IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,981

ROBERT DALE HENDERSON,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Comes now the Petitioner, ROBERT DALE HENDERSON, by and through undersigned counsel, pursuant to Fla. R. App. P. 9.100(i), and replies to the State's Response to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Etc., filed on March 11, 1988. Mr. Henderson's Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari was filed in this Court on February 26, 1988. Mr. Henderson's execution is currently scheduled for Thursday, April 7, 1988.

INTRODUCTION

Mr. Henderson's initial petition presented claims challenging fundamental constitutional errors involving the appellate review process, claims predicated on significant,

fundamental, and retroactive changes in constitutional law, and claims of ineffective assistance of counsel on appeal.

With regard to the ineffective assistance claims, Mr. Henderson would first point out that it was not his original intent to present Claims VI and VII as claims involving the ineffective assistance of counsel on appeal, but through stenographic error the order in which counsel intended to present the claims in his initial petition was partially reversed, and Claims VI and VII were mistakenly grouped with those claims which in fact involved ineffective assistance. (See State's Response to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Etc. [hereinafter "State's Response"] at 2). Secondly, to the extent that the State asserts that Mr. Henderson's appellate counsel made a "tactical" or "strategic" "choice" not to raise the issues discussed in Claims II through V of the initial petition, Mr. Henderson respectfully requests that this Court relinquish jurisdiction to the trial court so that these disputed factual matters can be resolved at an evidentiary hearing. Without such a hearing, Mr. Henderson's factual allegations must be taken as true. See Blackledge v. Allison, 431 U.S. 63 (1977).

As to the State's objection to the documents and records appended to the initial petition in support of Claim I, nothing in this Court's precedents or in the rules governing this Court's jurisdiction indicates that such supplementation is improper or inappropriate. Mr. Henderson did not feel it "necessary to go outside the record for factual support" (See State's Response at 4): record facts undeniably support the claim; the materials contained in the appendix support the factual allegations, see Fla. R. App. P. 9.110 (Committee Note), infra, and were presented to further clarify the facts and to aid this Court in considering and resolving the issue. This Court has the power to consider these materials in aid of the exercise of its habeas

jurisdiction, and should do so. See Fla. R. App. P. 9.110(e)(h)(i)(Committee Note)("The appendix [to a habeas corpus petition] should . . . contain any documents which support the allegations of fact contained in the petition").

ARGUMENT IN REPLY

CLAIM I

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

A. THIS CLAIM IS PROPERLY BEFORE THIS COURT

The State argues alternatively that the instant claim should not be heard since it was decided adversely to Mr. Henderson on direct appeal (See State's Response at 3, 4) and/or that the merits do not require relief under the standards announced in Michigan v. Jackson, 106 S. Ct 1404 (1985). Mr. Henderson will first discuss the State's procedural contentions and then discuss the merits.

The State is correct inasmuch as this claim was raised on Mr. Henderson's direct appeal and ruled on by this court. See Henderson v. State, 463 So. 2d 196 (Fla. 1985). This Court, however, decided this claim under a pre-Jackson analysis which no longer withstands constitutional scrutiny. See Henderson, supra, 463 So. 2d at 199, citing Canady v. State, 427 So. 2d 723 (Fla. 1983). Since Mr. Henderson's direct appeal was decided, the United States Supreme Court announced a new bright-line standard which governs this issue, see Michigan v. Jackson, supra, a standard grounded on fundamental sixth amendment principles.

Jackson thus changed the constitutional standards under which the instant claim is to be reviewed. Jackson involves the most fundamental of rights guaranteed the criminally accused, the sixth amendment right to the assistance of counsel at critical stages of criminal proceedings. Jackson has altered both the

Court's prior Canady analysis. As such, it represents exactly the type of change of law contemplated by Witt v. State, 387 So. 2d 922 (Fla. 1980). Mr. Henderson's claim is therefore cognizable in post-conviction proceedings.

After Jackson, the constitutional analysis applied by this Court on Mr. Henderson's direct appeal can no longer be deemed constitutionally valid. On direct appeal, this Court found that Mr. Henderson waived his right to counsel, and that the statements obtained from him through custodial interrogation by law enforcement were therefore admissible:

> Henderson claims that these statements were improperly elicited from him after he had requested the assistance of counsel. It is true that when an accused asks to see counsel, interrogation must cease. Edwards v. Arizona, 451 U.S. 477 (1981). However, there is nothing to prevent an accused from changing his mind and volunteering further information. "The stricter standard for showing that an accused has knowingly and intelligently waived a previous request for counsel is met when the accused voluntarily executes a written waiver." Canady v. State, 427 So. 2d 723, 729 (Fla. 1983). In this case Henderson signed written waivers before making the statements in question. We therefore conclude that there is sufficient evidence to support the finding that he knowingly and intelligently waived his right to have counsel present when making these statements.

Henderson, 463 So. 2d at 199.

Under Jackson's sixth amendment analysis, a waiver of the right to counsel for an interrogation initiated by law enforcement after judicial proceedings against the accused have taken place, and, as here, after the accused obtains counsel, is invalid, and the statements thus obtained are therefore inadmissible. See Jackson, 106 S. Ct. at 1411. It makes no difference if the waiver is written or oral: after judicial proceedings have commenced, thus triggering the sixth amendment right to counsel, any waiver procured through police-initiated interrogation is invalid (Id.). Thus, Canady, supra, the authority relied upon by this Court to deny the instant claim on

direct appeal, is no longer a valid or correct statement of the appropriate federal constitutional standard,[1] and this Court's direct appeal decision was therefore in error.

This issue thus directly concerns the judgment of this Court on appeal, and jurisdiction in this Court is now wholly appropriate. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). That the issue was previously raised and ruled on by this Court is no bar: "in the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a metter previously settled." Kennedy v. Wainwright, 483 So. 2d 429 (Fla. 1986). It is hard to imagine a constitutional right more fundamental than the specific sixth amendment guarantee at issue here. See Spano v. New York, 360 U.S. 315, 326 (1959)(Douglas, J., concurring)("[W]hat use is a defendant's right to effective assistance of counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?"), quoted in Maine v. Moulton, 106 S. Ct. 477, 485 (1986). This Court has previously exercised its habeas jurisdiction to hear claims involving the type of fundamentally significant change in constitutional law contemplated by Witt, supra, see, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Tafero v. Wainwright, 459

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[1] Canady was in fact in conflict with pre-Jackson federal constitutional law as well. The "additional safeguards" referred to in Edwards do not contemplate a written waiver: "when the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Id., 451 U.S. at 485; Cf. Jackson, 106 S. Ct. at 1410-11 ("In Edwards . . . we rejected the notion that, after a suspect's request for counsel, advise of rights and acquiescence in police-initiated questioning could establish a valid waiver . . . . Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.") The written waiver here shows nothing more than that Mr. Henderson eventually succumbed to the illegally-initiated interrogation.

So. 2d 1034, 1035 (Fla. 1984); Kennedy, supra, and it should not hesitate to do so now. This claim is before this Court on the merits, and the merits call for relief.

Contrary to the state's assertions, Jackson is precisely the type of change in law which, under the applicable standards, must be given retroactive application. (Cf. State's Response at 5-6). The Eleventh Circuit Court of Appeals has already applied Jackson retroactively to capital sentencing proceedings, see Fleming v. Kemp 837 F.2d 940 (11th Cir. 1988)(challenged statements introduced at sentencing but not guilt phase of trial), and currently has before it the question of whether Jackson should apply retroactively to the guilt-innocence phase of capital trials. See Collins v. Kemp, Case No. 86-8439 (11th Cir. 1986)(decision pending).

The cursory retroactivity analysis contained in the State's response is seriously flawed: the appropriate constitutional analysis, recognized and employed by this Court in Witt, supra, does not focus solely on whether the change in law at issue "cast[s] serious doubt on the veracity or integrity of the original trial proceeding" (See State's Response at 5).[2] Rather,

> the essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Brewer v. State, 264 So.2d 833, 834 (Fla. 1972); State v. Steinhauer, 216 So.2d 214, 219 (Fla. 1968),

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[2]Even under the State's own standard, however, the need for retroactive application of Jackson is plain: the State's flouting of the sixth amendment in this case clearly "cast serious doubt on the . . . integrity of the original trial proceeding. Id. (emphasis added).

> cert. denied, 398 U.S. 914, 90 S.Ct. 1698, 26 L.Ed.2d 79 (1970).

Witt v. State, 387 So. 2d at 926; see also Solem v. Stumes, 465 U.S. 638 (1984). Jackson meets that test. See, e.g., Fleming, supra.

The State's reliance on Solem v. Stumes, supra, is also misplaced. (See State's Response at 5). Stumes held only that Edwards v. Arizona, 451 U.S. 477 (1981), should not be given full retroactive effect because it was grounded on the Miranda v. Arizona doctrine, not on a specific Bill of Rights protection. Jackson, on the other hand, is grounded on an essential right -- the sixth amendment right to counsel.

Retroactivity analysis and doctrine is premised on the fundamental principle that every new decision has a different purpose and history, requiring an independent determination of whether it will be retroactive. As the Supreme Court has frequently stated:

> Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as Linkletter and Tehan suggest, we must determine retroactivity "in each case" by looking to the peculiar traits of the specific "rule in question." [citations omitted].

Johnson v. New Jersey, 384 U.S. 719, 728 (1966). See also, Linkletter v. Walker, 381 U.S. 618, 629 (1965); Tehan v. Shott, 382 U.S. 406, 410 (1966); Stovall v. Denno, 388 U.S. 293, 297 (1967).

The effect of a new constitutional rule depends on "particular relations and particular conduct of rights claimed to have become vested, of status, of prior determinations deemed to have finality," and other considerations of public policy. Lemon v. Kurtzman, 411 U.S. 192, 199 (1973). Consequently, if the Court's decision in Jackson is deemed to constitute a new rule, its retroactivity or non-retroactivity cannot be summarily

determined by automatic resort to an arguably analogous Supreme Court decision. Rather, the retroactivity of Jackson must be determined independently, using those criteria discussed in Witt, supra. See Witt, 387 So. 2d at 926; Stumes, supra, 465 U.S. at 642; see also Robinson v. Neil, 409 U.S. 505, 507-08 (1973); Brown v. Louisiana, 447 U.S. 323 (1980); Hankerson v. North Carolina, 432 U.S. 233 (1977). A proper consideration of the criteria governing retroactivity demonstrates that Jackson differs materially from Edwards,[3] and should be given full retroactive effect.

With respect to the first of the three criteria, Jackson's purpose extends far beyond the articulation of a "prophylactic" rule to be implemented in the setting of custodial interrogation. (Cf. State's Response at 5). Instead, Jackson deals with the fundamental right to counsel and that right's relationship to judicial proceedings. Jackson, 106 S. Ct. at 1408-09. The Court held that the assertion of the right to counsel in a formal proceeding precludes any attempt by any State officer to initiate custodial interrogation or otherwise undermine sixth amendment's assurance. Jackson's purpose is to protect the integrity of the judicial process and to further the mandates of the sixth amendment, not to control the conduct of police officers. As the majority stated in Jackson:

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[3]In Stumes, the Supreme Court analyzed the retroactivity of Edwards by examining the purposes served by its bright line rule in the fifth amendment context. Most importantly, the Court noted that Edwards established a prophylactic rule whose sole purpose is to monitor police conduct. The Court examined the history behind Edwards by looking at a long line of fifth amendment cases. This resulted in the Court's conclusion that Edwards should not be fully retroactive. See Stumes, 465 U.S. at 647, 648. However, the Court's conclusion on the retroactivity of Edwards, determined by an examination of Edwards' particular purpose and its unique fifth amendment progeny, can in no way dictate whether Jackson -- a case based on the relationship between the right to counsel, the integrity of judicial proceedings and police misconduct -- should be fully retroactive.

> [T]he reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after [a criminal defendant] has been formally charged with an offense than before . . . . The "Sixth Amendment guarantees the accused at least after initiation of formal charges, the right to rely on counsel as a medium between his and the State."

Jackson, 106 S. Ct. at 1408, citing Maine v. Moulton, 106 S. Ct. at 479. After judicial proceedings have been conducted and/or the sixth amendment right to counsel has been asserted, a person who was simply a "suspect" becomes the "accused", and the sixth amendment right to the assistance of counsel is triggered. This right ensures the fairness, justice, and integrity of the judicial process. It has an importance far beyond "prophylactic" rules governing investigatory police conduct which might violate constitutional rights. Compare , Solem v. Stumes, supra, with Michigan v. Jackson, supra, and Fleming v. Kemp, supra.

The Supreme Court has given full retroactive effect to every other decision protecting the sixth amendment right to counsel where, as here, deprivation of the right would affect the fundamental fairness of the judicial process. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968).

Nor does the second retroactivity criterion support limiting Jackson to prospective relief. The Court's decision in Jackson was clearly foreshadowed by the long line of cases that held that once the sixth amendment right to counsel has attached, the "police may not employ techniques to elicit information from an uncounseled defendant that might have been proper at an earlier stage of their investigation." Jackson, 106 S. Ct. at 1408-09. See, e.g., Massiah v United States, 377 U.S. 201 (1964); McLeod v. Ohio, 381 U.S. 356 (1965); Kirby v. Illinois, 406 U.S. 682 (1972); Beatty v United States, 389 U.S. 45 (1967); Brewer v Williams, 430 U.S. 387 (1977); United States v. Henry, 447 U.S.

264 (1980); Maine v. Moulton, 106 U.S. 474 (1985). Accordingly, in contrast with Edwards, there simply is no justified reliance on prior law and precedent which requires that the decision in Jackson be limited to prospective application.[4]

Finally, the retroactive application of Jackson would not work any ill-effect on the administration of justice, the third consideration to be factored into a retroactivity determination. Given the history of restrictions on custodial interrogations after sixth amendment rights have attached, violations of the right to counsel through interrogations after formal proceedings have generally not occurred because of police reliance on pre-existing rules or law. As Justice Rehnquist points out in his dissent in Jackson, the empirical evidence does not suggest that police commonly deny defendants their sixth amendment right to counsel through improper interrogations. Jackson, 106 S. Ct. at 1413. As a result, the fully retroactive application of Jackson would not jeopardize the states' legitimate interest in finality or "seriously disrupt" the administration of justice by requiring relitigation of issues on the basis of stale evidence. See Allen v. Hardy, ___ U.S. ___, No. 84-6593, slip op. at 5-6 (June 30, 1986).

Mr. Henderson has consistently argued that his convictions and sentence of death are unconstitutional because of the admission of improperly obtained statements. It would be a gross miscarriage of justice to permit his convictions and death sentence to stand simply because his arguments were made before Jackson held that they were constitutionally sound and correct.

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[4]This Court has retroactively applied other fundamental constitutional doctrines, see Downs v. Dugger, supra (applying Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), retroactively), which were foreshadowed by and followed from an antecedent precedent. Id. (Lockett foreshadowed Hitchcock.)

Accordingly, Jackson should be held applicable to the case at bar and the appropriate relief should follow.

As the arguments above and in Mr. Henderson's initial petition demonstrate, this issue is squarely before this Court on the merits. As the argument in the initial petition and in the following section demonstrates, the merits demand relief.[5]

B. MR. HENDERSON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE FLAGRANTLY VIOLATED, AND HE IS THEREFORE ENTITLED TO THE RELIEF HE SEEKS

The law which today governs resolution of this claim is Michigan v. Jackson, which held that when

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

Thus,

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

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

As the State readily agrees, "the Sixth Amendment right to counsel attaches . . . upon the initiation of adversary judicial proceedings, whether by way of formal charge, preliminary

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[5]At a minimum, a stay of execution would be proper for the Court to determine the retroactivity of Michigan v. Jackson after full briefing by the parties. See Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987)(stay of execution granted and parties directed to brief the question of whether Lockett is to be applied retroactively).

hearing, indictment, or information" (State's Response at 6). Here, Mr. Henderson had been arrested twice,[6] had sought and received the assistance of counsel, had been brought before a court and formally charged with murder, and had had counsel officially appointed by the court. Moreover, not only had Mr. Henderson formally requested and been appointed counsel, he had executed a written invocation of his right to counsel and his intent to rely on the assistance of counsel during any and all "questioning, interrogation, interviewing or other conversation whatsoever between [himself] and any police agency, prosecutor or agents thereof" regarding any matter. This formal invocation of his sixth amendment rights was announced in court on February 10, 1982, and copies were provided to law enforcement officers (R. 2236, 2266).

The fundamental sixth amendment right at issue here is not dependent on a technical nicety -- an actual "arraignment" for a specific crime is not required to trigger the right to counsel. What is required is the initiation of judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 399 (1977), citing Kirby v. Illinois, 406 U.S. 682, 689 (1972)(emphasis added). Mr. Henderson was under arrest, was formally charged at a judicial proceeding, and was in custody. Cf. Brewer, supra, at 400; see also, United States v. Gouveia, 467 U.S. 180, 187 (1984); Smith v. Wainwright, 777 F.2d 609, 619 (11th Cir. 1985)("Adversarial proceedings had been initiated against Smith when he was arrested and charged with the murders.") It is thus of no moment that Mr. Henderson had not

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[6]Mr. Henderson was arrested on charges of possession of a firearm by a convicted felon in Charlotte County on February 6, 1982 (R. 1122), and on one count of first degree murder occurring in Putnam County on February 10, 1982, pursuant to a warrant issued in Putnam County on February 9, 1982, and served in Charlotte County on February 10, 1982.

yet been technically "arraigned" at the time his sixth amendment rights were violated.

Nor is it of any moment that the formal judicial proceedings which had in fact been initiated against Mr. Henderson did not specifically embrace the Hernando County murders. In Jackson, supra, the petitioner had been arrested and arraigned on a wholly unrelated charge at the time he was interrogated and gave the sixth amendment-violative statement there at issue. See Jackson, 106 S. Ct. at 1406. Similarly, in Brewer, supra, petitioner Williams had been arrested and arraigned for another charge, abduction, at the time statements implicating him in the murder were given. See Brewer, 430 U.S. at 392. In fact, law enforcement in Brewer did not even know that a murder had occurred until they interrogated the suspect.

Mr. Henderson had been formally arrested and charged at the time the statements at issue here were illegally elicited from him. He had already implicated himself in numerous offenses (including the Hernando County murders) in addition to those for which he had been arrested by Putnam County law enforcement. He had been advised at the hearing at which he was charged with the Putnam County murders that he was also being held for other murders. The attorney who was appointed at that hearing had expressly notified law enforcement of Mr. Henderson's intention to invoke his right to counsel as to any interrogation regarding any crimes. There can be no question but that the authorities "had committed themselves to prosecution," and thus that the sixth amendment right to counsel had attached by the time the Putnam County officers interrogated him. See Gouveia, supra, 467 U.S. at 188, and that it had been asserted. Of course, by the time Hernando County Detective Tony Perez interrogated Mr. Henderson, the Government had long been irrevocably committed to his prosecution. Id.

Similarly, it matters not that Mr. Henderson's counsel had not been "appointed to represent him with reference to the murders at issue." (See State's Response at 7). Again, Jackson and Brewer control: in neither of those cases was counsel "appointed to represent [the petitioners] with reference to the murders at issue" -- in those cases, as here, the petitioners had not yet been charged with the crimes for which they were ultimately convicted when the sixth amendment right attached. Indeed, in Jackson, petitioner Bladel's counsel were not even aware that they had been appointed until after the incriminating statements were illegally elicited. See Jackson, 106 S. Ct. at 1406. Here, by contrast, court-appointed counsel, in anticipation of the far-reaching scope of the prosecution to which the government had committed itself, Gouveia, supra, specifically announced his client's express intent to have counsel present at any and all interrogations, by any law enforcement officials, concerning any criminal matter. The fundamental sixth amendment right to counsel explicated in Jackson thus applies with even greater force in the instant case, and the blatant and deliberate violations of that right which occurred here is even more egregious.

Once the sixth amendment right to counsel attaches, as it undeniably had here by the time the challenged statements were elicited, a waiver of that right after law enforcement's initiation of interrogation is invalid:

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

Jackson, 106 S. Ct. at 1411. As discussed at length above and in Mr. Henderson's initial habeas petition, the right had attached, and under Jackson his subsequent waiver of that right, executed by signing a form specifically prepared by law enforcement in

anticipation of the illegal interrogation which ultimately occurred here, was invalid.

The State presents a further wholly unfounded assertion: that the sixth amendment protections afforded by Jackson were not implicated here because Mr. Henderson initiated the discussions during which he made the challenged statements. (See State's Response at 5, 8). The State goes further and boldly asserts that this Court so held on direct appeal. (State's Response at 5: "The Jackson decision presents no basis for review of this cause given this court's correct determination that it was the petitioner, not the police, who initiated the 'interrogations' at issue." [Emphasis omitted]). No record or non-record fact supports the State's assertion. To the contrary, the facts show that Mr. Henderson did not initiate the interrogations at issue. On direct appeal, this Court made no "determination" that Mr. Henderson "initiated"; nor could it have, given the facts underlying the interrogation which occurred here (See Petition, pp. 14, 16-17; see also Henderson v. State, 463 So. 2d 196, 199 (Fla. 1985)).

Two Justices of the United States Supreme Court carefully examined the record in this case and likewise found no "initiation" on the part of Mr. Henderson:

> A few days after his assertion of the right to counsel and his consultation with an attorney, petitioner was transported from one jail to another in connection with an unrelated criminal investigation. The drive lasted almost five hours and the police officers accompanying petitioner were informed that he had asserted his right to counsel and had been advised by his counsel not to talk with the police. The police officers had nevertheless equipped themselves for the trip by taking along specially prepared forms by which petitioner could waive his right to be free from police interrogation in spite of his previous assertion of that right. In particular, the form declared that the signatory desired to make a statement to the police, that he did not want a lawyer, and that he was aware of his "Constitutional Rights to disregard the instruction of [his] attorney and to speak

with the Officers" transporting him. Resp. to Pet. for Cert. A-14.

During the course of the five hour drive, the police engaged in extended "casual conversation" with the petitioner. Although the police officers asserted that none of this conversation concerned any aspect of the case, they also asserted that petitioner's general manner as well as various "subtle comments" conveyed to them that "his conscience was bothering him," id., at A-21, and that "he wanted to discuss the [criminal] matter." Id., at A-20. Near the end of the five hour drive, the police stopped the car and one of the officers got out to make a phone call. The officer who remained with the accused perceived that petitioner "acted like he was interested in what we were doing," id., at A-60, so he explained that they were "calling the chief of detectives just to tell him that we were here." Ibid. When the accused "wanted to know what we would do then," the officer explained that they would probably place petitioner in jail. According to the officer, the petitioner then responded with a "look on his face" that made clear his willingness to talk with the police. As the officer put it, "It's hard to describe an expression," but he could see that the petitioner was thinking: "You've got to be kidding. . . . Here I am. I know all these things, and all you're going to do is take me to jail." Id., at A-61. The officer then directly asked the petitioner if there was anything he would like to tell the police. When petitioner expressed a tentative willingness to give information about the location of his victim's bodies, the police confronted him with the previously prepared waiver forms, which he signed.

. . .

It is clear that the direct question by the police officer easily meets this Court's definition of interrogation. See Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297 (1980). And the fact of the arrest, even without the five hour drive, makes the context clearly custodial. Thus the issue is whether the petitioner "initiated" a dialogue with the police concerning the subject matter of the investigation. By the police officer's own testimony, the only actual speech by the petitioner that directly related to his case was the casual question of what would happen after the officer telephoned the "chief of detectives." Although four members of this Court found a similar statement to be "initiation" of dialogue in Bradshaw, supra, there the comment was at least unrelated to any prior police initiated conversation. Here, in contrast, the comment was a response to the police officer's unsolicited partial

> explanation of the police's intentions. If the petitioner's question is deemed a general inquiry regarding the investigation, than the police officer's comment that elicited it must have been a similar reinitiation of dialogue. It is thus not surprising that the police insist that the petitioner made clear his desire to talk through repeated, though "subtle" hints. But surely, the right to counsel cannot turn on a police officer's subjective evaluations of what must stand behind an accused's facial expressions, nervous behavior, and unrelated subtle comments made in casual conversation. If it were otherwise, the right would clearly be meaningless.

Henderson v. Florida, 105 S. Ct. 3542, 3543-44 (1985) (emphasis added).

What this Court did find was not that Mr. Henderson initiated the dialogue which resulted in the incriminating statements (a contention now brought by the State which is wholly at odds with the facts of this case), but rather that Mr. Henderson validly waived his sixth amendment right to counsel, as evidenced by the signed waiver form procured by the interrogating officers. See Henderson v. State, 463 So. 2d 196, 199 (Fla. 1985), citing Canady v. State, 427 So. 2d 723, 729 (Fla. 1983). As previously discussed, the holding in Canady cannot and does not survive Jackson, and the analysis applied by this Court on direct appeal no longer passes constitutional muster. Jackson now makes clear that Mr. Henderson is entitled to relief.

The specific constitutional violations which occurred here are rendered even more egregious by the deliberate law enforcement misconduct employed in eliciting the statements at issue. As discussed in his initial petition, the "waiver form" which the police had carefully tailored to the specific constitutional violation which they planned and executed unconstitutionally misinformed Mr. Henderson as to the availability of counsel:

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

(R. 1707, 2222, 2248)(emphasis added). The magnitude of this

misinformation is compounded by what actually occurred: one of the Putnam County officers who participated in the first interrogation was in the police station, on the telephone with his superiors when the interrogation commenced, yet made no efforts to contact Mr. Henderson's attorney. Moreover, Hernando County Detective Tony Perez relentlessly continued his already illegally-initiated interrogation despite Mr. Henderson's repeated invocations of his right to remain silent (R. 2300-03). All the statements here at issue were obtained in violation of Jackson and the sixth amendment. (In fact, Detective Perez initiated his interrogation three times before Mr. Henderson finally provided the statements.

This Court has been especially vigilant in protecting the fifth and sixth amendment rights of the criminally accused against deliberate violations by law enforcement officials:

> [D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections. . . . [P]olice interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits. . . .

Halliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987), quoting Morane v. Burbine, 106 S. Ct. 1135, 1165-66 (1986)(Stevens, J., dissenting). As in Halliburton, the official misconduct which occurred here "violates the due process provision of Article I, section 9 of the Florida Constitution." Id. On this basis also relief is proper, for the interrogating officers flouted what the sixth amendment assured.

As demonstrated, Mr. Henderson's rights under the fifth, sixth, eighth, and fourteenth amendments to the federal constitution and under the Due Process Clause of the Florida Constitution were blatantly violated. As discussed in the preceding section of the instant pleading and in Mr. Henderson's

initial petition, this issue is before the Court on the merits. For the reasons advanced herein and in the initial petition, the merits demand relief.

CLAIM II

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

With the exception of the points discussed below, Mr. Henderson would rely on the argument presented in his initial petition with respect to this issue.

In arguing against this claim, the State places considerable importance on the fact that the defense was able to exclude many of those venire persons who had been tainted by pretrial publicity through the exercise of peremptories. (See State's Response at 13, 16). As this Court has recognized, however,

> [t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another of upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty.

Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982). The pervasive pretrial publicity here forced Mr. Henderson to exercise his peremptories to exclude those jurors who had been

exposed to extrajudicial information, and therefore frustrated the free exercise of that right, thus fundamentally compromising Mr. Henderson's right to a fair trial by jury. A criminal defendant simply cannot be forced to surrender one right in order to exercise another. This however, is exactly what the State would have the Court hold.

As to trial counsel's failure to exercise all peremptories, trial counsel carefully reserved this issue for appellate review and requested that the Court allow him to present argument on the point and explain why he accepted the jury without exercising all peremptories (R. 1030). His request was denied. In this regard, it must be noted that trial counsel had already questioned the entire venire with respect to publicity during the initial stage of voire dire, and knew which venire persons had admitted to extrajudicial knowledge of the case (R. 1033). Mr. Henderson submits that trial counsel had compelling reasons for declining to exercise his remaining peremptories -- "tainted" jurors would take the place of those challenged. To the extent that this Court may have any questions in this regard, Mr. Henderson urges that the Court temporarily relinquish jurisdiction to the lower court for a fact-finding hearing regarding the specific facts underlying counsel's failure to exercise the remainder of his peremptory challenges.

CLAIM III

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

As stated in his initial petition, Mr. Henderson recognizes that this Court has consistently held that instructions and argument such as those challenged here are not, absent objection, reversible error under Caldwell v. Mississippi, 472 U.S. 320

(1985), Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1495 (11th Cir. 1987) notwithstanding. See, e.g., Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988).

Mr. Henderson continues here to urge the Court to reconsider its previous holdings, but emphasizes that this claim implicates as well the state law concerns of Tedder v. State, 322 So. 2d 908 (Fla. 1975), Garcia v. State, 492 So. 2d 360 (Fla. 1986), and Holsworth v. State, 13 F.L.W. 138 (Fla. Feb. 18, 1988), as well as the eighth amendment precepts set forth in California v. Ramos, 463 U.S. 992 (1983), decided before Mr. Henderson's direct appeal.

The prejudice emanating from the trial court's denial of an accurate Tedder-specific instruction here cannot be viewed in a vacuum: it must be viewed in the context of the repeated responsibility-diminishing, eighth amendment violative, misinformation imparted to Mr. Henderson's jury by both the court and the state. At voir dire, jurors who expressed their discomfort with the magnitude of responsibility posed by the role of the capital juror were reassured, individually and collectively, that it was the judge, not they, who bore that awesome responsibility when it came to sentencing. (See, e.g., R. 527 [Court assures juror who expressed a concern regarding the possibility of being the "cause" of another man's death that, with regard to the jury's sentencing decision, the judge "can disregard anything you all say and sentence the way I feel is appropriate, so . . . you're not putting him to death. It would be me . . ."]; R. 528 [Court asks same juror whether he could "vote for a conviction . . . knowing that he might get the death penalty, but you don't have anything to do with that?"]; R. 675 [Court asks a juror who feels "uneasy" whether she understands that "the Court is the one -- even though the jury renders an

advisory verdict -- it's up to me to determine what his punishment is, and you have nothing controlling to do with it?"]; R. 786 [Court informs panel of twelve venire persons that the sentencing decision is "up to the Court"]; R. 863 [Prosecutor informs entire venire that "the sentence will be imposed by Judge Huffstetler, that's his job"]). The jurors understood this misinformation as the law, as evidenced by prospective juror O'Neal's expression before the entire venire of his understanding of the jury's role in the capital sentencing process: "I don't think we have anything with the punishment. I don't think I have to do with the punishment level of the case." (R. 841). Nothing was done to correct the jury's fundamental misconception of their role in capital sentencing.

This theme was echoed and reinforced in the jury instructions given at both the guilt and penalty phases of trial. At the conclusion of the guilt phase, the trial judge instructed the jury that while their job was to determine guilt or innocence, it was his "job" to determine "what a proper sentence would be." (R. 1524). In the preliminary instructions given at the commencement of the sentencing phase, prior to the presentation of evidence, the judge informed the jury that "[t]he final decision as to what punishment should be imposed rests solely with the Judge of the court." (R. 1579-80) (emphasis added). Again, during the final instructions, the Court reaffirmed that "the final decision as to what punishment should be imposed is the responsibility of the Court." (R. 1616).

These comments and instructions are not accurate statements of Florida law, as recognized by trial counsel, who asked that the jury be specifically instructed regarding the weight to be given the sentencing jury's decision under Tedder. Any efforts to accurately inform the jury of their true role in sentencing on the part of trial counsel were rendered nugatory by the trial judge's inaccurate and misleading comments and instructions of

law. See Adams, 804 F.2d at 1531 ("because . . . the trial judge . . . made the misleading statements in this case . . . the jury was even more likely to have believed [the misinformation]").

The comments and instructions at issue here were exactly the type of misleading and inaccurate information condemned by Caldwell. There, the court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by prosecutorial references to appellate review was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" Caldwell, 105 S. Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976), the Court vacated Caldwell's death sentence.

The constitutional vice of the type of misinformation condemned by the Caldwell Court is not the only the substantial unreliability it injects into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer. The jury is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a

jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

Caldwell and its application to Florida law is the quintessential example of a legal issue about which reasonable jurists differ. The state and federal courts cannot agree about Caldwell, compare Combs v. State, 13 F.L.W. 142 (Fla. February 18, 1988)("[W]e refuse to apply the Eleventh Circuit's decisions" . . . applying Caldwell in Florida), with Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), and the members of this Court cannot agree. Compare Combs, supra, 13 F.L.W. at 145 (Barkett, J., Kogan, J., specially concurring)("Caldwell indeed is applicable to Florida's sentencing scheme . . . [and] appellant's Caldwell claim should be sustained under the analysis of Justice O'Connor's

concurrence, which constitutes the essential holding on which a majority of the Caldwell Court agreed"), with Combs, 13 F.L.W. at 142 (Overton, J.)("[W]e refuse to apply" Caldwell to Florida). The issue is now pending en banc consideration before the Eleventh Circuit in Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1986), vacated and rehearing en banc granted, 828 F.2d 1497 (11th Cir. 1987) and in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), vacated and rehearing en banc granted, 828 F.2d 1498 (11th Cir. 1987).

Since Mr. Henderson's initial petition was filed, the United States Supreme Court has granted the State's petition for certiorari in Adams, supra. Adams v. Dugger, 56 U.S.L.W. 3601 (March 7, 1988). Immediately thereafter, the Eleventh Circuit granted a stay of execution in Tafero v. Dugger, No. 88-5198 (11th Cir. March 7, 1988), based on a Caldwell claim contained in Mr. Tafero's successive federal habeas corpus petition. The United States Supreme Court declined to vacate the stay in Tafero, as it declined to vacate a stay based on identical grounds issued by a federal district court in Johnson v. Dugger, No. TCA 88-40058-MMP (DC Fla., M.D. March 8, 1988).

Resolution of this claim is dependent on the United States Supreme Court's decision in Adams. It is entirely appropriate for this Court to grant a stay of execution pending the Adams decision in order to preserve its own jurisdiction. This Court has in fact recently indicated that it would grant stays of execution based on this issue in appropriate cases, in Darden v. Dugger, Nos. 72,087, 72,088 (Fla. March 14, 1988):

> Mr. Darden takes the position that because this very issue is now pending before the United States Supreme Court in Adams v. Dugger, No. 87-121, this Court should issue a stay of execution and preserve its jurisdiction to address this claim after the issuance of Adams. If this were the first time Darden presented this Caldwell claim to this Court, such a stay may be warranted. However, because this claim was previously rejected by this Court, we decline to issue a stay to reconsider the issue.

Id., slip op. at 2-3 (emphasis added). This is the first time Mr. Henderson has presented this claim, and a stay is now warranted.

CLAIM IV

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

The law in regard to this claim is crystal clear -- the same aspect of a defendant's crime cannot support the application of two different aggravating circumstances. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). Thus, the same underlying factual predicate may not be used to support multiple aggravating circumstances. Nevertheless, the trial court here applied both the "heinous, atrocious, or cruel" aggravating circumstance, Fla. Stat. 921.141(5)(h), and the "cold, calculated, and premeditated" aggravating circumstance, Fla. Stat. 921.141(5)(i) to the same set of underlying facts, i.e., that the victims were bound and then shot in the head.

Mr. Henderson is of course not contending here that "heinous, atrocious, or cruel" and "cold, calculated, and premeditated" can never be both validly applied; what he is contending, and what the State apparently concedes, is that they must be based on "sufficient distinctive proof as to each." (See State's Response at 20, citing Hill v. State, 422 So. 2d 816 (Fla. 1982); Mason v. State, 438 So. 2d 374 (Fla. 1983); Squires v. State, 450 So. 2d 208 (Fla. 1984); Stano v. State, 460 So. 2d 890 (Fla. 1984); Mills v. State, 462 So. 2d 1075 (Fla. 1985); Johnson v. State, 465 So. 2d 499 (Fla. 1985)).

The cases cited by the State are instructive. In all of those cases, there were distinct, separate factual bases

supporting each aggravating factor. For example, in Johnson, supra, heinous, atrocious, or cruel was based on the fact that the victim was strangled, while cold, calculated, and premeditated was founded on the facts that the victim escaped three times and was pursed, captured, and strangled each time until she eventually expired. Id., 465 So. 2d at 507. Similarly, in Mills, supra, heinous, atrocious, or cruel was based on the fact that the victim was abducted and transported to a remote site, all the while begging for his life, while cold calculated and premeditated was based on the fact that the victim was let out of the vehicle then stalked through the woods by the defendant before being shot. Id., 462 So. 2d at 1080-81. In Mason, supra, heinous, atrocious, or cruel was based on the fact that the victim lived for as long as ten minutes while strangling on her own blood, while cold, calculated, and premeditated was based on the facts that the defendant broke into the victim's house, armed himself with a knife taken from her kitchen, and stabbed the victim while she slept. Id., 438 So. 2d at 379. In all of the cases, the trial court's application of both factors was upheld only because "the findings in support of the death sentence contain[ed] sufficient, distinctive proof of each aggravating circumstance." Mills, 462 So. 2d at 1081, citing Squires, supra, and Hill, supra.

This was not the case here: as discussed at length in the initial brief, the trial court's order based the findings of heinous, atrocious, or cruel and cold, calculated, or premeditated on the identical factual predicate -- that the victims were bound and shot in the head (See R. 2157-60; see also Petition at 39-40). Those cases cited by the State as justification for appellate counsel's failure to raise this issue on direct appeal thus did not involve "comparable circumstances." (See State's Response at 22).

Whether or not there was "sufficient, distinctive proof" of each aggravating circumstance here, and Mr. Henderson submits that there was not, the trial court's sentencing order reflected no such proof and no such findings. Mr. Henderson would have been entitled to resentencing had this issue been raised on direct appeal, and he is so entitled now. This Court should now determine the claim and remand for sentencing, for the constitutional error at issue rendered Mr. Henderson's death sentence fundamentally unreliable.

CLAIM V

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

The discussion of the instructions given Mr. Henderson's sentencing jury presented in the State's response is significant for what it does not say: nowhere in that discussion does the State mention that the jury was explicitly and repeatedly informed that before they could recommend life, they must first determine whether there were "mitigating circumstances sufficient to outweigh the aggravating circumstances." (See, e.g., R. 1580, 1616, 1617; Cf. State's Response at 23). Of course, if one ignores those specific instructions which effectively informed the jury that it was Mr. Henderson's burden to prove that the evidence justified a life sentence, rather than the State's burden to prove that death was appropriate in his case, one "could well have concluded that this argument stood little chance of success." (See State's Response at 24). This was not, however, the case here: the jury was so instructed, over trial

counsel's vigorous objections, and the issue was well preserved for appeal.

In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), decided long before Mr. Henderson's direct appeal, this Court found that an instruction which apprised the sentencing jury of its "duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances," standing alone, conflicted with the "principles of law enunciated in Mullaney and Dixon." Id. However, because Mr. Arango's jury had also been instructed that a death sentence "could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances," the instructions as a whole were nor erroneous. Id.

Here, no such "curative" instruction was given. At no point during the sentencing instructions was Mr. Henderson's jury informed that the State had the burden of proving that aggravating circumstances outweighed mitigating circumstances before death could be recommended. (See R. 1579-80, 1616-20). Mr. Henderson's jury was informed that the State's only burden was to prove the existence of aggravating circumstances sufficient to justify the imposition of the death penalty, at which point they [the jury] would then determine whether the mitigating factors presented by the defendant outweighed those aggravating factors (See R. 1518, 1616, 1617), i.e., at which point the ultimate burden was unconstitutionally shifted to Mr. Henderson. Thus, once the State proved the existence of sufficient aggravation, death was appropriate unless the defense proved the existence of mitigation, and that the mitigation "outweighed" the aggravation already proved by the State. This is a classic example of unconstitutional burden-shifting.

In Francois v. State, 423 So. 2d 357 (Fla. 1982), cited by the State for the proposition that "appellate counsel could well have concluded that this argument stood little chance of

success," (State's Response at 24), the instructions given, taken as a whole, were "identical" to those given in Arango, Francois, 423 So. 2d 361, and thus trial counsel was not ineffective for failing to object and request appropriate instructions. Similarly, in Thomas v. State, 421 So. 2d 160 (Fla. 1982), the instructions given "were in conformity with the law as stated in State v. Dixon," Thomas, 421 So. 2d at 165 (citation omitted); cf. Arango, 411 So. 2d at 174, and therefore appellate counsel was not ineffective for failing to raise the issue on direct appeal.[7] The exact instructions given in the above cases are not apparent from the opinions, but since they were "identical" to those given in Arango, Francois, 423 So. 2d at 361, and were "in conformity with the law as stated in State v. Dixon," Thomas, 421 So. 2d at 165, they could not but have included a specific instruction regarding the State's burden to prove that aggravating circumstances outweighed mitigating circumstances. See Arango, 411 So. 2d at 174.

Arango thus does "dictate a different result" (See State's Response at 24) in Mr. Henderson's case. His jury was never informed of the State's true burden regarding the weighing of aggravation and mitigation, but only that they were to determine that the mitigation proven by the defense outweighed the aggravation proven by the State before they could recommend a sentence of life imprisonment. Such instructions unconstitutionally shifted the burden of proof to the defendant, contrary to Mullaney and this Court's decisions in State v. Dixon, 273 So. 2d 1 (1973) and Arango, supra. The issue was

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[7]Contrary to the assertions of the State, Thomas' trial attorney's failure to object or request a special instruction makes a significant "difference" sub judice (Cf. State's Response at 23). Here, trial counsel preserved the issue for appeal by objecting and requesting the appropriate instruction (See R. 1569, 1574, 2112, 2115): if he had not so preserved this issue, appellate counsel could not have raised it on direct appeal, see Fla.R.Crim.P. 3.390(d), and thus could not have rendered ineffective assistance by failing to do so.

preserved and ripe for appeal, and appellate counsel's failure to do so was patently ineffective. The error rendered the death sentences imposed in this case fundamentally unreliable -- relief is now proper.

CLAIM VI

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

As discussed in the introduction to the instant pleading, it was not Mr. Henderson's original intent to frame this issue in terms of ineffective assistance of appellate counsel. It is Mr. Henderson's position that the issue was raised on appeal (See Initial Brief of Appellant at 37 [constitutional argument regarding the application of "heinous, atrocious, or cruel" and "cold, calculated, and premeditated" aggravating circumstances to Mr. Henderson's case]; id. at 38-41 [constitutional attack of Fla. Stat. 921.141 facially and as applied]) and resolved by this Court, Henderson v. State, 463 So. 2d at 200, and he asks this Court to exercise its inherent jurisdiction to revisit this issue in this proceeding. See Kennedy v. Wainwright, 483 So. 2d 429 (Fla. 1986)("in the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled."); Cf. Smith v. State, 400 So. 2d 956, 961 (Fla. 1981). If and to the extent that this issue was not adequately raised on appeal, Mr. Henderson would also assert that he was also deprived of his sixth and fourteenth amendment rights to the effective assistance of appellate counsel.

The precise question presented in Mr. Henderson's initial petition with respect to this issue is now before the United States Supreme Court in Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987), cert. granted 56 U.S.L.W. 3459 (Jan. 11, 1988).

It is important to note that the Oklahoma courts are ultimately tied to the Florida courts on this issue, and consequently certiorari review of the Oklahoma statute and the Supreme Court's ultimate decision in Cartwright will directly affect Florida and the decision in this case. See Cartwright v. Maynard, 802 F.2d 1203, 1217 (10th Cir. 1986)("Oklahoma has clearly adopted the unnecessarily tortuous element through its wholesale adoption of the Florida Supreme Court's construction of 'heinous, atrocious, or cruel' in State v. Dixon . . .").

A stay of Mr. Henderson's execution pending the decision in Cartwright is more than appropriate.

CLAIM VII

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

As discussed in the introduction to this pleading, Mr. Henderson did not intend that the instant claim be presented in terms of ineffective assistance. Again, Mr. Henderson respectfully urges this Court to exercise its jurisdiction to revisit this claim anew, as it directly affects the judgment of this Court on direct appeal. See Smith, supra; Kennedy, supra.

Mr. Henderson agrees with the State that a judge or jury's consideration of lack of remorse in aggravation has been prohibited by this Court since 1983 (See State's Response at 10, citing Pope v. State, 476 So. 2d 194 (Fla. 1983). This Court again recently reaffirmed its blanket condemnation of such arguments in Robinson v. State, 13 F.L.W. 63 (Fla. Jan. 28, 1988). Appellate counsel challenged the State's and sentencing court's reliance on this improper factor (see Initial Brief at 36), but this Court did not address the issue in its direct appeal opinion. This Court should stay Mr. Henderson's execution, and grant relief for the errors herein at issue

rendered Mr. Henderson's death sentence fundamentally unfair and unreliable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard B. Martell, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 21st day of March, 1988.

Billy H. Nolas
Attorney