IN THE SUPREME COURT OF FLORIDA

NO. _____

ROBERT DALE HENDERSON,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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have been admitted. The United States Supreme Court has spoken, and has held that proceedings such as those resulting in Mr. Henderson's capital convictions and sentences of death flatly abrogate what the right to counsel guarantees. Michigan v. Jackson, 106 S. Ct. 1404 (1986). Even on the basis of pre-Jackson standards the Fifth and Sixth Amendment violations in this case are plain. But Jackson has now changed the law and made Mr. Henderson's entitlement to relief undeniable. As will be shown, Jackson now mandates that the Court, revisit this issue, and grant habeas corpus relief.

On direct appeal, this Court denied relief finding only that:

> 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 (1981). However, there is nothing to prevent an accused from changing his mind and volunteering further information. "The stricter standard for showing that an accused has knowingly and intelligently waived a previous request for counsel is met when the accused voluntarily executes a written waiver." Cannady v. State, 427 So.2d 723, 729 (Fla. 1983). In this case Henderson signed written waivers before making the statements in question. We therefore conclude that there is sufficient evidence to support the finding that he knowingly and intelligently waived his right to have counsel present when making these statements.

Henderson v. State, 463 So. 2d 196, 199 (Fla. 1986) (emphasis added). Post-Jackson it is clear that the Cannady analysis applied to Mr. Henderson's case wholly fails to meet the federal constitutional standard:

> [T]he State maintains that [the defendant] made a valid waiver of his Sixth Amendment rights by signing a postarraignment confession after again being advised of his constitutional rights. In Edwards [v. Arizona, 451 U.S. 477 (1981)], however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U.S., at 484, 101 S.Ct., at 1884. We find no warrant

> for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in Edwards was based, in part, on our review of earlier Sixth Amendment cases. Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.

Michigan v. Jackson, 106 S. Ct. at 1410-11 (footnotes omitted) (emphasis supplied).

Jackson makes clear that this Court's prior analysis cannot pass constitutional muster. Robert Dale Henderson's convictions and death sentences were based entirely on statements which the State obtained from him in absolute violation of the Fifth and Sixth Amendments to the United States Constitution, as this petition demonstrates.

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Jackson, 106 S. Ct. at 1410 n.8 (emphasis added), citing, Maine v. Moulton, 106 S. Ct. 477, 479 (1985). The State not only failed to "respect and preserve" Mr. Henderson's right to counsel, it affirmatively flouted it. Jackson did not exist when this Court rendered its opinion on direct appeal. Jackson has significantly changed the law and overruled the Cannady analysis which this Court then applied. Now, post-Jackson, the Court should revisit these issues. A stay of execution and habeas corpus relief are more than proper in this action. It is, in fact, precisely for cases such as Mr. Henderson's that the Court is authorized to issue its Writ of habeas corpus.

Mr. Henderson's petition also pleads other substantial claims for habeas corpus relief. These claims also demonstrate

that a stay of execution and thereafter habeas corpus relief are more than proper.

II. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Henderson's capital convictions and sentences of death. See Henderson v. State, 463 So. 2d 196 (Fla. 1985). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Henderson to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and

reliability of Mr. Henderson's capital convictions and sentences of death, and of this Court's appellate review. Mr. Henderson's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Downs, supra; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Henderson's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Henderson's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Henderson's claim, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and

dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Henderson will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Henderson's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Henderson's petition includes a request that the Court stay his execution (presently scheduled for April 7, 1988). As will be shown, the issues presented are substantial and warrant a stay. This court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert.

denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Henderson's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Robert Dale Henderson asserts that his capital convictions and sentences of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

IV. CLAIMS FOR RELIEF

CLAIM I

MR. HENDERSON WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On February 6, 1982, the Charlotte County Sheriff's Office received a report of an auto burglary in progress. When the responding officers arrived at the scene, Mr. Henderson approached them, told them that he was wanted for murder in several states, and expressed a desire to "give himself up" (R. 1122). Mr. Henderson told the officers that he had a gun, and voluntarily surrendered it to them (R. 1124). The officers ran Mr. Henderson's name through their central computer, and learned

that he was indeed wanted for murder in Ohio (R. 2277). He was taken into custody, arrested, and processed.

Upon Mr. Henderson's return to the Charlotte County Sheriff's Office, he was read his constitutional rights and subsequently interrogated. During the course of this interrogation, Mr. Henderson implicated himself in, inter alia, two Florida murders which occurred in or near Palatka, Florida, in Putnam County (R. 2287). He also referred to three other murders which occurred in some unknown location in North Florida, possibly somewhere around Perry, although he was not sure (R. 2288). Mr. Henderson did not go into any details regarding the latter murders (R. 1156). The interrogating officer later informed Putnam County law enforcement officials of the information regarding the Palatka offenses (R. 2288).

Shortly after the initiation of this interrogation, Mr. Henderson asserted his right to have an attorney present during questioning (Attachment 1, Supplementary Police Report, Feb. 8, 1982). His interrogators at that point called the Public Defender's Office and informed them of Mr. Henderson's wishes, but nevertheless continued questioning until the attorney actually arrived (Id.). When a representative of the Public Defender's Office arrived, questioning was cut off (Id.). Shortly before the cessation of the interrogation, sometime after he had expressed his desire to confer with counsel, and 45 minutes after the interrogation was initiated, the interrogating officers had Mr. Henderson execute a written waiver of rights (R. 1154). This was the first violation of Mr. Henderson's Fifth and Sixth Amendment rights.

Based on the information received from the arresting officers, a Putnam County detective, R. W. Bakker, was dispatched to Charlotte County to question Mr. Henderson about the Palatka area murders. Upon his arrival in Charlotte County, Bakker was informed that Mr. Henderson "wasn't talking to anyone" on the

advice of his attorney (R. 2210, 2221). Bakker then returned to Putnam County, and procured a warrant for Mr. Henderson's arrest based on information received from the Charlotte County officers (R. 2210, 2228-34).

Now armed with a warrant, Bakker returned to Charlotte County on February 10, 1982, to arrest Mr. Henderson and return him to Putnam County. In the company of another Putnam County detective, William Hord, Bakker attended a formal hearing at which custody of Mr. Henderson was remanded to Putnam County (R. 2236). At that hearing, at which Mr. Henderson was represented by counsel, the detectives were presented with a detailed "Notice of Defendant's Invocation of the Right to Counsel," which had been executed by Mr. Henderson on February 7, 1982, the day after his initial arrest (See R. 1702; see also R. 2218, 2236-37, 2266). That document expressly and unequivocally stated that Mr. Henderson had invoked his Sixth Amendment right to counsel, and that thereafter he desired the presence of counsel "before and during any questioning, interrogation, interviewing or other conversation whatsoever between myself and any police agency, prosecutor or agents thereof wherein there is any possibility that anything I say could be used against me." (See Attachment 2, Notice of Defendant's Invocation of the Right to Counsel, Feb. 7, 1982).

During the 5 hour trip from Charlotte to Putnam County, however, the detectives engaged Mr. Henderson in extensive "casual conversations" (R. 2218, 2219). According to Detective Bakker, these conversations, none of which initially concerned any criminal offenses, were "mostly" initiated by Mr. Henderson (R. 2254). They discussed hunting, an avid interest of Mr. Henderson's (R. 2219, 2254, 2269), and Mr. Henderson commented on

several hitch-hikers that they passed en route (R. 2219, 2269).[1] When Mr. Henderson complained of headaches which had been troubling him, causing sleeplessness, they offered him aspirin (R. 2220). They stopped several times to obtain food, drink, cigarettes, and shoes for Mr. Henderson (R. 2246-47). The atmosphere in the car was "friendly" (R. 2264-65, 2275).

From the friendly conversation they continuously engaged in with Mr. Henderson, the detectives somehow intuited that he wished to speak to them regarding the instant offenses, although he had never during the trip referred to any criminal offenses, even obliquely (see R. 2254, 2258). Detective Bakker testified that he "felt" that Mr. Henderson wanted to talk about the murders because of some "subtle comments" he had made (see, R. 2219; see also, n.1, supra), and attributed the headaches Mr. Henderson had complained of to a "bad conscience" (R. 2220). Mr. Henderson throughout the "trip", according to Detective Bakker, "spoke of subjects which led me to believe that he wanted to discuss the offenses" (See Attachment 3, Report of Detective Richard Bakker, Feb. 23, 1982). Detective Bakker understandably had a difficult time explaining just how he knew that Mr. Henderson wanted to talk about the offenses:

> He would just come up close to -- he didn't act, I guess you would say troubled. I couldn't tell that for sure, in his mind, what his mind read.

(Attachment 4, Deposition of Detective Richard Bakker, April 29, 1982).

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[1]Detective Bakker recalled that Mr. Henderson talked about how "dangerous" hitchhiking was, a fact which Bakker found significant because he was aware of prior statements by Mr. Henderson referring to hitchhikers somewhere in north Florida (See R. 2219). Detective Hord, however, who was in the car with Bakker and Mr. Henderson at all times, recalls that Mr. Henderson merely pointed out hitchhikers as they passed, paying particular attention to women, and mentioned nothing about the "dangers" involved in hitchhiking.

Detective Hord could tell from "the look on his [Mr. Henderson's] face" (R. 2260), from "his facial expressions and his physical gestures" (R. 2267), that Mr. Henderson desired to waive the rights which he had so clearly and carefully invoked and preserved and be interrogated by law enforcement. Detective Hord had similar difficulties expressing just what Mr. Henderson had done to lead him to believe that he (Mr. Henderson) wanted to engage in a discussion of the offenses:

> He was basically just uncomfortable. I -- it's hard to put into words, it was -- basically the whole trip he had, he had -- anything he would say, it would be to the point of you know, he would stop just short of what he, what he acted like he wanted to say.

(Attachment 5, Deposition of Detective William Hord, April 29, 1982). "Throughout the trip," according to Detective Hord, Mr. Henderson "had indicated by his actions and comments that he desired to discuss the case." (See Attachment 6, Report of Detective Hord, Feb. 19, 1982).

When the detectives reached Putnam County, Detective Bakker had Hord stop at a local police station, ostensibly so he could check in with his supervisor (R. 1172). While Detective Bakker was inside the station, Hord commenced the interrogation of Mr. Henderson -- the interrogation which, according to the testimony of the detectives, Mr. Henderson had "initiated" by his "facial expressions," unspecified "subtle comments," and "physical gestures" (see, e.g., R. 2219, 2260, 2266-67), the combination of which led them to the inescapable conclusion that Mr. Henderson desired to waive all of the rights he had previously invoked and freely incriminate himself. While alone with Mr. Henderson, Detective Hord, prompted by Mr. Henderson's "facial expressions," asked Mr. Henderson "what are you trying to tell me?" (R. 2259-60, 2267-68). The detectives then produced a waiver form which they had fortuitously prepared in advance for just such an

occasion, and both Bakker and Hord then proceeded to elicit extensive, incriminating statements.

The law enforcement ploys which led to this blatant abrogation of Mr. Henderson's Fifth and Sixth Amendment rights were simple, albeit not at all subtle. The detectives won Mr. Henderson's trust by engaging in hours of innocuous conversation, by plying him with food, drink, and cigarettes, and then by striking suddenly and without warning. The rights which Mr. Henderson and his attorney had so carefully and unequivocally sought to preserve were ignored. Cf. Brewer v. Williams, 439 U.S. 387 (1977). Once the interrogation began, no effort was made to provide Mr. Henderson the opportunity to consult with his (or any) attorney, although the opportunity certainly existed. In fact, as discussed below, Mr. Henderson was informed that he could not consult with an attorney until he actually appeared in a Putnam County court.

Once Mr. Henderson indicated, in response to the interrogation initiated by Hord, that he "thought" he wanted to help locate some bodies (R. 2259), full scale interrogation commenced. Mr. Henderson initially indicated that he would help locate the bodies, but that he would not discuss any details. As explained by Bakker,

> he stressed that he wanted to locate the three bodies and he didn't want to discuss anything with anything with any Hernando officer or with any of us regarding any of the details.

(Attachment 7, Deposition of Detective Bakker, June 29, 1982; see also Attachment 8, Deposition of Detective William Hord, June 29, 1982 ["at that time he was unwilling to be interviewed"]). Despite Mr. Henderson's unwillingness to discuss details of the offense, the interrogation intensified. Detective Bakker stepped in with a time honored, albeit illegal, method -- Bakker began to talk about the need for a "proper burial" (See R. 2259, 2261, 2221, 2226, 2227, 2245; cf. Brewer v. Williams, 439 U.S. 387

(1977)). Whether Bakker had actually never heard of the "Christian Burial technique," as he claimed (R. 2252),[2] he employed it, and employed it effectively.

There is no question but that Bakker and Hord were aware of Mr. Henderson's continuing invocation of his Fifth and Sixth Amendment rights to counsel and silence, of the fact that Mr. Henderson actually had counsel, and that formal judicial proceedings had been undertaken before they left Putnam County to take him into custody. Although fully aware of what had earlier transpired, they forearmed themselves for the violation of Robert Dale Henderson's constitutional rights -- before leaving for Charlotte County, they prepared to interrogate him and readied a factually specific form waiving the rights which Mr. Henderson had so carefully exercised and preserved (R. 2223, 2243, 2244).[3] Obtaining incriminating statements from Mr. Henderson was their stated objective (R. 2244, 2263), and they accomplished this objective by flagrantly violating Mr. Henderson's (Fifth, Sixth, and Fourteenth Amendment) rights.

The waiver form that the Putnam County detectives had prepared was carefully tailored to the specific constitutional violation which was planned and executed here. The pre-printed form included a special section with the statement that Mr. Henderson was to "disregard the instructions of [his] attorney." (R. 2274, 1703). Moreover, to further ensure that Mr. Henderson

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[2]Although Detective Bakker at one point indicated that it was Mr. Henderson, and not he, that brought up the need for a "proper burial" (R. 2221), his assertion is belied by his subsequent testimony (see, e.g., R. 2226 ("I think he [Mr. Henderson] brought up 'burial' and I might have brought up 'proper'"); R. 2245 (can't recall how discussion of "proper burial" arose, "other than when Chris Hord brought him in and said that . . . he wanted to . . . assist us in the recovery of the bodies")), and his prior account (See Attachment 4, supra ["assumed" that defendant wanted to locate the bodies so that they could be given a "proper burial"]).

[3]Even without the invocation, judicial proceedings had been undertaken and counsel had enterred the proceedings on Mr. Henderson's behalf. The Sixth Amendment's guarantees had undeniably attached, as these police officers very well knew.

would indeed "disregard" his Sixth Amendment rights, the waiver form instructed him that:

> We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.

(R. 1707, 2222, 2248) (emphasis added). The detectives were aware that Mr. Henderson was represented by counsel -- they had attended a formal hearing at which Mr. Henderson's counsel was present immediately prior to leaving for Putnam County. Although Bakker was on the telephone when he learned that Hord had initiated interrogation and that Mr. Henderson had consequently agreed to provide incriminating information (R. 2220, 2261), no effort was made to contact Mr. Henderson's, or any, attorney. Indeed, Mr. Henderson was told that he could not consult with any attorney at that time. The deputies not only deliberately ignored Mr. Henderson's previously invoked constitutional rights, but affirmatively mislead and misinformed him to ensure that he would not and could not reassert those rights before they obtained the statements that they had set out to get. They wanted their "statements", and they got them.[4]

Two members of the Supreme Court of the United States have cogently described the facts relating to law enforcement's blatantly unconstitutional interrogation of Mr. Henderson:

> A few days after his assertion of the right to counsel and his consultation with an attorney, petitioner was transported from one jail to another in connection with an unrelated criminal investigation. The drive lasted almost five hours and the police officers accompanying petitioner were informed that he had asserted his right to counsel and had been advised by his counsel not to talk with the police. The police officers had nevertheless equipped themselves for the trip by taking along specially

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[4]The preparation of such a waiver form in anticipation of interrogating a transportee of any sort was apparently not a usual practice of the Putnam County Sheriff's Office -- Detective Hord testified that he had never done so in connection with transferring suspects in the past, and did so here at the instruction of the Chief of Detectives (R. 2274).

> prepared forms by which petitioner could waive his right to be free from police interrogation in spite of his previous assertion of that right. In particular, the form declared that the signatory desired to make a statement to the police, that he did not want a lawyer, and that he was aware of his "Constitutional Rights to disregard the instruction of [his] attorney and to speak with the Officers" transporting him . . . .
>
> During the course of the five hour drive, the police engaged in extended "casual conversation" with the petitioner. Although the police officers asserted that none of this conversation concerned any aspect of the case, they also asserted that petitioner's general manner as well as various "subtle comments" conveyed to them that "his conscience was bothering him," id., at A-21, and that "he wanted to discuss the [criminal] matter." Id., at A-20. Near the end of the five hour drive, the police stopped the car and one of the officers got out to make a phone call. The officer who remained with the accused perceived that petitioner "acted [like] he was interested in what we were doing," id., at A-60, so he explained that they were "calling the chief of detectives just to tell him that we were here." Ibid. When the accused "wanted to know what we would do then," the officer explained that they would probably place petitioner in jail. According to the officer, the petitioner then responded with a "look on his face" that made clear his willingness to talk with the police. As the officer put it, "It's hard to describe an expression," but he could see that the petitioner was thinking: "You've got to be kidding . . . . Here I am. I know all these things, and all you're going to do is take me to jail." Id., at A-61. The officer then directly asked the petitioner if there was anything he would like to tell the police. When petitioner expressed a tentative willingness to give information about the location of his victim's bodies, the police confronted him with the previously prepared waiver forms, which he signed.

Henderson v. Florida, 105 S. Ct. 3542, 3543-44 (1985)(Marshall and Brennan, JJ, dissenting from denial of certiorari)(emphasis added).

The hyper-critical nature of the statements thus obtained from Mr. Henderson cannot be denied. Until that point, no one knew the location of the bodies, the details of the crime, or, in fact, whether or not the offenses had actually occurred. As Detective Hord readily testified, they would not have discovered

the bodies without Mr. Henderson's statements (R. 1188). But for the flagrant violation of his rights which occurred here, Mr. Henderson would not have been convicted and sentenced to death for the instant offenses.

The State's deliberate abrogation of Mr. Henderson's constitutional rights did not, however, end with the violations engineered by Hord and Bakker. On February 25, 1982, the Hernando County Public Defender was officially appointed as Mr. Henderson's "counsel." On June 11, 1982, after Mr. Henderson had entered guilty pleas in the two Putnam County cases, and while he was still actively represented by the Putnam County Public Defender's Office, Hernando County Detective Tony Perez picked him up at Raiford to transport him to the Hernando County Jail (R. 1658-59, 2301). Although adversarial proceedings were undeniably in progress, and although counsel had been officially appointed (twice -- in Hernando and in Putnam Counties), the detective "read" Mr. Henderson his rights, showed him a picture of one of the alleged victims, and asked, "Do you recognize the person in this picture?" (R. 2302). Mr. Henderson said, "No comment," and declined to further speak with the Detective (R. 2032). Ignoring Mr. Henderson's clear invocation of his right to silence, as he ignored Mr. Henderson's right to counsel, after a few minutes the detective again asked about the case (Id.). Mr. Henderson, again unresponsively said, "I already told other detectives and I know about what you're investigating, and I know you have copies of my statement" (R. 2302-2303). Detective Perez continued his questioning (R. 2303), and yet again Mr. Henderson declined to talk (Id.).[5] Perez persisted, despite Mr.

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[5]This was not the first time Mr. Henderson had exercised his constitutional rights and refused to be interrogated by Detective Perez. On February 11, 1982, Mr. Henderson had refused to talk to Perez at the Putnam County Jail without the presence of a representative from the Public Defender's Office. That interrogation had then ceased.

Henderson's unequivocal exercises of his rights, despite the fact that counsel had been officially appointed for Mr. Henderson in two different counties, and despite the fact that adversarial judicial proceedings had commenced in both counties. But Perez wanted his statements, and, eventually, he also got them.[6]

The statements discussed herein were the State's evidence at trial. Mr. Henderson was tried, convicted, and sentenced to death on the basis of statements which never should have been introduced, for they were obtained in complete abrogation of his rights to remain silent and to counsel. Mr. Henderson's "critical stage" right to counsel was rendered meaningless -- it was, in fact, completely ignored.

This case involves flagrant violations of the Sixth Amendment. The violations herein at issue speak for themselves: a criminal defendant asserted his right to counsel, but law enforcement continued to question him until the lawyer "got there"; counsel then entered the case; formal judicial proceedings were conducted; counsel and the defendant informed all concerned that law enforcement was not to speak to the defendant in counsel's absence; law enforcement, although aware of all this, nevertheless questioned the accused and had him sign specifically-tailored waiver forms which they had prepared for him; later, although counsel was formally appointed in two different counties, although adversarial judicial proceedings had been well under way in two different counties, although the defendant had again asserted his right to counsel, and although the interrogating detective was aware of all of this, that detective also ignored the Sixth Amendment, questioned the defendant, obtained a waiver, and obtained the statements he was after.

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[6]In fact, a lengthy, tape-recorded statement was the product of Perez's flouting of Mr. Henderson's rights.

The law today is Michigan v. Jackson, 106 S. Ct. 1404, 1409 (1986):

> [A]fter a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment--the
>
> constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Thus,

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Jackson, 106 S. Ct. at 1411 (emphasis supplied). Robert Dale Henderson asserted his right to counsel. Law enforcement nevertheless initiated questioning. Under Jackson, the resulting statements were flatly inadmissible.

Mr. Henderson asserted his Fifth Amendment right to counsel in Charlotte County. The officers nevertheless continued their interrogation and elicitation of statements while the lawyer was on his way to the station house. Then, formal judicial proceedings were conducted, and in the presence of the two Putnam County deputies Mr. Henderson and his counsel asserted that he should not be questioned in his lawyer's absence. Of course, during the ride, the officers flouted the right, and initiated an interrogation which eventually resulted in the elicitation of various incriminating statements from their transportee. The "critical stage" Sixth Amendment right to counsel had attached; the interrogation was starkly unconstitutional. Jackson, supra; Brewer v. Williams, supra. Later, after counsel had been formally appointed for Mr. Henderson both in Hernando and in Putnam Counties, after Mr. Henderson had pled guilty to the Putnam County charges and was being transported to face the capital charges lodged in Hernando County, Detective Perez took

his turn. Here too Mr. Henderson had asserted his Fifth and Sixth Amendment rights. Here too the rights were flouted. Detective Perez initiated the interrogation, and after three refusals, managed to extract the statements he was after from his transportee. Here too the "critical stage" Sixth Amendment right to counsel had been asserted by Perez's transportee. Here too law enforcement's interrogation was starkly unconstitutional. See Jackson, supra; see also Brewer v. Williams, 430 U.S. at 398-99.

The "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Michigan v. Jackson, ___ U.S. ___, 106 S. Ct. 1404, 1408-09 (1986), quoting, Maine v. Moulton, ___ U.S. ___, 106 S. Ct. 477, 479 (1986). This Sixth Amendment right to counsel attaches once adversarial proceedings have commenced. See, Jackson, supra at 1408-09; Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964); see also, (Jimmy Lee) Smith v. Wainwright, 777 F.2d 609, 619 (11th Cir. 1985)("Adversarial judicial proceedings were initiated against Smith when he was arrested and charged . . ."), citing, United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 2297 (1984). Consequently, once adversarial proceedings commence, i.e., once the "critical stage" right to counsel is triggered, "the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage . . ." Jackson, supra, 106 S. Ct. at 1409; see also, United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980).

There can be no doubt that formal judicial proceedings had taken place before either of the latter two, and most damaging, statements were elicited. Counsel had entered the case in Charlotte County and heard his client had both requested that the client not be questioned. Counsel had been appointed in two

different counties before the detective initiated his questioning. The Sixth Amendment had attached:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Jackson, supra, 106 S. Ct. at 1410 n.8 (emphasis supplied), citing, Maine v. Moulton, 106 S. Ct. 477, 479 (1985). The illegalities involved in law enforcement's actions in this case speak for themselves. The State gave no "respect" to Robert Henderson's Sixth Amendment rights. Moulton, supra. To the contary, the State flouted them.

Of course, after law enforcement initiated their interrogations, Robert Henderson signed waivers. As discussed in the Introduction to this petition, this Court relied on those "waivers" to deny relief on direct appeal. Henderson v. State, 463 So. 2d at 199, citing Cannady v. State. On this point too Jackson is instructive: "[W]ritten waivers are insufficient to justify police-initiated interrogations after a request for counsel," id. at 1410-11, or after the critical stage right to counsel has attached. Id.; see also, Edwards v. Arizona, 451 U.S. 477, 484 (1981). By now, of course, it is also settled that no "waiver" can be established by the fact that Mr. Henderson, eventually, responded to the questioning. See Jackson, 106 S. Ct. at 1410 n.9; Brewer v. Williams, 430 U.S. 387 (1977); Edwards, 451 U.S. at 484 n.8.

The entirety of the State's evidence in this case was based on statements obtained in violation of Mr. Henderson's Fifth, Sixth, and Fourteenth Amendment rights. Michigan v. Jackson has now significantly changed the analysis applied by this Court on direct appeal, and shows why the Court's analysis can no longer be squared with the federal constitution's guarantees. Michigan

v. Jackson is a significant, retroactive change in law -- a change which announced a fundamental constitutional precedent which was unavailable at the time of Mr. Henderson's trial and direct appeal proceedings. Mr. Henderson's claim is therefore more than properly now brought before the Court. See Witt v. State, 387 So. 2d 922 (Fla. 1980); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). The issues should now be revisited, for it is now clear that the Sixth Amendment's guarantees were made barren by the State's extraction of statements from Robert Henderson prior to his capital trial. Of course, that is where the Sixth Amendment's protections are most critically needed:

> [W]hat use is a defendant's right to effective assistance of counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?

Maine v. Moulton, 106 S. Ct. at 485, citing, Spano v. New York, 360 U.S. 315, 326 (1959)(Douglas, J., concurring).

These statements made up the entirety of the State's case. Under no construction therefore can these errors be deemed harmless beyond a reasonable doubt.

Moreover, the Eighth Amendment was also violated. The most blatantly unlawful actions of any of the law enforcement officers in this case were those of Detective Perez. Perez's testimony regarding Mr. Henderson's statements were the key aspect of the State's case at sentencing. The prosecutor forcefully used Perez's account to present his "lack of remorse," "heinous, atrocious, and cruel," and "cold, calculated, premeditated" arguments. Perez's account was the State's aggravating circumstances evidence. It was also used to rebut mitigation. it was what was used to sentence Mr. Henderson to death. The

Eighth Amendment was thus also abrogated by law enforcement's pretrial misconduct.

Jackson now makes Mr. Henderson's entitlement to relief plain. The Writ should issue.

CLAIMS II - VII

ROBERT DALE HENDERSON WAS DEPRIVED OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE WAS NOT PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

The appellate level right to counsel also comprehends the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It

> is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here completely failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), the issues presented in this petition: 1) "leaped out" on even a casual reading of the record; 2) involved per se reversible error; and 3) were incomprehensibly ignored. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Mr. Henderson is entitled to relief. See also, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Henderson's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Henderson must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the following discussions of each claim illustrate, Mr. Henderson can. Each claim sets out the specific errors and omissions and the resulting prejudice. These claims involve the

deprivation of the Sixth and Fourteenth Amendment right to the effective assistance of counsel on appeal.

They are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the following claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Henderson's capital convictions and sentences of death, and of this Court's appellate review, they should be determined on their merits, and habeas relief should be granted.

CLAIM II

THE TRIAL COURT'S FAILURE TO GRANT MR. HENDERSON'S RENEWED MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE, AND IT'S LIMITATIONS ON THE SCOPE OF VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY, AND APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL DEPRIVED MR. HENDERSON OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Extensive and highly prejudicial pretrial publicity regarding Mr. Henderson, the offenses with which he was charged, the offenses for which he had been previously convicted, and offenses for which charges were pending in other states permeated the news media in the counties which comprise the Fifth Judicial Circuit. Detailed coverage of his incriminating statements implicating himself in as many as twelve murders in five states, his previous guilty pleas to two Putnam County murders, and his statements regarding the instant offense literally inundated the local media on a daily basis, and, as soon became apparent, made it impossible for him to obtain an impartial, untainted jury in Hernando County.

Mr. Henderson was initially arrested in Charlotte County on February 6, 1982, after he turned himself in to the police. In the process, Mr. Henderson informed law enforcement that he was

"wanted for murder" in several states, and on that same day gave several statements detailing his involvement in offenses occurring in Ohio, Lousiana, South Carolina, Mississippi, and Putnam County, Florida. His arrest and subsequent statements received extensive news coverage. (See R. 1847-57, 1944-2029).

As a result of the statements obtained from Mr. Henderson by members of the Charlotte County Sheriff's Office, a warrant was issued in Putnam County for his arrest on charges of first degree murder. Officers from the Putnam County Sheriff's Office traveled to Charlotte County on February 10, 1982, to serve the warrant, take custody of Mr. Henderson, and transport him back to Putnam County. In the course of that process, the Putnam County officers (unconstitutionally) obtained additional statements from Mr. Henderson (see Claim I, supra), implicating him in an additional Putnam County murder and three murders in Hernando County. The discovery of the victims' bodies in Hernando County was extensively (and sensationally) covered by the press. (See R. 1547-57, 1944-2029).

On June 2, 1982, Mr. Henderson pled guilty to two counts of first degree murder in Putnam County, and was sentenced to two consecutive terms of life imprisonment. Almost immediately after he was sentenced, Mr. Henderson was transported back to Hernando County to stand trial on three counts of first degree murder (the instant case). Again, during this transportation process, law enforcement (unconstitutionally) obtained additional incriminating statements (See Claim I,supra), and again, his statements were widely covered by the news media. (See R. 1847-57, 1944-2029).

By the time trial commenced in Hernando County (November 8, 1982), Mr. Henderson had been the object of a constant, sensational barrage of news coverage on an almost daily basis since his February arrest (Id.). Citizens of Hernando, Putnam, Lake, and surrounding Counties read daily the details of Mr.

Henderson's "confessions", his five-state "crime spree", his out-of-state murder indictments, his Putnam County convictions, his previous criminal record, and his victims (Id.). Much of this coverage was by major market newspapers with circulations in the hundreds of thousands and covering large areas of East Central and Central Florida.

Trial commenced in Hernando County on November 8, 1982. The effect of the extensive pretrial media coverage by newspapers, radio and television became immediately and manifestly apparent. Of the first 24 jurors individually questioned as to their extra-judicial knowledge, 19 had some knowledge and 8 were sufficiently tainted by pretrial publicity to be excused for cause (R. 257). Of the first 67 interviewed, 25 were excused for cause because of their extrajudicial knowledge of the case (R 498). After three days of similar results, the trial judge granted a change of venue (R. 501).

Venue was transferred to Lake County, also in the Fifth Judicial Circuit, separated from Hernando County by only a narrow strip of Sumter County, and served by the same major media markets. Voir dire commenced on November 16, 1982. Mr. Henderson's renewed motion for individual and sequestered voir dire was denied, and the potential jurors were questioned regarding publicity in groups (R. 600).

It soon became apparent that Lake County was no better than Hernando County. Mr. Henderson could not obtain a fair, impartial, and untainted jury in Lake County for the same reasons he could not in Hernando County. Thus, of the first 87 jurors interviewed in Lake County, 40 had some knowledge of the case, and 18 had to be excused for cause. When it became apparent that a significant percentage of the venire had extrajudicial knowledge of Mr. Henderson's "confessions" in other cases, the defense again moved for a change of venue (R. 635). The motion was denied (Id.).

The change of venue to neighboring Lake County did not abate the effect of the extensive, prejudicial media coverage. To the contrary, the adverse effect of such publicity was furthered, as many Lake County jurors now had knowledge of the difficulties in seating a jury encountered in Hernando County. Mr. Henderson renewed his motion for change of venue continuously throughout voir dire, and again at the conclusion of the process (See R. 1029). His motions were denied, and he was thus deprived of his rights to a trial by a fair and impartial jury.

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and argument presented in court without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Lousiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Taylor v. Kentucky, 436 U.S. 478 (1978); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1478 (11th Cir. 1986). Mr. Henderson was deprived of this right when the trial judge denied his renewed motions for change of venue and for individual voir dire, despite the existence of overwhelmingly extensive pretrial publicity and despite the extent of the venire's prejudicial exposure to the facts of the instant offense, other offenses, other pending charges, prior attempts to seat a jury in Hernando County, and the subsequent change of venue (See, e.g., R. 629, 632, 646, 677, 681). Moreover, after the first day of voir dire, the prejudicial publicity became even more extensive, as the press engaged in greater and more thorough coverage. Thus, the second day's jury pool was even more biased -- the press effectively told them that they were to try a multiple murderer. (See R. 1547-57, 1944-2029).

Mr. Henderson's attempts to seat a fair and impartial jury were further frustrated by the inadequate group voir dire conducted after the move to Lake County. More importantly, the

trial court placed severe limitations on the scope of the questioning regarding publicity which the defense could conduct (R. 625, 639, 641, 660, 689, 695, 727). Had the court not so limited questioning, defense counsel could have demonstrated that the Lake County venire was infected by the very same media sources which had precluded the empanelment of an impartial jury in Hernando County. (Ironically, the court had not imposed such strict restrictions on questioning in Hernando County.)

While it is true that a motion for change of venue is addressed to the sound discretion of the trial court, Davis v. State, 461 So.2d 67 (Fla. 1984), it is equally true that where a community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," the court is obligated to grant the motion. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). Accordingly, when, as in this case, the inherently prejudicial nature of the publicity to which the community has been exposed is extreme, the voir dire examination of prospective jurors is deemed incapable of curing the impact of that publicity, and due process requires a change of venue without regard to voir dire. See Rideau, supra; Groppi, supra; Oliver v. State, 250 So. 2d 888 (Fla. 1971). This was such a case.

Even if the effect of the prejudicial pretrial publicity in Mr. Henderson's case could have been ameliorated by the voir dire process, it was not and could not have been by the group voir dire process actually conducted. Trial counsel recognized the inadequacy of group voir dire under such circumstances, and moved for individual and sequestered voir dire (R. 600). That motion was also denied, and its denial deprived Mr. Henderson of his right to be tried by a fair and impartial jury.

In order to protect the Sixth and Fourteenth Amendment rights of the accused in a case where, as here, there has been extensive and prejudicial pretrial publicity,

> it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the voir dire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Association v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, Marshall, Stevens, JJ., concurring). Mr. Henderson's was such a case. The trial court's denial of his motion for individual and sequestered voir dire consequently violated his due process rights to be tried by a fair and impartial jury. Cf Patton v. Yount, 467 U.S. 1025 (1985); Irvin v. Dowd, 366 U.S. 717 (1961); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

Where, as here, pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Rideau, 373 U.S. at 726-27; Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Although Mr. Henderson is therefore not required to demonstrate actual prejudice, Rideau, supra; Murphy, supra, he undeniable can demonstrate substantial prejudice in this case. As previously discussed, nearly half of those jurors questioned as to their extrajudicial knowledge admitted exposure to substantial, prejudicial publicity. Many of them had learned of Mr. Henderson's previous "confessions", pending charges in other states, and the specific facts of the instant offense. Under such circumstances, due process requires the trial court to grant a change of venue, See Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire.

Appellate counsel's unreasonable failure to raise these obvious issues on direct appeal was a glaring omission which infected the direct appeal process with unreliability. These issues were preserved by specific, timely motions and objections presented to the trial court; the issues involved no technical

niceties, but Mr. Henderson's fundamental rights to a fair trial before an impartial jury. Appellate counsel's failure to present these issues simply cannot be deemed in any sense "tactical". See Wilson v. Wainwright, supra; Matire v. Wainwright, supra. The failure was inexcusable.

This Court doubtless would have reversed had appellate counsel presented these errors. As stated, the errors were timely preserved before the lower court. Appellate counsel's failure undermines confidence in the appellate review process. Wilson, supra; Johnson, supra. This court's independent review of the record did not serve to cure the harm. As a consequence, Mr. Henderson's capital convictions and death sentences were allowed to stand notwithstanding the fact that they were obtained in violation of his rights to a fair and impartial jury trial, and simply cannot be allowed to stand under any standard, much less so under the scrutiny which the Eighth Amendment mandates in capital cases. The proceedings resulting in these convictions and sentences of death stand in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Court should therefore now correct the errors and grant habeas corpus relief.

CLAIM III

THE TRIAL COURT ERRONEOUSLY REJECTED DEFENSE COUNSEL'S REQUEST THAT THE JURY BE ACCURATELY AND COMPLETELY INSTRUCTED REGARDING ITS ROLE IN THE CAPITAL SENTENCING PROCESS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL VIOLATED MR. HENDERSON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

During the penalty phase of Mr. Henderson's trial, defense counsel requested that the trial court instruct the sentencing jury on the law as established in Tedder v. State, 322 So.2d 908 (Fla. 1975). Counsel specifically requested that the following language be inserted into the standard instructions: "The fact that your recommendation is advisory does not relieve you of your

solemn responsibility; for the court is required to -- and will give great weight and serious consideration to your verdict with regard to punishment." The prosecutor objected to the request, arguing:

> I think [this instruction] intrudes again on their job because they are supposed to make their decision based upon aggravating and mitigating circumstances. I don't think outside consideration of what happens afterwards should be part of it. They are supposed to be making a decision right here based on what goes on in the courtroom, not what might happen next week.

(R. 1564).

The trial judge denied the request holding that: "the Court is of the opinion that it would be improper to deviate from the standard instructions as authorized and approved by the Supreme Court." (R. 1577). Notwithstanding the prosecutor's assertion the trial court, however, then instructed the jury at the outset of the penalty phase as follows: "The final decision as to punishment which should be imposed rests solely with the Judge of the court. The law requires that you render to the Court an advisory sentence as to what punishment should be imposed." (R. 1579-80). Again, immediately prior to the submission of the case to the sentencing jury, the court reiterated: "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Court..." (R. 1616).

This Court has held that instructions such as these, absent objection, are not reversible error under Caldwell v. Mississippi, 472 U.S. 320 (1985). (See, e.g.) Jackson v. State, __ So.2d ___, No. 68,097 (Fla. 2/18/88); Combs v. State, __ So.2d ___, No. 68,477 (Fla. 2/18/88); Grossman v. State, __ So.2d ___, No. 68,096 (Fla. 2/18/88).[7]

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[7]Mr. Henderson urges that the Court reconsider its previous holdings. Given the Court's rulings, however, he will not belabor the point here.

However, the present case presents an issue not disposed of by Jackson, Combs, or Grossman. Here the question is whether the defense was entitled upon request to have the judge further explain that though the jury's verdict was advisory it was accorded great weight under Florida law. Even if the information that was given was accurate enough to pass scrutiny under Caldwell, is a different result dictated when counsel objects that the instruction fails to explain what is meant by an advisory verdict and specifically asks for an instruction detailing that great weight is to be given to an advisory verdict?

B. Tedder

The law regarding the significance of the jury's sentencing recommendation was set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975). There this Court stated:

> With respect to the trial court's sentence, we agree with appellant that the death penalty was inappropriate and that a life sentence should have been imposed. A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. That is not the situation here.

322 So. 2d at 910 (emphasis added).

This Court's holding in Tedder was recently reaffirmed in Holsworth v. State, ___ So.2d ___, No. 67,973 (Fla. February 18, 1988). At issue in Holsworth was a sentencing judge's override of a jury's recommendation of life. This Court reversed the sentence of death and imposed a life sentence stating:

> The jury, however, may have given more credence to this testimony. See Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986) (trial judge may not have believed evidence of impaired capacity but others might have). Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation. See Valle v. State, 502 So.2d 1225 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). A jury's

> advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation. See Gilven v. State, 418 So.2d 996, 999 (Fla. 1982); Mills v. State, 476 So.2d 172, 180 (Fla. 1985) (McDonald, J., concurring in part, dissenting in part), cert. denied, 106 S.Ct. 1241 (1986). On the record before us, we find that adequate grounds exist for reasonable persons to recommend life imprisonment.

Slip op. at 10.

Here the proposed jury instruction was offered to provide the jurors with accurate information regarding their role at sentencing and the awesome responsibility which the law would call on them to discharge. See, e.g., Garcia v. State, 492 So. 2d 360 (Fla. 1986). The instruction would have explained to the jury the effect of Tedder on the weight given its recommendation. An instruction which explains that great weight shall be given to the sentencing recommendation simply provides the jury with accurate information. The question thus becomes after Jackson, Combs, and Grossman whether upon request the trial judge must provide the jury with this additional, but critical, information.

C. Rule 3.390(d)

Florida Rule of Criminal Procedure 3.390(d) provides:

> (d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury.

Under this rule complaints regarding the jury instructions are waived unless brought to the attention of the trial judge. This rule is an outgrowth of the contemporaneous objection rule. It is designed to ensure that the trial judge is apprised of the

putative error and afforded an opportunity to correct it. This rule is satisfied where the record clearly shows a request for a specific instruction and that the trial court understood the request and denied it. State v. Heathcoat, 442 So. 2d 955 (Fla. 1983); Spurlock v. State, 420 So. 2d 875 (Fla. 1982); Thomas v. State, 419 So. 2d 634 (Fla. 1982).

Here, a written request was made. At the instruction conference counsel orally argued for the request explaining why it should be given. The prosecutor argued against the instruction, and the court ruled that it would simply abide by the standard instructions this Court has authorized and approved. Accordingly, Fla. R. Crim. P. 3.390(d) was complied with and the issue was preserved.

D. California v. Ramos

The question presented to the United States Supreme Court in California v. Ramos, 463 U.S. 992 (1983), was whether it was constitutional to instruct a capital sentencing jury as to the governor's power to commute a life sentence. There the capital defendant had successfully argued to the California Supreme Court that the governor's commutation power was irrelevant to the sentencing determination. In fact Ramos' argument was virtually identical to the position of the prosecutor in Mr. Henderson's case: Matters that do not go to weighing of the aggravating and mitigating circumstances are irrelevant. Id. at 1001. Ramos claimed that presenting such information to the jury diverted its attention from the issue of whether there were aggravating circumstances which outweighed the mitigating circumstances.

The United States Supreme Court rejected Ramos' claim and in so doing rejected the prosecutor's argument in this case:

> [T]he Briggs Instruction does not limit the jury to two sentencing choices, neither of which may be appropriate. Instead, it places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the

> defendant's case.
>
> . . .
>
> In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of person eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting . . . those defendants who will actually be sentenced to death." Zant v. Stephens, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983)(footnote omitted).

Id. at 1007, 1008 (footnote omitted).

Thus Mr. Henderson's requested instruction could not be rejected as irrelevant. It would have presented accurate information to the jurors by explaining their role in the sentencing process and the importance of their recommendation. Cf. Garcia, supra, 492 So. 2d at 367 ("It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi. . . and Tedder v. State. . . ."). The requested instruction would have made it clear that the jury's recommendation was not simply a straw poll used by the court to gauge public reaction to the crime. The instruction's purpose was to make clear that the recommendation had great and considerable weight -- it had legal effect. It would have insured that the jury did not entertain the mistaken impression that the judge was free to ignore their recommendation.

E. Caldwell v. Mississippi

At issue in Caldwell v. Mississippi, 472 U.S. 320 (1985) was the prosecutor's misrepresentation of the availability of appellate review and how the decision in Ramos applied to that misrepresentation. In Caldwell, the deciding vote was cast by

Justice O'Connor, who explained her position in a separate opinion. According to her, Ramos authorized a capital sentencing court to provide to a jury accurate information regarding post-sentencing procedures. This, Justice O'Connor believed, would be proper in order to enhance the reliability of the sentencing determination. She found error in Caldwell, however, because the information provided by the prosecutor was misleading:

> In telling the jurors, "your decision is not the final decision . . . [y]our job is reviewable," the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate. In fact, under Mississippi law the reviewing court applies a "presumption of correctness" to the sentencing jury's verdict. 443 So.2d 806, 817 (1983)(Lee, J., dissenting). The jury's verdict of death may be overturned only if so arbitrary that it "was against the overwhelming weight of the evidence," or if the evidence of statutory aggravating circumstances is ss lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict." Williams v. State, 445 So.2d 798, 811 (Miss.1984)
>
> Laypersons cannot be expected to appreciate without explanation the limited nature of appellate review, especially in light of the reassuring picture of "automatic" review evoked by the sentencing court and the prosecutor in this case. Ante at 2637-2638. Although the subsequent remarks of the prosecutor to which Justice REHNQUIST refers in his dissent, infra, at 2648, may have helped to restore the jurors' sense of the importance of their role, I agree with the Court that they failed to correct the impression that the appellate court would be free to reverse the death sentence if it disagreed with he jury's conclusion that death was appropriate. See ante, at 2645, n.7. I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that "the death penalty may [have been] meted out arbitrarily or capriciously" or through "whim or mistake." California v. Ramos, supra, at 999, 103 S.Ct., at 3451; id., at 1013, 103 S.Ct. at ---; Eddings v. Oklahoma, 455 U.S. 104, 1119, 102 S.Ct. 869, 879, 71 L.Ed.2d 1 (1982)(concurring opinion.

105 S. Ct. 2633, 2646-47.

Thus under Caldwell the question is not only whether the jury was mislead by being given inaccurate information but also whether over objection they were denied additional information which accurately explained the post-verdict process. In Mr. Henderson's case, fundamental Eighth Amendment error was committed when defense counsel's request that the jury be explicitly told that the sentencing judge must afford its recommendation great weight was refused. As a result an unacceptable risk was created that the death penalty may have been meted out arbitrarily or capriciously, and Mr. Henderson's sentences of death should have been reversed.

The "unacceptable risk" that Mr. Henderson's sentences of death were unreliably, arbitrarily, or capriciously imposed was enhanced here by other inaccurate instructions imparted by the court. At voir dire, the trial court attempted to assuage the concerns of jurors troubled by the awesome prospect of sentencing a fellow human being to death by giving them a wholly inaccurate portrayal of their role in the sentencing process:

> I can disregard anything you all say and sentence the way I feel is appropriate, so you're not -- you're not putting him to death. It would be me, if that was the result.

(R. 527) (emphasis added). Moreover, although the defendant "might get the death penalty," according to the court the jury "d[id]n't have anything to do with that." (R. 528). This is not an accurate portrayal of the jury's role in the Florida capital sentencing scheme -- while it may be true that the jury's verdict is "advisory," it is decidedly not true that the jury has "nothing to do" with sentencing, or that the court may "disregard anything [the jury] says." Such a view is contrary to Tedder, and encouraged the jury to abdicate the responsibility for sentencing which it is granted under Florida law. This is precisely what Caldwell condemned, and is precisely what trial

counsel was attempting to avoid by requesting an accurate instruction regarding the Tedder standard.

F. Ineffective Assistance of Appellate Counsel

Despite defense counsel's request for a specific instruction explaining to the jury the great weight accorded its sentencing recommendation, appellate counsel did not raise the issue on appeal. This Court addressed Caldwell in the context of prosecutorial misrepresentation of the effect of the jury's verdict in Foster v. State, ___ So. 2d ___, No. 70,184 (Fla. Dec. 3, 1987). There the Florida Supreme Court found the failure of trial counsel to raise the issue on appeal precluded the issue from being presented in a motion for post-conviction relief:

> In his appeal from the denial of his motion for postconviction relief, Foster contends that the conduct of the trial violated Caldwell v. Mississippi, 472 U.S. 320 (1985), in that the jury was told that its role was only to give an advisory opinion, thereby diminishing its sense of responsibility. If there was any validity to this claim, it should have been raised on appeal because Caldwell did not represent a change in the law upon which to justify a collateral attack.

Slip op., p. 2.

Thus this Court held that Caldwell was not such a significant change in the law to excuse appellate counsel's failure to raise it. In Mr. Henderson's case, the claim was available and was raised below and properly preserved. Appellate counsel's failure to bring it to this Court's attention thus cost Mr. Henderson his rights under the Eighth Amendment and under state law.

Counsels's failure to urge Mr. Henderson's claim was ineffective assistance, for Mr. Henderson would have prevailed but for counsel's error. Kimmelman v. Morrison, supra, 106 S. Ct. at 2588. Here, Mr. Henderson would have been entitled to a new sentencing hearing had appellate counsel presented his claim. Cf. Foster, supra; see also Garcia v. State, supra. The Court

should now issue its writ.

CLAIM IV

THE SENTENCING COURT'S USE OF AN IDENTICAL UNDERLYING FACTUAL PREDICATE TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES RENDERED MR. HENDERSON'S SENTENCES OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Although this Court has consistently reversed a defendant's sentence of death in cases in which aggravating circumstances were "doubled," this Court allowed Mr. Henderson's capital sentences to stand when reviewing this case on direct appeal. See Henderson v. State, 463 So. 2d 196 (Fla. 1985). Counsel failed his client by ignoring this issue. This case involved a classic example of the unconstitutional "doubling" of aggravating circumstances. It involved and involves fundamental error, and this Court should now correct the clear errors that it failed to correct on direct appeal. It also involves ineffective assistance of counsel; again, the Court should now take corrective action. Relief was and is proper.

The sentencing order in this case demonstrates that the court used an identical underlying predicate to establish two separate aggravating factors. The State had argued at the sentencing phase that the "heinous, atrocious, or cruel" aggravating circumstance applied because the victims had been tied up and shot in the head -- "executed" (R. 1603) -- and that the "cold, calculated, and premeditated" circumstance applied for similar reasons; i.e., "when three people are tied up and shot in the head it's a cold, calculated, premeditated murder" (R. 1604) (emphasis supplied).

The State's argument was thus that the same underlying factual predicate, "binding" and "tying" the victims, supported

both "heinous, atrocious, and cruel" and "cold, calculated, and premeditated" -- a classic example of unconstitutional "doubling". The court's sentencing order adopted this classic example of overbroad "doubling" in finding the existence of both of the formentioned aggravating circumstances (see R. 2157-60). The sentencing court merely repeated the arguments of the state -- i.e., that tying the victims' hands and shooting them in the head was both "heinous, atrocious, and cruel" as well as "cold, calculated, and premeditated" -- in finding the existence of these two statutory aggravating circumstances (Id.).

On direct appeal, this Court reviewed the propriety of the aggravating factors found and echoed the State's and trial court's unconstitutional "doubling" theme. See Henderson v. State, 463 So.2d at 201. This Court upheld the trial court's application of these factorsd for the same reasons: the victim's were bound, then shot in the head. As to heinous, atrocious, and cruel, this Court held:

> Henderson claims that the murders were not heinous, atrocious, or cruel because the victims died instantaneously from single gunshots to their heads. This argument overlooks the fact that the victims were previously bound and gagged.

Id. (emphasis supplied). As to "cold, calculated, and premeditated," this Court held:

> Appellant also argues that the court erred in finding that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. We hold that there was sufficient evidence to support the trial judge's finding of this factor. Henderson rendered the victims helpless by binding their ankles with tape. He then coldly proceeded to shoot them one by one execution-style.

Id. (emphasis supplied). Thus, this Court approved and adopted the trial court's finding of two separate aggravating circumstances based on the identical underlying factual predicate (i.e., bound and shot in the head).

The death sentences in this case were thus the result of

classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. See also Claim VI, infra. Mr. Henderson's sentences of death were and are fundamentally unreliable and unfair, and violate the Eighth and Fourteenth Amendments. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), relying on State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (condemning overbroad application of aggravating factors). Such procedures flatly abrogate the constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating factors "genuinely narrow the class of person eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983).

This is not a case where the sentencing court found no mitigation: although the court did not find that any statutory mitigating circumstances existed, it did find that non-statutory mitigating factors were present, albiet entitled to "little" weight in light of the aggravating circumstances "proved." Since the balance which would have been reached without the improper aggravating factors would have been different than the balance actually struck in this case because of the uncorrected errors, resentencing would have been (and is) proper. See Elledge v. State, 346 So. 2d 998 (Fla. 1977); Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978). In this regard, this Court's precedents are clear: because the improper application of aggravating factors unconstitutionally skews the balance by which the sentencer is to determine whether life or death is the appropriate sentence, the Court has consistently reversed and remanded for a new sentencing proceeding in cases where aggravating circumstances are improperly or overbroadly applied and mitigation is found. See Elledge, supra; Provence, supra, 337 So.2d at 786; Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) (vacating death sentence and remanding for new sentencing proceeding where aggravating

circumstances improperly applied and court was "unable to discern" whether sentencing judge found mitigating circumstances); Mendendez, supra, 368 So. 2d 1278; Riley, supra, 366 So. 2d 19. The balance was (and is) unconstitutionally skewed in Mr. Henderson's case; he was and is entitled to resentencing. The errors herein at issue cannot be deemed harmless.

This issue was argued and carefully preserved by trial counsel (See R. 1630, 2167, 2182). Appellate counsel nevertheless failed to raise the issue on direct appeal. Had it been raised, this Court's would likely not have accepted the trial court's errors as its own, and would have certainly directed a resentencing; Mr. Henderson's sentences would have been reversed. See Elledge; Provence; Mann, supra. Appellate counsel's failure to present this issue cannot be ascribed to any "strategy" or "tactic". See Wilson v. Wainwright. It was simply ineffective assistance. See Matire, supra. Mr. Henderson should now be granted relief.

CLAIM V

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING, REINFORCED BY THE PROSECUTOR'S SIMILAR BURDEN-SHIFTING COMMENTS DURING SUMMATION, DEPRIVED MR. HENDERSON OF HIS FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL

The sentencing court instructed the jurors that they were to consider whether the mitigating circumstances listed in the statute outweighed the aggravating circumstances found when deciding whether to vote for life or death. In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), this Court made clear that such an instruction was error, holding that a capital sentencing

jury must be told that a sentence of death is appropriate only "if the state showed the aggravating circumstances outweighed the mitigating circumstances." This allocation of burdens is in compliance with due process requirements. Id.; Mullaney v. Wilber, 421 U.S. 684 (1975). The standard upon which Mr. Henderson's jury was instructed was error, unconstitutionally shifting the burden on the issue of whether he should live or die to Mr. Henderson.

Before the penalty phase began, defense counsel submitted two special requested instructions regarding the burden-shifting language in the standard instructions. (R. 1569, 1574, 2112, 2115). Relying on Arango, supra, and Mullaney, supra, defense counsel requested that the court instruct the jury that aggravating circumstances must outweigh mitigating circumstances in order for the jury to recommend death. The trial court denied defense counsel's requests. (R. 1577).

In its preliminary instructions, the court then informed the jury that it should "determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances. . . ." (R. 1580). During summation, the prosecutor reinforced this standard, telling the jury that if it found aggravating circumstances had been proved, it should then consider "whether there are sufficient mitigating factors to outweigh the aggravating factors." (R. 1601). The court's final instructions to the jury repeated this unconstitutional standard. (R. 1617).

After instructions were completed, defense counsel renewed his objections to the standard instructions and renewed the requests for special instructions. (R. 1620). Those objections and requests were once again denied. (Id.). The jury returned a recommendation of death (R. 1622-23), upon which the trial court

relied in imposing the death sentences (R. 1646). In subsequent pleadings, defense counsel assigned as error the court's refusal to grant the defense special requested instructions. (R. 2166, 2182).

Burden-shifting such as occurred in this case misinforms and misleads the capital sentencing jury, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), infects the sentencing proceeding with arbitrary and capricious factors, and is wholly incompatible with Mullaney, supra, and Sandstrom v. Montana, 442 U.S. 510 (1979). The error here allowed the jury to recommend death without ever putting the State to its proper burden of proof on the question of whether death was the appropriate sentence. Mr. Henderson was deprived of rights which are guaranteed, as a matter of fundamental fairness, even to a misdemeanant. See In re Winship, 397 U.S. 358 (1970). His death sentences resulted from a proceeding at which the "truth-finding function" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972).

The law and facts relevant to this issue were plainly available to appellate counsel, who nevertheless failed to bring this preserved error to this Court's attention. This failure resulted in the denial of Mr. Henderson's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The error was not cured by this Court's independent review. Mr. Henderson was and is entitled to relief.

CLAIM VI

THIS COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AND "COLD, CALCULATED, AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THOSE AGGRAVATING CIRCUMSTANCES UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

In Gregg v. Georgia, 428 U.S. 153 (1976) the United States

Supreme Court found the Georgia statute creating a death sentencing process to be constitutional on its face. The Court found the sentencing discretion "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189. This was because the statute "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. Contemporaneous with its decision in Gregg, the Court upheld the Florida death penalty statute for virtually identical reasons. Proffitt v. Florida, 428 U.S. 242 (1976).

Recently, the United States Supreme Court summarized its case law since Gregg and its predecessor (Furman v. Georgia, 408 U.S. 238 (1972)):

> [O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McClesky v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1774, (1987) (emphasis added).

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a

particular murder with the circumstance present is different, and that this difference reasonably justifies "the imposition of a more severe sentence." Zant v. Stephens, 462 U.S. 862 (1983).

The narrowing function of an aggravating circumstance requires that such a circumstance be capable of objective determination. The aggravating circumstance must be described in terms that are commonly understood, interpreted, and applied. It must provide guidance and direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. The Supreme Court, in fact, has ruled that an aggravating circumstance cannot stand when it is so vague that it fails to adequately channel the sentencing decision and thus allows for "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Zant, 462 U.S. at 877.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court reviewed the Georgia courts' application of that state's version of the heinous-atrocious-and-cruel aggravating circumstance. The Court there held:

> [I]f a State wishes to authorize captial punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

446 U.S. at 428. The Court ultimately reversed because it found a failure on the part of the Georgia Supreme Court to apply a narrowing construction to the aggravating circumstance which would have provided the objective standards it otherwise lacked.

Recently, the Tenth Circuit Court of Appeals addressed the heinous, atrocious or cruel aggravating circumstance contained in the Oklahoma death penalty statute. Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987), cert granted, ___ U.S. ___ (1988). The Tenth Circuit reviewed the history of the circumstance and of the Oklahoma court's construction:

> The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Couurt of Criminal Appeals in this case is a departure from the construction initially adopted in Eddings. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in Eddings and previously approved by the Supreme Court in Proffitt. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428, 100 S.Ct. at 1764 (footnotes omitted).
>
> Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement that the offense was "outrageously wicked and vile, horrible and inhuman" was inadequate in Godfrey: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder. These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defeined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood, interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

882 F.2d at 1489. Ultimately the Tenth Circuit reversed, holding:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon

> all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." Godfrey, 428 U.S. at 429, 100 S.Ct. at 1765.

Id.

In the present case the trial court found all three homicides to have been especially heinous, atrocious or cruel, and cold, calculated, and premeditated, despite the fact that each victim died from a single gunshot wound to the head which caused instantaneous death, and despite the fact that the record failed to reflect a level of "coldness", "calculation", or premeditation beyond that which is present in most homicides (for which life is usually deemed the appropriate punishment). This Court then affirmed on appeal. This Court held that the heinous-atrocious-cruel aggravating circumstance was properly found because the victims "could see what was happening and obviously experienced extreme fear and panic while anticipating their fate." Henderson, 463 So. 2d at 201. The Court then applied a similar analysis to the "cold-calculated-premeditated" aggravating factor. Clearly, this Court's construction of these aggravating circumstances has broadened in exactly the same fashion condemned in Cartwright: "The sentencer is now free to rely upon any particular event that it beleives makes" the aggravating factor applicable. As a result the meaning that the sentencer in a particular case will attach to these circumstances "can only be the subject of sheer speculation."

Clearly, under the principles of Godfrey as elaborated on in Cartwright, the [non]standards attendant to the application of the heinous, atrocious, or cruel and cold, calculating, and premeditated aggravating circumstances in this case violate the Eighth and Fourteenth Amendments. Mr. Henderson's execution must be stayed (at least pending the United States Supreme Court's

decision in Cartwright), and, thereafter, habeas corpus relief should be granted.

CLAIM VII

THE PROSECUTOR IMPROPERLY PRESENTED AND ARGUED AND THE SENTENCING JUDGE AND JURY IMPROPERLY CONSIDERED MR. HENDERSON'S PURPORTED LACK OF REMORSE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase of Mr. Henderson's trial Detective Perez was recalled to the witness stand in order to provide additional details which he had extracted from Mr. Henderson during the course of his unconstitutional June 11, 1982, questioning. See Claim I, supra. The prosecutor asked Detective Perez to relate to the jury what Mr. Henderson had said about his life. Detective Perez responded: "Due to the conversation we were having and his life knowing what you know now, if you had to live you life over again, would you change anything, and he said, definitely not." (R. 1590).

An immediate objection was made that this evidence was irrelevant and immaterial since it did not relate to any of the statutory aggravating circumstances. The objection was overruled and the evidence was allowed to stand. (R. 1591).

Thereafter the prosecutor forcefully argued no remorse to the jury. He stated: "Let us recall some of the testimony, also indicating the defendant's manner, cold, no remorse." Another objection was denied (R. 1604-05).

In imposing a sentence of death the judge relied on Detective Perez's testimony that Mr. Henderson lacked remorse. The judge specifically referred to the evidence both in his oral pronouncement and in his written findings (R. 1644, 2159). The judge thus also believed that lack of remorse was relevant to the sentencing.

On appeal, appellate counsel for Mr. Henderson made the claim that "it was reversible error for the trial court to

consider, and to allow the jury to consider, the alleged lack of remorse." Initial Brief of Appellant, p. 36. This Court then noted what Detective Perez's testimony and the prosecutor's arguments presented: "The state also called the Hernando County detective who testified that Henderson told him he had no regrets and that if he had his life to live over again, he would not change anything." Id. at 199. This Court accepted the error as its own.

Since the Court's decision in Mr. Henderson's direct appeal, it has specifically barred the use of lack of remorse as evidence of an aggravating circumstance. In its recent decision in Robinson v. State, 13 F.L.W. 63 (Fla. Jan. 28, 1988), this Court stated:

> We vacate Robinson's death sentence because we agree with Appellant that the state impermissibly argued a nonstatutory aggravating factor and injected evidence calculated to arouse racial bias during the penalty phase of his trial.
>
> During closing argument at the penalty phase, the prosecutor stated to the jury: "One thing to know about Dr. Krop's testimony is the Defendant suffers from antisocial tendencies. He has a total indifference to who he's hurt, as to killing Beverly St. George. He really doesn't care that much. He showed no remorse, according to Dr. Krop."
>
> Defense counsel immediately objected and correctly pointed out that the prosecutor was improperly arguing a nonstatutory aggravating circumstance. The trial court denied the subsequent motion for a mistrial.

Slip Op., p. 8-9 (emphasis supplied).

The situation here is virtually identical and calls for equal application of the law. The introduction of evidence of lack of remorse, argument based upon that evidence, and reliance by the sentencing judge on the evidence was clear Eighth Amendment error. This Court should have reversed Mr. Henderson's sentences of death on direct appeal. It should not take corrective action.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Robert Dale Henderson, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief he seeks. Since this action presents certain questions of fact, Mr. Henderson requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions. Mr. Henderson, alternatively, urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just, proper, and equitable.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard B. Martell, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 26th day of February, 1988.

Billy H. Nolas
ATTORNEY