IN THE SUPREME COURT OF FLORIDA

THOMAS PROVENZANO,

Petitioner,

vs. CASE NO. 73,981

STATE OF FLORIDA,

Respondent.

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

COMES NOW respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100(h), and files the instant response to Provenzano's Petition for Extraordinary Relief, Petition for Writ of Habeas Corpus, Request for Stay of Execution and Application for Stay of Execution pending disposition of Petition for Writ of Certiorari, filed on or about April 6, **1989**, and moves this honorable court to deny all requested relief for the reasons set forth in the instant pleading.

PRELIMINARY STATEMENT

Provenzano was convicted of one count of first degree murder and two counts of attempted first degree murder in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, following a trial by jury on June 11-19, **1984**. A separate sentencing proceeding was held on July 11, **1984**, and the jury subsequently returned an advisory verdict of death. On July 18, **1984**, Judge Shepard formally sentenced Provenzano to death, finding five (5) aggravating circumstances and one (1) mitigating factor; the judge found in mitigation that Provenzano had no significant history of prior criminal activity, section 921.141(6)(a), whereas in aggravation the court found that Provenzano had previously been convicted of a felony involving the use or threat of violence, section 921.141(5)(b), that Provenzano had knowingly created a great risk of death to many persons, section 921.141(5)(c), that the capital felony was

committed for the purpose of avoiding lawful arrest, section 921.141(5)(e), that the capital felony was committed to disrupt or hinder the lawful exercise of a governmental function, section 921.141(5)(g) and that the homicide had been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i).

Provenzano appealed his convictions and sentences to this court, and such appeal was styled, Provenzano v. State, FSC Case No. 65,663. Provenzano presented nine (9) primary claims on appeal, including: (1) alleged error in the instruction on transferred intent; (2) alleged error in any denial of a motion for change of venue; (3) alleged insufficient evidence as to premeditation; (4) alleged error in the finding of the aggravating circumstance of cold, calculated and premeditated; (5) alleged error in the finding of the aggravating circumstance relating to disruption of a governmental function; (6) alleged error in the sentencing judge's failure to consider and find statutory and nonstatutory mitigating circumstances; (7) alleged improper questioning and argument by the prosecutor during the penalty phase; (8) alleged cumulative error including, inter alia, alleged limitation of cross-examination and denial of a motion for mistrial following an emotional outburst by the audience and (9) alleged unconstitutional application of section 921.141, given the fact that the jury does not find the aggravating circumstances.

On October 16, 1986, this court rendered its opinion, affirming Provenzano's convictions and sentence in all respects. See, Provenzano v. State, 497 So.2d 1177 (Fla. 1986). This court found no error in the instruction given the jury on transferred intent, and further found sufficient evidence as to premeditation. This court concluded that no claim of error had been preserved in regard to the point concerning the change in venue; however, this court chose to address the substantive aspects of the issue, so as to allay any fear that Provenzano had not received a fair trial and, indeed, concluded that Provenzano merited no relief. This court expressly approved the finding of

the cold, calculated and premeditated aggravating circumstance, as well as that involving the disruption of a governmental function. As to the allegedly unfound statutory mitigating circumstances, this court found that the trial court had considered all the evidence presented and found in its sound discretion that such did not rise to the level of a mitigating circumstance; similarly, as to the nonstatutory mitigating circumstances allegedly not found, this court concluded that none of the factors cited were supported by the record. This court found that the record refuted any contention of improper accumulation of errors, and further noted that even if the two contested aggravating circumstances had been improperly found, in light of the three that would remain and the single mitigating circumstance, "the sentence of death is still appropriate." Id. at **1184**. Finally, this court found Provenzano's attack upon the application of a capital sentencing statute to be without merit. This court subsequently denied rehearing on December **22, 1986**.

On or about February **17, 1987**, Provenzano sought review by the Supreme Court of the United States, presenting three **(3)** claims for relief, including that relating to any denial of his motion for change of venue, this court's affirmance of the trial court's failure to find anything in mitigation and the fact that the jury did not find aggravating circumstances. On April **20, 1987**, the Court denied review. See, Provenzano v. Florida, **481** U.S. **1024, 107** S.Ct. **1912, 95** L.Ed.2d **518 (1987).**

On March **7, 1989**, Governor Martinez signed a death warrant for Provenzano, such death warrant active between noon, May **8** and noon, May **15, 1989**, with execution presently scheduled for **7:00** a.m. on May **9, 1989**. Pursuant to Florida Rule of Criminal Procedure **3.851**, Provenzano filed a motion for post-conviction relief in the trial court on April **6, 1989**, as well as the instant petition for extraordinary relief in this court. In such petition, Provenzano presents twelve (12) primary claims for relief, including: (1) alleged error in the jury instructions in the penalty phase which allegedly shifted the burden of proof on to the defense; (2) alleged error in the finding of the "cold,

calculated and premeditated" aggravating circumstance **(3)** alleged error in the instructions given the jury on insanity and ineffective assistance of appellate counsel in failing to present that claim on appeal; **(4)** alleged error in the fact that Provenzano was absent from certain portions of his trial and alleged ineffective assistance of appellate counsel in failing to present that claim on appeal; (5) alleged error in the instructions given the jury upon release from sequestration and ineffective assistance of appellate counsel for failing to present that claim on appeal; (6) alleged error in the finding of all five aggravating circumstances; **(7)** alleged error in remarks which advised the jury not to consider sympathy; (8) alleged error in the prosecutor's closing argument during the penalty phase **(9)** alleged error in improper consideration of the victims' character and victim impact information and alleged ineffective assistance of appellate counsel in failing to present that claim on appeal; (10) alleged error in the sentencing court's refusal to find certain mitigating circumstances; **(11)** alleged error in the introduction of a photo of the victim and alleged ineffective assistance of appellate counsel in failing to present that claim on appeal and (12) alleged error in argument, instruction and comment which diluted the jury's sense of responsibility in sentencing, in violation of Caldwell v. Mississippi, **472** U.S. **320, 105** S.Ct. **2633, 86** L.Ed.2d **271 (1985),** and alleged ineffective assistance of appellate counsel in failing to present that claim on appeal.

ARGUMENT

THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED, IN THAT PROVENZANO HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL; ALL OTHER CLAIMS ARE IMPROPERLY PRESENTED AND ARE PROCEDURALLY BARRED.

Of the twelve (12) claims presented, only those presenting a claim of ineffective assistance of appellate counsel - by respondent's count, Claims 111, IV, V, IX, XI and XII - are

properly presented, in that the remainder represent matters which could have been, should have been, or actually were, raised on direct appeal and/or matters which were not preserved through objection at the time of trial.' In White v. Dugger, 511 So.2d 554, 555 (Fla. 1987), this court specifically advised the Office of the Capital Collateral Representative that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised on direct appeal or which were waived at trial or which could have, should have or have been raised in Rule 3.850 proceedings. See also, Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987) (statement by collateral counsel, to the effect that if issue should have been raised on appeal, such issue therefore cognizable on habeas corpus, found to be "a totally incorrect statement of the law."). Unfortunately, these admonitions have apparently fallen upon deaf ears, as evidenced by the constant onslaught of truly extraordinary petitions for extraordinary relief which, like that sub judice, present a smorgasbord of claims, properly presented or otherwise. Each of Provenzano's claims will now be addressed.

CLAIM I: PROVENZANO'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON TO THE DEFENSE.

As to his first claim, Provenzano argues that his sentence of death must be reversed because the instructions given the jury during the penalty phase allegedly impermissibly shifted the burden of proof on to the defense. In support of his argument, Provenzano cites to Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) and the granting of certiorari by the Supreme

[1] In the conclusion to the petition, Provenzano also identifies Claims I, VI and VII, as involving the ineffective assistance of appellate counsel, and fails to allege that Claim IX presents such argument. This conclusion, however, is difficult to reconcile with the actual claims themselves.

Court of the United States in Commonwealth v. Blystone, 549 A.2d 81 (Pa 1988), cert. granted, ___ U.S. ___ (March 27, 1989).[2]

Although Provenzano insists that he is proceeding correctly in presenting this claim on habeas corpus, after having failed to object to instructions at trial and further having failed to present any claim on direct appeal, the opposite is true. In Jones v. Dugger, 533 So.2d 290 (Fla. 1988), this court held that a claim that the language of the jury instructions impermissibly shifted to the defendant the burden of proving that the mitigating circumstances outweighed the aggravating, when presented on habeas corpus, was procedurally barred, in that it "should have been raised on direct appeal." Id. at 293. Provenzano makes no attempt to distinguish Jones, and, indeed, does not even acknowledge its existence. On the basis of Jones, White and Blanco, this claim is clearly procedurally barred, and in light of Harris v. Reed, U.S. ___, 109 S.Ct. 1038 (1989), the state would respectfully request that this court make its finding of procedural default express. See, Harris v. Reed, supra (federal courts will not respect state procedural rules unless last state court to consider claim expressly finds procedural bar).

To the extent that further argument is necessary, the state would respectfully suggest that Provenzano simply misreads the penalty phase instructions. In this case, the jury were initially told that they should consider whether there was sufficient aggravating circumstances to justify imposition of the death penalty and whether sufficient mitigating circumstances existed to outweigh them (R 2226). After being instructed on the specific aggravating circumstances, the jury was then told that if they did not find sufficient aggravating circumstances to exist, they should then return a recommended sentence of life imprisonment (R 2228). After instructing on the mitigating

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[2] It is interesting to note that Provenzano's present counsel is astute enough to be cognizant of this order by the Supreme Court of the United States, and yet has made no reference to the recent decision of such Court, Dugger v. Adams, U.S. ___, 109 S.Ct. 1211 (1989), in the discussion of his claim based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). See, infra.

circumstances, the judge then advised the jury that the aggravating circumstances had to be proven beyond a reasonable doubt before they could be considered; if one or more aggravating circumstances was found, then the jury should consider all the evidence tending to establish one or more mitigating circumstances and then give that evidence such weight as it felt it should receive (R 2229). The state suggests that a reasonable juror could not have misunderstood the burden of proof at sentencing. See, Preston v. State, 531 So.2d 154, 160 (Fla. 1988) (Florida's instructions do not shift the burden of proof to the defendant, when read as a whole). Further, although Provenzano fails to note this, defense counsel, during the course of his argument, expressly told the jury that even if they found the presence of an aggravating circumstance and nothing in mitigation, they could still recommend life if not convinced that a sentence of death was justified; defense counsel told the jury that such was the law in Florida, and no objection was interposed by the state (R 2206).

Further, any claim of "new law" is unconvincing or simply improperly presented. The state does not find Mills v. Maryland, apposite to this claim, and Adamson v. Ricketts, as a decision of an intermediate federal appellate court, could not serve as a basis for retroactive application, even if properly presented. See, Eutzy v. State, 14 F.L.W. 176 (Fla. March 28, 1989). It is, of course, unknown at this time what the Supreme Court of the United States will do in Blystone, but such case represents a claim involving a statute with an express presumption of death under certain circumstances, whereas here, despite Provenzano's best efforts, neither our statute nor our jury instructions contain such language. No relief is warranted as to this claim.

CLAIM 11: PROVENZANO'S CLAIM THAT THE FINDING OF THE "COLD, CALCULATED AND PREMED1TATED" AGGRAVATING CIRCUMSTANCE WAS ERROR.

In this claim, Provenzano argues that his death sentence must be reversed because of the allegedly erroneous finding of

the cold, calculated and premeditated aggravati g circumst nce, section 921.141(5)(i). Provenzano candidly concedes that this claim was presented on direct appeal, but argues that "recent changes in Eighth Amendment jurisprudence" dictate reconsideration (Petition at 18). Provenzano specifically claims that Roqers v. State, 511 So.2d 526 (Fla. 1987), is "indeed a change in law", and further contends that the aggravating circumstance was unconstitutionally applied to him, in violation of Maynard v. Cartwriqht, U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

The state would suggest that this claim is squarely foreclosed by Eutzy v. State, supra. In such decision, this court expressly held that Roqers did not constitute a "jurisdictional upheaval" requiring retroactive application. Eutzy at 178. Further, Eutzy, like Provenzano, had attacked the finding of this aggravating circumstance on appeal and had sought reconsideration of the issue on habeas corpus, This. court refused to revisit the claim, finding that no fundamental constitutional infirmity had been shown to exist. Such holding is applicable sub judice, given the fact, which Provenzano ignores, that this court has made an express finding of harmless error as to this aggravating circumstance. Thus, in affirming Provenzano's sentence of death, this court noted, in regard to the challenge to this aggravating circumstance and that relating to hinderance of governmental function,

> In this context we note that assuming arguendo that appellant [Provenzano] is correct that two aggravating circumstances were improperly found, in light of the three that remain, balanced against only one mitigating circumstance, the sentence of death is still appropriate. Kennedy v. State, 455 So.2d 351 (Fla. 1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed.2d 983 (1985). Provenzano at 1184.

Accordingly, the state suggests that this claim is procedurally barred. Provenzano has no right to reconsideration of a claim already presented, and rejected, on direct appeal.

See, e.g., White, supra. Any contention based upon Maynard v. Cartwright is also procedurally barred, in light of this court's decision in Henderson v. Dugger, 522 So.2d 835 (Fla. **1988)** (claim that cold, calculated and premeditated aggravating circumstance applied in unconstitutionally overbroad manner one which should have been presented on direct appeal). Further in Jones v. Dugger, supra, this court rejected a claim that Maynard impacted upon jury instructions describing this aggravating circumstance. No relief is warranted, especially given the fact that application of this aggravating circumstance remains in accordance with this court's precedents. Cf. Jones v. State, **440** So.2d 570 (Fla. **1983)** (defendant killed police officer in sniper attack, following prior difficulties with other members of the police). Further, in Rogers, this court simply held that this aggravating circumstance was properly applied where there was evidence of a careful plan or prearranged design. Given Provenzano's careful preparation and planning for the murder sub judice, the finding of this aggravating circumstance was proper. No relief is warranted as to this procedurally-barred claim, and, given Harris v. Reed, supra, the state would respectfully suggest that the finding of the procedural bar be made express.

CLAIM 111: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT THE INSTRUCTIONS GIVEN THE JURY ON INSANITY WERE CONSTITUTIONALLY INADEQUATE.

In this claim, Provenzano contends that he received ineffective assistance of appellate counsel due to appellate counsel's failure to argue on direct appeal that the instructions given the jury on insanity were constitutionally inadequate. Provenzano points to this court's decision, Yohn v. State, 476 So.2d 123 (Fla. **1985),** in which virtually identical jury instructions were disapproved. Provenzano further argues that there could have been no tactical basis for appellate counsel's failure to raise this claim,[1] and, citing to Johnson v. Wainwright, **498** So.2d 938 (Fla. 1986), asserts that "no

procedural bar precluded review of this issue." (Petition at **34)** (emphasis in original).

Actually, appellate counsel had very good cause not to raise any claim in this regard. Provenzano's contentions notwithstanding, no objection was interposed in regard to this jury instruction nor was any additional instruction requested, in contrast to Yohn (R **1821-33).** Johnson does not stand for the proposition that appellate counsel can be ineffective for failing to raise a procedurally-barred issue; in Johnson, the conviction was reversed due to the court's failure to sequester the jury during deliberation over the objections of defense counsel. This court has continually held that appellate counsel cannot be deemed to have rendered ineffective assistance of counsel for failing to raise issues which have not been preserved for review. See, e.g., Routly v. Wainwright, 502 So.2d **901** (Fla. **1987);** Ruffin v. Wainwright, **461** So.2d **109** (Fla. **1984).** Accordingly, Provenzano's claim of ineffective assistance of appellate counsel is totally without merit:

Further, it is clear from the arguments presented to the jury in this case that this jury was not misled as to the state's burden of proof as to sanity. During opening statement, the prosecutor promised the jury that the state would prove that Provenzano had been sane at the time that he had committed the murder (R **477).** During closing argument, defense counsel reminded the jury that the defense did not have to prove Provenzano insane, merely establishing a reasonable doubt as to his sanity (R **1907).** In the state's rebuttal argument, the prosecutor stated that the only issue in the case was the issue of sanity and that, based upon the evidence presented, the jury could reach a verdict that Provenzano had been sane and, thus, guilty (R **1963-4).**

The state would additionally note that in Smith v. State, 521 So.2d 106 (Fla. **1988),** this court held that the standard jury instruction condemned in Yohn was not constitutionally infirm and that such instruction did not constitute fundamental error. This court further observed,

> Despite any shortcomings, the standard jury instructions, as a whole, made it quite clear that the burden of proof was on the state to prove all the elements of the crime beyond a reasonable doubt. Smith, 521 So.2d at **108.**

In Smith, this court specifically refused to grant relief to a defendant, like Provenzano, who had not objected to the jury instructions at issue. See also, State v. Lancia, **499** So.2d **11** (Fla. 5th DCA **1986).** To the extent that this claim is improperly presented as a "merits" issue, it is plainly procedurally barred, given the lack of objection at trial. Smith, supra.

In conclusion, Provenzano has failed to set forth an adequate claim of ineffective assistance of appellate counsel, given the fact that counsel cannot be ineffective for failing to raise a procedurally-barred issue. See, Routly, supra; Ruffin, supra. Provenzano has likewise failed to present any claim of "fundamental" error, given this court's opinion in Smith, never cited by Provenzano, to the effect that the instructions given in this case were not constitutionally infirm or fundamentally erroneous. The state would suggest that any "merits" presentation of this claim is procedurally barred, and should explicitly be found such in light of Harris v. Reed, supra.

> CLAIM IV: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT PROVENZANO WAS ABSENT DURING CRITICAL STAGES OF HIS TRIAL.

In this claim, Provenzano contends that he received ineffective assistance of appellate counsel due to counsel's failure to argue on direct appeal that Provenzano's conviction should be reversed because he was absent from certain alleged critical portions of his trial. Provenzano identifies the following alleged absences: **(1)** alleged absence during the pre-trial motion hearing on May **1, 1984;** (2) alleged absence during the charge conference and **(3)** alleged absence during argument on a defense motion for mistrial. Provenzano argues that it was inexcusable for appellate counsel not to have raised this matter

on appeal, given the fact that these "errors" "leaped out of the record to even a casual reader." (Petition at 39) Provenzano also suggests that, in light of the Eleventh Circuit opinion in Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985), it was not necessary that these claims be preserved through objection at trial, before being presented on appeal.

Assuming simply for the sake of argument, and simply at this juncture, that Provenzano is correct as to the latter statement, the state suggests that, in any event, he has failed to demonstrate that he received ineffective assistance of appellate counsel. In order to prevail under such precedents as Downs v. State, 453 So.2d 1101 (Fla. 1984) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Provenzano must not only show deficient performance of counsel, but also resultant prejudice, such that it can be said that a reasonable probability of a different result exists, had counsel raised this claim on appeal. It is well established that counsel need not raise every nonfrivolous'claim apparent from the record, see, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and that one of appellate counsel's primary functions is to "winnow out" weaker arguments on appeal, and to focus upon those most likely to prevail. See, Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 454 (1986). This court has recognized that appellate counsel cannot be deemed ineffective for failing to present a legal argument which would, in all probability, have been found to be without merit. See, Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986). No relief is warranted as to this claim.

Turning to the three instances at issue, it would appear that Provenzano is simply in error as to his alleged absence at the hearing of May 1, 1984. While it is true that the transcript makes no express reference to him, the court minutes indicate that Provenzano was in fact present (R 2931, 2932). Appellate counsel, who, of course, was more than a mere "casual reader" of this record on appeal was no doubt aware of this fact. Further, even if he had not been, no reversible error would have been

demonstrated. The matters discussed at this hearing were not ones such that their discussion would have been "improved" by Provenzano's personal presence, and in no sense can this proceeding be regarded as a "critical" or "essential" stage of the trial. At this proceeding, legal arguments alone were presented on a motion to dismiss the indictment, based upon alleged unconstitutionality of the death penalty procedure, and upon a motion to suppress evidence, based upon alleged insufficiency of the affidavit of the search warrant, as to the reliability of the informant; no testimony was presented on either motion, and both were denied (R 2246-2257). The defense similarly presented legal arguments in support of its motion to require the state to anticipate an insanity defense during its own case in chief; this motion was denied (R 2257-2260). The rest of the proceeding was devoted to a motion by the Orlando Sentinel for access to the depositions, and the defense took no position as to this matter (R 2260-2296). It is clear, under prevailing caselaw, that this is not the type of proceeding where the defendant's personal presence is essential. *See*, e.g., Herzog v. State, 439 So.2d 1372 (Fla. 1983) (suppression hearing not critical stage); Stano v. State, 473 So.2d 1282 (Fla. 1985) (status conference not critical stage); Garcia v. State, 492 So.2d 360 (Fla. 1986) (conference wherein defense counsel argued motion for change of venue and other legal motions not critical stage); Muehlman v. State, 503 So.2d 310 (Fla. 1987) (suppression hearing not critical stage). Further, Provenzano's claim that this proceeding would have given him some pretrial "notice" as to his counsel's decision not to seek change of venue is meritless, in light of the fact that Provenzano was present at another pretrial hearing on May 15, 1984, at which time defense counsel expressly stated on the record that the defense would not be seeking a change of venue (R 2354-2388).

The other two alleged instances of absence involve the charge conference (R 1821-5, 1830-5) and argument on a defense motion for mistrial (R 1966-7). The record reveals that defense counsel specifically waived Provenzano's presence at both of

these proceedings (R 1821, 1966). Although Provenzano now contends that these waivers were made "without a knowing and intelligent waivver (sic) on the part of Mr. Provenzano" (Petition at 36), the record does not support this contention, in that it is unclear whether or not Provenzano was consulted, beforehand or afterwards, on these matters.[3] What is clear, however, is that neither of these proceedings can be considered a critical stage under Florida Rule of Criminal Procedure 3.180(a), in that, inter alia, the jury was not present, no evidence was presented, and, at most, arguments of law were made. It has continually been the law that a jury charge conference is not a critical stage, mandating the defendant's presence. See e.g., Randall v. State, 346 So.2d 1233 (Fla. 3rd DCA 1977); Maguerí v. State, 460 So.2d 975 (Fla. 3rd DCA 1984), cert. dismissed, 469 So.2d 749 (1985); Howard v. State, 484 So.2d 1319 (Fla. 3rd DCA), cert. denied, 492 So.2d 1332 (Fla. 1986). Even if this were not so, it is difficult to see what Provenzano's presence at this proceeding could have accomplished. Defense counsel did not waive any instruction on any lesser included offense to which Provenzano would have been entitled. Cf. Harris v. State, 438 So.2d 787 (Fla. 1983); Mack v. State, 537 So.2d 109 (Fla. 1989). Contrary to Provenzano's present arguments, defense counsel did in fact preserve a claim of error in regard to instructions which he regarded as improper, i.e., those on transferred intent (R 1822-3, 1830-2). Any suggestion that Mr. Provenzano's personal presence would have induced defense counsel to object to the standard jury instructions on insanity, discussed in part 111, supra, is particularly unpersuasive, given the fact that this court's decision in Yohn which would have served as the basis

[3] Provenzano has raised a claim of fundamental error, based upon his alleged absence from these proceedings, in his concurrently-filed motion for post-conviction relief, as well as a claim that trial counsel was ineffective for waiving Provenzano's presence without his knowledge or acquiescence (see, Emergency Motion to Vacate Judgment and Sentence, Etc., State v. Provenzano, Orange County Circuit Court Case No. 84-835, filed April 6, 1989, at pages 143-9, Claim IX). At this juncture it is unclear whether the record will be developed any further in this regard, although the state would suggest that the instant claim, based upon ineffective assistance of appellate counsel, can nevertheless be resolved, and rejected, based upon the present record.

for any objection, was not rendered until one year after this trial. Given the fact that Provenzano, even if present, could only have been heard through counsel and the fact that only arguments of law were presented, the defendant's absence from this proceeding was not fundamental error. Cf. Roberts v. State, 510 So.2d 885 (Fla. 1987) (defendant's absence from motions hearing during presentation of "matters in which Roberts, if present, could not have assisted defense counsel in arguing" harmless error). A similar result is dictated to Provenzano's absence during the argument on defense counsel's motion for mistrial, in that it is difficult to see what, if anything, Provenzano personally could have added to this presentation. Cf. Roberts, supra; Garcia, supra.

Thus, it can be said that no reasonable probability exists that, had these arguments been presented on direct appeal, this court would have reversed Provenzano's convictions and sentences. A particularly apposite precedent is Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). In such case, Johnson had petitioned this court for a writ of habeas corpus, on the grounds that his appellate counsel had been ineffective for failing to argue on appeal that Johnson had been absent during critical stages of his trial, i.e., during the testimony of a witness at the sentencing phase and at a time when two challenges for cause were exercised. The record indicated that defense counsel had specifically waived Johnson's presence during the testimony of the witness, stating that such was Johnson's desire, and had further failed to lodge any objection in this regard. Johnson, nevertheless, argued that, despite these facts, appellate counsel should have argued that an involuntary absence had occurred. This court rejected Johnson's contention, noting its contradiction by the record, and stating,

> We have said many times that an appellant in a criminal case is not entitled to have his counsel press every conceivable claim on appeal. It is not difficult to see how appellate counsel might well have decided not to argue this issue on appeal [footnote omitted]. That

> appellate counsel did not present the inventive and highly technical argument being brought before us now is not a basis for finding 'a substantial and serious deficiency,' (citation omitted), 'outside the wide range of professionally competent assistance.' (citation omitted). Because defense counsel at trial not only explicitly waived the defendant's presence on his behalf but also affirmatively requested that he be allowed to leave the courtroom, representing to the court that this was the defendant's agreement and in his interest, appellate counsel could very reasonably have decided that the issue was not a promising one because of the waiver and the lack of prejudice to the defense. Johnson, 463 So.2d at 211-12.

While, in this case, trial counsel did not affirmatively indicate that he was expressing Provenzano's personal preference, when waiving his presence, the state suggests that such omission is not critical, given the fact that in Johnson, the defendant was absent for a truly critical portion of the proceeding, i.e., the testimony of a witness. The record in this case indicates that defense counsel waived Provenzano's presence at two primarily "legal" proceedings, and the state rejects Provenzano's present contention that it was appellate counsel's "duty" to have presumed that such action by counsel was improper. On the basis of this record, it cannot be said that every reasonably competent appellate attorney would have made an argument that Provenzano was involuntarily absent during critical stages of his trial; similarly, it cannot be said that, had such argument been made, a reasonable probability of a different result existed on appeal. No relief is warranted as to this claim, and to the extent that such claim is also presented as a "merits" issue, it is procedurally barred, cf., Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), and given Harris v. Reed, supra, the state would respectfully request that the procedural bar be explicitly found.

CLAIM V: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT THE ADMONITIONS GIVEN THE JURY WERE INSUFFICIENT.

In this claim, Provenzano argues that his sentence must be reversed because he received ineffective assistance of appellate counsel, given appellate counsel's failure to brief on appeal any issue regarding the inadequacy of the admonition given the jury upon their release from sequestration at the conclusion of the trial. Provenzano argues that there could have been no strategic or tactical reason for appellate counsel to have omitted this claim (Petition at 43-4). Actually, as in Point 111, supra, appellate counsel had good cause to omit any claim on appeal in this regard. No objection was interposed in regard to the instruction as given and, at the time that the jury reconvened, no request was made for inquiry as to whether the jury had considered impermissible matters (R 1992-6; 2001-2042). It is well established that appellate counsel cannot be deemed ineffective for failing to raise a claim which is not preserved for appeal. See, Routly, supra; Ruffin, supra. Accordingly, no ineffective assistance of appellate counsel has been demonstrated.

The state would additionally suggest that portions of the admonition now proposed by Provenzano would simply have been inapplicable to the situation at bar. The jury had already concluded its deliberations as to guilt ,or innocence and had returned a verdict. The judge did, however, advise them that during the separation prior to sentencing, they should not allow anyone to discuss the case with them and that they were "in effect, sitting on a jury", even though it was not feasible to physically sequester them at that time (R 1993). They were likewise told that the case was still pending and that a really important phase was coming up (R 1993). No relief is warranted as to this claim, in that no ineffective assistance of appellate counsel has been demonstrated.[1]

CLAIM VI: PROVENZANO'S CLAIM THAT THE REMAINING FOUR AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY APPLIED TO HIM.

In this claim, Provenzano argues that four of the five aggravating circumstances found as part of his sentence of death were unconstitutionally applied to him; Provenzano attacked the remaining aggravating circumstance - cold, calculated and premeditated - in Claim II, supra. Provenzano cites no authority for his presentation of this argument at this juncture. It should be obvious that these represent matters which could have been, should have been, or actually were, presented on direct appeal, thus rendering them ineligible for consideration on habeas corpus. See, White, supra. Although Provenzano again cites to Maynard v. Cartwright, supra, it is difficult to see the applicability of such precedent, given the fact that the heinous, atrocious or cruel aggravating circumstance is not implicated. The state would suggest that this claim is procedurally barred and, in light of Harris v. Reed, supra, would further respectfully suggest that the existence of this procedural bar be made explicit.

In any event, Provenzano's specific attack upon the aggravating circumstances at issue are not convincing. As to the finding of the aggravating circumstance relating to prior convictions for crimes of violence, Provenzano's argument is particularly specious. Although Provenzano cites to such decisions as Wasko v. State, 505 So.2d **1314** (Fla. **1987)** and Perry v. State, 522 So.2d **817** (Fla. **1988),** for the proposition that contemporaneous convictions should not have been utilized in support of this factor, this argument is completely misleading. Provenzano was sentenced to death for the murder of Arnie Wilkerson; his prior convictions relate to his convictions of attempted murder for the shooting of Mark Parker and Harry Dalton. As even the above cases make plain, there is no problem utilizing such contemporaneous convictions when there has been more than one victim in the case. See also, Correll v. State, 523 So.2d 562 (Fla. **1988)** (simultaneous murder convictions can constitute "prior" convictions).

Provenzano's attacks upon the other three aggravating circumstances are primarily premised upon his belief that mental health mitigation had been established, a conclusion which was rejected by the sentencing court, and affirmed by this court on appeal. Additionally, although Provenzano does not note this, an attack was made upon the circumstance relating to the hinderance of governmental function on direct appeal, and this court rejected such,

> Appellant's contention that the trial court erred in finding that the murder was committed to disrupt or hinder the lawful exercise of a governmental function is without merit. This circumstance is appropriate because Provenzano intended to disrupt his trial, thus hindering one of the most basic government functions. This factor was not improperly doubled with the finding that the murder was committed to avoid lawful arrest because separate factual circumstances support each finding. See, Tafero v. State, 403 So.2d 355 (Fla. 1981). The fact that Provenzano' murdered Wilkerson to avoid his lawful arrest for the attempted murder of Dalton supports the finding that the murder was committed to avoid lawful arrest. As noted above, the fact that Provenzano attempted to disrupt his trial supports a finding that the murder disrupted a governmental function. Provenzano, 497 So.2d 1183-4.

Provenzano has offered this court no basis to revisit these findings, even should this claim not be procedurally barred. No relief is warranted.

> CLAIM VII: PROVENZANO'S CLAIM THAT THE PROSECUTION AND COURT IMPROPERLY ASSERTED THAT THE JURY COULD NOT CONSIDER SYMPATHY.

In this claim, Provenzano argues that his death sentence must be vacated because during the penalty phase the court and prosecutor improperly advised the jury that they were not to consider sympathy. Specifically, Provenzano points to two remarks by the prosecutor during argument in which he advised the jury not to consider sympathy for Provenzano in rendering their

advisory sentence (R 2171, 2196). Provenzano cites to no authority as to why he is permitted to present this claim on habeas corpus. No objection was interposed in regard to the above remarks, and no claim of this nature was presented on appeal. Accordingly, this claim is procedurally barred under White v. Dugger, supra, and, in light of Harris v. Reed, supra, the state would respectfully urge this court to explicitly find the existence of the procedural bar.

Even if this claim were not procedurally barred, Provenzano would be entitled to no relief. Provenzano quotes very selectively from the record, and, once one looks to the true context of the prosecutor's remarks, it should be apparent that he was simply, and quite properly, urging the jury to follow the law, and not their emotions. For instance, while Provenzano cites to the following portion of the argument,

> . . . the advisory recommendation to the court as to the sentence has nothing to do with sympathy. You are not going to decide anything on sympathy, not feeling sorry for anyone . . . not feeling sorry for Mr. Provenzano because ten years ago he had some marital problems. (quoted at Petition at 56-7),

the entire quote should read,

> . . . the advisory recommendation to the court as to the sentence has nothing to do with sympathy. You are not going to decide anything on sympathy, not feeling sorry for anyone; not feeling sorry for the victim, Arnold Wilkerson; not feeling sorry for Mr. Provenzano because ten years ago he had some marital problems. (R 2171) (emphasis supplied).

Similarly, as to the second portion of the argument, Provenzano quotes the following:

> . . . not what's the appropriate sentence because you feel sorry for him, feel sorry for Catherine Robinson . . . for his nephew, for his brother-in-law . . . (cited at Petition at 57).

The full quote should read:

> But the issue is, under the aggravating and mitigating factors, for you to make a weighing, a balancing, what's the appropriate sentence under the law, not what's the appropriate sentence because you feel sorry for him, feel sorry for Catherine Robertson, his sister, who apparently has done a lot of things for him, yet he dislikes her *so* much, for his nephew, for his brother-in-law.
>
> Or even its not appropriate for you that you feel sorry for Arnie Wilkerson, that you think maybe death would be the appropriate sentence just because you feel sorry. That's not appropriate. That's not what we're hear for again. We're not here for sympathy. We're here for you to make an objective evaluation of all the aggravating circumstances and mitigating circumstances, to balance them out and then make a recommendation based on that. (R **2196-7)** (emphasis supplied).

These even-handed admonitions to the jury to follow the law are entirely consistent with California v. Brown, **479** U.S. **538, 107** S.Ct. **837, 93** L.Ed.2d **934 (1987).** No relief is warranted as to this procedurally barred claim.

> CLAIM VIII: PROVENZANO'S CLAIM THAT THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE WAS FUNDAMENTALLY UNFAIR.

In this claim, Provenzano contends that the prosecutor's closing argument during the penalty phase rendered his sentencing proceeding fundamentally unfair.[4] Provenzano identifies two portions of the argument as objectionable - that portion wherein the prosecutor emphasized that the shooting had occurred at the courthouse itself (R **2183-4)** and that portion wherein the prosecutor had again emphasized that society as a whole could be considered the victim (R **2197-8).** Defense counsel objected to both of these remarks at the time of trial, and on appeal appellate counsel argued that such objections should have been

[4] Although the title to this point makes reference to the guilt phase as well, this is apparently a typographical error, in that all of the argument discussed occurred during the penalty phase.

sustained and a mistrial granted (see Initial Brief, Provenzano v. State, FSC Case No. 65,663, at 54-6, 58-9). In its opinion affirming Provenzano's conviction and sentence, this court observed,

> Appellant complains that improper prosecutorial questioning and argument deprived him of his right to a fair trial. The record refutes any contention of improper accumulation of errors. Provenzano, 497 So.2d at 1184.

In the instant petition for writ of habeas corpus, Provenzano argues that this court should "revisit" this issue, in light of such recent decisions as Scull v. State, 533 So.2d 1137 (Fla. 1988), Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Booth v. Maryland, 482 U.S. 486, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Such cases are hardly applicable. Scull and Booth dealt with the admission of "victim impact" evidence at sentencing; analogizing society to the "victim" in this case does not fall within the proscription of such cases. Caldwell, which involved an instance in which the jury's role in sentencing was allegedly improperly diluted, would hardly seem comparable to a situation in which, at worst, counsel may have had the effect of elevating the jury's role in the legal system. This issue was correctly resolved on direct appeal, and Provenzano's re-presentation of it constitutes an abuse of the writ and a violation of such precedents of this court as White v. Duqqer, supra, which clearly state that a petition for writ of habeas corpus cannot serve as a "second appeal" for the re-raising of issues presented, and rejected, on direct appeal. This claim should be expressly found to be procedurally barred under Harris v. Reed, supra. No relief is warranted.

CLAIM IX: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT IMPROPER VICTIM IMPACT INFORMATION WAS ADDUCED AT HIS TRIAL AND SENTENCING.

In this claim, Provenzano argues that his appellate counsel was ineffective for failing to argue on appeal that his rights under the Eighth Amendment were violated when improper victim "character" and "victim impact" information was adduced at trial and sentencing. Provenzano identifies the following instances of improper victim information: (1) during opening statement, the prosecutor made reference to the physical condition and injuries of the surviving victims (R 472-3); (2) the testimony of Mark Parker, one of the victims, as well as that of his doctor, Dr. Mumby (R 595-6, 811); (3) the testimony of Dr. Priu as to Bailiff Dalton's condition (R 856); (4) the fact that an audio tape of the actual shooting evoked an emotional reaction from the audience when played in the courtroom (R 1966-7) and (5) the fact that the wife of one of the surviving victims was allowed to testify at the imposition of sentence, after the penalty phase, regarding the proper sentence to be imposed upon petitioner, as well as the effects of the crime upon the victim's family (R 2299-2301). As far as the duties of appellate counsel are concerned, it is, of course, axiomatic that counsel can only brief claims on appeal which have been adequately preserved.

The record in this case reveals that there was no objection interposed in regard to the opening statement (R 472-3) or the testimony of Mark Parker himself (R 581-601), thus precluding appellate counsel from raising any claim of error in this regard. See, Routly, supra; Ruffin, supra. Similarly, while objections were interposed to the testimony of Doctors Mumby and Priu (R 811-13; 861-2), such objections were sustained, and no further relief i.e., a mistrial, was requested; thus, appellate counsel would not have been able to argue that the trial court had failed to grant further relief when requested. Conversely, as to the "emotionalism" engendered by the playing of the tape recording, defense counsel did move for a mistrial in this regard, and such

was denied (R 1966-7). Similarly, appellate counsel did raise this claim on appeal (See, Initial Brief of Appellant, Provenzano v. State, FSC Case No. 65,633 at 58), and this court concluded that "no improper accumulation of error" had occurred. See, Provenzano, 497 So.2d at 1184. Simply because appellate counsel did not convince this court that reversible error had occurred does not mean that he rendered ineffective assistance of counsel; this court has consistently held that a defendant's subsequent dissatisfaction with the outcome of an appeal does not impact upon counsel's performance. See, Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

Accordingly, the onl potentially viable claim of ineffective assistance of appellate counsel would seem to relate to counsel's failure to raise on appeal any claim of error in regard to the testimony of the wife of one of the victims at the actual sentencing proceeding. Trial counsel, did, indeed, preserve this claim and appellate counsel, did, in fact, not raise it on appeal. In 'his petition, Provenzano contends that the introduction of this testimony violates Booth v. Maryland, supra, as well as this court's decision in Scull v. State, supra; Provenzano likewise argues that Booth "represents a substantial change in law." (Petition at 70). There is, of course, a grave problem with Provenzano's analysis. If, as he posits, Booth does represent a change in law, then appellate counsel could hardly be deemed ineffective for failing to anticipate it. The sentencing proceeding in this case occurred in 1984, whereas Booth was rendered in 1987, and Scull in 1988. Counsel cannot be deemed ineffective for failing to cite to such precedents. See, Thomas v. State, 421 So.2d 160 (Fla. 1982); Muhammad v. State, 426 So.2d 533 (Fla. 1982).

Additionally, it is critical to understand the context in which this victim impact evidence was introduced and considered. A careful reading of the record in this case indicates that no victim impact information was introduced in regard to Provenzano's death sentence. Provenzano was convicted not only of the murder of Arnie Wilkerson, but also two counts of

attempted murder in regard to the shootings of Harry Dalton and Mark Parker. Dalton's wife testified at the sentencing proceeding of July 18, 1984 (R 2299-2301). This was a week after the actual capital penalty phase, in which the jury had been involved, on July 11, 1984. No jury was present at this proceeding at which Mrs. Dalton testified. Similarly, Mrs. Dalton testified, as the prosecutor expressly stated, "with regard to the sentencing for the Defendant on the second count of the indictment, the attempted murder of Harry Dalton." (R 2299) (emphasis supplied). Defense counsel did not object to the victim's wife making a recommendation as to sentencing, but merely to a repetition of the testimony concerning Dalton's present condition, such objection overruled in light of section 921.143 (R 2301-2).

This testimony had absolutely no effect upon the death sentence in this case, and Scull and Grossman v. State, 525 So.2d 833 (Fla. 1988), both recognize that no specific prohibition exists in regard to 'the introduction of victim impact information, under section 921.143, in regard to noncapital cases. Whereas appellate counsel could, if he wished, have raised this claim in regard to Provenzano's sentence for attempted first degree murder, it is well established that appellate counsel is not required to raise all nonfrivolous claims apparent from the record. See, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate counsel could quite reasonably have concluded that this potential issue would, in all probability, have been found to be without merit, especially in regard to the sentence of death. See, e.g., Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986). No relief is warranted as to this claim.

CLAIM X: PROVENZANO'S CLAIM THAT THE SENTENCER FAILED TO FIND MITIGATING CIRCUMSTANCES.

In this claim, Provenzano argues that his sentence of death must be vacated because Judge Shepard failed to find certain statutory and nonstatutory mitigating circumstances, and further

specifically states, "The court did not consider the evidence of nonstatutory mental health and other mitigation which was shown by the record. Cf. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987)" (Petition at 76). Provenzano specifically identifies those mitigating circumstances set forth in sections 921.141(6)(b) and (f) as those which "should" have been found, and further points to such nonstatutory factors as "Mr. Provenzano's love, concern, care and consideration for his son and nephews; Mr. Provenzano's turbulent childhood, the early death of his mother, the stillborn son and the divorce from his first wife; Mr. Provenzano's employment history and attainment of a Master Electrician license, especially in light of his mental problems and Mr. Provenzano's attainment at thirty-five years of age without having a significant prior criminal history, especially in light of his mental problems." (Petition at 77).

Provenzano never explains why it is proper for him to raise this claim on habeas corpus. Although he nowhere acknowledges this fact, this matter, was raised on direct appeal, when Provenzano's appellate counsel devoted an entire point on appeal to the sentencer's alleged failure to consider and find statutory and nonstatutory mitigating circumstances; indeed, the argument presented in the instant petition could have been listed verbatim from the Initial Brief, wherein it was argued that Judge Shepard had erred in failing to find the statutory mitigating circumstances under sections 921.141(6)(b) and (f), as well as such nonstatutory factors as, "Mr. Provenzano's love, concern, care and consideration for his son and nephew . . ., Mr. Provenzano's turbulent childhood, the early death of his mother, the stillborn son, the divorce from his first wife . . ., Mr. Provenzano's employment history and attainment of a Master Electrician license, especially in light of his mental problems . . ., Provenzano's attainment at thirty-five years of age without having any significant prior criminal history, especially in light of his mental problems" (Initial Brief of Appellant, Provenzano v. State, FSC Case No. 65,633 at 49-53).

In resolving this claim on direct appeal, this court concluded that, as to the evidence allegedly in support of section 921.141(6)(b), the trial court had considered all the evidence presented, and "found in its sound discretion that it did not rise to the level of a mitigating circumstance." Provenzano, 497 So.2d at 1184. Similarly, this court rejected any contention that Judge Shepard had abused his discretion in failing to find that Provenzano's capacity to appreciate the criminality of his conduct had been substantially impaired. This court further stated,

> Provenzano cites a number of nonstatutory mitigating factors that he feels apply to this case. However, none of the factors cited are supported by the record. Provenzano, 497 So.2d at 1184.

It is axiomatic that a petition for writ of habeas corpus "is not a vehicle for obtaining a second determination of matters previously decided on appeal." See, Messer v. State, 439 So.2d 875, 879 (Fla. 1983); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); James v. Wainwright, 484 So.2d 1235 (Fla. 1986); White, supra. Accordingly, the instant claim must be considered procedurally barred, and, in light of Harris v. Reed, supra, the state would respectfully suggest that this finding of a procedurally bar be explicit. Further, to the extent that Provenzano is presenting any claim premised upon Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), this court has clearly held that such claim must be presented by means of a post-conviction motion, filed pursuant to Florida Rule of Criminal Procedure 3.850, as opposed to a petition for writ of habeas corpus. See, Hall v. State, 14 F.L.W. 101 (Fla. March 9, 1989).[5] Inasmuch as the jury was correctly instructed (R 2229), and the sentencing order makes reference to nonstatutory mitigation (R 3460), this claim would simply seem to represent

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[5] Indeed, Provenzano has presented this identical claim, based upon Hitchcock, in his concurrently-filed motion for post-conviction relief. See, Emergency Motion to Vacate Judgment and Sentence, Etc., State v. Provenzano, Orange County Circuit Court Case No. 84-835, filed April 6, 1989, at pages 169-176, Claim XV).

disagreement with the actual sentence imposed, as opposed to the manner of imposition. No relief is warranted as to this procedurally-barred claim.

CLAIM XI: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT A PHOTOGRAPH WAS IMPROPERLY ADMITTED.

In this claim, Provenzano argues that his appellate attorney rendered ineffective assistance of counsel in failing to raise on appeal a claim that an "inflammatory" crime scene photograph was introduced into evidence. In contrast to so many of Provenzano's other claims involving appellate counsel, it is indeed true that this matter relates to a claim of error which was actually preserved. At the time the State's Exhibit #40 was introduced, defense counsel objected on the grounds that such was inflammatory (R 693). The state countered that the photograph was relevant, in that it showed the extent of the wounds which the victim suffered, which was in turn relevant to the issue of premeditation (R 693-4); the objection was overruled (R 694).

While this claim was available for review, it is well established that appellate counsel need not raise every nonfrivolous issue revealed by the record. See, Jones v. Barnes, supra. Instead, one of appellate counsel's functions is to "winnow out" weaker arguments on appeal, and to focus upon those most likely to prevail. See also, Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 454 (1986). Further, this court has recognized that appellate counsel cannot be deemed ineffective for failing to present a legal argument which would, in all probability, have been found to be without merit. See, Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986). Of course, to merit relief under Downs v. State, 453 So.2d 1101 (Fla. 1984) or Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Provenzano must not only show deficient performance of counsel, but also resultant prejudice, such that it can be said that a reasonable probability of a different result exists, had counsel raised this claim on appeal.

Such showing has not been made sub judice. Although the issue of allegedly "gruesome" photographs has been raised quite frequently in capital appeals, it can hardly be said that such claim has an enviable "track record". Thus, this court has consistently held that the fact that photographs are offensive and/or such as "might tend to inflame the jury" are insufficient bases to bar their admission, as long as they are relevant. See, e.g., Young v. State, 234 So.2d 341 (Fla. 1970); Henninger v. State, 251 So.2d 862 (Fla. 1971); Foster v. State, 369 So.2d 928 (Fla. 1979); Adams v. State, 412 So.2d 850 (Fla. 1982); Wilson v. State, 436 So.2d 908 (Fla. 1983). Indeed, in Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), this court specifically held,

> It is not to be presumed that gruesome photographs will *so* inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

This court also made the following observation in Henderson, which is particularly applicable sub judice,

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy (citations omitted). Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments. Id. at 200.

In light of these precedents, it is difficult to see how a reasonable probability of a different result on appeal could be said to exist, had this claim been raised. Under the particular facts of this case, it is unlikely that the admission of a single photograph inflamed the jury. It must be remembered that the defendant raised an insanity defense and, accordingly, did not contest the circumstances of the murder. Provenzano has failed to demonstrate ineffective assistance of appellate counsel, and no relief is warranted as to this claim.

CLAIM XII: PROVENZANO'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT THE JURY'S SENSE OF RESPONSIBILITY IN SENTENCING WAS DILUTED, IN VIOLATION OF CALDWELL V. MISSISSIPPI, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 271 (1985).

In this claim Provenzano argues that his appellate attorney rendered ineffective assistance of counsel in failing to argue on appeal that through various comments, arguments and instructions, the jury's sense of responsibility in sentencing was diluted in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 271 (1985). In support of this claim, Provenzano cites extensively to the record, pointing to every instance during ~~voir dire~~ in which the words "recommendation" or "advisory" were used to the jury, as well as any instruction during ~~voir dire~~ in which the jury was told that the judge was not required to follow their advice and/or that the ultimate decision as to sentencing was up to the court. Provenzano also cites to certain instructions and argument during the penalty phase. Provenzano suggests that "no tactical decision" can be ascribed to counsel's failure to urge this claim on appeal (Petition at 94).

As with so many of the prior claims, a clear "tactical" reason existed for omission of this claim on appeal. No objection was interposed in regard to *any* of the remarks or instructions now regarded as impermissible (R 85, 90, 93, 163, 164, 178, 179, 180, 181, 271, 272, 273, 274, 313, 317, 321, 329, 384, 408-9, 410, 411, 1981, 1982, 1992, 2042, 2171, 2172, 2173-4, 2188, 2193, 2196, 2200, 2226, 2230-1). It is, of course, axiomatic that appellate counsel cannot be deemed ineffective for failing to raise procedurally-barred issues on appeal. ~~See~~, Routly, supra; Ruffin, supra. This court has consistently held that alleged Caldwell errors must be preserved by objection before they can be presented on direct appeal. *See*, e.g., Jackson v. State, 522 So.2d 802 (Fla. 1988); Mitchell v. State, 527 So.2d 179 (Fla. 1985). Accordingly, no ineffective assistance of appellate counsel has been demonstrated.

Provenzano also seems to seek to present this claim as a "merits" issue, and, in doing so, fails to set forth an adequate, and even-handed, discussion of the controlling precedents in this area of the law, and additionally fails to apprise this court of the entire record. This court has consistently refused to address claims premised upon Caldwell, when presented on habeas corpus, holding that such matter represents one which could and should have been preserved through objection at trial and then presented on direct appeal. See, e.g., Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987). Provenzano makes no attempt to distinguish, or discuss, these controlling precedents. To the extent that a "merits" claim is presented, it must be considered procedurally barred. See also, White v. Dugger, supra. In light of Harris v. Reed, supra, the state would respectfully request that the finding of the procedural bar be explicit. It is obvious that Provenzano cannot dispute the propriety of the finding 'of procedural default as to this claim, given the recent decision by the Supreme Court of the Untied States in Dugger v. Adams, U.S. ___, 109 S.Ct. 1211 (1989), such decision, however, left unmentioned in the instant petition.

Further, it is doubtful that the record in this case could support any claim based upon Caldwell. In omitting the instant claim on appeal, appellate counsel was no doubt aware that, despite whatever "stray" comments the jury might have heard during voir dire, it was the events at the penalty phase which would be most determinative; after all, the penalty phase in this case took place long after the trial had ended and, indeed, began almost one month after voir dire. Thus, it is important to note that the prosecutor's closing argument during the penalty phase included the following:

> Now, I want to emphasize one more thing before we proceed in discussing aggravating circumstances. The law is not going to come in here and ask you to do something that doesn't mean anything, doesn't make any difference. The judge is no doubt

going to impose a sentence in this case. I mean, he's the one who has the burden on his shoulders, and he's going to impose it. And he'll impose it properly. **But you will make a recommendation, and it's an important recommendation.**

The judge doesn't have to agree with that recommendation. It doesn't mean it's not important, what you're doing, because you would not be a party to this particular procedure or this system if what you are doing is not important. It is important, and your recommendation this afternoon is going to be very important with respect to the sentence of the defendant.

And because it's not a unanimous verdict, even though it's what is known as a majority verdict that will support a recommendation by y'all, still doesn't mean it's not an important decision.

The state would ask that each of you make up your own mind. Deliberate. Think about it yourself and make a recommendation. And collectively as a group make that recommendation, because it's important,. that particular recommendation. (R **2173-4)** (emphasis supplied)

Similarly, defense counsel during his closing argument in the penalty phase stated as follows:

Now, perhaps a little background about what this hearing is all about.

There was a time in Florida when the jury in a first degree murder case could, in effect, set the penalty for the accused. That is no longer the law in Florida. It is now exclusively the province of the judge who presides over the case to determine the appropriate penalty. And that is, of course, as it should be.

That does not in any way lessen the importance of what you are here to do. You are the citizens before whom this citizen, Thomas Provenzano, has been tried. Your feelings and your evaluation of the facts against the law that the judge will give you are extremely important **to** the man who sits at that bench and who will have to make the final decision. I know that he will weigh your

recommendation very carefully before he makes a final decision in this matter. (R 2201-2) (emphasis supplied)

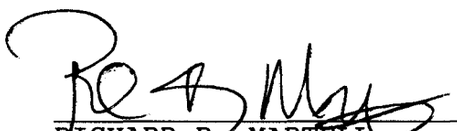
No objection was interposed in regard to this argument by defense counsel, and there is no reason to assume that the jury in this case did not view their advisory verdict as an important part of the sentencing process, as both prosecutor and defense attorney had told them that it was. These statements by the attorneys are hardly inconsistent with the standard instructions given the jury at the penalty phase as to their role in sentencing. Even if this claim were not procedurally barred, no relief would be warranted.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant petition for extraordinary relief, and all relief requested therein, including any stay of execution, should be denied in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Extraordinary Relief and Petition for Writ of Habeas Corpus, Etc., has been furnished, by U.S. Mail/Hand Delivery to Bret B. Strand, Esquire, Assistant Capital Collateral Representative, counsel for appellant, at 1533 South Monroe Street, Tallahassee, FL 32301 this 21 day of April, 1989.

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL