IN THE SUPREME COURT OF FLORIDA

CASE NO. 71981
72208

ROBERT DALE HENDERSON,

Petitioner,

v.

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

Respondent.

_____/

PETITIONER/APPELLANT'S SUPPLEMENTAL APPLICATION FOR STAY OF EXECUTION ON THE APPEAL OF THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF AND PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Robert Dale Henderson's temporary stay of execution granted by this Court, expires today at noon, less than four hours from the time the instant pleading is filed. He appears before this Court today on appeal of the trial court's denial of his Motion to Vacate Judgment and Sentence. That court issued its order denying post-conviction relief on April 6, 1988, after an evidentiary hearing which commenced on March 23, 1988, and concluded on April 1, 1988. This Court granted a temporary stay.

It is through no fault of Mr. Henderson or counsel that he is before this Court some four hours prior to his scheduled execution. Mr. Henderson has been pursuing his post-conviction remedies in the state courts since July of 1987. His Rule 3.850 motion was pending in the trial court when his death warrant was signed. He has at all times met all deadlines established by courts, statutes, and procedural rules. He diligently sought to prove his claims at the evidentiary hearing below; the lower court ordered continuances which were not requested by the defense. Mr. Henderson has not created the circumstances which

1936
atty (D-65)

now leave him and the Court in such a dangerous predicament. The substantial time constraints under which counsel is currently operating prevent full briefing of the claims presented in the Rule 3.580 Motion and litigated at the hearing. The instant pleading is intended as a supplement to all pleadings, applications, and motions heretofore filed in this Court in connection with Mr. Henderson's convictions and sentences of death, and as a renewed application for a stay of execution. Mr. Henderson will discuss below some of the issues raised in and ruled on by the Rule 3.850 court -- the imminence of his execution prevents a complete discussion of all of the factual and legal issues involved in these actions. Mr. Henderson does not intend to waive any of the issues presented in his Rule 3.850 motion; he incorporates into this pleading all matters heard in the proceedings heretofore conducted. Mr. Henderson would respectfully urge this Court to stay his execution in order to allow the complete, proper, and needed briefing and judicious consideration of his substantial and compelling claims for relief.

A. A STAY OF EXECUTION IS REQUIRED

Mr. Henderson presented sixteen issues in his Rule 3.850 Motion. All but three of those issues were summarily denied, and an evidentiary hearing was held on the remaining three. That evidentiary hearing concluded on April 1, 1988. Counsel filed post-hearing memoranda on April 6, pursuant to order of the court, and the court issued its order denying relief on April 6, 1988.

As the circuit court recognized, Mr. Henderson's was "a legally complex trial." The evidence presented at the evidentiary hearing reflects this complexity: the record from the proceedings in the court below is over 2,000 pages in length. The findings made by the circuit court are in many respects

erroneous, contrary to law and fact, and antithetical to the evidence presented. Mr. Henderson will discuss below some of the errors contained in and embraced by the trial court's order, but the constraints of time and the imminence of his execution prevent full, considered, and professionally adequate briefing and analysis. Again, Mr. Henderson would respectfully request that this Court stay his execution, to allow for complete briefing and judicious consideration.

Those claims summarily denied by the Rule 3.850 court presented substantial constitutional issues. The trial court's order denying those claims raises complex procedural issues and errors requiring careful analysis and argument, which Mr. Henderson is unable to present to this Court in the short time remaining before his execution. Again, a stay is appropriate.

Several of the claims presented in Mr. Henderson's Rule 3.850 Motion, and summarily dismissed by the court, present significant, retroactive changes in the law and/or questions which are currently pending before the United States Supreme Court. Such claims are cognizable in a Rule 3.850 proceeding, see Witt v. State, 387 So. 2d 922 (Fla. 1980); Tafero v. Wainwright, 459 So. 2d 1034 (Fla. 1984), and the trial court's summary dismissal of those claims was therefore erroneous.

For example, resolution of Claim I of the motion is controlled by Michigan v. Jackson, 106 S. Ct. 1404 (1986), decided after Mr. Henderson's direct appeal. There is no question but that Jackson represents a significant change in fundamental constitutional law: the only question for this Court to decide is whether Jackson is to be applied retroactively. Jackson's retroactivity is a question of first instance in this Court, although, as discussed in Mr. Henderson's reply to the State's response to his habeas petition, the federal circuit courts have addressed, or are in the process of addressing, the identical issue. This Court must now decide whether Jackson is

to be applied retroactively in Florida. Resolution of such a crucial constitutional issue requires full briefing, analysis, and argument, none of which can be adequately accomplished in the time remaining before Mr. Henderson's execution. A stay of execution is therefore appropriate.

Similarly, Mr. Henderson's Caldwell v. Mississippi claim presents a significant change in eighth amendment law, the application of which to the Florida capital sentencing scheme is currently pending before the United States Supreme Court. See Adams v. Dugger, 56 U.S.L.W. 3601 (March 7, 1988)(granting certiorari).

Caldwell and its application to Florida 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. Florida, No. 68,477 (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), cert. granted, ___ U.S. ___ (March 7, 1988)(No. 87-121), and the members of this Court cannot agree. Compare Combs v. State, No. 68,477 slip op. p. 13 (Fla. February 18, 1988)(Barkett, J., and Kogan, J., specially concurring)("Caldwell indeed in 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, slip op. at p. 1 (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).

Because the application of Caldwell to the Florida capital sentencing scheme is an issue about which reasonable jurists obviously differ, the United States Supreme Court granted certiorari in Adams, supra. 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).

Because reasonable jurists disagree, and because resolution of the issue is dependent on the Adams decision, this Court should stay Mr. Henderson's execution pending Adams in order to preserve its own jurisdiction. This Court has recently indicated that it may grant stays based on the Caldwell issue in appropriate cases. See Darden v. Dugger, Nos. 72,087 and 72,088 (Fla. Sup. Ct. March 14, 1988). This is such a case, and a stay should issue.

The issues presented in Mr. Henderson's Rule 3.850 Motion and developed at the lengthy evidentiary hearing held below are substantial and compelling, and require deliberate and judicious consideration for their just resolution. The imminence of Mr. Henderson's execution will prevent such a just resolution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant, and it should not do so now. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986)) Mason v.

State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

Mr. Henderson's Rule 3.850 Motion was the first and only such motion he has filed. The claims presented therein are no less substantial than those presented in the cases cited above. He has diligently pursued his post-conviction remedies, and the timing of his appearance before this Court is due to no fault of his own, or of his counsel. He therefore respectfully urges that this Court stay his execution and allow him the opportunity to fully brief and argue his substantial compelling constitutional claims.

CLAIMS FOR RELIEF[1]

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.

This issue was raised on direct appeal, and decided adversely to Mr. Henderson by this Court. Henderson v. State, 463 So. 2d 196 (Fla. 1985). In denying relief on this issue, this Court held that

---

[1]As forementioned, the time constraints under which Mr. Henderson proceeds and the imminence of his execution, prevents him from fully and adequately briefing the claims presented in his Rule 3.850 Motion and denied by the trial court. He here highlights and discusses only some of the claims raised below, to demonstrate to this Court the necessity of a stay of execution. He does not intend to, and does not, waive those claims not discussed herein. All claims presented below and any matters heard in the proceedings heretofore conducted are hereby incorporated into the instant pleading by specific reference.

> 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.

Jackson v. Michigan, 106 S. Ct. 1404 (1986), was decided after Mr. Henderson's direct appeal. Under Jackson's sixth amendment analysis, a waiver of the right to counsel obtained during custodial interrogation by law enforcement after judicial proceedings against the accused have commenced, and, as here, after the accused has obtained counsel, in invalid, and statements thus obtained are therefore inadmissible. 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.

As Mr. Henderson argued in his Rule 3.850 Motion, Jackson now controls the resolution of this issue. Under Jackson's sixth amendment analysis, Mr. Henderson's waiver was not valid, and relief is proper. This Court's resolution of the issue on direct appeal turned on the voluntariness of Mr. Henderson's purported waiver of his right to counsel: this Court did not question the existence or operation of the sixth amendment right to counsel, or law enforcement's initiation of the interrogation. See Henderson, 463 So. 2d at 199. Jackson speaks specifically to the validity of waivers under circumstances such as the instant, and held such a waiver invalid, and statements obtained after such a waiver inadmissable.

This Court's direct appeal ruling is thus in conflict with Jackson. Mr. Henderson is entitled to relief under Jackson's fundamental sixth amendment analysis. There is no question but that Jackson represents a significant change in the law, as is demonstrated by a comparison of the Jackson opinion with this

Court's opinion in Henderson. Thus, the question for this Court to now decide is whether Jackson is to be applied retroactively. Mr. Henderson submits, as discussed below, that Jackson is entitled to retroactive application.

A. JACKSON IS RETROACTIVE

The State argues that Jackson is not entitled to retroactive application. (See State's Response to Application for Stay of Execution/Anticipatory Answer Brief on Appeal from Denial of Motion for Post Conviction Relief [hereinafter "State's Response"] at 12-14). 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. 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 v. State, 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,

---

[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).

> 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), 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 13). 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. From as early as the Gideon v. Wainwright opinion, Supreme Court decisions such as Jackson, decisions defining the sixth amendment right to counsel, have consistently been given retroactive application.

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

---

[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.

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:

> [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

---

[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. Downs, supra (Lockett foreshadowed Hitchcock.)

v. Hardy, ___ U.S. ___, No. 84-6593, slip op. at 5-6 (June 30, 1986).

Mr. Henderson has consistently argued that his convictions and sentences 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. A stay is appropriate to allow this Court to determine the retroactivity of Jackson after full briefing and argument by the parties. See Riley v. Wainwright, 12 FLW 457 (Fla. Sup. Ct. Sept, 3, 1987)(stay of execution granted and parties directed to brief the question of whether Lockett is retroactive).

B. MR. HENDERSON IS ENTITLED TO RELIEF UNDER JACKSON

1. The Sixth Amendment Right To Cousel Had Attached

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 hearing, indictment, or information" (State's Response at 6). Here, Mr. Henderson had been arrested twice,[5] had sought and received the assistance of counsel, had been brought before a court and formally charged, and had had counsel officially appointed by the court. Counsel's role was by no means limited to "Charlotte County" cases -- the right had been asserted, and had attached, with regard to "any and all" questioning. See Brewer v. Williams, 430 U.S. 387 (1977). Moreover, not only had Mr. Henderson formally requested and been appointed counsel, he

[5]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.

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 open court on February 10, 1982, and copies were provided to law enforcement officers (R. 2236, 2266), the same officers who later elicited the statements at issue.

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 yet been technically "arraigned" at the time his sixth amendment rights were violated. (Cf. State's Response at 14-16).

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.

The State argues that language in Maine v. Moulton, 474 U.S. 159 (1985), to the effect that the Massiah v. United States, 377 U.S. 201 (1964), sixth amendment exclusionary analysis applies only to evidence pertaining to charges as to which the sixth amendment right to counsel had specifically attached at the time the evidence was obtained bars relief on Mr. Henderson's Jackson claim. State's Response at 16. However, neither Moulton, Massiah, nor United States v. Henry, 447 U.S. 264 (1980), are on point here, as they do not deal with actual custodial interrogation. Rather, those cases deal with situations where the State surreptitiously violates a defendant's rights through the use of a covert agent. In cases of custodial interrogation, as here, Jackson controls, and the limitation announced in Moulton, supra, does not apply. Again, it is instructive to note that one of the defendants in Jackson had been arrested and indicted on a wholly unrelated charge at the time he was interrogated. Jackson, 106 S. Ct. at 1406; see also Brewer, 430 U.S. at 392. The statements elicited from the defendant in Jackson were then used to arrest him on the charge for which he was ultimately convicted. Id. The use of those statements against him was found violative of the sixth amendment, despite the fact that they were elicited while he was under arrest and indicted for an offense unrelated to that for which he was tried and convicted. Id. Jackson was decided after Moulton. Obviously, if the limitation announced in Moulton applied to the custodial interrogation context, Jackson and Moulton would be in direct conflict.

Again, this Court's direct appeal ruling was based on its assessment of the voluntariness of the waiver executed by Mr.

Henderson. Henderson, 463 So. 2d at 199. This Court did not dispute the fact that the sixth amendment right to counsel had attached. Id. The trial court likewise made no such finding nor did the Rule 3.850 court, despite the urging of the State. The State now improperly urges this Court to change its original fact-findings.

2. Law Enforcement Initiated the Interrogation

No court that has addressed this issue has found that Mr. Henderson initiated the interrogation which led to the elicitation of the statements at issue herein -- neither the trial court, this Court, see Henderson, 463 So. 2d at 199, the United States Supreme Court, see Henderson v. Florida, 105 S. Ct. 3542, 3543-44 (1985)(Brennan and Marshall, JJ., dissenting from denial of certiorari), nor the Rule 3.850 court (see Transcript of Rule 3.850 Hearing ["Tr."] at 32; see also Order Denying Rule 3.850 motion). The State, however, now urges this Court, as it had unsuccessfully urged the Rule 3.850 court, to make such a finding. No court has made such a finding, and no court can make such a finding, even were it proper to do so, because the record simply does not support it.

The law enforcement officers involved here insisted, and the State still insists, that Mr. Henderson initiated the interrogation by "the looks on his face" (R. 2260), "his facial expressions" (R. 2267), and/or by "his physical gestures" (Id.). Of course, no case-law supports such an interpretation, and it seems almost absurd to have to defend such an assertion.

The facts leading up to the illegal elicitation of statements from Mr. Henderson are best stated in a United States Supreme Court opinion in dissent from that court's denial of certiorari (prior to Jackson):

> 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)(Brennan and Marshall, JJ., dissenting)(emphasis added). It was law enforcement that initiated the interrogations herein at issue. The record is barren as to any initiation on Mr. Henderson's part.

C. CONCLUSION

This Court addressed this issue on direct appeal, without the benefit of Jackson, and found that although the right to counsel was operative, Mr. Henderson validly waived that right and thereby consented to be interrogated without counsel being present. Henderson, 463 So. 2d at 199. Applying Jackson to the facts already established dictates a different result. The question now before this Court is whether Jackson applies retroactively. The Eleventh Circuit has held that Jackson applies retroactively to capital sentencing proceedings, in a case where the challenged statements were introduced only during

the sentencing hearing, Fleming v. Kemp, 837 F.2d 940 (11th Cir. 1988), and is currently deciding the issue in the context of the guilt-innocence phase of capital trials. Collins v. Kemp, 792 F.2d 987 (11th Cir. 1986). This Court must now decide, pursuant to Witt v. State, whether Jackson is retroactive in Florida. A stay of execution, to allow full briefing and argument of the issue, is appropriate.

The State urged the Rule 3.850 court, as it is now urging this Court, to make new factual findings, findings contrary to the record, all in a blatant attempt to convince this Court that it should act unjudiciously and avoid the application of Jackson to this case altogether (See P.C. 21-22; State's Response at 7-12). The Rule 3.850 court rightly refused to make such ex post facto findings, holding that Jackson was not entitled to retroactive application, and therefore denying an evidentiary hearing on the issue (See Order Denying 3.850 Relief at 2; P.C. 32). This Court should also refuse to change its original or make new findings of fact.

The question before this Court is whether Jackson applies retroactively. If it does, relief is proper. Mr. Henderson respectfully submits that it does, and requests the opportunity to submit briefs and argument on the issue. A stay is necessary to allow briefing, argument, and judicious consideration of this issue.

II

MR. HENDERSON'S CALDWELL V. MISSISSIPPI CLAIM[6]

The facts of and the legal analysis attendant to this claim are discussed at length in Mr. Henderson's Rule 3.850 Motion, and will not be repeated here. Mr. Henderson recognizes the view

---

[6]Presented as Claim XV in Mr. Henderson's Motion to Vacate Judgments and Sentences.

this Court has taken of this claim in the past, but respectfully urges this Court to stay his execution pending the decision of the United States Supreme Court in Adams v. Dugger, 56 U.S.L.W. 3601 (March 7, 1988), which will determine the applicability of Caldwell v. Mississippi to Florida capital sentencing proceedings.

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 motion 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 and 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. A stay is warranted.

III.

INEFFECTIVE ASSISTANCE OF COUNSEL

All criminal defendants are entitled to the effective assistance of counsel. Counsel's role is to "assure that the adversarial testing process works to procure a just result." Strickland v. Washington, 466 U.S. 668, 687 (1984). "Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. As to certain issues which may arise in a criminal case, counsel's obligation may be to seek out an appropriate expert. Although a defendant's mental condition is not at issue in every case, where it is at issue "defense counsel is bound to seek the

assistance of a mental health expert." Bertolotti v. State, __ So. 2d ___, No. 71,432 (Fla. April 7, 1988). See also Ake v. Oklahoma, 470 U.S. 68 (1985).

However, a mental health expert cannot conduct an adequate evaluation from just an interview of the criminal defendant: "In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data." Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). Dr. Pollack, the expert counsel retained in this action because (as counsel explained at the hearing), counsel knew the day would come when he would have to testify about his conduct, testified that when there is a court appointed mental health expert it is the attorney's obligation to obtain the independent data and provide it to the mental health expert (Tr. 363). This is consistent with counsel's obligation to make a reasonable investigation or a reasonable decisions that a particular investigation is unnecessary. Strickland 466 U.S. at 691. It is counsel's duty to advise the expert as to what particular legal concerns may be present and seek the expert's skill and knowledge in determining the significance of the defendant's mental condition under the law. Here, counsel informed the expert of nothing -- he never even asked that his client be evaluated with regard to mitigating factors. However, in seeking the assistance of the mental health expert counsel must provide the expert with the information necessary for a reliable as well as useful evaluation. The mere appointment of a mental health expert is not an ends in itself; it is in fact a beginning.

In the present case, the appointment of a mental health expert was sought and obtained. However, counsel failed to obtain any real assistance. Cf. Ake v. Oklahoma. The court-appointed psychiatrist, Dr. Pollack, did not view his role as one of assistance:

Q. When you are appointed then, you are appointed in your view to provide a report to who?

A. To whoever has placed the order. If it's from -- Sometimes it's the court, at which time both parties get the report. In this particular case, it was provided, a psychiatric evaluation of the gentleman, for his defense attorney.

Q. Generally, do you provide -- In your experience, is there -- Of the cases that you've provided just to defense counsel or cases where you have just provided it to the court, is there a difference?

A. Yes, sir.

Q. Okay. How do you decide who to provide it to?

A. What it says on the court order.

Q. Okay.

A. This particular court order said to the defense attorney only.

Q. So, you read the court order and you just follow it to the letter?

A. Yes, sir.

Q. Now, in this court order, what did you -- How did you interpret it as to what your job precisely was to do?

A. According to this, says, to assist counsel for the defense in evaluating the defendant's mental condition at the time of the alleged offense as far as his competency to stand trial.

Q. As part of that, did you view it as your job to evaluate Mr. Henderson as to voluntary intoxication.

A. That's part of it, yes, sir.

Q. And why would you do that?

A. Well, obviously somebody who is intoxicated, again, depending on the degree of intoxication, may not necessarily have his full command of his faculties and may not necessarily be able to form a plan and then carry it out. So, he may be impaired.

Q. Okay. Then, you're looking for possible defenses on behalf of the defense attorney; is that --

A. No, sir. I'm looking for an evaluation of the person and what their mental state was

both when I see him and at the time of the offense.

Q. In connection with this, then, precisely what is your relationship vis-a-vis the defense attorney?

A. He is the person to whom I report my findings.

Q. That's it?

A. That's it.

Q. If you have any questions about wanting any additional information do you give him a call and say "give it to me"?

A. Yes, sir. Yes, sir.

Q. In this case, did you do that?

A. Yes, sir.

Q. Did you get any additional information?

A. Just brief comments over the phone. Nothing in writing. No, sir.

Q. So, you got no additional collateral information, any documents or anything to show up in your file at this point in time?

A. Whatever is in my file is all I have. That's correct.

(Tr. 271-273).

Dr. Pollack testified that he contacted trial counsel but that he received no pertinent or relevant information from him regarding Mr. Henderson:

Q. When did you learn that the death penalty might be involved?

A. Probably sometime between the time the appointment was set up and the time that the appointment that I saw him.

Q. All right.

A. I believe I had a conversation with Mr. Springstead about some information about the case. The usual would be, I would get a phone call. I would contact the attorney and ask for whatever information would be pertinent, relevant, or anything he had about the persons.

Q. Did you do that in this case?

A. Yes, sir.

Q. Did you receive such information from Mr. Springstead?

A. No, sir.

(Tr. 265).

Dr. Pollack was also left in the dark regarding the aggravating and mitigating circumstances which a mental health expert is especially qualified to assist in exploring and developing for presentation to the sentencing jury. See Bertolotti v. State, supra. As he explained:

Q. Now, this -- When you did find it was a death penalty case, did that affect how you approached it at all?

A. No, sir -- pretty much approach it in the same fashion as the others.

Q. Are you familiar with the death penalty scheme in the State of Florida at all?

A. I'm not sure what you're referring to.

Q. In the State of Florida, there are aggravating and mitigating circumstances. Are you at all familiar with that concept?

A. No, sir.

Q. So, you don't know any of the aggravating circumstances or the mitigating circumstances which would be related to a mental health expert's field or his knowledge?

A. I'm just not sure of the question.

Q. Okay. Some of the mitigating circumstances and some of the aggravating circumstances would perhaps call for an opinion -- or could call for an opinion -- by a mental health expert. Are you at all aware of that?

A. Yes.

Q. In that regard, what mitigating and aggravating circumstances would you be aware of that might call for an opinion by a mental health expert?

A. Well, you know, let me -- One of the problems I have is translating your language to my language. When I pursue the evaluation, you know, what I'm looking for, number one, is assessment of the person when he comes in. Number two, an assessment of what took place at the time of the events or list of events. Number three, what led to that, and what could have made that event

take place or what made this person do what he did or didn't do at the time.

So, I think that answers your question as best as I can feel comfortable with.

Q. Okay. Well, when you're appointed, do you feel you like your job is to assist the defense counsel?

A. No, sir. My job is to evaluate the person.

Q. It is not to provide assistance to defense counsel?

A. No, sir. I believe that in this case it was -- I don't know the statute number, but I believe the defense attorney's allowed to have as part of his work product conversation with a psychiatrist.

As I proceed with that, in all cases, what I try to do is do an objective evaluation, regardless of who has requested it -- whether it's the state or the defense.

Q. Okay. Now, have you done prior capital cases?

A. Yes.

Q. Prior to this one?

A. Yes, sir.

* * *

Q. I believe the last question was: Can you tell us what any of the aggravated circumstances are?

A. I asked a little bit, just define -- If you can define that a little bit for me, I will do my best and answer it.

Q. Under the Florida Statute, in order for the death penalty to be imposed, there must be a finding that certain aggravating circumstances are present. These aggravating circumstances must be found beyond a reasonable doubt.

Are you at all familiar with any of the aggravating circumstances?

A. If you could use another word besides "aggravating circumstances", I can probably answer your question.

Q. Well, in the statute, it sets out the word "aggravating circumstances", and provides a list of them. I take it you're totally unfamiliar with them?

A. I really am not familiar with the Florida Statutes as they -- that is true.

Q. Similarly, there's also in the statutes, there are mitigating circumstances that are set out. Are you at all familiar with any of the mitigating circumstances?

These are circumstances which could justify a sentence of less than death if an aggravating circumstance has been found.

Are you at all familiar with any of the mitigating circumstances?

MR. HOGAN: I again object, just for the record. This is irrelevant. This is not a law professor sitting here. This is not Jack Springstead, the defense attorney, sitting here.

He has told the Court and these gentlemen his qualifications. He's a doctor. And they persist in asking him questions about Florida Statutes.

THE COURT: I'll sustain the objection.

MR. HOGAN: Thank you.

(Tr. 265-271).

Without an understanding of what aggravating and mitigating circumstances were, or what factors may have been pertinent to this case, Dr. Pollack could not provide the defense any assistance. Dr. Pollack's ignorance must be laid at defense counsel's doorstep. When counsel requested a court-appointed psychiatrist, he specifically asked for Dr. Pollack. He requested the appointment in order to "confirm what [he] believed to [be] the fact, and that is that Robert Dale Henderson was a sane, competent individual." (Tr. 421). Thus counsel wanted Dr. Pollack to find Mr. Henderson competent and sane. At the time of the evidentiary hearing, defense counsel could not contradict Dr. Pollack's claim that no pertinent, relevant background information was provided:

Q. Were you familiar with [Mr. Henderson's] statements to Dr. Pollack regarding running away when he was a child?

A. Oh, I have no firsthand knowledge of what he told Dr. Pollack.

Q. You did not discuss it with Dr. Pollack?

A. Discuss what?

Q. Dr. Pollack's conversation with Mr. Henderson.

A. My contact with Dr. Pollack was at the time prior to trial. And as I recall, I had this -- this is to the best of my recollection. I had some telephone conversations with Dr. Pollack and his office. What we discussed about, during those conversations, I can't tell you now. I really can't, because I don't know what we talked about, what he may have asked me, and what I may have told him. I just can't go back and honestly tell you what we talked about.

I seem to have a recollection of making the calls. The reason I say that is because it was stretched over a long period of time. And there was a number of contacts between Dr. Pollack and Mr. Henderson. But what we talked about, who called who, and when who called, I just can't tell you honestly.

Q. Do you have any idea as to the number of phone calls?

A. No, sir.

Mr. Springstead, who was Mr. Henderson's lead counsel testified that his second chair, Mike Johnson, was responsible for developing the penalty phase:

> And again, I would like to point out that the way we handled this case, with Mr. Johnson, Mike Johnson handling the, and accepting responsibility for the penalty phase presentation, Mr. Johnson would be also a really necessary person to inquire of regarding that issue, if you want to fully explore that issue and place it in the record, because Mr. Johnson can probably elaborate what I am telling you, with regard to his refusal to cooperate with us in circumstances surrounding that. Even though I had a good understanding of Mr. Johnson's understanding would be more detailed.

(Tr. 408).

However, Mr. Johnson testified he first became involved in the case "[t]he first part of November." (Tr. 878). Trial commenced on November 8, 1982, ran a couple of days before venue was changed, then recommenced on November 16, 1982. Thus, Mr. Johnson whose responsibility was to develop the penalty phase had precious little time to do it. As to contacting Dr. Pollack

about the penalty phase, Mr. Johnson related, "I don't have a specific recollection of talking to Dr. Pollack, but I know I did." (Tr. 882). A mental health expert cannot provide any meaningful assistance less than a week before trial without any knowledge of the concepts involved in the penalty phase of a capital proceeding. It is also clear from the record that Dr. Pollack's evaluation covered only competency and sanity. Dr. Pollack made limited inquiries during his limited meetings with Mr. Henderson in order to report on those limited topics (Tr. 288-290). There was no subsequent reinterview in order to focus upon the presence or absence of aggravating and mitigating circumstances.

Counsel failed to provide Dr. Pollack with any information as to the competency and sanity issues and any guidance as to the penalty phase. Mr. Springstead failed to communicate with Dr. Pollack regarding the differing reasons Mr. Henderson had given for his refusals to cooperate with Dr. Pollack (Tr. 279-80). Mr. Springstead did not provide Dr. Pollack with the complaint, the indictment, prior psychiatric and psychological evaluations, family background information, or the fact that in June of 1982, when brough to Hernando County, Mr. Henderson was taken off of Mellaril, an anti-psychotic medication, and Sinequan, an anti-depressant (Tr. 280-84).

As a result of counsel's many failures, Dr. Pollack was denied information necessary to do a complete and accurate evaluation of Mr. Henderson's competency and sanity. He was further unable to assist in any meaningful way in preparing for the penalty phase.

Counsel's failures did not end there. There is also the case of the mysteriously rejected plea agreement.

At the hearing, defense counsel testified that he conveyed to Mr. Henderson that the State had offered to drop the death penalty if Mr. Henderson would plead guilty and accept three

consecutive life sentences. This was the same agreement accepted by Mr. Henderson in Putnam County; there Mr. Henderson had received two consecutive life sentences. However, Mr. Henderson rejected the offer. One of the explanations former counsel offered for the inconsistency was odd, at best:

> So with the legal knowledge that he had, and the legal knowledge that I imparted with regard to the issue that we had raised, it's my opinion that he was fully cognizant of his situation, not only in Hernando County, but in the broader sense; his situation throughout the legal, the greater legal community, including these other states where he was wanted. And I feel that he made a conscious, knowing, intelligent decision, based on the best advice that I could give him, that this was the place to make his stand, and make his fight. Because he was going to go down probably here, but he had a good issue. He had an issue that might take him to the United States Supreme Court. And in my opinion, that's why he was motivated to take the position as evidenced by these memorandum, not because he showed any incompetence, but because he showed competence. He was able to say, this is my best shot, and I'm going to take it. And he took it.

(Tr. 425).

Since the Putnam County case involved the same [sixth amendment] "issue" former counsel referred to, he was asked about the inconsistency of accepting the plea there but not here:

> A No. No. The Putnam County, you know, I may be confused, but this was -- if I have got my case right, one of the issues over there had to be with a botched autopsy, if I am not mistaken. And possibly, that's what led to the negotiations in that offer over there.
>
> Q Okay. But over there was life, consecutive life, the same as the offer was here, consecutive life?
>
> A I don't know if that was the offer or not. That's what they ended up with, as I understand.
>
> Q You did take considerable information over there, depositions concerning the Putnam County Police --
>
> A As it related to our case.

Q As it related to your case, but the confession was one joint confession. It was obtained by Putnam County officials regarding both Putnam County and Hernando County; is that fair?

A Yeah. I think that -- I think that officers that transported him from Charlotte County to Putnam County obtained, during the course of that transportation, obtained an admission that led to our case.

Q Okay.

A I can say yes to that.

Q Okay. But you did take depositions of the Putnam County officials regarding how they got those confessions?

A Absolutely. We had a hearing on it.

Q So you are familiar with the strength of that issue in both cases, both the Putnam County cases and the Hernando County case?

A Well, you know, there are a lot of, you know -- no, sir. I can't say that. You're an attorney and obviously you know that simply taking a deposition of a witness regarding a specific issue in another county doesn't necessarily aggregate the existence of other collateral issues that may exist with other witnesses in other counties, but it may have nothing to do with your case. If that's the situation, then I can't sit here and tell you that these cases are one in the same when they rise and fall on the same issue. That's ludicrous. And you know that.

. . . .

Q Weren't you interested in knowing how the Putnam County defense attorney was successful in having him enter a guilty plea, and accept the consecutive life sentences; that there was something that he may have done, that you could do in accomplishing the same thing?

A No. I made my contact with my client. We had open, free discussions, as evidenced by these memoranda. And the plea was entered.

Q Okay.

A You know --

Q So you obtained no information then from Putnam County as to why he entered the plea over there and refused over here?

A Yeah. Like I said, I talked to those people over there. What we talked about, I don't know. It's been a long time ago.

Q And that wasn't something that you made a file memorandum regarding?

A No.

(Tr. 435-38).

Was the inconsistency explained? Counsel's puzzling and non-responsive answers were the rule, not the exception at the hearing. (Counsel, in fact, was non-responsive throughout the hearing, and the State objected when the defense sought to obtain an answer.) The inconsistency remains, as does the fact that Mr. Henderson's actions were bizarre at best. As the Rule 3.850 motion, and the evidence adduced at the hearing, show, Mr. Henderson's bizarre behavior raised serious doubts about his competency. The doubts entitled him to a Pate v. Robinson hearing. However, the doubts were never addressed by counsel or Dr. Pollack. This Court should now address the issue, and enter a stay of execution in order that it may be properly briefed.

IV.

MENTAL HEALTH ISSUES

Dr. Pollack rejected the results of the MMPI he administered to Mr. Henderson, the only such test which was administered when Mr. Henderson was neither in a stable prison setting nor on medication, although the test's results showed that the client was not well. Rejecting the test was professionally inadequate, but the inadequacies did not stop there. See, Magargee & Bohn, Classifying Criminals: A New System Based on the MMPI, p. 112. As authorities recognize, but Dr. Pollack failed to:

> In non-criminal justice settings, some clinicians question the validity of any profiles with F scale T-scores of 80 or above (raw score >= 15). However, the F scale has different implications in criminal justice settings since the mean F scale scores of criminal offenders are considerably higher than those found in "normal" or nonclinical

> samples (McKegney, 1965). For example, the mean T-score at the FCI is 72 (Wheeler and Megargee, 1970).

Id. The need for full and proper briefing of the technical but critically important mental health issues involved in this case, see, e.g., Mason v. State, 489 So. 2d 734 (Fla. 1986), makes the need for a stay of execution in Mr. Henderson's case plain. The mental health testimony at the hearing was highly technical; none of those issues can be fairly and properly briefed under the present time constraints.

Dr. Pollack diagnosed Mr. Henderson as suffering from an antisocial personality disorder (Tr. 334). This diagnosis was based upon at most eighty minutes of conversation. No information other than that obtained through self-reporting was used. However, as the recognized standards in the field make clear, see Kaplan & Sadock, Modern Synopsis of Comprehension Textbook of Psychiatry IV, 4th Ed., pp. 364, 374, there are certain essential prerequisites to making a diagnosis:

> To diagnose a personality disorder, the psychiatrist needs to gather objective facts systematically. Because someone with a personality disorder rarely recognizes the need for treatment, and because he seldom complains of the difficulties that he causes others, the diagnosis can rarely be made by listening to the patient alone.
>
> As the first step in the diagnosis, careful medical and neurological examinations are required to rule out organic causation: it is the rule, not the exception, that organic defects of the central nervous system mimic facets of personality disorder. Second, objective records must be obtained from employers, courts, schools, and hospitals; neither the patient's bland minimizing nor the exaggerations of the outraged relative or agency worker who brought the patient to the clinic are reliable. Third, to distinguish a personality disorder from incipient psychosis or from a chance bad break, the psychiatrist must elicit a history of repetition of the disturbing pattern. Therefore, a past social history is a necessity. The past social history also helps the psychiatrist appreciate the anguish underlying the complaints.

> Alcoholism must always be considered in the differential diagnosis of personality disorder. Granted, personality disorders and polydrug abuse often go hand in hand and most chronic opioid abusers also exhibit personality disorders. However, the same cannot be said for the alcohol abuser. Although many persons with personality disorders abuse alcohol many alcoholics are premorbidly quite normal.
>
> . . .
>
> The antisocial personality, often brought to the clinic against his will, may present a normal and even a charming and ingratiating exterior. The diagnosis of antisocial personality disorder depends on the patient's history, not on the results of his mental status examination.

Dr. Pollack's diagnosis, made prematurely and without sufficient data, failed to meet the recognized standards in the field. Even Dr. Pollack admitted this when he stated that this conclusions were subject to change depending upon the results of the Halstead-Reitan (Tr. 368).

Dr. Carbonell testified that prior to the evidentiary hearing she had conducted a number of tests on Mr. Henderson (Tr. 86). Included in the testing was the Halstead-Reitan. As to this test, Dr. Carbonell stated:

> The Halsted right hand [sic] is a neuropsychological assessment instrument that is very good at looking at the functional deficits that you get with brain damage, even the kind that Mr. Henderson seems to have, which is fairly defuse. That is, it is not a focal lesion. There's no one little place that you can look at. In fact, he scores in the brain damaged range on a wide variety of tests, virtually everything, and he tends to look like he's sort of left hemisphere, which would probably impair more of his verbal skills. In fact, if you look at the difference between his verbal and performance scores on the IQ test, he scores nine points lower on the verbal section than on the performance section, so it's supportive of that. In addition to that, the history of alcohol and the injuries to the head.
>
> Q So there would be a combination of a couple different factors.
>
> A The organic stuff would be sort of an overlay to the other.

Q How do they inter-react between the two?

A Well, people with organic types of brain damage -- for example, on one of the tests, it's really a test of concept formation and being able to create and understand concept, and Mr. Henderson has a great deal of difficulty with that. He's also easily frustrated and sometimes people with brain damage have poor impulse controls, and that's all very consistent.

Q How would alcohol intake relate or would it relate at all to the schizophrenia?

A Excuse me?

Q How would alcohol relate to -- I believe -- or actually paranoid personality problems that he has, how would alcohol relate to it? Would there be a relationship? Could it cause any aggravation of it?

A Alcohol is essentially a disinhibitor for someone like that. While drinking he would probably have a lot less control. In general, people have less control. Someone like Mr. Henderson would suffer even more from the affects of alcohol.

(Tr. 89-90).

Thus, the very test results Dr. Pollack indicated would negate his conclusions were in fact obtained. According to his own testimony, Dr. Pollack's opinion was thus rendered questionable. His failure to follow the recognized standards in the field and obtain the information he referred to as useful and the testing which could negate his preliminary findings rendered his assistance inadequate under Ake v. Oklahoma.

As stated, it is precisely these types of issues that need to be fully and properly briefed before they can be properly adjudicated.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

MARTIN J. McCLAIN
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Petitioner

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 11th day of April, 1988.

_____
Attorney