IN THE SUPREME COURT OF FLORIDA

NO. 73035

JASON THOMAS DEATON,

Petitioner,

v.

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

Respondent.

RESPONSE TO 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

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DIANE LEEDS
Assistant Attorney General

JOAN FOWLER
Assistant Attorney General

RICHARD BARTMON
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

JASON THOMAS DEATON, Petitioner, v. RICHARD L. DUGGER, Secretary, Dept. of Corrections, Respondent.	)	CASE NO. _____

RESPONSE IN OPPOSITION TO AND
PETITION FOR HABEAS CORPUS REQUEST FOR STAY OF EXECUTION

COMES NOW Respondent, RICHARD L. DUGGER, by and through undersigned counsel, and files this his Response, in opposition, to Petitioner's Petition for Writ of Habeas Corpus, as follows:

INTRODUCTION

This Response is being filed, pursuant to Defendant's Petition for Writ of Habeas Corpus, Filed September 12, 1988.

The symbols "e.a." will mean "emphasis added"; "R" will refer to the Record, of Defendant's trial and sentencing, as prepared on direct appeal. "T" will refer to the transcript of the Deaton trial, referred to by both parties, and "HT" will refer to the transcript of the evidentiary hearing.

JURISDICTION

The nature of Petitioner's claims of ineffective assistance of appellate counsel appropriately involve this Court's jurisdiction under Article V, Section 3 (b) (9) of the Florida Constitution (1980), and/or under Rule 9.030 (a) (3), Florida Rules of Appellate Procedure (1984). Respondent clearly continues to maintain that Petitioner is not entitled to any relief.

PROCEDURAL HISTORY

Defendant is presently within the lawful custody of the State of Florida, under a valid judgment and sentence of death for the murder of Santi Campanella. Said sentence was imposed upon Defendant by the Honorable Judge Moe on June 7, 1984 Defendant was sentenced to death in accord with a jury advisory sentencing recommendation of the death penalty (R 1769, T 1408). This Court subsequently entered its written findings in support of the death penalty on evidence demonstrating three aggravating circumstances and one mitigating circumstance.

On direct appeal Defendant raised four grounds, one in a supplement to Defendant's initial brief. The grounds were stated as follows:

> I.
>
> THE CUMULATIVE EFFECT OF THE TRIAL COURT'S EVIDENTIARY RULINGS REQUIRE A NEW TRIAL.
>
> II.
>
> THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.
>
> III.
>
> THE TRIAL COURT IMPROPERLY SENTENCED THE APPELLANT TO DEATH, AS NO FACTUAL FINDINGS JUSTIFYING SUCH SENTENCE WERE MADE.
>
> IV.
>
> THE TRIAL COURT ERRED BY IMPOSING THE DEATH PENALTY.

A Motion for Post-Conviction Relief was filed with the Circuit Court, Seventeenth Judicial Circuit and an evidentiary hearing is currently scheduled to be held. Said motion raises 12 issues as follows:

> CLAIM I
>
> MR. DEATON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE SOLE MENTAL HEALTH EXPERT

RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. DEATON WAS INCOMPETENT AND ENTITLED TO A COMPETENCY HEARING, IN THE FAILURE TO ESTABLISH AVAILABLE INSANITY, INTOXICATION, AND DIMINISHED CAPACITY DEFENSES, AND IN THE DEPRIVATION OF MR. DEATON'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION

CLAIM II

MR. DEATON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT

CLAIM III

MR. DEATON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

CLAIM IV

MR. DEATON WAS DENIED HIS RIGHT TO COMPULSORY PROCESS AS WELL AS HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL GUILT-INNOCENCE AND SENTENCING DETERMINATION BECAUSE THE TRIAL COURT ALLOWED MR. DEATONS'S CODEFENDANT, KERRY HALL, TO REFUSE TO TESTIFY REGARDING CRITICAL, EXCULPATORY INFORMATION OF WHICH MR. HALL AND FIRST-HAND KNOWLEDGE, AND BECAUSE OF THE TRIAL COURT'S REFUSAL TO PERMIT CONSIDERATION OF THE CODEFENDANT'S PRIOR EXCULPATORY ACCOUNT AT TRIAL AND SENTENCING

CLAIM V

MR. DEATON WAS SUBSTANTIALLY PREJUDICED BY INTRODUCTION OF IMPERMISSIBLE PROPENSITY EVIDENCE, AND BY THE INTRODUCTION OF EVIDENCE AND JUDGE COMMENT CONRNING HIS REFUSAL TO PROVIDE A HANDWRITING EXEMPLAR, AND HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THESE ISSUES, IN VIOLATION OF HIS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

CLAIM VI

EVIDENCE WAS INTRODUCED AND USED AT MR. DEATON'S CAPITAL PROCEEDINGS WHICH WAS OBTAINED AS A RESULT OF A PATENTLY ILLEGAL SEIZURE, AND COUNSEL FAILED TO PROVIDE HIS CLIENT WITH EFFECTIVE RE-

PRESENTATION BY INADEQUATELY LITIGATING THIS CLAIM, IN VIOLATION OF MR. DEATON'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

CLAIM VII

THE FAILURE TO PROPERLY INSTRUCT THE JURY THAT JURISDICTION IS AN ELEMENT OF THE CRIME TO BE PROVEN BEYOND A REASONABLE DOUBT WAS FUNDAMENTAL ERROR RENDERING MR. DEATON'S CAPITAL CONVICTION AND SENTENCE OF DEATH CONSTITUTIONALLY VOID

CLAIM VIII

MR. DEATON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE SOLE DEFENSE FAILED TO RENDER PROFESSIONALLY ADEQUATE ASSISTANCE, AND BECAUSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE ON THESE ISSUES

CLAIM IX

MR. DEATON'S SENTENCE OF DEATH WAS BASED UPON CONSIDERATON OF WHOLLY IMPROPER AND UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM X

MR. DEATON WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONDERNING THE VICTIM'S BACKGROUND AND OTHER CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM XI

THE PENALTY PHASE JURY INSTRUCTIONS, REINFORCED BY IMPROPER PROSECUTORIAL ARGUMENT, UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND THE EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM XII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. DEATON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

RESPONSE IN OPPOSITION TO
REQUEST FOR STAY OF EXECUTION

Petitioner boldly asserts "the issues presented are substantial and warrant a stay." Petition, p. 3. Respondent, however, submits that Deaton has raised no substantial grounds in support of relief.

Presently, no case has been accepted for review on the merits by the United States Supreme Court on the issues raised by Deaton herein. As the State will demonstrate, Deaton has failed to present any meritorious claim. His execution is presently scheduled for October 11, 1988. There is sufficient time for this Court to resolve the instant petition in advance of the execution. The State has a legitimate interest in the finality of litigation. §27.7001 Fla. Stat. (1985).

PROCEDURAL

BAR/WAIVER

ADDITIONAL ARGUMENT FOR DENYING THE WRIT

Most of the grounds raised on the instant habeas corpus petition are no more than new twists on issues that were either raised on direct appeal and therefore previously addressed and resolved, or already raised in the post-conviction motion. - - thus this Court will have to address and dispose of the issues in the appeal from the 3.850 relief denial. As this Court has found, by raising the same issues in the petition for writ of habeas corpus, as in the rule 3.850 petition, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. State, 507 So.2d 1377, 1384 (Fla. 1987). The State will respond to Deaton's arguments, but wishes to make it clear at the outset that the law of the case doctrine precludes reconsideration of the matters as either disposed of on direct appeal, or on determination of the 3.850 proceedings. See Blanco, Id.; and Preston v. State, 444 So.2d 939, 942 (Fla. 1984).

Whether a particular issue has been raised on direct appeal, in the 3.850 proceeding or otherwise procedurally defaulted will be pointed out in the argument of each claim.

CLAIMS FOR RELIEF

CLAIM I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND THERE WAS NO ERROR OF CONSTITUTIONAL DIMENSIONS.

Mr. Deaton complains that there was fundamental error in the failure of the jury to be instructed on "jurisdiction." The State maintains that there was no reversible error in the jury instructions given to the jury. Further, the lack of an objection at trial precluded appellate counsel from properly pursuing this claim on appeal.

Mr. Deaton's reliance upon Lane v. State, 388 So.2d 1022 (Fla. 1980), is misplaced. Lane does not even provide us with the contents of the jury instructions which were given, and which the Supreme Court found to be too general. At bar, the jury was given a very specific jury instruction; the jury had to find that the crimes occurred in Broward County (R 1352-1353). Also, Lane was reversed due to another issue, and Mr. Deaton is relying on mere dicta.

It is hard to comprehend Mr. Deaton's complaints at this juncture. In finding him guilty, the jury implicitly found that the murder took place in Broward County. If it took place in Broward County, it obviously did not take place in Tennessee. Thus, Mr. Deaton's argument on this issue is without merit.

There was overwhelming evidence to support a jury finding that the first degree murder of Mr. Campanella took place in Broward County. As discussed in earlier Points, Mr. Deaton's defense at trial was inherently incredible. As a matter of law, Florida had jurisdiction to try Mr. Deaton since it was proven that each element of the murder occurred in Florida. Id., at 1028. Deaton v. State, 480 So.2d 1279 (Fla. 1985). As long as any one element of murder occurs in Florida, there is jurisdiction. Lane, supra.

Even if Mr. Deaton were correct in his assertion that it was error not to give a jury instruction on jurisdiction, such an error would not rise to the constitutional magnitude he claims. Defense counsel stated that he had no objection to the jury instructions as given (R 1361). He did not request

a jury instruction on jurisdiction. Since trial counsel did not request the jury instruction, appellate counsel could not effectivly raise this as error.

Mr. Deaton erroneously claims that jurisdiction is an "element" of murder. Jurisdiction is not included within the statutory elements, nor does the situs of a murder have any effect on whether or not a murder has been committed. Jurisdiction is also not included within the Florida Standard Jury Instructions. A jurisdiction instruction is only given if specifically requested by trial counsel, and if supported by the theory of defense. Here it was not requested, and the theory of defense was self-defense, not jurisdiction as claimed by Mr. Deaton here. Since jurisdiction was not the defense presented at trial, the failure of trial counsel to request such an instruction or appellate counsel to raise its adsence as error would not constitute deficent assistance of counsel within the meaning of Strickland v. Washington, supra.

Since there was no error in the jury instruction which was so prejudicial as to render the trial fundamentally unfair, Mr. Deaton is not entitled to federal habeas corpus relief. Pleas v. Wainwright, 441 F.2d 56 (5th cir. 1971); Bryan v. Wainwright, 588 F.2d 1108 (5th Cir. 1979).

Mr. Deaton is obviously seeking a second appeal in violation of this court's holding in Blanco v. Wainwright, supra. State habeas corpus review does not lie here.

CLAIM II

THE TRIAL COURT PROPERLY REFUSED TO PERMIT CO-DEFENDANT TO TESTIFY AS WELL AS CONSIDERATION OF CO-DEFENDANT'S PRIOR TAPE.

Defendant argues that co-Defendant Hall should have been forced to testify despite the invocation of his Fifth Amendment rights. He further argues that co-Defendant's taped statement admitted into evidence in lieu of his testimony. This issue will be discussed in two parts:

CO-DEFENDANT'S TESTIMONY

Defendant argues co-Defendant shoud have been granted judicial immunity to testify on Defendant's behalf. This issue should have been raised on direct appeal and as such is procedurally barred Blanco, supra. However, should this Court choose to determine appellate counsel's effectiveness, the merits will be discussed. Florida law is clear that solely a prosecutor and not the court, can afford immunity. Clearly immunity is a creature of statute, the purpose of which is to "aid the State in the prosecution of crimes", see State v. Harris, 425 So.2d 118, 120 (Fla. 3d DCA 1982); see also Tsavaris v. Scruggs, 360 So.2d 745, 749 (Fla. 1977). As such, court ordered immunity would interfere with the State's prosecutorial perogative. It would also violate the constitutional doctrine of separation of powers between the judicial and executive branches of government, Harris at 120.[1] The Florida Supreme Court has refused to extend immunity "as a remedy beyond its statutory boundaries." Tsavaris at 752.

Federal law is in accord that a court is just not empowered to grant immunity to defense witnesses see, e.g., United States v. Beasley, 550 F.2d 261 (5th Cir. 1977) (court without power to require defense witness to testify about matters for which witness has right to claim Fifth Amendment privilege); In

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[1] The sole exception is prosecutorial misconduct which is not present nor is it alleged in the case at bar, see Montgomery, supra.

ed.[2]

Additionally, according to Defendant, co-Defendant Hall could solely testify as to having seen the victim in Tennessee as Defendant's testimony at trial was that co-Defendant was "at his grandmother's house" at the time of the crime (T 1104-5). Defendant had earlier, similarly, filed a document entitled "Defendant's Disclosure" which indicated that co-Defendant's knowledge extended solely to viewing the victim in Tennessee "alive and well" (R 1716; T 825). As co-Defendant did not observe the actual murder his testimony is not "crucial" to the defense as Defendant now argues. His testimony is merely cumulative to Rose Hall and Helen Harmon's trial testimony (T 999, 1038). As such there is no need for immunity where the witness' testimony is cumulative United States v. Turkish, supra; United States v. Klauber, 611 F.2d 512 (4th Cir. 1979); Harris,supra, at 122.[3] Further, failure to admit cumulative evidence is never grounds for reversal of a conviction, see Morgan v. State, 415 So.2d 6, 10-11 (Fla. 1982).

CO-DEFENDANT'S TAPE RECORDING

Defendant argues that co-Defendant's tape recorded statement, at mimimum, should have been introduced. However, defense counsel never attempted to introduce the tape as evidence and as such this issue is properly presented to the trial court in a motion alleging trial counsel's ineffectiveness, Blanco, supra. Said tape was received by the court merely as part of a proffer proving the content of co-Defendant's proposed testimony:

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[2] Even though the State may still prosecute a witness who has been granted immunity, the State will have to overcome a "heavy burden" of proving that all the evidence the government proposes to use was derived from legitimate independent sources, Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, 227 (1972); State v. Williams, 487 So.2d 1092, 1095 (Fla. 1st DCA 1986).

[3] Co-Defendant could not testify as to what Defendant had told him. That he killed the vicltim in self-defense pursuant to a sexual assault and that the reason Defendant did not tell the 'truth' earlier was to protect the girls. Such testimony is pure hearsay.

THE COURT: They don't know what the testimony is.

MR. RICH: [Defense Counsel]: That's why I want the tape introduced as a proffer.

THE COURT: There is no proof that is what he would say if he testified though. I will let you put the tape in evidence for the purpose of that proffer.

MR. RICH: Right, right. I don't want it to go back to the jury. I want to leave it.

THE COURT: Technically, it really is not part of the record at all.

(T 1184).

However, assuming arguendo that there was attempted introduction, this issue, again should have been raised on direct appeal not on a motion vacate, Blanco, supra. As to counsel's effectiveness for failing to raise same, the tape recorded statement was clearly hearsay (T 1186) and inadmissible. No hearsay exception is apparent. The tape is not admissible pursuant to §90.803 (18)(e) Fla. Stat. as even though co-Defendant was a co-conspirator, the statement was not made "in furtherance of the conspiracy." It was given after the conspiracy had terminated and both Defendant and co-Defendant were in jail, awaiting trial (T 823). See, Moore v. State, 503 So.2d 923 (Fla. 5th DCA 1987). Further, the tape recorded statement is not admissible pursuant to §90.804, Fla. Stat. even though the declarant is "unavailable" as it is not a statement against interest - it would not subject co-Defendant to liability. Clearly defense counsel wisely declined to seek introduction of co-Defendant's hearsay statement.

re Daley, 549 F.2d 469 (7th Cir. 1976) (a federal court is not empowered to prescribe immunity on its own initiative, since to recognize such power would be to contradict long-held beliefs as to governmental separation of powers); In re Darrel T., 90 Cal.App.3d 325, 153 Cal.Rptr. 261, 266 (1979) ("The issue of immunity is a prosecutorial prerogative as to which the defense has no right to attempt to have granted to witnesses."); State v. Matson, 22 Wash.App. 114, 587 P.2d 540 (1978) (grant of immunity a prosecutorial tool; no comparable right in the defendant); State v. Linsky, 117 N.H. 866, 379 A.2d 813 (1977) (trial court neither has the power to grant immunity on its own, nor to require the government to seek immunity for defense witnesses); State v. Simms, 170 Conn. 206, 365 A 2d 821 (1976); People v. Vicavetti, 54 A D 2d. 236, 388 NYS 2d. 410 (1976).

Further, "the compulsory process clause does not place any affirmative obligation on either the prosecutor or the court to secure testimony from a defense witness by replacing the self-incrimination privilege with a grant use immunity" Montgomery at 394-5; United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). The State cannot be held responsible for a witness' invocation of his Fifth Amendment privilege, Montgomery at 395; State v. Mesa, 395 So.2d 242, 243 (Fla. 3d DCA 1981); also see United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976). If this were the case there would be great potential for abuse of judicial immunity by co-defendants and co-conspirators:

> Co-defendants could secure use immunity for each other, and each immunized witness could exhonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense.
>
> Montgomery at 395, quoting Turkish, at 775.

Accord United States v. Thevis, 665 F.2d 616, 640 (5th Cir. 1982) n. 27; State v. Schell, 222 So.2d 757, 759 (Fla. 2d DCA 1969). Clearly Defendant's constitutional rights have not been violat-

CLAIM III

MR. DEATON WAS NOT PREJUDICED BY THE INTRODUCTION OF COMPLAINED-OF-EVIDENCE, AND IS NOT ENTITLED TO RELIEF SINCE NO OBJECTION WAS MADE TO THE INTRODUCTION OF THIS EVIDENCE AT TRIAL.

Mr. Deaton complains that certain "propensity" evidence was improperly admitted at trial, and that failure to raise the improper admission reflected ineffective assistance of appellate counsel. The State maintains that there was no impropriety in the admission of the complained of evidence, and further that by failing to object to the evidence, Mr. Deaton is procedurally barred from raising the issue here. It is axiomatic in Florida that failure to object to the admission of evidence precludes later review. See e.g., Clark v. State, 363 So.2d 331 (Fla. 1978), Castor v. State, 365 So.2d 701 (Fla. 1978). This State procedural bar is extended to federal habeas corpus review. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed 2d. 594 (1977). This issue could not have been effectively raised on appeal since it was not preserved. Further, Deaton appears to be bootstrapping this claim by alleging ineffectiveness of appellate counsel. This is improper. Blanco v. Wainwright, supra. This issue is not cognizable on state habeas corpus review.

Mr. Deaton complains first that evidence was admitted regarding the use by his co-Defendant of the deceased's credit cards. This evidence was properly admitted to show the circumstances of the murder, which involved an interplay between Jason Deaton, Kerry Dean Hall, and the three girls. Heiney v. State, 447 So.2d 210 (Fla. 1984). This evidence was relevant, and was properly admitted. Deaton has previously raised this claim on his direct appeal and it was rejected by this court. This ruling constitutes law of the case.

Mr. Deaton next complains of the admission of testimony regarding his failure to provide handwriting exemplars to an investigator pursuant to a court order. Again, this evidence was not objected to by trial counsel. The evidence was admitted to explain the course of action in providing a comparison of Mr.

Deaton's handwriting standards with the written confessions allegedly made by him while he was in jail. As such, it was properly admissible.

Mr. Deaton also complains of the admission of evidence showing his homosexuality. This evidence was important to explain how the victim got involved with Jason Deaton in the first place. Heiney v. State, supra. It's probative value clearly outweighed any potential prejudice, and the evidence was admissible.

Mr. Deaton argues that his trial attorney rendered ineffective assistance of counsel by giving him erroneous advice regarding providing handwriting exemplars. While it may be true that this advise was bad, it certainly doesn't give rise to the necessary level of prejudice required under Strickland v. Washington, supra. Nor does the trial attorney's failure to object to the introduction of the above evidence constitute ineffective assistance of counsel, since the admission was entirely proper. Even if the admission of this evidence was not proper, the admission of the evidence would not have changed the outcome of the trial. This issue does not entitle Mr. Deaton to state habeas relief as it is unrelated to appellate representation.

CLAIM IV

MR. DEATON'S ARREST WAS LEGAL, AND NOT THE RESULT OF AN ILLEGAL SEIZURE. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THIS ISSUE.

Mr. Deaton argues that his arrest was not based on probable cause, and that all evidence which was a fruit of that arrest should have been suppressed. The State maintains that his arrest was entirely proper, and that there was no need for suppression of any evidence. Since there was no need for suppression of any evidence, there could not have been ineffective assistance of trial counsel for failure to do so. Moreoever, failure of trial counsel to object at trial precluded appellate counsel from effectively raising this claim on direct appeal. There has been no ineffectiveness of counsel.

Officer Rice testified that he had put out a nationwide BOLO for Mr. Campanella's vehicle, and an all points bulletin for Mr. Campanella based upon information supplied to him by the victim's father, and the manager of the deceased's corporation (R 60-61, 79-84, 125-126). Mr. Deaton's arrest was the result of a citizen report that he had spotted the stolen vehicle at the shopping center. The citizen had read about the stolen vehicle in the newspaper (R 111-113). The Tennessee police were also aware that Mr. Campanella's stolen American Express card had been used at the Foxmoor store located in the shopping center where Mr. Campanella's vehicle was located (R 132-134). Deaton's counsel attempt to downplay the seriousness of the missing person information relayed to Officer Rice by both the deceased's father and the manager of his corporation fails. Both persons were quite concerned as to what had happened to Mr. Campanella, and relayed these concerns to the officials. The BOLO was wellfounded, and Mr. Deaton's arrest was entirely proper. The knowledge of the officer making the report is imputed to all officers under the "fellow officer" rule. Carroll v. State, 497 So.2d 253 (Fla. 3rd DCA 1985).

From the information on the BOLO, the officers who stopped Mr. Deaton had grounds to believe that a murder may have been committed. There were also the crimes regarding the stolen vehicle and credit cards. As such, Mr. Deaton's arrest was proper. Shriver v. State, 386 So.2d 525 (Fla. 1980). "The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction may be based." Id., at 528. See also, Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed 2d 953 (1985).

Since the initial arrest was proper, there was no problem with the admission of evidence flowing from that arrest. Wong Sun v. United States, 371 U.S. 471 (1973). Trial counsel's failure to suppress this evidence is totally unprejudicial since any motion to suppress would have properly been denied. Similarly, no prejudice has been shown by appellate counsel's failure to raise this issue on direct appeal. Strickland v. Washington, supra. It should be noted that Deaton is once again improperly attempting to bootstrap the argument, to allow State habeas corpus review. Blanco v. Wainwright, supra, 507 So.2d at 1383.

CLAIM V

TRIAL COURT'S FINDING OF AGGRAVATING CIRCUMSTANCES OF "HEINOUS, ATROCIOUS AND CRUEL" AND "COLD, CALCULATED AND PREMEDITATED" MANNER OF KILLING, WAS APPROPRIATELY SUPPORTED BY PROPERLY ADMITTED AND RELEVANT EVIDENCE AT PENALTY PHASE.

Deaton has challenged the use of evidence of his statement to State witnesses, in support of the aggravating circumstances of "heinous, atrocious and cruel" and "cold, calculated and premeditated" manner of killing, as inadmissible and uncorroborated hearsay. This claim must be denied, for procedural and substantive reasons.

It is apparent that Defendant is maintaining this claim, in a habeas context, as a de facto second appeal, which is completely improper. Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207, 210 (Fla. 1985). Additionally, the sufficiency of findings, on these two aggravating circumstances, as present collateral counsel concedes, Petition, at 28, was raised and rejected on direct appeal. Deaton v. State, 520, at 1282-1283. Any further review of this question, even if asserted as different grounds, should be procedurally precluded. Routley v. Wainwright, 520 So.2d 901, 903 (Fla. 1987); Martin, supra.

Assuming arguendo this Court reaches the merits, Defendant's arguments ignore the nature of a Florida capital sentencing phase. Under §921.141(1), any evidence, even if otherwise inadmissible at the trial phase, is admissible, if it has probative value, related to the nature of the crime, the character of the defendant, and/or the aggravating and mitigating circumstances. §921.141, Fla. Stat. (1985); Hildwin v. State, 13 F.L.W. 528, 529 (Fla., September 1, 1988); Bueonano v. State, 13 F.L.W. 401, 402 (Fla., June 23, 1988); Perri v. State, 441 So.2d 606, 607-608 (Fla. 1983). There is no question that Deaton and counsel, had opportunities to rebut this evidence, at the sentencing. Bueonano. supra; Perri, supra. Even assuming that the

character of Deaton's statements to Rita Callahan, Tammy Lambert or Margie Shannon were hearsay, that would not render such evidence inadmissible at sentencing. Hildwin; Perri, §921.141 (1), supra.

Deaton's contentions that his statements were not substantiated or verified by the State's proof, is contradicted by the Record. The medical examiner testified that the victim's strangulation death occurred within 30 minutes (R 249), and that his death could have resulted from relaxation and reapplication of the electric cord, around his neck (R 250). Furthermore, witnesses Callahan, Lambert, and Shannon testified about their observations and cleaning of significant amounts of blood, in the car, and on Deaton himself (R 297-298, 451-452, 459, 465, 577-579, 589-590, 592). This evidence from those who personally observed the victim's body, and the state of Deaton and his car after the murder, clearly indicates corroboration of Deaton's statements about the crime, and provides indicia of reliability, to support the findings of aggravation, by the trial court, as affirmed by this Court. Hildwin, supra; Johnson v. State, 465 So.2d 499, 506-507 (Fla. 1985).

CLAIM VI

TRIAL COURT'S SENTENCE WAS PROPERLY BASED ON APPROPRIATE AND CONSTITUTIONAL AGGRAVATING CIRCUMSTANCES, AND WAS IMPROPERLY BASED, ON "LACK OF REMORSE."

Defendant has maintained that the prosecutor's closing argument at sentencing, improperly injected Deaton's lack of remorse, into the consideraton of aggravating circumstances, in alleged violation of Florida law. In the appropriate context of the Record, this was not the case here, and this claim lacks both procedural or substantive merit.

In closing argument, the prosecutor urged that the aggravating circumstances of "heinous, atrocious, and cruel", (hereinafter "hac") applied to Deaton's murder of Campanella. (R 1394, 1395). In arguing the applicability of this factor, the

State stressed the victim's anguish, in struggling against Deaton; not dying instantly but over a period of 15 minutes; being beaton and kicked, in the gonads area, while being strangled; and the enjoyment Deaton took, in viewing the victim's evident anguish and struggle (R 1395). Thus, this appropriate reference, to the victim's mindset in evaluating the "hac" factor of aggravation, did not constitute improper reliance on lack of remorse, to prove or enhance aggravation.[4] Hildwin v. State, 13 F.L.W. 528, 530 (Fla., Sept. 1, 1988); Harvey v. State, 13 F.L.W. 398, 400 (Fla., June 16, 1988); Tompkins v. State, 502 So.2d 415, 421 (Fla., 1986); Phillips v. State, 476 So.2d 194, 196-197 (Fla. 1985).

This is further substantiated, by the State's argument to the judge, at defendant's actual sentencing. The State expressly stated that Deaton's lack of remorse, was a factor "... which the court cannot take into consideration", despite the state attorney's personal observation to this effect (R 1421); Suarez v. State, 481 So.2d 1201, 12 10 (Fla. 1985). Thus, the State not only did not regard lack of remorse as a basis for aggravation, but expressly recognized the impropriety of such a fact in aggravation. These circumstances, coupled with the absence of any objections to the prosecutor's argument or the trial court's sentence order (R 7395, 1420-1421) precludes relief on this claim. Hildwin, supra; Suarez, supra.

Defendant has demonstrated no reason, to disturb this Court's previous rejection of this claim, and approval of the

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[4] Although Defendant does not appear to challenge the trial court's order, in finding "hac" to exist, Sentence Order at 2, in his habeas petition, this "victim mindset" context was clearly the basis for such a finding. This Court, on direct appeal, affirmed the trial court's "hac" finding, quoting the language of the sentencing order, that Defendant's challenge is based upon. Deaton, 480 So.2d, supra, at 1282-1283. This ruling specifically rejected the specific challenge, made on direct appeal by defendant in citing and arguing error under Pope v. State, 441 So.2d 1473). See, Defendant's supplemental intial brief, November 9, 1984, at ppg. 6-7. Thus, defendant's present Pope claim, is clearly procedurally barred, because of the blatant attempt herein, to use habeas corpus as a de facto second appeal, on a claim clearly made and rejected on direct appeal. Routley v. Wainwright, 502 So.2d 901, 903 (Fla. 1987); Martin v. Wainwright, 497 So.2d 872, 876 (Fla. 1986).

trial court's "hac" finding. Deaton, 480 So.2d at 1282-1283.[5]

Assuming arguendo that the State's comments on trial court's order, reflected improper reliance on lack of remorse in aggravation, under Pope, supra, defendant remains unentitled to relief. It is beyond question tha the evidence of the victim's struggle, pleas for life, and intense suffering while being strangled by electrical cord, spitting up blood, and dying over a 15 minute span of such strangulation, proved the "hac" aggravating circumstance, regardless of any lack of remorse consideration. Huff v. State, 495 So.2d 145, 153 (Fla. 1986); Pope, 441 So.2d, supra, at 1078; Phillips, 476 So.2d, supra at 197; see also, Hildwin, supra; Tompkins, supra; Turner v. State, 13 F.L.W. 426, 428 (Fla., July 7, 1988). Thus, the trial court's finding of "hac", otherwise supported by the Record, was not fatally tainted by any existing defective considerations, under Pope. Huff, supra; Phillips, supra.

Defendant's tangential claim of ineffective appellate counsel, for failing to raise this issue on appeal, is absurd. As noted, appellate counsel did raise this claim, which was rejected on direct appeal. Furthermore, even if appellate counsel had not argued this point, the lack of preservation of the issue at trial, and its lack of merit, precludes any finding of ineffectiveness. Doyle v. Dugger, 13 F.L.W. 409, 410 (Fla., June 12, 1988); Routly, supra; Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Ruffin v. Wainwright, 461 So.1d 109, 111 (Fla. 1985). Defendant's reliance on Robinson v. State, 520 So.2d 1 (Fla. 1988), as "resurrecting" the claim, as collaterally cognizable under Witt v. State, 387 So.2d 922 (Fla. 1986), Petition at 30, n. 2, is unavailing. This Court in Robinson, clearly and completely based its discussion and decision on the pre-existing Pope decision, and so stated no new law under

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[5] Defendant's cited authority of Robinson v. State, 520 So.2d 1 (Fla. 1988), is completely distinguishable. In Robinson, supra, the prosecutor's comments were not made, in the context of establishing victim anguish and "hac" application; further, the comments in Robinson were preserved by objection. Robinson, at 5-6.

Witt. Robinson, 520 So.2d, supra, at 6.

CLAIM VII

DEFENDANT'S DEATH SENTENCE WAS NOT BASED UPON IMPROPER CONSIDERATION OF EVIDENCE OF IMPACT OF CRIME ON VICTIMS ("BOOTH CLAIM").

Defendant has alleged that various comments, evidence and argument by the State, and information contained in the pre-sentence investigation report (PSI), improperly injected victim impact and/or "comparable worth" statements or evidence, as a sentencing consideration, in violation of Booth v. Maryland, 482 U.S. ___ S.Ct. 2529, 96 L.Ed.2d 740 (1987). This claim lacks procedural or substantive merit.

It is apparent that Defendant did not challenge or object to any of the State's comments, argument or evidence, on the basis that such comments or evidence injected constitutionally impermissible victim impact or background information, into the proceedings (R 47-76, 461, 1244-1245, 1418-1420, 1562-1566). Because of this absence of objections, at trial or on appeal, Denton v. State, 520 So.2d 1279 (Fla. 1985), these claims are procedurally barred, since they could or should have been previously raised. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988); Thompson v. Lynaugh, 821 F.2d 1080, 1081-1082 (5th Cir. 1987).

Although Defendant has not specifically claimed, in his motion, that Booth was a sufficient change in the law to warrant first-time consideration on collateral review, Witt v. State, 387 So.2d 922 (Fla. 1979), it is evident that, absent appropriate objection, Defendant must rely on this argument, to gain review of the claim. The Supreme Court made clear that its ruling in Booth, prohibiting state law-mandated consideration of victim impact statements (VIS), was based on the "individual sentencing" requirements of the Eighth Amendment, previously recognized as far back as 1976. Booth, 96 L.Ed.2d, supra, at 448, 449; Gregg v. Georgia, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). This was

expressly recognized in Thompson v. Lynaugh, 831 F.2d, supra, at 1082,, when the Fifth Circuit panel stated that Booth ..."merely reiterates what the [U.S] Supreme Court previously held: the Eighth Amendment requires that [capital] sentencing focus on the individualized character of the defendant and the particularized circumstances of the crime." The Florida Supreme Court acknowledged, in Grossman, 525 So.2d, supra, at 842, that Booth did not mandate retroactive application to cases where no objections were posed against the admission of victim impact evidence. Thus, Defendant's claim is procedurally barred, and does not meet the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1979).

On the merits, Defendant has clearly misinterpreted Booth, in an inappropriate, inapplicable, and completely overbroad manner, to the factual circumstances of this case. The Booth decison rested on a Maryland law, mandating that victim impact information be contained in PSI reports, and be considered by a sentencing court and jury. Booth, 96 L.Ed.2d, supra, at 445-446; 446, n. 2; see also, State v. Post, 513 NE 2nd 754, 757-958, n. 1 (Ohio 1987); State v. Bell, 360 SE 2d 706, 713, n. 4 (S. Car. 1987). In its review of the Florida Supreme Court mandated that the introduction of victim impact evidence, as an aggravating circumstance in a death case, was invalid. Grossman, at 842. No such evidence was admitted at trial, or sentencing, for such purpose herein. Furthermore, the Booth decision was based on considerably detailed evidence of the difficulty that the victim's children had in coping with their parents' murder, including economic loss and psychological services. Booth, 96 L.Ed.2d, at 445-446; State v. Ghent, 739 So.2d 1250, 1271 (Cal. 1987) (en banc). The record clearly does not contain such references herein.

Defendant's objections to the State's reference, in voir dire of juror Reilly, is truly frivolous. Such voir dire had nothing whatsoever to do with aggravating circumstances at sentencing. Booth. Moreover, the State protected Defendant's

rights, by voicing concern over the impact of Reilly's knowledge of the Campanella family name, on Reilly's ability to be a fair and impartial juror (R 1562-1566). This concern was echoed by defense counsel, (R 1595-1597), ultimately resulting in Reilly's removal from the jury (R 149-1620). The State's express concern over the possible influence this knowledge would have on the jury, furthered defendant's rights under Booth.

Similarly, Defendant's reference to the State's preliminary witnesses, (R 47-76), and subsequent comments on such evidence during closing argument, (R 1244-1245, 1250) is specious. Such testimony and arguments were directed towards establishing the time and nature of the victim's disappearance, as well as identification of his car, his shirt and the victim himself. The context of these witnesse's connection to the victim, as employees clearly did not constitute improper reliance on victim impact. Booth. Furthermore, Ms. Lampert's brief testimony that, upon viewing the body when shown by Deaton, she hoped the victim had no family, (R 460-462), did not constitute detailed evidence of the impact of Campanella's death on his family. Booth. The prosecutor's reference to the victim's daily placing of those phone calls to his family, (R 1244-1246) was directed towards defense contentions that the victim had unforeseeably voluntarily accompanied Deaton and Hall to Tennessee, without telling anyone. (R 1244-1245). White v. State, 377 So.2d 1149 (Fla. 1975). 1975). This evidence and comments, simply did not prejudice Deaton, under Booth, and does not even approach the nature of comments held to be reversible under Booth - Booth, supra; Patterson v. State, 513 So.2d 1257 (Fla. 1987) (testimony of victim's niece, concerning impact of victim's children, and comment on appropriateness of death penalty, noted as probable Booth error, in dicta).

The reference by the victim's father, on the appropriateness of the death penalty, in the PSI Report, see Report, at 4, does not mandate Booth relief. In Scull v. State, 13 F.L.W. 545, 547-548 (Fla., September 8, 1988), the Florida

Supreme Court rejected the claim that the presence of a victim statement, contained in a PSI report in a capital case, necessitated reversal under Booth. The Court noted the lack of objections to the statement, and the fact that there was no showing that the trial court affirmatively used the statements of torment and impact on the family, in his death sentence order or factual findings. Scull, 13 F.L.W., supra, at 547-548. Similarly herein, there is no evidence that the victim's father's generalized statement, was used as a part of the trial court's sentencing order, or was considered as evidence of aggravation in such order. Scull, at 548. As in Scull, the mere presence of victim impact statements, that a court may see, but does not use or consider in his sentence, is not Booth error. The trial court cannot be faulted for failing to "excise" such a statement from the PSI; the mere fact of "exposure" to such statements, within a PSI, which is not unusual in Florida death cases, does not constitute reversible error. Scull, at 547-548; Grossman, 525 So.2d, at 842-843, n. 6.

There is clearly no question that, absent such a statement as referred to by Defendant, the trial court would have imposed a death sentence. Grossman, (at 845-846). The court, and not the jury, reviewed the victim impact statement, from the victim's father. Grossman, at 845. The written factual finding, show no "hint of reliance" on such a statement. Sentence order, June 14, 1984, at 1-4; Grossman, at 845-846; 846, n. 9. In light of the overwhelming balance of aggravating and mitigating circumstances, in favor of death, and the jury's death recommendation, (R 1408), any Booth error was harmless. Grossman, at 846; Hill v. Thigpen, 667 F.Supp. 314, 338 (ND Miss. 1987) (reversed on other grounds); Post, 513 NE 2d, supra, at 759; Darden v. Wainwright, 477 U.S. ___, ___ S.Ct. ___, 91 L.Ed.2d 144 (1986).

Defendant has additionally argued that appellate counsel was ineffective, for failing to raise a Booth issue, while at the same time urging this Court to view Booth as a Witt "change in the law", permitting collateral relief. Petition for

Habeas Corpus, at p. 38, n. 3. This is inherently inconsistent. Clearly, Deaton's appellate counsel cannot be faulted, for any failure to be clairvoyant, and foresee the decision in Booth, or Scull, supra, in 1985-1986. Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986); Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983).

Furthermore, appellate counsel could reasonably have believed that any such Booth claim had no substantive merit, Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987) even as alleged fundamental error. Stano v. Dugger, 13 F.L.W. 342 (Fla. 16, 1988); Ruffin v. Wainwright, 461 So.2d 109, 111 (Fla. 1984). The lack of preservation of the issue, further warrants rejection of Deaton's claim of ineffective counsel. Bertolotti supra; Routly v. Wainwright, 502 So.2d 901, 903 (Fla. 1987); Davis v. Wainwright, 498 So.2d 857, 859 (Fla. 1986); Ruffin supra. Finally, Defendant's attempt to assert Booth error, in the context of using habeas corpus as a vehicle for a de facto second direct appeal, should be rejected. Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207, 210 (Fla. 1985).

CLAIM VIII

THE JURY WAS NOT MISLED AND MISINFORMED AS TO THE ALTERNATIVES TO A SENTENCE OF DEATH.

Defendant argues that the jury should have been instructed that consecutive life sentences could have been imposed for the murder and armed robbery convictions. However, as Defendant properly notes, this issue is procedurally barred and should not be considered by this Court, Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987). Mills v. Maryland, 108 S.Ct. 1860 (1988) and Caldwell v, Mississippi, 105 S.Ct. 2633 (1985) are not on point and do not result in the instant claim representing a significant change in the law. The issue should have

been raised on direct appeal.

Appellate counsel, however, was not ineffective for failing to raise this issue. No objection was raised by trial counsel at the trial court level even though the court specifically inquired as to objections to the convictions (T 1406), consequently, this issue had not been preserved for appellate review. This general requirement is applied equally to sentences of death, Bertolotti v. Dugger, 514 So.2d 1095, 1096-7 (Fla. 1987) This issue is properly raised on a 3.850 motion.

However, should this Court choose to entertain the instant issue, no error is apparent. The jury was properly instructed according to the law in existence at the time of trial. In 1984, Fla.R.Crim. P. 3.390 (a) provided that

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the Defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed. (emphasis added).

Clearly, the judge was authorized to instruct the jury solely as to law and not as to any sentencing aspects. Sentencing is within the court's province, not the jury's.

The sole exception was an instruction as to the maximum and mimimum sentences for the crimes charged upon request of counsel. However, as early as 1982, this court recognized that even such a minimal sentencing instruction was ill advised. In In re Amendment to Rules to Criminal Procedure - 3.390 (a), 416 So.2d 1126 (Fla. 1982), an emergency rule was sought to eliminate said provision from the rule. Believing it to be a non-emergency the court refused to amend the rule until regular cycle in 1984.[6] Justice Alderman's dissent succinctly explained the problems behind the jury being advised as to sentence:

> The resolution of the Executive Counsel of the Conference of circuit Judges states cogent reasons for eliminating this portion of rule 3.390

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[6] The Florida Bar Re: Amendment to Rules - Criminal Procedure, 462 So.2d 386 (Fla. 1984).

> (a). It explains that the penalty is irrelevant to the jury's sole responsibility of determining a defendant's guilt or innocence, that the jury cannot be privy to the myriad factors which must be considered in sentencing, and that the court's advising the jury of the possible penalty is wholly inconsistent with the jury's responsibility to disregard the consequences of its vedict and tends to encourage a deplorable phenomenon which has come to be referred to as a "jury pardon."
>
> Id. at 1126

Clearly, under the rules of procedure existing at the time of the crime the jury could not be instructed as to consecutive versus concurrent sentences, solely maximum and minimum sentences, since that time this Court has even further restricted jury instruction on sentencing. Today's instruction reads:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

Consequently, assuming arguendo of a reversal on the issue, upon resentencing the jury would receive no instruction at all as to the possible armed robbery penalties. A reversal for resentencing would be futile.

Further, there is no reason to believe that the lack of an instruction on concurrent versus consecutive sentences left the jury with the impression that solely concurrent sentences could be received.[7] It is equally as likely that the jury was left with the impression that consecutive sentences could be received, in fact more likely. A reasonable juror would have most probably concluded that defendant would have needed to serve time on both his sentences otherwise why sentence defendant for both crimes?

Lastly, the sentencing hearing on the murder charge was greatly removed from the decision as to guilt or innocence on the

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[7] This is mere speculation upon which a reversal is never warranted, Sullivan v. State, 303 So.2d 632 (Fla. 1974).

robbery charge. It occurred five days later, involved solely the murder as well as different instructions. At the time of the advisory death sentence the jurors' minds were fixed upon the aggravating and mitigating factors, not upon the remote sentencing instructions given at the guilt/innocence phase.

As to the proposed instruction being given during the life/death sentencing phase, the focus during this phase must be on the Defendant and his blame-worthiness for the act of murder, Booth v. Maryland, 96 L.Ed.2d 440, 449 (1987). An instruction as to sentencing would shift the focus away from Defendant and his personal responsibility for his act and run contrary to the purpose behind capital sentencing. In effect, Defendant is herein requesting that the jury be instructed to the possibility of a jury pardon - to sentence Defendant to less than what his culpability requires (death) based upon the possibility of an extended life sentence (consecutive sentences for the murder and robbery). This is clearly improper. The intent behind Fla.R.Crim. P. 3.390 (a) in allowing for instructions on sentencing in capital cases is to allow instructions as to the appropriate weighing of aggravating versus mitigating factors and not on non-substantive sentencing issues.

Lastly, at the time of the commission of the crime as well as during Defendant's trial State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) was the law in Florida. As such, the instant Defendant could be convicted of the underlying robbery to the felony murder but not sentenced for same. (The law did not change until 1985 when State v. Enmund, 476 So.2d 165 (Fla. 1985) overruled Hegstrom, supra). Clearly, as the instant Defendant could not have been sentenced for the underlying robbery at all such a consecutive sentencing instruction would have been meaningless. See Deaton, supra, at 1279 which states solely that Defendant received a sentence of death even though the jury's verdict indicated guilt on the underlying robbery (T 1370); Deaton, supra, at 1281.

CLAIM IX

APPLICATION OF "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING FACTOR, WAS CONSTITUTIONALLY APPLIED, IN DEATON'S CASE.

Defendant alleges that the absence of any evidence that the trial court, or this Court in its review, applied an appropriate limiting construction of the aggravating circumstance of "heinous, atrocious and cruel" (hereafter "hac"), violated his Eighth Amendment rights, under Maynard v. Cartwright, 468 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). As with other sentencing claims, this allegation lacks procedural and substantive merit.

Defendant suggests that review of the "har" factor, by this Court on direct appeal, Deaton, 480 So.2d, at 1282-1243, must now be revisited, in light of Maynard, supra. Maynard cannot be characterized as new law, now cognizable collaterally, under Witt v. State, 387 So.2d 522 (Fla. 1980). The genesis of the Maynard claim, based on the express language of the United States Supreme Court's opinion therein, arises from Godfrey v. Georgia, 446 U.S. 420 (1980), and the basic promise of Furman v. Georgia, 408 U.S. 238 (1972), involving the requirement that the death penalty accurately challenged the discretion of jurors and judges in determining those cases where a convicted murderer should receive the death penalty. Maynard, 100 L.Ed.2d, supra, at 381-382. This challenge, to the hac factor as constitutionally vague and/or overbroad, was also the subject of the United States Supreme Court's opinion, determining the constitutionality of Florida's death penalty statute, in Proffit v. Florida, 428 U.S. 242, 254-256 (1976). Since this claim, under such circumstances was clearly available at time of trial and/or direct appeal, and was not raised therein, this claim is not cognizable in this habeas proceeding. Clark v. Dugger, 13 F.L.W. 548, 549 (Fla. September 8, 19898); Smith v. Murray, U.S. (1986); Witt, supra.

Assuming this claim is cognizable, the Maynard decision is fundamently distinguishable, from this case, and other Florida

death penalty cases on the issue. The Maynard case concerned construction of the "hac" aggravating circumstance, by Oklahoma, appellate courts, that differs substantially from Florida courts, facially and is applied in this case. The court in Maynard noted that Oklahoma appellate courts, had not adopted a "limiting construction" of the "hac" circumstance, having merely reviewed the facts, and deciding whether the facts supported an hac finding. Maynard, 100 L.Ed.2d, at 381-382. The Maynard decision found this to be a similar defect to the one in the Georgia "hac" factor reviewed in Godfrey, supra. Id.. In this analysis, the court did not overrule its review of the constitutionality of "hac" in Proffitt, supra; in fact, it favorably compared Proffitt, to Godfrey, and Maynard, by implicitly noting a distinction, between Proffitt and Godfrey. Maynard, at 381. In Proffitt, the United States Supreme Court specifically held that (unlike the Oklahoma courts in Maynard, the Florida statutory aggravating circumstance of hac, was not unconstitutionally overbroad or vague, because of the specific limiting construction, imposed by Florida courts on this factor. Proffitt, 442 U.S. at 255-256, citing State v. Dixon, 283 So.2d 1, 9 (Fla. 1972) ("hac" is limited to those crimes clearly apart from the norm, that are "conscienceless" "pitiless," and "unnecessarily torturous to the victim"). Since the defect in Maynard, is not thus shared in Florida, Proffitt, Defendant's claim lacks merit.

It is abundantly clear that, contrary to defendant's characterizations, the trial court and this Court did apply an appropriate limiting instruction, upon the hac aggravating circumstance. As noted and approved by this Court, the trial court, in finding that Deaton's murder of Santi Campanella was "hac," concluded that under the facts, "this crime was especially conscienceles, pitiless and unnessarily torturous." Deaton, 480 So.2d at 1282. Further, this Court's citation of supporting decisions, in approving the trial court's hac finding, included a decision, quoting the Dixon limiting construction. Deaton, 480 So.2d, at 1283; Clark v. State, 443 So.2d 973, 977 (Fla. 1983).

Therefore, it is clear that both the trial court and this Court, need not re-examine its review of this finding, when the initial review of said courts, was appropriate.

CLAIM X

DEFENDANT'S DEATH SENTENCE DOES NOT REST UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

Again, this issue is procedurally barred from review by this Court, Blanco, supra. Said argument does not represent a change in law, but instead is based on the "narrowing" issue presented in Zant v. Stephens, 462 U.S. 862, 877 (1983). Additionally, appellate counsel was not ineffective for failing to raise the issue on appeal as trial counsel did not preserve it. This requirement applies equally to sentences of death, Bertolotti v. Dugger, 515 So.2d 1095, 1096-1097 (Fla. 1987). This issue is properly raised on a 3.850 motion.

However, should this Court choose to entertain this issue no error is shown. Defendant argues that as he was charged with premeditated murder, which necessarily encompasses felony murder, the trial court's using felony murder as an aggravating circumstance resulted in an unconstitutional automatic aggravating factor. Defendant bases his argument on Lowenfield v. Phelps, 1 F.L.W. Fed. 1230 (Jan 13, 1988).

In Lowenfield the test for determining constitutionality, where a single aggravating circumstance which merely duplicates an element of the underlying offense is a resort to the capital sentencing scheme itself:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."
>
> Lowenfield at 1234, citing Zant v. Stephens, 462 U.S. cf. Gregg v. Georgia, 428 U.S. 153 (1976).

It is well-settled that the Florida capital sentencing scheme is constitutional. In Proffitt v. Florida, 428 U.S. 242, 259-260 (1976) the United States Supreme Court found Florida's capital system assumes "sentences of death will not be wantonly or freakishly imposed." Once defendant is found guilty of first

degree murder under the Florida Scheme, approved in Proffitt v. State, 428 U.S. 242 (1976), the jury proceeds to determine whether death is appropriate. It does so by weighing aggravating factors against statutory mitigating factors (currently ten aggravating and seven mitigating) as well as numerous non-statutory mitigating factors. The factors considered are specifically tailored to the individual circumstances of each case, §921.141, Fla. Stat. The sentencing authority, the judge, then receives said recommendation and makes his own determination based upon the same principles as the appropriateness of the death penalty §921.141 (3), Fla. Stat.. Thusly, Florida's scheme clearly and genuinely removes the class of persons eligible for the death penalty.

Defendant reads Lowenfield to stand for the proposition that an aggravating factor can be considered at either the conviction stage, as in Louisiana or at the sentencing stage, but not both. However, Lowenfield does not forbid the existence of duplicate factors in both stages. Legislative 'narrowing' is the constitutional requirement,[8] Lowenfield at 1234, see Blanco v. Dugger, 2 F.L.W. Fed. 187, 190-1 (April 27, 1988).

However, assuming arguendo of error, said error is merely harmless. The severity of the two remaining aggravating circumstances that the murder was heinous, atrocious and cruel as well as cold calculated and premediated - obviously outweigh the sole mitigating factor, no significant history of criminal activity. (See Claim III as well as sentencing order). In fact this Court found the aggravating factors to be so severe that were another mitigating factor found, defendant's young age, it would not have offset the aggravating factors, Deaton, supra at 1283. Clearly reversal is not warranted,

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[8] In fact Lowenfield approved of the Louisiana statute which contained a duplicitious aggravating factor as it was "no part of the constitutionally required narrowing process" Lowenfield at 1234.

CONCLUSION

WHEREFORE, Respondent respectfully requests that Petitioner's Petition for Writ of Habeas Corpus and any other further relief be DENIED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DIANE LEEDS
Assistant Attorney General

JOAN FOWLER
Assistant Attorney General

RICHARD BARTMON
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response to 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" has been furnished by United States Mail to: LARRY HELM SPALDING, Capital Collateral Representative, BILLY H. NOLAS, MARTIN J. McCLAIN, and JULIE D. NAYLOR, Counsel for Petitioner, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 this 28th day of September, 1988.

Of Counsel