IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1964
LT CASE NO.: 96-1277

DONALD BRADLEY
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant adopts Appellee's system of reference regarding the record on appeal for this Reply Brief, and reference herein to Appellee's Answer Brief will be noted by brackets as such: [AB page(s)].

SUMMARY OF THE ARGUMENT

The State's Answer Brief fails to overcome the merits of Appellant's claims of the ineffective assistance of trial counsel Chipperfield. Recanting the merits of the alibi defense in light of Bradley's "choice" of it only ignores the real issue: that the choice was meaningless and ill-informed due to trial counsel's failure to investigate competently. Such a failure is unbecoming of competent trial counsel exercising sound trial strategy in accord with prevailing professional standards. Chipperfield failed to read the Discovery documents thoroughly. Appellee's further claims regarding the Independent Act theory, *vis a vis*, the so-called exploitation of the duct tape evidence at trial, are simply incredulous.

That trial counsel unilaterally withheld from his experts, and from the sentencing court, key evidence of Bradley's mental state around the time of the crime prejudiced Appellant by proscribing statutory mitigation. Trial counsel should have enlightened his experts fully, especially after initial consultation revealed the alleged risk of their testimony. Trial counsel could have and should

have called the experts in front of the sentencing judge at the *Spencer* hearing, and this Court should require as much for future trials to improve the integrity of the capital trial process.

The Court should consider carefully any reliance on Carratelli v. State, 961 So. 2d 312 (Fla. 2007) as suggested by the State. The reasoning in Carratelli deserves reconsideration, and the circumstances are distinguishable from the case at bar.

ISSUE I: INVESTIGATION AND UTILIZATION OF DUCT TAPE EVIDENCE

Through over-generalization, the State mischaracterizes this issue as Bradley alleging "that trial counsel was ineffective for failing to exploit the 'duct tape' evidence." [AB 19]. As clearly articulated in Appellant's initial brief, trial counsel was ineffective for failing to realize the existence and utility of evidence inculpatory against Appellant's co-perpetrator, resulting in incomplete advice to Defendant regarding the substance of the evidence. The co-perpetrator received a sentence of life, not death. Due to this mis-information, Defendant "chose" to have trial counsel present an alibi as the primary defense, and the independent act defense as a "back-up." The prejudice was manifest in the inherent absurdity of these alternate theories. [IB 24].

The State argues that Appellant's claim fails because 1) "pursuing an Alibi defense was a reasoned strategy" [AB 27]; 2) "no evidence actually supports the

Independent Act theory of defense [AB 31]; and 3) "trial counsel did exploit the duct tape evidence." [AB 37]. Because the State's reasoning fails to address directly the true problem of trial counsel's failure to advise his client fully due to counsel's insufficient investigation, Appellant should be granted his relief sought.

1) <u>The Alibi defense</u>

The State effectually claims that because "Bradley chose the alibi defense," Chipperfield's "pursuit of an alibi defense was a reasoned tactical decision." [AB 27]. Appellee recounts well the story of trial counsel's Alibi defense. [AB 28-31]. This is insufficient to undermine Bradley's entitlement to relief, as the State completely skirts the true issue.

Regardless of the valor with which trial counsel propounded the failed Alibi defense, the error lies in his failure to investigate evidence thoroughly enough to have advised Defendant of the best theory of defense. The State purportedly corrects Appellant's assertion in his initial brief [IB 28] that Chipperfield "truly did not know about the duct tape exact match," claiming instead that he "testified he was aware of the FDLE report," and "that the end of the tape found in the master bathroom matched the duct tape found at the entry to the garage." [AB 22].

The pieces of tape of which the State claims Chipperfield knew at the time of trial were those numbered 9 and 14, from the respective submissions 22 and 23, as reported by FDLE. [PCR Vol. IV 749-50; AB 19]. This is apparent from the

record of the evidentiary hearing, wherein collateral counsel asked, "do you recall or are you aware that there was an end of tape found in the master bathroom that matched that on the garage door?" Trial counsel responded, ". . .I remember that, yes." [PCR Vol. V 810; AB 22].

In Appellee's own words, trial counsel "was . . . aware that the end of the tape found in the master bathroom matched the duct tape found at the **entry to** the garage." [AB 38, emphasis added]. As the record duly supports [PCR Vol. V 811-17], argued throughout Appellant's initial brief, Chipperfield did not know that the tape found **inside** the garage, balled up in a cinderblock, was directly linked to Linda Jones. Collateral counsel confronted Chipperfield about the foregone utility of this evidence, particularly "that the tape that's on the female that matches that in the master bedroom matches that at the doorway and the only tape that has any saw-toothed edge matches her and matches the bricks in the driveway. . ." [PCR Vol. V 817; underscoring added].

Chipperfield minced words in responding, "Yeah. I think you could -- that would support an argument that at some time before the police got there she removed her tape, left some of it in the bathroom, put some of it on the garage -- the door that came into the kitchen from the garage and put some of it wadded up in a ball inside a cinderblock inside the garage." [Id.] Despite Appellee's assertion

to the contrary [AB 38-9], trial counsel did not present this evidence to the jury, or more importantly discuss it with Bradley, discussed further *infra*.

Thus, it stands from the record that trial counsel "truly did not know about the duct tape exact match." [IB 28; AB 22; PCR Vol. V 810-17]. Returning, then, to Appellee's reasoning, adopted from the collateral court [AB 23-26], that trial counsel's use of the Alibi defense was a strategic decision, Appellant affirms that is simply not reasonable.

The State cites to Provenzano v. Singletary, 148 F. 3d 1327, 1332 (11th Cir. 1998) (noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice"), as well as to Asay v. State, 769 So. 2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under professional prevailing standards and was not a matter of sound trial strategy). [AB 18-19]. Appellant has carried his burden with respect to these two decisions.

Trial counsel failed to investigate fully the records provided him via the prosecution's discovery exhibit. Such failure could not have been reasonable. Surely, no competent counsel would make such a choice not to fully review the State's Discovery Exhibits. Just as surely, the State cannot be heard to argue that trial counsel Chipperfield was not ineffective based on his failure to investigate thoroughly.

2) <u>Evidence supporting the Independent Act theory</u>

Appellee presents the Court with a contradictory argument at this point. On the one hand, they argue that, "***<u>No evidence</u> actually supports the Independent Act theory of defense***." [AB 31, underscoring added]. Yet, they change gears and support the independent act theory by arguing that "***Trial counsel did exploit the duct tape evidence***." [AB 37]. The State pains to convince this Court that Bradley's claim of his co-perpetrator's independent act as the decisive measure is completely meritless, and then continues to expound the merits of the Independent Act defense in the next section of the Answer Brief. The arguments are logically inconsistent and therefore mutually exclusive, and the Court should decline to afford them deference.

In support of the State's claim that there is no evidence to support the Independent Act theory, the State effectually outlines an argument for the sufficiency of the evidence of intent. [AB 32-35]. Appellant has made no argument on this appeal regarding the sufficiency of the evidence of his conviction. The State's treatment of the issue, therefore, is misinformed or misleading.

The State also argues a lack of evidence presented by Bradley at the evidentiary hearing to corroborate the Independent Act theory. This line of reasoning further illustrates the State's failure to grasp, or its intentional deviation

from, the real issue: trial counsel's presentation of absurdly inconsistent defenses, based on the ill-informed "choice" by his client of the primary defense, itself premised upon counsel's own failure to investigate the evidence fully.

By its assertion that Appellant presented no evidence at the evidentiary hearing in support of the Independent Act theory, the State ignores the testimony of trial counsel Chipperfield regarding his lack of awareness of the duct tape's utility. This testimony was itself evidence in support of the independent act theory. Moreover, it supports Appellant's asserted grounds for relief when coupled with the trial testimony.

Had trial counsel properly investigated the FDLE reports regarding the duct tape, he would have realized the utility of the tape *inside* the garage, essentially proving - not merely suggesting - that Linda had entered the garage at some point after Bradley had left the home. The garage with a car that had blood in it and a missing tire iron (TR Vol. XII 1334, 1376 and TR Vol. XIV 1657). Competent advice on this point would have affected Bradley's ill-informed choice to proceed on the Alibi defense. Instead, Bradley was prejudiced by the presentation of absurdly inconsistent defense theories.

3) <u>Use of duct tape evidence at trial</u>

Aside from serving as the logical antithesis to the State's second point *supra*, this argument by Appellee is meritless for two further reasons: 1) trial counsel did

not "exploit" the duct tape evidence; 2) to any extent trial counsel made reference at all to the duct tape evidence, such was still ineffective.

In its Answer Brief, the State asserts "that trial counsel exploited the duct tape in support of both of his defenses." [AB 41]. "Exploit" is a serious over-statement of counsel's efforts, especially as presented by Appellee. The vast majority of Appellee's discourse regarding Chipperfield's "exploitation" of the duct tape evidence was merely a recount of how trial counsel introduced all four recovered pieces of tape, and the scientific analyses respecting them, into evidence through two expert witnesses. [AB 38-39]. Such can hardly be said to constitute "exploitation" of evidence. The utility of evidence to the theory of a litigant's case is discovered through a fully informed *argument* of counsel, and not simply by the introduction of the evidence into the record. Counsel must explain the significance of the evidence once it is introduced.

Rounding out Appellee's presentation of trial counsel's use of the "duct tape" evidence is a seemingly extraneous account of Deputy John Ring's recollection of all crime scene evidence other than duct tape. [AB 39]. This obviously did not elucidate trial counsel's exploitation of duct tape.

Finally, Appellee cites to the record instances where Chipperfield himself actually "exploits" - i.e. makes limited reference to - the <u>duct tape</u>:

> During closing argument, trial counsel argued that, after the McWhites left her home, Linda Jones actually killed Mr. Jones by

> using another weapon to hit her husband in the head four or five times. (TR Vol. XV 1814). Trial counsel told the jury that the tape found in the garage was from the same roll of tape used to bind Mr. Jones' hands and feet. Trial counsel argued that it was obvious that Ms. Jones moved around the house. He also pointed out that spots found in Ms. Jones' car tested positive for blood. He asked, rhetorically, what did Linda Jones go into the car for? [sic] (TR Vol. XV 1814).
>
> Trial counsel also pointed out that the Jones' shower had been used recently. Trial counsel argued that there was no reason for Linda Jones to take a shower unless she got blood on herself from beating her husband to death. (TR Vol. XV 1815). He argued that Linda Jones had the opportunity to get rid of the murder weapon before the police arrived by throwing it in the lake near her home. (TR Vol. XV 1815).

[AB 39-40; footnotes omitted]. In fairness, the following is the only material from trial counsel's closing argument, as distilled by the State in its Answer Brief, truly in support of counsel's "exploitation" of duct tape:

> We know she moved around in the house because there's a positive test for blood in the inside of the teal car. Did she go in the car? What for?
>
> There's duct tape balled up and stuck inside a cinder block in the garage, but both Patrick and Brian said they didn't do that. And we know it's from the same roll of tape that the tape was found that was used to wrap the hands and the feet. Mr. Plotkin asked that question. Well, why was she in the garage?

[TR Vol. XV 1814].

In a trial lasting several days, the immediately foregoing ninety-one words, originally spanning a total of eleven lines - not even one-half of one entire page - of volumes of trial transcript, are the only "exploitation" by trial counsel

Chipperfield of the duct tape evidence. Incorporating extraneous elements[1] also found within trial counsel's closing argument on pages 1814-15 of Volume XV of the trial record, the State's own account in its Answer Brief, quoted above, itself contains over twice as many words, and that is after excluding very lengthy footnotes. The State can hardly be heard to say that trial counsel "exploited" the duct tape evidence.

Regardless of whether this Court agrees that Appellee's account of trial counsel's reference to the duct tape evidence is fairly characterized as having "exploited" the same, any such reference still was ineffective. First, Trial counsel made no reference to the four pieces of duct tape as not only bearing relationship to each other, but also to Linda Jones specifically. Appellee acknowledges as much: "Trial counsel told the jury that the tape found in the garage was from the same roll of tape used to bind **Mr.** Jones' hands and feet." [AB 39]. Not co-perpetrator Mrs. Jones who received a life sentence.

Moreover, trial was not the time for Chipperfield's utilization of the duct tape evidence. Appellant's whole point is that Chipperfield failed to investigate the FDLE report thoroughly enough to advise Defendant of the utility of the

[1] Appellant notes again the logical inconsistency of Appellee's assertions that "no evidence supports the independent act theory" and that "trial counsel did use the duct tape evidence." All the extraneous matter referenced in the block quotation from the Answer Brief is Appellee's own account of trial counsel's limited amount of argumentation in favor of the independent act theory, which account negates Appellee's own previous argument.

evidence *before* trial, during preparation of the theory of defense. Trial counsel should not have argued alternate theories, so the State's point that trial counsel used the duct tape in support of the Alibi defense does absolutely nothing to address the sub-par investigation which led to Bradley's ill-informed "choice" of the same Alibi defense. The choice was meaningless because it was ill-informed. Such was really no "choice" at all. Citizens utilize attorneys, doctors, accountants and investment brokers for informed advice, not for advice that is not based on thorough investigation. Trial counsel provided advice without a thorough investigation and by doing so provided ineffective assistance of counsel.

The State's three premises regarding this issue of whether trial counsel was ineffective for failing to investigate the duct tape all have one common element: they address the prejudice prong of the *Strickland* test. Appellant submits again that the alternative defenses of Alibi and Independent Act were inherently prejudicial. They were logically inconsistent to the point of absurdity, insulting the common intelligence of the jury. Had trial counsel realized the full utility of the duct tape evidence, counseled Appellant as to its implications regarding the proper theory of defense, and *then* actually utilized such evidence at trial, there is a reasonable probability that Appellant's jury would have found that, based on the peculiar behavior of Linda Jones after the murder, Appellant could not be found to have killed Jack Jones to the exclusion of all reasonable doubt respecting the

independent act of Linda Jones. The one thing that all trial attorneys and defendants have to have with a jury is credibility. Arguing absurd contradictory theories destroys credibility. The fact that Linda Jones, the wife who put the wheels to this crime in motion, was sentenced to life and this defendant to death is prima facie evidence that credibility was lost as a result of counsel's failure to investigate.

ISSUE II: PENALTY PHASE MITIGATION EVIDENCE

Appellee's argument concerning this second issue consists of three main points: 1) "Bradley has failed to show any prejudice" [AB 54]; 2) Bradley . . . failed . . . to prove deficient performance" [AB 55]; 3) "trial counsel made a reasonable tactical decision not to call Dr. Krop or Dr. Szuch." [sic] [AB 57]. Appellant addresses the second and third points before the first.

The State asserts two further grounds in support of the more general proposition of Bradley's failure to prove deficient performance. [AB 55]. The substance of the first reason is indiscernible: "First, Bradley did not call a single additional witness, at the evidentiary hearing, who he avers trial counsel should have, but did, not call to testify." [Id.] Assuming that the claim has something to do with collateral counsel's decision not to call any witnesses other than Chipperfield at the evidentiary hearing, Appellant shall address the point *infra*

during discussion of the State's claim of Bradley's failure to show prejudice (ground 1 of this Issue II).

The State argues, "second, the record shows that trial counsel investigated thoroughly in preparation for the penalty phase." [AB 55-56]. A dissertation by the State of what trial counsel did in preparation only masks the crux of Appellant's argument on this issue. Trial counsel thwarted a thorough investigation of Bradley's mental state by unilaterally withholding records from experts and from the trial judge. The withheld records showed on their face that Bradley not only suffered from mental problems in the past, but also reasonably about the time of the murder based on the testimony of the co-defendants, the McWhites. Their testimony and his medical history are consistent with a blackout. Thus, mitigating premeditation and providing the statutory mitigator of extreme emotional distress.

The evidence established that Bradley well could have needed to be medicated during the time when he committed the crime. Clearly, medical testimony by a qualified expert that the Defendant suffered at the time of the crime from mental afflictions would warrant statutory mitigation. Moreover, even after consulting early-on with the experts Krop and Szuch, and realizing the alleged risk involved in presenting them during the penalty phase, trial counsel should have then furnished the withheld records to inquire whether utility might be realized

from the experts at the *Spencer* hearing. Finally, even if not through experts, trial counsel could still have enlightened the trial judge at the *Spencer* hearing by introducing the documents. [IB 35-36]. The documents, on their face are sufficient to create a nexus between his history and the behavior described by the State's witnesses.

This Court and the State must concede that medical records demonstrating the propensity for violent outbursts and blackouts, coupled with the McWhite's testimony, would have been compelling to demonstrate the statutory mitigator of extreme emotional distress.

Regarding his purportedly strategic decision, "In trial counsel's mind, there was a risk that calling Dr. Krop and Dr. Szuch would increase the chance that some things would come before the jury that he did not want jurors to hear." [AB 50]. Although trial counsel "did consider the possibility that Bradley had a panic attack or anxiety attack at the time of the murder," there was no "evidence of that except the McWhites' testimony," of which counsel "would have to be careful because the same evidence showed the brutality of the attack." [AB 52].

That fear was unfounded. The same penalty phase jury had just convicted Defendant of first-degree murder from all the evidence at the guilt phase. How anything to be revealed by paper records regarding "Bradley's increased anxiety, possible bipolar symptoms, increased violence, and increased risk of violence

without prescriptions" [AB 45] would surprise the jury with respect to Defendant's character is difficult to understand. During the guilt phase, the jury saw the crime scene photos and autopsy photos. They were keenly aware of the brutality of the attack by the time they were at the penalty phase.

Instead, trial counsel should have enlightened his experts, especially after initial consultation revealed that their opinions could be counter-productive. Appellee posits that "Contrary to Bradley's suggestion now, Dr. Krop was not kept in the dark about Bradley's risk for violence . . . [nor] about Bradley's anxiety disorder and panic attacks." [AB 46-47]. The Defendant verbally explained his experiences. How a verbal explanation by a Defendant facing a possible sentence of death would be as reliable as the documented medical history of those problems is beyond explanation, and is incredulous. Common sense dictates that any such verbal explanation was clearly self-serving. Trial counsel should have done more and this cannot be dismissed as a strategic decision without prejudice.

Appellant maintains that trial counsel should have presented all the evidence of mental infirmity, whether via expert witness or by introducing the medical reports directly, to the trial judge at the *Spencer* hearing. Appellee effectually fails to address this aspect of Appellant's argument at all, giving the following lone cursory statement: "[Trial counsel] could have called Dr. Krop at the *Spencer*

hearing. He did not do so, however." [AB 51]. That is the point, counsel could have but failed to do so.

This Court should instill a duty for trial counsel to apprise the sentencing judge at the *Spencer* hearing of anything not otherwise presented during the penalty phase which might reasonably establish statutory mitigating factors. Such a duty would overcome the State's claim in this case that Bradley cannot show prejudice because of his failure to call any other witnesses at the evidentiary hearing. In future capital trials in Florida, such a duty would ensure the reliability and validity of the sentence of death. Trial counsel was aware that Linda Jones, the victim's wife, put the wheels in motion for this crime. Counsel was further aware that the same sentencing Judge gave her the statutory mitigator of extreme emotional distress without any expert testimony or mental health evidence. She received a life sentence.

ISSUE III: PRESERVATION OF BURGLARY ISSUE

Appellant now addresses the State's reliance on Carratelli v. State, 961 So. 2d 312 (Fla. 2007) for the notion that *Strickland's* prejudice prong cannot be established based on the outcome of the appeal. The reasoning of the Court in Carratelli deserves attention here to demonstrate its inapplicability.

The omission complained of by Carratelli was trial counsel's failure to preserve for direct appeal his cause challenges to three trial jurors. The Fourth

District on direct appeal had found that the trial judge had abused discretion in denying the cause challenges, but also ruled that the challenges were unpreserved for direct review. In his collateral attack, *Carratelli* alleged ineffective assistance of counsel for the lack of preservation. The Fourth District denied relief, holding that *Carratelli* could not show that a biased juror had actually served on the trial jury. Carratelli v. State, 915 So. 2d 1256, 1258 (Fla. 4TH DCA 2005).

The State points to this Court's decision reported at Carratelli v. State, 961 So. 2d 312 (Fla. 2007) affirming the Fourth District. The portion of the holding alleged to apply here is based on the faulty premise that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding *whose result is being challenged*." *Strickland*, 466 U.S. at 696 (emphasis added). In this case, the proceeding 'whose result is being challenged' is the trial." Carratelli, 961 So. 2d at 322. (emphasis in original). The Court approved the decision of the Fourth District Court of Appeal in the same case. Id. (citing *Carratelli II*, 915 So. 2d at 1263-64). Such approval is flawed insofar as it lacks a firm foundation.

In agreeing with the reasoning of the Fourth District, and purportedly distinguishing the reasoning of the United States Court of Appeals for the Eleventh Circuit in Davis v. Secretary for Department of Corrections, 341 F.3d 1310 (11th Cir. 2003), this Court ignored the notion that a trial as the "proceeding" as contemplated by *Strickland* is not truly complete until the conviction is affirmed

through the entire process of direct appeal. This Court's own emphasized excerpt from *Strickland* as cited in *Carratelli* contains the word "**result**." That "result" is the finality of the conviction and the "proceeding *whose **result** is being challenged*" is the entire process of trial followed by direct appeal.

Such would also be to say that because a conviction is not final until exhaustion of the defendant's right to appeal, the overall "proceeding" similarly cannot be complete until such time. After all, the ultimate finality of the conviction is the end of the entire criminal *process*; it stands to reason that any "proceeding" engulfs that *entire process*.

Moreover, prejudice at trial necessarily is demonstrated on direct appeal. The direct appeal **is** the procedural vehicle by which trial error is shown. Trial counsel has an affirmative duty not only to defend well at the trial, but in so doing also to lay a foundation sufficient for appellate counsel to challenge and correct trial errors. It is sophistry for the Fourth District in *Carratelli*'s direct appeal to acknowledge the error by trial counsel, yet then the same tribunal to disallow its assertion by *Carratelli* as prejudicial on a collateral attack. For this Court to sanction such a result compounds the error. The Court should overrule *Carratelli*.

Even if *Carratelli* is sound, it is distinguishable from the case at bar. *Carratelli* concerned the preservation of the denial of a cause challenge to a juror, a very specific and uniquely exercisable trial right. In Appellant's case, any of

several procedural objections could have been raised, including pre-trial motions to dismiss or in limine regarding consent, and post-evidence requests for specific instructions or for judgment of acquittal. Trial counsel Chipperfield failed to preserve the error in any of these ways. The Court should refrain from reliance on *Carratelli* in determining the case at bar.

ISSUE IV: CUMULATIVE ERROR

Plainly, trial counsel's performance was ineffective. He failed to advocate in accord with prevailing professional standards. His lackluster investigation led to Bradley's ill-informed choice of an Alibi defense, absurd when coupled with the Independent Act defense as a back-up. His unjustified non-disclosure of essential medical records from expert witnesses resulted in the impossibility of the sentencing court to make a fully-informed decision regarding statutory mitigation, and ultimately the court's sentence of death. Trial counsel's failure to preserve error resulted in Appellant's inability to have his case examined in light of a lurking problem in Florida criminal law which was ultimately addressed by this Court regarding the defendant *Delgado*. These errors are real, and they compound each other. To any extent that one misdeed by trial counsel might not warrant relief standing alone, the three matters together certainly justify relief.

CONCLUSION

For all the foregoing reasons, the State has failed to show that Appellant is not entitled to the relief sought. This Court should reverse the decision of the trial court and deem the performance of Appellant's trial counsel ineffective. Appellant requests this Honorable Court to commute Bradley's sentence to life, or in the alternative, set aside his sentence of death and remand for resentencing. Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Meredith Charbula, Esq., Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via facsimile transmission and U. S. Mail this _____ day of February, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

Respectfully submitted,

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