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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,836

HAROLD LEE HARVEY, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court for
the Nineteenth Judicial Circuit,
in and for Indian River County, Florida
Case No. 86-322B

Honorable Dwight L. Geiger

APPELLANT'S REPLY TO STATE'S ANSWER TO APPELLANT'S INITIAL BRIEF

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ARGUMENT AND REBUTTAL

As set forth in Mr. Harvey's initial brief and in this reply, fundamental error plagued every phase of Mr. Harvey's trial, beginning with the suppression hearing, continuing through jury selection, opening statement, guilt/innocence, penalty, closing argument, and sentencing. Some of these errors are so basic and fundamental -- for example, defense counsel's acceptance of an admittedly biased and unrehabilitated juror on the panel and his statement to the jury in opening, without his client's consent, that "Harold Lee Harvey is guilty of murder," -- that prejudice must be presumed and this trial declared unconstitutional. Other critical errors also prejudiced Mr. Harvey's defense. Thus, when trial counsel failed to assert Mr. Harvey's written, executed pre-interrogation request for an attorney in support of a motion to suppress Mr. Harvey's confession, key evidence became available which should have been suppressed and without which there would have been no conviction. Taken together or separately, the errors in this case show that profound violations of Mr. Harvey's constitutional rights occurred, and that the trial court's judgment and sentence should be vacated and this case remanded for a new and constitutional trial.

These errors were brought to the attention of the trial court in a 359 page Rule 3.850 Motion filed by pro bono collateral counsel.[1/] On October 5, 1992, the trial court, in an enigmatic

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[1/] Jenner & Block is a participant in the American Bar Association's Capital Litigation Project, a pro bono program of attorneys assisting in the representation of defendants under sentence of death. Mr. Harvey's case was referred to Jenner & Block (continued...)

1 1/2 page order, denied all but one of Mr. Harvey's claims, attaching record excerpts which are jumbled and incomprehensible and which do not, as even the State concedes, give any indication of the trial judge's reasoning.[2/]

The State's response to Mr. Harvey's claims is formulaic, raising doctrines of harmless error, procedural bar and waiver. As demonstrated below, these doctrines do not apply here. They exist to distinguish trials which are fundamentally fair, notwithstanding the inevitable presence of immaterial error, from trials in which material error occurred to the prejudice of an accused. Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986). The errors here are so pervasive and patent that they deprive Mr. Harvey of the constitutional trial to which he was entitled.

It is not, as the State suggests, Mr. Harvey's complaint that his trial was less than perfect or that his trial counsel's strategy was, in retrospect, flawed. Instead, Mr. Harvey argues, and has shown, that his was not a trial at all within the meaning of the Sixth Amendment. The system simply did not function as it was supposed to function; there was no meaningful advocacy for the accused. Accordingly, Mr. Harvey's conviction cannot stand and Florida cannot constitutionally execute Harold Lee Harvey, Jr. on the basis of this judgment.

[1/] (...continued)
by the ABA and Volunteer Lawyer's Resource Center in December, 1989.

[2/] The trial court granted a hearing on Claim I.B., but subsequently denied that claim also.

A. The Trial Court Erred In Denying Claims I.A., I.C., I.D., I.E., I.F., II.G., IV., V., VI., VII., VIII., IX., X., XI., XII., XIII., XIV., XV., XVI., And XVII.; The Record Excerpts Attached To The Order Do Not Conclusively Show Mr. Harvey Is Entitled To No Relief.

The evidentiary standard of Fla. R. Crim. P. 3.850 is clear. "[A] prisoner is entitled to an evidentiary hearing unless the motion and the files and records in the case conclusively show that he is entitled to no relief." Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980) (emphasis in original). The State implicitly concedes that the trial court's order does not meet this standard, but argues that "it is reasonable to conclude" the trial court denied Mr. Harvey's claims on the merits. If this wasn't the basis of the trial court's decision, the State continues, then Mr. Harvey's claims must have been deemed procedurally barred. Both the State's arguments and the trial court's order are speculative, falling short of Rule 3.850's requirement that the record conclusively establish Mr. Harvey is entitled to no relief. If the judgment survives Mr. Harvey's other claims, this Court should reverse and remand the trial court's rulings on claims I.A., I.E., II.F., IV., V., VII., VIII., IX., X., XI., XIII., XIV., XV., XVI., and XVII. for evidentiary hearing. Meeks, 382 So. 2d at 676.

B. The Trial Court Erred In Denying Claims I.B., I.F. And IV.; Mr. Watson's Errors So Compromised The Integrity Of The Trial That There Can Be No Confidence In The Verdict

Two of the most fundamental errors committed by Mr. Watson in Mr. Harvey's trial were Mr. Watson's failure to strike a biased and unrehabilitated juror during jury selection, depriving Mr. Harvey of a trial by a jury of 12 impartial members, and, in opening statement, his concession of Mr. Harvey's guilt, effectively forfeiting Mr. Harvey's right to a trial on that issue. These errors compromised

the integrity of Mr. Harvey's trial; prejudice must be presumed. Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105, 92 L. Ed. 2d 460 (1986); United States v. Cronic, 466 U.S. 648, 659 and n. 25, 104 S. Ct. 2039, 2047 and n. 25, 80 L.Ed. 2d 657 (1984).

Ignoring this argument, the State asserts Mr. Watson's failures were not error at all but keen tactical choices, probably the result of trial strategy, and actions reasonable under the circumstances. In addition to missing the point, these arguments find no support in the record.

1. Mr. Watson's Failure To Strike Mrs. Brunetti Deprived Mr. Harvey Of An Impartial Jury.

The State does not address Mr. Harvey's primary argument on this claim -- that trial counsel's failure to strike or challenge an admittedly biased juror is fundamental error giving rise to presumed prejudice under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Cronic is dispositive. Mr. Watson's failure to strike a biased and unrehabilitated juror deprived Mr. Harvey of the fair trial before 12 impartial jurors guaranteed by the Sixth Amendment.

Moreover, the State's argument that the inclusion of Mrs. Brunetti was a "reasonable tactical decision," is unsupported by the record. There is simply no evidence, direct or circumstantial, that Mr. Watson's failure resulted from trial strategy. Mr. Watson did not, and does not know why he failed to strike this juror.[3/]

[3/] In his August 24, 1990 affidavit, Mr. Watson stated:

> I have reviewed the notes I made during voir dire and the trial record and am unable to discern why I did not challenge Mrs. Brunetti's

(continued...)

The State argues that Mr. Watson strategically disregarded Mrs. Brunetti's admitted bias, her knowledge that Mr. Harvey had confessed to murder, and her knowledge that the murders were committed during robbery and for the purpose of witness elimination, because of her statement: "I don't necessarily believe that two wrongs make a right." (R. 1825.) Even if the record supported this argument, and it does not, this purported strategy would have been so unreasonable as to fall below levels of constitutional competency. Whatever Mr. Watson's subjective views on the suitability of

[3] (...continued)

> serving on the jury. It appears clear to me that Ms. Brunetti had been exposed to extensive pretrial publicity that caused her to prejudge Mr. Harvey's guilt, and to even state that she would not be impartial. In fact at the time of her questioning, Ms. Brunetti's responses indicated that she believed in the existence of two factors which would be argued by the state as aggravating factors in support of the death penalty at the time of her questioning. I cannot, from the record, justify why I did not challenge her for cause based on her beliefs. There is no apparent reason why I did not move to back strike Ms. Brunetti when she was seated as an actual juror to replace an ill panel member on the first day of trial.

(Watson Aff. ¶ 14) (C.R. 940-941) (emphasis added).

In March of 1993, Mr. Watson, in response to questioning by the State, could not remember why he failed to strike Mrs. Brunetti either during initial voir dire or when she was seated as an actual juror. He testified: "I don't have an independent recollection of what I thought in 1986." (C.R. 99, 113, 119.) On cross-examination, Mr. Watson reaffirmed the statements in his August 24, 1990 affidavit as true. (C.R. 121.)

Mrs. Brunetti may have been, clearly this equivocal statement cannot outweigh the record facts regarding her bias.[4]

The State's position on this point illustrates that the presumption of prejudice required by Cronic and Rose v. Clark is not only fair, but logically necessary. At the March 3, 1993, evidentiary hearing, the State argued that Mr. Harvey was not entitled to relief on his biased juror claim because he had not demonstrated that Mrs. Brunetti's service on the jury had prejudiced him. Without waiving his argument that prejudice should be presumed and such proof not required, Mr. Harvey offered the testimony of Dr. Gary Moran, a psychologist and jury selection expert, on the impact of Mrs. Brunetti's bias on the remaining panel. As proffered at the hearing, Dr. Moran was prepared to present well-documented evidence on jury selection techniques and to testify to a scientific certainty that Mrs. Brunetti's bias would inevitably have infected the remaining panel. The State objected to this testimony on the ground that a factual predicate had not been laid for it; in sum, the State argued, and the trial court held, that unless it were shown that Dr. Moran witnessed the Harvey jury's deliberations, he would be barred from testifying about the impact of Mrs. Brunetti's bias on the panel. This ruling in itself was error. See Initial Brief, at 48 n.19.

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[4] Mrs. Brunetti had read and viewed through the news media the facts and circumstances of the crime. (R. 1815-16.) She recalled Mr. Harvey's name and that he had confessed. (R. 1820-21.) She knew that the murders were committed during a robbery and to eliminate witnesses, facts the State would argue as aggravating circumstances. (R. 1821-22, 1824-25.) Finally, Mrs. Brunetti clearly warned defense counsel (and the trial court) of her bias; she said she could not be impartial and that she would share her views with the jury during deliberation. (R. 1823, 1827.)

Moreover, the Florida Constitution and Florida statutes[5/] guarantee a defendant charged with first-degree murder the right to trial by a 12-person jury. State v. Joseph, 561 So. 2d 534 (Fla. 1990); State v. Poole, 561 So. 2d 535 (Fla. 1990); State v. Griffith, 561 So. 2d 528, 529 (Fla. 1990). Because this right is absolute and fundamental, a defendant in a capital case is entitled to a 12-person jury unless defendant has knowingly and voluntarily waived that right by consenting to a fewer number or a bench trial. Griffith, 561 So. 2d at 530; Alfonso v. State, 528 So. 2d 383, 384-85 (Fla. 3d DCA 1988); Jones v. State, 452 So. 2d 643, 645-46 (Fla. 4th DCA 1984). This fundamental right is infringed when the defendant is made to proceed to trial with less jurors than he is entitled to by law, or if one or more members of the jury has expressed bias and an inability to be impartial. See, e.g., Johnson v. Armontrout, 961 F.2d 748, 751 (8th Cir. 1992) (defendant's constitutional jury trial right "has not been granted if any member of the jury was biased"); State v. Terry, 601 So. 2d 161, 164 (Ala. Crim. App. 1992) (trial counsel's failure to strike biased juror unjustifiable as "trial strategy"); State v. McKee, 826 S.W.2d 26, 28-29 (Mo. Ct. App. 1992) (defendant's right to an impartial jury was violated when trial counsel failed to strike biased juror; prejudice presumed); Presley v. State, 750 S.W.2d 602, 607 (Mo. Ct. App.), cert. denied, 488 U.S. 975, 109 S. Ct. 514, 102

[5/] Article I, § 22 of the Florida Constitution guarantees a twelve-person jury in capital cases. See also Cotton v. State, 85 Fla. 197, 95 So. 668 (1923).

Section 913.10, Fla. Stat. (1993), and Fla. R. Crim. P. 3.270, provide that in a capital case, the accused has the right to be tried by a jury of no fewer than twelve people. See also State v. Griffith, 561 So. 2d 528, 529 (Fla. 1990).

L. Ed. 2d 549 (1988) (same); Knight v. Texas, 839 S.W.2d 505, 511 (Tex. Crim. App. 1992) (same).

The State responds by citing State v. Joseph, 561 So. 2d 534 (Fla. 1990), and State v. Griffith, 561 So. 2d 528 (Fla. 1990), arguing that trial counsel "has the authority to waive a 12-person jury in a capital case." This argument confuses form with substance. While defense counsel may indicate for the record his client's consent to a trial by a jury of less than twelve, only the client may consent to that course. Adams v. United States ex rel McCann, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942); Joseph, 561 So. 2d at 534; Griffith, 561 So. 2d at 530. And, although defendant need not provide a formal waiver, the defendant must consent to the waiver, and the record must evidence that consent. Id.[6]

Indeed, Joseph reaffirms the proposition that, where the record contains no evidence of defendant's consent to proceed with less jurors than he is entitled to under the law, or his trial counsel's consent on behalf of the defendant, waiver of that right cannot be implied. State v. Joseph, 561 So. 2d at 534 (Fla. 1990) (refusing to imply consent from a silent record). In the present case, there is not one scintilla of record evidence that Mr. Harvey consented to the presence of a biased and unrehabilitated juror on his panel and the State's argument, which asks this Court to imply Mr. Harvey's consent, is impermissible.

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[6] For example, in Griffith, the prosecution agreed with defense counsel to waive the death penalty in exchange for Griffith's consent to waive a 12-person jury and be tried before a 6-person jury. 561 So. 2d at 528-29. In holding that Mr. Griffith had waived his right to a 12-person jury, the Court relied on the record, which clearly indicated trial counsel's strategic choice and, critically, Mr. Griffith's consent.

In sum, there simply is no direct or circumstantial evidence establishing that Mr. Watson's failure to strike Mrs. Brunetti was a result of trial strategy. Indeed, Mr. Watson, after his own review of the record, could not justify his failure. Most significantly, however, Mr. Harvey never consented to a waiver of his right to a jury of 12 impartial members and was forced to stand trial with a de facto eleven-member jury.[7] And, as Cronic presumes, and, as Mr. Harvey has shown by proffer, even those eleven jurors were tainted by an irrevocable bias.

2. Mr. Watson's Unauthorized Concession Of Guilt So Undermined Mr. Harvey's Not Guilty Plea That Mr. Harvey Was Denied His Right To Trial.

Again, the State attributes error to trial strategy. Mr. Watson's unauthorized concession of his client's guilt in opening was strategic, the State asserts, because of the overwhelming quantum of evidence against his client. The State misses the point.

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[7] Indeed, the trial court should have stricken Mrs. Brunetti sua sponte, since the responsibility for assuring a fair and impartial trial ultimately rests with the court:

> **Prospective Jurors Excused.** If, after the examination of any prospective juror, the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the cause . . . .

Fla. R. Crim. P. 3.300(c) (emphasis added); Newton v. State, 178 So. 2d 341, 345 (Fla. 2d DCA 1965).

If there is "any reasonable doubt" that the juror will be able to render an impartial verdict, based on the evidence, the juror "should be excused on motion of a party, or by the court on its own motion." Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959). See also Armstrong v. State, 426 So. 2d 1173, 1174 (Fla. 5th DCA 1983); Choctawhatchee Elec. Co-op, Inc. v. Major Realty Co., 161 So. 2d 837, 840 (Fla. 1st DCA 1964).

A lawyer's unauthorized concession of his client's guilt effectively extinguishes that client's Sixth Amendment right to a trial. Francis v. Spraggins, 720 F.2d 1190, 1195 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985). Such a concession cannot constitutionally be made unless the client voluntarily and knowingly consents and waives his Sixth Amendment right on the record. Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S. Ct. 656, 70 L. Ed. 2d 630 (1981) ("[i]n those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin.")[8] See also Nixon v. State, 572 So. 2d 1336, 1339-40 (Fla. 1990), cert. denied, ____ U.S. ____, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991). Stated differently, a defendant is entitled to hold the prosecution to its burden of proof and that entitlement cannot be waived by trial counsel, regardless of the reasonableness of a concession of guilt in any particular case. Francis v. Spraggins, 720 F.2d at 1194 ("[C]ounsel does not have license to . . . concede the issue [of guilt] during the guilt/innocence phase simply because an adverse verdict appears likely.") This is so even where the evidence mounted against a defendant is overwhelming and the defendant has no credible defense. Scarpa v. DuBois, Civ. A. No. 92-12947-Y, 1993 WL 245655

[8] Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), requires that a court receive a plea of guilty with an on-the-record factual inquiry, outside the presence of the jury, to ensure that the plea is voluntary and intelligent.

at *4 (D. Mass. June 24, 1993) (quoting United States v. Cronic, 466 U.S. 648, 656 n.19 (1984)).

Therefore, even if the record supported the conclusion that Mr. Watson's concession of guilt was strategic, and it does not, Mr. Watson's "strategy" would have been constitutionally impermissible absent Mr. Harvey's knowing and voluntary consent. See also United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991); Young v. Zant, 677 F.2d 792, 799 (11th Cir. 1982); Nixon v. State, 572 So. 2d 1336, 1339-40 (Fla. 1990), cert. denied, 112 S. Ct. 164 (1991). The inquiry relevant here is not whether trial counsel's concession was "reasonable," but rather whether Mr. Harvey consented to it. The record shows he did not.

The State attempts to distinguish Francis v. Spraggins on the ground that trial counsel's strategy (presentation of an insanity defense) was at odds with the defendant's denial of any involvement in the charged crime. In other words, the State argues that the error in Francis was that trial counsel's strategy was stupid, not unconstitutional. This argument is spurious. The rule announced in Francis is straightforward. A lawyer is without license to waive his client's right to a trial on the issue of guilt.

On this record, the prejudice accruing to Mr. Harvey is plain. His counsel's opening statement mooted the guilt phase of his trial, abrogating Mr. Harvey's Sixth Amendment guarantee to that event. Prejudice is presumed. Even if it were not, the trial court's refusal to hear evidence on this point denied Mr. Harvey the fair hearing Rule

3.850 guarantees him.[9] In either case, the trial court's order is invalid and must be reversed.

C. The Trial Court Erred In Denying Claims I.A., II.A. And III.; Mr. Harvey Received Ineffective Assistance of Counsel At Trial.

1. Mr. Watson Was Ineffective In Failing To Assert Evidence Reflecting A Pre-Interrogation Request For Counsel In Support Of The Motion To Suppress Mr. Harvey's Confession.

In claim I.A. of his Rule 3.850 motion, Mr. Harvey asserted that his counsel's failure to introduce a booking sheet which reflected Mr. Harvey's pre-interrogation request for an attorney (the "C.R. 945 Booking Sheet") resulted in the avoidable admission of Mr. Harvey's confession and demonstrated constitutionally ineffective assistance of counsel. Until now, the State never questioned the authenticity

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[9] In its interim order below, the trial court denied this claim and precluded Mr. Harvey from presenting evidence that he did not consent to Mr. Watson's concession. At the March, 1993 evidentiary hearing on Claim I.B., collateral counsel moved _ore tenus_ for reconsideration of that ruling and proffered in support of that motion additional evidence that Mr. Harvey never consented to Mr. Watson's concession of guilt. As collateral counsel told the trial court at the Claim I.B. evidentiary hearing on March 3, 1993:

> MR. MIXON: I asked Mr. Harvey, "Do you remember when your attorney, Mr. Watson, made the statement that my client Harold Lee Harvey, Jr. is guilty of murder?" He said, "Yes, I do." I asked him this question, "Did Mr. Watson ask your consent to make that statement?" He answered, "No." I then asked him whether Mr. Watson told Mr. Harvey that he, Mr. Watson, would make that statement, even if he didn't ask his consent, "Did he, at least, tell you he was going to do it?" Mr. Harvey said, "No." In his words, "_I about fell out of my chair when he said it. I didn't know he was going to say that, and he didn't tell me_."

(C.R. 149-150) (emphasis added). The trial court, nevertheless, summarily denied the motion for reconsideration and refused to allow presentation of evidence on this claim.

of the C.R. 945 Booking Sheet or, indeed, that it proves that on the day of his arrest Mr. Harvey asked to speak with a lawyer. Instead, the State argued before the trial court, mistakenly, as they now concede, that the C.R. 945 Booking Sheet was generated at 6:25 p.m. on February 27, 1985, or alternatively, that the five Miranda cards executed during Mr. Harvey's 11-hour interrogation outweighed Mr. Harvey's pre-interrogation request for an attorney. On these bases, the trial court denied the evidentiary hearing Mr. Harvey sought on this claim.

Now, on appeal, and for the first time ever in this case, the State retracts its former assertion of fact and advances a new theory. The State now argues that the provenance of the C.R. 945 Booking Sheet is unclear on the face of this record but that there was no ineffectiveness and an evidentiary hearing is not required because "it is reasonable to conclude that the booking sheet was generated after Harvey confessed and after Harvey met with Mr. Killer [the Assistant Public Defender]." Response, at 24. In other words, the State now argues that this Court should deny Mr. Harvey's claim because, although the police may have violated Mr. Harvey's right to counsel under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), under the State's current construction of the facts they probably didn't. This argument is contrary to the verified record in this case and to law.

a. The C.R. 945 Booking Sheet Was Created Before Mr. Harvey Was Interrogated And Reflects A Pre-Interrogation Request For Counsel

Contrary to the State's assertions, the record shows that the C.R. 945 Booking Sheet was created before Mr. Harvey was interrogated

on February 27, 1985. Hence, the C.R. 945 Booking Sheet reflects Mr. Harvey's unequivocal request for an attorney prior to questioning.

The testimony at the suppression hearing and at trial established that Mr. Harvey was arrested at approximately 6:00 a.m. on February 27, 1985. (R. 606-08; R. 2075; R. 3595.) The arresting officers, Larry Miller and Gary Hargraves, advised Mr. Harvey that he was under arrest on charges of second degree murder and robbery. (R. 607.) Mr. Harvey was then taken to the Okeechobee County Jail, where he was booked on charges of second degree murder and robbery. (R. 609-11.) According to the officers' testimony, the authority for the arrest was a capias, reflecting charges of second degree murder and robbery, and an arrest affidavit, also reflecting charges of second degree murder and robbery. The C.R. 945 Booking Sheet, although undated, reflects the booking of Harold Lee Harvey on charges of <u>second degree murder and robbery</u>. Clearly, the C.R. 945 Booking Sheet is the record of the booking process Officers Hargraves and Miller described. The C.R. 945 Booking Sheet was therefore generated on February 27, 1985, at the time Mr. Harvey was booked.

The State does not appear to contest that the C.R. 945 Booking Sheet was, in fact, generated on the date of arrest. Instead, it argues, contrary to the testimony of the officers, that booking did not occur until some 12 hours after Mr. Harvey was taken into custody, and, critically, after Mr. Harvey had consulted an attorney. This assertion is baseless. It also contradicts routine police practice.

The booking process exists to advise a defendant of the charges against him and to receive custody of that defendant into the criminal justice system. The law requires that certain questions be administered to the defendant at the time of booking and that the

defendant's responses to those questions be recorded contemporaneously. This is the State's practice; it is the requirement of law. Mr. Harvey was booked prior to his interrogation, and the C.R. 945 Booking Sheet reflects what he told the booking officer at that time. Unequivocally, he wanted a lawyer. He was not allowed to see one. These are the record facts established by the C.R. 945 Booking Sheet and testimony in this case.

These facts are also established by Mr. Harvey's sworn verification of the allegations of his Rule 3.850 Motion. (C.R. 930). However skeptical the State may be of this verification and the pleading it concerns, and however much it may fume in its response about Mr. Harvey's waste of its valuable time and about the vituperative nature of Mr. Harvey's allegations, the fact remains that the State has introduced not one shred of evidence to rebut the sworn allegation that Mr. Harvey requested a lawyer before he was interrogated by the Okeechobee County Sheriff. Thus, on the face of the record, Mr. Harvey's Sixth Amendment right to counsel was violated. When the smoke is blown off the State's response, this point remains unchallenged by contrary evidence.

b. Trial Counsel Was Ineffective For Failing To Introduce The C.R. 945 Booking Sheet

Collateral counsel found the C.R. 945 Booking Sheet in documents provided by the State. Suspecting a discovery violation, collateral counsel inspected Mr. Watson's files to determine whether the State had turned over this powerfully exculpatory evidence. When the C.R. 945 Booking Sheet was found in Mr. Watson's file, collateral counsel asked Mr. Watson why the document had not been used and why, if he had known of it, Mr. Watson had conceded Mr. Harvey's waiver of

counsel. Watson had never seen the C.R. 945 Booking Sheet found in his own files and did not know of its existence.[10/]

The rule of Edwards v. Arizona, 451 U.S. 477 (1981), and its progeny is plain. The Sixth Amendment imposes upon the State an affirmative obligation to protect the right of an accused to consult with an attorney prior to questioning. Davis v. United States, ____ U.S. ____, 114 S. Ct. 2350, ____ L. Ed. 2d ____ (1994). As the Supreme Court has emphasized, this is a "bright-line" rule. Id. Moreover, once an accused has made an unequivocal request for counsel to any officer of the State,[11/] no post-request responses to further interrogation can be used to cast retrospective doubt on the clarity of the initial request. Smith v. Illinois, 469 U.S. 91, 100, 105 S. Ct. 490, 495, 83 L. Ed. 2d 488 (1984).[12/]

[10/] In his affidavit, Watson stated:

> I have recently discovered a booking sheet which proves that Mr. Harvey requested the assistance of counsel at the time he was brought into jail and booked. This document may have been in my possession, although I only recently became aware of its existence. This document should have apparently been offered into evidence at the motion to suppress.

(Watson Aff. ¶ 11) (C.R. 939).

[11/] Michigan v. Jackson, 475 U.S. 625, 634-35, 106 S. Ct. 1404, 1410, 89 L. Ed. 2d 631 (1986), held that a request made to one state officer invokes the Edwards rule as to all.

[12/] Davis v. United States, 114 S. Ct. 2350 (1994), reaffirms this rule. In Davis, the request at issue was equivocal: "Maybe I should talk to a lawyer," followed by a statement by the accused that he did not want to talk with a lawyer. Here, the request was unequivocal: "Do you want to have a lawyer now? -- Yes." (C.R. 945.) Edwards applies, and under instant facts, the confession would have fallen. Davis is not to the contrary.

Every police officer knows these rules. When a request for an attorney is made, questioning must cease. Here it did not. The evidence obtained by the State through Mr. Harvey's confession was likely inadmissible. Because the State's case flowed almost exclusively from the confession, see Initial Brief, at 18-20, the case against Mr. Harvey and his co-defendant was in substantial jeopardy. Mr. Watson had this evidence and did not use it. His error profoundly prejudiced the outcome of Mr. Harvey's trial.

c. The State's Other Arguments Are Without Merit

The State's remaining arguments on this point are puzzling and beside the point. The State claims that Mr. Harvey may not now assert his counsel's failure to introduce a pre-interrogation request for counsel as a basis for suppression because Mr. Watson "vigorously challenged" the confession on other grounds. Response, at 23. But the Sixth Amendment guarantees a competent attorney, not merely a "vigorous" one. This argument is meaningless.

The State then argues that it is inappropriate for Mr. Harvey to use the vehicle of a Rule 3.850 motion to challenge the proceedings before the trial court on the motion to suppress. This argument stems from the State's mischaracterization of Mr. Harvey's claim. Mr. Harvey is not suggesting merely that his counsel should have made "different arguments" but that Mr. Harvey's counsel was insufficiently familiar either with his own file, or with the legal significance of the evidence it held, to represent Mr. Harvey competently. It is the incompetency of counsel which is at issue here, not counsel's strategic choice in argument.

Finally, and, as emphasized earlier, for the first time, the State now contends that the C.R. 945 Booking Sheet, which came from

the State's own files, is of questionable authenticity. This argument is in bad faith. The C.R. 945 Booking Sheet is an official record of responses to questions the police are legally required to ask. The State created this document, maintained this document and supplied this document to collateral counsel, until now never questioning its authenticity. It is disingenuous of the State now to argue, after the opportunity for evidentiary hearing has been foreclosed, that this Court may not take cognizance of evidence contained in the collateral record throughout this proceeding. Plainly, the C.R. 945 Booking Sheet is authentic and means what it says: at the time of booking on February 27, 1985, before his interrogation, Harold Lee Harvey unequivocally requested an attorney.[13]

d. The Record Warrants Vacation Of The Judgment And Sentence Below.

Mr. Watson's error in overlooking the C.R. 945 Booking Sheet made the difference to Mr. Harvey between a likely dismissal of charges and his conviction of first degree murder and a sentence of death. There is no greater prejudice which might accrue to a defendant from the error of his attorney than this.

The facts set forth here warrant the conclusion that the C.R. 945 Booking Sheet reflects a pre-interrogation request for an attorney. That conclusion requires that this conviction be reversed. Additionally, however, the existence of the C.R. 945 Booking Sheet raises a fundamental question about the integrity of this prosecution and trial. The provenance of the C.R. 945 Booking Sheet could have

[13] The existence of the C.R. 945 Booking Sheet warrants reconsideration of Mr. Harvey's claim, raised on direct appeal, that his confession should be suppressed under Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

been determined by the evidentiary hearing that Mr. Harvey sought yet was denied below. If Mr. Harvey's judgment and sentence survive, this issue clearly requires at least remand for determination of the pre-interrogation nature of Mr. Harvey's request for counsel. In either case, the trial court's order cannot stand.

2. **Trial Counsel Was Ineffective In Failing To Investigate Mr. Harvey's Background And Presenting Statutory and Non-Statutory Mitigating Circumstances And For Failing To Retain A Psychiatrist To Evaluate Mr. Harvey**

a. **Mr. Watson's Failure To Investigate And Present Compelling Evidence Of Mr. Harvey's Background**

Mr. Watson did not conduct a proper investigation of Mr. Harvey's background and mental condition. Consequently, he failed to present readily available evidence of Mr. 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." Initial Brief, at 67-68. The State contends that this evidence would have been cumulative or irrelevant to the limited evidence presented, citing Hill v. State, 515 So. 2d 176 (Fla. 1987), cert. denied, 485 U.S. 993, 108 S. Ct. 1302, 99 L. Ed. 2d 512 (1988). But Hill provides no support for this argument. In Hill, the trial court refused to allow evidence relating to the character of the witnesses rather than to the character of the defendant. Here, Mr. Watson overlooked substantial mitigating evidence focusing on the defendant, Mr. Harvey.

The State also contends that the evidence of "negative aspects of Harvey's life and personality" was simply at odds with trial

counsel's reasonable strategy during the penalty phase. Response, at 27. The State confuses the negative aspects of Mr. Harvey's life, however, with the negative aspects of his personality. While presenting evidence of the negative aspects of Mr. Harvey's personality may have conflicted with Mr. Watson's strategy, compelling evidence relating to Mr. Harvey's background would not have conflicted at all. Additionally, any substantive discussion of Mr. Watson's "strategy" is undermined by the fact that Mr. Watson did not conduct a proper investigation of Mr. Harvey's background.

The mitigating evidence trial counsel failed to present would not have been cumulative or contradictory to the limited evidence actually presented. Indeed, because Mr. Watson failed to conduct a meaningful investigation, he presented a false and inaccurate picture of Mr. Harvey's life. Unlike the loving family portrayed by Mr. Watson, Mr. Harvey was raised in an abusive and dysfunctional environment. Had Mr. Watson conducted a meaningful investigation, he could have presented a true picture of Mr. Harvey's life, providing compelling evidence that would have swayed the jury into recommending a life sentence.

b. Mr. Watson Was Ineffective In Failing To Retain A Psychiatrist To Evaluate Mr. Harvey And Mr. Harvey Was Denied A Competent Mental Health Examination

The State asserts that Mr. Harvey has alleged nothing to show that his trial counsel was deficient for failing to retain a psychiatrist to evaluate Mr. Harvey's mental health. The State ignores the extensive evidence proffered by Mr. Harvey in his motion for post-conviction relief, most notably the proffered testimony of Dr. Norko, the Director of the Whiting Forensic Institute and a

Professor of Psychiatry at Yale University, retained by pro bono counsel at its own expense.

Dr. Norko performed the psychiatric testing and evaluation on Mr. Harvey that should have been conducted prior to the penalty phase of trial. (C.R. 949.) His tests revealed that Mr. Harvey suffers from major depressive and organic brain disorders. (C.R. 961-62.) He diagnosed Mr. Harvey as suffering from Dependent Personality Disorder. (C.R. 962.)

Mr. Watson did not present this compelling evidence because of his inexplicable failure to hire a psychiatrist, even after the court made funds available for that very purpose. Mr. Watson compounded his error when he advised Dr. Petrilla, the psychologist he did select, to avoid any inquiry with Mr. Harvey into the circumstances of the crime.[14/] Initial Brief, at 66-67. Consequently, Dr. Petrilla, the only expert Mr. Watson hired to assess Mr. Harvey's mental condition, was unable to offer an expert opinion on Mr. Harvey's mental state during the commission of the crime. Specifically, he was unable to address the statutory mental mitigating factors of diminished capacity, extreme emotional disturbance, and substantial domination by the co-defendant.[15/] See § 921.141(6)(e), Fla. Stat. (1993).

[14/] Indeed, Mr. Watson's limitation of Dr. Petrilla's inquiry undercuts the State's argument that Mr. Watson strategically focused only on the penalty phase of trial. This limitation illustrates that Mr. Watson was over his head and floundering in the preparation of his client's defense.

[15/] In Claim II.B., Mr. Harvey raises trial counsel's ineffectiveness for his failure to investigate and present evidence of Mr. Harvey's domination by his co-defendant.

Due to Mr. Watson's failure to conduct an adequate pretrial evaluation of Mr. Harvey's mental condition, the jury never heard evidence of Mr. Harvey's psychological and physiological state at the time of the killings. The State's assertion that this evidence would be "either cumulative to, or in direct contradiction to" the evidence at trial is nonsensical. Trial counsel's deficient performance deprived Mr. Harvey of due process by denying him the opportunity, through an appropriate psychiatric examination, to develop factors in mitigation of the imposition of the death penalty. See Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (finding defendant entitled to a competent psychiatrist for the evaluation, preparation and presentation of mitigating evidence); State v. Sireci, 536 So. 2d 231 (Fla. 1988) (affirming trial court's ruling at Rule 3.850 hearing that failure of psychiatrist to order certain testing deprived defendant of due process by affecting the presentation of mitigating evidence).

D. The Trial Court Erred In Denying 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.; OTHER GROUNDS OF ERROR.

1. Other Instances Of Ineffective Assistance Of Counsel; Claims I.A., I.D., XVI., IX., II.D., II.C., and II.F.

The State has generally responded to Mr. Harvey's other claims of ineffective assistance of counsel by either mischaracterizing the record or the nature of Mr. Harvey's claim, or by attributing error to "trial strategy." The State's response is unsupported by the record. Moreover, when viewed as a whole, these additional instances of ineffectiveness illustrate the breakdown of Mr. Watson's advocacy

on behalf of Mr. Harvey.[16] In cumulative effect, these errors denied Mr. Harvey a fair trial. See, e.g., United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (errors, individually harmless, in cumulative effect deprived defendant of a fair trial); Amos v. State, 618 So. 2d 157, 163 (Fla. 1993) (same).

Mr. Watson was ineffective because he failed to assert as grounds for his motion to suppress Mr. Harvey's confession the fact that the police used Mr. Harvey's wife as their agent to elicit that confession, in violation of Mr. Harvey's Sixth Amendment right to counsel.[17] (Claim I.A.) The State contends that this claim is procedurally barred because it was "raised and rejected on direct appeal." The State has misread the record, and cites in support of this argument portions of the collateral record. The record on direct appeal, on the other hand, establishes that Mr. Watson moved to suppress primarily on the ground that the police improperly induced Mr. Harvey's confession by promising him a visit with his wife,[18] (R. 468; 680 - 91), and that denial of the motion to suppress was

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[16] The breakdown of Mr. Watson's representation of Mr. Harvey was exacerbated by several trial court rulings. The trial court refused to appoint co-counsel to assist Mr. Watson, despite the notoriety of the crime. (Claim V.B.) The trial court failed to rule on Mr. Watson's motion to suppress until the eve of trial, after voir dire. (Claim V.A.) Finally, the trial court denied a continuance of the penalty phase trial. (Claim V.B.)

[17] Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246 (1964); United States v. Henry, 447 U.S. 264, 272-74, 100 S. Ct. 2183, 2188-89, 65 L. Ed. 2d 115 (1980); Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481 (1983).

[18] The only other ground for the motion to suppress was the fact that the public defender initially appointed to represent Mr. Harvey was prevented from consulting with him until after the 11-hour interrogation of Mr. Harvey. (R. 692.)

raised on direct appeal. (R. 3583, 3585.) Thus, contrary to the State's representation, the ground raised by Mr. Watson is not the same as the present claim. The present claim is that it violates due process for the State to enlist a wife as an agent of the State against her husband, a fundamentally different violation of law.

The State also dismisses as "trial strategy" Mr. Watson's insistence that testimony by a prison guard that Mr. Harvey had threatened to kill another inmate be admitted. (Claim XVI) Because the admission of such highly prejudicial evidence is reversible error, Jackson v. State, 451 So. 2d 458 (Fla. 1984); Delgado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990), any such trial strategy is unreasonable.

Additionally, Mr. Watson failed to object to repeated statements made by the prosecution and the trial court that improperly shifted the burden to Mr. Harvey of proving that the death penalty was not the appropriate sentence. (Claim IX) The State contends that Mr. Watson was not deficient in failing to object, because "such a claim has been rejected in numerous other cases," citing Arango v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140, 102 S. Ct. 2973, 73 L. Ed. 2d 1360 (1982), and Robinson v. State, 574 So. 2d 108, 113 n.6 (Fla.), cert. denied, ____ U.S. ____, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991). These cases, however, are much more limited than the State represents. In Robinson, this Court addressed only whether Florida's standard jury instructions improperly shifted the burden to defendant, and held that they did not do so. In contrast to the present record, this Court in Robinson did not have to consider other statements that may have improperly shifted the burden to defendant. Robinson, 574 So. 2d at 113, n.6.

Similarly, in Arango, the defendant based his claim on an instruction that impermissibly shifted the burden to the defendant. Arango, 411 So. 2d at 174. This Court carefully reviewed the record and held that despite the challenged instruction, the record as a whole "reveal[ed] that the burden of proof never shifted." Id. Indeed, contrary to the State's implication that such claims have no merit, Arango supports the principle that burden-shifting instructions must be reviewed in context of the entire record to determine the cumulative effect of the instructions and any extraneous comments by the trial court and the prosecution. This process was not done in the present case.

The State next asserts that Mr. Harvey's trial counsel made a "strategic decision" not to waive the mitigating circumstance of no prior history of significant criminal activity, and therefore the trial court properly denied Mr. Harvey's claim of ineffective assistance of trial counsel. (Claim II.D.) In support of its argument, the State cites Bush v. Wainwright, 505 So. 2d 409 (Fla.), cert. denied, 484 U.S. 873, 108 S. Ct. 209, 98 L. Ed. 2d 160 (1987). In so doing, the State misreads the law and, again, mischaracterizes Mr. Harvey's claim.

In Bush, this Court denied a claimed error involving "actions pursued following sound strategies of the defense." Id. at 411 (emphasis added). This Court did not say, as the State seemingly suggests, that a decision made as part of any strategy, no matter how unsound, is not subject to challenge. In Mr. Harvey's case, his trial

counsel made a critical decision affecting the jury's weighing of aggravating and mitigating circumstances.[19]

Mr. Watson did not know the law. This failure can hardly be deemed "strategy." His failure to waive this mitigating circumstance enabled the State to argue that Mr. Harvey would likely try to escape again. This no doubt affected the jury's decision whether Mr. Harvey should be sentenced to life in prison, or to death from which no escape is possible. Mr. Watson's complete unfamiliarity with the law controlling a critical stage of the trial amounted to ineffective assistance of counsel. See Cave v. Singletary, 971 F.2d 1513, 1518

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[19] The following colloquy occurred during the penalty phase of the case:

> MR. MORGAN [prosecutor]: I was wondering if the Defendant is going to waive any of the mitigating circumstances.
>
> MR. WATSON [defense counsel]: Are we going to waive any of the mitigating circumstances? I don't know what you mean by that.
>
> MR. MORGAN: Well, if certain of the mitigating circumstances are not waived the State can proceed up front with evidence as opposed to waiting for the rebuttal portion.
>
> MR. WATSON: Why is that?
>
> MR. MORGAN: It is just the law.
>
> MR. WATSON: To disprove the--
>
> MR. MORGAN: Right. Unless you waive it. Specifically, I'm speaking of no significant history of prior criminal activity.
>
> MR. WATSON: Well, I'm not going to waive.
>
> THE COURT: So that will be an issue and the state will have an opportunity to prove criminal history for that purpose only, to determine whether it is mitigating.

(R. 2578-79.)

(11th Cir. 1992); Brown v. State, 480 So. 2d 119 (Fla. 3d DCA 1985); Chapman v. State, 442 So. 2d 1024, 1026 (Fla. 5th DCA 1983).

The State also dismisses as "trial strategy" Mr. Watson's deficient and highly prejudicial closing argument at the penalty phase, whereby Mr. Watson distanced himself from Mr. Harvey, and conceded a number of aggravating factors, failing to argue the favorable mitigating evidence available to him. (Claim II.C.) The State asserts, without citing a single reference in the record, that the aggravating factors were established by Mr. Harvey's confession. Under the State's reasoning, therefore, trial counsel should abandon any attempts to challenge the existence of aggravating factors -- which must be established by the State beyond a reasonable doubt -- if his client has confessed. Clearly, the existence of a confession does not abrogate trial counsel's duty to argue all those mitigating factors supported by the evidence. He failed to do so. Mr. Watson's closing argument was little more than an unfocused and deficient general plea for mercy.

2. The Trial Court And The State Denigrated The Jury's Role In Sentencing In Violation of Caldwell v. Mississippi

At the penalty phase of trial, the trial court, over Mr. Watson's objection, repeatedly reminded the jury that its role in sentencing was merely advisory. Mr. Harvey raised this claim on direct appeal, and this Court denied relief without discussing whether Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), was applicable under Florida law. Harvey v. State, 529 So. 2d 1083, 1084 n.2 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989).

Since Mr. Harvey's direct appeal, the Eleventh Circuit has held Caldwell applicable to Florida's sentencing scheme. Mann v. Dugger, 844 F. 2d 1446, 1454 (11th Cir. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L. Ed. 2d 821 (1989). Mr. Harvey's appeal also predated the United States Supreme Court's decision of Espinosa v. Florida, ____ U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), which held Florida's then "especially wicked, evil, atrocious or cruel" aggravating instruction unconstitutionally vague. Although the Supreme Court did not address Florida's sentencing scheme in the context of a Caldwell claim, the Court noted that because Florida law accords great weight to the jury's advisory sentence, the jury and judge are deemed co-sentencers. Id. at 112 S. Ct. 2928. This is precisely the reason why denigrating the jury's role as merely "advisory" is inherently misleading.

The State asserts that this Court has held Caldwell inapplicable to Florida's sentencing scheme, relying on Combs v. State, 525 So. 2d 853 (Fla. 1988) and Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, ___ U.S. ____, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993). In Combs and Sochor, the Court held that Florida's standard jury instructions did not violate Caldwell. These holdings cannot logically be stretched to insulate all comments by the State or the trial court, outside the context of those instructions, that would denigrate the jury's sentencing role in violation of Caldwell. Clearly, Combs and Sochor cannot be read to suggest what the State contends, specifically, that Florida courts are not bound by Caldwell's principles.

Additionally, the State ignores a critical distinction between Combs and Sochor and the present case. In Combs and Sochor, the

defendants did not challenge the prosecutor's remarks and jury instructions under Caldwell, therefore the issue was not properly preserved for review. Sochor, 619 So. 2d at 292, Combs, 525 So. 2d at 856. In contrast, Mr. Harvey's trial counsel objected, and appellate counsel raised this issue on direct appeal. Because this issue was preserved, this Court may properly review this claim under Sochor, and should consider revisiting this issue in light of Espinosa v. Florida, 112 S. Ct. 2926 (1992).

3. Trial Court Erred In Instructing Jurors On The Application Of The Heinous, Atrocious Or Cruel And Cold, Calculated And Premeditated Aggravating Circumstances

The State submits that under James v. State, 615 So. 2d 668 (Fla. 1993), Mr. Harvey's claim that the trial court improperly instructed the jury on the application of the heinous, atrocious or cruel ("HAC") and cold, calculated and premeditated ("CCP") aggravating circumstances is procedurally barred. Response, at 35. However, in James, this Court reversed the conviction, and remanded for resentencing because the defendant "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. Because of this it would not be fair to deprive him of the Espinosa [v. Florida, 112 S. Ct. 2926 (1992)] ruling." 615 So. 2d at 669. Mr. Harvey has done no less and is deserving of the same remedy.

During his trial, Mr. Harvey objected to the then-standard instruction on HAC and CCP by proposing supplemental language that would clarify the vagueness of the instructions. (R. 3589.) See Beltran-Lopez v. State, 626 So. 2d 163, 164 (Fla. 1993), cert. denied, ___ U.S. ____, 114 S. Ct. 2122, 128 L. Ed. 2d 678 (1994) (instruction may be attacked either by submitting a limiting instruction or making

an objection to the instruction as worded). Mr. Harvey requested the addition of the word "shockingly" before the word "evil" within the HAC instruction in order to narrow the jury's construction of the phrase. He cited directly to State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974) (defining heinous as "shockingly" evil). (R. 3589.)

Mr. Harvey further requested that the CCP instruction be supplemented with the instruction: "In order to find this aggravating circumstance, you must find more than mere premeditation. You must find cold calculation as well as the absence of moral or legal justification." (R. 3589.) Although this Court has held that heightened premeditation is required, Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), the trial court overruled Mr. Harvey's motions and objections. (R. 2851, 2867.)

On appeal, Mr. Harvey raised the trial court's error in denying his specially requested jury instructions, relying upon the authorities cited by trial counsel in his specially requested jury instructions. Initial Brief on Direct Appeal, at 61-62. On direct appeal this Court found sufficient evidence supporting application of the HAC and CCP factors. See Harvey, 529 So. 2d at 1087-88. In attacking the HAC and CCP instructions at trial, and pursuing the objections on appeal, Mr. Harvey has preserved his Espinosa claim for collateral review. James, 615 So. 2d at 669 & n.3.

Here, the use of unconstitutionally vague HAC and CCP instructions that infected the jury's weighing process is not harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18,

87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (adopting Chapman). As the Supreme Court recently made clear, a jury is likely to disregard an instruction unsupported by the evidence, but it is "unlikely to disregard a theory flawed in the law." Sochor v. Florida, ____ U.S. ____, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). In Stringer v. Black, ____ U.S. ____, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), the Court held that "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."

A harmless error review is not a substitute for the review involved when a trial judge's sentencing findings are at issue on direct appeal. As this Court has explained, "[i]t is of no significance that the trial judge stated that he would have imposed the death penalty in any event," Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), for on direct appeal the Court is simply determining whether there was sufficient evidence to support an aggravator. On the other hand, a harmless error analysis asks whether the state has established beyond a reasonable doubt that the erroneous instruction did not contribute to the sentencing verdict. See e.g., Sullivan v. Louisiana, ____ U.S. ____, 113 S. Ct. 2078, 124 L. Ed. 2d 182, 189 (1993); Stringer, 112 S. Ct. at 1136; Sochor, 112 S. Ct at 2119.

Using this standard, it is clear that the unconstitutionally vague HAC and CCP instructions freed Mr. Harvey's jury to find aggravating factors based on anything about the crime they found disturbing. Given that mitigation was present, it would be highly speculative to find the instructions amounted to harmless error. See Preston v. State, 564 So. 2d 120, 123 (Fla. 1990) (finding harmful

error because "there was mitigating evidence introduced at the trial, even though no statutory mitigating circumstances were found [by the trial judge]"); Hitchcock v. State, 614 So. 2d 483, 484 (Fla. 1993) ("We cannot tell what part the instruction played in the jury's consideration of its recommended sentence.").[20]

Even if this Court did not apply the harmless error standard set forth in Chapman, choosing instead to ask whether, given the evidence, the outcome of the trial would have been different had the jury been properly instructed, see e.g., Davis v. State, 620 So. 2d 152 (Fla. 1993), cert. denied, ____ U.S. ____, 114 S. Ct. 1205, 127 L. Ed. 2d 552 (1994), it is impossible to conclude that a properly instructed jury would have found that Mr. Harvey either intentionally inflicted great pain on the victims or that the murder was torturous. See Arave v. Creech, ____ U.S. ____, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993). As three of this Court's justices noted in regard to the CCP instruction, the evidence "does not measure up to the planning and prearranging design that the Court was articulating in Rogers v. State, 511 So. 2d 526 (Fla. 1987)." See Harvey v. State, 529 So. 2d

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[20] In addition, the unconstitutionally vague instructions could not have been harmless because of the cumulative effect of the numerous other penalty phase errors. In particular, the trial court erred in failing to answer questions from the jury concerning the length of Mr. Harvey's sentence and the availability of parole. (R. 3044-47; see Claim VIII.C.) Refusal to allow argument or instruction concerning the availability of parole violates due process and may well violate the Eighth Amendment. Simmons v. South Carolina, ____ U.S. ____, 114 S. Ct. 2187, ____ L. Ed. 2d ____ (1994) (plurality opinion); id. at *12-*13 (Souter, J., concurring).

1083, 1088 (Fla. 1988), cert. denied, 489 U.S. 1040 (1989) (Ehrlich, J., dissenting).[21]

4. Remaining Claims

Finally, the State argues that Mr. Harvey has abandoned all claims noted in Section VI.D.7 of his initial brief, where certain claims from the Rule 3.850 Motion are reincorporated by reference because of space limitations. The State cites two civil cases in support of its argument. These cases, which are off point and distinguishable,[22] do not support the State's argument. But, although the State does not cite it, there is a case which may be read to do so. See Duest v. Dugger, 555 So.2d 849, 851-52 (Fla. 1990). For the reasons which follow, however, Duest should not apply here. Mr. Harvey has not abandoned or waived any claim asserted below.

Mr. Harvey's Rule 3.850 Motion was 359 pages. The trial court's order denying it was 1 1/2 pages. Excepting only Claim I.B, the trial court's reasoning is not determinable from its order, as even the State concedes. The resulting vagueness of the order on appeal is contrary to law and renders impossible the task of addressing specifically each error committed. See Section A above. In light of these facts, it is cruelly cynical of the State to assert that length limitations curtail Mr. Harvey's valid arguments against death, and to do so invites violation of due process.

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[21] In considering whether error was harmless, this Court should also consider the fact that the trial court improperly refused to instruct the jury on the statutory mitigating circumstance of diminished capacity. See Habeas Petition Reply, at 13. The trial court also failed to evaluate mitigating circumstance and committed other sentencing errors. (Claim VI.)

[22] See Harvey's Response To State's Motion To Strike Initial Brief, Case No. 81.836, at pp. 9-11.

In fact, were this Court to apply Duest here, the fundamental injustice of Mr. Harvey's case would be compounded yet again. Page limitations are a necessary response of our trial and appellate systems to a normal, constitutional adjudication of guilt. But if this motion and appeal demonstrate anything, it is that Mr. Harvey's trial was not normal and not constitutional; the system did not work here and the adjudication it produced is fraught with error and unreliable. When the trial system malfunctions, the appellate court can cure the error only by ordering a new trial. That is the remedy Mr. Harvey seeks. Mr. Harvey should not be penalized because the errors below are too numerous and pervasive to be exhaustively briefed and argued in 100 pages.

CONCLUSION

For the foregoing reasons, the Order Denying Postconviction Relief should be reversed, the trial court's judgment and sentence vacated and this case remanded for a new and constitutional trial.

Respectfully submitted,

HAROLD LEE HARVEY, JR.

By: [signature]
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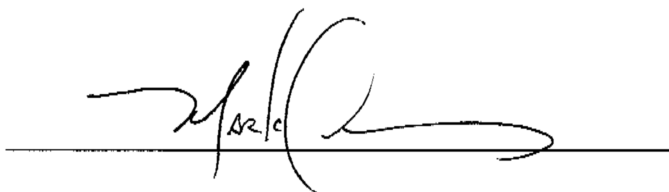
DATED: July 27, 1994.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply to State's Answer to Appellant's Initial Brief was served by U.S. Mail, postage prepaid, upon Sara D. Baggett, Esq., Assistant Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299 and David C. Morgan, Esq., Assistant State Attorney, Nineteenth Judicial Circuit, 411 South Second Street, Fort Pierce, Florida 34950, this 27 day of July, 1994.



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