IN THE SUPREME COURT OF FLORIDA

ROY ALLEN HARICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

_____/

73930

CASE NO.

EMERGENCY: DEATH WARRANT
Signed for March 29 - April 5, 1989. Execution scheduled for 7:00 a.m., March 30, 1989;temporarily Stayed for twenty-four hours

ON APPEAL FROM THE SUMMARY DENIAL
OF POST CONVICTION RELIEF BY THE
CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

I. BACKGROUND:

Roy Harich testified that on June 26, 1981 between 4:00 p.m. and 9 p.m. he consumed about fifteen cans of beer and six marijuana cigarettes and became "mildly drunk." Trial Transcript, Vol. II, at 502-08. On his way home from a friend's house he met Carlene Kelley and Deborah Miller at a gas station in Daytona Beach. The two girls did not know Harich, but after some discussion they accepted a ride with him. While in Harich's van, the three smoked a small amount of marijuana.

They stopped at a convenience store to purchase a six-pack of beer. Harich then drove the girls to the woods where he had a marijuana patch. The marijuana leaves were too damp to smoke, so they placed the leaves under the hood of the van to dry. After waiting for about an hour, Harich began to discuss the sexual problems he had been having with his wife. At this point, Miller asked if they could leave. They got into the van, but Harich drove only a few yards before stopping. Using a gun, he forced Carlene Kelley to have sex with him. He then offered to give them a ride back, promising not to hurt them. The girls accepted.

After a short drive, Harich told the two girls that they would have to get out and walk the rest of the way. He instructed them to lie down behind the van while he drove away. The two then laid down on their stomachs behind the van. Harich wrapped his gun in a towel and shot both Kelley and Miller in the

back of the head. He then used a knife to cut both their throats. Kelley died instantly, but Miller survived. Harich drove away.

Miraculously, Miller remained conscious and made her way to the highway. A passing motorist picked her up and drove her to the hospital. At the hospital, Miller described her assailant and his van. She told the police that her attacker's name was Roy. Trial Transcript, Vol. I, at 228. At trial, she made an in-court identification of Harich.

Harich was the only witness for the defense. He claimed that the alcohol and drugs he consumed the night of the murder caused him to forget the events in detail until December, 1981. Harich testified that when his memory became clear he remembered driving Kelley and Miller into the woods to look for marijuana. However, he denied sexually assaulting, attempting to kill, or killing anyone. He claimed that he left the girls, unharmed, at a nearby convenience store at approximately 11:00 p.m., and arrived at home 11:10 p.m. This was about fifty minutes before the police learned of the incident.

The State of Florida charged Harich with first degree murder, use of a firearm in the commission of a felony, and two counts of kidnapping. The jury found Harich guilty of all charges, then advised the trial court to impose the death penalty, by a recommendation of nine to three (R 920, 1253).

In the penalty phase, Harich presented a clinical psychologist who testified that, though Harich was competent at the time of the offense, he was operating at that time under the

influence of extreme mental or emotional disturbance because of his consumption of substantial amounts of drugs and alcohol. Harich also called character witnesses who testified that he worked very effectively as a volunteer fireman and that he had been a model prisoner while confined in jail before his trial. The state presented as evidence in the penalty phase the testimony of two law enforcement officers, Sergeants Vail and Burnsed, concerning statements Harich had made during interrogation which had been suppressed during the guilt phase of the trial. Sgt. Vail testified that shortly after Harich's arrest he stated that he left the girls on the ground behind the van and that at no time did Harich tell him that he left the girls at a convenience store (R 756-758). The only new information contained in the state's penalty-phase testimony was a statement made to both Sgt. Burnsed and Sgt. Vail. Sgt. Burnsed testified that Mr. Harich told him and Vail that he must have thrown the gun out of the van window into a drainage ditch next to the dirt road. Sgt. Burnsed stated that they were unable to locate the weapon despite a search at the appropriate location (R 758-763).

The trial court sentenced Harich to death for the murder on April 9, 1982. The trial judge found as aggravating circumstances: (1) that Harich murdered Carlene Kelley while he was committing or attempting to commit the crimes of sexual battery and kidnapping; (2) that he killed Carlene Kelley for the purpose of avoiding and preventing his lawful arrest; (3) that the killing of Carlene Kelley was especially heinous, atrocious,

and cruel; and (4) that the capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. The trial judge found one mitigating circumstance, specifically, that Harich had no significant prior history of criminal activity.

Notice of appeal was filed on July 19, 1982. The Initial Brief of Appellant was filed on or about November 2, 1982.[1] The

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[1]The grounds raised for relief on direct appeal to the Supreme Court of Florida are as follows: (1) the evidence was insufficient as a matter of law to establish premeditation due to Harich's voluntary intoxication and Harich was denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida; (2) the trial court committed reversible error in allowing rebuttal testimony (A) that the police had received a call at 11:59 p.m. on June 26, 1981 to search a particular area for a girl lying in the road when Harich had testified that he arrived home at approximately 11:05-11:10 p.m. and had watched the news and the medical examiner's testimony estimated the time of death at 12:30 a.m. (Testimony showed Harich could not have been home at 11:05-11:10 p.m. on June 26, 1981); (B) Harich told Sgt. Wall that "I remember driving through the woods with the girls. And then, next thing, I got back in the van, the girls were lying behind, on the ground, as I drove away. The surviving victim Deborah Miller testified that Harich did not leave her and Carlene Kelley alive at a convenience store (Testimony rebutted Harich's defense that Sgt. Wall was mistaken or lying and that he had left the girls alive at a convenience store). Trial court's failure to exclude such testimony violated Harich's rights to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United State's Constitution and Article I, Section 9 of the Florida Constitution; (3) the prosecutor improperly commented on defense trial tactics in his final argument (recounting the advice of Percy Foreman to blame someone else and muddy the waters; "state's evidence not hidden as there is open discovery - first time defendant came forward to tell story was yesterday." The result of this improper argument denied Harich his constitutional right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. I, Sec. 9 and 16, Fla. Const. With regard to the sentencing phase, Harich asserted as error that (4) the trial judge improperly allowed the state to present evidence of his statements which had previously been suppressed in the guilt phase that he had left the girls on the ground behind the van and that he must have thrown the gun out of the van window into a

Answer Brief of Appellee was filed on or about December 22, 1982. A Reply Brief was filed on January 26, 1983. In an opinion dated

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drainage ditch next to the dirt road. Such evidence was irrelevant to any issue in the penalty-phase; constituted evidence of a non-enumerated aggravating circumstance, violated Edwards v. Arizona, 451 U.S. 477 (1981) and denied Harich his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution (5) the prosecutor engaged in improper argument during the penalty phase - prosecutor's argument concerning marks on a towel being I.D. marks of lab personnel not laundry marks in response to defense argument in guilt phase that police should have checked it out - was an accusation that defense counsel misled the jury during the guilt phase; prosecutor's comments on acts done to surviving victim improper as to aggravating factors in this murder; prosecutor injected personal opinion that crime was most heinous, atrocious, evil and cruel that he has known. Harich was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec 9 and 16, Fla. Const.; (6) that the standard jury instruction used in the penalty phase is improperly worded to require seven votes to recommend the imposition of a life sentence - deprived Harich of a fair sentencing recommendation in accordance with statutory procedures and unconstitutionally infected sentencing recommendation with partiality in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 9 and 16, Fla. Const.; (7) the trial judge erred in applying the four aggravating factors to this murder: findings of the trial judge fail to cite any facts in support of three out of four aggravating circumstances and the facts cited in support of the finding that the murder was "especially wicked, evil, atrocious and cruel" cites only very limited facts; impermissible doubling up - same facts cited in support of aggravating factor that murder was committed during commission of or attempt to commit sexual battery and kidnapping and aggravating factor that the crime was committed for the purpose of avoiding or preventing a lawful arrest; sexual battery and kidnapping complete and girls were free to go before murder - aggravating factor that crime committed during commission of sexual battery and kidnapping improperly found; aggravating factor that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody not proven or supported by factual findings; murder was not especially heinous, atrocious or cruel - no acts of torture, no more shocking than norm of capital felonies; statutory language provides for "especially heinous, atrocious or cruel," finding murder was "especially wicked, evil, atrocious and cruel" is an unenumerated aggravating circumstance; state argued primarily a felony-murder theory of guilt and there is no factual basis for the finding that the capital homicide was committed in a cold, calculated and premeditated manner; (8) the

August 25, 1983, the Supreme Court of Florida affirmed the conviction and sentence. Rehearing was denied on October 12,

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trial court should have found statutory mitigating factors (A) that Harich was under the influence of extreme mental or emotional disturbance and did not have the ability to appreciate the criminality of his conduct or to conform that conduct to the requirements of law - on the basis of the testimony of independent clinical psychologist Dr. Elizabeth McMahon that Harich's behavior was the product of the lowering of his inhibitions by the alcohol and marijuana he consumed and something that triggered an area of conflict; (B) that Harich was 22 years old at the time of the offense; (c) the trial court should further have found as nonstatutory mitigating factors the fact that Harich would be a model prisoner as well as his service to the community as a fire-fighter and upstanding reputation (9) it was reversible error for the trial judge to refuse to order a presentence investigation report; (10) the Florida capital sentencing statute is unconstitutional on its face and as applied, denies due process of law and constitutes cruel and unusual punishment: (A) fails to provide any standard of proof for determining that aggravating circumstance outweigh mitigating factors; (B) does not define "sufficient aggravating circumstances"; (C) does not define each aggravating circumstance; (D) the aggravating circumstances have been applied in a vague and inconsistent manner; (E) the Florida capital sentencing process does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors (F) the failure to provide the defendant with notice of the aggravating circumstances on which the state will seek the death penalty deprives the defendant of due process of law (G) execution by electrocution is cruel and unusual punishment (H) the Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law (I) the Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community (J) the rule of Elledge v. State, 346 So.2d 998 (Fla. 1977), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the Constitution (K) the amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(i) (cold and calculated) renders the statute in violation of the Eighth and Fourteenth Amendments to the Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance (L) it is a denial of equal protection to allow as an aggravating circumstance the fact that

1983. Harich v. State, 437 So.2d 1082 (Fla. 1983). A petition for writ of certiorari[2] to the Supreme Court of Florida was subsequently denied by the United States Supreme Court. Harich v. Florida, 465 U.S. 1051 (1984).

On February 20, 1986, Governor Graham denied clemency and signed a death warrant effective Thursday, March 13, 1986, through noon, on Thursday, March 20, 1986. Execution was scheduled for Wednesday, March 19, 1986 at 7:00 a.m. On or about March 16, 1986 Harich filed a motion to vacate judgment and sentence in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida.[3] The motion was denied in an

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the defendant committed a capital felony while on parole and not legally incarcerated, but to prohibit a finding of an aggravating circumstance in the same circumstances for a defendant on probation (M) Supreme Court of Florida merely ascertains whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction but should review death sentences to insure that similar results are reached in similar cases and should review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted.

[2] As grounds for invoking the discretionary jurisdiction of the United States Supreme Court on certiorari Harich alleged that (1) he was denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution as a result of the perfunctory and conclusive nature of the trial court's written findings of fact in support of the death penalty which precluded meaningful review and (2) the Florida Supreme Court's affirmance of Harich's conviction and death sentence left unredressed the trial court's denial of Harich's right to due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by ruling that previously suppressed statements of Harich could be introduced during the penalty phase through the testimony of Sergeants Vail and Burnsed.

[3] The grounds for relief raised in the Rule 3.850 motion are as follows: (1) the trial court failed to instruct the jurors regarding the potential effect of intoxication on specific intent and defense counsel unreasonably failed to request a jury instruction with regard to intoxication in violation of the Sixth, Eighth and Fourteenth Amendments; (2) trial counsel

order dated March 18, 1986. An appeal from the summary denial of post-conviction relief was taken to the Supreme Court of Florida,

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ineffectively prepared for the asserted alternative voluntary intoxication defense and should have requested expert assistance on this issue (report of Dr. Harry Krop, Ph.D., clinical psychologist tendered reflecting his opinion that Harich suffered from alcohol-idiosyncratic intoxication and was responding impulsively to the emotional strain in his life at that time and was not capable of forming the specific intent to kill, kidnap or sexually assault the victim); (3) the prosecutor's closing argument in the penalty phase was inflammatory, improper, prejudicial and constitutionally defective and defense counsel was ineffective for failing to object-prosecutor stated in effect that of forty cases only five have resulted in penalty phase proceedings and indicated that majority of cases do not come to this stage; crime is most heinous, atrocious, evil and cruel he has known; prosecutor commented on right to remain silent and consult an attorney and argued in support of aggravating circumstances that murder was committed to avoid detection that Harich's first reaction was to call a lawyer not the police-also referred to post-Miranda silence in guilt/innocence phase; contrasted procedural safeguards afforded to the defendant with the safeguards offered the victim, stating "Carlene didn't get the opportunity to be evaluated by a psychologist. She didn't have the opportunity to let her side be heard. Carlene will not return to society in twenty-five years"; argued from expertise that age was not a mitigating factor since "our common knowledge and our experience shows us that most crimes are committed by people in the eighteen to twenty-five year range"; misled the jury that because Dr. McMahon testified Harich was sane it meant he was not entitled to the substantial impairment mitigating circumstance; prosecutor invoked the testimony of Sgt. Vail and Burnsed to prove a nonstatutory aggravating circumstance, bad character or untruthfulness, i.e., that Harich had been untruthful when he denied have any memory of the offense. These arguments distorted the balancing process and a new sentencing hearing is required under Caldwell v. Mississippi, 105 S.Ct. 2633 (1985); (4) trial counsel was ineffective for failing to investigate facts rebutting statutory aggravating circumstances and for failing to investigate and present mitigating testimony of family members, preachers, teachers, friends and others who were willing to testify. Dr. McMahon was not asked to evaluate specific intent which could have refuted statutory aggravating circumstances. Affidavits reflected the following undiscovered mitigating circumstances: Roy Harich was the only child of a German immigrant who had spent time in a Russian concentration camp in Yugoslavia; he was effectively raised by his grandmother although his parents lived close by; he was a model child, always obedient and perfectly behaved and his grandmother spoiled him; when he entered school he returned to his parents' house and the transition was difficult; the extended family structure was

which court subsequently upheld said summary denial on March 18, 1986. Harich v. State, 484 So.2d 1239 (Fla. 1986).[4]

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confusing to him; other children taunted him about his German accent; he would walk away to avoid a conflict during his childhood and adolescence; he was overly sensitive and concerned about what other people thought of him; he was extremely gullible and easily led by his peers and often taken advantage of by them; his father was the disciplinarian and they had a love-hate relationship; his grandfather was also a strict disciplinarian and used physical violence, hitting him in the back of the head; he was an easygoing teenager, had a close relationship with his parents, was active in their church and served as an altar boy; he was a good student, respectful of authority, even-tempered and popular and went out of his way to avoid violence and conflict; he began drinking heavily and using marijuana at age fifteen, skipped classes and received near-failing grades; he was introverted, suppressed feelings and could not verbalize feelings and emotions; he suffered from spells during which he was out-of-touch with reality and after which he could remember nothing; he got his future wife pregnant when she was sixteen but she put the baby up for adoption despite his desire to marry her-his parents disappointment was a source of conflict in their marriage; he was a hard worker and became a skilled carpenter; he took firefighting classes and served as a volunteer fireman; he was married at nineteen but the marriage deteriorated due to the interference of his parents; he became withdrawn and incommunicative and sexual relations decreased and he had an overwhelming workload; his physical and mental health deteriorated, he could not follow conversation and acted spacey and lost interest in personal hygiene; suffered from Alcohol Idiosyncratic Intoxication and became aggressive after ingesting small amounts of alcohol; (5) the prosecutor and trial judge misled the jury about the weight accorded its sentencing verdict in violation of the Eighth Amendment as applied in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985); (6) the "avoid lawful arrest' aggravating circumstance was not supported by the evidence under the standard applied in Doyle v. State, 460 So.2d 353 (Fla. 1984)--there was no evidence the motive for the homicide was to avoid arrest for a prior felony--prosecutor improperly commented on the exercise of constitutional rights, arguing that the jury could look to Harich's conduct after the murder--talking to an attorney instead of the police-as evidence of this circumstance--Doyle holds that the mere fact that a sexual assault occurred and that the victim might be able to identify her assailant is not sufficient proof of motive (7) on its face as applied, the aggravating circumstances, "especially heinous, atrocious, or cruel "has failed adequately to channel the sentencing decision patterns of juries and judges in Florida, and its widespread application among cases and its singularly overwhelming mandate for death within each case has thereby resulted in a pattern of arbitrary and capricious sentencing like that found

On or about March 17, 1986, Harich filed a petition for writ of habeas corpus in the Supreme Court of Florida.[5] Said petition

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unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). Aggravating circumstance not sufficiently limited in its application to provide a principled way of distinguishing the cases in which it is found from the cases in which it is not found. Definitions in State v. Dixon, 283 So.2d 1 (Fla. 1973), do not cure facial overbreadth and vagueness. Penalty phase instructions did nothing to cure the unlimited applicability of this aggravating factor--did not call for a reading of the last sentence in Dixon's limiting construction "what is intended to be included are those capital crimes where the actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Unlimited discretion has not been cured by the affirmance of those sentences by the Supreme Court of Florida. Circumstance has been applied in almost every kind of capital homicide except where death is instantaneous and the victim has no forewarning that death is imminent and the killing was not execution style; (8) Harich was denied due process of law and a fair trial by an impartial jury when the trial court instructed the jury that seven or more of their number were required to return a sentencing recommendation--a majority vote is not required for a life recommendation. The Supreme Court of Florida held the error nonprejudicial in light of the 9 to 3 jury vote but under Caldwell v. Mississippi, the jury's verdict was tainted by misinformation.

[4] Harich filed no briefs on appeal from the denial of post-conviction relief but incorporated all such claims in a pleading entitled "Application for Stay of Execution and Appeal from the Trial Court's Actions Denying a Stay, a Hearing on Defendant's 3.850 Motion, and Denying the Relief Requested Therein." The Supreme Court of Florida held that all but two of Harich's claims either were raised or could have been raised in his appeal on the merits and were not properly subject to review in a 3.850 proceeding. The two issues found to be properly before the court were the claims that trial counsel ineffectively prepared for the asserted alternative voluntary intoxication defense and unreasonably failed to investigate facts rebutting statutory aggravating circumstances and to investigate and present the mitigating testimony of family members, preachers, teachers, friends and others, all of whom were willing to testify. Harich v. State, 484 So.2d 1239, 1240 (Fla. 1986).

[5] Harich raised the following grounds for relief in his habeas petition to the Supreme Court of Florida: (1) the state may not constitutionally exclude for cause from the guilt phase jurors who can fairly determine guilt or innocence in a capital case, but who cannot impose a sentence of death in a subsequent penalty

was denied the same day. Harich v. Wainwright, 484 So.2d 1237 (Fla. 1986). Certiorari was denied on June 9, 1986. Harich v. Wainwright, 106 S.Ct. 2908 (1986).[6]

On March 18, 1986, Harich filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Orlando Division.[7] Relief was denied the same day and the district court dismissed the petition and denied

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proceeding, an issue then being considered by the United States Supreme Court in Lockhart v. McCree, No. 84-1865 (2) ineffective assistance of appellate counsel for failing to argue that the trial court erred in not instructing the jury on the affirmative defense of voluntary intoxication (3) ineffective assistance of appellate counsel for failing to argue that trial counsel failed to request a jury instruction on voluntary intoxication and (4) ineffective assistance of appellate counsel for failing to argue that the state attorney incorrectly advised the jury in final argument that voluntary intoxication could never be a defense to premeditated murder.

[6] As ground for invoking the discretionary jurisdiction of the United States Supreme Court, Harich argued pursuant to Lockhart v. McCree that the biasing effects of the death qualification process obtain constitutional stature even though no venire members who could fairly decide guilt are excluded for cause and that this case would be an appropriate companion case to Lockhart because it presents a dimension of the death qualification problem not addressed by Lockhart; whether death qualification is constitutionally permissible in a state where the jury's only function is to render a nonbinding advisory verdict which need not be unanimous; the claim cannot be barred as a procedural default as the validity of Florida's procedural default rule is itself a ground for certiorari.

[7] In his federal habeas petition, Harich abandoned claims raised on direct appeal. Only those claims underlined in footnote 1, supra, were raised by Harich in his federal habeas petition. Harich extended, as well, his argument that the evidence did not support the finding of the aggravating factor that the murder was cold and calculated to include the argument that this aggravating factor was unconstitutional on its face and as applied. Harich raised all qrounds previously raised in his Rule 3.850 with the exception of the claim that the trial court erroneously instructed the jury that seven or more of their number were required to return a sentencing recommendation. All claims raised in the state habeas petition were raised in the federal petition as well.

Harich's request for a certificate of probable cause to appeal.Harich took an immediate appeal and the Eleventh Circuit Court of Appeals granted his request for a certificate of probable cause and entered an order staying his execution pending appeal. In an opinion dated March 18, 1987, that court affirmed the opinion of the district court but reversed and remanded the case to the district court for an evidentiary hearing to determine whether trial counsel rendered ineffective assistance with respect to the intoxication defense, and if so, the legal consequence of such a determination.[8] Harich v. Wainwright, 813

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[8] On appeal from the dismissal of Harich's habeas petition, the Eleventh Circuit Court of Appeals entertained the following issues briefed and raised by Harich. (1) counsel's alleged failure to ask for an instruction on the voluntary intoxication defense (2) counsel's alleged failure to adequately prepare and present an intoxication defense (3) prosecutorial misconduct by misstating the Florida law regarding voluntary intoxication during closing argument (4) ineffective assistance of counsel in failing to investigate and present evidence of mitigating circumstances (5) prosecutorial misconduct in the guilt/innocence phase by (a) attempting to impeach Harich's credibility with his constitutionally protected silence by indicating that "the first time Harich came forward to tell the entire situation was yesterday" (b) arguing that defense lawyers are not to be trusted (6) prosecutor's closing remarks during the penalty phase were improper by stressing his own expertise in seeking the death penalty in this case, comparing it with other cases and arguing that the crime was the most heinous, atrocious and cruel he has known (7) in arguing Harich had committed the crime to avoid lawful arrest, the prosecutor commented on his right to seek counsel by indicting Harich's first reaction was to call a lawyer, not the police (8) prosecutor misled the jury as to the mitigating circumstances of "substantial impairment" and "age of the defendant" (9) improper admission of statements during the penalty phase that had been suppressed in the guilt/innocence phase (10) prosecutor and trial judge misled the jury as to its role in sentencing (11) trial court ignored unrebutted mitigating evidence (12) cold, calculated and premeditated aggravating circumstance is unconstitutional on its face and as applied (13) insufficient evidence to support the aggravating factor that the murder was committed for the purpose of avoiding and preventing a lawful arrest (14) especially heinous, atrocious or cruel aggravating factor not limited in application by the Supreme

F.2d 1082 (11th Cir. 1987). Upon the state's request, rehearing *en banc* was granted. Harich v. Dugger, 838 F.2d 1497 (11th Cir. 1987) The court then determined as a matter of law without the necessity of an evidentiary hearing that Harich had not been deprived of effective assistance of counsel. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). A petition for a writ of certiorari was denied by the United States Supreme Court in an order entered March 6, 1989.[9]

On March 7, 1989, Governor Martinez signed a second death warrant directing that Harich be executed between noon, Wednesday, March 29th, 1989 and noon, Wednesday, April 5, 1989. Execution has been set for March 30, 1989 at 7:00 a.m. A temporary twenty-four hour stay of execution was granted on March 28, 1989 by the Supreme Court of Florida.

Court of Florida and arbitrarily applied (15) trial court erroneously instructed the jury that its sentencing recommendation must be a majority decision. Harich did not brief and abandoned on appeal the argument from the Rule 3.850 motion that the prosecutor improperly contrasted procedural safeguards afforded to the defendant with the safeguards offered the victim, stating "Carlene didn't get the opportunity to be evaluated by a psychologist. She didn't have the opportunity to be evaluated by a psychologist. She didn't have the opportunity to let her side be heard. Carlene will not return to society in twenty-five years." Harich also abandoned the argument raised in his state habeas that the state may not constitutionally excluded for cause from the guilt phase jurors who can fairly determine guilt or innocence in a capital case, but who cannot impose a sentence of death in a subsequent penalty proceeding.

[9] In an effort to have certiorari granted, Harich argued that the Eleventh Circuit's decision misconstrued Caldwell v. Mississippi, as the failure to instruct the jury properly as to the Tedder standard and the misleading statements diluted the jury's sense of responsibility for sentencing; such claims will continue and grow and the decision is at odds with the Eleventh Circuit's decisions in Adams and Mann.

On March 27, 1989, a second motion to vacate judgment and sentence was filed in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida. Relief was summarily denied that same day. This appeal follows.

II. EXPEDITED REVIEW PROCEDURE

Pursuant to Barefoot v. Estelle, 463 U.S. 880 (1983) a court may utilize expedited review procedures to resolve the merits of a claim at the same time it decides a motion for a stay of execution. Notice is hereby given that the state will seek expedited review in all courts, state and federal, in which relief may be sought and that counsel is expected to address both the merits of the claims and the request for a stay.

III. STAY OF EXECUTION

It is clear that the constitutionally enforceable obligation to stay execution runs only to the point where all post conviction protections have been fairly accorded and not beyond into the realm of mere possibility that something not yet considered may yet emerge in the minds of old or new counsel or that an error of substance in decisions already made may emerge from the same source. Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980). Harich has already had one round of post conviction litigation in both state and federal court and has, thus, been accorded all post conviction protections. In ruling on an application for a stay of execution, the irreversible nature of the death penalty must be weighed against the fact that there

must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that legal issues in the case have been sufficiently litigated and relitigated so that the law must be allowed to run its course. O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982). The footnotes herein reflecting Harich's past course of litigation aptly demonstrate exhaustive review. It is time to allow the law to run its course in this case.

The technique of last minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier has been condemned as a tactic unworthy of our profession as it brings to bear a "hydraulic pressure" upon any judge or group of judges and inclines them to grant last minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing, he has fully grasped the contentions of the parties and correctly resolved them. Evans v. Bennett, 440 U.S. 1301, 1307 (1979). The contentions in the present case, however can be easily grasped and resistance to such pressure is needed. The nature of such contentions and the absence of any plausible explanation from counsel as to the need for late filing should be sufficient to tell this court that what is sought is not the vindication of constitutional rights but the delay of the inevitable so that something heretofore as yet unimagined may emerge in the minds of counsel.

When entertaining an application for a stay, factors to be considered for the exercise of the court's discretion are (i) the probability of irreparable injury if no stay is granted and the remediable quality of any such injury, (ii) the likelihood of success on the merits, and (iii) whether granting of the stay would substantially harm other parties and whether granting of a stay would serve public interest. Sullivan v. State, 372 So.2d 938, 941 (Fla. 1979); O'Bryan v. McKaskle, 729 F.2d 991 (5th Cir. 1984). It is clear that in the absence of a stay irreparable injury will be suffered but that is always the case and it must be weighed against counterveilling factors. In this case, the merits of Harich's claim should not even be reached in a successive round of litigation and even reaching the merits, it cannot be said that there is any likelihood of success, as will be discussed herein. The granting of a stay would substantially harm the victim's family and disserve public interest because one who has not demonstrated actual innocence of the crime he is convicted of or demonstrated an entitlement to a sentence less than death will have avoided the swift and just punishment the law is expected by society to carry out. In the absence of such swift and just punishment, the deterrent effect of capital punishment itself is diluted.

THE TRIAL COURT PROPERLY FOUND ALL CLAIMS TO BE PROCEDURALLY BARRED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850.

ARGUMENT

As grounds for relief, Harich argues that: (1) trial counsel had an undisclosed conflict of interest which denied Harich the effective assistance of counsel in that Assistant Public Defender and Chief of the Capital Division Howard B. Pearl was also an active law enforcement officer since 1968, i.e., a special deputy sheriff for the Marion County Sheriff's Department; (2) that he was denied the right to due process of law because his sentence of death was based on the materially erroneous assumption that Harich had committed a sexual battery; (3) That the trial judge failed to consider nonstatutory mitigating evidence as required by Hitchock v. Dugger, 107 S.Ct. 1821 (1987) and (4) failure to obtain effective psychiatric assistance under Ake v. Oklahoma, 470 U.S. 68 (1985), which would have demonstrated Harich suffered from organic brain dysfunction caused by reactive hypoglycemia which causes psychotic delirium which made him insane at the time of the offense, incapable of forming specific intent and caused him to act under extreme emotional disturbance and substantially impaired his ability to conform his conduct to the requirements of the law.

Pursuant to Florida Rule of Criminal Procedure 3.850 no motion to vacate judgment or sentence shall be filed or considered if filed more than two years after the judgment and

sentence become final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

In the present case Harich was sentenced to death on April 9, 1982. The judgment and conviction were affirmed on October 12, 1983. Harich v. State, 437 So.2d 1082 (Fla. 1983). Certiorari was denied in 1984, Harich v. Florida, 465 U.S. 1051 (1984) and the judgment and sentence became conclusively final. Thus, the present motion is filed out of time, i.e., more than two years after the judgment and sentence became final. It is clear that the facts upon which the claims are predicated could have been timely ascertained by the exercise of due diligence and are mere extrapolations and enlargements of previously known facts. Harich filed a prior motion on March 16, 1986 and it is clear that by that point in time there was either a factual, state or federal law basis for any constitutional claim raised herein.

In regard to the claim of conflict of interest of trial counsel, the motion itself alleges that Howard Pearl has been an active law enforcement officer since 1968 and it is quite clear that such facts could have been ascertained earlier by the exercise of due diligence and such claim is not premised upon the retroactive application of any new constitutional right. The facts underlying the aggravating factor that the murder was

committed during a sexual battery or attempted battery have been available since the time of trial. Whether the judge considered nonstatutory mitigating evidence was certainly known at the time of trial and no true Hitchcock claim is even presented as will be discussed later. That Harich allegedly failed to get effective psychiatric assistance could also certainly have been ascertained before this late date.

The rule also does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. The basis for such nonretroactive claims being long available, relief must be denied. It is quite clear that direct appeal would be the appropriate place to challenge the aggravating factor that the murder occurred during the commission of or attempt to commit a sexual battery and, in fact, it was argued that there was an impermissible doubling up in that the same facts cited in support of the aggravating factor that the murder was committed during the commission of or an attempt to commit sexual battery and kidnapping and the aggravating factor that the crime was committed for the purpose of avoiding or preventing a lawful arrest. It was also argued that the sexual battery and kidnapping were complete and the girls were free to go before the murder and the aggravating factor that the crime was committed during the commission of a sexual battery and kidnapping was improperly found. It was also argued on direct appeal that the Florida capital sentencing process does not provide for individualized sentencing in

violation of Lockett v. Ohio, 438 U.S. 586 (1978) (Appellant's Initial Brief p. 64), and that the trial judge limited his consideration to statutory mitigating circumstances (p. 46).

A second or successive motion may also be dismissed under Rule 3.850 if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of procedure.

The present motion is a second or successive one. The prior determination was clearly on the merits. *See*, Harich v.State, 484 So.2d 1239 (Fla. 1986). This successive motion may be dismissed to the extent it fails to allege new or different grounds or mere extrapolations of grounds previously raised and decided. No compelling reasons have been proffered or demonstrated why the failure to assert new and different grounds should be considered anything other than an abuse of procedure. No plausible showing of factual innocence or that a sentence less than death was called for has even been made.

It is clear that the claim of conflict of interest by virtue of Howard Pearl's alleged status as a special deputy could have easily been discovered and raised in the first rule 3.850 motion filed in 1986 since he has allegedly openly held such position for twenty years. It is clear, as well, such claim is being used as a vehicle to relitigate claims of ineffective assistance and other claims previously litigated and

to reach forfeited new claims on the merits. Presentation of such claim at this point in time is clearly an abuse of procedure.

Arguments directed to the inapplicability of the aggravating factor that the murder was committed during the commission or attempted commission of a sexual battery are grossly out of time and also constitute a clear abuse of procedure since they were not raised in the first 3.850 motion and actually should have been raised on direct appeal if at all.

Failure to assert the alleged Hitchcock claim earlier is likewise and abuse of procedure because the aberrant variation of the claim presented need not have awaited the Hitchcock decision for presentation.

The claim that Harich received ineffective psychiatric assistance constitutes an abuse of procedure at this juncture, as well. The decision in Ake v. Oklahoma, 470 U.S. 68 (1985) upon which this claim is premised was available in 1985, before the first Rule 3.850 motion was filed and Harich could certainly have been diagnosed and examined at that time.

I. CONFLICT OF INTEREST CLAIM

Examination of these claims more closely reveals even more their gross insufficiency. While the motion to vacate alleges that defense counsel Howard Pearl is a special deputy for the Marion County Sheriff's Department and much pain has been taken to set out the duties of such special deputy, the affidavit of William Harris actually reflects that Mr. Pearl serves in the Sheriff's Reserve, which is something entirely different, to

which no duties or compensation are ascribed by the appellant, and which by nature of the title would imply an inactive status. Moreover, Mr. Pearl would enjoy such status only in his home community of Marion County, Florida and no nexus between such status and the present case is alleged or described so as to call into question any constitutional right of appellant despite any statutory directives. Thus, the claim is insufficient on its face as well.

As the statement of the case and facts and the footnotes thereto reveal, this case has had exhaustive review and the record therein scrutinized by state and federal courts. On the basis of such record, it cannot be said that Harich did not receive a fair trial and all courts have agreed that Howard Pearl was an effective attorney. In fact, the Eleventh Circuit Court of Appeals stated "Indeed, we think that the lawyer was above average if not outstanding in representing his client in this case." Harich v. Dugger, 844 F.2d 1464, 1471, n. 6 (11th Cir. 1988).

That this claim is used as a vehicle to relitigate issues previously litigated and now the law of the case is obvious from the actual flaws in performance alleged to have resulted from such conflict: (1) failure to counsel the defendant regarding the availability of a voluntary intoxication defense (2) failure to object to the prosecutor's and court's statements that under Florida law the court and not the jury had the responsibility to determine whether the defendant should be sentenced to death and stating during closing argument that "the judge alone decides

what the sentence shall be" (3) failure to object to the prosecutor's closing argument that voluntary intoxication was not a defense (4) failure to request an instruction on voluntary intoxication (5) failure to conduct an effective penalty phase defense by using available testimony from family and friends; and failing to elicit an expert opinion as to capacity to form specific intent. All these claims were previously decided by this court in the context of an ineffective assistance of counsel claim in the first Rule 3.850 motion and prior habeas petition except that the claim regarding statements diminishing the jury's sense of responsibility was found to be barred. Harich v. State, 484 So.2d 1239 (Fla. 1986); Harich v. Wainwright, 484 So.2d 1237 (Fla. 1986). The Caldwell v. Mississippi, 472 U.S. 320 (1985), claim was fully entertained by the Eleventh Circuit despite the default found by this court and was found to be meritless. Harich v. Dugger, 894 F.2d 1464 (11th Cir. 1988).

The remaining flaws in performance attributed to counsel's "conflict" are meritless and reflect an effort, as well, to reach the merits of claims which should have been raised on direct appeal or in the first Rule 3.850 motion. The record reflects that on cross-examination of Sgt. Wall, counsel brought out the fact that as part of the conversation Harich had actually said he remembered nothing because he was drunk, high or both and that such statements were not memorialized in any way either by being reduced to writing or recorded (R 371-372), and were not acknowledged by Harich. During rebuttal cross-

examination of Officer Wall counsel reasonably tried to show that what the officer had heard was that as Harich drove away he saw the girls in the back of his truck but had mistakenly written down with the intervention of time that they were laying on the ground (R 606). In closing argument, counsel exhorted the jury to use their common sense to conclude that Sgt. Wall was wrong because Harich had talked to a lawyer before the police came who had advised him of his rights, was a reasonably intelligent young man going to Daytona Beach Community College, knew he was under suspicion but did not think he had killed anyone and it would not have been logical for him to tell the police he left the girls laying on the ground, and it was much more likely he said he saw them in the back of his van as he drove away and he did not say "in the woods." Counsel argued further " . . . But Tommy Wall, like any other human being is entitled to be wrong once or more in his life. He is entitled to make a mistake. He doesn't want to admit it, of course." (R 639-645) Counsel has no obligation to insist without evidence that the police are lying, and his actions hardly amounted to bolstering their testimony.

Appellant now takes the incongruous position of attacking counsel for reinforcing Deputy Burnsed's testimony that Harich told him where the murder weapon could be found by eliciting testimony on cross-examination that it was possible the gun was in the drainage ditch and they had just failed to find it. On direct appeal, Harich complained that such testimony was irrelevant and went to bad character and was evidence of a non-

statutory aggravating circumstance. It must be remembered that at this point in time Harich had already been convicted and the goal was to establish with the help of a medical expert that Harich was suffering from the affects of alcohol and acting out of character and counsel could have felt there was no point in having Harich look like a deliberate liar. This court already determined, in any event, that evidence that the gun had been thrown into a canal was not critical or prejudicial given the surviving victim's testimony in the guilt phase. Harich v. State, 437 So.2d 1082, 1086 (Fla. 1983). Appellant again simply seeks relitigation in the guise of a conflict of interest claim.

Appellant does not suggest how counsel was supposed to cross-examine and impeach Officer Champion as to the time of the initial call at 11:59 fixing the time of the incident in contradiction to Harich's testimony when such time was established, as well, by virtue of a computer readout and log (R 590).

Had Officer Vail wished to tailor his testimony or buttress Officer Wall's testimony, it could have been accomplished by pre-trial collaboration between the two and the issue of lack of sequestration of Officer Vail as an incident of counsel's ineffectiveness based on conflict is frivolous.

It is clear that nothing counsel could have argued would have prevented the finding of the aggravating factor that the murder was committed during a sexual battery in view of the surviving witness' testimony that Harich first forced Carlene Kelley to perform fellatio on him and then had intercourse with

her (R 462-464). Even an attempted sexual battery would have been enough to support this factor. Penetration and ejaculation were not even necessary for a sexual battery to have taken place so counsel would certainly not have been required to hire a pathologist to testify as to the lack of sperm in the body cavities if this were indeed so. Appellant does not suggest what information was available to impeach this witness with. Little would have been accomplished by pointing out Harich lured them back in the van by promising not to harm them when he had a gun and their free will was limited anyway.

In view of the fact that Harich wrapped a gun in a towel, shot the girls in the head then deliberately slashed their throats, Miller's pretrial deposition testimony that "he seemed to have it all planned out only as it came "would hardly have prevented the finding in aggravation that the murder was cold and calculated.

The court in Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980) interpreted the kidnapping statute § 787.01(1)(a)2, Florida Statutes (1979) as not including movement or confinement that was inconsequential or inherent in the nature of a felony such as robbery or rape. Under the facts of the present case, the court was not required to give such instruction nor counsel required to request it. It is clear that Harich held the girls against their will and it is sophistry to argue that they "voluntarily" reentered the van after the sexual battery simply upon his promise that he would not harm then when he had already held them at gunpoint and still possessed the gun. They were

certainly confined against their will at the time they were shot and their throats slashed.

Harich was certainly not entitled to the statutory mitigating circumstance of § 921.141(6)(c) that the victims were a participant in the defendant's conduct or consented to the act by virtue of the fact they reentered the van after the sexual battery. Harich, after all, still had a gun and could have shot them there had they not seemed to believe his promise not to harm them further. However, one looks at it, Harich was the one in control.

After claiming innocence and contending he left the girls alive, Harich complained that a defense of voluntary intoxication was not used. He now complains he was not counseled about his former position. Surely this is an accusation that could have been lodged in the first 3.850 motion which contained numerous allegations of ineffective assistance of counsel.

Not only is the present "conflict" claim being utilized to relitigate claims already decided in the context of ineffective assistance of counsel, but the claim seeks as well to litigate for the first time claims that could have been raised as early as direct appeal and which would have had no chance of success on the merits even had they been raised. What is sought to be reached by this claim demonstrates its use to abuse 3.850 procedure.

Even if this claim was not procedurally barred, no relief could be granted as a colorable claim has not been stated. The

statutory and constitutional provisions cited do not deal with constitutional conflict of duties. The appropriate remedy for such a statutory violation would be to drop the status of being a member of the Sheriff's Reserve, not to overturn a valid judgment and conviction. The appellant has failed to make out a demonstrable claim by showing (1) his attorney was actively representing conflciting interests and (2) specific instances in the record where his defense counsel acted or refrained from acting due to the conflciting interests. Cuyler v. Sullivan, 446 U.S. 335 (1980). No duties as a deputy are cited during the trial of this case and no duties ascribed to Mr. Pearl personally. It is not alleged that Mr. Pearl personally received any compensation. The cited instances in this case of counsel bolstering the testimony of law enforcement officers is ludicrous, and other cited instances are a clear effort at relitigation and to reach the merits of forfeited claims that should have been raised earlier.

II. "SEXUAL BATTERY" CLAIM

This has been discussed within the first claim. Suffice it to say evidence of sexual battery was more than sufficient.

III. HITCHCOCK CLAIM

The claim premised upon Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) is not a true Hitchcock claim at all. In the penalty phase, nonstatutory mitigating evidence was received by the jury and judge that Harich had been a volunteer fireman and a model prisoner while confined in jail. The jury was instructed prior to deliberation that it was their duty to "render to the court

an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R 914. There were further instructed that the "aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence." (R 914) No such limitation was put on the mitigating evidence (R 916). The jurors were then instructed that they could consider certain enumerated statutory mitigating factors as well as "any other aspect of the defendant's character or record and any other circumstances of the offense" (R 916). The sentencing order reflects that the jury was so charged but "these mitigating circumstances were rejected by the jury by a vote of nine to three and the Court does find, however, that the Defendant, Roy Allen Harich, has no significant history of prior criminal activity." (R 1256) The sentencing order would indicate, as the instructions themselves, that all mitigating factors were considered by the judge.

While this court has held that Hitchock is a significant change in the law, permitting defendants to raise a claim under that case in post-conviction proceedings, Hall v. state, 14 F.L.W. 101 (Fla. March 9, 1989), such holding presumes that what is presented is a true Hitchcock claim. This claim is nothing more than a rehash of the arguments made on direct appeal that the court should have found nonstatutory mitigating factors based on the evidence presented in the penalty phase, largely

based on the fact the court commented in its order on the unpersuasive nature of all mitigating evidence by virtue of the jury's death recommendation of 9-3. The findings of fact reflect consideration of all mitigating evidence. This is an aberrant claim and Hitchcock not a change of law in relation to it. It is also clear that there was a state law basis to raise this claim at the time of trial and appeal and the first Rule 3.850 motion in Songer v. State, 365 So.2d 696 (Fla. 1978). See, Adams v. Dugger, 3 F.L.W. Fed. S105 (Feb. 28, 1989). This claim was properly barred under Rule 3.850.

IV. INEFFECTIVE PSYCHIATRIC ASSISTANCE CLAIM

Appellant's last claim is that he received ineffective psychiatric assistance under Ake v. Oklahoma, 470 U.S. 68 (1985), for failure to discover that he suffers from organic brain disorder caused by reactive hypoglycemia which caused him to suffer delirium with psychotic features. This claim was properly barred by the trial court as an abuse of procedure.

Harich's position at trial was that he had not, in fact, committed the murder at all but had left the girls alive at a convenience store. Upon the signing of the first death warrant, Harich complained that expert testimony on intoxication should have been presented to the jury (based on a new report of Dr. Harry Krop reflecting that Harich suffered from alcohol idiosyncratic intoxication and was responding impulsively to the emotional strain in his life at that time and was not capable of forming the specific intent to kill, kidnap or sexually assault the victim). It was determined that telling the jury that

Harich was not capable of forming the specific intent to kill, kidnap, or sexually assault the victims because he was suffering from alcohol idiosyncratic intoxication, would implicate him in the murder in contradiction of his own testimony. Harich v. Dugger, 844 F.2d 1464, 1472 (11th Cir. 1988). Upon the signing of the second warrant, Harich now suggests that despite prior proclamations of innocence a defense should have been mounted, on the basis of yet a new doctor's opinion, based on a variation of the last alcohol idiosyncratic intoxication theory, i.e., that he suffers from reactive hypoglycemia which causes organic brain disorder in which the ingestion of alcohol, which lowers the blood sugar, caused "delirium", a state in which Harich might seem normal and not act drunk. Such delirium would cause Harich to be insane at the time of the crime, to lack specific intent, to suffer from extreme emotional disturbance and to substantially impair his ability to conform his conduct to the requirements of law. Harich, to this day does not overtly admit to having committed the murder. He makes no attempt to explain why this enlargement upon his proposed intoxication defense would be any less inconsistent with his trial defense than the defense proposed by Dr. Krop in the first Rule 3.850 motion. Harich also makes no attempt to explain why he should be entitled to three defenses. The new expert does not even repudiate the last expert's alcohol idiosyncratic intoxication theory but adds the new twist of additional organic brain disorder caused by newly discovered hypoglycemia of which there is no evidence Harich suffered from at the time of the crime.

What Harich really seeks along with maintaining his innocence and the fall back voluntary intoxication defense is an *ex post facto* defense of diminished capacity, as well, which is not recognized in this state. Chesternut v. State, 14 F.L.W. 9 (Fla. Jan. 5, 1989). Moreover, such claim could well have been raised in the first Rule 3.850 motion. This was properly barred as a successive claim. Witt v. State, 465 So.2d 510, 512 (Fla. 1985).

A similar claim involving the same doctor was raised in Eutzy v. State, No. 73,894 (Fla. March 28, 1989) (a copy of this court's opinion is included in an appendix to this brief). This court held that Eutzy was not entitled to bring this claim outside the two year period set forth in Rule 3.850 and that the facts could have been ascertained prior to the first Rule 3.850 motion. Eutzy had also been examined by an expert prior to the first Rule 3.850 motion. As in Eutzy, the second expert in this case found no organic etiology but that Harich's problems were indeed alcohol related--something that was before the jury and judge at sentencing. Summary denial of this claim should be affirmed as in Eutzy.

Aside from being procedurally barred, the claim was improperly raised below in an unverified legal memorandum with an attached unsigned affidavit of Dr. Merikangas. Without such affidavit, the legal memorandum did not even rise to the level of stating a claim.

Even if a sufficient claim was raised which was not procedurally barred relief could not be granted. Ake merely

acknowledges the right to an independent psychiatric expert if sanity is an issue. It creates no right to a "competent" expert with such "competency" to be determined years later by yet a new expert.

The report and testimony of Dr. McMahon at the penalty phase reflect that extensive testing was done on Harich (R 791-794). He evidenced no brain dysfunctioning (R 795). Dr. McMahon testified that the crimes were not consistent with Harich's values (R 814) and were the result of alcohol or marijuana lowering his inhibitions and impairing his controls and that something triggered a conflict area of dependency or inadequacy (R 815) Harich act under the influence of extreme mental or emotional disturbance and his ability to conform his conduct to the requirements of law was substantially impaired (R 821). That Harich may have suffered from hypoglycemia as well would have had little impact on the jury in view of the heinous nature of the murder. Even under the new hypoglycemia theory, it took alcohol to fuel the "psychotic features" which is little more than Dr. McMahon said in that his inhibitions were lowered and control lost.

CONCLUSION

Appellee respectfully requests that this court find all claims procedurally barred under Florida Rule of Criminal Procedure 3.850 in clear and unambiguous language. See, Harris v. Reed, 3 F.L.W. Fed. S74 (Feb. 22, 1989).

Respectfully submitted,

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