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IN THE SUPREME COURT OF FLORIDA

HAROLD LEE HARVEY, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,836

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

HARVEY LEE HARVEY, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,836

PRELIMINARY STATEMENT

Appellant, Harold Lee Harvey, Jr., was the movant in the trial court and will be referred to herein as "Harvey." Appellee, the State of Florida, was the respondent in the trial court and will be referred to herein as "the State." References to the pleadings and transcripts of the original trial will be by the symbol "TR," references to the pleadings of the postconviction proceeding (including the supplemental record) will be by the symbol "CR" and "SCR," and references to the evidentiary hearing transcripts will be by the symbol "CT" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of Harvey's motion for postconviction relief. In his initial brief, opposing counsel details a "Statement of the Case," "Course of Proceedings Below," and "Statement of Facts" in 35 pages. Pursuant to Florida Rule of Appellate Procedure 9.210(c), the State (appellee) should omit the statement of the case and facts from its answer brief "unless there are areas of disagreement, which should be clearly specified." In this particular case, however, Harvey's statement of the case and facts is so captious and vituperative that the State cannot merely specify those areas with which it disagrees. Rather, the State must expend its valuable time in presenting an objective statement of the case and facts from which this Court can make an informed and reasoned decision regarding this appeal. As a result, the State submits the following:

The facts of this case were succinctly stated by this Court in its opinion on direct appeal.

> On February 23, 1985, Harold Lee Harvey met with Scott Stiteler, his codefendant at trial, and drove to the home of William and Ruby Boyd, intending to rob them. Upon their arrival, Stiteler knocked on the front door. In the meantime, Harvey grabbed Mrs. Boyd as she was walking around from the side of the house and took her into the house where Mr. Boyd was located. Harvey had a pistol and Stiteler was holding Harvey's AR-15 rifle which ad recently been converted into an automatic weapon. Harvey and Stiteler told the Boyds they needed money. Mr. Boyd then went into the bedroom and got his wallet. Sometime during the course of the robbery, Harvey and Stiteler exchanged guns so that Harvey now had possession of the automatic weapon. After getting the money from the Boyds, Harvey and Stiteler discussed what they were going to do with the victims and

> decided they would have to kill them. Sensing their impending danger, the Boyds tried to run, but Harvey fired his gun, striking them both. Mr. Boyd apparently died instantly. Harvey left the Boyds' home but reentered to retrieve the gun shells. Upon hearing Mrs. Boyd moaning in pain, he shot her in the head at point blank range. Harvey and Stiteler then left and threw their weapons away along the roadway.
>
> On February 27, 1985, Harvey was stopped for a driving infraction in Okeechobee County and subsequently placed under arrest for the Boyds' murders. He was read his Miranda rights at that time. He was then transported to the Okeechobee County Sheriff's Department and again read the Miranda warning. Harvey was questioned and interrogated, and after speaking with his wife, gave a statement in which he admitted his involvement in the Boyds' murders.
>
> On May 11, 1986, Harvey escaped from the Okeechobee County Jail. He was located sleeping in a truck the following day by a North Miami Beach police officer. When the officer woke him up, Harvey pointed a gun in the officer's face. After the officer fired his gun, Harvey jumped in the police car and fled the scene. After a car chase through the city, Harvey was finally subdued.

Harvey v. State, 529 So.2d 1083, 1084 (Fla. 1988) (footnote omitted).

In his direct appeal, Harvey raised the following eleven issues: (1) whether a potential juror was excused for cause while Harvey was not present and had not waived his presence, (2) whether the trial court erred in refusing to disclose the identity of a confidential informant, (3) whether the trial court erred in granting the State's motions for cause against three jurors opposed to the death penalty, (4) whether the trial court erred in limiting defense counsel's questioning of the jury regarding the propriety of the death penalty, (5) whether the

trial court erred in denying Harvey's motion in limine to prohibit the State from arguing to the jury that Harvey would be eligible for parole after 25 years if a death sentence were not imposed, (6) whether the State made an improper comment in voir dire, (7) whether the trial court erred in admitting evidence of Harvey's pretrial escape and in giving a flight instruction, (8) whether the evidence was sufficient to support the findings of the HAC, CCP, and avoid arrest aggravating factors, (9) whether the trial court erred in denying Harvey's motion to suppress his confession where it was allegedly made in exchange for a visit with his wife, (10) whether the trial court erred in denying Harvey's special requested penalty-phase jury instructions, and (11) whether the trial court erred in denying Harvey's motion to suppress his confession where Harvey was not told that a public defender who had heard that Harvey had been arrested for the Boyds' murders was at the jail to talk with him. Issues 2, 3, 4, 6, 9, and 10 were denied on their merits without comment, and issues 1, 5, 7, 8, and 11 were denied on their merits after discussion by this Court. The opinion was issued on June 16, 1988, and rehearing was denied on September 16, 1988. Harvey, 529 So.2d at 1084-88.

The United States Supreme Court denied Harvey's petition for writ of certiorari on February 21, 1989. Harvey v. Florida, 489 U.S. 1040 (1989). On March 29, 1990, the governor signed a warrant for the week of May 29-June 5, 1990. Harvey filed a petition for writ of habeas corpus in this Court on April 18, 1990, seeking a stay of execution, which was granted on April 25, 1990, allowing Harvey four months within which to file a motion for postconviction relief.

On August 27, 1990, Harvey filed his 3.850 motion raising seventeen claims. A corrected copy of the motion was filed on September 24, 1990. In his motion to vacate, Harvey raised the following claims: **I.A.** Trial counsel was ineffective for failing to make the following arguments in support of his motion to suppress Harvey's confession: (1) Harvey invoked his right to counsel when he was booked into the jail, but the police ignored his request, (2) the initial Miranda warnings that were given to Harvey were incomplete and misleading, (3) Harvey invoked his right to counsel during questioning, but the police ignored his request, and (4) Harvey was not promptly taken before a judicial officer for his first appearance. Trial counsel also failed to (1) effectively argue that the police refused to allow a public defender to speak with Harvey, (2) effectively argue that the police coerced Harvey into making a confession by using a visitation with his wife as a bargaining tool, and (3) obtain the services of a psychiatrist who would have testified that Harvey suffered from organic brain damage and was subject to becoming quickly and easily confused in stressful situations. **I.B.** Trial counsel was ineffective for failing to challenge juror Brunetti for cause or peremptorily after she stated that she could not be impartial. **I.C.** Trial counsel was ineffective for failing to object to the trial court's change of venue to Indian River County; **I.D.** Trial counsel was ineffective for making claims in his opening statement that were not later established; **I.E.** Trial counsel was ineffective for failing to raise a valid objection to the admission of hearsay testimony relating to Harvey's pretrial escape; **I.F.** Trial counsel was ineffective for

admitting Harvey's guilt during opening statements; **II.A.** Trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; **II.B.** Trial counsel was ineffective for failing to establish the "substantial domination" mitigating factor; **II.C.** Trial counsel was ineffective during his penalty-phase closing argument; **II.D.** Trial counsel was ineffective for failing to waive the "no significant history" mitigating factor; **II.E.** Trial counsel was ineffective for allowing the State to anticipatorily rebut evidence of remorse when such an argument was not made; **II.F.** Trial counsel was ineffective for failing to present evidence or argument at the final sentencing hearing; **II.G.** Trial counsel was ineffective for failing to investigate and confirm that the victims overheard Harvey and Stiteler decide to kill them, a fact which established the HAC aggravating factor; **III.** Trial counsel was ineffective for failing to ensure that Harvey received a competent mental health examination; **IV.** Harvey was tried by a de facto eleven-person jury; **V.A.** The trial court rendered trial counsel ineffective by refusing to hear and rule on Harvey's motion to suppress prior to jury selection; **V.B.** The trial court rendered trial counsel ineffective by denying counsel's motion for co-counsel; **V.C.** The trial court rendered trial counsel ineffective by denying counsel's motion for continuance made between the guilt and penalty phases of the trial; **VI.** The trial court failed to expressly evaluate all mitigating factors, failed to find each proposed mitigating circumstance, and failed to weigh those factors against the aggravating factors; **VII.** Fundamental changes in the law require resentencing because the trial court

improperly rejected the "no significant history" mitigating factor based on offenses committed after the murders but before sentencing; **VIII.A.** The trial court failed to properly instruct the jury regarding the HAC and CCP aggravating factors; **VIII.B.** The penalty-phase jury instructions and the prosecutor's closing argument precluded the jury from considering sympathy in recommending a sentence; **VIII.C.** The trial court erred in refusing to answer two jury questions relating to when Harvey would be eligible for parole and whether life sentences would be imposed consecutively; **VIII.D.** The trial court erred in denying Harvey's special requested penalty-phase instructions; **IX.** The penalty-phase jury instructions improperly shifted the burden to Harvey to prove that the mitigating factors outweighed the aggravating factors, and trial counsel was ineffective for failing to object to them; **X.** The HAC instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; **XI.** The CCP instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; **XII.A.** The State withheld the fact that witness Griffin had been used as a jail-house informant in other cases; **XII.B.** The State withheld the fact that Harvey requested counsel after his arrest; **XIII.** Florida Rule of Criminal Procedure 3.851 violates Harvey's rights to due process, equal protection, and access to the courts; **XIV.** The jury was improperly instructed that its role was merely advisory; **XV.** The State improperly argued victim-impact evidence; **XVI.** Trial counsel was ineffective for failing to object to the admission of evidence

that Harvey threatened to kill a fellow inmate; and **XVII.** Florida's system for funding the defense of indigent capital defendants violates due process and equal protection. (CR 557-928).

On March 1, 1991, the State responded that all of the claims were either procedurally barred, conclusively rebutted by the record, or without merit on the face of the motion; thus, an evidentiary hearing was not warranted. (CR 1585-1648). The trial court entered an interim order on October 6, 1992, denying all claims except I.B., for which it granted an evidentiary hearing. (CR 1649-50).

The evidentiary hearing was conducted on March 11, 1993, before the Honorable Dwight Geiger in Indian River County. At the hearing, Harvey called James Green on his behalf. Mr. Green testified that he was attorney from Palm Beach County and that he had handled between 300 and 500 criminal cases in his career, 10 to 12 of which were capital cases. In addition, he testified that he had selected between 60 and 90 juries, 5 to 6 of which were in capital cases. (CT 20-28). When Harvey tendered Mr. Green as an expert in criminal cases in general and in jury selection in capital cases in particular, the State objected that selecting five or six capital juries did not qualify him as an expert in capital jury selection. The trial court agreed and sustained the objection. (CT 28-30). Regardless, Mr. Green was allowed to testify that he reviewed numerous materials relating to Harvey's case and that, in his opinion, Harvey's trial counsel rendered ineffective assistance by failing to strike juror Brunetti, which, in effect, denied Harvey a jury of twelve

impartial jurors. (CT 30-39). In reviewing the materials and in talking to trial counsel, Mr. Green could not discern any strategical reason for not striking juror Brunetti. (CT 39-53). On cross-examination, Mr. Green testified that trial counsel was a personal friend of his and that counsel's reputation in the legal community is very good. (CT 54-57).

As his next witness, Harvey called Dr. Gary Moran, a professor of psychology at Florida International University who specializes in the study of jury dynamics. When Harvey tendered Dr. Moran as an expert on the effect of the seating of juror Brunetti on the other jurors, the State objected based on the fact that this was not a recognized area of expertise. (CT 65-88). The trial court sustained the State's objection, finding that "there is a significant lack of a predicate upon which this witness can base an opinion." (CT 88). Thereafter, counsel proffered the witness' testimony. In essence, the witness would have testified that juror Brunetti affected the jury's deliberative process and thus affected the outcome of the trial because of her conviction that Harvey was guilty. (CT 90-94).

Following Dr. Moran's testimony, Harvey rested his case. (CT 94). The State then called Harvey's trial counsel, Robert Watson. Mr. Watson testified that he graduated from law school in 1979 and worked for the public defender's office until 1981 when he went into private practice. (CT 95-97). While at the public defender's office, Mr. Watson worked on approximately ten capital cases, but none of them went to trial. (CT 97-98). While in private practice, he devoted between 50 to 75 percent of his practice to criminal law. (CT 95-96).

Regarding Harvey's trial, Mr. Watson testified that he did not have an independent recollection of the trial, specifically the voir dire, but that, from reading the transcripts from voir dire, he recognized that he could have challenged juror Brunetti for cause. (CT 98-100). He believed, however, that he was concerned about the court's ruling on his motion to suppress Harvey's confession. If the confession were admitted, a verdict of guilty would have been a foregone conclusion; therefore, he would have focused on gaining credibility with the jurors and on picking a jury that was receptive to mental health testimony and mitigation in general, and that was open-minded regarding a sentence of life imprisonment. (CT 100-12). In fact, he specifically remembered trying to establish credibility with the jury. (CT 109). Regarding juror Brunetti, Mr. Watson believed from reading her responses that she was receptive to psychological testimony. (CT 110-11). She also indicated that, although the death penalty was a deterrent to the person sentenced, she did not "necessarily believe that two wrongs make a right." (T 112).

Based on Mr. Watson's experience and education since Harvey's trial, the trial court accepted Mr. Watson as an expert in the practice of criminal law without objection by Harvey's counsel. (CT 113-17). Thereafter, the State posed a hypothetical question based on a case with evidence of guilt as strong as in Harvey's case, including a comprehensive confession, and a prospective juror who had knowledge of the case and a belief in his client's guilt, but who was receptive to psychological testimony and arguments against the propriety of

the death penalty. Based on these facts, Mr. Watson agreed that it would be a reasonable strategy to accept this juror and concentrate on the penalty phase. (CT 117-18). In fact, he believed that the record in Harvey's case supports such a strategy. (CT 120).

On cross-examination, Harvey established that the trial court had denied the motion to suppress just prior to questioning the prospective alternate jurors, of which juror Brunetti was one. Thus, trial counsel knew that the confession was going to be admitted when he questioned juror Brunetti. (CT 122-25). As an aside, Mr. Watson testified that he did not know whether a booking sheet which indicated that Harvey had requested an attorney was in his files at the time of trial or at the time that he prepared an affidavit for postconviction purposes. Since it was not mentioned in his affidavit, he assumed that it was not in his files at the time. In fact, he did not know where the booking sheet came from. (CT 128-31). On another unrelated issue, Mr. Watson also testified that he did not specifically recall obtaining Harvey's consent to concede his guilt in opening statements. Although he doubted that they discussed the specific statements he was going to make in his opening statement, he recalled discussing with Harvey whether he was going to argue for a not-guilty verdict or a lesser included offense. (CT 138-39). Mr. Watson agreed that conceding that Harvey was guilty of murder would have been consistent with a strategy to gain credibility with the jury. (CT 139-40). In fact, from reading the transcripts of his opening statement, it was obvious to Mr. Watson that he was arguing for second-degree murder, "which [he]

felt was the only possibility." (CT 140). Mr. Watson was sure that he was trying to "create in the minds of the jury sufficient mitigating circumstances to spare his life against the aggravating circumstances that [he] knew full well the state was going to present." (CT 141).

Following Mr. Watson's testimony, the parties gave brief closing statements (CT 142-49), and Harvey's counsel moved for reconsideration of the trial court's interim ruling denying claim I.F., which was based on trial counsel's concession of guilt in opening statements without Harvey's consent. Basically, Harvey's counsel asserted that he learned that morning from Harvey himself that he and Mr. Watson did not discuss counsel's theory of defense, and that Harvey was neither aware of nor consented to counsel's decision to concede his guilt in opening statements. (CT 149-51). The State objected to the late factual amendment to the claim, but the trial court indicated that it would consider the motion as made ore tenus and request a written response from the State if it was inclined to reconsider its previous ruling on this issue. (CT 151-57). At that point, the hearing was adjourned. On March 19, 1993, the trial court denied Harvey's motion for postconviction relief, attaching portions of the record which conclusively showed that Harvey was not entitled to relief. (CR 1691-1898). Harvey now appeals therefrom.

SUMMARY OF ARGUMENT

Claim I - As required, those claims that were denied on the merits had corresponding, dispositive record excerpts, and those claims that were procedurally barred did not. Consequently, this case does not need to be remanded for an evidentiary hearing or for attachment of record excerpts. To the extent that the trial court's order is not sufficiently specific, however, a limited remand for clarification of the order would be warranted.

Issue II - Trial counsel's decision not to move to strike juror Brunetti for cause or peremptorily was a reasonable tactical decision. Thus, Harvey was not tried by a de facto eleven-person jury. Harvey's claim that trial counsel was ineffective for conceding his guilt in opening statements was also without merit, given that counsel made a sound strategic decision.

Issue III - Harvey's claim that trial counsel was ineffective for failing to argue for the suppression of Harvey's confession based on a booking sheet which indicates that Harvey requested counsel was procedurally barred, as Harvey litigated the denial of his motion to suppress on appeal. Regardless, this claim is without merit; the booking sheet does not support Harvey's claim. Harvey's claim that trial counsel failed to adequately investigate and present statutory and nonstatutory mitigating evidence is also without merit. The evidence Harvey claims should have been presented was either cumulative to what had been presented or was in complete contradiction to what the same witnesses had testified to at the trial. Similarly, Harvey

has failed to show that he was given an incompetent mental health examination. The fact that Harvey has procured a psychiatrist who has a different opinion than Harvey's mental-health expert at trial does not establish his claim. Harvey's trial expert supported trial counsel's penalty-phase strategy.

Issue IV - The remainder of Harvey's claims were either procedurally barred, waived by failure to present argument on them in this appeal, or properly denied on the merits.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ATTACHED APPROPRIATE RECORD EXCERPTS TO ITS ORDER SUMMARILY DENYING RELIEF (Restated).

In his motion for postconviction relief, Harvey raised seventeen issues. An evidentiary hearing was held on claim I.B. After considering the motion, the State's response, the files and records, and evidence and argument of counsel, the trial court found that "the motion and the files and records in this case conclusively show that defendant is entitled to no relief on his Claims IA., IC., ID., IE., IF., and all of Claims II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, and XVII. A copy of that portion of the files and records in this case which conclusively show defendant is entitled to no relief on these claims is attached hereto." (CR 1691). In this appeal, Harvey claims that "the trial court failed to attach any record excerpts for Claims I.D., I.E., I.F., II.G., V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII. The record excerpts attached in support of the denial of Claims I.A., I.C., and IV do not relate to those claims, although it is possible they may relate to other claims." **Brief of Appellant** at 38 (footnote omitted). Harvey apparently has a fundamental misunderstanding of the trial court's order and the law.

Although the trial court did not specifically delineate which claims were denied on their merits and which claims were found to be procedurally barred, it is reasonable to conclude that the record excerpts relate only to claims the trial court

considered on the merits.[1] Considering the fact that the record excerpts were taken directly from the State's proposed order, which related the excerpts to corresponding claims,[2] it is therefore reasonable to conclude that the trial court denied claims I.B., I.C., I.D., I.F., II.A. through II.E., III, and XVI on the merits.[3] Conversely, it is reasonable to conclude that the trial court found claims I.A., I.E., II.F., II.G., IV through XV, and XVII procedurally barred, as they either were, or should have been, raised on direct appeal, or without merit upon the face of the motion. Thus, as required, those claims that were denied on the merits had corresponding, dispositive record excerpts, and those claims that were procedurally barred did not. Consequently, this case does not need to be remanded for an evidentiary hearing or for attachment of record excerpts.[4] To the extent that the trial court's order is not sufficiently

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[1] It is axiomatic that record excerpts are not required for claims that are found to be procedurally barred.

[2] Exhibit IA related to claim I.B., exhibit IB related to claim I.C., exhibit IC related to claims I.D. and I.F., exhibit IIA related to claim II.A., exhibit IIB related to claim II.B., exhibit IIC related to claim II.C., exhibit IID related to claim II.D., exhibits IIE and IIF related to claim II.E, exhibit III related to claim III, and exhibit IV related to claim XVI. (SCR 4-223).

[3] The material contained in the record excerpts attached to the order denying relief also corresponds directly with those pages of the record cited to by the State in its response to Harvey's 3.850 motion.

[4] Harvey challenges the denial of each of these claims independently in other issues within his brief. The State will address the propriety of the denial of these claims in those issues.

specific, however, then a limited remand for clarification of the order would be warranted.

As for Harvey's assertion that the State submitted a proposed order ex parte to the trial court, **brief of appellant** at 38, the record reveals that the State notified Harvey of its submission (SCR 3), and Harvey responded by letter to the trial court, indicating that he would file "more formal objections both to the order, the process by which it was given to the Court, and the method of 'service' upon counsel" once he received a copy of the proposed order. (CR 1648a-b). No objections were ever made, and Harvey now makes no claim that he was not provided a copy of the proposed order or had no time to respond to the proposed order. The trial court did not even enter the interim order denying relief until sixteen months after the State submitted the proposed order. The final order was not signed for another five months. Thus, the State's sua sponte submission of a proposed order, the substance of which the trial court did not even use, did not constitute ex parte communications with the trial court. See Groover v. State, 19 Fla. L. Weekly S249, 250 (Fla. May 5, 1994).

ISSUE II

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIMS I.B., I.F., AND IV (Restated).

In his motion for postconviction relief, Harvey claimed that trial counsel was ineffective for failing to strike juror Brunetti (claim I.B.). Harvey also alleged that, because counsel failed to do so, he was, in effect, tried by only eleven jurors (claim IV). In addition, Harvey alleged that trial counsel was ineffective for admitting Harvey's guilt during opening statements (claim I.F.). (CR 620-28, 638-46, 812-16). Harvey was granted an evidentiary hearing on claim I.B., but the claim was ultimately determined to be without merit. (CR 1691-92). As discussed in Issue I, supra, claim I.F. was summarily denied on the merits, and claim IV was found to be procedurally barred. (CR 1691).

In this appeal, Harvey claims that the trial court erred in denying relief on these claims. **Brief of Appellant** at 40-50. Regarding trial counsel's decision not to move to strike juror Brunetti for cause or peremptorily, the record reveals that this was a reasonable tactical decision. After the parties had selected the twelve-member jury, the trial court heard and denied trial counsel's motion to suppress Harvey's confession. At that point, trial counsel believed that a guilty verdict was a foregone conclusion; thus, he decided to focus on the penalty phase, both in terms of picking a jury receptive to his case and in terms of maintaining credibility with the jury throughout both phases. (CT 102-05). Although counsel had no independent

recollection by the time of the evidentiary hearing of his strategy at trial, he agreed from his review of the transcripts that an important consideration was the jurors' attitudes regarding penalty-phase mental health experts and the death penalty. (CT 109-18).

After the motion to suppress was denied, the parties resumed voir dire for the selection of two alternate jurors. Juror Brunetti was being questioned in that respect. Although juror Brunetti indicated an awareness of some facts of the case, including the fact that Harvey had confessed, trial counsel knew that Harvey's confession was going to be admitted anyway and that a guilty verdict was almost assured. Of greater importance was juror Brunetti's indication that she would be receptive to mental-health testimony, and that, although she thought the death penalty deterred the offender, she did not "necessarily believe that two wrongs make a right." (CT 110-12). From these statements, it was reasonable for trial counsel to decide that juror Brunetti would be an acceptable penalty-phase juror who would be receptive to mental-health mitigation and pleas for a life sentence. Consequently, when one of the jurors fell ill during opening statements and the trial court indicated that it would replace her with juror Brunetti, trial counsel's decision not to challenge her at that time was reasonable based on his strategy.

To prevail on a claim of ineffective assistance of counsel, Harvey must show that trial counsel's performance fell below an objective standard of reasonableness and that but for counsel's deficient performance there is a reasonable probability that the

result would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). Every attempt must be made to reconstruct the circumstances of the challenged conduct and evaluate that conduct from counsel's perspective at the time, thereby eliminating the distorting effect of hindsight. Id. at 689. Here, counsel made a tactical decision not to strike juror Brunetti from the panel. Such a tactical decision was reasonable under the circumstances. Thus, counsel's performance was not deficient. See Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987) ("The claimed errors of counsel involve . . . actions pursued following sound strategies of the defense. The fact that these strategies resulted in a conviction augurs no ineffectiveness of counsel."); Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985) ("Strategic decisions of counsel will not be second-guessed on collateral attack.").

As for Harvey's corresponding claim that because counsel did not strike juror Brunetti from the jury he was, in effect, tried by an eleven-member jury (claim IV), the trial court properly found that Harvey was entitled to no relief. Again, trial counsel made a tactical decision to keep Brunetti on the jury. Because of this decision, Harvey was tried by twelve people as required by law. No challenge was made to the panel as a whole, because counsel was satisfied with his decision. Regardless, counsel has the authority to waive a twelve-person jury in a capital case. State v. Joseph, 561 So.2d 534 (Fla. 1990). Thus, the record supports the trial court's denial of this claim.

Similarly, the record supports the trial court's denial of claim I.F., wherein Harvey claimed that trial counsel was

ineffective for conceding Harvey's guilt in his opening statement. Although the trial court did not grant an evidentiary hearing on this claim, Harvey's counsel elicited testimony on this issue at the hearing and then moved ore tenus for reconsideration of the trial court's interim ruling denying relief on this claim, which the trial court took under advisement. (CT 138-41, 149-57). Moreover, exhibit IC to the trial court's order further supports the trial court's ruling.

At the evidentiary hearing, Harvey's trial counsel, Robert Watson, testified that, although he doubted that he and Harvey discussed the specific statements that he was going to make in his opening statement, he recalled discussing with Harvey whether he was going to argue for a not-guilty verdict or a lesser included offense. (CT 138-39). From reading the transcripts of his opening statement, it was obvious to him that he was arguing for second-degree murder, "which [he] felt was the only possibility." (CT 140). Mr. Watson was sure that he was trying to "create in the minds of the jury sufficient mitigating circumstances to spare his life against the aggravating circumstances that [he] knew full well the state was going to present." (CT 141).

Mr. Watson also testified that his strategic priority was to maintain credibility with the jury. By that point in time, counsel knew that Harvey's confession was going to be admitted. Because of the comprehensive nature of the confession, he had to acknowledge its existence. (CT 105-07). He knew that he could not argue in good faith that Harvey was not at the murder scene. Rather, trial counsel used Harvey's confession as evidence of his

cooperation with police and genuine remorse for the crimes. (CR 1705-15). Under the circumstances, it was not unreasonable to concede identity, argue that the facts proved only second-degree murder, and then plead for mercy in the event of a verdict of guilty to first-degree murder. See Bush; Wilson; Jennings v. State, 583 So.2d 316, 319-20 (Fla. 1991); Squires v. State, 558 So.2d 401, 403 (Fla. 1990).

To support his claim to the contrary, Harvey cites principally to Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). Francis, however, is factually distinguishable, and thus provides no support for Harvey's position. In Francis, although the defendant continually denied his involvement, his attorney presented an insanity defense that was not supported by the facts. Here, Harvey made no claim of innocence which was contradicted by a groundless defense. In fact, Harvey has even claimed in his 3.850 motion that trial counsel was ineffective for failing to present mental-health testimony that supported his defense of second-degree murder. (CR 796-811). Trial counsel's reasonable, strategic decision did not constitute ineffective assistance of counsel. As a result, the trial court properly denied this claim for relief.

ISSUE III

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIMS I.A., II.A., AND III (Restated).

In his motion for postconviction relief, Harvey claimed that trial counsel was ineffective for (1) failing to argue for the suppression of Harvey's confession to the police based on a booking sheet which indicated that Harvey requested an attorney (claim I.A.), (2) failing to adequately investigate and present statutory and nonstatutory mitigating evidence (claim II.A.), and (3) failing to ensure that Harvey was given a competent mental-health examination (claim III). (CR 583-620, 650-774, 796-811). In its written order, the trial court summarily denied all of these claims. (CR 1691-92). Contrary to Harvey's assertion on appeal, **brief of Appellant** at 51-68, the record conclusively shows that Harvey was not entitled to relief on these claims; thus, they were properly denied.

Regarding claim I.A., relating to counsel's failure to argue for the suppression of Harvey's confession based on the booking sheet, this claim was procedurally barred, since the admission of Harvey's confession had been vigorously challenged at trial and on direct appeal. Harvey's postconviction claim that counsel should have made different arguments in his motion is merely an attempt to relitigate the substantive claim under the guise of ineffective assistance of counsel. Such an attempt, however, should not prevail. Medina v. State, 573 So.2d 293 (Fla. 1990) ("Proceedings under rule 3.850 are not to be used as a second appeal. Moreover, it is inappropriate to use a different

argument to relitigate the same issue. . . . [Further,] [a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."); Porter v. Dugger, 559 So.2d 201 (Fla. 1990).

Regardless, Harvey's claim is wholly without merit. In his 3.850 motion, Harvey appended a copy of a booking sheet with his name on it. (CR 945-46). Without any factual support for his allegation, Harvey claimed that the booking sheet was generated at 6:35 a.m. on February 27, 1985. The two-page document, however, has no date or time reflected on it.[5] The document does contain, on the other hand, a notation that Assistant Public Defender Clyde Killer came to the station and spoke to Harvey personally. By Harvey's own allegations, Mr. Killer was not allowed to speak with Harvey until after Harvey gave his confession. Thus, it is reasonable to conclude that the booking sheet was generated after Harvey confessed and after Harvey met with Mr. Killer. As a result, the booking sheet does nothing to support Harvey's claim that he requested an attorney before he gave his confession, especially since the record contains copies of five waiver forms that were signed by Harvey at various times beginning at 6:20 a.m. and ending at 4:28 p.m. (TR 3595-3601).

As for Harvey's allegation that trial counsel was ineffective for failing to raise this as a ground for his motion

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[5] In its response to Harvey's motion, the State alleged that the booking sheet reflected a time of 6:15 p.m. Upon further reflection, however, it is apparent that this time relates to Harvey's first appearance and was obtained from the first-appearance sheet appended with the booking sheet. (CR 947).

to suppress, Mr. Watson testified at the evidentiary hearing that did not know where this booking sheet came from. When he and Harvey's collateral counsel went through his files prior to his filing an affidavit in support of Harvey's 3.850 motion, they did not find this booking sheet. Rather, collateral counsel showed it to him one day. He assumed that had it been in his files, he would have noted that fact in his affidavit, but he did not. (CT 128-31). Thus, besides the fact that this booking sheet does not support Harvey's allegations, its authenticity is questionable. Consequently, assuming that this claim is not procedurally barred, it is nevertheless wholly without merit, and therefore properly denied.

Harvey's next claim--that trial counsel failed to adequately investigate and present statutory and nonstatutory mitigating evidence--is also without merit. Harvey specifically alleges that trial counsel failed to present evidence of Harvey's "deprived and abused childhood, the lack of affection and support he received throughout his life, his early exposure to alcohol and long-standing history of substance abuse, the traumatic experiences he had as a young adult including the acute injuries he suffered in a 1979 automobile accident, his dependence and passivity, his debilitating depression at the time of the offense, and above all his organic brain damage." **Brief of Appellant** at 67-68. The record conclusively shows, however, that such evidence was either cumulative to what had been presented or was in complete contradiction to what the same witnesses had testified to at the trial.

As revealed in exhibit IIA of the trial court's order denying relief, numerous witnesses testified that Harvey was neither abused nor deprived as a child. Quite the contrary, numerous witnesses, including family members, testified that Harvey was very close to his family and had several friends with whom he interacted. Home movies and photograph albums were even admitted to show Harvey's positive interaction with his family. Harvey's friends testified that, although Harvey drank occasionally, he never got drunk. He was a good, dependable worker, who got along well with his coworkers. He became severely depressed after the car accident which killed the female driver and injured himself, and he became depressed after he married. Finally, the record is replete with testimony that Harvey was a very quite and passive person.

In presenting the testimony of seventeen witnesses, defense counsel attempted to establish that Harvey came from a loving family, even though they had financial trouble. Harvey was portrayed as a loving son upon whom his family depended. He helped with his bedridden sister and provided financial support after his father became disabled. Harvey was a dependable person, who worked very hard. Harvey was a depressed and passive young man who possessed certain valuable qualities and who was loved by his family. As a result, he deserved mercy from the jury.

To the extent that Harvey now seeks to present evidence relating to his family's background, this information is irrelevant, and thus trial counsel was not ineffective for failing to present it. See Hill v. State, 515 So.2d 175, 177-78

(Fla. 1987). Similarly, the evidence which relates negative aspects of Harvey's life and personality was simply at odds with trial counsel's strategy during the penalty phase. Trial counsel's strategy was reasonable; thus, counsel's performance was not deficient. Burger v. Kemp, 483 U.S. 776 (1987). Medina, 573 So.2d at 297-98. Even if this evidence had been admitted, however, there is no reasonable probability that the sentence would have been different, given that the victims were an elderly couple, that they were shot in their own home after complying with Harvey's demand for money, that they were forewarned of their impending deaths when they overheard Harvey and his codefendant discussing their demise, and that Harvey reentered the victims' home and shot Mrs. Boyd in the head to ensure her death. See Medina, 573 So.2d at 298.

Regarding Harvey's claim that trial counsel failed to ensure that Harvey was given a competent mental-health examination, the record supports the trial court's denial of relief. In his motion for postconviction relief, Harvey criticized Dr. Petrilla's preparation and presentation of mitigating evidence. To support has allegations, Harvey presented evidence relating to a recent evaluation performed by Dr. Michael Norko, who opined that Harvey suffers from various disorders, including dependent personality disorder, organic brain disorder, and major depressive disorder. (CR 799-811). As a result of this evidence, Harvey claimed below that such evidence would have established the existence of three statutory mitigating circumstances, would have illustrated Harvey's insanity/incompetence, and would have supported the claim that Harvey was incapable of waiving his Miranda rights.

A review of the record, however, establishes the rationale and strategy behind the evidence presented. Dr. Petrilla purposefully chose not to be informed of the facts of the case prior to the evaluations in order to avoid creating any expectations. He was made aware of the facts prior to trial. Dr. Petrilla not only interviewed Harvey twice, but he also interviewed many of Harvey's family members and friends. Dr. Petrilla's performance cannot be characterized as constitutionally deficient.

Trial counsel's defense at the guilt phase was to negate the evidence of premeditation by emphasizing Harvey's inadequacies. Basically, the strategy was to illustrate the fact that Harvey was remorseful and that he provided the police with the entire case against himself. Dr. Petrilla consistently testified to the same at the penalty phase. The jury heard evidence of Harvey's emotional and mental problems, which include his dependent nature, his inability to solve problems appropriately, his inadequate marriage, his passivity, his chronic depression, his lack of self-esteem, and his suicidal attempts. Trial counsel was attempting to illustrate Harvey's remorse for the murders to which the jury had already convicted him. As previously stated, this strategy was also applicable to the penalty phase, where trial counsel pled for mercy based on these, and other, aspects of Harvey's personality. Given this valid trial strategy, Dr. Petrilla's testimony provided information upon which counsel could argue remorse and make a credible plea for mercy, rather than information upon which counsel could make a futile attempt to justify a cold, calculated, and premeditated double murder.

In sum, counsel investigated and presented mitigation which would support a reasonable defense strategy. Dr. Petrilla's testimony, which was based on interviews with Harvey, and his family and friends, lent appreciable credit to counsel's plea for mercy. Harvey has done nothing to show that counsel's strategy was not reasonable, or that counsel's performance fell below an acceptable level of competence. The evidence Harvey claims should have been presented is either cumulative to, or in direct contradiction to, testimony and evidence presented at his trial. Thus, since Harvey failed to show that counsel's performance was deficient, and that such deficiency prejudiced his case, the trial court's order denying relief should be affirmed. See Medina; Rose v. State, 617 So.2d 291, 295 (Fla. 1993); Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990); James v. State, 489 So.2d 737 (Fla. 1986).

ISSUE IV

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIMS I.A., I.D., I.E., II.B., II.C., II.D., II.E., II.F., II.G., IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI AND XVII (Restated).

In this appeal, Harvey renews his claim that trial counsel was ineffective for failing to argue in his motion to suppress that the police used Harvey's wife to elicit a confession (claim I.A.). **Brief of Appellant** at 69-71. The State argued below, and the trial court found, however, that this claim was procedurally barred since it had been raised and rejected on direct appeal. (CR 1590-91, 1691). At Harvey's trial, defense counsel moved to suppress Harvey's confession on the ground that the police coerced Harvey's confession when they agreed to let Harvey talk to his wife in exchange for a confession. (TR 468, 680-92). The trial court denied the motion to suppress, and Harvey appealed this issue to this Court. Harvey v. State, 529 So.2d 1083, 1084 n.2 (Fla. 1988). Although Harvey now frames the issue somewhat differently, it is in essence the same claim. As this Court has stated numerous times, "Postconviction cannot be used as a second appeal." Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990). See also Turner v. Dugger, 614 So.2d 1075, 1078 (Fla. 1992) (finding claims procedurally barred because they, or variations of them, were raised on direct appeal). Thus, the trial court properly denied this claim.

Harvey also renews his claim that trial counsel was ineffective for making claims in his opening statement that were not later established (claim I.D.). **Brief of Appellant** at 71-72.

As the State argued below, trial counsel's strategy was to endear himself to the jury and to create an attitude of sympathy and mercy toward Harvey. Knowing that Harvey's confession was going to be admitted, thereby foreclosing a claim of innocence, trial counsel attempted to paint the picture of a depressed man of low intelligence making an impulsive decision during a robbery gone bad. This strategy, which was begun in opening statements and remained consistent throughout the trial, was reasonable. The fact that the State attempted to diffuse that defense does not make trial counsel ineffective. Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987); Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

Even if trial counsel's performance was deficient, however, Harvey has failed to show that the outcome of his trial would have been different. Assuming that defense counsel had presented evidence that Harvey lived with his parents until he married two months prior to the murders, that his family worked hard on the farm, that Harvey was immature and of low intelligence, that Harvey had difficulty supporting his wife, and the Harvey was depressed at the time of the murders, there is no reasonable probability that the jury would have found Harvey guilty of a lesser offense or not guilty. Thus, the trial court properly denied this claim.

Harvey also renews his claim that trial counsel was ineffective for causing the introduction of testimony relating to Harvey's threat to kill another inmate (claim XVI). **Brief of Appellant** at 72-74. As evidenced by exhibit IV to the trial court's order denying relief, trial counsel attempted

unsuccessfully to exclude any evidence relating to Harvey's threat against Marvin Davis. When his motions and objections were denied, trial counsel wanted the entire episode admitted in order to show the jury that Harvey was being provoked by Davis. (CR 1895-98). This was a reasonable strategic decision. Even were it not, however, Harvey has failed to show prejudice. There is no reasonable probability that the outcome would have been different had counsel not put Harvey's statements to Davis in context; thus, the trial court properly denied this claim. See Haliburton v. State, 561 So.2d 248, 251 (Fla. 1990); Burr v. State, 550 So.2d 444, 446 (Fla. 1989).

Harvey next renews his claim that trial counsel was ineffective for failing to object to the penalty-phase jury instructions, and the trial court's and prosecutor's comments, which improperly shifted the burden to Harvey to prove that the mitigating factors outweighed the aggravating factors (claim IX). **Brief of Appellant** at 74-76. Since such a claim has been rejected in numerous other cases, see, e.g., Arango v. State, 411 So.2d 172, 174 (Fla. 1982), cert. denied, 474 U.S. 1015 (1983); Robinson v. State, 574 So.2d 108, 113 n.6 (Fla. 1991), cert. denied, 116 L.Ed.2d 99 (1992), trial counsel was not deficient for failing to object.

Next, Harvey renews his claim that trial counsel was ineffective for failing to waive the "no significant history" mitigating factor (claim II.D.). **Brief of Appellant** at 76. As exhibit IID to the trial court's order reveals, however, trial counsel made a strategic decision not to waive this mitigating factor because he wanted to show that Harvey had not been in any

serious trouble with the law prior to the murders. Given the fact that the evidence of Harvey's escape had already been admitted during the guilt phase, trial counsel's strategic decision was a reasonable one. Thus, the trial court properly denied this claim. Bush; Wilson.

Harvey next renews his claim that trial counsel was ineffective during his penalty-phase closing argument because he conceded numerous aggravating factors and failed to argue effectively for various mitigating circumstances (claim II.C.). **Brief of Appellant** at 78-80. The record reveals, however, that Harvey himself established the existence of several aggravating factors when he confessed. Since trial counsel's strategy was to gain credibility with the jury and plead for mercy, trial counsel could not ignore the aggravating factors or argue in good faith that they had not been established. Rather, by presenting the testimony of seventeen witnesses, trial counsel attempted to convince them that life imprisonment was a fitting punishment under the circumstances of this case. Such a strategy was reasonable; thus, counsel's performance was not ineffective. Bush; Wilson.

Next, Harvey renews his claim that trial counsel was ineffective for failing to present any evidence or make any argument during the sentencing hearing (claim II.F.). **Brief of Appellant** at 80-81. The *record reveals, however,* that trial counsel presented the testimony of seventeen witnesses during the penalty phase and argued persuasively for mercy in his closing argument. The trial court heard the evidence and argument. Unlike in Stevens v. State, 552 So.2d 1082 (Fla. 1989), wherein

counsel made no argument either to the jury or to the judge although significant mitigation existed, Harvey points to nothing additional that trial counsel failed to argue or present; thus, he has failed to prove that counsel was ineffective.

Next, Harvey renews his claims that the trial court rendered trial counsel ineffective by failing to hold a hearing and rule on Harvey's motion to suppress prior to jury selection, by denying counsel's motion for co-counsel, and by denying counsel's motion for continuance made between the guilt and penalty phases of the trial (claim V). **Brief of Appellant** at 81-86. As the State argued below, and as the trial court found, these claims were procedurally barred since they could have been raised on direct appeal. (CR 1618-22). Medina v. State, 573 So.2d 293 (Fla. 1990); Aldridge v. State, 425 So.2d 1132, 1135 (Fla. 1985).

Harvey also renews his claim that the jury was improperly instructed that its role was merely advisory (claim XIV). **Brief of Appellant** at 86-87. Although Harvey acknowledges that he raised this issue on direct appeal, he claims that this Court "denied relief without expressly discussing whether Caldwell applied to Florida's sentencing scheme." Id. at 86. Besides the fact that Harvey is impermissibly trying to relitigate this issue, Medina, this Court has since held that Caldwell does not apply to Florida's sentencing scheme. Combs v. State, 525 So.2d 853, 854-58 (Fla. 1988); Sochor v. State, 619 So.2d 285, 291-92 (Fla. 1993). Thus, the trial court properly denied this claim.

Next, Harvey renews his claims that the HAC and CCP instructions were unconstitutionally vague (claims X and XI). **Brief of Appellant** at 87-92. At Harvey's trial, defense counsel

presented proposed penalty-phase instructions on these two aggravating factors, but never made an argument regarding the constitutionality of the standard instructions. The trial court denied trial counsel's proposed amendments. (TR 2848-51, 2865-67). Harvey challenged the denial of his special requested instructions on direct appeal, but he did not specifically address these two instructions. The State submits that, because Harvey did not make the same argument at trial or on appeal that he made in his 3.850 motion or his initial brief, his claims relating to these two aggravating factor instructions are procedurally barred. See James v. State, 615 So.2d 668, 669 (Fla. 1993) ("James . . . objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received.").

Next, Harvey renews his claim that fundamental changes in the law require resentencing because the "no significant history" mitigating factor should have been found in his case (claim VII). **Brief of Appellant** at 93-95. 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.[6] Thus, Scull was not final until after Harvey became final.

Harvey now seeks to have Scull applied retroactively. 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).

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[6] 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.

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 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).

Harvey's next renews his claim that the State withheld material, exculpatory information from Harvey (claim XII). **Brief of Appellant** at 95. 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. 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).

Harvey now claims that the State's actions constituted a violation under Brady v. Maryland, 373 U.S. 83 (1963). Clearly, the facts upon which this claim was based was known to Harvey at the time of his direct appeal. Because he did not raise this issue at that time, he was, as the State argued below and the trial court found, procedurally barred from raising it in his motion for postconviction relief. Medina.

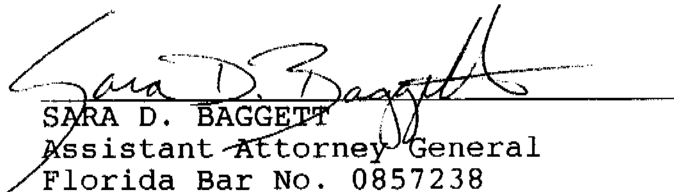
In his final subissue, Harvey "restates and reincorporates" nineteen claims and subclaims that he raised in his 3.850 motion. In doing so, he merely lists the claims; he does not provide any factual or legal support for reversing the trial court's denial of those claims. **Brief of Appellant** at 96-97. Rule 9.210(b)(5) specifically requires the appellant to provide "[a]rgument with regard to each issue." This rule has been interpreted to mean: "It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." Polyglycoat Corporation v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1983) (citations omitted), pet. for rev. dism., 451 So.2d 848 (Fla. 1984). See also F.M.W. Properties, Inc. v. Peoples First Financial Savings and Loan Ass'n, 606 So.2d 372, 377 (Fla. 1st DCA 1992) (quoting Singer v. Borbua, 497 So.2d 279, 281 (Fla. 3d DCA 1986) ("[E]ach matter upon which an appellant relies for reversal must be argued under an appropriate issue presented for review. . . . 'It is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal.'"). Based on Harvey's disregard for the rule and his superficial treatment of these issues, the State submits that Harvey has waived these issues for review. If not, the State would renew its arguments below that these issues were either procedurally barred or lacking in merit, and thus the trial court properly denied them.

<u>CONCLUSION</u>

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the trial court's denial of Harvey's motion for postconviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ross B. Bricker and Steven F. Samilow, Esquires, Jenner & Block, One Biscayne Tower, Miami, Florida 33131, this 23rd day of April, 1994.

SARA D. BAGGETT
Assistant Attorney General