IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 72,589

THEODORE CHRISTOPHER HARRIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

INTRODUCTION

The Appellant, **THEODORE CHRISTOPHER HARRIS** was the Defendant in the trial court and the Appellee, **THE STATE of FLORIDA**, was the prosecution. Appellant will be referred to in this brief as he stood below and the Appellee will be identified as the State.

The symbol "OR", in this brief, will refer to the Record-on-Appeal in the defendant's direct appeal before this Court, in Case No. 61,343, and the symbol "R" will refer to the Record on Appeal in the proceedings on defendant's Motion for Post-Conviction Relief including the transcripts of the hearing. The symbol "T" will designate the various transcripts of lower-court proceedings in the original trial which will be further identified by date. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellant's Brief, which does not even roughly comply with the requirements of Rule 9.210(b), Fla.R.App.P., contains no Statement of the Case and Facts, as required. Alternatively, if its "Statement of the Case" is so construed, it contains numerous material errors and omissions and consists primarily of improper argument. Therefore, Appellee must reject it in its entirety and submit Appellee's Statement of the Case and Facts, as follows:

A. Procedural History

Mr. Harris, on April 28, 1981, was charged by Indictment with First Degree Murder (Count I), Burglary of a Dwelling with a Dangerous Weapon and with an Assault (Count II) and Robbery with a Dangerous Weapon (Count III) (OR.4-5A). The defense, prior to trial, filed a Motion to Suppress Evidence (OR.83), a Motion to Suppress Defendant's Confessions, Admissions and Statements (OR.87-88) and a Motion in Limine to preclude any allusion to the fact that the defendant was on parole at the time of the crime or that he was arrested at his parole officer's office (OR.89-90).

The Motion in Limine was granted (T. 9/10/81 at 8:10 a.m., 59, l. 19-21). Extensive evidentiary hearings were held on the other defense motions (T. 9/8/81 at 9:00 a.m., 1-153; T. 9/9/81 at 9:00 a.m., 1-164; T. 9/10/81 at 8:10 a.m., 1-68). Subsequent to these hearings, each of the other motions referred to above was denied (T. 9/10/81 at 8:10 a.m., 59-66).

Trial began on September 21, 1981 (T. 9/21/81, 1-3) and, on September 2, 1981, the jury returned verdicts of guilty on all three counts, as charged (T. 9/26/81 at 9:00 a.m., 2-4). The defense was granted a continuance to attempt to contact witnesses (T. 9/26/81 at 9:00 a.m., 5-6) and the court reconvened for the penalty phase on September 29, 1981

(T. 9/29/81 at 8:00 a.m., 1-3). The jury returned with a recommendation for the death penalty (T. 9/29/81 at 9:00 a.m., 82-84). Subsequently the trial court sentenced the defendant to death on the Murder count, finding five (5) aggravating factors (with pecuniary gain and during the course of a burglary and robbery not being doubled and noting that, although there was evidence that the crime was commited for the purpose of avoiding or preventing a lawful arrest, it was not raised by the State nor considered by the court) and no mitigating factors (T. 9/29/81 at 8:00 a.m., 85-92). The court sentenced the defendant to 100 years incarceration on the Armed Burglary with Assault (T. 9/29/81 at 8:00 a.m., 93) (OR.242) and 100 years incarceration, consecutive to the sentence on Count II, for the Armed Robbery (T. 9/29/81 at 8:00 a.m., 93) (OR.242).

The defense appealed to the Florida Supreme Court, raising the following issues:

POINT I - THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON IMPROPER COMMENTS OF THE PROSECUTOR DURING CLOSING ARGUMENT.

A - THE PROSECUTOR IMPROPERLY COMMENTED ON APPELLANT'S FAILURE TO TESTIFY.

B - THE PROSECUTOR IMPROPERLY APPEALED TO THE SYMPATHIES OF THE JURY.

POINT II - THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

A - THE STATEMENTS EXTRACTED FROM APPELLANT BY THE POLICE WAS THE RESULT OF HIS ILLEGAL SEIZURE, WITHOUT PROBABLE CAUSE, IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, §7, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

B - THE INCULPATORY STATEMENTS OF APPELLANT WERE NOT FREELY AND VOLUNTARILY GIVEN, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, §10, OF THE CONSTITUTION OF FLORIDA.

POINT III - THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON INCULPATORY STATEMENTS.

POINT IV - THE TRIAL COURT ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, IN NOT ALLOWING THE JURY TO CONSIDER LESSER INCLUDED CRIMES CHARGED IN THE INDICTMENT.

A - THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON NECESSARILY INCLUDED LESSER OFFENSES CHARGED IN THE INDICTMENT.

B - IT WAS ERROR FOR THE TRIAL COURT NOT TO GIVE CURATIVE INSTRUCTIONS TO THE JURY BASED UPON THE PROSECUTOR'S MATERIAL MISREPRESENTATION OF LAW CONCERNING THE JURY'S CONSIDERATION OF LESSER INCLUDED OFFENSES CHARGED IN THE INDICTMENT.

POINT V - THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UPON APPELLANT.

A - THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL DURING THE PENALTY PHASE OF THE TRIAL PROCEEDING, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY RECOMMENDATION IN THE CONSIDERATION OF HIS SENTENCE.

> B - THE TRIAL COURT IMPROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.[1]
>
> C - THE TRIAL COURT IMPROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> D - THE TRIAL COURT IMPROPERLY FOUND THE ABSENCE OF ANY NONSTATUTORY MITIGATING CIRCUMSTANCES.
>
> (R.179-181).

The Florida Supreme Court affirmed the Judgement and Sentence of the trial court at Harris v. State, 438 So.2d 787 (Fla. 1983), making the following findings:

First, it agreed with the trial court's findings, as follows, concerning the defendant's arrest;

> 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.
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> Id. at 793.

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[1] The Appellant, in headnote 4, again raises this issue (Appellant's Brief, 12). However, Maynard v. Cartwright, 56 U.S. L.W. 4501 (June 7, 1988) has no applicability where no such issue was raised in the trial court.

It noted that the arrest was supported by probable cause and that, even if there had been deliberate falsity, the remaining contents of the affidavit were legally sufficient to support the warrant. (Id. at 793).

Second, the court affirmed the trial judge and jury in their conclusion that the defendant's confession was voluntary. Id. at 794.

Third, the Supreme Court examined the following comment of the prosecutor, alleged to be an improper comment on the defendant's failure to testify;

> I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial.
>
> Id. at 794.

The court held that the comment concerned was a description of the defendant's demanor during his interrogation, not a comment on defendant's exercise of his right to remain silent and was proper, even at a time when no harmless error rule applied to any comment which could reasonably be construed as a comment on the defendant exercise of his Fifth Amendment right to silence. Id. at 794-795.

Fourth, the court found that the requested defense instruction on inculpatory statements was adequately covered by the standard jury instruction on the matter which was given by the trial court. Id. at 795.

Fifth, the Supreme Court found that the appellant, himself, as well as his counsel, knowingly and intelligently waived his right to instructions on necessarily included lesser offenses, noting that the trial court took meticulous care to make sure the appellant knew of the waiver request and made an express oral waiver of his right to these instructions. Id. at 795-797.

Sixth, the court examined the propriety of the actions of the trial court in instructing the jury to disregard the following prosecutorial comment made during closing argument in the penalty phase, but refusing to grant a mistrial on these grounds;

> The Defense may tell you, Well, 25 years is a long time, 25 years without eligibility for parole, but I can tell you this: That in 25 years this 27 year old Defendant will be 52 years old. He will walk out of prison as he walked out of prison before.
>
> Id. at 797.

It found that, although the comment should not have been made, that it was not so prejudicial as to require a mistrial and agreed with the actions of the trial court. Id. at 797.

Seventh, the court found that the aggravating factor that the murder was heinous, atrocious and cruel was clearly justified by the record. Id. at 797.

Eighth, the court found that the State had not established beyond a reasonable doubt that the murder had been commited in a cold, calculated and premeditated manner. Id. at 797-798. However, the court found that there was still four (4) properly-applied aggravating circumstances and no mitigating circumstances and that the imposition of the death sentence was appropriate. Id. at 798.

Subsequent to the denial of rehearing, the defense Petitioned the United States Supreme Court for Certiorari review, which was denied at Harris v. Florida, 466 U.S. 963 (1984).

Then, on February 8, 1985, the defense filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida alleging ineffective assistance of appellate counsel for failing to adequately attack the affidavit in support of the arrest warrant for the defendant. The Supreme Court denied the Petition, finding both that the petitioner, under the guise of a claim of ineffective assistance, was seeking a second review of an issue previously raised and addressed and that the allegations in the Petition failed to establish any deficiency by appellate counsel that caused a prejudicial

impact on the petitioner. Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985).

The defense the filed the Motion for Post Conviction Relief concerned herein, raising twenty (20) issues. (R.20-26). An evidentiary hearing was held on the matter on June 6 and 7, 1988 (R.384-610) and the trial court denied the motion, on all grounds (R.382-383).

B. The Facts In the Original Case

The facts in the trial, as set forth by this Court in the defendant's direct appeal were:

> The victim , a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1981. She had died during the night from multiple stab wounds and wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was splaterred over the walls and furnishings of the bedroom, living room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.
>
> While police officers were investigating at the scene of the murder, they were approached by Lionel Cook, who indicated that he suspected that Harris might be involved in the crime. At the time of the murder, Harris was living with Cook and his wife, the victim's granddaughter, in

the same general neighborhood as the victim. Harris knew the victim, having attended a dinner at her house on a previous occasion, and having been previously married to Mrs. Cook's sister. Cook told the police that Harris had taken his wife's car late on Saturday night and that he had not returned it. Cook said that one of the staff of Jackson Memorial Hospital called him early Sunday morning to tell him that Harris had been hospitalized with a severely lacerated hand and that, when he went to the hospital to pick up his wife's car, he saw Harris and took Harris's personal effects from the hospital. He turned the personal effects over to the police on Sunday evening, along with two bloody towels he had found in his wife's car.

The police interviewed Harris in the hospital late Sunday night. At this interview, Harris stated that his hand had been cut the night before when two men attacked him in the parking lot of a bar and tried to steal a gold chain from around his neck. He explained that, in trying to defend himself against a knife attack, he grabbed the blade to deflect it from his body.

The police investigated further, focusing on Harris as a suspect. They examined the parking lot where Harris claimed he had been attacked, but they did not discover any trace of blood or any evidence of a scuffle. The chief investigating officer talked with the doctor who treated Harris's hand, and it was the doctor's opinion that the wounds could have been caused by the hand sliding down over the handle of a knife onto the blade while Harris was wielding the knife in a stabbing motion. Laboratory analysis showed that two types of blood were present in the victim's house, type A and type O. The victim had type O blood; Harris's blood was type A, and it had further characteristics that made it

> consistent with the type A blood found at the scene. Four partial fingerprints were found in the victim's house, but none was identified as belonging to Harris. Analysis of Harris's clothing revealed the presence of type A blood, but none of the blood on these articles of clothing was ever identified as being of the victim's blood type.
>
> The police obtained a warrant on April 7 and arrested Harris on April 14, approximately three weeks after the murder. At the time of his arrest, Harris had a cast on his right forearm that interfered with his wrists being handcuffed behind his back, as police regulations required, so the police handcuffed his right elbow to his left wrist behind his back. Harris was interrogated at the police station from 1:00 p.m. to 7:00 p.m. During this time, he was handcuffed and sat in an aluminum chair. He did not receive either food or drink during the interrogation. The investigating officers testified that Harris was calm and matter-of-fact about the handcuffs or his treatment. He consistently denied his involvement in this murder until about 7:00 p.m., when he said, "All right, I'll tell you the truth." After giving an oral statement, Harris signed a written confession which was introduced into evidence at trial. (footnotes omitted).
>
> Harris v. State, 438 So.2d 787, 789-790 (Fla. 1983).

C. The Facts Elicited at the Hearing

The Facts which were elicited at the hearing held on defendant's Motion for Post Conviction Relief were as follows:

Pedro Echarte testified, on June 6, 1988, that he and Alfred Williams represented the defendant in his 1981 trial (R.394). He did not confer with Mr. Harris' family, friends or former employers (R.395-396). He did not subpoena or review the defendant's school or Army Service Records (R.396). He testified that he did not visit the Harris family or the neighborhood where the defendant grew up and did not assign an investigator to do so. (R.397). He did not spend time with the defendant to discuss his background and personal history for the penalty phase. (R.397). Mr. Williams was responsible for penalty phase preparation (R.397).

He did not contact Christine Harris' doctor to solicit his assistance in obtaining an adjournment due to her hospitalization (R.397). He met with defendant two or three times. (R.398).

Mr. Williams said he believed they would prevail at trial. (R.398).

If he had been aware that friends, family and former employers of the defendant wished to testify in mitigation, he would have presented them. (R.398-399).

Mr. Williams may have had an investigator working with him on the case, but Mr. Echarte didn't know (R.399-400).

Alfred Williams testified that he represented the defendant at trial. (R.405-406). He did not confer with any of the persons from whom the defense had obtained affidavits (attached to the Motion) except Robin Smith and, by telephone, Wayne Carswell (R.406-407). He did not review Mr. Harris school or military records and did not visit the Harris family or the neighborhood where defendant was raised. (R.407-408). He was aware of some of the information in the defense affidavits, but not from those, particular, people (R.408). He was unaware that Harris received a Red Cross Recommendation while in the military. (R.408).

As between himself and Mr. Echarte, Echarte was responsible for penalty phase preparation. (R.408).

He didn't, personally, contact Christine Harris' doctor to get his assistance in securing an adjournment from Judge Scott. (R.408-409).

The Public Defenders' office, at the time, was at an all time low and he had at least five first degree murder cases as well as a normal case load. (R.414-415).

He presented no witnesses at the penalty phase. (R.414).

He does not believe, looking back at the Harris case, that either he or Mr. Echarte devoted an adequate amount of time to the penalty phase. (R.415).

Mr. Williams does not believe he was ineffective during the guilt phase of the trial. (R.416).

An investigator was working on the penalty phase of the trial, as well, named Gary Wayne. (R.417). He received reports that contacts were being made with defendant's family members (R.417), that certain people had been talked to and that some things were coming while others were not developing. (R.418).

He received no complaints from family members or Robin Smith about the preparation of the case (R.419), nor did any of his supervisors report to him that any such complaints were made (R.419).

He did intend to call certain family members and/or friends during the penalty phase (R.419) based on representations made to him by the investigator or Echarte that some would be appearing for the hearing. (R.419-420). None of the people from Jacksonville showed up (R.420).

Robin Smith was in court at the time, but refused to testify. (R.420-421). He found it surprising that, in her affidavit, she claimed she was never given an opportunity to testify. (R.421).

They had anticipated Christine Harris testifying, but her illness made it impossible. (R.421-422). He tried to get a continuance because of her illness, but it was denied. (R.422).

He never failed to return any telephone call from any family member or friend of the defendant who offered help during either the penalty or trial phase. (R.422).

This defendant is the only person he has ever represented who is on death row. (R.422-423).

He feels he was ineffective because he was sitting in the first chair and takes the blame for the things that people he delegated responsibilities to didn't do. (R.423).

Christine Harris was somewhat reluctant to testify because of the nature of the crime. Her grandmother was the victim. (r.425).

He got reports from either Pedro or Gary that they were having trouble lining up family members. (R.425-426). Robin was supposed to be helping. (R.426).

He had no reports that Echarte or Wayne went to Jacksonville. (R.426).

Mr. Henry Fuller testified that he served in the armed forces in Vietnam, Korea, Panama Canal Zone, Oklahoma and Kansas (R.429-432). He has been married to the defendant's sister for thirteen years and knew her for two or three years before. (R.432). He met the defendant when he met his wife. (R.432-433).

He testified that he was a good friend of the defendant's with a brother relationship and that Harris is real timid and easily persuaded. (R.433). He's a kind-hearted person and a good father. (R.434). LaShawn Fuller, his stepdaughter, writes him and communicates with him by phone. (R.434). They went places together and he was supportive of her and loved her. (R.435). He believes that Harris has been of assistance to LaShawn and could be of futher assistance, even if incarcerated. (R.435). He regularly visits Harris. (R.435-436).

Nobody ever asked him to testify in the defendant's 1981 trial or contacted him about it. (R.436). He didn't know he could testify for him and would have been willing to. (R.436). He woud have told the jury that Harris is not a real bad man and he doesn't feel he deserved this. (R.436).

He is disturbed because he was not contacted by Williams, Echarte, or Wayne because they all love him and he's an asset to the community. (R.437). His views were never different from that, nor were the family's. (R.438).

He has no problem seeing Harris as a role model for his children, despite his knowledge of his criminal record. (R.439). He knows Harris was convicted of burglary prior to the murder and then violated his probation on the burglary by committing another felony. (R.440). He knew that Harris, then, committed a robbery of an elderly woman in Jacksonville. (R.440). Neither he nor other family members, to his knowledge, testified at Harris sentencing hearing in Jacksonville. (R.441).

He would loan the defendant money, or even his car, if he asked for it. (R.442). He doesn't believe that Harris murdered someone for $30 and would have been prepared to tell the jury that in 1981 (R.443).

He had no contact with Harris during his incarceration prior to trial in 1981. (R.443), nor, to his knowledge, did his wife. (R.443). Neither did his brother, Curtis Harris, or LaShawn (R.443-444). They did have contact with Christine Harris and she made no complaints about the defendant's attorneys that he knows of (R.445-446). He only heard complaints about how things were handled afterwards (R.446-447).

He believes Harris would never hurt anybody (R.449), despite his prior Robbery Conviction. (R.449-450). When it was explained to him that "Under the law of Florida, a rob-

bery requires either force, violence, putting someone in fear or assaulting them", his answer was, "So does love. . . ." (R.450). He knew that Harris was convicted of burglary (R.450-451), drug possession (R.451) and robbing an elderly woman in Jacksonville (R.451), but didn't know the facts of this murder. (R.451). He didn't know the victim was a 73-year old woman that Harris cut 50 times. (R.451). he didn't know Harris stabbed her in the head five times. (R.451). He is still not a bad man to him. (R.453).

He said he was good to his family members (R.453-454) but the witness knew that the woman he killed was related to the defendant by marriage, had taken him into her home, had given him dinner and had treated him well. (R.453-454).

He doesn't know Robin Smith. (R.455). The family and neighborhood didn't know precisely when defendant's trial was taking place. (R.456). He found out about the penalty phase after it was over. (R.456).

LaShawn Fuller is 22 years old, lives with her parents, is a student at Florida Community College and works at a fast food restaurant. (R.457-459). She is in the Army National Guard and became interested in military through the defendant and her father. (R.459). She has known Harris all her life and he has been a good uncle to her. (R.460). He helps her out with her college background and they write back and

forth. (R.460-461). She has not visited him. (R.461). He encourages her to continue the good work and has been an influence for good. (R.461-462). She knows that he has been convicted of several offenses including murder, but feels he can continue to be of help to her even if he remains in prison. (R.462).

She was 15 in 1981 and was close to Mr. Harris, but nobody contacted her about testifying at this trial. (R.463). She didn't know she could testify for him and didn't know when his trial took place. (R.463-464). She would have wanted to testify for him and would have done so. (R.464). She would have said he was a good uncle and advisor during her career. (R.464). She doesn't know Robin Smith. (R.464-465).

Wayne Carswell lived in the defendant's neighborhood with two houses between his and the Harris family. (R.466-467). He is a minister and Pastor of the Community Baptist Temple in Jacksonville. (R.467). He has a four-year degree from Toledo Bible College and went to FJC for two years. (R.467). He also works with insurance and an investigating company and has a son 16 and a daughter 15 (R.468). He has known the defendant all his life, like family, and Harris would do anything he asked him to do. (R.468).

The defendant had a good family relationship and they all attended church. (R.469). It saddened him that Harris couldn't stay out of criminal activity and he is aware of his convictions and incarcerations. (R.469).

The defendant appeared very much in love with his wife and expressed love for the children, including, equally, the children that weren't his. (R.470).

He employed Harris in 1980, when he got out of prison, in his janitorial service. (R.471). He was like a supervisor, he put his burden on him and he took it. (R.472). He was an excellent employee. (R.472). He paid him $200 a week and he worked flexible hours, but was dependable. (R.472-473).

Harris left his employ because he was thinking about relocating his family and said he would be gone a week or two to seek employment. (R.473). He was reconciling with Christine, at the time. (R.473-474).

Nobody from the Public Defender's Office contacted him to advise him of the defendant's trial or asked him to serve as a witness. (R.474). He would have been willing to testify. (R.474). He would have testified as he has today. (R.475). Mr. Harris is an excellent fellow that he would trust with his family if he had to go on a trip or something in the ministry. (R.475).

He knew that the defendant has had brushes with the law. (R.477-478). After his burglary conviction, Mr. Carswell offered him counseling to get him back on the straight and narrow. (R.478). He did not know that, while on probation for the burglary he was caught for another felony, a drug possession. (R.478-479). He did counsel him after that (R.479). He was not aware that, after he got out of jail for that, he was convicted of assault and battery. (R.479-480). He was not aware that he was subsequently convicted of robbery. (R.480).

Mr. Carswell didn't know the facts of the murder, what the defendant did. (R.480). He couldn't explain why Harris would inflict fifty knife wounds in order to take $30 from a member of the church. (R.481). He didn't know any reason that Harris would stab a 73-year old woman five times in the head to get $30. (R.481).

He would still trust him with his family. (R.481-482). He doesn't know of a darker side to him. (R.482). He didn't know the lady Harris killed was his wife's grandmother. (R.482).

The death penalty may be appropriate for murder if there are witnesses. (R.484). A confession is not enough. (R.485).

He is close to the friends and family of the defendant.

(R.486). He never heard that there were problems with how his attorneys were representing him (R.486) and none of the family members ever asked for his help. (R.487).

He travels a lot and no one hardly ever know his whereabouts. (R.487). He is up at 3:00 or 3:30 a.m. and doesn't get home until 10:00 or 11:00 at night. (R.487).

Christine Harris is the defendant's ex-wife and has three children. (R.491-492). She met him in 1971 at a school dance and it was love at first sight. (R.492). She had one child at the time, Catesha. (R.492).

They were married in 1975 when defendant was in the Army, stationed in Seattle. (R.493). Prior to their marriage, they had a child, Theodore II, born March 19, 1973. (R.494). After the marriage, Theodore went back to Seattle and, although he wrote and supported the family (she was also working), she began to see other people. (R.494-495). Theodore went AWOL several times to see her, but she decided to divorce him in 1977 because she had gotten pregnant by another person. (R.495-496). He didn't believe in divorce and was upset. (R.496-497).

He continued to visit, to support the children and there was no difference in his relationship to the children. (R.497).

He returned from Seattle in 1978 and they would still talk and he would come over and see the children and provided financial support for them. (R.498). He was sent to prison, but continued to communicate with her and the children and she visited him. (R.499).

He was released in November of 1980 and they got back together and talked about remarrying. (R.501). Zaire was born when Harris was in prison and was not his child, but he treated her like his own. (R.502). He worked at a janitorial service with Mr. Carswell and gave her all his pay. (R.502-503). He went to live with her sister, Sarah Cook, and her husband Lionel in Miami because Lionel said he could get him a job and, eventually, she and the kids could come to Miami. (R.503-504).

After the defendant was arrested for Murder, she visited him and tried to get him a private lawyer, but wasn't financially able. (R.504-505).

She met Mr. Williams when she came down for a hearing that got postponed. (R.506). Her sister, Robin Smith, told her about the hearing. (R.506-507). A bailiff told her who Mr. Williams was and she introduced herself. (R.507). He said the hearing had been postponed and he would get in touch with her. (R.508). She gave him her work number because she didn't have a telephone. (R.508). She attempted to call him,

but couldn't get through. (R.508). They never spoke again and she received no letters from the Public Defender's office, although she gave him her address. (R.509).

She did not attend the trial because nobody contacted her and she was in the hospital. (R.510). She was sad that the women killed was her sister's (and her) grandmother, but that did not make her unwilling to be a witness. (R.510). Nobody told her she could come to testify on the penalty issue and she would have wanted to. (R.511). She would have told the jury that he was a warm, gentle person who treated all of her children as his own and that she doesn't believe he committed the murder. (R.512).

She and Theodore exchange encouraging letters and writes to the children, as well. (R.513). She thinks the children still need him and that he continues to play a positive role in her life and the lives of her children. (R.513-514).

She was upset when Mr. Williams didn't return her calls and Robin Smith was also upset about him not being able to respond to them. (R.514-515). Robin couldn't find out anything, but Christine doesn't know if she really got into the situation because they don't communicate that much. (R.516). Basically, she said, "Robin, check into it," and when she came up with no answers, that was it. (R.517). She didn't contact her side of the family about it because of the

situation, Sarah Cook is her sister. (R.517-518). Nobody was violently upset, but she didn't talk to them because she didn't want to put them in a situation between two sisters. (R.518).

She complained to Janice Fuller and Janice and her family were going to try and do what they could. They tried to get lawyers. (R.519).[2] They were not successful. (R.520). They constantly tried to find another lawyer, but were unable to. (R.520). She did not discuss the problem with Hank Fuller, LaShawn Fuller, Curtis or John Harris, Gail Smith, Wayne Carswell or Jackie Robinson. (R.521).

She would have told the jury, in 1981, that she believed he is innocent. (R.522-523). In a statement in her Affidavit attached to the motion, she said, "I never talked to him again, although I got some phone messages at my job while I was hospitalized in late September '81". (R.524). She could have gotten messages from Mr. Williams, but only recalls one from Robin. (R.525).

She was not available to testify at the time because she was in the hosptial. (R.525).

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[2] This is contradicted by Henry Fuller (R.445-447) and Janice Fuller. (R.539).

Janice Fuller, the defendant's sister testified that her daughter LaShawn became interested in the National Guard through her father and the defendant. (R.526-527). She took care of the defendant and helped her mother raise him and he had a good relationship with her parents. (R.528). Nobody wrote to or contacted her father, to her knowledge, from the Public Defender's office, not did they come to see her. (R.529-530). Nobody ever came to see her or told her anything. (R.530). Theodore was a good, kind, loving brother and they were close. (R.531). He treated all of Christine's children the same. (R.531). He was heartbroken over the divorce, but continued to provide support for his children. (R.533). His relationship with the children remained good. (R.533).

She still loves him, despite his murder conviction, and would have wanted to come and testify for him in 1981. (R.533-534). She was shocked and hurt not to have been contacted and had the opportunity. (R.534). She would have told the jury that she loves him and cares for him and he has good qualities. (R.535). She visits him in prison (R.535) and corresponds with him. (R.535). She believes he has had a positive influence on her children by letting them know just how rough it is. (R.536). He spent a lot of time with LaShawn and gave her good, positive advice. (R.536).

She went to Mr. Harris' sentencing on his first burglary charge, but not his sentencing for the probation violation on the felony drug charge (R.537), his assault and battery sentencing (R.537) or his robbery sentencing. (R.537). She never spoke to him, at all, when he was in prison in Miami before his murder conviction. (R.538).

She heard no complaints concerning his lawyers in Miami (R.539) although she knew Christine wouldn't talk to the Public Defender. (R.539). She didn't do anything about it because she didn't know who to call. (R.539). She could have asked Christine who Theodore's lawyer was, but she was going to stand on procedure that the lawyer had to call her first when she didn't know what she was doing. (R.540).

Mr. William White was declared a legal expert, based on his qualifications. (R.541-547). He had read the trial transcript and the Post Conviction pleadings and heard the testimony of the witnesses. (R.547). He believed that the defendant did not receive effective representation of counsel with respect to the penalty phase in that counsel did not find, did not interview, did not make an informed choice and did not use the witnesses presented at the hearing along with the military records aspect of the case. (R.549).

He also reviewed counsel's closing argument at the penalty phase. (R.549) and felt that there was an aspect of

the argument that was very difficult to deal with, telling the jury that they can't hide behind the law and that they would be akin to Nazi war criminals or slavers if they were to impose the death penalty in this case. (R.549-550). He felt that there was no strategic or tactical advantage to be gained by taking that approach and that it did not represent effective assistance of counsel. (R.550).

He felt that most of the information heard at the hearing would have been disclosed by a simple interview form. (R.551). Probability of success at trial should make no difference in how preparation for the penalty phase is approached. (R.553).

It would have been difficult to put on character testimony during the guilt phase of the trial, although he can't say it would have been ineffectiveness. (R.554-555). He thinks that the heart of ineffectiveness in this case is not knowing what was available, but not seeking out information that was available. (R.555).

He felt that the demeanor of the witnesses was excellent. (R.556). They seemed like good, sincere people and the value of their testimony was showing that Mr. Harris had a loving family relationship, was a good father, and serves a purpose by being alive. (R.556-557).

He can't say what a jury would have done with these witnesses, but he would have put them on. (R.557).

One of the most disturbing things about the argument was telling the jury that the defendant's family didn't like him or get along with him with no explanation. (R.558-559).[3]

He believes that there certainly was effective assistance of counsel in the guilt phase. (R.560). He has no reason to believe that Mr. Williams is lying or confabulating the facts. (R.561). He believes that no one was in charge, but can't square that with Mr. Williams' testimony that he was receiving reports from Mr. Echarte or his investigator that contacts were being made and that family members were being spoken with. (R.562). There is nothing to rebut Mr. Williams' statement that he had an investigator working on the death penalty phase and gathering witnesses except these people weren't located. (R.563). He remembers Mr. Williams saying that his investigator informed him, between the guilt and penalty phase that some of the witnesses could not be contacted in Jacksonville, but others had been contacted and were coming to the hearing. (R.564).

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[3] What was said was ". . .he's the only person that stands behind him when you think about the fact that his family has turned against him because he was accused of this act. He's always - - they have been against him since then. (T.9/29/81, 68).

It certainly creates difficulties when you have a senseless, apparently unmotivated vicious killing. (R.567).

Mr. Williams made some good points during his argument. (R.567). He tried to mitigate Harris' responsibility by claiming the victim had the knife first. (R.567). He argued that the defendant was surprised by the victim during his burglary. (R.568). The evidence of a number of Harris' prior crimes would not have been admissible if character witnesses were not put on. (R.568-569).

Mr. White believes that personal contact by attorneys conducting a capital case with important sources of mitigating evidence is essential, and can not be delegated to anyone. (R.570-571).

Closing argument was then held during which the State noted that five (5) of the defendant's twenty (20) issues had already been decided against him by the Supreme Court. (R.580-581), another ten (10) were procedurally barred because they could have and should have been raised on direct appeal. (R.581-584), that no prejudice was shown due to the loss of the defense attorney's file. (R.584) and that the evidence presented specifically contradicted the two (2) issues alleging ineffectiveness of counsel during the guilt phase. (R.584-585).

The remainder of closing arguments consisted of the defense claiming that they had shown acts and omissions below the standards of competence and the State arguing that they had not. (R.574-602).

The hearing concluded (omitting comments on logistics and costs) as follows:

> THE COURT: Okay. Is there anything further from anybody?
>
> MR. RABINOWITZ: No, Your Honor.
>
> MR. GILBERT: Nothing further from the State, Your Honor.
>
> THE COURT: All right. With regard to Case Number 81-7561 the Court is completely familiar with Mr. Al Williams as a trial attorney. I'm not that familiar with Pedro Echarte. I know who he is, but if I've had him practicing before me I frankly don't remember it, which means nothing against him, but I am thoroughly familiar with Mr. Al Williams. He's a very thorough attorney. He has been ever since I've known him. He's a good attorney.
>
> I share with Mr. White the statement that I don't believe Mr. Williams would ever come in here and say something that was inaccurate, not true, hedged or shaded; however you might want to use the phrase. I think that the investigator that was working with Mr. Echarte and Mr. Williams, just as Mr. Williams testified, was diligently trying to locate members of Mr. Harris' family, not members of Mrs. Harris'family, but member of Mr. Harris' family.

I think that a number of the people whose names have been mentioned were made known to Mr. Williams, Mr. Carswell, Mrs. Harris, and frankly I think there was another one whose name escapes me at the moment.

Be that as it may, I think that Mr. Williams, as he stated, regardless of between Pedro Echarte and Mr. Williams as to who thought they were the supreme being in the making of decisions, Mr. Williams very accurately said, "No matter which one of us is making the decision, I am the senior Public Defender, I am responsible for anything I do and I am responsible for anything Mr. Echarte does and I am responsible for anything the Public Defender investigator does."

I think Mr. Williams had intended to put on witnesses, if they were available, with regard to Mr. Harris' background. They were not available. Some of them didn't show up that he knew about.

Mrs. Harris, who according to Al Williams was a little wish-washy with the investigator as to whether she would or would not testify for Mr. Harris, solved the matter simply by being in the hospital and unable to testify for anybody about anything and avoided the entire issue. I'm not saying she did that deliberately, but it conveniently got her out of a pickle.

I think Mr. Williams made a tactical decision forced upon him by the fact that the people from Jacksonville never showed up and he made a decision to rely on hopefully hitting the sympathy on behalf of the jury by pointing out that Mr. Harris had a deprived background type and that he did not have his family with him and was seeking the sympathy of the jury and hoping that the jury would decide that he's a poor put-upon human being and was, therefore, forced into these acts by reason of his background.

I think Mr. Williams was fully, completely, 1,000 percent aware that if he put on character witnesses, that Mr. Harris' less than admirable background was going to be jammed down the throats of the jury, which would have been not helpful to Mr. Harris in a penalty phase.

What I'm doing obviously is thinking out loud and the final question will be what have I missed that you want me to comment upon?

With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdict.

I share with Mr. Gilbert the feeling--I'm trying to say incredibleness, which is of couse not a word--lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.

They knew he had had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.

I don't think the testimony of any of the witnesses heard here today would have altered in any way, shape or form the verdict that the jury reached in 1981.

With regard to this case, 81-7561, the motion is denied.

If there is anything that you gentlemen, either one of you or all of you, wish me to comment upon so that whoever reviews this has the benefit of whatever thinking I might have, I'll be happy to do that.

MR. RABINOWITZ: Nothing further.

THE COURT: David, anything?

MR. FAHLBUSCH: Not unless you want to comment upon res judicata, procedural bar.

THE COURT: I don't think we have to concern ourselves with that. I agree with you from a legal standpoint. Number two, none of that has been mentioned today by anybody but you. Either, (a), it has been abandoned and, if it hasn't it's already been decided by a prior decision.

MR. RABINOWITZ: It has not been abandoned, Your Honor. I am not waiving those claims.

THE COURT: I understand, but I agree that there is something not to be considered today. That's something that history from long ago has taken care of that.

(R.602-607).

POINT ON APPEAL

WHETHER THE ALLEGED FAILURE OF DEFENDANT'S TRIAL COUNSEL TO PREPARE FOR THE PENALTY PHASE DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL? (Restated).

SUMMARY OF THE ARGUMENT

Relying on a professional investigator's word, in periodic reports, that friends and family of the defendant were being contacted, that background history was being developed and that a number of mitigating witnesses would be appearing for the defendant at the penalty phase of the trial does not constitute ineffective assistance of counsel, even when the witnesses, later, don't appear. Allowing investigators to take witness statements has specifically been held not to demonstrate ineffectiveness and should not, given the periodic heavy workload that both private attorneys and public defenders are periodically subjected to.

Further, where two (2) of the five (5) character witnesses admitted that they were unavailable at the time of the defendant's sentencing, where the trial court found that all of such witnesses were unbelievable, where the trial court found that they could have made no difference to the outcome, and where they provided a springboard for the State to get in substantial evidence of prior felonies, otherwise inadmissible, their absence could not have prejudiced the defendant.

Defense counsel's summation could not have established his ineffectiveness where it made numerous strong points, some of which even appellant has admitted, and where the

overwhelming evidence of four (4) aggravating factors made the death penalty inevitable.

Appellant chose not to present argument below, or to this Court, on the remaining eighteen (18) issues, so they are abandoned.

ARGUMENT

THE ALLEGED FAILURE OF DEFENDANT'S TRIAL COUNSEL TO PREPARE FOR THE PENALTY PHASE DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL. (Restated).

The essence of the defense argument is that Mr. Williams, the defendant's trial attorney, by relying on periodic reports from his investigator that said friends and family of the defendant were being contacted, that background history was being developed and that a number of perople would be appearing for the defendant to present mitigating evidence, committed an omission below the standards of competent counsel by not, personally, assuring that they would appear. (R.417-419, 423, 570-571).

The second stage of their analysis is that, although the witnesses were totally unbelievable (R.605), and provided a springboard for the State to get in the defendant's numerous prior convictions for burglary, assault and battery, a drug offense and robbery of an elderly woman, as well as to hammer at the completely heinous facts of the crime, itself, involving over 50 stab wounds to a 73-year old woman for $30. (R.440-443, 451, 477-481, 537-538), that the defendant was clearly prejudiced by their absence, even where the trial court found that their testimony would not have altered the result in any way, shape or form. (R.382, 605-606).

The defense presented, at the hearing, five (5) mitigating witnesses that if contends should have been contacted and testified at the penalty phase. (R.404).[4]

Of these five, however, counsel can hardly be faulted for not calling Christine Harris who was unavailable in the hospital, at the time. (R.422-423, 525). Trial counsel tried to get a continuance on these grounds, but was unsuccessful. (R.422).

It is also difficult to fault trial counsel for failure to call Wayne Carswell, whom he did speak to (R.407), where Carswell testified that he traveled a lot, that no one hardly ever knows his whereabouts and where even his normal scheduled gets him up at 3:00 or 3:30 a.m. and not back home until 10:00 or 11:00 at night. (R.487).

Further, the usefulness of LaShawn Fuller, who was fifteen years old at the time, (R.463) would have clearly been minimal where she could not have effectively testified that he was a good advisor for her during her career, as she stated (R.464) where she was not a member of the National Guard, at the time (R.460) and there was no indication that she had even begun her career working in a fast food restau-

[4] Although they presented affidavits from sixteen witnesses who said they would be perfectly willing to testify, attached to their motion. (R.93-135). Evidently, people who said they would testify and then didn't show up was a problem in the motion hearing, too.

rant, at that time. (R.459). Indeed, any help she may have been by testifying that he was a good uncle and family man (R.464) would probably have been outweighed by the prejudice involved by bringing a fifteen-year-old girl into the situation, at all.

The remaining witnesses (indeed, all the witnesses) were not only inherently incredible (R.605) but, as previously noted, provided a method of getting in numerous facts, including prior convictions, eminently prejudicial to the defendant. (R.440-443, 451, 477-481, 537-538). Additionally, Hank Fuller believes that love requires force, violence, putting someone in fear or assaulting them (R.450) and Janice Fuller clearly knew she could testify for the defendant because she did so at this first sentencing hearing (although never since) (R.537). She knew that Christine knew who the defendant's attorneys were (R.540), but she wasn't going to call him because he could have contacted her. (R.540).

Further, she testified that she knew that Christine wouldn't talk to the public defender (R.539) and flatly contradicted Christine's testimony that she and Janice constantly tried to get the defendant a private lawyer (R.519-520) by saying that, when she found out Christine was having problems contacting the public defender, she didn't do anything. (R.539).

Failure to call these witnesses, as the trial court found, could not have prejudiced the defendant. (R.382-383).

Appellant has been unable to cite any law for their proposition that reliance on an investigator's word that he has contacted and interviewed witnesses constitutes ineffective assistance of counsel (Appellant's Brief). However, this issue has been dealt with, and it has been held that failure of a defendant's counsel to personally interview alibi witnesses, who were interviewed by a staff investigator of the public defender's office did not constitute denial of effective assistance of counsel. United States v. Chaney, 446 F.2d 571, 576-577 (3d Cir. 1971). Further, an attorney's decision not to interview witnesses and to rely on other sources of information, if made in the exercise of his professional judgement, is not ineffective assistance. United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983). See also, Dickson v. Wainwright, 683 F.2d 348, 351-352 (11th Cir. 1982); Plant v. Wyrick, 636 F.2d 188, 189-190 (8th Cir. 1980). Given Florida law that a particular decision not to investigate is to be assessed for reasonableness considering all the circumstances and applying a "heavy measure of deference to counsel's judgements.", pursuant to Downs v. State, 453 So.2d 1102, 1108 (Fla. 1984), it is respectfully submitted that counsel's decision to rely on his investigator was not an unreasonable one given that he was, at the time, representing five (5) first degree murder defendants as well

as handling a normal case load. (R.414-415). See, Burger v. Kemp, 97 L.Ed.2d 638, 657 (1987). Otherwise, overworked public defenders like Mr. Williams will consistantly be held to be ineffective for allowing their investigators, instead of themselves, to interview witnesses, as the defense expert urgues. (R.549, 563, 570-571). See, McClesky v. Kemp, 753 F.2d 877, 900-901 (11th Cir. 1985).

Further, where there is no question that four (4) aggravating circumstances were properly found by the trial court, pursuant to Harris v. State, 438 So.2d 787 (Fla. 1983) and where the trial court found the witnesses unbelivable and that there presence could have made no difference (R. 382-383, 602-607), the defendant could not possibly have been prejudiced by the alleged failure to prepare. Thompson v. Wainwright, 787 F.2d 1447, 1452-1454 (11th Cir. 1986); Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985); Griffin v. Wainwright, 760 F.2d 1505, 1512 (11th Cir. 1985); Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986); Darden v. State, 475 So.2d 218, 220 (Fla. 1985); See, Tafero v. Wainwright, 796 F.2d 1314, 1319-1322 (11th Cir. 1986).

The defense has not established ineffective assistance of counsel due to lack of preparation. However, although they don't raise it as a Point on Appeal, the defense also argues that the penalty phase summation, by itself constituted ineffectiveness (Appellant's Brief, 27-34). Of

Course, even the defense expert admitted that good points were made in the argument (R.567), including the claim that the victim had the knife first (R.677) and that defendant was surprised by the victim during his burglary. (R.569).

Indeed, defense counsel at the trial argued diminished capacity, based on possible drug use, mental illness, emotional distress and pain (T.9/29/81, 61), that the crime was not cold, calculated or premeditated where there was obviously no predetermined plan to kill (T.9/29/81, 62), that the defendant did not take any weapons to the home (T.9/29/81, 64) (which the defense maintained below was never argued; Motion, 14), that Harris was attacked by the victim and seriously cut (T.9/29/81, 65) (another argument that the defense alleged was never made; Motion, 14); that the defendant faced three (3) life sentences if not sentenced to death (T.9/29/81, 67), that aggravating factors must be proven beyond a reasonable doubt, but mitigating factors do not (T.9/29/81, 68), that the victim Essie Daniels, was an active church woman and, based on the commandment, "Thou Shalt Not Kill," what would she want (T.9/29/81, 70-71) and he wasn't going to be a part of killing anybody and the jury shouldn't, either (T.9/29/81, 71).

The defense expert found little wrong with the argument. One of the things he found "most disturbing" was that, allegedly, counsel told the jury that his family didn't like

him or get along with him without offering an explanation. (R.558-559). Counsel below, as we now know, did offer an explanation, that they turned against him ". . .because he was accused of this act. . . ." (T.9/29/81, 68). This clearly was, as the trial court found, a reasonable tactical decision where none of the expected mitigation witnesses showed up except for Robin Williams, who refused to testify. (R.420-421, 604).

Appellant argues that arguing in the penalty phase that the defendant wasn't guilty was ineffectiveness (Appellant's Brief, 29-30), a technique which has been found not to constitute ineffectiveness. Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985). Indeed, that was the thrust of a number of the mitigating witnesses that the defense says were required to be presented. (R.443, 449-450, 522-523).

That taking defendant's life would be hiding behind the law (T.9/29/81, 58, 60, 65, 69) appears, despite Mr. White's complaints, to be precisely the kind of tactical decision contemplated as being within the broad range of competence contemplated by Strickland v. Washington, 466 U.S. 668 (1984).

Additional arguments the defense has chosen to ignore are that, if the jury makes a mistake, it can't be corrected (T.6/29/81, 58); that they have to look at the defendant and

tell him, "We're going to kill you," (T.6/29/81, 60) that aggravating factors and mitigating factors are not weighed in terms of numbers, but in terms of considerations (T.6/29/81, 65); that the slighest force can create a robbery (the prior violent crime) (T.6/29/81, 66) and that "Thou shalt not kill" is what God commanded (T.6/29/81, 71).

The fact is, like any summation, trial counsel's contained week arguments and strong, some that were beautifully presented and some that were less articulate. However, it must be examined as a whole, not in the out-of-context bits and pieces presented by the defense (Appellant's Brief, 27-34). When this is done, it clearly does not fall below the broad range of tactical and strategic decisions expected of counsel. McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); cert. denied, 464 U.S. 1063 (1984).

Further, as previously noted, given the overwhelming evidence of four (4) aggravating fctors, minor changes, such as those noted, in the final summation could not have, as the trial court found, prejudiced the defendant. (R.382-384). Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

Trial counsel's summation, clearly, did not establish ineffective assistance of counsel, either.

Concerning the other eighteen (18) claims that were contained in the motion (R.20-26), but which were not argued below (R.) and which are addressed in eight (8) lines of the brief (Appellant's Brief , 50), which say virtually nothing and cite a clearly inapplicable case, the trial court properly found as follows:

> 2. With regard to the allegations of ineffective assistance of trial counsel during the guilt phase for conselling the defendant to waive his right to jury instructions on lesser - included offenses (Issue C.g.) and for failure to procure the services of experts (Issue C.h.), no evidence was presented that these acts constituted ineffectiveness of counsel and, in fact, the only evidence presented on the issue was that trial counsel was effective during the guilt phase of the trial. This Court finds that trial counsel was effective during the guilt phase of the trial.
>
> 3. Further, this Court finds, with regard to each of defendant's allegations of ineffective assistance of counsel, that defendant has not demonstrated that he was prejudiced thereby, as required by Strickland v. Washington, 466 U.S. 668 (1984).
>
> 4. No evidence was presented that the defendant was prejudiced in any manner by the alleged loss of the Public Defender's file and this motion is denied on that ground, as well. (Issue D).
>
> 5. Five (5) of the remaining fifteen (15) issues of the motion are barred on the grounds of res judicata, collateral estoppel and law of the case, having been previously ruled upon, against the defendant, by the Florida Supreme Court. Specifically, Issues A.c., C.a., C.b., C.d. and C.f. of the Motion.

> 6. The remaining ten (10) issues of the motion are procedurally barred because they were issues which could have and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial. Specifically, Issues A.d., A.e., A.f., A.g., A.h., B.a., B.b., B.c., C.c. and C.e. of the Motion.
>
> (R.383)

Further, failure to argue such points in the brief precludes consideration of the issues. Roberts v. State, 181 So.2d 646, 647-648 (Fla. 1966); See, Tracey v. State, 130 So.2d 605 (Fla. 1961).

Therefore, where no argument was presented either in the court below or in Appellant's Brief on the eighteen (18) issues concerned in paragraphs 2, 4, 5, and 6 of trial court's order (R.383), the appellant has abandoned them.

CONCLUSION

Based upon the foregoing reasons and authorities, the Order of the trial court denying the Appellant's Motion for Post Conviction Relief should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **DANIEL RABINOWITZ**, Esquire, McCARTER AND ENGLISH, Attorneys at Law, 550 Broad Street, Newark, New Jersey, 07102 on this 23rd day of June, 1988.1988.

CHARLES M. FAHLBUSCH
Assistant Attorney General

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