HAS BEEN PRESENTED.

No basis for relitigating the constitutional propriety of the admission of Henderson's various confessions exists under Rule 3.850 as to issues which do not constitute a fundamental change in the law, i.e., those issues which could and should have been raised at trial and on direct appeal or which were so raised cannot be raised by motion for post-conviction relief. See, Groover v. State, 489 So.2d 15 (Fla. 1986); Smith v. State, 445 So.2d 323 (Fla. 1983); Fla. R. Crim. P. 3.850. Accordingly, the only suppression issue even arguably cognizable on collateral review is Henderson's allegation that Michigan v. Jackson should be retroactively applied, an assertion factually and legally unsupported in this case.

A. MICHIGAN v. JACKSON IS INAPPLICABLE WHERE, AS IN THIS CASE, THE POLICE DID NOT INITIATE THE INTERROGATIONS AT ISSUE.

It is unnecessary to reach the retroactivity issue in this case because the bright-line rule of Jackson (like that of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is factually inapplicable since both prophylactic rules protect only against **police-initiated interrogation.** See, Smith v. Dugger, No. 86-3333, 2 F.L.W. Fed. C278, 280 (11th Cir. March 9, 1988) (The court found it unnecessary to reach the question as to Jackson's retroactivity in the guilt phase context where the suppression hearing transcript demonstrated that interrogation was not police-initiated such that Jackson was otherwise inapplicable); Tucker v. Kemp, 818 F.2d 749 (11th Cir. 1987) (Jackson claim inapplicable to interrogation initiated by defendant such that intervening decision of no import).

As determined by the Florida Supreme Court on Henderson's direct appeal, Edwards v. Arizona, does not preclude the admission of testimony from an accused who has changed his mind

and **volunteered** information with reference to an offense, as long as any re-interrogation that follows occurs only after a knowing, intelligent, and voluntary waiver of previously asserted Fifth Amendment rights, including the right to counsel. Edwards v. Arizona, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885 n.9; Accord: Smith v. Illinois, 105 S.Ct. 490, 492-493, 83 L.Ed.2d 488 (1984).

In rejecting Edwards as a bar to admission of Henderson's confessions in the Fifth Amendment context, both the trial and appellate courts necessarily evaluated the same factual questions necessary to a determination of Jackson's applicability, i.e., was there police-initiated interrogation resulting in the Putnam County and Hernando County confessions? If there was **no** police-initiated interrogation, and the confessions resulted from Henderson's volunteering of information and initiation of conversation with reference to the offenses followed by a knowing and voluntary relinquishment of his constitutional rights, then no violation of Edwards (Fifth Amendment) or Jackson (Sixth Amendment) is demonstrated.

Henderson argued in his pre-trial motions and on direct appeal that his constitutional rights were violated and his confessions improperly obtained because he had invoked his constitutional rights prior to his trip to Putnam County (resulting in his confessions to Putnam County deputies) and his later return trip to Hernando County (resulting in his confession to Deputy Perez). The Florida Supreme Court, like the trial court, rejected the challenges to **all** of Henderson's confessions, specifically noting that Edwards did not preclude a defendant from **volunteering** further information even after initially asserting his constitutional rights, to wit:

> Henderson's first point on appeal claims error in the denial of his pretrial motions to suppress the statements he made to the Putnam County deputy and the Hernando County detective. Henderson claims that these statements were improperly elicited from him after he had requested the assistance of counsel. It is true that when an accused asks to see counsel, interrogation must cease. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). **However, there is nothing to prevent an accused from**

changing his mind and volunterring further information.

Henderson v. State, 463 So.2d 196, 199 (Fla. 1985) (emphasis supplied).

In its recitation of the facts surrounding the confessions to the Putnam County deputies, the court correctly determined that "Henderson volunteered to show them where the bodies of the three [murdered] hitchhikers were", and that Henderson's original refusal to discuss the case with Hernando County Detective Perez was because he had already given his statement to the Putnam officers, but that he later changed his mind. Id. at 198.

Testimony from the Putnam County deputies at the suppression hearing clearly indicated that Henderson struck up conversations with the officers during the trip to Putnam County during which they engaged in small talk and casual conversation (R 2218-2219). Henderson indicated that he had had a headache and something on his mind that was bothering him (R 2220). Sergeant Bakker noted that Henderson was talkative and started conversations during the trip, and that while the officers did take part in discussions, **they at no time attempted to utilize them for purposes of interrogation** (R 2238, 2240-2242, 2254).

Putnam County Deputy Hord corroborated Bakker's statements to the effect that there had been no conversations with Henderson relating to any alleged criminal conduct on their trip from Charlotte County to Putnam County until they reached Crescent City, where Bakker stopped the vehicle to call his captain (R 2257-2258). Henderson was interested in what was going on, and Hord explained to him that Bakker was calling to tell the captain they were there, and to determine what he wanted them to do (R 2258-259). When Henderson was informed that he would likely be taken to the detention facility at the sheriff's department, Hord noted that the petitioner's reaction and expression communicated to him something to the effect of "Is that all?" and "Isn't there something else?" In an effort to clarify Henderson's reaction, Hord asked what it was Henderson was trying to say, and at that point, Henderson **volunteered** that he wanted to assist the officer in finding some bodies. No previous conversation had occurred

during the trip as to the offenses at isue,"missing bodies", or locating bodies for burial (R 2259-2261).

Prior to any further discussion, Henderson was specifically re-advised of his rights, and told "in great detail" that he did not have to discuss any case with the officers, and that if he did, he was going against the advice of his previous attorney (R 2221). Henderson indicated that he nevertheless wanted to discuss the matter, and that he was concerned with the burial of the three victims. Id. At that point, Sergeant Bakker read Henderson a waiver of rights form which again specifically indicated Henderson's voluntary decision to disregard the instructions of his attorney and to speak with the officers, notwithstanding his right to remain silent and to speak with an attorney before answering any questions and to have an attorney present before any questioning (R 2222-2223, 2261). The waiver of rights form was read to Henderson "until he fully understood it", and Henderson then executed the form in the presence of a number of witnesses. Id.

In Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), a plurality of the Supreme Court joined by Justice Powell rejected a claim that a conversational exchange comparable to the one involved in this case, resulted in an Edwards violation barring admission of the defendant's subsequent confession. Under the rationale of that decision and its explanation of Edwards and the "initiated" requirement, it is clear that Henderson, not the Putnam officers, "initiated" all further communication, conversation and interrogation.

Deputy Hord's clarifying question as to what it was that Henderson was trying to say to him did not constitute an initiation of communication or conversation with the petitioner, since Henderson had, in fact, initiated the conversation or dialogue with the officers hours earlier during the lengthy trip and continued that conversation by inquiring of Deputy Hord as to what would happen to him when they arrived in Crescent City. Henderson's inquiries and statements, prior to his volunteering to locate the bodies were, like Deputy Hord's conversation,

relative to "routine incidents of the custodial relationship, [which] will not generally 'initiate' a conversation in the sense in which that word was used in Edwards." Oregon v. Bradshaw supra, 462 U.S. at 1047, 103 S.Ct. at 2835. There was, therefore, no Edwards or Jackson impropriety in that conversation, and Henderson actually initiated "interrogation," when he volunteered to find the bodies, and then executed a knowing, intelligent and voluntary waiver of right to counsel and right to silence in accordance with the dictates of the Edwards rule as interpreted in Oregon v. Bradshaw, and Smith v. Illinois.

Henderson's assertion that the trial court erred in denying his motion to suppress his June 11, 1982, confession to Hernando County Detective Perez is also baseless. Again, the argument is in effect nothing more than a repetition of the claim presented to and rejected on direct appeal. Henderson v. State, supra, at 199.

Perez first met Henderson on February 11, 1982, and at that time, Henderson informed him that he would not talk to Perez until he had obtained the necessary paperwork from Hernando County, providing for his transfer (R 2300). Henderson then noted that it would be a long trip back to Hernando County and stated that "we'll see what happens on the way back" (R 2300-2301). On June 11, 1982, Perez picked Henderson up to transport him back to Hernando County based upon a court order for change of jurisdiction (R 2301). Henderson had not been formally charged or indicted for the Hernando County murders.

Having complied with Henderson's previously stated condition that "paperwork" and transport be obtained, Perez then advised Henderson of his rights, and asked him if he recognized a picture of one of the victims; Henderson simply replied, "No comment". The record indicates that Henderson stated that he did not want to talk because he had already given his statement to the Putnam County deputies, and knew that Perez had copies of that statement (R 2302-2303). After Perez told Henderson that he only sought the information so that he could have "first hand knowledge",

Henderson said nothing, **and the conversation between the two ceased** (R 2303). Later into the trip, Hernando County authorities stopped to use the telephone, and at that point in time, Henderson initiated both conversation and further interrogation by volunteering that if the officers would buy him a Pepsi and cigarettes, he would tell them about the case. They made the purchases then readvised Henderson of his rights before Henderson gave a taped statement outlining the details of the murders (R 2303-2304). Perez also noted that since his return to Hernando County, he had five or six subsequent conversations with Henderson at Henderson's request, wherein he related his prior criminal history and actions (R 2304-2307).

The record supports the factual conclusion that, after the cessation of interrogation by Perez, Henderson later "changed his mind" during the return trip to Hernando County and "volunteered" (after first executing a written waiver) details of the murders. Perez specifically noted that it was Henderson's own voluntary decision to re-initiate conversation and explain the details of the offenses which led to the ultimate taped confession utilized at trial (R 2309). As previously noted, this volunteering of information pursuant to conversation initiated by Henderson for a Pepsi and cigarettes does not, as determined by the trial court and the Florida Supreme Court, run afoul of Edwards.

This analysis is just as relevant and applicable to Jackson; indeed, the question specifically addressed by the Jackson Court was whether "the same rule" of Edwards, i.e., the "bright-line rule to safeguard pre-existing (Fifth Amendment) rights" should be applied to protect a defendant's Sixth Amendment right to counsel after arraignment. Accordingly, the same factual basis for rejecting Edwards, i.e., Henderson's initiation of the interrogations at issue, necessarily serves to render Jackson equally inapplicable.

B. RETROACTIVITY OF JACKSON.

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, it likewise should not be applied retroactively.[1] Johnson v. Cabana, 818 F.2d 333, 344 (5th Cir. 1987) (Jackson is not a "new rule of law" sufficient to justify collateral attack in a successive habeas corpus petition.)

In Witt v. State, 387 So.2d 922 (Fla. 1980), the Florida Supreme 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 and the relevant three-part test discussed therein.

The Jackson holding simply hardens the rules concerning police contacts with suspects. Those presumptions are not essential prerequisites for fair or reliable interrogations. As the record in the instant case shows, the police inquiries to Henderson did not make his statement unreliable or coerced. In fact, the statements enhanced the truth or fact-finding function.

Turning to the second criteria of the test applied in Solem and Witt, it cannot be said that Jackson's holdings were clearly

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[1]As recently noted in Smith v. Dugger, No. 86-333, 2 F.L.W. Fed. C278 (11th Cir. March 9, 1988), the decision in Fleming v. Kemp, 837 F.2d 940 (11th Cir. 1988) determined the issue of Jackson's retroactivity only in the sentencing context; retroactivity as to the guilt phase is unsettled in that court. See, Collins v. Kemp, 792 F.2d 987 (11th Cir. 1986) (lower court held Jackson not retroactive but case stayed to allow briefing of retroactivity issue).

foreshadowed. Prior to Jackson, the courts had consistently rejected the notion that a suspect's request for counsel at initial appearance prohibited subsequent police-initiated efforts to seek a waiver and obtain a statement. E.g., Love v. Young, 781 F.2d 1307 (7th Cir. 1986) (per curiam); Tinsley v. Purvis, 731 F.2d 791 (11th Cir. 1984); Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982). Moreover, in judging pre-trial Sixth Amendment waivers, the United States Supreme Court had used the "totality of circumstances" test. Brewer v. Williams, 430 U.S. 387 (1977). Accordingly, the reliance factor points to the conclusion that Jackson should not be applied retroactively.

Finally, retroactive application would disrupt the administration of justice. As the chronology of Henderson's case demonstrates, a retroactive application would require any state retrial to take place years after the material events occurred. Such efforts could be severely hampered by problems of lost evidence, faulty memory and missing witnesses. Those barriers work against retroactivity. Solem v. Stumes, supra. Thus, under the three-prong criteria, the new decision in Jackson does not apply to the facts in this collateral proceeding and Henderson is not entitled to relief on this claim.

C. SIXTH AMENDMENT INAPPLICABLE WHERE NO ADVERSARY JUDICIAL PROCEEDINGS BEGAN AT TIME OF STATEMENTS..

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

Although Henderson 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 his transportation to Putnam County. Henderson had neither been arrested nor 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 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. The government was, however, free to continue investigation of that individual if he was suspected of committing other offenses for which he had not been formally charged, because 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 challenge to the Putnam County confessions 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.[2] 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, such that the constitutional protections of the Sixth Amendment were not implicated in the Putnam County or Hernando County confessions (R 1662-1663).

POINT II

CLAIMS II-VI AND X-XVII WERE IMPROPERLY RAISED BY MOTION FOR POST-CONVICTION RELIEF AS ISSUES THAT ALREADY WERE OR COULD AND SHOULD HAVE BEEN RAISED AT TRIAL AND ON DIRECT APPEAL.

As determined at the hearing on the motion for post-conviction relief Claims II-VI and X-XVII of Henderson's rule 3.850 motion belatedly raised issues not cognizable in such a proceeding. As previously noted in Point I, Henderson's renewed challenge to the denial of his pre-trial motions to suppress his various confessions does not justify post-conviction relief. Similarly, Claims II-VI and X-XVII do not justify collateral review under rule 3.850 because the issues raised were either already argued at trial and on direct appeal or could and should have been so raised. See, Johnson v. State, 13 F.L.W. 177 (Fla.

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[2]For the same reasons the unexplained February 25, 1982 order appointing counsel is of no constitutional import since no actual Sixth Amendment right to counsel existed at that point; i.e., as explained by the prosecutor at the hearing on the pre-trial motion to suppress, the order was a legal nullity with no constitutional ramifications. (R 583-5, 1656) Futhermore, that issue was clearly presented at trial and cannot now be relitigated.

March 7, 1988); McCrae v. State, 437 So.2d 1388 (Fla. 1983); Fla. R. Crim. P. 3.850 - "rule does not authorize relief based upon grounds which could have or should have been raised at trial and ... on direct appeal." No evidentiary hearing is required to address an issue where the record demonstrates that post-conviction relief under the rule is not warranted. Stano v. State, 13 F.L.W. 167, 168 (Fla. Feb. 25, 1988).

CLAIM II. Henderson argued for the first time that he was allegedly absent during critical stages of his trial. This issue is barred inasmuch as it has been specifically held that claims of this type must be raised on direct appeal. See, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Mills v. State, 507 So.2d 602 (Fla. 1987); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

CLAIM III. The refusal to hear Henderson's belated assertion that it was error for the court to have denied his renewed motion for change of venue comports with holdings which have consistently held that claims of this type must be raised on direct appeal. See, Mills v. State, 507 So.2d 602 (Fla. 1987); Armstrong v. State, 429 So.2d 287 (Fla. 1983).

CLAIM IV. Henderson's untimely argument that he was denied a fair trial because the jury was aware that he was in custody is also one subject to summary denial inasmuch as it could and should have been raised on direct appeal. It has been consistently held that claims of this type are not cognizable in rule 3.850 proceedings. See, Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986). In any event, the assertion of reversible error upon this claim is ludicrous under the particular facts of this case.

CLAIM V. Henderson's claim that the excusal of potential jurors due to age, hardship or the presence of minor children in the home denied him a jury composed of a fair cross-section of the community was raised on direct appeal, and Henderson cannot relitigate it at this juncture. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983). Henderson's assertion at the rule 3.850 hearing as to "various interpretations" of legal precedent on

this issue is baseless and the specific jurisdictional limitations of rule 3.850 should be enforced.

CLAIM VI. Again Henderson's argument that impermissible evidence regarding his other offenses was improperly admitted was raised on direct appeal, and cannot be re-raised at this juncture. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983). No "interest of justice" exception, as urged by Henderson at the motion hearing, has ever been recognized to obviate the specific limitations of rule 3.850 on such claim.

CLAIM X. Henderson's argument, raised for the first time, that his sentence of death is invalid, because premised, in part, upon allegedly invalid prior convictions from Putnam County used in aggravation cannot be urged as the basis for collateral attack under the rule. Claims of this type are improperly raised by motions for post-conviction relief in capital cases. See, James v. State, 489 So.2d 737 (Fla. 1986); Mann v. State, 482 So.2d 1360 (Fla. 1986); Adams v. State, 449 So.2d 819 (Fla. 1985). Obviously, any attack on these convictions, if not defaulted, should have been made in Putnam County within the appropriate time for such challenges. Henderson has neither alleged nor demonstrated that any such challenge was timely made.

The state would further observe that as correctly noted by the court at the evidentiary hearing, under Correll v. State, 13 F.L.W. 34 (Fla. Jan. 14, 1988), Henderson's simultaneous convictions of three counts of murder would satisfy the requirement of a prior conviction under section 921.141(5)(b), Florida Statutes (1981), even if the Putnam County offenses were ever invalidated, rendering any potential error harmless.

CLAIM XI. Henderson's argument that the sentencing court impermissibly relied upon certain non-statutory aggravating circumstances in sentencing is barred, in part, as previously raised and should otherwise be summarily rejected because it could and should have been raised on appeal.

Henderson argued on appeal that the trial court had improperly relied upon his lack of remorse, but the other matters asserted in this claim were never presented on appeal. It has

been consistently held that claims, such as this, must be raised on direct appeal. See, McCrae v. State, 510 So.2d 874 (Fla. 1987); Herring v. State, 501 So.2d 1279 (Fla. 1986); Mikenas v. State, 460 So.2d 359 (Fla. 1984).

CLAIM XII. Henderson next contends that his sentences of death must be vacated because the jury was misled as to the alternatives to the death penalty, specifically the fact that he could receive concurrent life sentences. Henderson's strained effort to characterize this purported error as comparable to that in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) is baseless. The cases are not factually or legally similar. In any event, it is clear that this issue is one which should have been raised on direct appeal and is therefore barred. Cf., Buford v. State, 492 So.2d 355 (Fla. 1986); McCrae v. State, 437 So.2d 1388 (Fla. 1983).

CLAIM XIII. Henderson's challenge to the failure to order a pre-sentence investigation report also represents an issue which must be raised on direct appeal and not by initial challenge in a motion for post-conviction relief. See, Jackson v. State, 437 So.2d 147 (Fla. 1983).

CLAIM XIV. Henderson's belated argument that the prosecutor and court misinformed the jury that they could not consider "mercy" in their advisory verdict likewise represents a matter which should have been raised on direct appeal. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983).

CLAIM XV. The contention, again raised for the first time in a collateral proceeding, that the jury instructions were misleading, in that they did not specifically advise that only six votes were required for a life verdict is a matter which should have been raised on direct appeal. It has been consistently held that the decision in Harich v. State, 437 So.2d 1082 (Fla. 1983), does not represent a change in law, such that this issue would be cognizable on collateral attack. See, Jackson v. State, 438 So.2d 4 (Fla. 1983); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984).

In any event, the jury recommended death by a vote of eleven

to one evincing an obvious lack of prejudice from any claimed confusion in the instructions. It should be noted that the specific instructions as to entering a life recommendation stated that only "six or more votes" were necessary to reach that conclusion clearly distinguishing that vote from a death recommendation which required a "majority" vote (R 1619).

As with many of his other belated sentencing/jury instruction arguments Henderson's effort to raise an untimely claim and magically transform it into a Caldwell issue should be summarily rejected. (See, Claims XII, XIV) Florida procedure differs markedly from Mississippi and Caldwell should not be extended beyond its factual and legal basis. In any event, Caldwell provides no intervening change in law sufficient to justify an untimely attempt to invalidate otherwise proper sentencing procedures. See, Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988).

CLAIM XVI. Henderson's argument that the jury instructions and prosecutor's argument violated Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and misled the jury as to their responsibility in sentencing should have been raised on direct appeal, and cannot be raised for the first time by post-conviction motion. Caldwell does not constitute a fundamental change in law, so as to serve as a basis for relief on collateral attack. See, Ford v. State, 13 F.L.W. 150, (Fla. Feb. 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Henderson, particularly, cannot argue that he "needed" Caldwell to raise this issue on appeal. His 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 their advisory verdict (R 2106). Thus, should Henderson truly have wished to raise this issue on appeal, a

sufficient record existed, and his procedural default should not be excused.

CLAIM XVII. Again, Henderson's argument that the jury instructions at sentencing were defective, in that the burden was allegedly shifted onto him to demonstrate the existence of mitigation, and thus to justify a life sentence is untimely made. This claim represents a matter which should have been raised on direct appeal. See, Zeigler v. State, 452 So.2d 537 (Fla. 1984).

POINT III

HENDERSON HAS FAILED TO DEMONSTRATE ANY INCOMPETENCE OF MENTAL HEALTH EXPERT AND/OR ANY INCOMPETENCY ON HIS OWN PART TO HAVE STOOD TRIAL IN 1982.

In his pleadings to date, Henderson has contended that Dr. Robert Pollack, who assessed his mental competence, pursuant to Florida Rule of Criminal Procedure 3.216, rendered ineffective assistance of mental health expert. The doctor allegedly failed to acquire sufficient background information regarding him and conduct "adequate testing"; Henderson also contends that he was mentally ill, and thus incompetent to have stood trial. A cornerstone of Henderson's argument is apparently that no reasonably competent mental health professional could have concluded that the MMPI, which Dr. Pollack and his associates administered to Henderson in October of 1982, had produced an invalid result.

All of the allegations against Dr. Pollack are refuted by the record at the evidentiary hearing, and Henderson has completely failed to demonstrate that the psychiatric examination was so grossly insufficient that it ignored clear indications of either mental retardation, organic brain damage or, for that matter, incompetence to stand trial for any reason. See, State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986). The record indicates that Dr. Pollack was appointed to examine Henderson pursuant to Rule 3.216, and that he had seen Henderson for a brief time on August 11, 1982 and again on October 7, 1982. At the initial interview, Henderson

"indicated some difficulty", as he had not been allowed to shower and shave beforehand, and the exchange between the two lasted only 20 minutes (TR 278). The doctor's report, which was introduced into evidence, indicated that he found Henderson to be well-oriented and evidencing no signs of delusions, paranoia or distortions of reality; the doctor found that Henderson understood the charges against him and was able to assist his attorney in his defense (Defense Exhibit #10) (TR 289).

Following such interview, a subsequent one was scheduled for October 6, 1982, at which time Henderson was transported to Dr. Pollack's office in Winter Park. According to the doctor, the meeting lasted from between 45 minutes to 90 minutes (TR 290); at such time, two of Dr. Pollack's associates, Barbara Mara and David Cunningham administered a MMPI, which they subsequently interpreted for the doctor (TR 291). Prior to the test, Pollack had conducted his clinical interview (TR 293). In his report, the doctor concluded that the mental status examination showed Henderson to be alert and oriented as to person, place and time; he found no signs of cognitive disfunction. Pollack also found that Henderson was sane at the time of the offense and able to aid and assist his counsel in preparing an appropriate defense. He also concluded that the MMPI reflected "a grossly invalid score with an attempt to falsify the results of the test." (Defense Exhibit #11).

At the evidentiary hearing, Dr. Pollack testified that, while he still found the MMPI to be invalid, he would no longer utilize the term "gross" invalidity (TR 294). The doctor explained that the reading obtained was the profile of someone attempting "to look ill--false/negative" (TR 337). Dr. Pollack stated that the MMPI was not a major part of his diagnosis (TR 338). The doctor also said that sometime following the evaluation in 1982, he had been shown a number of "new materials", such as the reports of two other doctors who examined Henderson in 1982, Henderson's military records, prison records, juvenile records, defense file, etc.,--in short, the bulk of materials considered by defense expert Joyce Carbonell--and that

such had not caused him to change his opinion as to Henderson's competence in 1982 (TR 329). Dr. Pollack maintained his position that, at most, a personality disorder was involved, with no evidence of any thought disorder (TR 334, 328-9); similarly, the doctor found no reason to change his original conclusion that Henderson had been competent to stand trial (TR 329, 342-3, 366).

Additionally, the two mental health experts who interpreted the MMPI testified at the evidentiary hearing, and both explained in detail the rationale for the finding of invalidity as to the MMPI results (TR 700-2, 860, 871). It is clear from their testimony that the primary basis for the conclusion was what is known as the F-K scale, a standard "test" among professionals; if the reading is above a certain number, the result, as a whole, can be deemed suspect (TR 338, 700, 590-1, 608, 655-8, 688-9). Dr. David, a psychologist who had examined Henderson in regard to his 1982 Putnam County murders, expressly testified that Dr. Pollack's finding of invalidity as to the MMPI was "not outside the realm of professional competence" (TR 655). Additionally, both Dr. David and Dr. Hampton, who had also examined Henderson in 1982 in regard to his competence to stand trial in regard to the Putnam County murders, stated that they adhered to their original findings of competency, despite any "newly-learned" information, including the MMPI administered by the defense expert in 1987 (TR 485, 535, 647, 691). Both doctors also agreed that while the more background information the better, reasonably competent mental health professionals could differ as to how much was enough (TR 530, 647-8). Significantly, while Dr. David indicated that, had he been Dr. Pollack, he might have done more investigation after concluding that the MMPI was invalid, the doctor, despite being shown the MMPI administered by the defense expert in 1987, still adhered to his original diagnosis (TR 671-2, 677, 691); of course, it must be recognized that no subsequent doctor evaluating Dr. Pollack's competence, could truly "know" the extent of information which the psychiatrist possessed in 1982, inasmuch as the doctor expressly stated that his files did not contain all information, as he had received phone calls from

defense counsel (TR 280, 301).

In short, Henderson's entire premise, that he is "mentally ill" and that his court appointed expert was ineffective for failing to so conclude is fallacious. Robert Dale Henderson has a personality disorder, not a strange phenomenon when one considers how many persons he has killed, and his competence cannot seriously be questioned. Because it cannot be said that Henderson's sanity at the time of the offense was a significant factor at trial, or that the state presented psychiatric evidence in aggravation at sentencing, Henderson's reliance upon Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) would seem misplaced. See also, Bush v. Wainwright, 505 So.2d 409 (Fla. 1987). The weight of the testimony presented by mental health experts was to the effect that Henderson was not psychotic, did not suffer from brain damage, organic or otherwise, and was not significantly paranoid (TR 357). Similarly, the weight of mental health expert testimony below was to the effect that a reasonable, competent mental health expert, knowing what Dr. Pollack did, could have concluded that the MMPI administered to Henderson was invalid. Henderson's fixation with this one aspect of the mental evaluation, however, is improper. As even its proponents recognize, the MMPI is just one test, and Dr. Pollack's ultimate conclusion regarding Henderson's competence is in accordance with the other doctors who examined him closest in time to the incident, as well as with the CAT scan results taken at such time. The fact that a subsequent "expert" now offers a diagnosis of, inter alia, "diffuse organic brain damage", (TR 204), hardly seems to invalidate the prior findings of competency. See, Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987); Stano v. State, 13 F.L.W. 167, 168 (Fla. Feb. 25, 1988) ("That [the defendant] has now found experts whose opinions may be more favorable to him is of no consequence").

In Bush, the Florida Supreme Court rejected a claim of incompetence and "professionally inadequate psychiatric evaluation", noting that there was no evidence that the defendant had lacked the sufficient present ability to consult with and aid

his counsel in the preparation of a defense with a reasonable degree of understanding, no evidence that the defendant was incompetent to stand trial and no evidence of any "long psychiatric history indicating incompetence"; the court further observed,

> The report prepared by a newly appointed expert offers only weak support to Bush's claims. The numerous psychological problems now pointed out, such as learning diabilities, a passive and dependent personality and a possible 'diffuse organic brain damage' do not, when taken together, sufficiently raise a valid question as to Bush's competence to stand trial. Id. at 411.

A similar result is warranted sub judice. Additionally, in light of defense counsel's testimony as to his **good** relations with Henderson and his lack of any problems in communication, it would seem, again, that the defense "expert"'s testimony regarding Henderson's alleged difficulty in aiding his defense is expressly refuted by the record. See also, James v. State, 489 So.2d 737 (Fla. 1986) (some disinclination not to assist counsel, as opposed to inability, not sufficient to constitute incompetence to stand trial). No relief is warranted.

POINT IV

HENDERSON HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT EITHER THE GUILT OR PENALTY PHASE.

In his pleadings, Henderson has contended that he received ineffective assistance of counsel, both at the guilty and penalty phases, due to counsels': (a) failure to present a defense of intoxication; (b) failure to present a defense based upon mental incompetence and (c) failure to investigate and present sufficient background information in mitigation at sentencing and/or evidence as to the statutory mitigating circumstances. These contentions are refuted, if not positively shattered, by the record, as evidenced by the testimony of the defense attorneys themselves.

Henderson was represented by Public Defenders Jack Springstead and Michael Johnson, assisted by Investigator David

Franklin. Springstead testified that he requested that Henderson's competence to stand trial, as well as his competence at the time of the offense, be evaluated, although he really had no question in his own mind as to his client's competency (TR 391-2, 439); the attorney stated that he recognized insanity as a potential defense in almost any case, which needed to be considered, especially if certain signs or symptoms exhibited themselves (TR 392-3, 480-1). Springstead also testified that he saw no indications that Henderson was incompetent to stand trial or to assist in his defense, the attorney stating that Henderson readily discussed anything about the offense which he wished to know (TR 401-2, 405, 772). Springstead did indicate, however, that Henderson was not inclined to divulge information as to his family, stating that he did not want them involved, and if they were contacted, they would have nothing good to say about him (TR 757, 765, 777, 807). He also said that Henderson, contrary to his advice, had turned down a plea offer of life imprisonment, given his desire not to be in general population, but to be on death row, a decision explainable in part by Henderson's predicament, i.e., the number of pending jurisdicitons which wished to prosecute him (TR 424, 448-9, 450-1, 452, 798). According to Springstead, Henderson rejected the plea so that he could pursue his appellate remedies in regard to the denial of his suppression motions and because he felt that should he receive a death sentence, which would not be carried out in the near future, he could escape extradition to the other states, who would lose interest in prosecuting him (TR 798, 800-1).

Springstead stated that the state's case against his client was extremely strong, and that the evidence, including Henderson's detailed confessions, was inconsistent with any defense based upon intoxication or incompetence (TR 802-5, 845); both such defenses would have necessitated calling Henderson as a witness, something which the defense wished to avoid, given the fact that Henderson could make the case worse, by testifying, in accordance with his prior statements, as to how he had completely intended to kill the victims when he shot them (TR 805-6, 826).

As to the evidence in mitigation, Springstead stated that he had called a reporter to testify at the penalty phase, who had presented testimony as to Henderson's background, with the advantage that the state could not cross-examine her as to the evidence related or seek to present less favorable aspects of Henderson's past, which he had not divulged to her (TR 807-9). Counsel also reiterated that the defense had not been "bound" by Henderson's flat refusal to have his family contacted as to background, but had attempted to secure similar information through other sources, including his Wyoming parole officer, whose testimony, however, would have done more harm than good (TR 809-10, 814-16). He also provided an explanation for the supposedly "irrational" incidents in the jail (TR 810-14).

Springstead's testimony was in accordance with that of Attorney Johnson and Investigator Franklin. Michael Johnson stated that he had primarily been responsible for the penalty phase and that he had worked in capital litigation immediately prior to the trial (TR 878-9). He testified that he was familiar with the statutory mitigating circumstances and that he had conversed with all three doctors who had examined Henderson, Drs. David, Hampton and Pollack, to see if they could provide any helpful testimony in the penalty phase, as to either statutory or non-statutory mitigation (TR 440, 747, 768, 881-2, 884-5, 902, 917). He stated that Henderson himself, despite explanation as to why such would be helpful, had refused to provide detailed information as to his own background, stating that such would not be helpful (TR 883, 885, 907, 919); there was testimony that the doctors who were contacted would have presented information positively harmful to the defense, i.e., one doctor offering his opinion that Henderson was the "purest sociopath" he had ever seen (TR 917-18). Johnson testified as to the attempts to locate favorable witnesses at the Wyoming prison and/or at the parole and probation office, noting again that Henderson's parole officer would have provided information in support of additional aggravating circumstances, as opposed to anything favorable (TR 886, 919-921). Johnson testified that he likewise considered

intoxication as a defense or mitigating factor, but found it inconsistent with the facts of the case and difficult to prove, given the necessity of putting Henderson on the stand, a risk which he did not wish to take (R 900-1, 894, 922, 923). Further, he stated that they had no "expert support" for any insanity defense, and that he had no doubts as to Henderson's competence to stand trial (TR 904, 906, 922). Johnson said that, in view of the state's evidence, any school records, which would have shown Henderson to be a poor student, or military records, which would have shown him to have been dishonorably discharged, would not have helped the defense at the penalty phase (TR 924, 925).

David Franklin, Chief Investigator for the Public Defender's Office, testified that one of his duties was to interview clients and make an evaluation as to whether a mental health expert should be appointed or, eventually, a defense raised based upon mental state (TR 939, 962). Franklin stated that in his initial interview with Henderson, the defendant had claimed that he had blacked out at the time of the murders from alcohol, but that he had subsequently changed his story, going into great detail as to how the crimes were committed; Franklin stated that it was not unusual for clients, in their first interview, to give statements inconsistent with their latter accounts, and to seek to bring forth "defenses" which eventually did not pan out (TR 942, 94, 955-6). It was Franklin's opinion, from the detail in which Henderson described the crimes, that he was neither intoxicated nor mentally incompetent at the time he had committed them (TR 942, 944, 955-6). Franklin testified as to his unsuccessful attempts at obtaining background information from Henderson, as well as the defense attempts to secure witnesses in that vein, such as the Wyoming parole officer (TR 948, 951-3, 977-8); Franklin stated that he explained to Henderson the value of "humanizing" background information, but that the latter had simply said that he did not wish his family involved, that they did not know him that well and that they would not have anything good to say about him (TR 949-950, 961, 976). He also testified as to Henderson's preference for death row, given his unfavorable

impression of "general population", following his sentencing in the Putnam County cases (TR 954-5). Franklin likewise testified concerning his conversation with Drs. Hampton and David, as well as to the fact that their testimony would not have been helpful (TR 957-9). The investigator also stated that Henderson had never indicated that he suffered any physical trauma, and that even should he have had a childhood accident, such might not be relevant unless he had aftereffects, which, from the mental evaluations, there had apparently not been (TR 965-7, 984-5).

It should be clear from the above that the defense investigated every possible defense, not contradicted by the evidence, and made reasonable tactical choices as to how to proceed. Insanity was considered, but no mental health expert would support it. Similarly, intoxication was belied by the detail in which Robert Dale Henderson had confessed, as well as the manner in which the victims were killed. Attempts to secure background information from Henderson's family for use at the penalty phase were frustrated by Henderson's own opposition, yet the defense, to its credit, was able to elicit some testimony through a reporter, and sought further information which it did not use, due to its unfavorable nature. Additionally, Henderson himself indicated repeatedly that his family's testimony would not be helpful, and nothing in this record suggests that he was inaccurate in that assessment, given the contents of his military records. The conclusion has to be not that defense counsel was ineffective, but that Robert Dale Henderson left his attorneys very little to work with. It is difficult to see how Henderson can be said to have made **any** showing under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or Downs v. Wainwright, 453 So.2d 1101 (Fla. 1984). The adversarial process worked in this case, and it is clear that Attorneys Springstead and Johnson made strategic choices after as complete an investigation as circumstances, including their client's attitude, allowed. Given Robert Dale Henderson's continued statements that his family would not be helpful in his defense, the following quotation from Strickland would seem

appropriate,

> And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. Strickland at 692.

The state suggests that Henderson has also, of course, failed to show any prejudice or unreliability in regard to the verdicts and sentences below, a difficult task given the overwhelming evidence of guilt and that in aggravation as to the death sentences, and the implausibility of the "defenses", which Henderson now claims should have been asserted. See, McCrae v. State, 510 So.2d 874 (Fla. 1987) (no ineffective assistance of counsel due to counsel's failure to present more psychological evidence in mitigation, where attorneys stated that such evidence would not have been helpful, and might have been harmful; likewise, no ineffectiveness for failing to present school records showing below average intelligence, where psychiatric reports contained similar information); Scott v. State, 513 So.2d 653 (Fla. 1987) (counsel not ineffective for failing to present defense inconsistent with trial theory and physical evidence); Blanco v. Wainwright, 517 So.2d 1377 (Fla. 1987) (counsel not ineffective for failing to investigate defendant's background further, where such investigation would have revealed "substantial derogatory material" and client uncooperative; similarly, no ineffectiveness in failing to raise incompetency as a defense where defendant "gave every appearance of competence" and alleged "fits" had ended in early childhood); Daugherty v. State, 505 So.2d 1323 (Fla. 1987) (no ineffective assistance of counsel, where counsel considered calling psychiatrists at penalty phase, but concluded that such would not be helpful, relying instead upon lay witness to present testimony as to defendant's background); Bush v. Wainwright, 505 So.2d 409 (Fla. 1987) (counsel not ineffective for failing to present incompetency defense, where no evidence supported such, despite later expert's testimony as to "difuse organic brain damage"); Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986) (counsel not

ineffective for allegedly inadequately investigating defendant's background, where character evidence was presented and where "more complete knowledge of defendant's childhood circumstances, mental and emotional problems, school and prison records" unlikely to have influenced judge and jury); James v. State, 489 So.2d 737 (Fla. 1986) (counsel not ineffective for failing to present further "character" evidence, where such would only have opened the door for the state to have exposed details of defendant's criminal record); Groover v. State, 489 So.2d 15 (Fla. 1986) (counsel not ineffective for failing to raise intoxication defense, where such reasoned strategic choice, due to inconsistency of such defense with that presented); Booker v. State, 441 So.2d 148 (Fla. 1983) (counsel not ineffective for failing to properly present insanity defense and/or supplying greater information to experts, where experts had sufficient information to make evaluations; presentation of second degree murder defense, an alternative to insanity, reasonable under the circumstances, given strength of the state's evidence). No relief is warranted as to this claim.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the state moves this honorable court to deny all requested relief.

Respectfully submitted,

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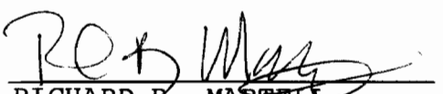
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by delivery to Billy Nolas, Esquire, Capital Collateral Representative, at 1533 South Monroe Street, Tallahassee, Florida 32301 this 6 day of April, 1988.

Richard B. Martell
Of Counsel