IN THE SUPREME COURT OF FLORIDA

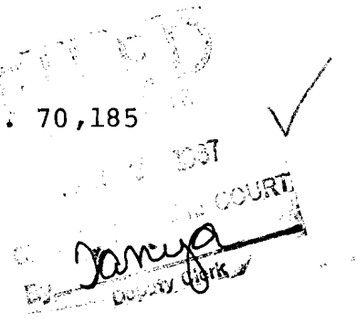
TED HERRING,

Appellant,

v. CASE NO. 70,185

RICHARD DUGGER,

Appellee.



RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW respondent, the State of Florida, and, pursuant to this court's order to show cause dated March 19, 1987, hereby responds to the petition of Ted Herring as follows:

I. **JURISDICTION.** Respondent does not dispute the jurisdiction of this court to entertain a petition for writ of habeas corpus grounded upon a claim of ineffective assistance of appellate counsel alleged to have occurred before this court.

II. **STATEMENT OF FACTS.**

A. **FACTS OF THE CRIME AND TRIAL.**

Respondent disagrees with some of the factual representations presented in Herring's initial petition, as either conclusory or unsupported by the record. In the interest of brevity and clarity, respondent discusses relevant areas of disagreement along with respondent's discussion of the issues to which the facts pertain. In general, respondent relies upon the facts as summarized by this court in Herring v. State, 446 So.2d 1049 (Fla. 1984), which is attached hereto for the convenience of the court as Appendix "A".

B. **FACTS RELATING TO THE DIRECT APPEAL.**

As noted above, Mr. Herring's case was reviewed by this court, and opinion was issued at 446 So.2d 1049. Herring's appeal was prosecuted by Michael Becker of the Public Defender's Office. Mr. Becker's initial brief, served October 15, 1982, is provided as Appendix "B". The answer and reply briefs constitute Appendix "C" and "D", respectively. The opinion, affirming Herring's conviction and sentence, is dated February 2, 1984.

C. **SUBSEQUENT PROCEEDINGS.**

Herring, having engaged his present private counsel, filed a motion for post conviction relief, including ineffective assistance of trial counsel. This court affirmed denial of relief on December 30, 1986. Herring v. State, 501 So.2d 1279 (Fla. 1986). Rehearing was denied March 2, 1987. No death warrant has yet been signed for Mr. Herring.

III. NATURE OF RELIEF SOUGHT. Respondent contends that the allegations of the petition are either refuted by the record or on their face do not warrant any relief.

IV. REASONS FOR DENYING THE WRIT. Herring claims he was denied effective assistance of appellate counsel in the direct appeal of his conviction because Attorney Becker failed to raise certain claims, and because he inadequately argued those he did present. Needless to say, the mere fact that Mr. Becker did not succeed in his arguments does not render him "ineffective," nor does his tactical judgment in choosing to raise only certain issues he wished to emphasize. In fact, to respondent's knowledge, Mr. Becker has been successful in every other death penalty case he has pursued. See, Ramos v. State, 496 So.2d 121 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Teffteller v. State, 439 So.2d 840 (Fla. 1983); Jennings v. State, 413 So.2d 24 (Fla. 1982). Petitioner correctly relates the standard for judging effective assistance of counsel, based upon Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Strickland standard applies to appellate counsel. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985). Under Strickland, Attorney Becker is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 104 S.Ct. at 2066. Consequently, respondent addresses first the issues raised by Attorney Becker, and then considers why he may have decided to exclude others. In addition, respondent suggests Herring suffered no prejudice.

A. **ISSUES RAISED IN HERRING'S INITIAL APPEAL AND CONSIDERED BY THIS COURT.**

1. JUROR CAMERON AND THE WITHERSPOON ISSUE.

Herring contends that Becker's eleven pages in his initial brief were insufficient to apprise the court of his position that juror Cameron should not have been excluded, based on Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 776 (1968). He then selectively presents juror Cameron's colloquy with the court, reiterating exactly what Attorney Becker quoted, but less forthrightly. While Mr. Becker included **all** of Cameron's responses in making his argument, Herring's present counsel apparently feels it better appellate practice to ignore the facts detracting from his position, and proceed as if they don't exist. Herring excludes statements of Cameron's such as "I'd have difficulty keeping an open mind," (TR 206)*; "I'm sure I would not recommend the death penalty," (TR 209); and his responses to questions such as

> A. ...the way you feel right now, there are no circumstances whatsoever that you would be able to recommend the death penalty?
>
> A. That's true. (TR 207)

Herring's present exclusion of Cameron's responses such as these is particularly incredible in view of this court's emphasis upon such responses in deciding the issue. See, Herring v. State, 446 So.2d at 1053-1054. While this is not an appropriate forum to reargue the merits, respondent points out that this court's skepticism of Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), in rejecting Herring's argument initially [see 446 So.2d at 1055], was amply vindicated by Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Wainwright v. Witt, respondent submits, makes this once-rejected claim virtually frivolous at this point[1].

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*The record available to respondent is apparently paginated differently than that of petitioner. The record citations used herein are referenced as follows: ROA-Record on Appeal; TR-Trial Transcript; SUPP (date)-Suppression Hearing (date); SR-Sentencing Proceeding.

[1]Herring's focus on the **standard** for juror exclusion in Witt misses the point of the case. The holding of Witt in reversing the Eleventh Circuit was that the trial court's judgment in deciding whether the standard was met is accorded due deference, making Witherspoon questions factual rather than legal issues.

Herring continues by criticizing Attorney Becker for quoting passages verbatim from relevant cases. In respondent's view, verbatim quotation is particularly appropriate in dealing with a Witherspoon issue, since the **exact** language of questions and answers in prior cases is crucial. That language, along with the holding of the court, is what Mr. Becker presented. Illogically, Herring also complains that Becker's treatment of Burns v. Estelle, was inadequate because he "should have set out the facts and the holding of the case." (Petition, p. 28-29). Apparently, this again reflects the view of present counsel that it is better to present the court with counsel's own distilled version of the facts and holding rather than quoting the actual language. With due respect, Mr. Becker's method is considerably more reliable.

Herring also criticizes Becker's attempt to expand the coverage of Witherspoon, or, more specifically, Cameron's exclusion, to argue in favor of a new trial as well as sentencing. This is not a criticism. Becker's attempts anticipate Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), probably the most fundamental attack on modern day death penalty cases. Further, Herring inexplicably overlooks Becker's reply brief, in which Mr. Becker makes clever use of Florida statutes, with Witherspoon intertwined, to extend juror exclusion into a new trial issue. Had Grigsby[2] prevailed, or this court been inclined to accept Mr. Becker's interpretation of Florida statutes, the limited position Herring's counsel now advocates would have been disastrous - perhaps even ineffective assistance.

2. WHETHER ATTORNEY BECKER ADEQUATELY ARGUED THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED.

Respondent perceives nothing material added to this issue by Herring's present counsel, although his discussion is, admittedly, longer. In Mann v. State[3], the only evidence of premeditation lay in the nature of the killing - by stab wounds

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[2]Grigsby was recently rejected in Lockhart v. McCree, 106 S.Ct. 1758 (1986).

[3]402 So. 2d 578 (Fla. 1982).

or a crushed skull. While this would take longer than a single gunshot, there was no evidence that Mann, a psychotic with paranoid feelings of rage and pedophilic urges, had engaged in cold or calculated premeditation. To the contrary, the murder seemed more likely committed as a result of rage or emotional disturbance. In any event, the state's evidence, consisting solely of the nature of the murder, failed to prove it was cold and calculated. In Herring's case, on the other hand, Herring deliberately prepared himself for murder in the event the robbery was resisted, and deliberately shot the victim a second time in a cold, calculated effort to kill him.

Likewise, Herring's suggestion that Attorney Becker should have more closely "compared the facts" of McCray v. State, 416 So.2d 804 (Fla. 1982), fails to reveal any ineffectiveness. Typically, Herring's present comparison overlooks the crucial fact of McCray: it is a jury override case. While the case does provide a good **general** statement in Herring's favor (as Attorney Becker cited), too close a comparison of **facts** does not assist him. Essentially, the case held that "given the circumstances of this case, the jury's recommendation of a life sentence is not unreasonable..." . McCray does not suggest that "cold, calculated, and premeditated" could **not** have been found, had the jury returned a verdict of death. Herring's jury returned a verdict of death.

The premeditation issue in this case was already considered by this court in the direct appeal, including a dissent in Herring's favor. The writ of habeas corpus is not a vehicle for re-argument of issues which have been raised and ruled on by this court. Routly v. Wainwright, 12 F.L.W. 101 (Fla. Feb. 12, 1987). Attorney Becker's decision not to belabor the point does not undermine confidence in this court's analysis or result[4].

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[4]Respondent notes Mr. Becker also argued that Herring's action could not be said to be "without any pretense of moral or legal justification," (see Reply Brief, p. 11-12), since there was some evidence Herring might have thought he was defending himself. Becker's treatment of this argument is not discussed by petitioner.

3. WHETHER ATTORNEY BECKER ADEQUATELY ARGUED THE AGGRAVATING FACTOR OF AVOIDING LAWFUL ARREST.

Attorney Becker's argument on this issue appears at pp 23-28 of his initial brief, (Exhibit "B"), and pp 10-11 of his reply brief (Exhibit "D"). Once again, respondent suggests there is no material distinction between the argument as presented by Becker, and Herring's proposed approach. His introductory paragraphs parallel that of Becker's, although Becker is somewhat more precise in his statements.

Herring agrees that the evidence supporting the witness elimination factor was (1) Herring shot the victim a second time while he lay helpless on the floor, and (2) Herring admitted he shot the victim a second time to prevent him from being a witness against him. It is rather obvious, given these two facts, that witness elimination is a sustainable finding no matter what argument is made, or by whom. Becker did argue that Varner's statement was unreliable, (p. 25-28), and did contend there was insufficient evidence that witness elimination was the "dominant or only motive" for the killing (p. 11, Reply Brief). Nothing he could have said would have changed the facts.

Herring's criticism of Mr. Becker once again centers upon his present counsel's view that certain facts should be taken out of context and emphasized. No matter how many times counsel repeats "by mistake" and "out of fear," the factual findings of the court do not change. Furthermore, the context of the "mistake" and "fear" reveal that Herring's claim of "mistake" is rather weak: when the victim put up his hand in a defensive gesture, Hering shot him "by mistake" because "...I meant to just put the gun to his head not for it to go off." Herring's statement of "fear" is completely consistent with a "fear" of lawful arrest. It is difficult to conceive of any other motive for the second deliberate shot in the head, once the victim was already lying unconscious on the floor. In sum, Herring's taped confession is completely consistent with his statement to Varner. There were no legal grounds requiring that Varner be disbelieved, no matter how extensively Mr. Becker (or present counsel) argued the facts.

4. FAILURE TO FILE SUPPLEMENTAL AUTHORITY.

Herring claims his counsel provided ineffective assistance, to his detriment, because he failed to alert this court to its own decisions. Respondent suggests it is within the realm of competent counsel to assume this court is aware of opinions it issued two weeks earlier. All justices sign all opinions; there are not even two panels deciding cases independently of each other. In any event, especially since this court is acutely aware of prior cases for their independent proportionality review, the failure of appellate counsel to supply copies of this court's own opinions could not have prejudiced Herring, since this court is, in fact, cognizant of its own opinions.

B. ISSUES NOT RAISED BY APPELLATE COUNSEL.

Herring contends his appellate counsel provided ineffective assistance because he failed to raise five issues: (1) admissibility of the probation officer's testimony in the penalty phase; (2) admissibility of Herring's confession; (3) improper "doubling up" of two aggravating factors relating to the same fact; (4) the adequacy of the jury instructions; and (5) an allegedly improper comment by the prosecutor. Respondent first points out that three of these issues [(3), (4), and (5)] were procedurally barred from appellate review by lack of objection in the trial court; counsel is not ineffective for failing to raise issues barred by lack of objection. Routly v. Wainwright, 12 F.L.W. 101 (Fla. Feb. 12, 1987); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). Respondent discusses these issues first.

1. IMPROPER "DOUBLING UP" OF AGGRAVATING FACTORS.

This court has held repeatedly that the aggravating factors of witness elimination and "cold, calculated and premeditated" can co-exist. See, e.g., Cooper v. State, 492 So.2d 1059 (Fla. 1986); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Pope v. State, 441 So.2d 1073 (Fla. 1983). While cold, calculated, premeditated goes to the **manner** of the crime, witness elimination goes to the **motive**. A cold, calculated murder can be committed for various motives: misguided love, pecuniary gain, or, as here, witness elimination. Some motives are more culpable than others, and can

constitute an additional aggravating factor on their own. For example, in Michael v. State, 437 So.2d 138 (Fla. 1983), a cold, calculated murder was committed for pecuniary gain. Both the manner and the motive were aggravating factors. In Harvard v. State[5], on the other hand, a cold, calculated murder was committed out of misguided love. While the manner could be considered in aggravation, the motive could not. Herring's manner in deliberately firing a shot into the head of a helpless victim laying on the floor was cold, calculated and premediated irrespective of his motive. If he administered this "coup de grace" shot for no motive other than a thrill at killing, it would still be cold, calculated murder. In addition, Herring was motivated in his crime by a specifically recognized factor: witness elimination. Appellate counsel could reasonably conclude these are separately culpable factors. In addition, while the witness elimination finding was based exclusively on the second shot, the finding of premeditation relates to the first shot as well. Appellate counsel's argument against premeditation, consequently, sought to persuade the court that the first shot, which transversed the victim's hand, was an unplanned, perhaps defensive, reaction. (Initial Brief, pp. 28-30; Reply Brief, pp. 11-12). Attorney Becker's argument against the second, "witness elimination," shot pertained to the credibility of Varner's statement. Herring's present approach does not address the first shot at all, and would permit separate factual findings to support each factor. Accord, Provenzano v. State, 497 So.2d 1177, 1183-4 (Fla. 1986).

In sum, given that these two factors have never been held mutually exclusive, the failure of counsel to argue their inappropriateness is not measurably below the performance expected of competent counsel. Not every conceivable issue need be raised, or even occur to counsel, in order for him to render reasonably effective assistance. Hardwick v. Wainwright, 496

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[5]375 So.2d 833 (Fla. 1977), appeal after remand (for Gardner resentencing), 414 So.2d 1032 (Fla. 1982).

So.2d 796 (Fla. 1986). Given the unlikelihood of success of this argument, counsel could choose not to raise it in the absence of objection below, and Herring was not prejudiced by its omission.

4. THE ADEQUACY OF THE JURY INSTRUCTIONS.

There was no objection to the adequacy of the jury instructions as now argued by Herring. See, (sentencing, SR 796-7; SR 815-823). It is not ineffective assistance of appellate counsel to fail to attack the standard jury instructions, especially when there was no objection at trial. Martin v. Wainwright, 497 So.2d 872 (Fla. 1986); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). Herring misconstrues the meaning of this court's opinion in Herring v. State, 501 So.2d 1279 (Fla. 1986) when he asserts the court said **appellate counsel** could have raised the issue. The point of Herring v. State was that **Herring** could have raised the issue, by appropriate objection in the trial court[6], and subsequent appeal.

5. IMPROPER COMMENT BY PROSECUTOR.

Appellate counsel cannot be considered ineffective for failing to argue the impropriety of a prosecutor's comment where there was no objection at trial. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). As Herring's present counsel notes, Attorney Becker did successfully argue against this same comment in Teffeteller v. State, 439 So.2d 840 (Fla. 1983). In Teffeteller, the error alleged was the court's **denial of a motion for mistrial** and refusal to give a cautionary instruction. In the absence of an objection and motion by trial counsel, there is simply no error for appellate counsel to argue; any impropriety by the prosecutor has been waived. Clark v. State, 363 So.2d 331 (Fla. 1978). Mr. Becker's decision to forgo this issue was sound, and cannot be the basis of a claim of ineffectiveness. Davis v. Wainwright, 498 So.2d 857 (Fla. 1986)

6. ADMISSIBILITY OF THE PROBATION OFFICER'S TESTIMONY.

Of the five issues Attorney Becker "failed to raise," two

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[6]The claims to which the court referred were raised as substantive issues, not in the context of ineffective assistance of trial counsel.

had related objections in the trial court. Herring first contends that Mr. Becker should have argued the testimony of Mary White, the probation officer, was inadmissible. The testimony, at the time of this trial, was admissible as evidence of the heinous, atrocious, and cruel factor. See, Pope v. State, 441 So.2d 1073 (Fla. 1983) (disallowing lack of remorse prospectively). The trial judge, while judging the issue "close," found this statutory aggravating factor inapplicable[7] (R 74). The testimony, therefore, did not affect Herring's ultimate sentence or sentencer. It is not ineffective to decline to dilute more valid issues by advocating a point which, even if accepted, would not change the result. Bush v. Wainwright, 12 F.L.W. 116 (Fla. Feb. 26, 1987).

Herring begins his discussion of this issue by asserting that the probation officer's testimony was prejudicial beyond its evidentiary value because of the term "cracker." Respondent seriously questions whether an ordinary, rational jury is suddenly converted into an impassioned lynch mob simply by use of this term. While petitioner apparently views the term as having some special impact, respondent perceives little distinction between the statement "just one less cracker" and, for example, "just one less seven-eleven clerk." Assuming petitioner is referring to a geographic connotation, as in "Florida cracker" or "Georgia cracker," respondent points out that most juries are composed of people who moved to Florida from somewhere else. The jurors who revealed their point of origin in this trial were from Cleveland, Ohio (Felicia Wroniak); Washington, D.C. (Rilla Painter); Pennsylvania (Alice Reede); Michigan (Thelma Crawford); Maryland (Elvira Newcombe); and New Jersey (Lorraine Flannagan) (TR 65-181). Mrs. Flannagan was still a consultant to the business she sold in New York. These are not persons "inflamed" by the term "cracker."

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[7]The prosecutor abandoned this factor in her closing argument, which she perhaps need not have done. See, e.g., Huff v. State, 495 So.2d 145 (Fla. 1986) (victim's upraised hand indicating knowledge of impending death).

Herring offers two grounds which he believes rendered the testimony inadmissible: a purported Miranda violation, and lack of discovery under Rule 3.220, Florida Rule of Criminal Procedure.

Herring bases his Miranda argument upon Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which held that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) applied to a defendant's in-custody interrogation by a court-appointed psychiatrist for competency determination. Herring asserts that Estelle v. Smith applies to him because Mary White, a probation officer, questioned him while he was in custody awaiting arraignment, and her questioning was not preceded by Miranda warnings (Petition, p. 4). As a record citation for these assertions, Herring provides "Supp. at 777-778." (Petition, p. 4). Not one of his factual conclusions appears on these pages, except the fact that Mary White was a probation officer. The pertinent pages are attached hereto as Appendix "E". There is no factual allegation in evidence that Herring was "in custody" at the time he spoke with Ms. White, although he was **at** (not "in") the jail. California v. Behler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). There is no factual allegation that Ms. White was questioning or interrogating Herring, rather than simply conversing in the hall with someone she knew. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In fact, there is not even any factual basis from which an appellate court could conclude Herring was **not** given Miranda warnings. Nobody **asked** Ms. White if Miranda warnings were given, or established they were necessary[8]. Appellate counsel could not possibly have sustained

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[8]This is not merely a technical argument by respondent. From all indications, Mary White would have no reason whatever to be questioning or interrogating Herring. White was a "pretrial intervention" probation officer (sentencing, SR 22; "Supp. at 777"). It is unclear when in June, 1981, she had this conversation with Herring; after his confession(s), Herring certainly was not being considered for PTI. Pre-trial intervention officers are frequently at the jail, and it would not be unusual for Ms. White to have an incidential conversation with Herring upon meeting him there.

an argument based on Estelle v. Smith, or any other case, without the requisite facts in the record. There is no ineffectiveness in declining to present arguments based on sheer speculation or "facts" without record support. Davis v. Wainwright, 498 So.2d 857 (Fla. 1986); see also, Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).

Attorney Becker could have raised an argument which is supported by this record, and which was preserved by an objection:

> MR. QUARLES [DEFENSE COUNSEL]:...Mary White, who is a Probation and Parole Officer, and I'd object to that admission being testimony along those lines, on the grounds that I don't have any evidence or showing that he was advised of his constitutional rights. (Sentencing, SR 3)

This is a somewhat different issue than Estelle v. Smith. There are certain circumstances when a defendant's statements cannot be admitted against him, unless he was first advised of his constitutional rights; under these circumstances, the state must establish a predicate for admissibility, to-wit: Miranda warnings. Defense counsel here raised a predicate objection, claiming that the state must first show Miranda warnings were given before the probation officer's testimony is admissible.

Appellate counsel could reasonably forgo this argument as well. Miranda warnings are not a necessary predicate for admitting a defendant's statements against him unless the statements were obtained by an agent of the state during custodial interrogation. See generally, Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); Rhode Island v. Innis, supra.; California v. Behler, supra. The burden is upon the **defendant** to demonstrate Miranda warnings were necessary. U.S. v. Charles, 738 F.2d 686 (5th Cir. 1984). Unless the defendant alleges facts showing his statements were the product of custodial interrogation, there is no requirement that the state

show Miranda warnings were given[9]. U.S. v. Charles; see also, Garcia v. State, 492 So.2d 360, 365 (Fla. 1986). Since there is nothing in this record to support the argument that Miranda warnings were necessary, counsel need not raise the argument.

Additionally, this record affirmatively demonstrates Herring was advised or reminded of his Miranda rights at least four or five times on June 12, 1981 (SUPP Jan. 15, 1982, 6; 11-13; SUPP Jan. 22, 1982, 6; 26). Assuming White spoke to him on that day or shortly after, "there is no necessity to continually re-advise an individual in custody as to his Miranda rights." Deluca v. State, 384 So.2d 212 (Fla. 4th DCA 1980). In Maguire v. U.S., 396 F.2d 327 (9th Cir. 1968), "Office Hammond's [Miranda] warning...came three days before the interrogation of Appellant by agent Turnage; thus, even if the warning given by Turnage was insufficient, the appellant could not claim he had not been apprised of the Miranda warnings." 396 F.2d at 331. In Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975), Miranda warnings given nearly two weeks earlier were held sufficient. Without more facts surrounding the time, place and circumstances of Herring's statement to White, there are no grounds to argue error, either in the direct appeal or now[10].

Herring's second ground for excluding the probation officer's testimony is a purported lack of notice. He asserts the state offered the testimony "without prior disclosure to Herring's trial counsel of the identify of the probation officer" or the substance of her testimony. (Petition, p. 12). This allegation demonstrates a regrettable lack of candor on Herring's part. The state responded to all discovery requests of counsel,

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[9]As pointed out supra, there is no indication in this record that Miranda warnings were **not** given. The record reveals, and the only objection was, that Herring's statement was admitted without first proving them.

[10]This does not mean trial counsel was ineffective for failing to provide a more specific objection. Perhaps, he knew that Mary White did not, in fact, interrogate Herring, and that Miranda warnings were not necessary, or perhaps that they had been given. Under these circumstances, a predicate objection was the best objection available.

see, (ROA 3,4), although an actual witness list is not included in this record. Each side, state and defense, announced all their witnesses (including penalty phase witnesses) prior to the trial. (TR 16-17). This list included Mary White (TR 16). With respect to any federal due process rights, Herring certainly could have spoken to or deposed Mary White; the statement was within his knowledge; White was subject to cross-examination. Machin v. Wainwright, 758 F.2d 1431 (11th Cir. 1985).

With respect to a purported violation of Florida discovery rules, respondent points out that Rule 3.220 has never been strictly applied to penalty proceedings. A defendant has no right to pre-trial notice of the aggravating circumstances. Sireci v. State, 399 So.2d 964 (Fla. 1981); Menendez v. Stae, 368 So.2d 1278 (Fla. 1979). As noted above, Mary White's name was provided to Herring. This satisfies any due process requirement. Whatever is required under Rule 3.220, this court has already allowed an appellate finding of harmless error without need for hearing. Maxwell v. State, 443 So.2d 967 (Fla. 1983). Counsel below did not even ask for any hearing. Since the record affirmatively demonstrates Mary White was disclosed as a witness, it was well within the realm of effective assistance of appellate counsel to omit this issue.

5. ADMISSION OF HERRING'S CONFESSION.

The trial judge, after evidentiary hearing, made a factual finding that the state **did** meet its "heavy burden" under Miranda v. Arizona, and it would have been frivolous for appellate counsel to argue otherwise (ROA 13).

> The ruling of the trial court on a motion to suppress, when it comes to the reviewing court, is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978)

Faced with this burden and the general objection below, there was little appellate counsel could do with this issue.

Herring suggests Attorney Becker should have argued Herring's waiver of rights was ineffective because he was

interrogated regarding crimes other than the auto theft for which he was initially arrested. However, Herring never gave the least indication that he did not wish to be questioned on any other subject. Obviously the initial questioning involved a seven-eleven robbery, since that was the source of the stolen vehicle. Herring was given or reminded of his Miranda rights at least four or five times during his several hours of interrogation. Officers did not need to readvise him every time they became suspicious he had committed another robbery, including the instant murder (Herring admitted to a whole series of seven-eleven robberies).

Re-Mirandizing is not necessary to question a suspect about "any unlimited subjects," including a murder, after he declines to answer questions about a robbery. Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983). As noted above, a defendant does not need to be continually re-advised of Miranda warnings, even if the focus of the questioning is materially changed. U.S. ex rel. Henne v. File, 563 F.2d 809 (7th Cir. 1977). In Henne, new warnings were not required when questioning resumed the next morning, even though Henne was by then suspected of murder, not just escape. 563 F.2d at 814.

Contrary to Herring's assertion, there is no evidence in this record that Herring expressed any disinclination to discuss any crime. Quite the opposite is true: all the testimony repeatedly sustains a finding that Herring was always willing to talk about any crime (SUPP Jan. 15, 1982, 16; 19; 21; SUPP Jan. 22, 1982, 8-9). Merely asking "what he was being charged with" implies no unwillingness to talk about other crimes. The police were perfectly honest in responding that "he was being charged at that time for grant theft..." (SUPP Jan. 15, 1982, 16). In Colorado v. Spring, 107 S.Ct. 851 (1987), Spring was arrested for a firearms violation and advised of Miranda rights; he was then questioned about a murder. Had Spring inquired, just like Herring, "what he was being charged with," the answer would be "you are being charged at this time with a firearms violation." No one mentioned the unrelated murder in Colorado when Spring

signed his waiver of rights for a firearm violation in Kansas. There was no "trickery" in Spring or in this case[11]. Herring, in addition, waived his rights once again to initiate the taped confessions. These waivers are valid. Oregon v. Elstad, 105 S.Ct. 1285 (1985). There was no legitimate argument for Becker to raise on direct appeal, and there is none here.

Respondent additionally points out that appellate counsel was limited on appeal to the specific grounds asserted by trial counsel. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Since this specific ground was not asserted below, (ROA 12), it was not preserved for review, and could not be asserted on appeal.

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[11]Herring's assertion that "the officers...affirmatively told Herring that the interrogation would be limited to a specific charge," (Petition, p. 15, ftnt), is sheer fabrication. The officers told him what he was charged with - nothing more, nothing less.

CONCLUSION

Ted Herring was afforded a thorough review of his conviction and sentence by this court, and was assisted by better-than-average counsel in arguing his claims for reversal. Differences in style or choice of issue can vary from one attorney to the next. Michael Becker's performance did not deprive Herring of his right of appeal, and the issues now argued do not establish a case of ineffective assistence. Respondent prays the writ be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Ellen D. Phillips

ELLEN D. PHILLIPS
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the above and foregoing has been furnished by express mail to, Jeremy G. Epstein, Esquire, counsel for appellant, 53 Wall Street, New York, New York 10005, this 6th day of April, 1987.

Ellen D. Phillips

Ellen D. Phillips
Of Counsel