IN THE SUPREME COURT OF FLORIDA

FRED ANDERSON, JR.,
Petitioner,

v. CASE NO. SC08-644

WALTER A. MCNEIL, *etc.*,
Respondent(s).
_______________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RESPONSE TO PRELIMINARY STATEMENT

Article 1, Section 13 of the *Florida Constitution* contains the language quoted in Anderson's petition. The remainder of the first paragraph on page one of the petition is argumentative and is denied. The discussion of citation format contained in the second paragraph appears to be correct.

RESPONSE TO ORAL ARGUMENT REQUEST

The Respondent recognizes that oral argument is routinely granted on appeal from the denial of a capital defendant's first post-conviction relief motion, as well as on a capital defendant's initial petition for habeas corpus relief. However, not all capital post-conviction proceedings are worthy of the expenditure of judicial resources attendant to oral argument. The Respondent defers to this Court's judgment as to whether oral argument is justified in this case.

RESPONSE TO INTRODUCTION

The "Introduction" set out on page two of the petition is argumentative and is denied. Contrary to the assertions made by Anderson, appellate counsel is not required to raise every colorable or non-frivolous argument. Instead:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
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> > "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one."
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> Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L. Q. 115, 119 (1951).
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> Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:
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> > "Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the

> stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981). [FN5]
>
> [FN5] Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claimed error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, *Appeals to the Second Circuit* 38 (1980).
>
> . . . A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A. B. A. J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. *See generally, e. g.,* Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal*, 30 Sw. L. J. 801 (1976). [footnote omitted]

Jones v. Barnes, 463 U.S. 745, 753 (1983). Three years later, the United States Supreme Court further refined that holding, stating:

> After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland v. Washington* made clear, "[a] fair assessment of

> attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690.

Smith v. Murray, 477 U.S. 527, 535-536 (1986). And, as Eleventh Circuit Judge Edmondson has pointed out:

> First, I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly. The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. *See Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. *See Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices. Today's court disposes of the ineffective assistance of counsel claims on lack of prejudice grounds. So, what the court says about counsel's performance is *dicta*: language inessential to determining the case. Still, I worry that some of the *dicta* sends the wrong signal to lawyers.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991) (Edmondson, J., concurring).

Likewise, this Court has long held that "'[we] do not approve of counsel urging frivolous claims, **nor do we require that every colorable claim regardless of relative merit**, be raised on appeal. *Wilson* [*v. Wainwright*, 474 So. 2d 1162 (Fla. 1985)] at 1164.'" *Darden v. State*, 475 So. 2d 214, 217 (Fla. 1985). (emphasis added).

The Legal Standard.

This Court has summarized the legal standard that applies to Anderson's claims in the following way:

> Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000). Consistent with the *Strickland* standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine:
>
> > [W]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
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> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); *see also Freeman*, 761 So. 2d at 1069; *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So. 2d at 1069; *see also Knight v. State*,

> 394 So. 2d 997, 1001 (Fla. 1981). Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *Thompson*, 759 So. 2d at 660. "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford*, 774 So. 2d at 643 (*quoting Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). It is under this legal framework that Hannon's habeas claims will be addressed.

Hannon v. State, 941 So. 2d 1109, 1148 (Fla. 2006). Moreover, Florida law is settled that:

> . . . "appellate counsel may not be deemed ineffective for failing to challenge an unpreserved issue on direct appeal." *Hendrix*, 908 So. 2d at 426.
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> Even assuming the error was fundamental, we have held that "appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002) (*citing Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), and *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990)).

Farina v. State, 937 So. 2d 612, 634 (Fla. 2006).

RESPONSE TO PROCEDURAL HISTORY

In its direct appeal decision, this Court summarized the facts and issues in the following way:

> On March 20, 1999, appellant Fred Anderson, Jr. robbed the United Southern Bank (USB) in Mount Dora, Florida, and shot two tellers, Marisha Scott and Heather Young. Young was killed, but Scott survived.

At trial it was revealed that Anderson was on community control for a conviction of grand theft. He was ordered to pay restitution in excess of $ 4,000, but he paid less than $ 100. On March 15, 1999, Anderson was found to have violated his community control and was ordered to spend one year at a probation center beginning March 19. To obtain the funds to pay the restitution, Anderson decided to rob the Mount Dora USB, and, on March 18, 1999, he visited a member of his church at the USB where she worked as a part-time teller. Anderson also stole a loaded .22 caliber six-shot revolver from a neighbor's storage building. The gun fired heavier ammunition than a normal .22 caliber revolver and was a single action revolver, which meant that the hammer had to be pulled back and cocked each time the gun was fired.

On the morning of March 19, Anderson went to the USB under the pretense that he was a student writing a paper on banking and finance. He spoke with Scott and met with the bank manager, Allen Seabrook. Anderson took particular note of the bank's security VCR, which was kept in Seabrook's office. His plan was to deposit the robbery money into a new bank account at a second bank. After visiting the second bank, Anderson telephoned his supervisor and told her he had the money to pay off the restitution.

On March 20, a Saturday, Anderson obtained a second .22 caliber revolver from his mother's house, and then went to the USB with orange juice and doughnuts under the ruse that he wanted to thank the employees for their help. USB was scheduled to close at noon and Young and Scott were the only people working. Shortly before noon when no customers were present, Anderson told Young and Scott that he was going to his car to get his business card. Anderson returned with the two revolvers and ordered Young and Scott into the bank vault where he ordered them to fill a trash liner with money. Anderson then shot the two tellers. Scott was left paralyzed but was able to testify at trial. She testified that Anderson asked which one of them wanted to die first. Scott said she begged not to be shot. [FN1]

[FN1] Anderson fired ten shots, hitting the victims nine times. The single action revolver was fired six times, and the other revolver four times.

During the robbery, Sherry Howard entered the bank with her children and saw Anderson near the vault. She also heard Scott saying, "Please don't" or "please no." Howard heard two or three gunshots and ran outside to call the police. The first police officer to arrive saw Anderson ripping an electrical cord and VCR equipment from the wall. Anderson was holding a trash can, which contained the smaller revolver and cash in excess of $ 70,000. The officer told Anderson to "drop the stuff." Anderson complied and was handcuffed. [FN2] Paramedics arrived and began working on the two victims. Young died in transit to the hospital.

[FN2] At trial, a second officer testified that he heard Anderson say, "I did it. I did it by myself. I'm by myself" shortly after the police arrived on the scene.

In addition to being caught while the crime was in progress, Anderson's hands tested positive for gunshot residue, and blood recovered from Anderson's clothing was consistent with Scott's DNA. Additionally, a Florida Department of Law Enforcement (FDLE) firearms analyst examined the guns seized at the scene. [FN3] She compared bullets test fired from the guns with seven bullets fired during the crime, some of which were found in the vault and others of which were recovered from Young's body during an autopsy. She concluded that four larger bullets displayed the same poor rifling characteristics as the test fires from the long caliber revolver, but she was not able to positively match them with that gun. However, she did positively match three smaller bullets with the second revolver.

[FN3] The long caliber revolver was found under the desk in the manager's office.

The forensic pathologist who performed the autopsy on Heather Young testified that Young had a total of

seven gunshot wounds. She said that all of Young's wounds could have been fatal, with the possible exception of a wound that had entered Young's chin and exited near her eye. One of the wounds had a pattern of gunpowder "tattooing" around it, which indicated that it had been fired at close range. She also testified that there were two injuries on Young's head that were consistent with blunt force trauma caused by some sort of flat surface. At trial, the pathologist examined a picture of Scott and noted that Scott had the same type of blunt trauma injury on her forehead. [FN4]

> [FN4] At trial, the State offered the theory that after shooting the two victims, Anderson went to retrieve the VCR, and while he was doing so he heard noises coming from the vault. According to the State's theory, upon returning to the vault and discovering that the victims were still alive, Anderson hit the victims in the head with the VCR or some other blunt object. In addition to the pathologist's testimony regarding blunt force trauma, Scott testified that she remembered a "black object" coming at her forehead after being shot. The State speculated that this object was the VCR. There was testimony that the VCR was dented, but it was not clear at trial how this damage occurred. Anderson testified he returned to the vault with the VCR, was surprised to see blood coming from Scott's neck, and dropped the VCR.

During the defense's case-in-chief, Anderson took the stand. Anderson admitted the robbery and testified to his bleak financial condition. Anderson also testified that he lived with his mother, who was disabled, retired, and a cancer survivor. Anderson admitted taking both guns and shooting the tellers, although he stated that he could only remember firing three shots. He also denied that he asked the tellers which one of them wanted to die first.

The jury convicted Anderson of grand theft for stealing the revolver, armed robbery, attempted first-

degree murder, and first-degree murder. During the penalty phase, the State introduced the testimony of Young's brother and of her long time boyfriend. The defense offered the testimony of a number of people, including Anderson's mother, friends, members of Anderson's church, and former employers, all of whom testified that they had known him as a person of good character. The jury unanimously voted in favor of a death sentence recommendation and the trial court sentenced Anderson to death. The trial court found four aggravating factors [FN5] and ten nonstatutory mitigating factors. [FN6]

[FN5] The four aggravating factors were: (1) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (2) the homicide was committed for pecuniary gain (moderate weight); (3) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation (little weight); (4) the defendant was convicted of a previous violent felony (great weight). The previous violent felony aggravator was based on Anderson's contemporaneous conviction for the attempted murder of Scott.

[FN6] The court considered seventeen mitigating factors: (1) remorse for conduct (moderate weight); (2) cooperation with law enforcement (some weight); (3) strong religious faith (consolidated); (4) past achievements and constructive involvement (consolidated); (5) contributions to community and society through exemplary work (consolidated); (6) loving relationship with family (little weight); (7) employment history (little weight); (8) care for family and community (consolidated); (9) potential for rehabilitation (consolidated); (10) skills to be productive in prison (consolidated); (11) no prior history of violence (substantial weight); (12) well

liked in his community (consolidated); (13) sympathetic and thoughtful of people (consolidated); (14) active in his church (consolidated); (15) active in community churches (consolidated); (16) appropriate courtroom demeanor (little weight); (17) willingness to plead (little weight). Because of the interrelated nature of (3), (14), and (15), the trial court considered them as a single mitigating factor which was given substantial weight. Likewise, (4), (5), (8), (12), and (13) were also combined into a single mitigating factor that was given moderate weight. Finally, (9) and (10) were consolidated into a single mitigating factor that was given little weight.

On appeal, Anderson raises nine issues. [FN7] Although Anderson does not raise the issue of sufficiency of the evidence on appeal, we have independently reviewed the evidence in this case and conclude that there is sufficient evidence supporting the convictions in this case. *See Sexton v. State*, 775 So. 2d 923, 933-34 (Fla. 2000); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998); *see also* § 921.141(4), Fla. Stat. (2002); *Fla. R. App. P.* 9.140(h). We have referred to that evidence in some detail above.

[FN7] Anderson claims that: (1) the trial court erred in finding CCP as an aggravating circumstance; (2) the trial court erred in finding pecuniary gain as an aggravating circumstance; (3) the death penalty is disproportionate; (4) the trial court erred in considering and weighing mitigating evidence; (5) the trial court erred in allowing testimony with respect to blood stain pattern analysis; (6) the trial court erred in denying Anderson's motion to suppress; (7) the trial court erred in admitting photographs of victim Marisha Scott; (8) the cumulative effect of an improper comment by a forensic serologist and an improper comment by the prosecutor in closing argument violated Anderson's right to a fair trial; (9) Florida's death penalty

> scheme is unconstitutional in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Anderson v. State, 863 So. 2d 169, 174-176 (Fla. 2003). This Court affirmed Anderson's convictions and sentence of death.

On March 18, 2005, Anderson filed a motion for post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.851. Following a 5-day evidentiary hearing, the trial court denied relief. Anderson filed notice of appeal, and, following various extensions of time, filed his *Initial Brief* on April 1, 2008. His petition for habeas corpus relief was filed on or about April 1, 2008.

RESPONSE TO STATEMENT OF JURISDICTION

The *Rules of Appellate Procedure* and the Florida *Constitution* set out the scope of this Court's habeas corpus jurisdiction. Anderson's petition is argumentative and is denied. While this petition is properly filed, it sets out no grounds for relief.

RESPONSE TO GROUNDS FOR RELIEF[1]

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[1] Anderson says that his rights under the "Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution" were violated. With the exception of the Sixth Amendment ineffectiveness of counsel claim contained in claim I, and the speculative Eighth Amendment incompetence for execution claim set out in claim II, Anderson has not explained how any

I. THE CHANGE OF VENUE CLAIM

On pages 9-18 of the petition, Anderson argues that appellate counsel was ineffective for not raising the denial of his change of venue motion of direct appeal. What Anderson does not reveal is that the trial court did not formally deny the motion for change of venue until immediately before the jury was empaneled and sworn. (V12, R1312). Likewise, the trial court was well aware of the procedures to be followed in selecting a jury, and was prepared to grant the motion had seating a jury proven impossible. (V4, 178). The trial court referred to this Court's decision in *Henyard*, which reads as follows:

> In *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977), we adopted the test set forth in *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), and *Kelley v. State*, 212 So. 2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue: Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.344 So. 2d at 1278 (*quoting Kelley*, 212 So. 2d at 28). *See also Pietri v. State*, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995). In *Manning v. State*, 378 So. 2d 274 (Fla. 1980), we further explained:

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other constitutional violations took place. The boilerplate citation to various Constitutional provisions is insufficient to convert a non-specific claim into a "federalized" one.

> An **application for change of venue is addressed to the sound discretion of the trial court**, but the defendant has the burden of . . . showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or **may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause**.
>
> *Id.* at 276 (citation omitted). **Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.**
>
> During the actual *voir dire* here, each prospective juror was questioned thoroughly and individually about his or her exposure to the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

Henyard v. State, 689 So. 2d 239, 245-246 (Fla. 1996). (emphasis added). In the context of a claim of ineffectiveness of trial counsel, this Court has held:

Provenzano says that his lawyer should have moved for a change of venue. The venue issue came up early in the case when trial counsel stated on the record that he had been advised that any change of venue would involve a trial in St. Augustine and that he preferred the trial to be held in Orlando. He felt that a juror's knowledge of the case would not necessarily be an impediment, since an insanity defense would be presented and he believed an Orlando jury would be more receptive to such a defense than a more conservative one in St. Augustine. Trial counsel stated that this had been explained in detail to Provenzano and that the latter understood that the defense would not be seeking a change of venue. However, when Provenzano later said that he did not think he would be tried by Orange County jurors, even though the trial were held in Orlando, defense counsel made an oral motion for change of venue, subject to the court's determination of whether or not a fair and impartial jury could be selected. **Thereafter, a jury was selected and the motion was not formally renewed.** In his original appeal, Provenzano contended that venue should have been changed because of the extensive pretrial publicity surrounding the case. In rejecting the claim, this Court observed:

> The trial court did not have great difficulty in impaneling a fair and impartial jury. When Provenzano first made his oral motion for change of venue, defense counsel, the prosecutor and the trial judge all agreed that it would be best to attempt to impanel an impartial jury before ruling on the motion. We approved the procedure in *Manning v. State,* 378 So.2d 274 (Fla. 1979). **The fact that defense counsel never renewed his motion for change of venue and the judge never ruled on the motion creates a strong presumption that a fair and impartial jury was ultimately impaneled.**
>
> Of the eighty-seven veniremen called, twenty-seven potential jurors expressed fixed opinions as to Provenzano's guilt due to information received pretrial. This is a far cry from *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), in

> which the United States Supreme Court noted that the trial court had great difficulty in selecting a jury where 268 of 430 veniremen were excused because they were inclined to believe the accused guilty. Rather, this case is more analogous to *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), in which the United States Supreme Court failed to find that the trial court had great difficulty in selecting a jury where only twenty of the seventy-eight persons questioned were excused because they indicated an opinion as to the petitioner's guilt. Further, the trial court did everything within its power to ensure that Provenzano received a fair trial. Any potential juror with even a hint of prejudice was immediately removed for cause, and a comprehensive gag order covered even peripheral participants.

Provenzano, 497 So.2d at 1182-83. It is evident that counsel's decision not to renew the motion for change of venue was a tactical decision. Moreover, it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury. Also, as noted in our prior opinion, Provenzano personally acquiesced to the selection of the jury panel after consulting with his attorney, and the defense did not use all of its peremptory challenges. Counsel was not ineffective for not renewing the motion for change of venue, and Provenzano was not prejudiced as a result.

Provenzano v. Dugger, 561 So. 2d 541, 544-545 (Fla. 1990) (emphasis added).

In this case, as in *Provenzano*, trial counsel did not renew the motion for change of venue before the jury was empaneled and sworn, a fact which weighs against the perceived strength of the motion, and raises a question as to whether the motion was even properly preserved for appeal in the first place. Assuming that

the change of venue issue was preserved at all, appellate counsel cannot be faulted for deciding not to press an issue that is reviewed under the abuse of discretion standard when there was no significant difficulty in seating a jury. Under the facts and controlling law, this issue is weak to begin with. Appellate counsel cannot be faulted for choosing to focus on the nine issues that were raised on appeal without cluttering the brief with a weak issue that does not have the facts behind it to establish that the trial court abused its discretion by not changing venue.[2] Even if counsel had raised this claim, under *Henyard* and *Provenzano* there was no basis for reversal. Because that is so, Anderson cannot carry his burden under *Strickland, supra*, and is not entitled to relief. See pages 5-6, above.

On pages 14-15 of his brief, Anderson refers to "a letter that is part of the postconviction record" to support his change of venue claim. Given that his claim is purely one of ineffectiveness on the part of direct appeal counsel, that argument makes no sense at all. Direct appeal counsel cannot have been ineffective based upon matters that are not in the direct appeal record.

[2] Under these facts, trial counsel would not have been ineffective for not renewing the motion to change venue (assuming *arguendo* that the motion was, in fact, renewed). Because that is so, appellate counsel cannot have been ineffective for not raising that claim on appeal.

On pages 15-17, and again on pages 18-20 of his petition, Anderson argues that the "jury questionnaires" support his change of venue ineffectiveness claim as well as a claim that appellate counsel "did not insure a complete record." This portion of Anderson's petition should be stricken because it relies on matters that are not a part of the record. As Anderson admits in the petition, he has filed a motion to supplement/correct the record to include the jury questionnaires -- as Anderson says, that motion had not been disposed of at the time the habeas petition was filed. However, Anderson has not revealed that, on April 17, 2008, **this Court denied that motion**. Consequently, Anderson's petition argues matters that are not before this Court and therefore cannot constitute a basis for relief. And, given that this Court denied Anderson's motion to correct the record, it stands reason on its head to assert that the jury questionnaires are documents that are required to be included in the record on appeal pursuant to *Florida Rule of Appellate Procedure* 9.200. Anderson's claim collapses because the argument is based on facts not in the record.

II. THE "PRESENCE OF THE DEFENDANT" CLAIM

On pages 20-26 of his petition, Anderson argues that he is entitled to relief because he was not present during the

"general qualification" of the jury panel. This claim is foreclosed by settled law:

> Clearly, the defendant was present from the beginning of his trial. **We do not reach the question of whether appellant validly waived his presence during the prior general qualification process because we do not find that process to be a critical stage of the proceedings requiring the defendant's presence.** We see no reason why fundamental fairness might be thwarted by defendant's absence during this routine procedure. Thus, we find no merit to appellant's contention regarding this absence.

Robinson v. State, 520 So. 2d 1, 4 (Fla. 1988). (emphasis added). *Robinson* controls disposition of this claim.

Further, there was no objection by trial counsel that remotely preserved this claim -- because that is so, and because the case law precludes this claim to begin with, appellate counsel can hardly be faulted for not raising it. Anderson's "critical stages" claim has no legal basis, is not a basis for relief, and satisfies neither prong of *Strickland*.

III. THE "ANTI-DOUBLING" CLAIM

On pages 26-28 of the petition, Anderson claims that appellate counsel was ineffective for not arguing for relief because the "anti-doubling" of aggravators jury instruction was not given. Putting aside the fact that trial counsel did not **request** that instruction, **Florida law is settled that the aggravators at issue do not "double" in the first place.**

Anderson claims that the cold, calculated and premeditated aggravator "doubles" with the pecuniary gain aggravator. That argument ignores settled Florida law which expressly rejected this specific claim. *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996) (*relief granted on other grounds*, *State v. Larzelere*, 979 So. 2d 195 (Fla. 2008); *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed. 2d 282 (1993); *Echols v. State*, 484 So. 2d 568 (Fla. 1985). Anderson neither acknowledges those decisions nor suggests any reason they are not controlling. This claim has no legal basis, and does not support a claim of ineffectiveness of appellate counsel.

IV. THE COMPETENCE TO BE EXECUTED CLAIM

On pages 29-31 of the petition, Anderson argues that he "may be incompetent" at the time of his execution. Until such time as a death warrant is issued, this claim is not ripe for review under well-settled Florida law. *Hitchcock v. State/McNeil*, 33 Fla. L. Weekly S343 (Fla. May 22, 2008).

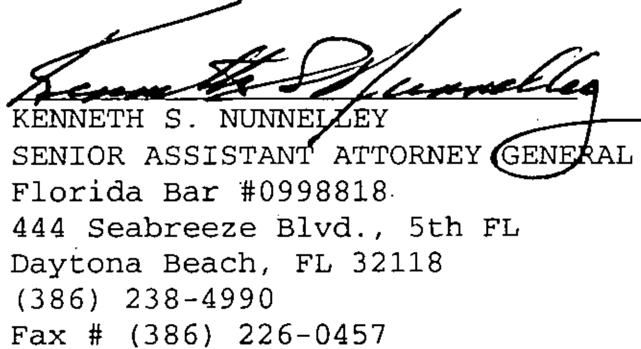
CONCLUSION

For the reasons set out herein, the petition should be denied.

Respectfully submitted,

BILL McCOLLUM

ATTORNEY GENERAL



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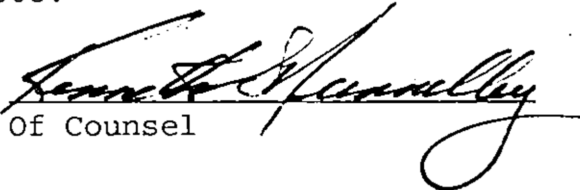
CERTIFICATE OF SERVICE

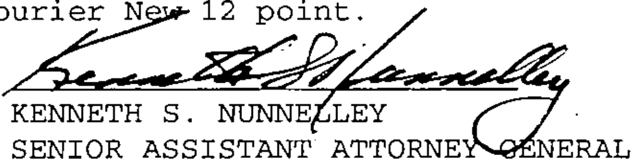
I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Maria D. Chamberlin; Marie-Louise Samuels Parmer; and Nathaniel E. Plucker,** CCRC - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this 30th day of June, 2008.



Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.



KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL