IN THE SUPREME COURT OF FLORIDA

ROBERT DALE HENDERSON,

Petitioner,

v. CASE NO. 81,603

HARRY K. SINGLETARY,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, ETC.

COMES NOW Respondent, Harry K. Singletary, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.110, in response to Henderson's Petition for Writ of Habeas Corpus and Application for Stay of Execution, Etc., filed on or about July 15, 1992, and respectfully moves this Honorable Court to deny any and all requested relief, including any stay of execution, for the reasons set forth in the instant pleading.

Procedural History

Henderson was charged by indictment with three counts of first degree murder, in violation of §782.04, Florida Statutes (1981), on June 16, 1982. Although the prosecution was originally brought in Hernando County, the site of the murders, venue was subsequently changed to Lake County and, on November 16 through 20, 1982, Henderson was tried before a jury and found guilty as charged an all three counts. A separate penalty phase

was held on November 22, 1982, and the jury, by votes of eleven (11) to one (1), subsequently returned advisory verdicts recommending death on all counts. Judge Huffstetler sentenced Henderson to death on all counts on such date.

Henderson appealed such judgments and sentences to the Florida Supreme Court on January 14, 1983, and raised seven (7) points on direct appeal. These included the following contentions: (1) the trial court erred in denying Henderson's motion to suppress his confession, such confessions allegedly obtained in violation of, inter alia, the Fifth, Sixth, and Fourteenth Amendments; (2) the trial court erred in denying Henderson's motion in limine to preclude admission of evidence relating to his other crimes; (3) Henderson was deprived of a fair trial by virtue of the trial judge's reference to a "penalty phase" prior to the guilt phase; (4) the trial court erred in admitting into evidence allegedly gruesome photographs; (5) Henderson was deprived of his right to be tried by a fair and impartial jury drawn from a representative cross-section of the community; (6) Henderson was improperly sentenced to death and (7) the Florida capital sentencing statute was unconstitutional on its face and as applied. In regard to the sentencing point, Henderson contended that, of the three aggravating circumstances found, two were improper - the finding that the homicides had been especially heinous, atrocious or cruel and that they had been committed in a cold, calculated and premeditated manner, as set forth in §921.141(5)(h) and (i); Henderson also argued that the judge had improperly considered lack of remorse as an

aggravating circumstance. In its answer brief, filed September 9, 1983, the state questioned the preservation of part of Henderson's first claim in violating the admission of the confessions.

In its opinion of January 10, 1985, Henderson v. State, 463 So.2d 196 (Fla. 1985), the Supreme Court of Florida unanimously affirmed the convictions and sentences in all respects. In the course of recounting the facts of the case, the court found that Henderson "volunteered" to show the authorities the location of the bodies of the three victims in this case. Henderson at 198. The court also found that there was sufficient evidence "to support the finding that he knowingly and intelligently waived his right to have counsel present when making [these] statements." Id. at 199. The court found, as to the second claim on appeal, that while it had not been proper for evidence concerning Henderson's admission to being wanted in other states to have come in, any error therein was harmless, noting,

> The amount of evidence against Henderson is simply overwhelming. There were at least four confessions to four different police officers, There was also substantial circumstantial evidence linking him to the crime and corroborating hi5 confession. Id. at 200.

The court found the other three challenges to the convictions to be without merit, and further found the death sentences "appropriate under the law established in similar cases", and premised upon correctly-found aggravating circumstances. Id. at 201. Henderson's motion for rehearing was denied on February 28, 1985, and he thereupon sought relief in the United States Supreme

Court, raising two claims - one pertaining to the admissions of his confessions and the other as to the selection of the jury. The Court denied review on July 1, 1985. See, Henderson v. Florida, 473 U.S. 916, 105 S.Ct. 3542, 87 L.Ed.2d 665 (1985).

On July 1, 1987, Henderson filed a motion for post-conviction relief in the state circuit court, raising seventeen (17) claims for relief. These claims included: (1) error in denial of Henderson's motion to suppress his statements; (2) error in allegedly conducting portions of the trial in his absence; (3) error in denial of his renewed motion for change of venue; (4) error in the fact that the jury was allegedly aware that he was in custody during the trial; (5) error in the manner in which the jury was selected; (6) error in the admission into evidence of testimony regarding Henderson's being wanted for other offenses; (7) ineffective assistance of psychiatric expert; (8) Henderson's alleged incompetency to stand trial (9) ineffective assistance of trial counsel at both guilt and sentencing phases; (10) error in utilizing Henderson's prior convictions from Putnam County as the basis for: finding an aggravating circumstance at sentencing; (11) error in the judge's alleged reliance upon non-statutory factors in aggravation; (12) error in the fact that the jury was allegedly misled as to the alternative to death, in that they were not specifically told that three consecutive life terms could be imposed; (13) error in the fact that the sentencing court did not order a pre-sentencing investigation report; (14) error in the fact that the jury was allegedly not advised that they could consider mercy in their

advisory verdict; (15) error in the fact that the jury was allegedly not advised that only six votes would suffice for a life recommendation; (16) error in the fact that the jury instructions and prosecutor's argument allegedly misled the jury as to their respansibility in sentencing; (17) error in the use of jury instructions at the penalty phase which allegedly shifted the burden of proof onto the defense, Although Henderson requested sixty days in which to amend the pleading, he never filed any further pleadings or attempts at amendment, despite the fact that the state did not formally respond until well more than sixty days had elapsed.

On February 24, 1988, the state filed a response, asserting, inter alia, that all claims except three, those pertaining to Henderson's competence and ineffective assistance of both the attorney and psychiatric expert, were improperly presented, in that such represented issues which, under Florida law, could and should have been raised on direct appeal. The state also argued that Henderson's claim regarding the admission into evidence of his confessions represented a matter which had already been raised on appeal, and that the subsequent decision of Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), did not represent a change in law, entitled to retroactive application on collateral proceedings, and, in any event, did not apply to Henderson's case.

An evidentiary hearing was held n the circuit court as to these matters on March 23 through 25, 1988 and on March 31, 1988 and April 1, 1988 (TR 1-1002). At the hearing, Henderson called

eight (8) witnesses and the state called two (2). These witnesses included: (1) Dr. Joyce Carbonnell, a psychologist who had examined Henderson in 1987 and 1988; (2) Dr. Robert Pollack, the psychiatrist who had examined Henderson, at defense request pursuant to Florida Rule of Criminal Procedure 3.216, in October of 1982 in reference to this case; (3) Dr. Archibald Hampton, a psychiatrist who had examined Henderson in reference to his prior murder charges in Putnam County in 1982; (4) Dr. Robert David, a psychologist retained under identical circumstances in regard to the 1982 Putnam County offenses; (5) Dr. Barbara Mara, a psychologist associated with Dr. Pollack, who had interpretated Henderson's MMPI, administered as part of the psychiatric examination and (6) David Cunningham, mental health counselor associated with Dr. Pollack, who, likewise, had assisted in interpretation of Henderson's MMPI. The defense additionally called attorney Jack Springstead, who had been lead counsel at Henderson's trial on these charges in Hernando County in 1982 and attorney Michael Johnson who had assisted him on the penalty phase. The state called Dr. Leslie Garrett, who had interpreted the results of a CAT scan taken of Henderson in 1982, and David Franklin, an investigator with the Public Defender's office who had assisted the defense team at Henderson's trial.

Following the presentation of this evidence, the parties were directed to file memoranda by 5 p.m. on April 5, 1988, with ruling to be made at or by noon on April 6, 1988. The district court denied all relief at such time, The judge's order found, in accordance with the state's response, that 13 of the claims

were procedurally barred due to their improper presentation. The court found that Henderson's claim as to his confession had already been presented on direct appeal, and that Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), was not a change in law, entitled to retroactive application, and did not, in any event, apply to the case. As to the other claims, the court found that Henderson had received reasonably competent representation by counsel, that the mental health examination had been competently performed and that the subsequent testimony by an expert did not invalidate the prior findings that Henderson was competent to stand trial in 1982 (TR **1398-1406).**

Henderson immediately appealed such ruling to the Supreme Court of Florida, which, on April **6, 1988,** granted **a** temporary stay of execution until noon, April 11, **1988,** setting oral argument for 8:30 a.m. on April 11, **1988.**

Additionally, **fallowing the** signing of a death warrant in this case, Henderson, pursuant to Florida Rule of Criminal Procedure 3.851, filed a petition for writ of habeas corpus in the Supreme Court of Florida on February 26, 1988, raising seven (7) claims for relief. These claims included: (1) another assertion of error in regard to the admission into evidence of his statements; (2) a contention that the sentencing judge and jury had impermissibly considered the non-statutory factor of lack of remorse in aggravation; (3) a contention that the statutory aggravating circumstances relating to a homicide being especially heinous, atrocious or cruel and committed in a cold,

calculated and premeditated manner were applied in an unconstitutionally overbroad manner; (4) a contention that he had received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal the denial of his renewed motion for change of venue and other motions pertaining to voir dire; (5) a contention that he had received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal the denial of a requested jury instruction on the jury's responsibility in sentencing; (6) a contention that he had received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal a contention that two of the aggravating circumstances had impermissibly been based on the same factual predicate and (7) a contention that he received ineffective assistance of appellate counsel due to counsel's failure to raise on appeal the denial of the requested jury instruction on the burden of proof at the penalty phase.

In its response, filed March 11, 1988, the state contended that all of the claims except those relating to ineffective assistance of appellate counsel had been improperly presented, in that they represented matters which could and should have been raised on direct appeal, under Florida law, or matters which had been presented at such time and resolved against Henderson. The state further argued that Henderson's claim regarding the admission of his confessions and any alleged change in law based upon Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), was one which was more properly raised by 3.850, as Henderson had already done, in that such procedural

vehicle was specifically designed to deal with claims based upon change in law. See, Witt v. State, 387 So.2d 922 (Fla. 1980).

On April 11, 1988, the Florida Supreme Court rendered its opinion, denying the petition for writ of habeas corpus, and affirming the state's circuit court's denial of Henderson's 3.850 motion in all respects. In its opinion, Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), the Florida Supreme Court expressly held that fifteen (15) of the claims presented were procedurally barred; these claims were: (1) that Henderson was involuntarily precluded from being present during critical stages of the proceedings; (2) that the trial court erred in denying Henderson's renewed motions for change of venue; (3) that Henderson was forcefully removed from the courtroom in the presence of the jury; (4) that potential jurors were improperly excused for hardship; (5) that collateral crime and bad act evidence were improperly admitted at trial; (6) that Henderson's sentences of death were based upon unconstitutionally obtained prior convictions; (7) that Henderson's sentences were based on the improper aggravating circumstance of lack of remorse; (8) that the trial court erred in failing to instruct the jury that one of their options was to sentence Henderson to three consecutive life terms; (9) that the sentencing court improperly failed to provide Henderson with a presentence investigation report; (10) that the trial court erred in instructing the jury that they could not consider mercy; (11) that the jury was erroneously instructed that a verdict of life must be reached by

a majority; (12) that the penalty phase jury instructions diluted the jury's sentence of responsibility, in violation of Caldwell v. Mississippi 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (13) that the trial court conclusively shifted the burden of proof onto the defense; (14) that the sentencing court unconstitutionally "doubled" aggravating factors, using the same facts to conclude that more than one aggravating factor was established and (15) that the Florida Supreme Court had interpreted the aggravating circumstances of heinous, atrocious or cruel and cold, calculated and premeditated in an unconstitutionally overbroad manner. Henderson, 522 So.2d at 836, n.*.

The Florida Supreme Court specifically addressed three of the claims presented, As to Henderson's renewed challenge to the admission of his confessions, on the basis Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the court held that Jackson was not entitled to retroactive application, and that its original holding that the statements were properly admitted "remains undisturbed." Henderson, 522 So.2d at 837. As to the remaining claims, including Henderson's alleged lack of competency to stand trial, and alleged ineffective assistance of counsel, the state appellate court held that the trial court's denial of relief, after evidentiary hearing, was supported by competent and substantial evidence in the record. The court specifically held:

> As to Henderson's competency, the experts who examined Henderson at the time of his trial unanimously agreed that Henderson was legally competent to stand trial under the proper

legal definitions. One such expert further classified -Henderson as a textbook "antisocial" or sociopath. That is, Henderson knew right from wrong and was capable of conforming his conduct to societal standards, but simply did not wish to conform his conduct and did not care that his actions were wrong. Moreover, Henderson's attorney and the public defender investigator testified that Henderson capably assisted them in the preparation of his defense throughout the proceedings and that he fully understood the charges against him. The subsequent diagnosis made by a defense-hired expert five years after his conviction, that Henderson may not have been competent to stand trial does not affect the evidence supporting his competency. The trial court had ample evidence on which it could base its findings that Henderson was competent, regardless of what other contradictory evidence exists. Evidently the trial court, well within its province, gave little weight to the subsequent expert's testimony that Henderson was incompetent. Because the trial court's findings were based an competent and substantial evidence, we will not disturb them. Id.

Likewise, the Florida Supreme Court held:

> Similarly, the finding that Henderson's counsel was reasonably effective is supported by the record. Trial counsel testified at the hearing below that he did everything he could under the circumstances of a difficult case. Indeed, the record shows that counsel inquired into the possibility of asserting an insanity defense despite the fact that there were no indications that such a defense was supported by the facts. Counsel was prohibited from talking with Henderson's relatives by Henderson himself, not by any failure to investigate on counsel's part. In addition Henderson's allegation that counsel was ineffective for failing to raise the intoxication defense is without merit as the record is devoid of facts indicating that Henderson was drunk at the time the offenses were committed. We affirm the trial court's findings as to effective assistance of counsel as such findings are based on competent and substantial evidence. Id. at 837-8.

Henderson then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Jacksonville Division, on the same day; the case was styled, Henderson v. Dugger, United States District Court Case Na. 88-54-Civ-OC-16. The petition, some one hundred and thirty nine (139) pages in length, presented twenty (20) claims for relief: (1) that admission of Henderson's confessions had violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as such specific precedents as Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); (2) that the trial court had failed to assure Henderson's presence at all critical stages; (3) that the trial court had erred in failing to grant Henderson's renewed motion for change of venue; (4) that Henderson's removal from the courtroom by court officers prejudiced him; (5) that the excusal of various prospective jurors due to age, hardship or parental status deprived Henderson of a jury composed from a fair cross-section of the community; (6) that the state had impermissibly introduced evidence concerning collateral crimes; (7) that trial counsel had been ineffective in failing to secure the assistance of a competent mental health expert; (8) that Henderson had not been competent to stand trial; (9) that counsel had rendered ineffective assistance of counsel at the guilt and penalty phases; (10) that the prior convictions utilized as an aggravating circumstance in Henderson's death sentences had been unconstitutionally obtained; (11) that the death sentences had been based upon non-statutory aggravating circumstances; (12) that the jury was misled as to

alternatives to death; (13) that the trial court failed to provide Henderson with a presentence investigation report; (14) that the sentencing jury was impermissibly precluded from considering mercy; (15) that the penalty phase jury instructions misled the jury as to the number needed for a life recommendation; (16) that the penalty phase jury instructions violated Caldwell v. Mississippi 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (17) that the penalty phase jury instructions had impermissibly shifted the burden of proof onto the defense; (18) that Henderson received ineffective assistance of counsel on appeal; (19) that the Florida Supreme Court had interpreted and applied the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances in an unconstitutionally overbroad manner and (20) that the prosecutor had impermissibly argued lack of remorse.

The district court granted a stay of execution, but, on June 27, 1988, following the filing of a response by the state and a traverse by the defense, Judge Moore rendered an order denying all relief. In such order, Judge Moore expressly found Claims 2 (absence), 3 (venue), 4 (removal from courtroom by bailiffs), 11 (portions of claim involving consideration of non-statutory aggravators), 12 (failure to advise jury of alternatives to death), 13 (failure to supply Henderson with presentence investigation report), 14 (jury's alleged inability to consider mercy), 15 (jury instruction on majority), 16 (Caldwell claim), 17 (burden-shifting claim), 19 (unconstitutional application of heinous, atrocious or cruel and cold, calculated and premeditated

aggravated circumstances to be procedurally barred; in each instance, Judge Moore concluded that Henderson could not demonstrate cause and prejudice, so as to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Order of June 27, 1988 at 9-12, 23-30, 32-3). The district court addressed the other claims on the merits.

Judge Moore found as to Claim 1, involving the confessions, that Henderson was entitled to no relief, in that Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) was not entitled to retroactive application (Order of June 27, 1988 at 4-8). As to Claim 5, involving the excusal of prospective jurors, the court found no constitutional violation (Order at 13). As to Claim 6 involving the admission of evidence concerning Henderson's other crimes, Judge Moore concluded that Henderson had not been deprived of fundamental fairness (Order at 13-14). As to Claim 7, involving the competence of the mental health expert, Judge Moore found that the state court's conclusions regarding the fact that this expert had in fact been competent were supported by the record, and that no relief was warranted (Order at 14-15). Likewise, as to Claim 8, involving Henderson's own competence to stand trial, the federal district court concluded that the state court's conclusion that Henderson had been competent was supported by the record, and that no relief was warranted (Order at 15-16). As to Claim 9, involving ineffective assistance of counsel at trial and penalty phase, the court found that Henderson had not demonstrated either deficient performance of counsel or prejudice Strickland v. Washington, 466

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (order at 16-20). As to Claim 10, involving allegedly unconstitutional prior convictions, Judge Moore found, on the basis of Mann v. Duqqer, 817 F.2d 147 (11th Cir. 1987), that the claim was properly before him (Order at 20); he also found that Henderson was entitled to no relief, even if the allegations were true, due to the fact that other valid aggravating circumstances existed to support his sentences of death (Order at 20-21). Judge Moore found that the portion of Claim 11 involving the sentencer's alleged Consideration of lack of remorse was properly presented, but that Henderson was entitled to no relief (Order at 21-22); Judge Moore found that Claim 20 duplicated this claim (Order at 33). As to Claim 18, involving alleged ineffective assistance of appellate counsel, the court noted that there were four (4) subclaims presented: (a) counsel's failure to appeal the issue regarding the denial of a change of venue; (b) counsel's failure to appeal the denial of a requested jury instruction on the importance of the jury's role at sentencing; (c) counsel's failure to appeal the alleged doubling of two aggravating circumstances and (d) counsel's failure to appeal alleged burden-shifting error; Judge Moore ruled, in all respects, that Henderson had failed to satisfy the dictates of Strickland v. Washinqton, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (Order at 30-32).

Following this ruling, Henderson, on July 1, 1988, filed a Motion to Alter and Amend Judgment, pursuant to Fed.R.Civ.P. 59, pointing out as to Claim 10, the recent decision of Johnson v.

Mississippi, 486 U.S. 578 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and, inter alia, as to Claim 19, the recent decision, Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988). In his order of July 26, 1988, Judge Moore ruled, as to Claim 10, that Henderson's reliance upon Johnson v. Mississippi was misplaced in this regard, given the fact that Henderson's prior convictions from Putnam County had never been overturned, and, in fact, Henderson "has never attempted to overturn the prior convictions." (Order of July 26, 1988 at 2). Henderson appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit, but did not raise all the claims presented to the district court, Thus, in his initial brief in the federal appeal, Henderson v. Dugger, 11th Cir. Case No. 88-3680, Henderson raised the following nine (9) primary claims for relief: (1) admission of Henderson's confession; (2) denial of motion for change of venue; (3) alleged incompetence to stand trial, ineffective assistance of mental health expert, and ineffective assistance of counsel, in regard to these issues; (4) Henderson's alleged absence from certain proceedings; (5) allegedly unconstitutional application of the heinous, atrocious and cruel and cold, calculated and premeditated aggravating circumstances; (6) alleged burden-shifting; (7) alleged consideration of non-statutory aggravating factors; (8) alleged improper preclusion of mercy from consideration and (9) alleged ineffective assistance of appellate counsel, due to counsel's failure to raise the denial of a proposed Caldwell instructions and failure to attack the alleged doubling of two aggravating circumstances.

On February 20, 1991, the federal appellate court rendered its opinion, Henderson v. Dugger, 925 F.2d 1309 (11th Cir. 1991), affirming the district court's denial of all relief. In regard to the confession issue, the court expressly found that admission of Henderson's confession to the Putnam County officers had not been error, in that, "Henderson in fact initiated the confession," Id. at 1313; accordingly, the court found no violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The federal appellate court made a similar finding, i.e., that Henderson had initiated the confession, in regard to Henderson's second confession to Officer Perez. Henderson, 925 F.2d at 1314. As to the claim involving the denial of the motion for change of venue, the court concluded that Henderson could not demonstrate cause or prejudice, so as to merit relief. Id. at 1315. As to the claim involving Henderson's alleged incompetence to stand trial, and the ineffectiveness of counsel and expert, the court concluded that the district court's findings, based upon the state record, had not been clearly erroneous, Id. at 1315-16. As to the claim involving Henderson's alleged absence from the proceedings, the Eleventh Circuit held that the evidence was in conflict, and that Henderson was entitled to no relief. Id. at 1316. In regard to the "burden-shifting" point, the Eleventh Circuit denied relief on the basis of Bertolotti v. Dugger, 883 F.2d 1503, 1524-5 (11th. Cir. 1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990); the court disposed of Henderson's claim involving mercy on a similar basis. Henderson, 925 F.2d at 1317-

18, 1319. The Eleventh Circuit found that Henderson had failed to demonstrate a lack of fundamental fairness, in regard to his claim involving the alleged consideration of non-statutory aggravation. Id. at 1318-19. Further, the court rejected Henderson's claim of ineffective assistance of appellate counsel as without merit. Id. at 1319-20.

In regard to the claim involving the two aggravating circumstances, the Eleventh Circuit held that Henderson's claim, in reference to the application of the two factors, was properly presented, but without merit; the court held, however, that Henderson's claim that the jury instructions on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances were unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988) was procedurally barred, because Henderson had not raised the issue on direct appeal to the Florida Supreme Court. Henderson, 925 F.2d at 1316-17. The court found:

> The state argues, and the district court found, that Henderson had procedurally defaulted on this claim - that the jury instructions as to the "especially heinous, atrocious, or cruel" and "cold, calculated, and premeditated" aggravating factors were insufficiently specific - by failing to raise it before the Florida Supreme Court on direct appeal. Our examination of the trial record and Henderson's brief on direct appeal shows that Henderson clearly raised this issue before the state trial court.[25] Henderson raised a slightly different version of the claim on direct appeal, referring only to Florida's construction of the aggravating factors.[26] Henderson's attempted to raise the issue in seeking state postconviction relief, but the Florida Supreme Court found it procedurally barred.[27] We agree that the claim that the vagueness of the jury

instructions is barred but also hold that Henderson's related claim that the statute's construction is overbroad is properly before this court, as this latter claim was raised before both the Florida trial and appellate courts.

On the merits, Henderson's claim is that Florida's construction of two aggravating factors failed to narrow his sentencer's discretion, as required by *Maynard v. Cartwright*[28] and *Godfrey v. Georgia*[29]. The Florida Supreme Court has adopted narrowing constructions of these two aggravating circumstances that this court has determined to be sufficiently limiting. For example, *Harich v. Wainwright*[30] found that the Florida Supreme Court has adequately narrowed both the "especially heinous, atrocious, or cruel'' aggravating circumstances, and the "cold, calculated, and premeditated" aggravating circumstances

The trial court in this **case** found ample support for its conclusion that both aggravating factors applied. When considering the application of the "heinous, atrocious, or cruel''factor, the court noted that the evidence showed that two of the three victims were bound, hand and foot, with adhesive tape; that Henderson joked with the two bound victims prior to shooting them; that Henderson forced the third victim to bind the other two victims and to watch their shooting; and that the third victim tried to break free and was then shot at close range. This would seem to amount to a "'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'"[33] **AS** to the "cold, calculated, and premeditated" aggravating factor, the trial court found that the fact that the victims were bound prior to being shot supported the additional level of premeditation necessary to justify this aggravating factor. We therefore refuse to disturb Henderson's sentence on these grounds.

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[25] See Trial Transcript, at 1570-71 (Henderson's counsel: "**The** standard jury instructions used to define this aggravating circumstance. I don't

believe they do that anymore. Without that definition, this aggravating circumstance is unconstitutionally vague and over broad."); id, at 1575-76.

[26] See Initial Brief of Appellant (appeal to the Supreme Court of Florida), at 38 ("The statute ... does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the stated. See *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).").

[27] ***Henderson** v. **Dugger,*** 522 So.2d at 836 n.* (claim 15).

[28] 486 U.S. **356, 108** S.Ct. **1853,** 100 L.Ed.2d 372 (1988).

[29] 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d **398** (1980).

[30] 813 F.2d 1082 (11th Cir. 1987), aff'd en banc in pertinent part, 844 F.2d 1464 (11th Cir. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1355, 103 L.Ed.2d. 822 (1989).

[31] **Id. at** 1104.

[32] **Id.** at 1102 ("the Florida courts have construed [the aggravating circumstance] to require a greater degree of premeditation and cold-bloodedness than is required to obtain a first degree murder conviction" (citation omitted)).

[33] *Profitt v. Florida,* 428 U.S. 242, 255, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976) (citations omitted) (upholding Florida's construction of "heinous, atrocious, or cruel" aggravating factor).

Henderson, 925 F.2d at 1316-7.

Henderson filed a petition for rehearing, and, on July 30, 1992, the Eleventh Circuit denied the motion, but issue a revised opinion. Henderson v. Singletary, 968 F.2d 1070 (11th Cir.

1992). In this opinion, the court revised its disposition of Henderson's claim involving the admission of his confession to Officer Perez. The Eleventh Circuit expressly held that "Henderson initiated the confession," Id. at 1073, and found that Henderson's rights under the Fifth and Sixth Amendments had not been violated. Id. at 1072-5. The court found that Henderson had "not invoked his right to counsel when Perez picked him up," and that, at the time of the confession, "Henderson had not appeared in any adversary judicial proceedings with regard to the Hernando County murders," Id. at 1072. The court also concluded that Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), was not entitled to retroacative application under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Henderson, 968 F.2d at 1073.

Henderson subsequently filed a petition for writ of certiorari in the United States Supreme Court, seeking review of this decision; in such petition, Henderson again attacked the admission of his confessions, and contended that he was entitled to relief under Espinosa v. Florida, ___ U.S. , 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), due to the allegedly unconstitutional jury instructions at the penalty phase. The United States Supreme Court denied certiorari on November 30, 1992. See, Henderson v. Singletary, ___ U.S. ___, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). Henderson then moved for rehearing, on the basis af Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992). This motion was denied on February 22, 1993. Henderson v. Singletary, U.S. , 113 S.Ct. 1374, 121 L.Ed.2d 751 (1993).

On March 18, 1993, Governor Chiles signed a death warrant for Henderson's execution, such warrant active between April 20, and April 27, 1993, with execution presently scheduled for April 21, 1993 at 7:00 a.m. On April 12, 1993, Henderson filed a second motion for post-conviction relief in the state circuit court, raising four (4) claims for relief: (1) alleged violation of Espinosa v. Florida, U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), in regard to the jury instructions at the penalty phase on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating Circumstances; (2) a claim that Florida's entire capital sentencing statute was facially vague; (3) a claim that invalid prior convictions were used in aggravation and (4) a claim that access had been denied to Henderson's files under Chapter 119. Following response by the State, and the presentation of argument, the state circuit judge denial all relief, finding all of Henderson's claims procedurally barred; the judge made alternative findings of lack of merit and harmless error. Henderson appealed such ruling to the Florida Supreme Court, and also, on April 15, 1993, filed a successive state petition for writ of habeas corpus; such petition presented one (1) claim for relief, that Henderson's appellate counsel had been ineffective for failing to attack the constitutionality of the penalty phase jury instructions on the heinous, atrocious or cruel and the cold, calculated and premeditated aggravating circumstances on appeal in 1983.

Argument

THE INSTANT SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED, IN THAT ALL CLAIMS RAISED ARE PROCEDURALLY BARRED

This Court has held that successive petitions for habeas corpus, seeking the same relief, are improper, see Mills v. Singletary, 18 F.L.W. S209 (Fla. April 1, 1993), Kennedy v. Singletary, 599 So.2d 991 (Fla. 1992), Francois v. Wainwright, 470 So.2d 685 (Fla. 1985), White v. Dugger, 511 So.2d 554 (Fla. 1987), Mills v. Dugger, 574 So.2d 63 (Fla. 1990), and, of course, has also consistently held that habeas corpus is not a vehicle for obtaining appeals of issues which were raised, should have been raised on direct appeal, or which were waived at trial or which could have, should have, or have been, raised in prior post-conviction filings. Mills, supra; Medina v. Dugger, 586 So.2d 317 (Fla. 1991); Francis v. Barton, 581 So.2d 583 (Fla. 1991); Mills v. Dugger, 559 So.2d 578 (Fla. 1990); White, supra; Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). The instant petition, which was filed in violation of all the above, should be summarily denied,

Claim I

Henderson's sole claim in his successive state habeas petition is that his appellate counsel rendered ineffective assistance for failing to present on direct appeal to the Florida Supreme Court in 1983, any claim of error in regard to the constitutionality of the jury instructions on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances. It is the State's position that this

claim is procedurally barred. Henderson filed a petition for writ of habeas corpus in this Court in 1988, in which he raised an allegation of ineffective assistance of appellate counsel, on four grounds: (1) appellate counsel's failure to raise on appeal the denial of Henderson's motion for change of venue; (2) appellate counsel's failure to raise on appeal the denial of defense counsel's requested jury instruction on the importance of the jury's role at the penalty phase; (3) appellate counsel's failure to raise on appeal a claim that the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances "merged", and (4) appellate counsel's failure to raise on appeal a claim that the standard penalty phase jury instruction had "shifted the burden of proof" (Petition, Henderson v. Duqqer, Florida Supreme Court Case No. 71,981, filed February 26, 1988, at pages 24-44). This Court denied relief, Henderson v. Duqqer, 522 So.2d at 838; the Eleventh Circuit expressly found appellate counsel's performance not to be deficient. Henderson v. Duqqer, 925 F.2d at 1319-1320.

Because Henderson has attacked the competence of appellate counsel in a prior proceeding, he cannot file a successive petition, seeking to raise the issue an different grounds. In prior capital cases, this Court has specifically held that successive petitions of this nature are procedurally barred. See Francois v. Wainwright, 470 So.2d 685, 686 (Fla. 1985); Card v. Dugger, 512 So.2d 829, 830-831 (Fla. 1987) (where defendant attacked competence of appellate counsel in prior habeas petition, he could not relitigate claim, on different basis, in

successive petition), On the authority of Francois and Card, this claim is procedurally barred. It is clear that collateral counsel could have raised this claim in the 1988 petition. Henderson's counsel then was quite sensitive to claims of this nature, inasmuch as collateral counsel argued in 1988 that appellate counsel had been ineffective for failing to appeal the denial of other defense-requested jury instructions at the penalty phase, and collateral counsel likewise attacked appellate counsel's handling of claims of error involving these two aggravating circumstances, on different bases, The instant claim, such as it is, was always available, and is procedurally barred at this time.

To the extent that any further argument is necessary, the State would contend that Henderson is entitled to no relief, Although the State maintains its position that it was improper, under Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the circuit court to have allowed Henderson's former appellate counsel to proffer unsworn testimony regarding her prior representation in this case, the testimony presented, in fact, clearly demonstrates that no relief is warranted. Claims of ineffective assistance of appellate counsel are, of course, governed by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires showing of deficient performance of counsel and prejudice. It is well-recognized that appellate counsel need not raise every non-frivolous issue revealed by the record in order to be effective. See Provenzano v. Dugger, 561 So.2d 541, 549 (Fla. 1990); Jones v. Barnes, 463

U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Cf. Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986) (mere fact that counsel, after recognizing that claim exists, does not present it, does not establish cause for procedural default; attorney error short of ineffective assistance of counsel does not constitute cause far a procedural default); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434, 106 S.Ct. 2661 (1986). The standards set forth in Strickland v. Washington are objective ones, and the State contends that it is Henderson's burden to demonstrate, inter alia, that every reasonable appellate attorney in Ms. Newton's position in 1983 would have raised the claims now at issue. Ms. Newton herself testified that, at the time that she wrote the brief, no Florida death sentence had ever been vacated on the basis of allegedly vague jury instructions at the penalty phase in regard to these aggravating circumstances (Transcript of Hearing of April 14, 1993, at 23-25); in fact, Ms. Newton testified that she was unaware of any case invalidating these jury instructions until 1992, when Espinosa v. Florida, U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), was decided. (Id. at 24). The fact that counsel representing other inmates, such as Davidson James, did raise claims of error in this regard or that Ms. Newton herself may have wished to actually raise this argument, does not establish deficient performance, where, inter alia, she raised other substantial claims on behalf of Henderson, and no showing has been made that her omission in this regard was outside of the wide range of professionally competent assistance. Cf. Pelmer

v. White, 877 F.2d 1518 (11th Cir. 1989) (cousnel not ineffective for failing to object to jury instruction which was later invalidated, because at time of trial instruction seemed to have support in the law); Pitts v. Cook, 923 F.2d 1568 (11th Cir. 1991) (counsel's failure to raise "Batson" objection, prior to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), not ineffective; counsel not required to be innovative, in order to provide effective assistance).

Finally, Henderson cannot demonstrate prejudice. AS Ms. Newton testified, it was not until ten years after Henderson's trial and penalty phase that precedent emanating from the United States Supreme Court suggested that the 1982 jury instructions had been deficient; Ms. Newton did testify that it was possible that, even if she had presented this issue in 1983, the Florida Supreme Court would have found any error to be harmless (Transcript of Hearing of April 14, 1993, at 24; R 2382). Henderson's theory of prejudice is not so much that he would have obtained relief in 1983, had this claim been presented on direct appeal, but that, ten years later, he would have been in a position to secure collateral relief based on supervening caselaw. In Lockhart v. Fretwell, U.S. ___, 113 S.Ct. 838, 121 L.Ed.2d 180 (1993), the United States Supreme Court conclusively rejected this "windfall" theory of prejudice, and rejected any mechanistic outcome-determinative test, holding that prejudice cannot be established under Strickland v. Washington, unless counsel's deficient performance has rendered the proceeding fundamentally unfair. Henderson is not entitled to

any decade-delayed windfall, because, as the State has asserted in its other pleadings in this and the circuit court, tho jury instructions sub judice, did not render the 1982 penalty phase fundamentally unfair. Under the facts of this case, any jury instruction error was harmless under Clemons v. Mississippi, 449 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. *1992).* The aggravating circumstances defined were validly found, and every *court* to review this case has concluded that they were applied in a proper, constitutional and narrow fashion; even without these two aggravating circumstances, Henderson would still remain eligible for death, given the statutory aggravating circumstance relating to prior conviction. Cf. Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d *269* (1992). The instant procedurally-barred petition for writ *of* habeas corpus ahould be denied in all respects.

Conclusion

WHEREFORE, for the aforementioned reasons, the instant petition for writ of habeas corpus should be denied in all respects, in that the only claim raised therein is procedurally barred. Any stay of execution, and any other related relief, should likewise be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Martin J. McClain, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 16th day of April, 1993.

RICHARD B. MARTELL
Assistant Attorney General