IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,523

THEODORE CHRISTOPHER HARRIS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD G. DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

RESPONSE

COME NOW Respondents, Louie L. Wainwright and Richard G. Dugger, by and through their undersigned counsel, and file this their Response to this Court's Order to Show Cause dated February 19, 1985, and would show:

1) Petitioner, Theodore Christopher Harris, asserts in his Petition for Writ of Habeas Corpus that he was denied effective assistance of counsel on direct appeal from the judgment and conviction entered and the sentence of death imposed.

2) Respondents specifically deny each and every allegation contained in petitioner's pleadings with regard to the effective assistance of appellate counsel on direct appeal.

3) REASONS FOR DENYING RELIEF

WHETHER HARRIS WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON DIRECT APPEAL.

Petitioner argues that he was denied the effective assistance of appellate counsel on direct appeal in that said counsel failed to adequately present the Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), issue to this Court. Appellate counsel, on direct appeal, attacked the defendant's arrest on the ground that the arrest warrant was not supported by probable cause because the sworn affidavit upon which the warrant was issued contained four factual misrepresentations and inaccuracies. This Court determined that the arrest was lawful. Petitioner now claims that had appellate counsel thoroughly addressed the issues raised and raised several other alleged misrepresentations and inaccuracies in the arrest affidavit, this Court would clearly have been compelled to invalidate the warrant, suppress Petitioner's confession and reverse the conviction and sentence.

Initially, the State would submit that the high prerogative writ of habeas corpus should not be used as a vehicle for presenting issues that should have been raised on appeal. Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980); State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956). Thus, Petitioner should not be allowed to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal by merely making allegations of ineffective appellate counsel. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). It is quite clear that Petitioner is indeed seeking a second review of the lawfulness of his arrest based upon alleged inaccuracies or misrepresentations in the arrest affidavit. The issue was properly raised by appellate counsel on direct appeal. This Court considered and rejected the claim in light of the entire record. This Court stated as follows:

> "In attacking his arrest on the basis of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), appellant asserts that the arrest warrant was not supported by probable cause because the sworn affidavit upon which the warrant was issued contained factual misrepresentations and inaccurracies. At an evidentiary pre-trial suppression hearing, these allegedly incorrect factual statements of the police-officer affiant were presented to the trial court, which found
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> > 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.
>
> We agree with the trial judge and find that he scrupulously adhered to the requirements of Franks, as well as to the dictates of this Court in Antone v. State, 382 So.2d 1205 (Fla.), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), in concluding that the arrest was supported by probable cause and that, even assuming there was falsity, the remaining contents of the affidavit were legally sufficient to support the arrest warrant.
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> Harris v. State, 433 So.2d 787, 793 (Fla. 1983).

It is clear that a Petition for Writ of Habeas Corpus is not an avenue to reargue legal claims that have already been raised and rejected. In In re Shriner, 735 F.2d 1236 (11th Cir. 1984), the Eleventh Circuit Court of Appeals in discussing this issue observed:

> ". . .In is first petition, Shriner argued that the trial judge restricted the consideration of

non-statutory mitigating factors in violation of the Eighth and Fourteenth Amendments. Shriner's present attempt once again to raise the issue of mitigating factors merely revisits this issue by couching it in terms of ineffective assistance of counsel. His claim that statutory mitigating factors were not presented is based on the same facts as his non-statutory mitigating factors claim. Shriner may not be permitted to raise and re-raise the non-presentation of evidence of his deprived background merely by developing "different arguments and conclusions," Smith v. Kemp, supra, 715 F.2d at 1469, relating to that issue. Additionally, Shriner instructed counsel not to present to the sentencing jury any evidence of mitigating circumstances.

Similarly, Shriner's third and fourth claims both involve the voluntariness of his confession. The issue was fully litigated in Shriner's first habeas proceeding and found to be without merit. Shriner contends that at the earlier proceeding he did not present evidence that he was intoxicated or under the influence of drugs when he gave his confession, but that he is now willing to testify to this effect. Because the evidence of Shriner's intoxication and drug use is and has been particularly within his own knowledge, his failure to present it along with his first habeas corpus petition was clearly the consequences of his own neglect. More importantly, such evidence constitutes merely a new factual basis for the identical legal claim presented in the original petition. Shriner's attempt to couch the issue in ineffective assistance terms is once again unavailing. If such arguments were allowed on successive habeas petitions, every petitioner would be entitled to file and have considered successive petitions merely by alleging a substantive ground for relief in the initial petition and then, even after the initial petition is denied, by alleging in a second petition his attorney failed to raise a substantive ground at the trial stage, claiming that such failure constituted ineffective assistance of counsel.

735 F.2d at 1240.

The petition should clearly be denied. In an over abundance of caution, however, Respondents will address the issues raised by Petitioner.

In his petiton, Petitioner has failed to demonstrate errors or omissions of appellate counsel of such magnitude that it can be said that he deviated from the norm or fell outside the range of professionally acceptable performance; nor has he demonstrated that any alleged failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision. Strickland v. Washington, ___U.S.____, 104 S.Ct. 2052, ___ L.Ed.2d (1984); Johnson v. Wainwright, ___So.2d____, Case No. 66,458 (Fla. January 28, 1985)[10 F.L.W. 85]. Accordingly, the petition should be denied.

On appeal, appellate counsel claimed that Petitioner's confession should have been suppressed because it resulted from his unlawful arrest and was part of an uninterrupted chain of events following that arrest. In attacking the arrest on the basis of Franks v. Delaware, supra, counsel alleged that the arrest warrant was not supported by probable cause because the sworn affidavit upon which the warrant was issued contained factual misrepresentations and inaccuracies. Specifically, Petitioner's lawyer alleged the following:

1) That the affidavit misrepresented the results of serological tests performed on blood stains left at the scene of the crime.

2) That the statement in the affidavit to the effect that the wound suffered by the defendant was inconsistent with defensive wounds, but consistent with the hand sliding down over a blade while used in a stabbing motion, was a misrepresentation of the statements of the physician who treated the wound ;

3) That the statement in the affidavit indicating that Petitioner was familiar with the lay out of the victim's home was a misrepresentation;

4) That the statement in the affidavit that Petitioner had vacated his residence and had not been located was misleading in implying that Petitioner had fled the area, when the affiant knew that Petitioner, in fact, had not fled, but had been asked to leave his residence.

(Petitioner's Exhibit D, p. 21-28).

Petitioner now asserts that counsel was ineffective because the Franks issue was inadequately presented to this court in that appellate counsel failed to properly present the alleged falsehoods or misrepresentations contained in the affidavit and failed to raise certain other alleged falsehoods or misrepresentations in the affidavit. An examination of Petitioner's claim demands a finding that appellate counsel was not incompetent. In fact, appellate counsel properly raised only those issues which appeared meritorious.

Respondent will examine the affidavit, line by line, as has Petitioner, in order to demonstrate that the contentions of Petitioner are without merit.

[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." Petitioner admits that this statement is true.

[2] "The victim also had inflicted upon her two (2) crushing blows to the head." Petitioner admits that this statement is 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." Petitioner admits that the second portion of this statement is true. Petitioner submits, however, that the affidavit erroneously indicated that Petitioner had been convicted of robbery, rather than armed robbery, and had been released from prison four months, rather than one month, prior to the murder of Essie Daniels.

Initially, these alleged misrepresentations have no effect whatsoever on the probable cause issue. The facts, as conceded by Petitioner, still indicate that he was released from prison a short time prior to the crime and that he had been convicted of a felony involving force, violence, assault or putting in fear of another. Section 812.13(1), Florida Statutes. Indeed, the victim of the purse-snatching committed by Petitioner was dragged and suffered a broken arm as a result. (T. 1746).

Secondly, these alleged misrepresentations were never presented to the trial judge during the Franks hearing. Appellate counsel's claim that the trial judge erred in

denying the motion to suppress based upon alleged misrepresentations in the arrest affidavit could not be based upon alleged misrepresentations that were never presented to the trial judge. Accordingly, appellate counsel was not incompetent in failing to raise these discrepancies.

Finally, even if the statements were false, there has been no showing that the affiant, Detective Parmenter, did not believe that the statements were true. Pursuant to Franks v. Delaware, supra, it must be shown that false statements in the affidavit were made knowingly or with reckless disregard for the truth before they are excised from a warrant to determine if probable cause remains. In the instant case, no such showing was made in the lower court or in the instant petition. In fact, no such showing can be made. The following colloquy took place during the Franks hearing:

> Assistant State Attorney: With regard to continuing in the same paragraph of the background as to the Defendant having been released from the Florida State Prison System and his relationship to the victim, from whom did you obtain that information?
>
> Detective Parmenter: About being released from Lionel Cook and being a relative from Lionel Cook.
>
> (T. 350-351).

This is the only discussion with reference to this portion of the affidavit during the Franks hearing. Thus, appellate counsel was clearly not incompetent in failing to raise these minor discrepancies where there has been no showing that the standard required by Franks v. Delaware, supra, has been met.

[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." Petitioner contends that this statement is false and that the affiant knew that it was false when made. The record, however, simply does not support this assertion.

Detective Parmenter testified at the motion to suppress as follows:

> Q: Now, the portion of the affidavit--the top portion which you alleged that the suspect, Theodore Harris, according to his roommate, Lionel Cook, knew the victim, Essie Daniels came every Saturday night from the bake sale with a large amount of cash, did Mr. Cook tell you this?
>
> A: Yes.
>
> Q: When did he tell you that?
>
> A: On the first evening, the 22nd of March, when I had gone by his house.
>
> Q: Exactly what did he tell you?
>
> A: Exactly word by word I can't tell you. It was basically we were discussing Essie Daniel's 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 they discussed those things?
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> 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 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 actually took part in the discussions. He said he was there when they were being discussed.

Q: Did you question him any further on that?

A: No.

Q: Did he tell you she came home every Saturday night or they had bake sales on occasion that she brought the money home?

A: It was my impression from my notes I read later that there was a Church bake sale every Saturday night. She would bring home the money.

Q: That was your impression?

A: From talking to him, yes.

Q: That's not what you recall him saying, though?

A: That is what I recall him saying. I wrote it down when I was there.

(T. 324-325).

Thus, the testimony of Detective Parmenter indicates that Theodore Harris' housemate, Lionel Cook, advised him that Mr. Harris knew that Essie Daniels came home every Saturday night from the Church bake sale with cash. There is nothing in the record to establish that this statement is false. In fact, during the deposition of Lionel Cook, there was only one question with reference to the money that Ms. Daniels kept at her home, to wit:

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 a while, and there was times that she did take it home and take it back and stuff like that.

(Petitioner's Exhibit F, p. 26).

Indeed, the testimony of Lionel Cook, during the trial, also proves the truth of the statement in the affidavit. Lionel Cook testified as follows:

> Q: Had you or Sarah Cook or Greg in your presence--had they ever had discussions about Ms. Daniel's money that she kept around the house?
>
> A: Well, we all knew she kept money around the house because she was--she kept, you know, money from the Church. She was president of the usher board and a lot--she did a lot of the selling, and on Saturdays, she always baked the potato pies and she kept the Church money all the time.
>
> (T. 1063).

Petitioner's allegations in his petition that Lionel Cook stated in his deposition that "Ms. Daniels brought money home only on infrequent occasions," and that "he never told Officer Parmenter anything different," is simply not true. (Petitioner's Petition, p. 10). There is absolutely nothing in the record to demonstrate that the statement of Detective Parmenter is false.[1]

Even if Petitioner was able to demonstrate that the statement was false, Petitioner cannot show that Detective Parmenter knew that the statement was false or made the statement in reckless disregard of the truth. Without such a showing, the claim has no merit. In Franks v. Delaware,

[1]Petitioner asserts that "despite his [Detective Parmenter's] 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 when they discussed these things.' (Petitioner's Petition, p. 10-11). This argument is curious in that there was no sworn claim in the affidavit that Lionel Cook told Detective Parmenter that Mr. Cook had discussed these matters with Mr. Harris. The affidavit merely stated that Theodore Harris knew about the money. (Petitioner's Exhibit A).

supra, 438 U.S. at 165, the Supreme Court stated:

> [T]he Fourth Amendment demands a [truthful], factual showing sufficient to comprise 'probable cause'. * * * 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 upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. * * *[I]t is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Since the record establishes the truth of the statement, Petitioner would be hard pressed to satisfy the above burden. Appellate counsel clearly was not incompetent for making such a frivolous argument.

With regard to Detective Parmenter's use of the word "large" when describing the amount of money that Ms. Daniels kept in her home. Respondent would submit that Petitioner again cannot meet the Franks v. Delaware, supra, burden. And assuming Petitioner could meet that burden, deletion of the word would not effect the probable cause determination.

Admittedly, Detective Parmenter stated that he never discussed the amount of money that Ms. Daniels had. (T. 325) It is quite clear, however, that Detective Parmenter was not acting in bad faith when making this statement. It would have been natural to assume that church funds which are in the custody of a church official are generally not "small" amounts of money. Indeed, there is nothing to demonstrate that the statement was false or that Detective Parmenter was acting in bad faith in making the statement.

Assuming, arguendo, that Petitioner could demonstrate that the amount of money was not large and that affiant knew the falsity of that categorization, striking the amount of money involved has no affect on the probable cause issue. Franks v. Delaware, supra. The remaining statement would read: 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 cash.

It is apparent from the above that any argument from appellate court concerning this statement would have been without merit and would have had no affect on the Franks v. Delaware, supra, issue. As such, appellate counsel was clearly not deficient or incompetent for failing to raise such a nonmeritorious issue.

[5][6][7] "Blood samples from the murder scene were compared with the suspect, Theodore Harris, and the results were highly consistent. 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 examination was conducted by Kathy Nelson of the Public Safety Department Crime Lab and her findings were that 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." Kathy Nelson, the person who tested the blood samples, testified at the suppression hearing as follows:

> Q: All right, Miss Nelson, did you have any conversation with Detective Parmenter with regard to, in your opinion, the percentage of six percent of the general population in terms of what they would

mean as to getting an arrest warrant for the defendant?

A: That, to me, was--was very consistent with the subject he had in mind at that point and to me six percent of the population is very low and there were six analyses done at that point, all which were consistent with the subjects clothes. Stains originating from inside the subjects clothes which, at the time, I was deducing was, in fact, the subject's blood and therefore, I felt that was definitely cause for arrest warrant.

(T. 361).

Thus, tests conducted on the blood stains left by Petitioner on a towel revealed that the blood was extremely consistent with blood recovered at the crime scene.

On direct appeal, appellate counsel raised the same arguments as Petitioner now raises with regard to the remainder of the statement.[2] (Petitioner's Appendix D, p. 21-24).

[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." Petitioner admits that this statement is true.

[2]Petitioner makes several arguments which merit only brief response. The affidavit mentioned "a bloody towel from suspect's car which was recovered on March 22nd." Initially, Petitioner contends that the car did not belong to Petitioner but rather Sara Cook. It is undisputed, however, that Petitioner was driving the vehicle on the date of the crime. That the vehicle was referred to as being the "suspect's car" has no impact on the issue of probable cause. Secondly, Petitioner contends that the statement implies an inference of flight in that it implies that the car was somehow "recovered" by the police. The State would submit that there is no such implication from the statement. The statement refers to the towel that was recovered from the car. (Petitoner's Exhibit A).

[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." On direct appeal, appellate counsel raised the same arguments as Petitioner now raises with regard to this statement. (Petitioner's Appendix D, p. 24).

[10] "Initial conversations by the affiant with the subject resulted in an 'alibi' being offered by the subject." Petitioner admits that this statement is true.

[11] "The 'facts' given in the alibi were not verified by subsequent investigation, and one witness contradicted the time frame given by the suspect." While the first portion of the statement was never challenged at the Franks hearing, the record establishes its truth. Detective Parmenter and Detective Roosevelt Turner testified that they visited the area where the defendant claimed he had been stabbed, and found no blood stains. (T. 1313-1315, 1466). Detective Turner returned to the area the following morning and again searched for evidence to support Petitioner's alibi, but to no avail. (T. 1466).

The second portion of the statement is also proved true by the record. Greg Williams specifically contradicted the Petitioner's time frame for his alibi. Detective Parmenter testified at the suppression hearing as follows:

> Q: At what time are we talking about?
>
> A: We are talking about Theodore said he was home around 12:30 when he first saw Greg. He stated that time and drove to McDonald's and

> then came back home at 1:30. He said that Greg came back at 2:00. He said he stayed around the house until 3:30, at which time he left again and went to McDonald's Lounge, at which time he got stabbed.
>
> Greg stated he was home at 12:05, within five minutes of being home he had seen Theodore. That Theodore left at 12:40, came back real soon, borrowed $5.00, that Greg immediately left with the car and picked up his girlfriend and came home. That Greg, at 1:50 looked for the car, it was gone and so was Theodore and Theodore never came home after that time.
>
> The discrepancy lies in that Theodore is claiming he stays at the house finally from 2:00 to 3:30 and then leaves and gets robbed.
>
> Greg says at 1:50 Theodore is gone and never comes back.
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> (T. 340-341).

There was an absolute lack of testimony at the suppression hearing to establish the falsity of the statement in the affidavit. Indeed, the deposition of Greg Williams contained the following:

> Q: Do you know what time you picked up your girlfriend?
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> A: It was right before I loaned Theodore the car. Possibly eleven, something like that.
>
> Q: You picked her up about eleven?
>
> A: Yeah, and then I--we came back to the house. That's when he got the car and he said he was coming right back, but he didn't.
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> (Petitioner's Exhibit H, p. 19).
>
> . . .
>
> A: . . .what happened this female was over to my house, okay. We were waiting on Theodore to get back. That's what it was. We were waiting on him to get back with the car and four o'clock in the morning

came and still he wasn't back yet,
so I called her a cab.

(Petitioner's Exhibit H, p. 17).

Thus, the statement in the affidavit is true, regardless of the precision of the time, and any attempt by appellate counsel to demonstrate that the statement was an intentional false statement made in knowing and reckless disregard for the truth would have been frivolous.[3]

[12] "The residence of Essie Daniels at 14420 Northwest 21st Court, in Opa Locka, Dade County, Florida, was entered by the attacker pushing out a screen in the bedroom window." There is nothing in the record to establish the falsity of this statement. In any event, the statement is not necessary to a determination of probable cause.

[13] "The victim had possessed approximately $400; which was found near the body, but removed from her purse and transferred to a paper bag." Petitioner admits that this statement is true.

[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. Petitoner admits that the initial portion of the statement is true. As far as any challenge to the statement concerning Petitioner's knowledge of the lay-out of the home, appellate counsel addressed this issue

[3]Petitioner, in attempting to demonstrate the falsehood of the statement, discusses testimony concerning whether Mr. Williams observed blood on the towel which was wrapped around Petitioner's hand. The issue of whether Mr. Williams observed blood on the towel has no relevance, however, to the contradiction of the time frame established in the alibi.

on direct appeal before this Court. (Petitioner's Exhibit D, p. 25). The final portion of the statement regarding the regular Saturday night existence of cash in the home was, as indicated earlier, what Detective Parmenter was told by Lionel Cook. (T. 325). Thus, again there was clearly no further argument that competent counsel would have made to this Court.

[15] "As soon as the subject left the hospital, he vacated his residence and has not been located since." On direct appeal, appellate counsel raised the same arguments as Petitioner now raises with regard to this statement. (Petitioner's Exhibit D, p. 25-26).

It is clear from the above analysis that Petitioner, in the instant petition, has made a heroic attempt to establish that he was provided with incompetent appellate counsel. This attempt, however, wholly fails. Petitioner has merely reargued the issues raised by appellate counsel on direct appeal or raised issues wherein it cannot be established that the standard set forth in Franks v. Delaware, supra, has been met. See United States v. Lee, 743 F.2d 1240 (8th Cir. 1984). As noted by this Court in McCrae v. Wainwright, supra at 870:

> "Because of limitations of time, space, and human energy, a lawyer briefing an appeal must choose from all the conceivable arguments those arguments most likely to bring about a favorable outcome."

Appellate counsel need not raise every conceivable claim. "If there is no way of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is not a substantive and serious deficiency." Ruffin v.

Wainwright, ___So.2d____, Case No. 65,117 (Fla. December 20, 1984)[10 F.L.W. 20]; Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Francois v. State, 423 So.2d 357 (Fla. 1982). As noted by the Supreme Court in Jones v. Barnes, ____U.S._____, 103 S.Ct. 3308, 3313-3314, ___L.Ed.2d ___(1983), and as cited by this Court in Ruffin v. Wainwright, supra:

> "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts --often to as little as 15 minutes --and when page limits on briefs are widely imposed. See, e.g., Fed. Rules App. Proc. 28(g); McKinney's 1982 New York Rules of Court §§670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments --those that, in the words of the great advocate John W. Davis, 'go for the jugular,' Davis, The Argument of an Appeal, 26 A.B.A.J. 895, 897 (1940)--in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, Twenty Pages and Twenty Minutes--Effective Advocacy on Appeal, 30 Sw.L.J. 801 (1976).
>
> . . .For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders. Nothing in the Constitution or our interpretation of that document requires such a standard. (Footnotes omitted).

That appellate counsel failed to raise alleged misrepresentations in the arrest affidavit which as shown earlier,

either are in fact not misrepresentations; have no bearing on the issue of probable cause; or which cannot be shown to meet the Franks standard, is not a basis for finding "a substantial and serious deficiency," Knight v. State, 394 So.2d 997, 1001 (Fla. 1981), "outside the wide range of professional competent assistance." Strickland v. Washington, ___U.S.____, 104 S.Ct. 2052, 2066, ___L.Ed.2d ____(1984).

Based on the foregoing, Respondents would respectfully submit that Petitioner has failed to satisfy the requirements of Knight v. State, supra, and Washington v. Strickland, supra, and the petition should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE was furnished by mail to McCARTER & ENGLISH, Attorneys at Law, 550 Broad Street, Newark, New Jersey 07102, on this 25 day of March, 1985.

JULIE S. THORNTON
Assistant Attorney General

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