IN THE SUPREME COURT OF FLORIDA

CASE NO. 72589

THEODORE CHRISTOPHER HARRIS, :

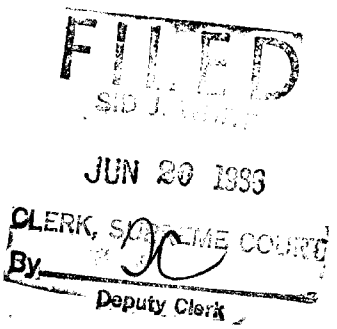
Defendant, Appellant :

v. :

STATE OF FLORIDA, :

Plaintiff, Appellee :

_____ :



APPELLANT'S BRIEF ON APPEAL FROM THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF AND CONSOLIDATED REQUEST AND STAY OF EXECUTION

THEODORE CHRISTOPHER HARRIS, a condemned capital inmate against whom a death warrant has been signed and whose execution is currently scheduled for Friday, July 8, 1988 at 7:00 a.m., submits this Brief in support of his appeal from the denial of his motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850. Mr. Harris moves this Court for a stay of execution pending the proper and judicious consideration and disposition of this appeal. In support of this application, Mr. Harris, through counsel, states as follows:

PRELIMINARY STATEMENT

Theodore Harris awaits his scheduled execution on July 7, 1988 under circumstances which call into the most serious question the fairness of the penalty proceeding of his trial. The

astonishing failure on the part of his trial counsel to prepare for the penalty phase of his trial for first-degree murder irretrievably taints the judgment of death. The uncontroverted evidence presented on this point below should persuade this Court to intervene now to right the judicial process gone fundamentally awry by virtue of counsel's neglect.

For the most important hearing in Mr. Harris' life -- the penalty phase that would determine whether Mr. Harris (an incarcerated indigent) lived or died--neither of Mr. Harris' two appointed trial counsel, Alfred Williams and Pedro Echarte, did a single hour's meaningful preparation. As they candidly admitted during the evidentiary hearing on the Rule 3.850 motion, each believed the other was preparing the penalty phase (we discuss this testimony at painful length below). With Mr. Harris' life hanging in the balance, Mr. Williams played Alphonse to Mr. Echarte's Gaston. The conduct of the penalty phase was manifestly unjust, unacceptable and unconstitutional. The trial court's denial of the Rule 3.850 motion should be reversed as unsupported and in some instances directly contradicted by the evidence below; the sentence of death should be set aside; and a new penalty hearing provided to Mr. Harris. Moreover, relief should be granted as well as those aspects of the §3.850 Petition dismissed by the Court below without a hearing.

PROCEEDINGS BELOW

Mr. Harris filed this motion for post-conviction relief pursuant to Rule 3.850 in the Circuit Court in November 1985. This was his first motion under Rule 3.850. A limited evidentiary hearing was granted and held before the Trial Court (Morphonios, J.) on June 6-7, 1988, to explore the question of ineffective assistance of counsel at sentencing. Mr. Harris presented the testimony of:

1. Pedro Echarte, Esq. -- Mr. Harris' trial counsel.

2. Alfred Williams, Esq. -- Mr. Harris' lead trial counsel.

3. Hank Fuller -- Mr. Harris' brother-in-law.

4. Janice Fuller -- Mr. Harris' sister.

5. LaShawn Fuller -- Mr. Harris' niece.

6. Christine Harris -- Mr. Harris' ex-wife.

7. Wayne Carswell -- Mr. Harris' long time friend.

8. William White, Esq. -- an expert qualified by the Court to present expert testimony on the issue of whether Messrs. Williams and Echarte provided ineffective assistance of counsel.

None of the lay witnesses testified at Mr. Harris' original sentencing trial; all testified they would have testified at that trial if they had been asked to do so. At the hearing, Mr. Harris also requested that the Court below stay his execution pending the full and fair disposition of his Rule 3.850 motion.

The Court below denied Mr. Harris' Rule 3.850 motion in its entirety, as well as the application for a stay of execution. Reducing the intemperate and injudicious language of the Order below (language identical to that submitted by the State) to its legitimate essence, Judge Morphonios found that:

> 1. Trial counsel attempted to locate mitigating witnesses via an investigator and they proved to be uncooperative or unavailable;
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> 2. Trial counsel made a tactical election not to present mitigating testimony but rather to appeal by way of oral argument to the jury's sympathy;
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> 3. The mitigating evidence presented at the Rule 3.850 hearing would not have affected the outcome of the sentencing phase of Mr. Harris' trial;
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> 4. All other claims in the §3.850 Petition were without merit or procedurally barred.

Notice of Appeal was timely filed on June 9, 1988 thus conferring jurisdiction on this Court.

BASIS FOR THE APPLICATION FOR A STAY

Mr. Harris' execution is presently scheduled for Friday, July 7, 1988, at 7:00 a.m. The outstanding death warrant is the first warrant issued against Mr. Harris. In order to ensure that the meritorious claims that he raises in this appeal are fully and adequately resolved, and in order to ensure that this appeal is not rendered unjustly moot by his execution, Mr. Harris respect-

fully urges that the Court stay the execution pending the full and proper disposition of the appeal.

Mr. Harris' motion pursuant to Rule 3.850 and its appendices, together with the State's response and a full transcript of the evidentiary hearing below, have been previously provided to this Court. The substantial, meritorious nature of the claims he has asserted are apparent from the contents of his motion. As discussed in the Rule 3.850 motion, the claims Mr. Harris has presented are properly brought in this action.

This Court has not hesitated to stay executions to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69, 563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68, 619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So.2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So.2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). We respectfully urge that it do so here.

STATEMENT OF THE CASE

Mr. Harris was denied his right to effective assistance of counsel due to a complete failure by his trial counsel to conduct meaningful preparation for the sentencing phase of the trial. Mr. Harris, an indigent, was incarcerated from the moment of his arrest until the conviction and sentence. The Office of the Public Defender in and for Dade County was assigned by the Court to represent Mr. Harris. Despite circumstances intrinsic to the facts of this case which made preparation of a penalty phase defense crucially important and potentially successful, Mr. Harris' appointed trial counsel failed to investigate Mr. Harris' background, failed to obtain his service and school records, and failed to locate and contact members of Mr. Harris' family, friends and former employers. If these persons--many of whom testified in the Rule 3.850 hearing below--had been contacted, trial counsel would have discovered and would have been in a position to present to the trial jury and the trial court critical facts about Mr. Harris' background and character. If presented, these witnesses might well have changed the result. As it was, the defense made no presentation whatsoever at the penalty phase and the jury divided 8-4 on its recommendation of death.

Among other derelictions, trial counsel failed to discover and present readily available evidence that: (1) Mr. Harris was a devoted husband and father; (2) Mr. Harris was a

loving and well loved member of a close knit family and neighborhood in Jacksonville, Florida; and (3) Mr. Harris was a veteran of the United States Armed Forces. To add insult to what may already have been mortal injury, counsel then inaccurately told the jury that Mr. Harris' family, with whom he never spoke, had turned against him. Finally, in the course of an already inexcusable summation he saw fit to insult and berate the jury itself, and to compare them to war criminals and slavers for even considering the death penalty.

That a trial jury--already deeply divided about the appropriateness of the death penalty in this case--and the sentencing court were thus placed in the position of passing judgment upon Mr. Harris while utterly ignorant of these facts about him seriously undermines confidence in the fairness and accuracy of the penalty phase. Trial counsel's shabby and disreputable performance was constitutionally ineffective. Their conduct had disastrous consequences for the fundamental fairness of the proceedings at trial -- consequences that this Court should intervene to correct.

Summary of the Penalty Phase

On April 29, 1981, Mr. Harris was indicted on charges of first-degree murder, burglary and robbery in connection with the death of Mrs. Essie Daniels. Mr. Harris had been arrested on

April 14, 1981, one week after a warrant for his arrest was issued on the basis of an Affidavit of Detective John Parmenter.[1]

Mr. Harris remained in the Dade County jail until his sentencing. Mr. Harris, who was indigent, had attorneys appointed from the offices of the Dade County Public Defender. Lead counsel for Mr. Harris was Alfred Williams, with Pedro Echarte also participating. Mr. Harris' case was the first capital case in which Mr. Williams was lead counsel; it was also the first capital case in which Mr. Echarte had participated in any capacity.

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 Mrs. 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,

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1. At trial and in the hearing below, Mr. Harris challenged the validity of the arrest and subsequent confession on constitutional and state law grounds. The court below refused to consider these claims on the ground that they had already been decided by this Court. Harris v. State, 438 So.2d. 787 (Fla. 1983). Although this brief is devoted to the issue of ineffective assistance of counsel in connection with the penalty phase, we press in this Court all claims raised in the Rule 3.850 motion.

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).[2]

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. 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

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2. "Tr. 9/22/81, 193:20-212:15" refers to the Trial Transcript for September 22 1981, page 193, line 20 to page 218, line 15. Hereafter "Tr. H." refers to the Transcript of the evidentiary hearing held below on the Rule 3.850 motion.

3. "Parmenter Dep. 13:7-9" refers to the Deposition of John Parmenter, page 13, lines 7-9. Copies of all the Depositions referred to are contained in the Appendix To Petition for Writ of Habeas Corpus and For Other Relief, Case No. 61,343 in this Court.

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.

After the Suppression Hearing at which Mr. Harris' challenges to the admissibility of his statement were rejected by the Trial Court, trial proceeded. Mr. Harris did not testify and presented no other witnesses. The jury returned a verdict of guilty on all counts.

The penalty phase of Mr. Harris' trial was held on September 29, 1981. Testimony began at about 8:15 a.m. and ended at about 8:35 a.m. (Tr. 9/29/81). The State's evidence in the

penalty phase consisted of testimony by Dr. Roger Mittleman, the medical examiner, to demonstrate that the victim felt both pain and fear at the time of the killing (Tr. 9/29/81, 9:21-13:1); and by several law enforcement officials to establish that Mr. Harris had a 1978 conviction for robbery (strongarm) arising out of an instance of purse snatching, and was on parole at the time of the killing. (Tr. 9/29/81, 15:17-17:3; 18:20-21:11, 21:25-24:20). Cross-examination, where offered, was minimal. The defense put in no evidence whatsoever to establish the existence of mitigating factors, statutory or non-statutory. In the complete absence of any proffered evidence in mitigation, the jury nevertheless deeply divided and rendered an advisory recommendation that the death penalty be imposed by a vote of 8-4. See Verdict Sheet, 9/29/81.

The Court below accepted the jury's advisory recommendation and imposed the death sentence. The Trial Judge, in a bench opinion rendered immediately following the jury recommendation, found six (five independent) aggravating circumstances and no mitigating factors. The aggravating factors found were: (a) that the capital felony was committed by Mr. Harris while under sentence of imprisonment (Mr. Harris was, at the time of the offense, on parole from a 1978 conviction for purse snatching in which no weapon was used); (b) that Mr. Harris had previously been convicted of a felony involving the use or threat of violence to a person; (c) that the crime was committed

for pecuniary gain; (d) that the crime was committed during a burglary and robbery; (e) that the capital felony was heinous, atrocious and cruel; and (f) that the crime was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification. (Tr. 9/29/81, 85:16-90:17).[4]

The Central Importance of Penalty Phase Preparation in this Case

The circumstances of this case made a strong presentation at the sentencing phase of the trial absolutely essential, since:

> (1) If a conviction on a capital offense were to be entered, at least three aggravating circumstances were known by counsel to be present: the prior 1978 purse snatching conviction, the parole status of Mr. Harris, and the burglary/pecuniary gain factor. Moreover, discovery should have alerted counsel to the likelihood that a claim would be pressed with regard to "heinous, atrocious and cruel" as well. Thus, the search for mitigation to counterbalance the "built-in" aggravating factors should have been of paramount importance to trial counsel; and
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> (2) With Mr. Harris' confession admitted in evidence, the likelihood of acquittal in this case was slight, especially since Mr. Harris' prior felony conviction effectively debarred him from testifying on his own behalf

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4. The last of these aggravating factors was overturned by this Court as inapplicable. Harris v. State, supra, 438 So.2d at 797-798. In addition, the validity of the fifth aggravating factor -- that the crime was heinous, atrocious and cruel -- is in serious doubt due to the United States Supreme Court's recent decision holding an essentially identical aggravating factor in the Oklahoma statutory scheme to be unconstitutionally vague. Maynard v. Cartwright, ___ U.S. ___, 56 U.S.L.W. 4501 (June 7, 1988).

> before the jury. Although the admissibility of Mr. Harris' statements and the conviction which rests upon those statements was--and still is--highly doubtful, the trial judge in his September 10, 1981 Opinion decided to admit the confession. Certainly at this point the likelihood of a first degree murder conviction was substantial; the chances that the claim of involuntariness could be successfully argued to the jury were slight, particularly in the absence of Mr. Harris' testimony. Under these circumstances, faced with a serious likelihood of a conviction, trial counsel had one and only one imperative: to devote all efforts to preparing for the penalty phase of the trial and to pursue a strategy during the guilt phase aimed at maximizing the chances for a successful result in the penalty phase.

While the likelihood of acquittal in this case was modest so long as the Court allowed the inculpatory statements in evidence, the chances of avoiding the imposition of the death sentence were substantial, given an adequate defense preparation of the available mitigating evidence. Even on the State's own evidence, significant mitigating issues were clear:

a) Mr. Harris in entering the dwelling of the victim, may well have believed it to be unoccupied, and was surprised by its inhabitant wielding her own knife;

b) Mr. Harris himself was gravely and painfully injured in the ensuing struggle; and

c) the murder weapon, the kitchen knife, was the victim's own and no weapon was brought to the premises by Mr. Harris.

We know that a substantial minority of the jurors below were persuaded that mitigation (and life imprisonment) were warranted even in the absence of a single word of affirmative testimony from

the defense, and in the mistaken belief that Mr. Harris' family had turned against him. But more compelling mitigating evidence was readily available had effective counsel been in charge of the penalty phase.

Mitigating Evidence Trial Counsel Failed to Present

The evidence presented at the hearing below demonstrated beyond legitimate dispute that trial counsel could have presented considerable favorable evidence about Mr. Harris' background and character. This evidence, we urge, would have convinced the trial jury that Mr. Harris, despite his conviction for murder and his criminal record, was then and remains to this day a beloved member of an extended and socially acceptable circle of family and friends. This evidence included the following:

1. Mr. Harris, a native of Jacksonville, Florida where the bulk of his family continues to reside, was the product of a close knit and stable family environment. His father (alive in 1981 but now dead), his brothers, his sister, Janice Fuller, her husband, Hank Fuller, and their daughter LaShawn were deeply interested in Mr. Harris' fate at the time of his 1981 trial and had crucially important evidence to offer on the question of penalty. Both Hank Fuller, a decorated veteran of the Vietnam War, and Janice Fuller testified at the hearing below of their close, enduring relationship to Mr. Harris, of

the central role he has played in the life of their daughter LaShawn and of their strong conviction that his life remains important to them and the rest of their family even if it is spent behind prison walls. LaShawn Fuller, now a grown woman and a member of Florida's Army National Guard, testified about the important role Mr. Harris played in her formative years. Although perhaps unable on cross-examination to cite Mr. Harris' past criminal record chapter and verse, these witnesses all testified that they were familiar with Mr. Harris' record and his repeated inability to conform his conduct to law.[5] They nevertheless continue to love him and to value his life. (Tr. H. 6/7/88, 31:10 to 34:23; 59:16 to 62:1; 126:20 to 128:14; 134:24 to 135:15).

2. Although divorced at the time of the trial, Mr. Harris and his ex-wife Christine Harris had been attempting for several months prior to his April, 1981 arrest to reconcile their differences and resume their marriage. Mrs. Harris testified

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5. The Trial Court's finding that some of these witnesses were somehow "shocked" by the details of Mr. Harris' past record was patently erroneous. While the precise statutory citations for the past offenses may have eluded them, these people were incontestably aware that Mr. Harris was frequently in serious trouble with the law.

about Mr. Harris' devotion to her (even after their marriage ended at her instance) and their three children. She explained that while Mr. Harris was in the Army stationed in Seattle, he remained in close contact with Mrs. Harris and the family and continuously provided financial support. Even after the divorce, he continued to support his family. Indeed, Mr. Harris moved to Miami (where the crime occurred) only to secure better paying employment. In the time since his conviction, Mr. Harris has remained a vitally important part of Mrs. Harris' life. (Tr. H. 6/7/88, 92:17 to 103:5; 112:2 to 113:13).

3. Mr. Harris is the father of three children. One child, Theodore, Jr. (who attended the Rule 3.850 hearing) was his own; the other two children were not Mr. Harris' natural children but several witnesses at the hearing testified, based upon their frequent personal observations, that he always treated the other children as if they were his own. The testimony of various witnesses at the hearing demonstrated that Mr. Harris has always been a devoted, loving father. The evidence showed that Mr. Harris' life, even if he remains in prison, is

important to the children. (Tr. H. 6/7/88, 33:1-19; 68:25 to 70;6; 130:7 to 131:9; 132:4-15).

4. Mr. Harris had numerous friends and neighbors who could have testified about his character based upon warm and stable personal relationships with Mr. Harris and his family. Wayne Carswell, an ordained minister, testified about his life-long, close friendship with Mr. Harris. He described to the Court how, notwithstanding Mr. Harris' criminal record with which he was familiar, he would nevertheless trust Mr. Harris with the care of his own family to this day.[6] (Tr. H. 6/7/88, 67:11 to 68:17; 74:15-24).

5. Mr. Harris was a loyal, hard working and trustworthy employee. Mr. Carswell testified that Mr. Harris worked for him in his janitorial business. Mr. Harris worked long hours and was often left to do his job alone. This is so, even though Mr. Carswell's business by its

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6. Other friends and neighbors of Mr. Harris, who submitted affidavits with the Rule 3.850 motion, were not able to attend the hearing. Thelma Thomas, a neighbor of the Harris family, died since the filing of the motion. Two other witnesses, Anne Williams and Jeannie Tarvar, now seven years older since Mr. Harris' conviction, were too infirm to be present. Mr. Harris' father, who was alive in 1981 but was never contacted by trial counsel, died before the instant §3.850 motion was brought. (Tr. H. 177:14 to 21)

nature was conducted on the premises of customers. (Tr. H. 6/7/88, 70:7 to 72:10).

6. Mr. Harris volunteered for service in the United States Army. He received a Red Cross Commendation and laudatory letters from his Commanding and Executive Officers for his voluntary Red Cross activities during his service. The Commendation and letters were received in evidence at the hearing. Defense Exhibit A.

Trial Counsel's Failure to Investigate and Prepare for the Penalty Phase

There is no evidentiary dispute that not one shred of this evidence was known either to trial counsel or presented to the sentencing Juge or jury. Trial counsel, in an affidavit filed with the instant Petition (Ex. 22) and in testimony, conceded that notwithstanding the obvious need to plan for and focus on the penalty phase of the trial, they did the opposite. They failed to adequately investigate. Whether because of overconfidence about the outcome of the guilt phase or because of simple neglect--both possibilities are supported by the record below--defense counsel's efforts in connection with the penalty phase were virtually nil.

The testimony of Mr. Echarte and Mr. Williams at the Rule 3.850 hearing established as an uncontroverted (but nonetheless astounding) fact that both Mr. Williams and Mr. Echarte focused their efforts only on the guilt phase of the trial. Mr. Williams

testified that he believed that Mr. Echarte was preparing the penalty phase of the trial; Mr. Echarte testified that he thought Mr. Williams was undertaking that critical responsibility. Listen first to Mr. Williams:

> Q. [by Mr. Rabinowitz]: Now, Mr. Williams, who was responsible for the preparation of the penalty phase of this case as between yourself and Mr. Echarte?
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> A. [by Mr. Williams]: Mr. Echarte.

(Tr. H. 6/7/88, 7:13 to 17). And now listen to his co-counsel, Mr. Echarte:

> Q. [by Mr. Rabinowitz]: Mr. Harris [sic], between you and Mr. Williams, which of you was responsible for the preparation of the penalty phase in this trial?
>
> A. [by Mr. Echarte]: Mr. Williams.

(Tr. H. 6/6/88, 14:1 to 4).

Not only did the record below establish the noone was at the helm, it not surprisingly demonstrated that the vessel was far off course. The evidence at the Rule 3.850 hearing established what Mr. Williams and Mr. Echarte each concede: neither interviewed Mr. Fuller, Mrs. Fuller, LaShawn Fuller, Wayne Carswell, or Mr. Harris' parents, brothers, neighbors or others who could testify concerning his background and character. Neither went to Jacksonville to meet witnesses from Mr. Harris' hometown or to acquaint themselves personally with the nature of his background. Neither obtained Mr. Harris' educational records or his military

service records; in fact, neither trial counsel even knew Mr. Harris had been in the Armed Forces or had received a Red Cross Commendation and laudatory letters from military officers.[7] To this day counsel evidenced confusion about Mr. Harris' family structure, incorrectly believing then that Mr. Harris had a brother who was a Minister, and believing even now that Robin Smith, a friend of Mr. Harris in Miami, was a member of or close to the man's family.

Hopelessly unprepared for the penalty phase, counsel obtained a brief postponement of the penalty trial from Saturday,

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7. There was testimony that from Mr. Williams that he had spoken to Christine Harris, Wayne Carswell and Robin Smith, although Robin Smith and Wayne Carswell have denied ever having been contacted by Mr. Williams. Even if Mr. Williams' recollection is accurate, the undisputed failure to speak to Harris' parents, sister, brothers, brother-in-law, niece or children cannot thus be transformed into a strategic decision or be made otherwise excusable because of such limited communications.

September 26, 1981 (when the guilty verdict was rendered) until Tuesday, September 29, 1981. (Tr. 9/26/81, 5:13-6:10).[8] Having gotten the brief adjournment, defense counsel squandered even that fleeting opportunity to save their client by conducting practically no investigation over the weekend. After desultory efforts, trial counsel learned that Mr. Harris' ex-wife was in the hospital and would not be able to testify on September 29th. Rather than immediately notify the court of this fact as soon as they learned of it, counsel waited until the penalty phase was about to begin to inform the court of the unavailability of the only potential witness they had ever contacted from Mr. Harris' family. (Tr. 9/29/81, 4:15 to 5:17). Indeed, counsel did not even move the court for a further adjournment until after the jury was seated and the State had put in its penalty case. (Id. at 24:25 to 25:21).

Although these facts about counsel's derelictions in the penalty phase were essentially undisputed, the State offered, and the court below accepted two arguments in rebuttal: first, that

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8. In requesting thte adjournment, Mr. Williams represented that he would be calling Mr. Harris' "wife as well as a Minister from Jacksonville and other folks if I can contact them." Id. (Emphasis added). It is simply beyond belief that this late in the game, with a penalty hearing staring him in the face, Mr. Williams had only the vaguest idea who he was going to use and no idea whether they would be available. Moreover, Mr. Williams' confusion persists to this day about whether Mr. Harris ever had a brother who was a Minister.

counsel did use an investigator who, according to Mr. Williams, attempted without success to develop mitigating evidence; and second, that the individuals who testified at the Rule 3.850 hearing should have contacted Mr. Williams themselves or complained to his superiors about his faulty handling of Mr. Harris' case. The first argument is largely irrelevant and unsupported by the record; the second is without merit.

At the heart of the Trial Court's refusal to find that counsel's inadequate performance constituted ineffective assistance of counsel was its belief that, contrary to their testimony, trial counsel did perform an adequate investigation into penalty phase issues through the efforts of an investigator, one Gary Wayne. Mr. Wayne did not testify for either side at the hearing below, and the Court's heavy reliance on Mr. William's vague hearsay reports of the investigation done by Mr. Wayne is misplaced for at least two reasons. There was no evidence that Mr. Wayne, who was assigned to work on the guilt phase as well as the penalty phase, was in fact conducting an investigation that

could be used at the penalty phase or that Mr. Williams knew this to be so.[9] Mr. Williams testified only that he "assumed" that this was what was going on:

> Q. Now, during the course of your preparation of the trial phase and the penalty phase, you were receiving reports from either Mr. Echarte or from your investigator, Mr. Wayne, that contacts were being made with family members, correct?
>
> A. Yes.
>
> Q. And that they were developing a background history for your client for the penalty phase?
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> A. That's what I assumed was taking place, yes.
>
> Q. That's what they told you was taking place, was it not?
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> A. Well, the penalty phase was assigned to Pedro [Echarte] and he was to work it up. I got reports in the interim that he had talked to certain people, certain things were coming, certain things were not developing.
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> Q. They were not developing, but the efforts were being made to develop them by both your investigator and Mr. Echarte?
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> A. As far as I know, yes.

(Tr. H. 6/7/88, 16:19 to 17:16) (Emphasis added.) And as Mr. Echarte cogently tells us, Mr. Williams' assumption could not have been further from the truth:

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9. It is significant that Mr. Williams testified that he believed the investigator was working with Mr. Echarte, given Mr. Echarte's unqualified denial that he was working with an investigator. (Compare Tr. H. 6/7/88 15:25 to 16:15 with Tr. H. 6/6/88 to 14:11 to 13).

Q. Mr. Echarte, during the course of your representation of Mr. Harris, did you at any time confer with Mr. Harris' family?

A. No.

* * *

Q. Did you at any time during your representation of Mr. Harris confer with or speak to any of Mr. Harris' former employers or friends?

A. No.

Q. Including Wayne Carswell?

A. No.

Q. Robin Smith?

A. No.

* * *

Q. Mr. Echarte, did you subpoena or otherwise have occasion to obtain and review Mr. Harris' school records?

A. I did not.

Q. His Army service records?

A. No.

* * *

Q. Mr. Echarte, did you ever go to Jacksonville to visit the Harris family?

A. No.

Q. Did you ever visit the neighborhood where Mr. Harris grew up?

A. I did not.

Q. Did you ever assign an investigator to do so on your behalf?

A. I did not.

Q. Mr. Echarte, did you ever spend time sitting with Mr. Harris to discuss his background and his personal history in preparation for the penalty phase?

A. I did not.

(Tr. H. 6/6/88, 11:24 to 14:8). Neither Mr. Williams nor Mr. Echarte spoke personally to any potential witness other than Christine Harris, Robin Smith and perhaps Wayne Carswell. (Tr. H. 6/6/88, 11:24 to 14:18; 6/7/88, 5:14 to 7:22).

For similar reasons, the Court's ruling that trial counsels' actions constituted tactical decisions not to call witnesses is also unsupportable. At most, Mr. Williams "decided" not to call two witnesses: Robin Smith and Christine Harris, although the failure to call the latter was due more to the fact that Mr. Williams discovered she was in the hospital and unavailable at the last minute.[10] With regard to other witnesses, Mr. Williams' testimony was, if anything, the exact opposite of a reasoned decision not to call them: Mr. Williams stated that he was prepared to call a number of witnesses with whom he had not spoken or even met, but was unable to do so because they never

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10. Significantly, Mr. Williams failed to obtain appropriate medical records or a physician's letter to support a request for a continuation until she would be available.

arrived from Jacksonville.[11] (Tr. H. 6/7/88, 18:19 to 19:24). The Court's records, of course, reflect the obvious: not one subpoena was used in Mr. Harris' behalf in the course of the trial. Docket Sheet, State v. Harris, Case No. 81-7561.

In short, the undisputed testimony was that neither Mr. Williams nor Mr. Echarte personally did any preparation for the penalty phase until the eleventh hour, apparently because each believed the other was going to do it. As a result, neither Mr. Williams nor Mr. Echarte spoke to Harris' friends or family in Jacksonville and neither arranged to have the potential witnesses testify at the trial. This failure was not due to any strategic decision, nor could it have been, since neither had spoken to the witnesses to know what they would say. Both Mr. Williams and Mr. Echarte, the attorneys with the responsibility for the conduct of the penalty phase, played practically non-existent roles in interviewing, evaluating and recruiting witnesses to present mitigating evidence. Both now concede that they erred, that their conduct fell below acceptable norms, and that they would have presented such testimony had they been aware of its existence.

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11. The friends and family members who testified at the Rule 3.850 hearing testified that they were willing to testify in 1981, had they known they could. It cannot pass notice that Mr. Harris' current counsel had little trouble in arranging for the witnesses to come to Miami for the hearing.

Petition Ex. 22 (Affidavit of A. Williams, Esq.); (Tr. H. 6/6/88, 15:23 to 16:10; 6/7/88, 14:15-20).

Even more unpersuasive is the argument, implicit in the State's cross-examination of the witness below, and apparently adopted by the Court, that it was somehow up to the family members and not the lawyers to conduct the representation of Mr. Harris. (See, e.g., Tr. H. 6/7/88, 138:1 to 139:22). All of the individuals who testified at the hearing were simple, decent people who live on the edge of the economy and earn what they have by dint of hard work. They live more than 400 miles from the scene of the trial. Since none of them had any information about the crime itself, they did not know any testimony they could give was needed or useful. No one told them they could testify in mitigation of the possible penalty. None of these people knew Mr. Williams had a supervisor, much less how to complain to a supervisor about Williams' shoddy handling of Mr. Harris' case. (Tr. H. 6/7/88, 35:3 to 12; 62:2 to 63:11; 73:5 to 74:7; 129:6-23; 138:1 to 139:22). The lawyers had the obligation to locate witnesses, to interview them, to evaluate their testimony, to inform them how they could help, and to get them to the courthouse.

Trial Counsel's Disastrous Summation to the Jury

Mr. Harris' trial counsel not only failed to put in any of the available favorable evidence concerning Mr. Harris' character and background, but they made matters even worse for Mr.

Harris by arguing to the jury in summation that Mr. Harris' family had turned against him, a statement that was not only wholly outside the trial record, but was demonstrably and disasterously false:

> Mr. Williams: I am not going to tell you -- to stand here and talk to you about proof, what's been reasonable doubt, but I ask you to consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because of this act. He's always -- and they have been against him since then. Mr. Darby [Assistant State Attorney] asked -- who comes in here to speak for him? Think about that. They don't want to be against him. They don't want to be for him.

(Tr. 9/29/81, 68:9-20) (Emphasis supplied.)

This assertion, as the testimony of the witnesses at the hearing below amply demonstrated, was simply untrue. Indeed, as discussed above, the reason why Mr. Harris' family and friends were not present at trial to help Mr. Harris was counsel's own inexplicable failure to contact the family to recruit their assistance and to keep them apprised of the status of Mr. Harris' case. Mr. Harris' family was ready and willing -- indeed anxious -- to assist Mr. Harris' cause, as the record below shows. (Tr. H. 6/7/88, 35:13 to 37:1; 63:12-23; 73:21 to 74:14; 105:4 to 107:25; 133:7 to 134f:140). One has only to lay this amazing summation comment by Mr. Williams alongside the testimony of the Fullers, Wayne Carswell and Christine Harris, to see how shabby

and disreputable his performance at the penalty phase really was and how far it departed from the constitutional norms.

Trial counsel further rendered ineffective assistance of counsel in connection with final arguments to the jury in the penalty phase of the trial in that:

(1) Counsel argued with the jury over its verdict in the guilt phase:

> "We disagree on a lot of things which doesn't mean that we are wrong or that anybody's right. It demonstrates that mistakes can be made. We all make mistakes through our lives, big ones, little ones. Some involving other people, sometimes we hurt nobody but ourselves. We make mistakes in decisions we have made. The verdict you rendered, but that's not the issue we are here to decide at this time whether or not you agree with me on your verdict, whether or not you agree with yourselves now that you've thought about it."
>
> (Tr. 9/29/81, 57:11-20).
>
> * * *
>
> "He [the Assistant State Attorney] never told you how it happened. He gave you several theories of' what went on. Nobody ever told you what happened because there's several things for the life of me he just can't explain. I can't figure it out. I tried ... And if you can say he should die not answering those questions; you live with yourself, but it is those things I wonder about in this trial."
>
> (Tr. 9/29/81, 59:6-10, 21-21.)

Under the circumstances, the jury having already concluded that Mr. Harris was guilty, Mr. Harris' position in the

sentencing phase could hardly have been advanced by a counsel's argument that the jury's decision was wrong;

(2) Counsel suggested to the jury, without any factual foundation whatsoever, that Mr. Harris' conduct was the result of drug addition;

> "[L]et's start with when Mr. Darby says whether or not the person in the house that night knew what they were doing. I will tell you I wasn't there. I don't know. You don't know. But what we do know is that in this trial Kathy Nelson, the serologist, testified to the fact that someone had blood she could not fully analyze because it was smeared, if you recall, and Mr. Echarte asked her, what does smeared mean? She told you drugs could possibly do that and Dr. Clifford was asked how a person could possibly continue to use a hand when it is cut that bad. He said drugs might cause someone to do it."
>
> (Tr. 9/29/81, 61:2-13.)
>
> * * *
>
> "Those things you can probably relate but mental illness, that is something you can't blame the person for. It's like a seed. It grows in a person's mind. Mental illness is like somebody took a needle and injected something in your mind so you won't have control over what you're doing. For instance, if somebody would hold a person down and inject dope in their arms against their will, then if they get up, do something wrong, do you blame them for that? In mental illness it is the same way. It is just God put the drug in the mind. That's the only way I can explain it."
>
> (Tr. 9/29/81, 63:17-64:5.)

Apart from the fact that the record is utterly devoid of any proof of drug addition or drug use, such argument -- that the killing of Mrs. Daniels was committed while Mr. Harris was under the influence of drugs -- was hardly likely to convince the jurors not to impose the death sentence; and

(3) Worst of all, counsel continuously and repeatedly provoked, threatened and badgered the jury with utterly irresponsible, indeed obnoxious, assertions that the jurors would be "hiding behind the law" if they voted to impose the death penalty:

> "If you can tell him [Mr. Harris] there's wrong in what he did, assume that you were right in your verdict, that you can come back and tell him, you can do it rightfully, that you can take a life because you can hide behind the law, that you can determine the circumstances that went on that night, that you know for a fact that it was him and he should deserve to die and if you are wrong, that's the ultimate punishment. That's a mistake that you never will be able to correct. That's one you will live with."
>
> (Tr. 9/29/81, 58:7-16) (Emphasis supplied.)
>
> * * *
>
> "If you can tell him he's right and say you're wrong, you're right simply because you hide behind the law, that doesn't make it right.
>
> I mean, Mr. Darby talks about the fact that this is slavery or whatever. It's very little difference when we come down to it. With slavery it was justifiable to hang black people because it was the law. The law said it was good, but now maybe just because they

allow black people to participate in the law, that doesn't make it right because they have always preyed on the lower end of society, those accused, defenseless, the helpless."

(Tr. 9/29/81, 60:11-22) (Emphasis supplied.)

* * *

"God made some of us normal, some of us abnormal, some of us better thinkers than others, but he made us all. He's the only one that made us. He never made us out to be killers. Those are mistakes. We all make mistakes. If you want to call it God's mistakes, you can, I'm not.

But I do believe that God predestined all of us to have our time and to have our way and we'll go our way at his time. We can't control that. It is just the way it happens. You are helping this without word from God. Because if he says, "You drop dead on the way to the jury room," that's God's will; but then would you blame me for my argument to cause your death? No, you wouldn't, but that's God's will."

(Tr. 9/29/81, 64:6-19) (Emphasis supplied.)

* * *

"And he's telling you that the aggravating factors outweigh the mitigating factors. Well, ladies and gentlemen, I just tell you the aggravating factors and mitigating factors are not weighed in terms of numbers. It is weighed in terms of considerations. How much do you consider human life? How much do you consider the rest of your life? How much are you going to hide behind the law.

They hid behind the law in Viet Nam. They hid behind the law in Watergate. Now, it is time you hide behind the law, if that's what you want to do."

(Tr. 9/29/81, 65:16-66:2) (Emphasis supplied.)

"And the only thing you have to hid behind to burden your decision -- to bear on your decision, help you bear your burden would be the law, the same thing so many people have used for years to hide behind the law, just because it says, he wants you to go ahead and do the maximum.

I believe that the law is a creature of most people who speak out. That's what it comes down to. None of us have ever sat in Tallahassee, wrote out one law. Somebody else wrote it out and tells us we should live by it.

I'm not telling you we shouldn't live the law because the law's good, but when it comes down to the law to commanding us to do things that are against human dignity, there comes a cut-off point. There is a cut-off point.

In Nazi Germany they hid behind the law because they were following orders in what they did. Like I say, in slavery they hid behind the law, doing what they do, saying that's the law, kill the black people. During wars lots of soldiers in Viet Nam hid behind the law when they massacred defenseless women, kids, but that doesn't make it right."

(Tr. 9/29/81, 69:2-24) (Emphasis supplied.)

Counsel's summation was thus littered with false, threatening, irrelevant, argumentative and inflammatory comments. Mr. Williams devoted hardly any of his remarks to the significant mitigating evidence that even he knew to exist in the record, including that the offender did not bring a weapon into the victim's home and that the killing was only committed after the

offender himself sustained a serious and painful injury. That evidence of which he was wholly ignorant, the testimony of Mr. Harris' family and friends, he affirmatively discounted. The damage to Mr. Harris' cause was grevious.

Prejudice to Mr. Harris

The inexplicable failure of trial counsel to prepare for the penalty phase could not have been more prejudicial to Mr. Harris' cause. All murders are terrible crimes; this one is no exception. But the facts below show a burglary gone awry in panic, not the premeditated killing by a hardened criminal intent upon the extinction of life from the inception of the criminal scheme. Mr. Harris entered the house without a weapon and left it grievously wounded himself. Even without any mitigating evidence submitted on Mr. Harris' behalf, this jury divided.

Yet this jury was fully entitled to assume that Mr. Harris had nothing to say for himself and that even his own family (as counsel inaccurately told the jury) had turned against him. As the testimony below of the Fullers and the other witnesses amply demonstrated, this was simply untrue. Had the jury been told that there were numerous people who genuinely loved and needed Mr. Harris, even in spite of his many flaws and even if his life was spent in prison, a different result might well have ensued. The trial court erred in finding there was no prejudice here.

The Expert's View

No more persuasive evidence of ineffectiveness exists in the record below than the expert testimony of Bill White, Chief Assistant Public Defender for the Fourth Judicial Circuit of Florida. (Tr. H. 6/7/88, 140:18-25).[12] Mr. White, whose testimony was by no means one-sided (Tr. H. 159:8-13), found Mr. Williams and Mr. Echarte's handling of the penalty phase to have been markedly below the standards required by the Constitution. He testified:

> With respect to the penalty phase, I believe that Mr. Harris did not receive effective assistance of counsel and that the conduct of counsel in not first, finding, second, interviewing, third, making an informed decision whether to use, and fourth, using the witnesses that we've heard from today, along with other aspects that I reviewed in the file such as military records of Mr. Harris, that was not in accordance then existing and does not comport with constitutional requirements of the right to counsel and the reliability we seek in capital sentencing hearings.

(Tr. H. 6/7/88, 147:19 to 148:6). Mr. White further found there was "No rational basis, strategic or tactical advantage to be

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12. Mr. White has served (in various capacities including chairman) on the Executive Council of the Criminal Law Section of the Florida Bar, and Sentencing Committee of the Criminal Law Section, the Jury Instruction Committee, the Committee for Representation of Indigents (and a sub-committee on capital cases) and the Supreme Court Committee on the Criminal Procedure Rules. He has taught trial practice at serveral Law Schools and to Public Defenders and has lectured on various aspects of the death penalty. He was qualified as an expert in this case without objection. (Tr. H. 6/7/88, 142:1 to 146:8).

gained," (Tr. H. 6/7/88, 149:9-11), from that portion of trial counsel's summation that he found was a "virtual assault on the jury in terms of telling the jury they can't hide behind the law, telling the jury they would be akin to Nazi war criminals or slavers if they were to impose the death penalty in this case." (Tr. H. 6/7/88, 149:1-6).

Having himself witnessed the testimony of the family and friends of Mr. Harris at the Rule 3.850 hearing, Mr. White opined that in his view these witnesses were impressive in appearance, demeanor and in the content of their testimony and that their testimony might well have affected the outcome of penalty trial:

> [I] think their demeanor was excellent. These are good people, and when you're evaluating penalty phase evidence it's not often that you have people that are as articulate. They don't present normally the appearance that these people presented today. These seem like very good people, very sincere people, and the value that I see in the testimony of family members and close friends is that when you try a capital case, the guilt phase is most often limited to either a few moments, a few hours or a very short period of time in a person's life, and the penalty phase, the non-statutory mitigating factors that I could see being established by this family is the portrayal of another side to an individual in this case, Theodore Harris, showing that the man had a loving family relationship, that he was a good father, that he even in prison serves a purpose alive as opposed to dead.

(Tr. H. 6/7/88, 155:16 to 156:11). He opined that trial counsel could have and should have personally interviewed these people and

that counsel should not have left the preparation of the penalty phase case solely in the hands of an investigator (if they did even that much). He stated:

> The duty that's delegated to an investigator or witness interviewer is to help you find witnesses, help you perhaps bring them down to the courthouse. The lawyer has the ultimate responsibility of putting the witnesses on. You can't rely, on a capital case--you might be able to where your case load is so high you don't have time to do it and you cannot and never have been able to do in a capital case, put on a witness without knowing what that witness looks like, what they think about the client and knowing the content of their testimony face to face.

(Tr. H. 6/7/88, 170:5-18).

Mr. White explained the dangers in a capital case of conducting a representation "without an engineer at the switch" (Tr. 6/7/88, 161:10) and further criticized counsel for misplaced confidence on the outcome of the penalty phase:

> You can't in any criminal case, if I've learned anything in 14 years, you can't count on a not guilty verdict and you can't count on the outcome of an appeal. So there are things that a lawyer just cannot afford to do, and I don't believe it would be effective representation to count on an acquittal.

(Tr. H. 6/7/88, 153:14-20). Measured against Mr. White's testimony and that of Mr. Williams and Echarte, who themselves conceded their own ineffective representation on the penalty phase, the Court's finding that Mr. Harris received effective assistance of counsel was clearly erroneous.

ARGUMENT

THE FAILURE OF DEFENDANT'S TRIAL COUNSEL TO PREPARE FOR THE PENALTY PHASE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

Theodore Harris is, according to the unrebutted testimony of friends and family members, a good and devoted father who was and is important to his children. He is a loving husband, and a loyal friend. He is a beloved and important member of a tight-knit neighborhood who, even while in prison, made a difference in the lives of those he touched. On September 29, 1981, however, at the sentencing phase of his trial, as Harris stood convicted of a brutal murder, the jury learned none of this, and was fully justified in believing--as it no doubt did--that this was a man whose life was of no value or meaning to anyone. Such a false picture of Mr. Harris was created by omission on the part of trial counsel, who failed to present a single piece of readily available mitigating evidence. This failure was due not to any strategic decision by counsel based on a considered evaluation of the testimony of prospective witnesses. Rather, the failure was due to a complete breakdown in the preparation for the penalty phase. Each of Mr. Harris' two trial counsel believed then--as they do today--that the other was handling that critical aspect of the trial, and each so testified below.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court set out a two pronged test to assess claims of ineffective assistance of counsel. First, the defendant must show that the trial counsel's performance was deficient. Second, he must show that the deficient performance prejudiced the defendant. Strickland, supra, 466 U.S. at 667, 104 S.Ct. at 2064. The record below contains more than enough uncontroverted evidence to meet both prongs of the Strickland test.

A. Failure to Prepare For The Penalty Phase

In denying defendant's motion for post-conviction relief following the evidentiary hearing, the Court below found that an adequate investigation had been done and that the failure to call witnesses was a tactical decision. The Court's ruling is not supported by the record, because it ignores the undisputed testimony about the irresponsible manner in which the penalty phase investigation was conducted and draws from very selected portions of the testimony of Mr. Williams far more than that testimony will bear.

The Court's determination that the failure to present mitigating evidence at the penalty phase was somehow a tactical decision reflects a fundamental misunderstanding by the Court below of the evidence of the handling of the penalty phase. The failure to present mitigating evidence was clearly due to the

crucial misunderstanding between trial counsel as to who had responsibility for the penalty phase, a misunderstanding presumably born in the unjustified overconfidence with regard to the guilt-phase outcome and general inexperience.[13] One thing is clear: the disastrous result at the penalty phase was plainly not due to any reasoned or informed tactical decision by counsel not to call these witnesses.

Each of counsel's derelictions provides its own independent basis for finding that ineffective assistance of counsel occurred here. See Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987) (failure to present witnesses due to failure to conduct investigation not based on informed decisions about potential witnesses is ineffective assistance of counsel); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) (failure to present mitigating evidence at penalty phase due to confidence in securing acquittal is ineffective assistance of counsel); Walker v. Lockhart, 807 F.2d 136 (8th Cir. 1986) (failure to present witnesses due to negligent failure to ensure their attendance at trial is ineffective assistance of counsel).

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13. Judge Morphonios' findings about Mr. Williams' capabilities as a trial lawyer--he apparently appears regularly in her court--are wholly irrelevant to the issue before this Court. Whatever Mr. Williams' abilities are today, he was inexperienced in capital matters in 1981 and, in all events, simply did an inexcusably bad job in representing Theordore Harris in the penalty phase of his trial.

Moreover, trial counsel did not simply fail to present mitigating evidence. They seriously compounded the error by stating falsely that Mr. Harris' family had turned against him and that he was under the influence of drugs at the time of the crime, and by antagonizing the jury by bickering with them during summation and comparing them to slaveholders, Nazis and war criminals. Indeed, William White, the legal expert who testified on behalf of defendant, described the statements suggesting that Harris' family had turned against him to be "one of the most disturbing things about the argument made to the jury." (Tr. H. 6/7/88, 157:3-4).

Courts have repeatedly found constitutionally inadequate conduct of trial counsel that is diligent by comparison. In Armstrong, supra, for example, the Court of Appeals affirmed the District Court's holding that trial counsel was ineffective for failing to investigate and present mitigating evidence. Although trial counsel interviewed his client and his client's mother, father and parole officer, the last of whom he then called as a witness at the penalty phase, the Court of Appeals agreed with the trial court that counsel's failure to investigate further fell below the objective standard of reasonableness mandated by Strickland. As in this case, trial counsel in Armstrong failed to interview and present a number of persons, such as various family members, who had valuable information and who would have testified

at the sentencing hearing had they been asked to do so. In Armstrong, as here, trial counsel's failure to investigate more witnesses was not due to a strategic decision, but was due to inexperience. 833 F.2d at 1432-33.

Similarly, in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Court of Appeals affirmed the District Court's finding that trial counsel was ineffective for failure to present evidence of mitigating circumstances. Trial counsel interviewed a number of friends and family members of the defendant, but failed to inform them that their testimony could be used at the penalty phase. The potential witnesses believed they had nothing to contribute to the determination of guilt or innocence, since they knew nothing of the murder, but would have offered mitigating testimony during the penalty phase if they had known such evidence was useful and needed. The Court held that the trial counsel's failure to inform the witnesses that they might testify at the penalty phase was ineffective assistance of counsel. Mitigating evidence from family members was available to testify about, among other things, the defendant's character and reputation as a mother. Mitigating evidence from outside the family from Tyler's former employer was also available. The Court further stated:

> Mitigating evidence was especially important because of the attitude in the small rural county where the murder occurred. Ms. Tyler's family lived outside the county. She had married and moved there. Her husband's family lived in the county. Both families

> were blacks, and the black community was outraged over the killing. Bishoff sought testimony from persons within the county but had difficulty finding anyone who would even talk to him about the case. He sought the testimony of a black minister, whose testimony he thought would be more helpful than that of anyone else, but to no avail. In these circumstances the testimony of family members, of defendant's former employer, and of her lack of a criminal record was especially important. These appeared to be the sole available sources for mitigating evidence, and they were not utilized.

755 F.2d at 745. The Court concluded:

> As the Supreme Court has noted in its capital decisions, one of the key aspects of the penalty trial is that the sentence be individualized, i.e., the jury's discretion should be focused on the particularized nature of the crime and the characteristics of the individual defendant. Gregg v. Georgia, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976). In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) the court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted in this case was thus robbed of the reliability essential to assure confidence in that decision.

Id.

The facts in Tyler are strikingly analogous to the facts here. In Tyler, as here, counsel failed to interview family

members and a former employer and, it follows, failed to inform them and other witnesses that their testimony was "needed and useful" even though they knew nothing of the murder. Moreover, the need for mitigating testimony was especially important in this case, as in Tyler, because of the circumstances of the crime. Here, as in Tyler, there was a need for the jury to receive adequate and accurate information regarding Mr. Harris in order to make the life/death decision in a rational and individualized manner. Unfortunately for Mr. Harris, the (non-existent) information provided to the sentencing jury was neither adequate nor accurate. It follows that the result here should be no different than the result in Tyler.

In Blake, supra, Blake had been sentenced to death for murdering a two year old child by dropping her off a bridge. The Court of Appeals affirmed the District Court's decision to vacate a death sentence because trial counsel's representation of Blake in the sentencing phase was ineffective. Counsel failed to prepare for the penalty phase because he believed he could win the case. As a result, the extent of counsel's investigation into his client's background was limited to interviews with Blake's father at which "other persons" were present.

At his post-conviction evidentiary hearing, Blake proferred his mother and four persons who could have testified that "Blake was a man who was respectful toward others, who

generally got along well with people and who gladly offered to help whenever anyone need anything." 758 F.2d at 534. Under these circumstances, the Court concluded:

> As we have already indicated, we find it a close question whether the petitioner received any defense at all in the penalty phase. Certainly he would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, Haupt's failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 523.

Finally, in Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), the Court ruled that the attorney's performance amounted to ineffective assistance of counsel, where the attorney had interviewed the defendant's mother and was prepared to present her as a witness, but had not tried to obtain mitigating testimony

from other family members or persons who knew the defendant from work, school or his neighborhood. See also King v. Strickland, 748 F.2d 1462 (11th Cir. 1984) (failure to present available mitigating evidence combined with harmful closing argument amounts to ineffective assistance of counsel); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (ineffective assistance of counsel found where attorney interviewed defendant's mother, tried to telephone his girlfriend and "might have" spoken to one of five prosecution witnesses.).

B. Mr. Harris was Demonstrably Prejudiced

To demonstrate prejudice, a defendant need not prove to a certainty that the outcome would have been different but for the errors in counsel's performance, or even that a change in outcome is more likely than not. All that need be shown is "a reasonable probability [that], but for counsel's unprofessional errors, the result of the proceeding would have been different." Stickland, supra, 466 U.S. at 694; 104 S.Ct. at 2068. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Id.

The prejudice suffered by Mr. Harris as a result of the conduct of trial counsel was manifest. Had trial counsel done even a minimally adequate investigation, they would have discovered a significant number of friends and family members who

would have testified--as they did in the hearing below--that Mr. Harris was a devoted father, son and brother, a loyal friend, and a good employee and had served in the Armed Forces. These witnesses would have testified to the important and valuable role Mr. Harris played in their lives. The existence of this valuable mitigating evidence is, by itself, sufficient evidence of prejudice to warrant a finding of ineffective assistance of counsel. See Armstrong v. Dugger, supra, 833 F.2d at 1434 (the availability of undiscovered mitigating evidence is sufficient to satisfy the requirement of prejudice); Blake v. Kemp, supra.

In addition, the evidence in support of a penalty of death, as opposed to life imprisonment, was far from overwhelming. Even on the State's evidence, significant mitigating factors were present. The intruder entered Mrs. Daniels' home not expecting to find anyone home. He was unarmed, and the death of Mrs. Daniels resulted after a fight in which he himself was badly injured. Even without a single piece of evidence from Mr. Harris' trial counsel on mitigation, the jury was still deeply divided, recommending the death penalty only by a margin of 8 to 4. Had they not been told that Mr. Harris' family had abandoned him, and had they instead been allowed to see the outpouring of love and concern from his family and friends, it is at least probable that two or three jurors would have changed their minds and recommended life imprisonment. Certainly, at a minimum, the allegations and

established facts indicate "a reasonable probability that, but for counsel's unprofessional errors, the result of the [penalty phase] would have been different." Strickland v. Washington, supra, 466 U.S. at 694; 104 S.Ct. at 2068.

The Court below found that no prejudice had been proven, because the mitigating witnesses' testimony was unbelievable because the witnesses professed love and support for Harris despite the brutal nature of the crime and because of the Court's belief that offering the testimony would have exposed the jurors' to unfavorable testimony concerning Harris' background. Indeed, the Court's findings on this point are so intemperate as to call its very conclusion into question:

> [T]he testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached. (Emphasis added). Order Denying Motion, at ¶1, p.1.

Others at the hearing formed different views: Bill White, an experienced trial counsel qualified here as an expert, found the testimony of the mitigating witnesses to be credible and, in fact, found the witnesses' demeanor to be articulate and impressive, more so in his experience than most witnesses offered in mitigation at penalty phases. (Tr. 6/7/88, 155:16 to 156:11). Under the Florida system, it is for the jury in the first instance to weigh the credibility of mitigating witnesses along with all other evidence. A jury's recommendation of life or death is

intended to reflect the lay conscience of the community. See, e.g., Lowenfeld v. Phelps, 108 S.Ct. 546, 551 (1988). It truly cannot now be said that these witnesses could not have made a difference.

The Court's other reason for failing to find prejudice--that it would have led the jury to be exposed to additional criminal convictions of Mr. Harris--misses the point because it fails to place the evidence in the larger context. As noted above, "one of the key aspects of the penalty trial is that the sentence be individialized, i.e., the jury discretion should be focused on the particularized nature of the crime and the characteristics of the individual defendant." Tyler, supra, 755 F.2d at 745. The testimony Mr. Harris might have offered by way of mitigation was crucial to presenting his specific characterisitics and, more importantly, to rebutting the picture of him painted by the testimony in the guilt and penalty phases to that point.

While cross-examination at the penalty phase may have brought out unfavorable facts about Harris' background, he already stood convicted of a brutal murder. The jury (and the witnesses alike) knew that Mr. Harris had just been convicted of murder, and had previously served time for robbery (strongarm). More surely gilded an already gilt flower. The sentencing phase represented his only opportunity to present favorable testimony to contradict

the stark picture of the killer presented during the guilt and penalty phases by the prosecution. This was Harris' opportunity to show the jury another side of his life. This was Harris' opportunity to prove that he was a loving and devoted father, son and brother, a caring uncle who was helping his niece to prepare for college, and a loyal friend. The harm of additional testimony concerning a prior car burglary, a ~~major~~ minor assault, and other criminal acts would, we urge, have been more than outweighed by the very existence of testimony that attempted to portray Harris as a human being with a decent loving side, one who was and is still important to many people.

III. OTHER CLAIMS

The foregoing claim, as well as those presented in the remainder of Mr. Harris' Rule 3.850 motion, all involved errors which "precluded the development of true facts and resulted in the admission of false [or misleading] ones" and errors which "served to pervert the jury's deliberations considerations concerning the ultimate question of whether in fact [Mr. Harris should have been sentenced to die.]" Smith v. Murray, U.S. _____, 106 S. Ct. 2661, 2668 (1968).

CONCLUSION

For all the reasons stated in Mr. Harris' Rule 3.850 Motion and in this Brief, Theodore Christopher Harris respectfully requests that the Court grant the relief sought therein and all

other and further relief which the Court may deem just, proper and equitable.

Respectfully submitted,
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