IN THE SUPREME COURT OF FLORIDA

HAROLD LEE HARVEY, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 75,841

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0857238

DEPARTMENT OF LEGAL AFFAIRS
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL 33401-2299
(407) 688-7759

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PROCEDURAL HISTORY

The State is in substantial agreement with Petitioner's procedural history, but would add the following:

In his direct appeal, Harvey raised the following issues for review: (1) the trial court erred in granting the state's cause challenge against juror Keneven outside Harvey's presence, (2) the trial court erred in denying Harvey's request to disclose the name of the confidential informant, (3) the trial court erred in granting the state's cause challenges against jurors Roach, Rogers, and Meadors, (4) the trial court erred in precluding defense counsel from questioning the venire regarding the propriety of the death penalty in specific factual situations, (5) the trial court erred in denying Harvey's motion in limine which sought to prohibit comment on Harvey's eligibility for parole after twenty-five years in prison, (6) the trial court erred in denying Harvey's motion to strike and motion for curative instruction relating to comments made by the state during voir dire, (7) the trial court erred in denying Harvey's motion in limine which sought to prohibit comments on Harvey's escape from custody and subsequent unlawful conduct and in instructing the jury on flight, (8) the trial court erred in finding the existence of the HAC, CCP, and avoid arrest aggravating factors, (9) the trial court erred in denying Harvey's motion to suppress statements he made to the police, (10) the trial court erred in denying Harvey's special requested jury instructions, and (11) the trial court erred in denying Harvey's motion to suppress his confession based on a violation

of his right to counsel. This Court found no merit to any of Harvey's claims and affirmed both convictions and sentences of death. Harvey v. State, 529 So.2d 1083 (Fla. 1988).

GROUNDS FOR RELIEF

ISSUE I

WHETHER HARVEY'S COUNSEL ON DIRECT APPEAL RENDERED INEFFECTIVE ASSISTANCE.

In his habeas petition, Harvey claims that his appellate counsel was ineffective for the following reasons: (1) failing to challenge the trial court's decision not to excuse Juror Brunetti on its own motion, (2) failing to challenge the trial court's denial of Harvey's motion for new trial based on alleged Brady violations, (3) failing to challenge the trial court's lack of consideration of all mitigating circumstances, (4) failing to effectively challenge the denial of Harvey's requested penalty-phase jury instructions, (5) failing to challenge the trial court's refusal to instruct on mental mitigating factor (6)(f), (6) failing to challenge the trial court's denial of Harvey's motion for co-counsel, (7) failing to argue on appeal that the gun taken from Mr. Variotto's car was inadmissible under the Williams Rule and that the evidence of flight was inadmissible, (8) failing to challenge the denial of Harvey's special requested instruction regarding premeditation, (9) failing to challenge the trial court's denial of Harvey's request for a complete instruction on the underlying offense of burglary as it related to felony murder, (10) failing to challenge the presentation of victim impact evidence to the jury, and (11) failing to challenge the trial court's decision to restrict cross-examination of the medical examiner. **Habeas pet.** at 2-66.

In order to prevail on a claim of ineffective assistance of appellate counsel, Harvey must show that counsel's alleged

omissions constitute a substantial deficiency that falls measurably outside the range of professionally acceptable performance and that such deficient performance compromised the appellate process so as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 19 Fla. L. Weekly S101, 102 (Fla. Oct. 9, 1993). For the following reasons, Harvey has failed to show deficient performance and prejudice.

Regarding Harvey's first claim--that counsel was ineffective for failing to raise on direct appeal the trial court's failure to strike juror Brunetti for cause on its own motion--the State submits that this issue is procedurally barred. Harvey is attempting to challenge through the back door what he cannot challenge through the front door. First, Harvey's trial counsel did not move to strike juror Brunetti for cause or in any way challenge her qualifications to sit as a juror; thus, appellate counsel was precluded from challenging her qualifications on appeal. Jackson v. State, 452 So.2d 533, 536 (Fla. 1984) ("Appellate counsel cannot be ineffective for failing to raise issues which were not properly preserved at trial, because the appellate court may not review those issues."). See also Thomas v. Wainwright, 495 So.2d 172, 175 (Fla. 1986) ("It is within the range of reasonable choice by counsel to decide not to pursue this issue because there had been no legally sufficient objection at trial. Argument of this issue on appeal depends on proper preservation of the issue."), cert. denied, 480 U.S. 911 (1987). Second, Harvey has already raised this issue--under the guise of ineffective assistance of trial counsel--in his motion

for post-conviction relief.[1] This Court has held numerous times that "[h]abeas corpus is not to be used to relitigate issues that have been determined in a prior appeal." Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990). See also Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material."), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991). Although this issue was not raised on direct appeal, Harvey has managed to get review on the merits in his 3.850 proceeding, and review on appeal from that ruling. As a result, he is procedurally barred from raising it again under the guise of ineffective assistance of appellate counsel in his habeas petition.

Harvey's second basis for claiming ineffective assistance of appellate counsel relates to counsel's failure to challenge the trial court's denial of Harvey's motion for new trial based on an alleged Brady violation. **Habeas pet.** at 12-18. The State submits, however, that "[f]ailing to brief or argue a nonmeritorious issue is not ineffective assistance of appellate counsel." Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990).

At Harvey's trial, the jury rendered its verdicts of guilt on June 18, 1986. (R 3455-56). The same day, the State submitted an amended witness list for the penalty phase.

---

[1] In fact, Harvey was granted an evidentiary hearing on this very issue. He is currently appealing the denial of his motion to this Court in case no. 81,836.

Included on this list was Hubert Griffin. The following day at the beginning of the penalty phase, defense counsel objected to the late notice of witnesses. Regarding Mr. Griffin, defense counsel requested time to interview/depose him prior to his testimony, which the trial court granted. (R 2594-96). After speaking with Mr. Griffin (R 2601-19), defense counsel requested a 24-hour continuance in order to investigate Mr. Griffin's background. (R 2620-21). Although the trial court denied the motion for continuance, it stated the following: "[I]f there is additional evidence which bears upon this which can be uncovered through investigation between now and the time the case is submitted to the jury, you may move to have that admitted then. And I'll consider that further then at that time, if there is an indication of additional evidence which would bear upon the credibility of the witness." (R 2622).

The following day, during the middle of the State's penalty-phase closing argument, defense counsel called a side-bar and indicated that he had just been handed a note relating to Hubert Griffin. Defense counsel learned that Mr. Griffin had been a jailhouse informant in another case. Based on this information, defense counsel moved for a mistrial, which was denied. (R 3002-04). He did not, in the alternative, move to reopen his case and present this evidence to the jury as the trial court had indicated he could earlier.

On June 30, 1986, defense counsel filed a motion for new trial, claiming that the trial court erred in allowing Mr. Griffin to testify. It also alleged newly discovered evidence relating to Mr. Griffin's character. (R 3471-76, paras. 12 &

14). On July 7, 1986, the trial court denied the motion for new trial. (R 3480). Harvey's notice of appeal was filed on July 24, 1986. (R 3495). Four weeks later, on August 26, 1986, defense counsel moved for an evidentiary hearing relating to the motion for new trial, which the trial court granted on September 3, 1986. (R 3506-07, 3512). At the evidentiary hearing, which was held on September 10, 1986, defense counsel presented the testimony of Michael Sullivan, an assistant public defender from Okeechobee. Mr. Sullivan represented a client against whom Mr. Griffin testified as a result of conversations with the client while both were in jail. Mr. Sullivan was also aware that Mr. Griffin was listed as a witness in two other cases in Okeechobee. (R 3088-91). Defense counsel then argued that he was prejudiced in his ability to impeach Mr. Griffin's testimony because of the late notice of the witness and the fact that this evidence was not discovered until after Mr. Griffin's testimony. (R 3092-96). Thereafter, the trial court denied the motion without comment. (R 3097).

In his habeas petition, Harvey now claims that the State's actions constituted a Brady violation and that appellate counsel was ineffective for not raising it on direct appeal.[2] Since trial counsel did not raise the issue as a Brady violation, however, appellate counsel would not have been able to raise it as such either. Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst

---

[2] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue D(6)).

v. State, 412 So.2d 332, 338 (Fla. 1982). Rather, appellate counsel could have raised the issue as an improper denial of Harvey's motion for new trial. The standard of review would have been one of abuse of discretion. Glendening v. State, 604 So.2d 839, 840 (Fla. 2d DCA 1992), rev. denied, 613 So.2d 4 (Fla. 1993). Under the facts of this case, however, Harvey would not have prevailed on appeal. In order to obtain a new trial based on newly discovered evidence, Harvey had to show that the newly discovered evidence--that Mr. Griffin had been used by the state in other cases to relate admissions made by other defendants while in jail--would probably have changed the verdict or finding of the court. **Fla. R. Crim. P.** 3.600(a)(3). See also Freeman v. State, 547 So.2d 125, 128-29 (Fla. 1989); Swafford, 569 So.2d at 1267. Given that there were four valid aggravating factors and very little in mitigation, there is no reasonable probability that Harvey would have been successful in showing an abuse of discretion on appeal. Thus, appellate counsel was not ineffective for not raising this issue on direct appeal. Swafford.

In his third claim, Harvey alleges that appellate counsel was ineffective for not challenging the trial court's failure to consider all of his evidence in mitigation. **Habeas pet.** at 18-23.[3] Harvey specifically mentions evidence of depression, lack of self-esteem and self-confidence, poor coping skills, and evidence of social underdevelopment. As this Court noted in its

---

[3] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(7)).

opinion from Harvey's direct appeal, the trial court found as nonstatutory mitigating evidence that Harvey had a low IQ and poor educational and social skills. Harvey v. State, 529 So.2d 1088, 1088 n.5 (Fla. 1988). The fact that the trial court did not specifically mention each item of proposed mitigating evidence, however, does not mean that it was not considered. See Lucas v. State, 568 So.2d 18, 23 (Fla. 1990), and cases cited therein. Rather, it could easily be found that the trial court grouped the evidence into categories like this Court proposed in Campbell v. State, 571 So.2d 415, 419 n.4 (Fla. 1990). See also Atwater v. State, 626 So.2d 1325, 1330 (Fla. 1993) ("While the judge did not indicate the extent to which each factor existed, it is evident that he found nonstatutory mitigation to exist and that he carefully weighed it in his deliberations."). Because the record is clear that the trial court considered all of Harvey's proposed evidence in mitigation, appellate counsel was not ineffective for failing to raise this as an issue. Engle v. Dugger, 576 So.2d 696, 703-04 (Fla. 1991).

Harvey's fourth claim of ineffective assistance of appellate counsel is based on counsel's failure to "effectively" challenge the trial court's denial of Harvey's special requested penalty-phase instructions. **Habeas pet.** at 23-35.[4] At the outset, Harvey concedes that his appellate counsel challenged the trial court's denial of *his proposed instructions*, but claims that his efforts were "perfunctory" and ineffective. This Court

---

[4] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(7)).

has previously held, however, that "[a]fter appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance." Swafford, 569 So.2d at 1266. More importantly, this Court has repeatedly stressed that habeas petitions must not be used as second appeals. See, e.g., Lopez v. Singletary, 18 Fla. L. Weekly S633, 634 (Fla. Dec. 9, 1993) (quoting Mills v. Dugger, 559 So.2d 578, 579 (Fla. 1990) ("'Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions.'"). Harvey has raised this issue previously; thus, he is procedurally barred from raising it again.

Harvey's fifth claim of ineffective assistance of appellate counsel relates to counsel's failure to challenge the trial court's decision not to instruct the jury on statutory mitigating factor (6)(f) (substantial impairment). Specifically, Harvey claims that the evidence supported such an instruction and that appellate counsel should have challenged the trial court's refusal to give the instruction. **Habeas pet.** at 36-40. Failing to raise a claim on appeal that has no merit, however, does not constitute deficient performance. Swafford, 569 So.2d at 1266.

During the penalty phase, Harvey presented the testimony of Dr. Fred Petrilla, a licensed psychologist who interviewed Harvey prior to trial and performed numerous psychological tests on him. On direct examination, defense counsel asked if Dr. Petrilla had reviewed all of the police reports and other materials relating to the murders. Dr. Petrilla responded affirmatively. Defense counsel then asked the doctor, "Now is your testimony here today

that -- are you trying to justify that or explain that in terms of whether or not his personality caused that or his relationship with his brother caused [it] or anything like that?" Dr. Petrilla responded, "No, I'm here just to explain the test results." (R 2769). During the subsequent charge conference, defense counsel requested an instruction on the mitigating factor that Harvey's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. At that point, the following colloquy occurred:

> [THE STATE]: . . . In response to a question asked by his own attorney, the psychologist said he wasn't there to explain why he had committed this crime. He was just explaining his personality traits. I don't remember any testimony of any psychiatrist that talked about the fact that his capacity to appreciate the criminality of his conduct was impaired. My recollection was he testified that the man was eighteen years and nine months at the minimum as far as mental age.
>
> THE COURT: That I think is the diminished capacity standard which is insanity defense in some states, and basically my understanding is that that means that a person was of such a diminished capacity that he didn't know what he was doing was a crime.
>
> [THE STATE]: I think the word "substantially" comes into play there, too, as far as the definition you are using. Substantially impaired.
>
> THE COURT: As I say, my recollection of that is it is, as I said, what is a sanity defense in some states. That's not the sanity standard in this state. But I believe it is a sanity defense in some states.
>
> [DEFENSE COUNSEL]: Judge, the testimony that we would point out from the psychologist would be that he said that he had

> sufficiently impaired decision-making ability that would be aggravated by stressful situation and I think that his ability to make decisions affects his ability to live within the confines of certain rules and regulations, which is the question of criminality. And the point of substantial impairment is I think a question of fact.
>
> THE COURT: The motion to give that mitigating circumstance is denied. Now, you may argue the evidence as that applies to any other aspect. It would fall within that. But I just don't see that there is evidence that would tend to prove that particular mitigating circumstance, the capacity of the Defendant.

(R 2854-55).

It is well-settled that "[t]he decision as to whether a mitigating circumstance has been established is within the trial court's discretion." Preston v. State, 607 So.2d 404, 412 (Fla. 1992), cert. denied, 113 S.Ct. 1619 (1993). There was no testimony by Dr. Petrilla regarding Harvey's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, nor was there any other evidence to support this mitigating factor. See Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (affirming rejection of this mitigating factor where "there was no testimony that Pardo's ability to conform his conduct was substantially impaired or that he did not know that killing these victims was wrong. The court did not have to accept Pardo's self-serving statements regarding his motives."), cert. denied, 111 S.Ct. 2045 (1991). Thus, the trial court did not abuse its discretion in refusing to instruct the jury on, or find the existence of, this mitigating factor. Consequently, appellate counsel's performance was not deficient for not raising this issue on appeal. Swafford.

Even if it were, however, Harvey has failed to establish prejudice. This case involves the double murder of an elderly couple in their own home. Even if the trial court should have found the existence of this mitigating factor, there is no reasonable probability that Harvey would have received a life sentence, given that there are four valid aggravating factors and very little in mitigation. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

As his sixth claim of ineffective assistance of appellate counsel, Harvey complains that counsel failed to challenge the trial court's denial of co-counsel. **Habeas pet.** at 41-43.[5] Again, counsel cannot be deemed ineffective for not challenging an unmeritorious claim. Swafford. This Court recently held that "[t]here is no general requirement that a defendant must have co-counsel in capital cases[; thus,] the judge did not abuse his discretion in failing to appoint additional counsel." Reaves v. State, 19 Fla. L. Weekly S173, 174 (Fla. April 7, 1994). Harvey points to nothing about his case that would render the trial court's decision an abuse of discretion. "[T]he enormous volume of facts and the complexity of the legal issues involved in this case, as well as the Florida death penalty trial system which provides for a bifurcated trial," **habeas pet.** at 43, do not, as Harvey claims, establish an abuse of discretion. Thus, appellate counsel cannot be deemed ineffective for not challenging the trial court's ruling.

---

[5] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of this claim in case no. 81,836 (Issue (D)(2)(b)).

In his seventh claim, Harvey alleges that appellate counsel (1) failed to challenge the admission of testimony relating to the source of the AR-15 used by Harvey to kill the Boyds, and (2) "failed to put forth the proper legal argument" for the exclusion of the testimony relating to his escape and subsequent criminal activity. **Habeas pet.** at 43-48. At trial, Witness Variotto testified that he bought the AR-15 used to kill the Boyds. Shortly before the murders, he left the gun in his truck and when he returned it was gone. Defense counsel objected to this testimony on relevancy and prejudice grounds, but the trial court overruled the objection. (R 1878-80). Harvey now claims that appellate counsel should have challenged its admission on the basis of improper Williams rule evidence. Since this was not the basis for the objection below, however, appellate counsel was precluded from arguing this basis on appeal. Bertolloti, 514 So.2d at 1096.

To the extent that trial counsel's argument encompassed an argument under Williams, such an argument would not have been meritorious on appeal since the trial court has broad discretion regarding the admission of evidence. Moreover, Harvey has failed to establish prejudice since there is no reasonable probability that the jury's verdict or the trial court's sentence would have been different had appellate counsel raised this claim and been successful. The testimony regarding the gun, if erroneous, would have been harmless error given the overwhelming evidence of Harvey's guilt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Regarding the evidence of Harvey's escape and subsequent criminal acts, Harvey concedes that appellate counsel raised this issue on direct appeal. However, he believes that appellate counsel "failed to put forth the proper legal argument" for the exclusion of this evidence. **Habeas pet.** at 47-48. As noted previously, failure to convince this Court to rule in Harvey's favor does not constitute ineffective assistance of appellate counsel. Swafford, 569 So.2d at 1266. Since Harvey raised this issue on direct appeal, he is procedurally barred from raising it a second time in his habeas petition. Id.

Harvey's eighth claim relates to appellate counsel's failure to challenge the denial of a requested jury instruction. **Habeas pet.** at 48-54. At trial, defense counsel requested the following instruction at the guilt phase: "Sudden, impulsive acts may be committed under certain circumstances showing lack of premeditation." The State responded that the instruction was covered by that part of the instructions which defined premeditation as "killing after consciously deciding to do so," and the trial court denied Harvey's requested instruction. (R 2395-96).

Even if appellate counsel had raised this claim on direct appeal, Harvey would not have prevailed since the evidence did not support the instruction. Contrary to Harvey's assertion here, **habeas pet.** at 49, he and his codefendant had decided to kill the Boyds. The excerpts from his confession reveal that, once they got the money from the Boyds, Harvey remarked to his codefendant that Mr. Boyd knew him. At that point, the following discussion took place:

> Lee Harvey: And then ah I said what are we gonna do. And ah he said ah I guess we're gonna have to shoot em. . . .
>
> And ah we traded guns and ah . . . .
>
> [T]hey said what are you gonna do with that? And then they got up like they was gonna run so I had to shoot em.

(R 3622-23). Harvey went back inside shortly after shooting them in order to retrieve the shell casings. He heard Mrs. Boyd breathing, so he shot her again. (R 3625-26). Based on these statements, Harvey's requested instruction was not supported by the evidence. Thus, the trial court did not abuse its discretion in refusing to give it. See Banda v. State, 536 So.2d 221, 223 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). Regardless, as the State argued in the trial court, Harvey's requested instruction was covered by the standard instruction on premeditation. Consequently, appellate counsel was not ineffective for failing to challenge this issue on direct appeal. Swafford.

In his ninth claim, Harvey alleges that the trial court improperly instructed the jury on felony murder during the guilt phase and that appellate counsel was ineffective for not raising this issue on appeal. Specifically, Harvey claims that the trial court failed to instruct the jury on the object of Harvey's intent in committing a burglary. In other words, burglary was one of the underlying felonies for felony murder. Burglary requires that the defendant have an intent to commit an offense inside the dwelling. Harvey wanted the trial court to specify

the offense intended, but the trial court refused. **Habeas pet.** at 54-57.

This Court has previously held that "[i]t is not necessary . . . to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony." Brumbley v. State, 453 So.2d 381, 386 (Fla. 1984). Here, Harvey was not charged with burglary. The trial court instructed the jury, however, on the essential elements of burglary. Thus, absent fundamental error which would have mandated reversal on appeal, Harvey's appellate counsel was not ineffective for raising this issue. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982), sentence vacated on other grounds, 582 So.2d 613 (Fla. 1991).

Harvey's tenth claim relates to appellate counsel's failure to challenge comments made by the prosecutor as improper victim-impact evidence. **Habeas pet.** at 57-63. Initially, the State submits that none of the comments constitute victim-impact evidence. See Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992), cert. denied, 114 S.Ct. 112 (1993). Even if they do, however, "Booth claims are cognizable in habeas corpus proceedings only in extraordinary circumstances," which are not present here. Swafford, 569 So.2d at 1266. As for the State's comments during its guilt-phase closing argument, these were proper comments on the evidence. See Breedlove v. State, 413 So.2d 1 (Fla. 1982). The State was specifically attempting to rebut Harvey's argument that he did not premeditate. Similarly, the State's comments during its penalty-phase opening statement were relevant to establish the existence of several aggravating factors. As for

the comments made during the State's penalty-phase closing argument, defense counsel made no objection. Thus, appellate counsel was precluded from challenging these on appeal. Swafford, 569 So.2d at 1266; Jackson, 452 So.2d at 536; Thomas, 495 So.2d at 175. Regardless, they were proper argument relating to the existence of the HAC aggravating factor. Consequently, since none of the comments were improper, appellate counsel was not ineffective for not challenging them on appeal. Swafford.

Appellant's final claim relates to appellate counsel's failure to challenge the trial court's restriction of Harvey's cross-examination of the medical examiner. **Habeas pet.** at 63-66. At trial, Harvey wanted to elicit from the medical examiner that the victims had traces of alcohol and a Valium-type substance in there blood. (R 2051). Defense counsel claimed that such evidence was relevant because all of the actions of all of the participants in a shooting are relevant. (R 2052-53). The doctor was unable to determine, however, the amount of alcohol in either victim at the time of their murder because he did not examine the victims' bodies until 28 to 48 hours after their deaths, and because a dead body produces alcohol as it decomposes. (R 2054). Moreover, he could not determine what effect, if any, the substances had on either victim. (R 2056-57). Because the testimony sought by defense counsel was "insufficiently conclusive," and thus irrelevant, the trial court precluded defense counsel's cross-examination. (R 2057).

In his habeas petition, Harvey claims that the evidence was relevant to rebut the HAC aggravating factor. Had the doctor been able to determine the amount of alcohol in the victims at

the time of their murders and any possible effect it might have had on their behavior, then this testimony might have been relevant. As it was, no nexus could be made; thus, the evidence was properly excluded. See Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991) (finding no abuse of discretion in denying defendant opportunity to cross-examine medical examiner concerning any drugs detected during autopsy of victim), cert. denied, 112 S.Ct. 136 (1992). Since this claim is without merit, appellate counsel was not ineffective for not raising it on direct appeal. Swafford. Consequently, Harvey's habeas petition should be denied.

ISSUE II

WHETHER THIS COURT SHOULD RECONSIDER ITS DECISION THAT THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR (Restated).

In his habeas petition, Harvey concedes that he challenged the trial court's finding of the HAC aggravating factor on direct appeal, but he claims that this Court should reconsider its decision based on new law, specifically, Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). In Porter, this Court reversed the finding of the HAC aggravating factor because the record was "consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful." Id. at 1063 (emphasis in original). Based on the emphasized language, which changes the focus from the victim to the defendant, Harvey claims that this Court should reassess the application of this factor to the facts of his case. **Habeas pet.** at 66-70.

In Herring v. State, 580 So.2d 135 (Fla. 1991), this Court was faced with a similar request regarding the CCP aggravating factor. Herring wanted this Court to reassess the propriety of that factor to the facts of his case based on this Court's refinement of the CCP aggravating factor in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). This Court refused Herring's request because its decision in Rogers was "'a mere evolutionary refinement in the law,' which should not be utilized to abridge the finality of [its] judgments." Herring, 580 So.2d at 138 (quoting Eutzy v. State, 541 So.2d 1143, 1147 (Fla. 1989)).

As in Herring, this Court should refuse Harvey's request to reassess the propriety of the HAC aggravating factor under the facts of his case. Porter, like Rogers, was merely an evolutionary refinement which does not warrant retroactive application. Even were the HAC aggravating factor inapplicable to Harvey's case under this refinement, however, resentencing would be unnecessary. As this Court found in Herring, "[n]one of the facts and circumstances that were before the jury regarding how [Harvey] committed the murder[s] are changed." 580 So.2d at 138. The same facts would be used to establish the CCP, avoid arrest, and felony murder aggravating factors. Thus, even if the HAC factor were eliminated, it would not compromise the weighing process of either the judge or the jury. See id. Consequently, Harvey's habeas petition should be denied.

ISSUE III

WHETHER THIS COURT SHOULD RECONSIDER ITS DECISION THAT THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR (Restated).

In his habeas petition, Harvey concedes that he challenged the trial court's finding of the CCP aggravating factor on direct appeal, but he claims that this Court should reconsider its decision because it was "flatly inconsistent" with preexisting case law. **Habeas pet.** at 70-77.[6] As noted previously in this response, a habeas petition should not be used as a second appeal. Swafford, 569 So.2d at 1266; Lopez, 18 Fla. L. Weekly at S634. This Court was aware of its preexisting decisions in Rogers and Hamblen v. State, 527 So.2d 800 (Fla.), cert. denied, 109 S.Ct. 404 (1988), which Harvey believes are inconsistent. Since this Court has already considered the merits of this issue on direct appeal, Harvey is procedurally barred from raising it a second time in this habeas petition.

---

[6] To the extent that Harvey claims that his appellate counsel was ineffective for failing to file "a supplemental brief or notice of supplemental authority regarding the effect of the Rogers decision on this issue," **habeas pet.** at 72 n.5, the State submits that Harvey has failed to show prejudice since this Court cites to Rogers in its opinion.

ISSUE IV

WHETHER THIS COURT SHOULD RECONSIDER THE PROPRIETY OF THE TRIAL COURT'S REJECTION OF THE "NO SIGNIFICANT HISTORY" MITIGATING FACTOR (Restated).

During the penalty phase of Harvey's trial, the State argued over Harvey's objection that Harvey's pretrial escape and subsequent criminal activities, evidence of which was admitted during the guilt phase, rebutted the "no significant history" mitigating factor. (R 2972-76, 3000-02). Based on such evidence, the trial court rejected this statutory mitigating factor. (R 3466-67, 3470). Harvey did not challenge this issue on appeal.

At the time of the trial and appeal, Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882 (1981), supported the State's argument and the trial court's finding. After this Court issued its opinion in Harvey's case, but while rehearing was pending, this Court issued Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989), wherein this Court receded from Ruffin and held that criminal activity contemporaneous with the murder could not be used to rebut this mitigating factor. When Harvey's decision became final, however, rehearing was still pending in Scull.[7] Thus, Scull was not final until after Harvey became final.

---

[7] Harvey's opinion was issued on June 16, 1988, and he filed a motion for rehearing on June 28, 1988. Scull's opinion was issued on September 8, 1988. Harvey's motion for rehearing was denied on September 16, 1988, and rehearing was denied in Scull on December 5, 1988.

Harvey now seeks to have Scull applied retroactively. **Habeas pet.** at 78-81.[8] The State submits, however, that Scull was not a fundamental change in the law that requires retroactive application. As this Court has held many times, only fundamental constitutional changes in the law deserve retroactive application; evolutionary refinements do not. Accord Witt v. State, 387 So.2d 922 (Fla. 1980). See also Mills v. Singletary, 606 So.2d 622 (Fla. 1992) (refusing to apply Sochor v. Florida, 112 S.Ct. 2114 (1992), retroactively); Gilliam v. State, 582 So.2d 610 (Fla. 1991) (refusing to apply Campbell v. State, 571 So.2d 415 (Fla. 1990) retroactively); State v. Glenn, 558 So.2d 4 (Fla. 1990) (refusing to apply Carawan v. State, 515 So.2d 161 (Fla. 1987), retroactively); State v. Statewright, 300 So.2d 674 (Fla. 1974) (refusing to apply Miranda v. Arizona, 384 U.S. 436 (Fla. 1966), retroactively).

By receding from Ruffin, this Court merely made an evolutionary refinement in the law, not a jurisprudential upheaval. Such a conclusion is evidenced by this Court's decision in Lucas v. State, 568 So.2d 18 (Fla. 1990). In Lucas, the State urged the jury during its penalty-phase closing argument to reject the "no significant history" mitigating factor based on Lucas' contemporaneous convictions for attempted murder. On appeal, Lucas claimed that the prosecutor's comments tainted the jury and misled it in considering the mitigating evidence. In vacating Lucas' sentence on other grounds, this Court noted

---

[8] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(5)).

its decision in Scull and then made the following comments: "While such an argument should not be made now, it could be made at the time of Lucas' resentencing. Lucas did not object to the argument, however, and, because we do not find fundamental error to be involved, this issue has not been preserved for review." Id. at 21. Based on this language, the State submits that Scull should not be applied retroactively to Harvey's case.

Even if it were applied retroactively, however, resentencing would not be warranted. This case involves the double murder of an elderly couple in their own home. Even if the trial court should have found the existence of this mitigating factor, there is no reasonable probability that Harvey would have received a life sentence, given that there are four valid aggravating factors and very little in mitigation. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

ISSUE V

WHETHER THIS COURT SHOULD RECONSIDER ITS DECISION THAT THE JURY WAS NOT IMPROPERLY INSTRUCTED REGARDING ITS ROLE IN SENTENCING (Restated).

In his habeas petition, Harvey concedes that he challenged on direct appeal the trial court's instruction that the final determination regarding sentencing rests with the judge. **Habeas pet.** at 81-82. He now seeks reconsideration of his Caldwell v. Mississippi, 472 U.S. 320 (1985), claim based on two subsequent decisions: Dugger v. Adams, 489 U.S. 401 (1989), wherein the United States Supreme Court found Adams' Caldwell claim procedurally barred, and Dugger v. Mann, 489 U.S. 1071 (1989), wherein the United States Supreme Court denied the State's certiorari petition from the Eleventh Circuit's decision which vacated Mann's sentence based on Caldwell. **Habeas pet.** at 81-83.[9]

Initially, the State submits that, since Harvey raised this issue on direct appeal, he is procedurally barred from raising it again. Lopez; Swafford. The Eleventh Circuit opinions in Adams and Mann had issued prior to Harvey's direct-appeal opinion. Moreover, in Combs v. State, 525 So.2d 853, 854-58 (Fla. 1988), which had also issued prior to Harvey's opinion, this Court specifically "refuse[d] to apply the Eleventh Circuit's decisions in Mann . . . and Adams" because it disagreed with the Eleventh Circuit's interpretation of Florida's death penalty statute.

---

[9] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(3)).

Although the United States Supreme Court ultimately allowed the Mann decision to stand, this Court has maintained that Florida's standard jury instruction properly instructs the jury on its role in the sentencing proceeding. See, e.g., Sochor v. State, 619 So.2d 285, 291-92 (Fla. 1993); Rose v. State, 617 So.2d 291, 297 (Fla. 1993), cert. denied, 114 S.Ct. 279 (1993); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992); Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992). Based on these cases, this Court should deny Harvey's habeas petition.

ISSUE VI

WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THIS CASE (Restated).

Because the Governor signed a warrant for Harvey's execution within the two-year time period during which Harvey must file a motion for postconviction relief, Harvey claims that his rights to due process and equal protection have been violated. **Habeas pet.** at 84-99.[10] This issue, however, has been rejected repeatedly by this Court. See, e.g., Remeta v. Dugger, 622 So.2d 452, 456 (Fla. 1993); Swafford, 569 So.2d at 1267; Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990); Cave v. State, 529 So.2d 293, 299 (Fla. 1988), sentence vacated on other grounds, 971 F.2d 1513 (11th Cir. 1992). Based on these cases, Harvey's habeas petition should be denied.

---

[10] Harvey also raised this claim in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(7)).

ISSUE VII

WHETHER FLORIDA'S SYSTEM FOR FUNDING THE DEFENSE OF CAPITAL DEFENDANTS IS CONSTITUTIONAL (Restated).

In his habeas petition, Harvey claims that Florida's system of funding the defense of indigent capital defendants is unconstitutional on its face and as applied, in that it violates both state and federal rights to due process and equal protection. Specifically, Harvey complains that fiscal expenditures for such things as co-counsel, mental health experts, and voir dire consultants should not be within the trial court's discretion. **Habeas pet.** at 99-107.[11] Apparently, Harvey believes that he should have unlimited access to funds for the investigation and presentation of his case.

Because the facts upon which this claim is based were known or available to Harvey at the time of trial, this issue should have, and could have, been presented to the trial court and then pursued on direct appeal. Because it was not, Harvey is procedurally barred from raising this issue for the first time in this habeas petition. Lopez, 18 Fla. L. Weekly at 634.

Even were it properly raised here, it is wholly without merit. Section 925.035, Florida Statutes, authorizes the appointment of counsel for indigent capital defendants and requires the prosecuting county to pay for the attorney's "compensation and costs" as set forth in § 925.036. Section 925.036 authorizes compensation at a set hourly rate, subject to

---

[11] Harvey also raised this issue in his motion for postconviction relief and is appealing the denial of that claim in case no. 81,836 (Issue (D)(7)).

a set fee cap, and further provides that "such attorney shall be reimbursed for expenses reasonably incurred, . . ." (Emphasis added). As part of its inherent power, then, the trial court has the discretion to determine what is reasonable.

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.
>
> Yet it is the judiciary that must decide upon the ultimate delineation of power. The doctrine of inherent power should be invoked only in situations of clear necessity. The courts' zeal in the protection of their prerogatives must not lead them to invade areas of responsibility confided to the other two branches. Accordingly, it is with extreme caution that this Court approaches the issue of the power of trial courts to order payments by local governments for expenditures deemed essential to the fair administration of justice. The same extreme caution should be used by trial courts in seeking solutions to practical administrative problems that have not been resolved or provided for by the Legislature.[9]

---

[9] "Judges should constantly be aware that their constitutional responsibility to maintain the judicial system carries with it the corresponding responsibility to limit their requests to those things reasonably necessary in the operation of their courts and to refrain from any extravagant, arbitrary, or unwarranted expenditures."

Rose v. Palm Beach County, 361 So.2d 135, 137-38 (Fla. 1978) (footnotes omitted) (quoting McAfee v. State ex rel. Stodola, 258 Ind. 677, 681, 284 N.E.2d 778, 782 (1972)).

This Court has repeatedly affirmed the discretionary aspects of taxing costs to the county for expenses incurred by indigent capital defendants. See, e.g., Reaves v. State, 19 Fla. L. Weekly S173, 174 (Fla. Apr. 7, 1994) ("There is no general requirement that a defendant must have co-counsel in capital cases, and the judge did not abuse his discretion in failing to appoint additional counsel."); Espinosa v. State, 589 So.2d 887, 893 (Fla. 1991) ("The trial judge did not abuse his discretion in refusing to authorize costs" to retain a professor of psychology to testify with respect to the reliability of eyewitness identification.); Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985) ("[W]e find no error in the refusal to tax costs for a public opinion survey of the community feeling about this case in Wakulla County."); Quince v. State, 477 So.2d 535, 537 (Fla. 1985) ("[T]he trial court did not abuse its discretion in refusing to appoint experts" and investigators for Quince's postconviction evidentiary hearing.), cert. denied, 475 U.S. 1132 (1986); Martin v. State, 455 So.2d 370, 371-72 (Fla. 1984) (finding no abuse of discretion in refusing to appoint an eighth mental health expert because "[t]he appointment of experts is discretionary."). Such inherent power, required for the proper administration of justice, does not violate capital defendants' rights to due process or equal protection.

Nor have Harvey's rights in particular been abridged. He had the assistance of a mental health expert. (R 2006-2812).

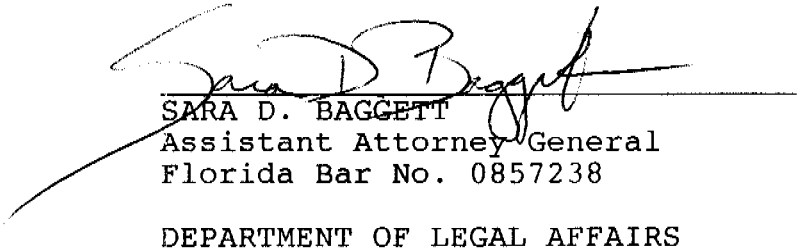
Co-counsel is not mandated. Reaves. And experts to study the composition of the venire are neither constitutionally nor statutorily mandated, nor essential under the common law. Thus, refusal by the trial court to provide such witnesses at the county's expense has not violated any right beholden to Harvey. Consequently, this Court should deny Harvey's habeas petition.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court deny Petitioner's petition for writ of habeas corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



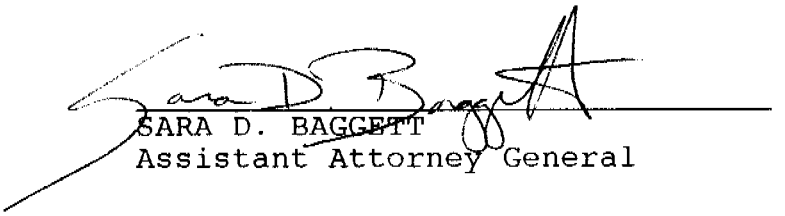
SARA D. BAGGETT
Assistant Attorney General
Florida Bar No. 0857238

DEPARTMENT OF LEGAL AFFAIRS
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ross B. Bricker, Esquire, Jenner & Block, One Biscayne Tower, Miami Florida 33131-1807, this 26th day of April, 1994.



SARA D. BAGGETT
Assistant Attorney General