IN THE SUPREME COURT OF FLORIDA

THEODORE CHRISTOPHER HARRIS,	:	
Petitioner,	:	
v.	:	Case No. 66523
LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	:	
Respondents.	:	

PETITION FOR WRIT OF HABEAS CORPUS
AND FOR OTHER RELIEF

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IN THE SUPREME COURT OF FLORIDA

THEODORE CHRISTOPHER HARRIS, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida, Respondents.	:	CASE NO. _____ PETITION FOR WRIT OF HABEAS CORPUS AND FOR OTHER RELIEF

Petitioner Theodore Christopher Harris, an indigent proceeding in forma pauperis, by his undersigned counsel petitions this Court (a) to issue its writ of habeas corpus pursuant to Fla. R. App. P. 9.030(a)(3) and Fla. R. App. P. 9.100; (b) for reconsideration pursuant to Fla. R. App. P. 9.330; and (c) for augmentation of the Record on Appeal pursuant to Fla. R. App. P. 9.200(a)(2).

Theodore Christopher Harris states that he was sentenced to death in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and under the Constitution and laws of the State of Florida because he was denied the effective assistance of counsel in the preparation, briefing and argument of the direct appeal from his conviction and sentence of death.

In support of this petition, in accordance with Fla. R. App. P. 9.100(e), Theodore Christopher Harris states as follows:

I.

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3), and Article V, §3(b)(9), Fla. Const.

As described more fully below, Mr. Harris was denied the effective assistance of appellate counsel in all proceedings before this Court at the time of his direct appeal. Appointed counsel failed to bring certain issues relating to the validity of the Affidavit which supported the Warrant of Arrest for Mr. Harris to the attention of this Court in an effective manner. If these issues had been properly raised and addressed, they would have required the invalidation of the Warrant, suppression of Mr. Harris' confession, and reversal of Mr. Harris' conviction and death sentence. Since the claim of ineffective assistance of counsel stems from acts and omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

We recognize that the extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substituted appeal. Nevertheless, this and other Florida Courts have consistently recognized that the Writ must issue where the constitutional right of appeal is completely thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Ross v. State, 287 So.2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So.2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for a writ of habeas corpus. Baggett, supra, 287 So.2d at 374-75; Powe v. State, 216 So.2d 446, 448 (Fla. 1968). We demonstrate below that the inadequate performance of Mr. Harris' appointed counsel was so significant, so fundamental, and so prejudicial as to require the issuance of the Writ.

II.

FACTS UPON WHICH PETITIONER RELIES

Procedural History

On April 7, 1981, Detective John Parmenter, Metro-Dade County Public Safety Department, applied to Judge Arthur Winton, in the Circuit Court for the Eleventh Judicial Circuit, Dade County, for a Warrant of Arrest for Theodore Christopher Harris. (R1-2).[1] Judge Winton granted the application based upon Detective Parmenter's affidavit, Id., which identified Mr. Harris as the suspect in the March 22, 1981 killing of one Essie Daniels, in Opa Locka, Florida.

Mr. Harris was arrested by Detective Parmenter one week later, on April 14, 1981, as he attended a scheduled conference with his parole officer. (Tr. 9/8/81, 112:9-114:6).[2] The arrest took place at around midday. (Tr. 9/8/81, 115:21-23). Upon his arrest, Mr. Harris was handcuffed and taken to the Metro-Dade Public Safety Department Offices, where he was continuously questioned for the next six hours by various detectives in a small interrogation room. State v. Harris, 438 So.2d at 790; (Tr. 9/8/81, 114:15-116:11; 129:21-25; Tr. 9/9/81, 10:20-22; 12:22-24). During the entire period of questioning Mr. Harris was shackled, left wrist to right elbow, behind his back. State v. Harris, 438 So.2d at 790. Insofar as it appears of record, Mr. Harris was handcuffed in this unusual mode because his right arm was in a cast from the hand to the elbow as a result of recent orthopedic surgery. Id. The record contains no explanation for the duration of the restraint. Mr. Harris was not represented by counsel, spoke to no outside person or persons, and did not leave the room during the questioning for any reason.

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1. "(R1-2)" refers to the Record on Appeal, pages 1 to 2.

2. "(Tr. 9/8/81, 112:9-114:6)" means Transcript of Proceedings for September 8, 1981, page 112, line 9 to page 114, line 6.

(Tr. 9/9/81, 12:22-13:15). He was not provided with food or drink. Id. At the end of the questioning, Mr. Harris gave the brief inculpatory statement reprinted in full in this Court's previous opinion. State v. Harris, 438 S.2d 787, 790 n.2 (1983). Only then was Mr. Harris booked and jailed. (Tr. 9/8/81, 147:9-21). He was not presented to the Magistrate in return of the Warrant until the following day, just within the time prescribed by Fla. R. Crim. P. 3.130(a). (R3).

Mr. Harris was indicted by the Grand Jury in and for the Eleventh Judicial Circuit, Dade County, on April 29, 1981. (R4) The indictment charged Mr. Harris with one count of murder in the first degree, one count of burglary of a dwelling and one count of robbery, all in connection with the death of Essie Daniels. Id. The case was called for trial on September 8, 1981. Mr. Harris, an indigent, was represented by the Dade County Public Defender. Selection of a jury was preceded by a Suppression Hearing at which Mr. Harris moved to suppress his confession as being, inter alia, involuntary and the product of an unlawful arrest pursuant to a Warrant procured in violation of the United States and Florida Constitutions. (R87) (Tr. 9/8/81, 9/9/81/ 9/10/81). Testimony at the Suppression Hearing lasted until September 10, when, in a brief bench opinion, the Trial Court rejected Mr. Harris' claims and allowed the confession into evidence. (Tr. 9/10/81, 60:9-62:8). The trial lasted 5 days; petitioner neither testified nor put on any evidence. (Tr. 9/21/81-9/25/81). On September 26, 1981, Mr. Harris was convicted on all three counts of the indictment. (Tr. 9/26/81). The brief penalty phase of the trial was held on September 29, 1981. (Tr. 9/29/81). The jury divided, and rendered an advisory recommendation that Mr. Harris be sentenced to death by a vote of 8 to 4. (Tr. 9/29/81, 82:22-83:8) (Verdict Sheet, 9/29/81). The Court below sentenced him to death. (Tr. 9/29/81, 92:6-19).

This Court, on direct appeal pursuant to Article V, 3(b)(1), Florida Const., affirmed the judgment of conviction and sentence of death. Harris v. State, 438 So. 2d 787 (Fla. 1983). A motion for rehearing was denied. Harris v. State, No. 61,343 (Fla. Nov. 8, 1983). A petition for a Writ of Certiorari filed in the United States Supreme Court was denied. Harris v. State, 104 S.Ct. 2181 (1984).

The Proofs At Trial

Mr. Harris was charged with the murder of Essie Daniels during a burglary. At trial, the State contended that Mr. Harris entered Mrs. Daniels' home in Opa Locka, Florida, late in the evening of Saturday, March 22, 1981, with the intention of stealing money he knew she had there. The State contended that during the burglary Mr. Harris was unexpectedly confronted by Mrs. Daniels, that a struggle ensued during which he was badly cut on his right hand by Mrs. Daniels' kitchen knife, and that he then killed Mrs. Daniels by repeatedly stabbing her with the kitchen knife and bludgeoning her. State v. Harris, 438 So.2d 787, 789-790 (Fla. 1983); (Tr. 9/22/81, 193:20-218:15-State's Opening Statement; 9/25/81, 164:16-201:13-State's Closing Argument).

The burglary and killing were reported the following morning by a neighbor of Mrs. Daniels, who noticed water coming out of an open door to the Daniels house. (Tr. 9/22/81, 247:22-249:19). No witness saw the killer enter Mrs. Daniels' home; no witness saw him leave. No neighbor or passer-by noticed anything amiss while the crime took place. (Parmenter Dep. 13:7-9).[3] No property stolen from Mrs. Daniels was ever recovered from Mr. Harris. Although many latent fingerprints were collected by the investigating officers from Mrs. Daniels' house, none matched Mr.

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3. "Parmenter Dep. 13:7-9" refers to the Deposition of Detective John Parmenter, page 13, lines 7-9. Copies of all the Depositions referred to in this Petition are contained in the Appendix To Petition For Writ of Habeas Corpus and For Other Relief.

Harris' fingerprints. (Tr. 9/24/81, 144:14-17; Parmenter Dep., 12:19-13:6). Although Mr. Harris and Mrs. Daniels were both badly cut that night (Mrs. Daniels died; Mr. Harris required orthopedic surgery on his hand), no blood consistent with Mr. Harris' blood type was recovered from Mrs. Daniels' person or clothes, and none of her blood type was found on any item of Mr. Harris' recovered by the investigating officers. (Tr. 9/29/81, 30:20-99:17).

Stripped to its essential elements, the State's case against Mr. Harris rested upon the following basic proofs:

a) Mr. Harris, a distant relative of Mrs. Daniels by marriage, knew her and had once visited her home;

b) Mr. Harris was treated, early on the morning after the killing, for deep cuts of his hand, which he ascribed to a street fight;

c) Mr. Harris' blood type was consistent with blood samples recovered from various areas of the victim's home, and inconsistent with the victim's blood type; and

d) Mr. Harris, after his arrest (pursuant to the contested Warrant) and a subsequent extended incommunicado interrogation, gave the inculpatory statement quoted in full in this Court's previous opinion.

In light of these proofs, it is apparent that the inculpatory statement extracted from Mr. Harris during the six-hour interrogation at police headquarters immediately following his arrest was the cornerstone of the State's case. Because we here demonstrate that the Warrant was obtained on the basis of an Affidavit that the trial record shows to be riddled with falsehoods, deliberate omissions, reckless errors, and gross exaggerations; because we here demonstrate that these contentions were adequately established before, but improperly rejected by, the Trial Court; and because we here demonstrate that, despite the centrality of the issue and the expansive available record, appointed appellate counsel failed adequately to present the point to this Court, the Writ should issue.

The Invalid Affidavit

On April 7, 1981, some sixteen days after the crime, Detective John Parmenter of the Metro-Dade Public Safety Department, who was in charge of the investigation of the murder of Mrs. Daniels, made his application to Judge Winton for the Warrant at issue here. He contacted Assistant State Attorney Abe Laeser for assistance in preparing the Affidavit of Probable Cause. (Tr. 9/10/81, 6:15-20).[4] Parmenter testified that he told Mr. Laeser the results of his investigation to date; that Mr. Laeser drafted the Affidavit; and that Parmenter then reviewed it with Mr. Laeser for accuracy. He then swore that the assertions contained in the Affidavit were true. (Tr. 9/12/81, 6:4-14, 7:1-24).

The Affidavit of Probable Cause (R1-2) is quoted here in its entirety; for convenient reference bracketed numbers have been inserted to identify each sentence:

> [1] Between the 20th day of March, 1981 and the 23rd day of March, 1981, the victim, Essie Daniels, was stabbed a total of sixty-one (61) times; forty-four stab wounds in the head, thirteen (13) stab wounds to the hands and arms, and four (4) stab wounds to the torso. [2] The victim also had inflicted upon her two (2) crushing blows to the head. [3] The suspect, Theodore Harris, was released one month before the murder from the Florida State Prison System for armed robbery and was a distant relative of the victim, Essie Daniels. [4] Suspect, Theodore Harris, according to his roommate, Lionel Cook, knew that the victim, Essie Daniels, came home every Saturday night from the Church Bake Sale with a large amount of cash. [5] Blood samples from the murder scene were compared with suspect, Theodore Harris, and the results were highly consistent. [6] The examination of the blood samples at the scene was compared with a bloody towel from the suspect's car, which was recovered on March 22nd. [7] The examination was conducted by Kathy Nelson of

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4. There is in the record the suggestion that Mr. Laeser was the last of a series of Assistant State Attorneys consulted by Parmenter seeking approval of the Warrant. The Trial Court forbade defense inquiry into this contention at the Suppression Hearing. (Tr. 9/10/81, 6:21-25).

> the Public Safety Department Crime Lab and her findings were that only a black male could have left the blood at the scene, and that only 6 percent of the black male population could have left the identical sample on both the towel and the other items found at the scene. [8] The subject, Theodore Harris, was treated at Jackson Memorial Hospital for cut wounds to his right hand, which he claimed were the result of defending himself from an attack. [9] The wounds, according to the treating doctor, Dr. Clifford, were inconsistent with being defensive wounds; but were consistent with the hand sliding down over a blade while it was used in a stabbing motion. [10] Initial conversations by the affiant with the subject resulted in an "alibi" being offered by the subject. [11] The "facts" given in the alibi were not verified by subsequent investigation, and one witness contradicted the time frame given by the suspect. [12] The residence of Essie Daniels at 14420 Northwest 21st Court, in Opa Locka, Dade County, Florida, was entered by the attacker by pushing out a screen in the bedroom window. [13] The victim had possessed approximately $400; which was found near the body, but removed from her purse and transferred to a paper bag. [14] The subject had previously been to the residence of the victim, and was familiar with its layout, as well as the regular Saturday night (March 21st) existence of cash quantity in the house. [15] As soon as the subject left the hospital, he vacated his residence and has not been located since.

Of the fifteen sentences contained in the Affidavit, only six were true or not misleading - sentences 1, 2, 8, 10, 12 and 13. Standing alone they do not establish probable cause for the arrest of Mr. Harris (or, for that matter, of anyone else). The remaining nine sentences, the guts and sinew of the Affidavit, were, on the plain record of pretrial depositions and Suppression Hearing testimony, either grossly exaggerated, distorted in a manner plainly calculated to mislead Judge Winton, or simply false.

<u>The Affidavit was riddled with error, omission, material exaggeration and untruth</u>.

We now provide this Court with what it should have had on direct appeal, but did not receive - a careful analysis of the

extent to which the Trial Court's decision at the Suppression Hearing rejecting the challenge to the Warrant is inconsistent with or ignores the record evidence on each of the points at issue. It is the very gist of our claim in this Petition that such an analysis is here presented to this Court for the first time. We proceed sentence by sorry sentence:

[1.] "Between the 20th day of March 1981 and the 23rd day of March 1981, the victim, Essie Daniels, was stabbed a total of sixty-one (61) times; forty-four (44) stab wounds in the head, thirteen (13) stab wounds to the hands and arms, and four (4) stab wounds to the torso." This first sentence of the Affidavit was, on the undisputed record, true.

[2.] "The victim also had inflicted upon her two (2) crushing blows to the head." This sentence was similarly true.

[3.] "The suspect, Theodore Harris, was released one month before the murder from the Florida State Prison System for armed robbery and was a distant relative of the victim, Essie Daniels." This sentence was incorrect and seriously misleading, under the circumstances. The record below establishes that Mr. Harris had been convicted, not of Armed Robbery in violation of §§812.13(2)(a) or (2)(b), Fla. Stat. (1981), but of Robbery in violation of §§812.13(2)(c), Fla. Stat. (1981). That conviction arose from a purse-snatching incident in 1977, in which no weapon was used. Moreover, Mr. Harris was released on parole on November 10, 1980, more than four months before the murder of Essie Daniels, and not one month before. (Tr. 10/29/81, 20:23-21:2). The record does establish that Mr. Harris was, as stated in this sentence, a distant relative, by marriage, of the victim.

[4.] "Suspect Theodore Harris, according to his room-mate, Lionel Cook, knew that the victim, Essie Daniels, came home every Saturday night from the Church Bake Sale with a large amount of cash." The trial record demonstrates this sentence was false.

Lionel Cook, the informant upon whose word the assertions in this sentence in the Parmenter Affidavit were predicated, testified in his deposition that Mrs. Daniels brought money home only on infrequent occasions, that he never knew the amount of money she brought home, and that he never told Officer Parmenter anything different. (L. Cook Dep., 26:7-14). In Mr. Cook's own words:

> Q: Did you know she kept large sums of money in the house?
>
> A: I knew at times. Now the amount, I couldn't tell you, but I knew at times she did have the church money. She was on the usher board, the president of the ushers. She had been president for quite awhile, and there was times that she did take it home and take it back and stuff like that.

Id. Sara Cook, Lionel Cook's wife and Mr. Harris' sister-in-law, who was present when Officer Parmenter conducted his interviews, testified in her deposition that she did not think Mrs. Daniels kept money around the house and did not know if Mrs. Daniels brought money home from the bake sales:

> Q: Did your grandmother keep money around the house often?
>
> A: No. Not really. Because there is so much breaking in and stuff, she wouldn't have no big money around the house or nothing. She always go to the Bank and put her money in.
>
> Q: Did she often bring home the money from the church banquets?
>
> A: Well, if they had anything -- my grandmother was the president. I don't know who was the treasurer. I don't know whether the treasurer kept the money or did my grandmother keep the money. I don't know.

(S. Cook Dep., 40:12-23).

Detective Parmenter admitted this lapse of accuracy in his Affidavit at the Suppression Hearing. He testified that, despite his sworn claim in the Affidavit that Lionel Cook told him that he had discussed these matters with Mr. Harris, Mr. Cook actually said only that Mr. Harris was "around at times when they

(the Cooks) discussed these things". (Tr. 9/10/81, 8:9-18).

Parmenter further conceded that Mr. Cook never discussed with him the amounts of money Mrs. Daniels occasionally had:

> Q: Exactly what did he [Lionel Cook] tell you?
>
> A: Exactly word by word I can't tell you. It was basically we were discussing Essie Daniels' habits, who her contacts in the community might be. He had gotten around to telling me that Essie Daniels was quite active in the Church; in fact, she was some type of treasurer within the Church's organization. That she would take money home from the bake sales and hold it in her house until it could be deposited with the bank and that Theodore Harris had, in fact, been around at times when they had discussed these things.
>
> Q: He told you that, in fact, Theodore Harris was around when she discussed those things.
>
> A: I asked him was Theodore Harris ever around when they talked about her having money in her house and he said, yes, he was there when they had discussions about it.
>
> Q: Did he indicate whether or not Theodore Harris was part of those discussions?
>
> A: He didn't indicate if Theodore Harris actually took part in the discussions. He said he was there when they were being discussed.
>
> * * *
>
> Q: As a matter of fact, wouldn't it be more correct that Lionel Cook said that he knew that she had bake sales and sometimes brought the money home, but he's not sure how much nor when?
>
> A: We didn't discuss the amounts that she would bring home. We discussed that she would bring the money home.
>
> Q: You never discussed the amounts?
>
> A: Not the amounts she would take in, no.
>
> Q: Small amounts? Large amounts?
>
> A: We never discussed the amounts.

(Tr. 9/10/81, 8:9-10:1).

[5.] "Blood samples from the murder scene were compared with the suspect, Theodore Harris, and the results were highly consistent." The trial and pretrial record demonstrates conclusively that this sentence was false. No blood samples were taken from Mr. Harris prior to his arrest. (Tr. 9/25/81, 68:20-69:17) That arrest occurred one week after the Affidavit was sworn to by Officer Parmenter. Before that time, no blood samples from the murder scene were or could have been compared with Mr. Harris' blood.

[6.] "The examination of the blood samples at the scene was compared with a bloody towel from suspect's car which was recovered on March 22nd." The record at trial also shows this sentence to be false in significant part. The bloody towels, which belonged to Sara Cook, were found in Sara Cook's car and not the "suspect's car." (Tr. 9/8/81, 14:13-16; 23:3-6).[5] Blood from the towels was found to be consistent with blood from the crime scene. (Tr. 30:20-98:21). Sara Cook's car itself, however, was never "recovered". Indeed, from the beginning of the investigation until its close the car was never out of its owner's possession. Mr. Harris used the vehicle on the night of March 22-23, with the permission of Sara Cook's son. (Tr. 9/8/81, 72:7-9; Williams Dep., 15:3-16:1). Lionel Cook picked up the car from the hospital where Mr. Harris was being treated on the following morning and brought it home. (Tr. 9/8/1, 18:18-9:3). He later gave the towels he found in the car to the police. (Tr. 9/8/81, 27:6-28:1). The inference of flight that Judge Winton justifiably might have drawn from the artful and misleading implication that Mr. Harris had a car which was somehow "recovered" by the police is utterly belied by the facts.

[7.] "The examination was conducted by Kathy Nelson of the Public Safety Department Crime Lab and her findings were that

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5. At the time of these events, Mr. Harris did not have a car.

only a black male could have left the blood at the scene, and only 6 percent of the black male population could have left the identical sample on both the towel and the other items found at the scene." As even the Trial Court found, this sentence was false. Kathy Nelson, the State's forensic serologist, testified in her deposition and at the Suppression Hearing that she never concluded -- or told Parmenter that she concluded -- that "only a black male could have left the blood found at the scene and only six per cent of the black male population could have left the identical sample on both the towel and the other items found at the scene." (Nelson Dep., 20:8-17). To the contrary, she had attempted to narrow the range of possible suspects to black males and was unable to do so:

> Q: Did you find anything in this case that would relate the blood tests directly to a black individual?
>
> A: No, I did not.
>
> * * *
>
> Q: Now, so I'm clear on this point, you did no tests to determine whether this blood belonged to a black or white individual?
>
> A: Well, the hemoglobin was done to determine that possibility.
>
> Q: But there was nothing finalized for you to say one way or another?
>
> A: Certainly not.
>
> Q: Is there anything finalized for you to give a possibility or probability?
>
> A: No.
>
> Q: Did you at any time personally speak with Detective Parmenter of the results of your analysis and the tests you did?
>
> A: Yes, I did.
>
> * * *
>
> Q: Did you at any time tell Detective Parmenter that the blood gathered on the items; specifically, the towel and other items submitted from Essie Daniels' residence -- that any of the blood had to be left by a black male; could have been left by only six percent of the population and it had to be a black male. Did you tell him anything like that?

A: That it was left by a black individual? No. He might not have understood what I said about the hemoglobin, but I never told him that.

(Nelson Dep., 14:14-16; 19:3-20:17). She testified at the Suppression Hearing as follows:

Q: Did you at any time tell Detective Parmenter that the blood gathered on the items; specifically the towel and other items gathered from Essie Daniels residence, that any of that blood had to be left by a black individual? It could only be left by six percent of the black male population?

A: I did not tell him it could be -- it was only left by a black male; however, I did tell him six percent of the population, it would have, yes, been consistent with the black population, but not male.

Q: You never told him black male?

A: No, I did not.

Q: Did you narrow anything down to black male?

A: No, I did not.

(Tr. 9/10/81, 43:22-44:10).

Although Parmenter misstated the facts again in his deposition, (Parmenter Dep., 11:18-22), he finally conceded at the Suppression Hearing that the statements contained in the Affidavit concerning what he was told about the state of the serological evidence were false:

Q: I take it you allege in this affidavit that Kathy Nelson told you that only a black man could have left the blood at the scene and only six percent of the black male population could have left the identical sample of blood -- sample on both the towel and at the scene; is that what she told you?

A: This is what I thought she had said. I found out different later.

(Tr. 9/10/81, 11:8-15).

[8.] "The subject, Theodore Harris, was treated at Jackson Memorial Hospital for cut wounds to his right hand, which

he claimed were the result of defending himself from an attack." The record establishes that this sentence was true. But it is of crucial significance to note that nowhere in the Affidavit was the Magistrate told when Mr. Harris' injuries were sustained (the previous week? the previous month? the following day?) or when Mr. Harris sought treatment. This evidence was simply never put before Judge Winton. Without any relationship in time between Mr. Harris' injuries and the murder, the relevance and probative value of sentence [8] is virtually nil on the issue of probable cause.

[9.] "The wounds, according to the treating doctor, Doctor Clifford, were inconsistent with defensive wounds; but were consistent with the hand sliding down the knife over a blade while it was used in a stabbing motion." The testimony in the record about Dr. Clifford's conversation with Detective Parmenter once again exposes Parmenter's Affidavit report of his talk with Dr. Clifford as materially, crucially false. In his deposition, Dr. Clifford testified that he told Detective Parmenter, during the conversation summarized by Parmenter in the Affidavit, that the wounds Mr. Harris sustained were consistent both with grabbing a knife in a defensive manner (as Mr. Harris suggested had occurred in his alibi) and with the use of a knife in a stabbing action (as Detective Parmenter hypothesized). (Clifford Dep., 22:24-24:23). He testified as follows:

> Q: Did you have occasion to speak with the police about this case?
>
> A: I received one call. I cannot remember who it was and whether he even identified -- it had something to do with the case. This was -- I cannot even recall when it was. It was sometime after the event, obviously. But he asked me whether I thought the lacerations were due to him grabbing a knife. That is all he asked. I do not know whether he was a police officer or what his role was, but it was -- he told me -- whatever he told me, made me give him the information. So he said he had something to do with the case. Maybe he was a police officer.

Q: That was the only question he asked you?

A: That was the only question. Yes.

Q: Did he give you any background to that question, as to grabbing that knife in what manner or how he grabbed it or anything of that nature?

A: If he did, I do not recall.

Q: The only thing you recall was him asking you, was the wound consistent to grabbing the knife?

A: (Witness nodded head).

Q: You have to answer out loud.

A: Yes. I said, "It could be consistent with grabbing a knife."

Q: Did you tell him anything similar to, "No, it is not consistent with a defensive wound, but it looks more like an offensive wound of someone grabbing a knife"?

A: I did not tell him anything like that.

Q: Did he ask you anything about a defensive wound as opposed to an offensive wound?

A: I do not believe so. I told him, similar to what I told you. That the position of his hand -- if it was a knife, it was around -- it was in a grabbing manner. His hand was closed, in other words. That is all I can really say.

Q: That was the only time you spoke with someone who represented himself as the police, in the case?

A: Yes. It was a brief conversation.

Q: So that I have it correctly; the wounds in Theodore Harris' hand were consistent with someone grabbing a knife in a defensive manner and a knife sliding out of someone's hand while they are holding it?

A: (Witness nodded head).

Q: Either way, you cannot tell one way or the other?

A: I cannot tell. The only way I can tell -- the lacerations -- the blade probably had to go through the hand multiple times.

Id.

Confronted with Dr. Clifford's testimony about his conversation with Parmenter, the beleaguered detective once again backed away from his own Affidavit at the Suppression Hearing:

> [Dr. Clifford] said for purposes of Court he could not give me either way of being the way it happened, but that it would seem more logical that with one, in fact, three cuts across his palm, that it would be more likely that the hand would slide over a knife to get cuts like that. That he could not go to Court and say that.

(Tr. 17:5-10).

[10.] "Initial conversations by the affiant with the subject resulted in an 'alibi' being offered by the subject." The record does establish that this sentence is true. When Mr. Harris was first interviewed by Detective Parmenter, shortly after he came out of surgery for the cuts to his hand, he told the investigating officer that he had been injured in a street robbery late the previous night outside a bar.

[11.] "The 'facts' given in the alibi were not verified by subsequent investigation, and one witness contradicted the time frame given by the suspect." The record establishes that this statement was exaggerated and misleading to the Magistrate. Mr. Harris told Officer Parmenter, when he was interviewed at the hospital shortly after surgery, that he was injured in a robbery attempt early on Sunday, March 23, 1981, at McDonald's Lounge in Opa Locka. As we have seen, Dr. Clifford's only conversation with the Dective neither proved nor disproved this alibi. Detective Parmenter's further "investigation" of Mr. Harris' alibi consisted of a cursory fifteen minute inspection of the Lounge parking lot at 10:30 p.m. on Sunday night (a time when the Lounge was closed). (Tr. 9/24/81, 181:23-182:9; 193:13-195:2; 286:3-289:12). Officer Parmenter and his partner took no samples of stains he noticed in the blacktop parking area. (Tr. 9/24/81, 287:1-289:12). They did not use a metal detector or other device to search for the knife

Mr. Harris said was used to rob him or the necklace he said was taken from him. (Tr. 9/24/81, 287:14-17). Moreover, although Detective Parmenter suggested in his deposition that he could find no witnesses to the robbery of Mr. Harris, (Parmenter Dep., 26:6-11), he later conceded that the Lounge was closed when he went there and that he never went back. (Tr. 9/24/81, 228:9-15).

The assertion in sentence [11] that a witness contradicted the alibi time frame given by Mr. Harris in his interview with the investigator is also misleading in its presumed clarity. Detective Parmenter stated at the Suppression Hearing that this phrase in the Affidavit referred to information he received from Greg Williams, Lionel and Sara Cook's son and Mr. Harris' roommate. (Tr. 9/10/81, 18:22-19:5). Officer Parmenter testified that Williams told him he saw Mr. Harris at exactly 12:05 a.m. on March 23 and Mr. Harris had a blood soaked towel in his hand. (Tr. 9/10/81, 24:15-25:11; Parmenter Dep., 8:9-11). Williams testified in his deposition that he never said this to the Detective with the precision that made it material to the Court reviewing the sufficiency of the Affidavit. Williams said, instead, that he did not look at a watch when he arrived home from work before midnight on March 22 and saw Mr. Harris. Asked when he arrived home that night, he said:

> A. Because I get off work from collecting approximately ten o'clock, and we was around staying at the store. I was speaking with the vice-president concerning some matters that went on in the store, and by the time we left there, it had to be about eleven or twelve o'clock, approximately.
>
> Q: So you are estimating the time. You never looked at your watch to determine?
>
> A: No I didn't. I say approximately eleven to twelve.

(Williams Dep., 11:1-10). Greg Williams also testified that the towel Mr. Harris was carrying at the time had no blood on it. He was asked and answered about this as follows:

Q: The towel on his hand, was it blood-soaked?

A: I didn't see any blood. It was at night. We were outside. I didn't really pay much attention to the towel. You know he didn't say anything about any pain or anything, so I didn't pay too much attention to it.

(Williams Dep., 24:2-10). Parmenter, once again confronted at the hearing, lamely conceded that despite the wording of his Affidavit, he never asked Mr. Harris if the times he gave Parmenter in his initial interview were exact. (Tr. 9/10/81, 22:12-14).

[12.] "The residence of Essie Daniels at 14420 Northwest 21st Court, in Opa Locka, Dade County, Florida, was entered by the attacker by pushing out a screen in the bedroom window." This sentence may or may not be true, but is simply speculation by Detective Parmenter. Insofar as the record addresses the point, it suggests otherwise.

[13.] "The victim had possessed approximately $400; which was found near the body, but removed from her purse and transferred to a paper bag." This sentence is supported by the record.

[14.] "The subject had previously been to the residence of the victim, and was familiar with its layout, as well as the regular Saturday night (March 21st) existence of cash quantity in the house." While the first clause of this sentence is accurate, minimal discipline utterly failed the investigator-affiant thereafter. Parmenter conceded at the Suppression Hearing that the only thing he knew was that Mr. Harris had once been to the house as a guest for dinner. (Tr. 9/10/81, 29:8-23). He did not ask Lionel or Sara -- and was not told by them -- if Mr. Harris had been in any room of the house except the kitchen. Id. Consequently, the sworn statement that Mr. Harris was "familiar with the layout" of Mrs. Daniels' home was a considerable leap, unsupported by anything said to Detective Parmenter by the Cooks

or by any other witness. The allegedly "regular Saturday night (March 21) existence of cash quantity" is, as we show above, a substantial and inculpatory distortion of that which the Cooks testified they actually told Officer Parmenter.

[15.] "As soon as the subject left the hospital, he vacated his residence and has not been located since." Of all of the averments contained in the Parmenter Affidavit, this was the most damaging, especially in conjunction with the alleged "recovery" of Mr. Harris' non-existent car alluded to in sentence [6], discussed above. This sentence was included for one purpose only: to suggest to Judge Winton that a guilty and fearful Mr. Harris was, at the time of the application for the Warrant, in flight to avoid apprehension. If true, such actions by Mr. Harris lent powerful credence to the application for the Warrant. Nevertheless, the implication that Mr. Harris was on the run was false, and the record demonstrates that Detective Parmenter knew it to be so.

Mr. Harris, a native of Jacksonville, had been residing with the Cook family, his ex-wife's relatives, for several months while he sought work in the Miami area. (Tr. 9/8/81; 10:21-22:3; 45:8-20; Tr. 9/23/81, 197:7-198:24, S. Cook Dep. 4:10-6:12). His stay with the Cooks was arranged by his wife and Sara Cook, her sister. Mr. Harris left the hospital on March 25, 1981, in the company of a member of the Cook family. (L. Cook Dep., 28:19-24; Williams Dep. 32:1-16). Before leaving the hospital, he was told by Lionel Cook that, as a result of the investigation, he was no longer welcome as a guest in the Cook's house. (Id.; Tr. 9/10/81, 30:3-9; 31:13-17). As Detective Parmenter and the Cooks knew, Mr. Harris was thus left without either means of support or a place to reside in Miami. Mr. Harris, after speaking with various members of the Cook family, decided to go home to Jacksonville -- the only home he had, and the residence of his ex-wife, his child, his

parents, and his siblings. The Cooks helped him by picking him up at the hospital, giving him his clothes at their house and taking him to the bus station so he could catch the bus to Jacksonville. (Williams Dep., 32:1-16). There was, of course, no warrant out for Mr. Harris' arrest. Neither had he been told by the police not to leave town, or even to inform them of his whereabouts.

Lionel Cook testified in his deposition that he told Mr. Harris he did not want him in the house:

> She [Sara Cook] was scared to death. She said if he really did it, he'd kill us even in this house. She said, "I don't want him coming back," and rather than telling him that, we just told him because I found that and I couldn't have that.
>
> Q: You told him that on the day he was released from the hospital?
>
> A: On the telephone.
>
> Q: Greg went to pick him up?
>
> A: Yeah. He wanted Greg to pick him up and take him to the bus station.

(L. Cook Dep. 28:10-24).

Greg Williams, Lionel's step-son, testified in his deposition that he picked up Mr. Harris at the hospital, took him to the Cook residence to pick up his clothes and then took him to the bus station to get a bus for Jacksonville, to return to his wife (Sarah Cook's sister). He stated:

> Q: After that day, when was the next time you saw Theodore Harris?
>
> A: When I went and got him from the hospital.
>
> Q: Do you recall what day that was?
>
> A: No, not exactly. You can have it at the Trailways bus station when he bought the ticket.
>
> Q: So from the hospital you took him straight to the bus station or back by the house?
>
> A: I took him by the house, but I left him in the van because I didn't think it

> would have been too swift for my mother to see him because she was very disturbed. Her and my grandmother were very close, very, very close, and "they" wanted me to take him to the bus station because they didn't want him to live there no more.
>
> I didn't want to take him, but she says, "Well, take him," so I did.

(Williams Dep., 32:1-16).

Not only is there little doubt (and no mystery) surrounding the facts of Mr. Harris' departure from Miami -- there is little doubt that Officer Parmenter was fully aware of the circumstances of Mr. Harris' trip home. The contacts between the Cook family and Officer Parmenter commenced the day after the murder, when the Cooks first put Mr. Harris' name forward to Detective Parmenter as a suspect. (Tr. 9/24/81, 177:19-22, 178:21-180:2, Parmenter Dep., 4:22-6:22). As their suspicion of and animosity towards Mr. Harris grew, they provided the detective with numerous items of physical evidence, including the towels from Sara Cook's car, Mr. Harris' clothing, and other objects. (Tr. 9/8/81, 24:22-26:1, 27:6-28:1, 30:15-32:2). Uncontested testimony from the Cooks and Detective Parmenter proves that they were in daily contact with each other before and after Mr. Harris' departure, and that the Cooks told the officer of Mr. Harris' return to Jacksonville. (Id.; Tr. 9/10/81, 31:2-12; Tr. 9/24/81, 335:19-21: Parmenter Dep., 17:15-18:21). Detective Parmenter acknowledged at the Suppression Hearing that he knew Mr. Harris had a Jacksonville residence. (Tr. 9/10/81, 31:8-11). He also knew that Mr. Harris' wife and father lived there; he knew their addresses as well. (Tr. 9/24/81, 205:8-22; 335:22-336:25). Striving to defend his Warrant in his deposition, the Detective trod delicately:, "One time he [Lionel Cook] stated he had heard that Theodore Harris had gone back to Jacksonville and was up there staying with somebody". (Parmenter Dep., 18:17-19).

The artful vagueness is unavailing under the circumstances. Mr. Harris was not just Detective Parmenter's leading suspect -- he was his only suspect. The Cooks, the victim's nearest relations, were his key cooperating witnesses. That Detective Parmenter really didn't know where Mr. Harris was and believed him to be on the run strains credulity to the breaking point. Certainly none of the Cooks viewed themselves as assisting Mr. Harris in a flight from justice when they took him to the bus station for his trip to Jacksonville, and the record is clear that Detective Parmenter never taxed them with any such claim.[6]

Mr. Harris, meanwhile, continued to report to his Miami Parole Officer, Nanette Brochin, by telephone.[7] Mr. Harris' parole had been recently transferred to Miami from Jacksonville. (Tr. 9/8/81, 79:22-81:1, Brochin Dep., 2:19-25) Parole Officer Brochin testified in her deposition that Mr. Harris made a normal initial appointment with her after receiving a letter she sent to him at the Cook residence, (Brochin Dep., 4:7-14), in a call placed before the Warrant was issued:

> Q: Prior to that date [April 14, 1981], ma'am, did you speak with Mr. Harris over the telephone at any time?
>
> A: Yes. My first one that I have documented here was on 4/6/81, where he had called me. 4/6/81 subject called me and he got my letter and appointment was scheduled for 4/10/81 at 3:00 P.M.

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6. Although Detective Parmenter at the Suppression Hearing contended that he asked the Jacksonville Police to look for Petitioner before the warrant was issued, (Tr. 9/10/81, 39:11-20), his trial testimony makes clear he contacted the Jacksonville Police only after Judge Winton issued the the warrant. (Tr. 9/24/81, 205:14-22). Indeed, had Parmenter in truth unsuccessfully tried to contact Petitioner through the Jacksonville Police and been unable to do so, he and Mr. Laeser would surely had said so in the Affidavit.

7. We do note that Mr. Harris' trip to Jacksonville represented a technical violation of the terms of his Parole, although he had not yet had his first meeting with the Dade County Supervising Officer, and he did have a valid Travel Pass from his Jacksonville Supervising Officer. (Tr. 9/8/81, 94:8-11).

(Brochin Dep., 5:2-7). Mr. Harris, in Jacksonville on April 10th, called her again and rescheduled his appointment for the 14th. (Tr. 9/8/81: 85:1-12, Brochin Dep., 8:4-16).

The crowning irony, which gives the lie to the official claim of flight presented to an unsuspecting Judge Winton in order to secure the Warrant, is that Detective Parmenter, having secured the Warrant, learned from Ms. Brochin that Mr. Harris was in touch and had scheduled an appointment. (Tr. 9/8/81, 81:22-85:25; Brochin Dep., 6:7-13; 8:21-9:9). He simply told her to call him when Mr. Harris arrived. Id. Detective Parmenter's confidence in Mr. Harris was not misplaced. Mr. Harris kept his April 14 appointment. (Tr. 9/8/81, 84:24-25). He was arrested by Officer Parmenter on the Warrant as he sat in Ms. Brochin's Miami office, conducting his scheduled parole interview. (Tr. 9/8/81, 88:18-89:9).

The Conduct of the Supression Hearing

The deficiencies in the Warrant were identified and brought to the Trial Court's attention by trial counsel at the time of the Suppression Hearing. (Tr. 9/10/81). At the Suppression Hearing, Parmenter, Nelson and Clifford testified in person. Id. In addition, trial counsel referred extensively at argument to the Depositions of Lionel Cook and Nanette Brochin. (Tr. 9/10/81, 50:17-23; 53:5-11). He pointed out numerous deficiencies in the Warrant Affidavit. Using the deposition of Lionel Cook, he showed that Lionel Cook never told Parmenter that Essie Daniels brought large amounts of money home on Saturday nights, and that the claim that Mr. Harris "knew the layout" of Mrs Daniels' home was false and misleading. (Tr. 9/10/81; 50:17-23; 52:3-18). He challenged the veracity of Parmenter's statement that Nelson had narrowed the range of possible suspects to six percent of the black male population. (Tr. 9/10/81

50:4-13). He attacked Parmenter's inaccurate representations concerning Dr. Clifford's conclusions about the nature of Petitioner's hand wounds. (Tr. 9/10/81; 51:4-22). He established that Parmenter's statement that Mr. Harris had "vacated his residence and has not been located since" was, in light of what Parmenter knew or had reason to know at the time, patently false. (Tr. 9/10/81; 52:19-53:19). He summed up as follows:

> The only reason that a warrant was issued, Judge, is because the detective alleged facts about the blood and narrowing it down and the doctor saying the wounds were inconsistent with defensive wounds, as well as the Defendant vacating his residence, his whereabouts unknown, all three of those allegations are misstatements of the facts. They are intentional misrepresentations and intentional misstatements calculated to mislead this Court, calculated to mislead the Magistrate in issuing the warrant and calculated only towards having the warrant issued to arrest Theodore Harris and not based upon probable cause and this warrant does not show probable cause on its face without those misrepresentations.

(Tr. 9/10/81; 53:25-54:13).

The Trial Court, in its ruling, dealt only with one portion of the arguments advanced by defense counsel, and ignored or overlooked the remaining deficiencies in the Affidavit:

> Next, turning to the Franks versus Delaware question. The Court, pursuant to the State versus Nova and the State versus Battleman enters the following findings of fact under Franks versus Delaware, 438 U.S. 154 [1978]: Number one, the Court's aware of the presumption of validity as to the search warrant. Number two, the Court's aware probable cause may be based on hearsay and upon information received from, for example, Lionel Cook. Strike that. Upon information received from informants, for example, Lionel Cook. Indeed, it is well known that such information must be garnished hastily.
>
> Based upon such investigative practices, as in this case, such discrepancies between witnesses' statements can and sometimes will develop. Yet, such discrepancies I find, as the trier of fact, do not rise to the level necessary to meet the test of Franks versus Delaware.

> I find that there was no deliberate falsity or reckless disregard by the investigating police agencies. Here, at best, there was a possible negligence or innocent mistake concerning a blood typing and evidence on that regard.
>
> Moreover, assuming arguendo, there even was a falsity or disregard, there remains sufficient contents within the warrant affidavit to support a finding of probable cause.
>
> Viewing the affidavit in one or two different matters, for example, number one, paragraph number one of the affidavit, all information in paragraph one is true. As to paragraph number two, all information in paragraph number two is correct, except that concerning Kathy Nelson, which is a matter of interpretation. Number three, as to paragraph number three of the affidavit, all information is correct.
>
> Viewing it from another perspective, even without that particular bit of information, there is sufficient evidence to constitute probable cause based upon the fact that the blood sample was obtained, that he knew the victim, that there was a cut, knowledge of Essie Daniels, that alibi was not verified, and that he knew the layout of the home.
>
> Therefore, I find that they have met the test, to-wit: That probable cause existed where the facts and circumstances within the offender's knowledge are sufficient to -- in themselves to warrant a man of reasonable caution and belief that an offense has been committed and that the Defendant has committed the crime under Benefield versus State, 160 So. 2d 706. The motion under Franks versus Delaware is denied.

(Tr. 9/10/81; 60:9-62:16). This abbreviated ruling represented the only statements by the Trial Court in response to a crucial and broadly-based attack on the bona fides and truth of the Affidavit. The very brevity and narrowness of focus of the Trial Court's ruling should have invited the careful scrutiny so conspicuously absent in the presentation on Mr. Harris' behalf in this Court.

Appellate Counsel Failed Adequately To Present Petitioner's Fourth Amendment Claims To This Court

Petitioner brought a direct appeal of his conviction and sentence to this Court in accordance with Florida law. Pursuant to an order of the trial judge, counsel was appointed to represent petitioner on his appeal.

In his brief to this Court, counsel did raise as a point of error the Trial Court's denial of petitioner's motion to suppress the arrest warrant. (Appendix D, at 21). Counsel utterly failed, however, to adequately present to this Court the unlawful circumstances surrounding Petitioner's arrest:

> -- Despite the central and dispositive nature of the claim of error, appellate counsel devoted only seven and one-half of 56 pages of his brief to the Franks v. Delaware issue and failed in that brief to offer the kind of careful and detailed analysis of the Warrant's cumulative deficiencies that was critical to effective presentation of the claim.
>
> -- Appellate counsel failed to include in the appellate record the depositions and trial testimony of several witnesses whose testimony demonstrated that numerous material allegations of the Affidavit were false.
>
> -- Counsel neglected to file any reply brief at all, or to respond in any way to numerous telling misstatements of fact and law made by the State in its brief point in response, Appendix E at 41.
>
> -- Finally, although allowed ample time for argument, and despite the crucial significance of the issue, appellate counsel failed even to refer to the defective arrest warrant at oral argument before this Court.

In short, the overwhelming and largely undisputed evidence of police misconduct in connection with Mr. Harris' arrest briefly canvassed here was never properly brought to this Court's attention, by Brief, in the Record Appendix, or at oral argument. Had these matters been properly presented, we submit this Court would not have countenanced the errors below, and should not do so now.

III.

BASIS FOR THE WRIT

The right to a full and meaningful direct appeal and to the effective assistance of appellate counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Florida law. Evitts v. Lucey, 36 Crim. L. Rep. (BNA) 3109 (U.S. S.Ct. January 21, 1985) (available February 6, 1985, on Lexis, Genfed Lib, Sup file); Knight v. State, 394 So.2d 997 (Fla. 1981). The essence of that appeal is the meaningful scrutiny of key rulings made at trial, measured against the full backdrop of the record before the Trial Court. When the claim relates to a violation of the Fourth Amendment, the duty is correspondingly higher, since this Court is, for all practical purposes, the Court of final appeal. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed 2d 1067 (1976); Cardwell v. Taylor, 461 U.S. 571, 103 S.Ct. 2015, 76 L.Ed 2d 333 (1983). Where, as here, a dispositive ruling was clearly erroneous and went, perforce, virtually unreviewed in this Court due to the inadequacies of appointed counsel, the Writ must issue.

The Trial Court Erred In Refusing To Suppress the Confession

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed 2d 667 (1978), the Supreme Court held that warrants based upon false Affidavits, either made with knowledge that the statements were false or made in reckless disregard of truth or falsity, are invalid under the Fourth Amendment if the false assertions were necessary to establish probable cause:

> In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue; but upon probable cause, supported by Oath or affirmation...." Judge Frankel, in United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D. N.Y. 1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported) put the matter simply:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a truthful showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

438 U.S. at 164-165, 98 S.Ct. at 2681, 57 L.Ed 2d 667. Even before Franks, Florida courts had invalidated warrants when the supporting affidavits were found to contain intentional or reckless misstatements of fact concerning matters material to probable cause. See e.g., State v. Bogard, 388 So. 2d 1296 (Fla. 4th DCA 1980) (Officer-affiant misrepresented that he had obtained information from a reliable "Confidential Informant".) Since Franks, still more courts have stricken the egregious warrant. See Debord v. State, 422 So.2d 881 (Fla. 2d DCA 1982) (Officer-affiant incorrectly represented to Magistrate that he had had direct contact with an informant); State v. Marrow, 459 So.2d 321 (Fla 3d DCA 1984) (Officer-affiant misled Magistrate as to the hearsay nature of his conversation with informant).

The result in United States v. Namer, 680 F.2d 1088 (5th Cir. 1982), illustrates the application of the constitutional principles laid down in Franks to the instant Warrant. In Namer, certain items were seized from defendant's business office pursuant to a search warrant. Namer challenged the warrant, claiming it contained false statements material to the issue of probable cause. The United States Court of Appeals the Fifth Circuit agreed, basing its decision on constitutional grounds.

During an investigation into Namer's business affairs, the prosecutor contacted the Deputy Commissioner of Securities for Louisiana and asked whether the loan commitments in which Namer was dealing were securities within the meaning of the Louisiana

Blue Sky Law. The Deputy Commissioner cautiously opined that the loan commitments "probably" were securities within the meaning of the law and that the loan commitments were not registered.

On the basis of this information, the prosecutor sought a warrant to search Namer's office for evidence of violations of the Blue Sky Law. The affidavit stated that the Deputy Commissioner had "advised" the District Attorney's office that the Namer loan commitments were "classified" as securities under Louisiana law and that the offerings were not registered with the Securities Commission.

The Court of Appeals held that the police affiant's representation that the Deputy Commissioner had said the loan commitments were "classified" as securities was a material misrepresentation:

> In the case before us, the Affidavit was drafted by two attorneys during the course of a lengthy investigation at a time when they were not beset by any exigent circumstances. The word "classified" connotes the authoritative result of ordered procedures and methodologies, not an ad hoc and qualified oral opinion of a single agency employee. The affidavit's statement is no less a misrepresentation because it manipulates the facts subtly. By using the word "classified", the affiant inaccurately described what had transpired. Since the statement that the instruments were "classified as securities" was the only item in the affidavit tending to establish that Namer had acted criminally, we also conclude that the misrepresentation was material.

680 F.2d at 1094.

The Court then observed that the concepts of scienter and materiality are "often bound together." Because it held that the misrepresentation was "crucially material," and discerned no exigent circumstances in the preparation of the Affidavit, the Court concluded that the Affidavit could not stand:

> The search warrant application was drafted by the members of the Economic Crime Unit of the Orleans Parish District Attorney's office after a year-long investigation into Namer's business affairs. The two principal draftsmen were attorneys with at least some exposure to the legal and factual intricacies often

> involved in detecting while collar crime. It is not shown that they acted in a hurried fashion. Rather, we presume from the pace of the investigation and the frequency of these conversations with Stansbury [the Deputy Commissioner] that they acted deliberately and that they were aware of the novelty of their legal theory. We also note that a strong opinion from Stansbury was the best, if not only, hope for conferring an aura of legitimacy upon this legal theory. Given all of the above - lengthy investigation, draftsmen trained in the law with experience in white-collar criminal prosecution, lack of exigency, novel legal theory, appreciation of the importance of Stansbury's opinion, and understanding of the informal process by which Stansbury reached and rendered his opinion - we conclude that the members of the Economic Crime Unit proceeded in reckless disregard of the truth when they characterized Stansbury's ad hoc, oral opinion as a "classification". The circumstances surrounding the investigation and warrant application permit no other reasonable conclusion.

680 F.2d at 1094.

Applying the Franks, Boqard-Namer test to the Trial Court's decision on the motion to suppress requires three steps.

1. The Trial Court clearly erred [8] in its factual finding that there was only one misstatement (the state of the serological evidence) in the Affidavit. The undisputed evidence we summarize above, evidence which was of record before the Judge at the time of the Suppression Hearing, established that Detective Parmenter made numerous, cumulative misleading and false statements about his investigation, the Trial Court's brief and erroneous conclusion to the contrary notwithstanding. See discussion, above, at 8-23.

2. The warrant Affidavit was so riddled with crucially important misstatements and falsehoods that the Trial Court plainly erred in not finding the misstatements and untruths in

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8. We assume that the standard of review for factual findings by the Trial Court is clear error -- it is a standard we have no difficulty meeting here, at least in the few instances in which the Trial Court made any explicit findings at all. Compare, Chicken N' Things v. Murray, 329 So.2d 302, 305 (Fla. 1976).

Affidavit to be deliberately false and calculated to mislead Judge Winton into issuing the Warrant, or, at a minimum, reckless in their continual and cumulative disregard of the responsibility for accuracy. Had the only false statement in the Affidavit been the one about the state of the serological evidence, or even the discrepancies in Parmenter's report of the Cook's statements about the family discussions of Mrs. Daniels' moneys, perhaps the Court below could reasonably have found mere negligence by Detective Parmenter. Here, however, virtually every assertion critical to the finding of probable cause was misleading, partly incorrect, or simply false. Many, such as sentences 6 and 15, were artfully so. Conversely, not one of the relevant material assertions was unqualifiedly true. A clear design emerges - a pattern intended to convey the impression that the police had already built a strong case against Mr. Harris when in truth this was simply not so. Viewed cumulatively and in context, as Namer and common sense demand, the Affidavit must be seen, at least, as recklessly and materially deceptive.

The circumstances under which the Affidavit was prepared also compel the conclusion that Detective Parmenter acted wilfully. The undisputed record utterly refutes the suggestion in the Trial Court's bench opinion that this Affidavit, as opposed to other, similar documents, was the hastily assembled product of exigent circumstances. Detective Parmenter did not even seek a warrant for Mr. Harris' arrest until three weeks after the murder, and two full weeks after he knew Mr. Harris had gone home to Jacksonville. The numerous false and misleading representations in the Affidavit were thus not the result of a need to act quickly before the suspect disappeared, but the product of a deliberate, calculated effort to mislead Judge Winton into thinking the police had probable cause to make the arrest. As in Namer, this Affidavit was not drafted in the field, by an untrained and over-

burdened policeman, in hot pursuit of a suspect. It was written at leisure with the help of at least one (and perhaps more than one) Assistant State Attorney -- trained professionals in the preparation of such documents. That the product of this collaboration was an Affidavit replete with falsity and subtle deception hardly supports the finding by the Court below of innocent mistake.

Finally, and of greatest significance to the question of intent, the undisputed chronology of events surrounding the execution of the Warrant reveals Officer Parmenter's true motivation for misleading Judge Winton. The conclusion that what Detective Parmenter wanted was to get a confession in order to bolster the precariously weak case he had been able to assemble in the previous weeks of investigation cries out from the record of his actions before and after the arrest was made. Had the true state of affairs been as stated in the Parmenter Affidavit, the obvious law enforcement imperative was to arrest Mr. Harris immediately in order to immobilize him, thereby preventing future crimes by him and assuring his presence at trial. No lengthy delay would have preceded the application for the Warrant; no similar leisurely period would have characterized its execution. The noon arrest would have been followed, presumably, by a brief interrogation and then by Mr. Harris' timely arrainment before the Magistrate issuing the Writ.

Instead, matters took the opposite course. The application for the Warrant was made weeks after the investigation quieted, and was not executed for an additional period of time. When it was executed, the circumstances make it clear that protracted, coercive interrogation, not incarceration, was the primary police aim.

Thus, the findings of fact entered by the Court below in denying Petitioner's Franks v. Delaware motion were wholly

unsupported -- indeed flatly contradicted -- by the undisputed record evidence of intentional police misconduct. The Court below should have concluded, like the Courts in Namer, Bogard, Debord, and Marrow, supra, that the warrant Affidavit contained material falsehoods that must, under Franks, be purged from the Affidavit.

3. Had the Court below appropriately excised the false allegations contained in sentences 3-7, 9, 11, 12, 14, and 15 of the warrant Affidavit, or even if it had merely redacted some of them to their truthful kernels, there is no doubt that it should have invalidated Petitioner's arrest. Stripped of the offending misrepresentations, the Affidavit would have, in essence, provided that:

> -- The victim, Essie Daniels, was stabbed sixty-one times and bludgeoned two times on March 22, 1981;
>
> -- Mr. Harris was a distant relative of the victim and had previously been to her house (on one occasion);
>
> -- Harris was treated at an unspecified time at Jackson Memorial Hospital for hand wounds received at an unspecified time;
>
> -- In one conversation with Detective Parmenter, Harris gave Parmenter an alibi;
>
> -- The residence appeared to have been entered through a screened bedroom window;
>
> -- The victim possessed approximately $400 in cash at the time of the murder, which was found near the body in a paper bag.

Presented with such an Affidavit, we submit no Judge could properly have found probable cause to make an arrest.[9]

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9. It is, of course, axiomatic that the Court, in assessing whether probable cause exists, must evaluate the sufficiency of warrant affidavits precisely as they were presented to the Magistrate. The reviewing Court cannot consider facts known to the affiant but omitted from the Affidavit. Thus, the fact that Petitioner's hand was injured on the same night as the murder cannot be considered in determining whether there was probable cause -- because that fact nowhere appears in the Affidavit. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 565, 91 S.Ct. 1031, 28 L.Ed 2d 306 (1971).

As the Warrant Goes, So Goes the Confession

Since the record establishes that Petitioner was unlawfully arrested, the Court below, as a matter of law, should have suppressed the inculpatory statement given to police immediately following his arrest. Because the primary objective of the official misconduct was to obtain the opportunity for custodial interrogation, and because of the remarkably coercive circumstances of the interrogation that in fact elicited Mr. Harris' brief confession, the statement is tainted fruit of the poisonous tree. As such, it must be suppressed.

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed 2d 416 (1975), and Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed 2d 824 (1979), together preclude admissibility of this confession if the arrest is overturned. Florida courts, following Brown and Dunaway, have frequently suppressed confessions that were the direct results of unlawful arrests. See, e.g., K.H. v. State, 407 So.2d 266 (Fla. 3d DCA 1981) (Juvenile's statements following an unlawful arrest suppressed as unlawful product of the arrest); State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983) (Statements made by defendant following unlawful arrest were suppressed, since there was no break in the causal connection between the arrest and the confession). No different result obtains here, where circumstances no less egregious than those presented in Dunaway and Brown are uncontested on the record below. Here, Detective Parmenter flagrantly violated Petitioner's Fourth Amendment rights by obtaining an arrest warrant on the basis of an Affidavit that was riddled with deliberate falsehoods. Immediately following his midday arrest, moreover, Petitioner was taken to Metro-Dade Public Safety headquarters and subjected to six uninterrupted hours of incommunicado interrogation, shackled all the while. Under these circumstances, no one could seriously argue that any intervening event -- and certainly not the advice

of rights -- broke the causal connection between Petitioner's arrest and his confession. Instead, here, as in Dunaway and Brown, the Court below should have found the confession was the direct product of an unlawful arrest and should have suppressed it.

Appointed Appellate Counsel Failed Adequately to Present the Fourth Amendment Claims

Although this case is old, we have thus far traversed new and untrodden paths in this Petition; no more damning statement could be made about the conduct of the appeal. Appellate Courts cannot review every page of every record and every legal precedent to locate appellate issues for any party. The Courts must inevitably depend upon lawyers, as active advocates for the client's causes, to apprise them of the record facts and law that support their contentions on appeal. The stakes here were life and death, and the failure was correspondingly catastrophic. Not only was the briefing inadequate in the main brief and nonexistent in reply; not only was the oral argument wholly devoid of reference to the Fourth Amendment; here appointed counsel inexplicably failed even to include much of the evidence that supports Mr. Harris' present contentions in the Record Appendix, thus depriving this Court of the opportunity to find the important evidence even if it had looked for it. In sum, this Court has never been afforded the opportunity to consider thoroughly Mr. Harris' claim that he was denied rights secured to him under the Fourth Amendment rights. As a result, Mr. Harris has not been afforded the meaningful appeal to which he was constitutionally entitled.

Although the right of effective assistance of appellate counsel is well settled in this state, Knight v. State, 394 So.2d 997 (1981), and in this Federal Circuit, the United States Supreme

Court had not until recently spoken directly on this issue. In Evitts v. Lucey, 36 Crim. L. Rep. (BNA) 3109 (U.S. S.Ct. January 21, 1985) (Available February 6, 1985, on Lexis, Genfed Library, Sup file), however, the Court held that the right to effective assistance of appellate counsel is firmly rooted in the Sixth and Fourteenth Amendments. In Evitts, Lucey was convicted in Kentucky of trafficking in controlled substances. He retained counsel to handle his appeal. Counsel filed a timely notice of appeal but failed to file a "statement of appeal" -- a statement setting forth the name and address of counsel, the name and address of the trial judge, the date judgment below was entered and similar information -- as required by Kentucky appellate rules. As a result, the Kentucky Court of Appeals dismissed the appeal. Lucey's attempt to get relief in the state courts was unsuccessful. He then successfully sought relief in the federal courts and Kentucky appealed. On appeal both parties conceded that appellate counsel was "ineffective;" the issue presented was whether the Sixth and Fourteenth amendments guaranteed the effective assistance of appellate counsel. The Supreme Court affirmed the grant below of habeas corpus relief, holding Lucey was constitutionally entitled to effective counsel on appeal.

The Court based its holding in the intersection of two lines of constitutional adjudication. In one line of cases beginning with Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed 891 (1956), the Court had held that the Fourteenth Amendment guarantees an appellant in a first appeal as of right certain minimum safeguards necessary to make the appeal "adequate and effective", such as a right to counsel. In the second line beginning with Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed 2d 799 (1963), the Court had held the Sixth and Fourteenth Amendments guaranteed the effective assistance of trial counsel. Addressing the second line of cases, the Court observed:

> As we have made clear, the guarantee of counsel" cannot be satisfied by mere formal

> appointment,"...[T]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command...An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Last term, we emphasized this point while clarifying the standards to be used in assessing claims that trial counsel failed to provide effective representation. See United States v. Cronic, 466 U.S. ____ (1984); Strickland v. Washington, [466 U.S. _____ (1984)], supra. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.

36 Crim. L. Rep. at 3112. The Court found these two lines of cases dispositive of Lucey's claim:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, and the consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation at trial -- does not suffice to render the proceedings adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Id. (Emphasis added).

Although Evitts broke new ground by settling the federal constitutional dimensions of the claim of ineffective assistance of counsel, it worked no substantial change in the law of Florida. This Court has previously described the required showing to establish ineffective assistance of appellate counsel in Knight v. State, 394 So.2d 997, 1001 (Fla. 1981): (1) a specific omission or overt act upon which the claim of ineffective assistance of counsel is based; (2) that the specific omission or act alleged was a "substantial and serious deficiency measurably below that of competent counsel"; and (3) that the petitioner was prejudiced to

the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. Cf. Strickland v. Washington, 466 U.S. _____, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

We have here met all three requirements of proof under Knight and we submit that the State cannot meet its countervailing burden of showing Petitioner has not been prejudiced.

Appellate counsel's presentation of the Franks v. Delaware issue in his brief to this Court was hopelessly anemic. (Appendix D). In the seven and one-half pages (of 56) he devoted to this crucial claim, so central to the State's proofs, counsel referred only to three misstatements of fact in the Affidavit: those relating to the serological evidence, the erroneous report of Dr. Clifford's conclusions about petitioner's wounds, and the trumped-up and false allegations of flight by Petitioner. Counsel failed even to attempt to show -- as we show here -- that the Affidavit, far from containing just one error, as the Trial Court found, or just three errors, as counsel urged in appeal, was instead replete with omissions, exaggerations, misstatements, and outright falsehoods. Moreover, the cumulative perspective required by the cases is wholly absent. The brief point at issue, singularly lacking in conviction and urgency, and submerged beneath arguments far less likely to be outcome-determinative, does not even assign as error the narrowness of the Trial Court's rulings.

Notwithstanding Fla R. App. P. 9.200, which requires that counsel make his own record, counsel failed to include the evidence necessary to sustain even his own argument, to say nothing of the argument that he should have been making, in the

Record on Appeal.[10] The depositions of Sarah and Lionel Cook, Greg Williams, Dr. Stephen Clifford, Cathy Nelson, Nanette Brochin and Detective Parmenter were all omitted, and are here proffered in the Appendix to this Petition for the first time. These depositions, which were duly filed in the Clerk's Office in the Eleventh Judicial Circuit, were absolutely critical to petitioner's claim that Parmenter's affidavit was deliberately false and misleading.

Counsel failed even to file a reply brief -- a lapse that plainly troubled at least one member of this Court at oral argument. As a result, counsel never apprised this Court of the numerous factual inaccuracies contained in the State's brief concerning Petitioner's Fourth Amendment claim. Among other things, the State contended in its brief that Detective Parmenter had "no

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10. Rule 9.200 provides in pertinent part as follows:

> (1) The record shall consist of the original documents, exhibits and transcript of proceedings, if any, filed in the lower tribunal except summonses, praecipes, returns, notices, dispositions, other discovery and physical evidence.
>
> (2) Within 10 days of filing the notice of appeal, an appellant may direct the clerk to include or exclude other documents filed in the lower tribunal.
>
> * * *
>
> (e) The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on petitioner or appellant.

It is well settled law, moreover, that it is the appellant's burden to provide an adequate record to the appellant court. See Brice v. State, 419 So.2d 749, 750 (Fla. 2d DCA 1982) (Petitioner's failure to provide reviewing court with the order appealed from is fatal to his appeal, since "it is the appellant's duty to provide an adequate record to the appellate court); Mills v. Heenan, 382 So.2d 1317, 1318 (Fla. 5th DCA 1980) (Court affirmed the decision below holding the record on appeal, consisting only of pleadings and the order appealed from, was inadequate to demonstrate error below and it was the duty of appellant to "bring before the appellant court a record adequate to support his appeal").

idea" where Petitioner was prior to the day of his arrest. (Appendix E at 7). At another point in its brief, the State contended that Petitioner's alibi was "contradicted" by the total absence of physical evidence and that the alibi had been "carefully examined" by the Detectives investigating the case. (Appendix E at 20). Similarly, the State quoted from Doctor Clifford's Suppression Hearing testimony about his ultimate conclusions, but made no reference to Dr. Clifford's deposition, in which he described his only conversation with Detective Parmenter before the issuance of the Warrant. (Appendix E at 8). These -- and other -- contentions in the State's brief were inaccurate and misleading. A reply could have -- and should have -- been made. Under the circumstances, counsel's failure to file a reply brief addressing the Franks issue represented virtual abandonment of the claim, as opposed to the vigorous advocacy required by law.

Finally, and perhaps most significant of all, counsel failed even to mention the Franks claim at his extended oral argument. Instead counsel's argument focused exclusively upon his contentions that the prosecutor had improperly commented in summation upon Petitioner's silence and the Trial Court's refusal to charge the jury on lesser included offenses. Although these were substantial issues upon which a reversal could have -- and should have -- been granted, counsel should nevertheless have made the Fourth Amendment claim a central part of his argument to this Court. By failing to mention, much less highlight, this issue at argument, counsel deprived this Court of an opportunity for thorough review of the Petitioner's Fourth Amendment claim which was based upon overwhelming evidence of police misconduct.

As the Supreme Court made clear in Evitts, "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." 36 Crim.

L. Rep. at 3112. Here, Mr. Harris was placed in even a worse position. This Court was entitled to infer that the Fourth Amendment issue lacked substance from the cavalier fashion in which it was treated by counsel. Regrettably, that is simply not supportable on the record.

Perhaps this Court, on the basis of the weak presentation made by appellate counsel, had prior reason to conclude, as it did, that the Court below "scrupulously adhered" to the requirements of Franks v. Delaware, but the truth, as we have shown the record to demonstrate, is otherwise. Had counsel adequately presented the issue to this Court, we submit it would have found error below. The overwhelming record evidence of a Fourth Amendment violation in his case demanded a far more forceful and extensive presentation by an appellate counsel than was made here. It commands issuance of the Writ, consideration de novo on the merits and reversal.

Respectfully submitted,

McCarter & English, Esqs.
Attorneys for Petitioner
Theodore Christopher Harris

By: 
Daniel L. Rabinowitz
A Member of the Firm

On the Petition:
Daniel L. Rabinowitz
Keith E. Lynott
Kamil Ali

VERIFICATION

STATE OF FLORIDA)
) SS.
COUNTY OF BRADFORD)

THEODORE CHRISTOPHER HARRIS, of full age, duly sworn according to law, upon his oath deposes and says:

1. I am the Petitioner in this matter.

2. I have read the foregoing Petition for Writ of Habeas Corpus and for Other Relief. All the facts set forth therein are true.

Theodore C Harris
Theodore Christopher Harris

Sworn to and subscribed before
me this 7 day of February 1985

Carlos DeLaCova

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 16, 1988

CERTIFICATION OF SERIVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Habeas Corpus and for Other Relief was served on the Honorable Jim Smith, Attorney General of the State of Florida, 401 N.W. 2d Avenue, Room 360, Miami, Florida this 8th day of February 1985.

Daniel L. Rabinowitz, Esq.