IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,598

HARRY PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

Appellee, the State of Florida, was the prosecution/respondent in the 3.850 proceeding in the trial court below and Appellant, Harry Phillips, was the defendant/petitioner. The parties will be referred to as the State and Defendant. The symbol T.T. will refer to the trial transcript, E.H. to the transcript of the 3.850 evidentiary hearing, and "R" to the 3.850 record on appeal. All other documents will be described in full. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

The State accepts the Defendant's statement of the Case relative to the procedural history of this cause.

STATEMENT OF THE FACTS

To describe the Defendant's factual recitations as misleading and inaccurate would be like saying that Custer had a minor accounting problem at the Little Big Horn. The State therefore rejects the Defendant's Statement of the facts, and offers instead the following detailed summary of the testimony presented at the evidentiary hearing on Defendant's Rule 3.850 motion, as well as relevant portions of the trial testimony.

Julius Phillips (Defendant'sBrother)

Defendant's older brother Julius Phillips testified that the Defendant was born in Belle Glade, Florida, where both parents worked as migrant field laborers. (E.H. 8749). In the early 1950's the family moved to Brownsville, Florida, and subsequently to Opa Locka, Florida. At that time both the mother and father were employed outside the home and left the children unsupervised. The father also had a child outside the marriage and brought the child to live with them. Julius testified that his father favored this child above the rest, that his parents

argued constantly, and that his father would physically strike his mother in front of the children. (E.H. 8750-54). The father was a very abusive man and would hit the Defendant in his head, the shoulders, and back. (E.H. 8755). Defendant did not talk to Julius about his father hitting him, but was "a very quiet type person" who did not have any friends or even girlfriends, and would not share in their games. (E.H. 8757-59).

The father eventually abandoned the family in 1955 (when the Defendant was ten years old). Defendant did not comment on hi3 father's leaving the house. (E.H. 8760). Julius was stationed overseas in the Navy for over twenty years, and when his mother phoned him with the news that Defendant was indicted for first degree murder, he was shocked. On cross-examination Julius indicated that he did not know that the Defendant was arrested and convicted for attempted murder in 1963 and for armed robbery in 1972, stating, "I don't anything about this." (E.H. 8765-68). Defendant's trial counsel, Ronald Guralnick, had not contacted Julius at any time.

Ida Stanley (Defendant's Sister)

Mrs. Stanley's account of the Defendant's background was consistent with Julius' account. Mrs. Stanley testified that the Defendant attended an all black school, and that they didn't feel they could go into the white sections of town. (E.H. 8770-71).

Their father punched their mother, and in one instance chipped a tooth. (E.H. **8777).** Defendant was always "very quite", and watching his father strike his mother "made him feel bad **and** got quieter." The utilities were cut off when his father abandoned them, and the family lost his paycheck. **(E.H. 8778).** Mrs. Stanley stated that the Defendant was shot in the side of the head when he was 13 or 14 years old, but that he was not admitted to the hospital, and was brought home the same day. As a result, Defendant suffered headaches. (E.H. **8780, 81).** On cross-examination, Mrs. Stanley testified that the bullet did not enter Defendant's cranium but only "grazed" the left side of Defendant's head, and that the Defendant was not hospitalized. Mrs. Stanley stated that the Defendant's school grades were C's, D's and F's, and that after the Defendant was released from prison he returned to live at home, worked, and gave his mother almost his entire paycheck. (E.H. **8783, 84).** Defendant would babysit for Mrs. Stanley's four children, and Mrs. Stanley stated that the Defendant was still "quiet" when he was released from prison. (E.H. **8785,** 86).

a After the Defendant was charged, in 1983, for the instant first degree murder charge, Scott **(an** inmate who became a state witness at Defendant's trial, see below) approached Mrs. Stanley two times. The first time, Scott said he was a trustee at the jail "and we'd better *go* and see about Harry because they was going to do something to him." (E.H. 8787). The second time,

Scott came up to Stanley's yard and gave her a twenty dollar bill to give to the Defendant, because "he liked Harry." She split the twenty dollar bill with her mother, and did not give it to the Defendant because she did not trust Scott. (E.H. 8788, 8793, 94). Mrs. Stanley spoke about Scott to Defendant's trial counsel. She testified at Defendant's trial, but said Mr. Guralnick did not explain to her the meaning of "mitigating evidence." (E.H. 8790). She saw Mr. Guralnick three times prior to Defendant's trial. (E.H. **8796).** She has never seen the Defendant smoke, drink or take drugs (E.H. **8800).** Their father would hit both Julius and the Defendant, as well as their mother. (E.H. **8803).**

Laura Phillips (Defendant's Mother)

Mrs. Phillips' testimony about Defendant's childhood environment was consistent with Mrs. Stanley's and Julius'. Concerning the head injury, Mrs. Phillips did not indicate Defendant lost consciousness, or that Defendant hit his head on the pavement. (E.H. **8820,** 21). Mrs. Phillips testified that the **Defendant's** quiet demeanor **did** not change **after** the **shooting** incident. (E.H. **8851).**

C.E. Jenkins

Jenkins is the pastor for the church attended by the Defendant's mother. He gives services at the Dade County Jail, several of which were attended by the Defendant. Jenkins spoke to the Defendant on one or two occasions at the behest of his mother (E.H. 8853), sometime in the early 1980's. Jenkins tried to get the Defendant to change for the better, so he could help save himself. The Defendant seemed "kind of spacey,'' as though he really wasn't paying attention. (E.H. **8856).** He seemed paranoid, and would agree with whatever Jenkins said, (E.H. **8858, 59).**

Marv Hill Williams

Williams was a family friend who knew the Defendant well in his childhood. (E.H. 8864). He was a good boy, but quiet. Williams and her husband helped out Mrs. Phillips financially on many occasions, as well as with gifts of food. (E.H. 8868). After the Defendant returned from prison, he still showed her alot of respect, **and** he was still a quiet person. (E.H. **8870).**

Samuel Ford

Ford was a neighbor and also his junior high science teacher. The Defendant was very quiet, and not a fast learner. (E.H. **8877).** His attendance was very good, but he was a below average student, unlike brother Julius and sister Ida, who were

better and more energetic students. (E.H. **8878).** They had ambition, the Defendant did not. Outside the classroom, the Defendant stuck to himself, not taking much interest in what others were doing. (E.H. 8881).

Robert Cummings

Cummings worked with the Defendant at the Solid Waste Department, from **1970-72.** The Defendant **was** a good worker who got along well with his coworkers. (E.H. **8884).** The Defendant would joke around sometimes, but usually was pretty quiet. The Defendant helped Cummings do repair work on his house. The Defendant's performance at work fell off in **1972.** It seemed like something was bothering the Defendant. (E.H. 8887).

Dr. Joyce Carbonel

Dr. Joyce Carbonel, a forensic psychologist, evaluated the Defendant in 1988. The evaluation included a psycholagical interview with the Defendant, a battery of psychological tests (including the Wechsler Adult Intelligence Scale Revised, the Peabody Individual Aptitude Test, the Rorscharch Test, the Wechsler Memory Scale Test, and the Canter Background Interference for the Bender Gestalt), a review of affidavits from Defendant's close relatives and family friends, a telephone conversation with Defendant's high school teacher, and a review

of Defendant's records from the Department of Corrections and from the City of Miami Sanitation Department, where Defendant was employed for approximately two years. (E.H. *9077, 78).* Dr. Carbonel also spoke with Defendant's trial counsel. Dr. Carbonel testified that Defendant's score on the Wechsler Adult Intelligence Scale was *75,* consistent with "borderline range intellectual functioning." (E.H. 9081). Defendant scored *75* in the verbal portion of the WAIS and 77 in the performance portion. He scored 88 in spelling, *75* in reading recognition, and 53 in arithmetic on the Wide Range Achievement Test. Defendant's scores on the Peabody Individual Achievement Test were consistent with the scores on the Wide Range Achievement test. The aptitude tests scores, in turn, were consistent with Defendant's numerical IQ results on the WAIS-R2. (E.H. 9082-84).

Dr. Carbonel could not determine whether Defendant suffered from organic brain damage. (E.H. 9086). However an individual, such as the Defendant, who suffered physical abuse in childhood and head trauma could have suffered organic brain damage. She cannot rule it out. (E.H. 9101). Dr. Carbonel's opinion was based on the affidavits prepared by Defendant's mother and sister relating that the Defendant, while a teenager, was shot in the face, lost consciousness and may have hit his head on the pavement. Id. Defendant's results on the Roscharch were indicative of social isolation and withdrawal and were congruent with Defendant's verbal output. Defendant's results on

the Wechsler Memory Scale "appears higher than his IQ." Defendant "did well on subtests that were about personal information and current information and thase that require rote memory, for example saying the alphabet and counting backwards. His performance was worse on subtests that require memory of prose passages and require visual reproduction." (E.H. 9088).

As for the Defendant's performance on the Minnesota Multiphasic Personality Inventory test (MMPI), Dr. Carbonel testified Defendant's MMPI Scores were valid, albeit Defendant attempted to present himself in a "good light." (E.H. 9090). Defendant's thinking was very naive and unsophisticated, "not uncommon in people with lower socio-economic status. . . He looked depressed. . . he sort of presents with a low energy level, someone who prefers to be alone, relatively isolated, may be overly sensitive to criticisms from others." (E.H. 9090, 91). The Defendant's personality testing indicates he is alienated, inadequately socialized, and isolated. (E.H. 9091, 9099). She stated that Defendant's prison history established a passive aggressive behavior pattern. Sometimes he was cooperative and easily led while at others he was a difficult prisoner. (E.H. 9104, 05). Dr. Carbonel explained that the above description of Defendant's conduct while in prison was congruent with her observations of Defendant's passive aggressive traits. (E.H. 9106). Dr. Carbonel stated:

> "He's eventually going to get frustrated, not that that's going to be effective with getting what he wants, but gets him in more trouble. You can see the pattern. He'll be very passive, then he'll do something in a sense sort of troublesome, but doesn't help him achieve his goal, and then he's simply going to go back to being passive." Id.

Dr. Carbonel explained the Defendant has "the characteristics of someone who is in fact schizoid. . . that he has no close friends other than --outside his family, chooses solitary activities, is somewhat isolated, is withdrawn, doesn't relate well to other people. (E.H. 9099). The Defendant has a passive-aggressive personality, with the aggression coming out when he is frustrated. (E.H. 9105, 06).

The Department of Corrections gave the Defendant numeraus I.Q. tests, with the results ranging from 73 to 83. (E.H. 9106).

The Defendant's difficult and abusive upbringing, and lack of supervision, created emotional stress that helped shape his personality. (E.H. 9112-15), and his father's desertion caused further emotional withdrawal, as well as a closer attachment to his mother. (E.H. 9116). His passivity, "low level'' of intellectual functioning, and his inability to cope effectively with what's going on" are the essence of his emotional make-up. (E.H. 9118).

Dr. Carbonel indicated that, in her opinion, Defendant was incompetent to stand trial in 1983. She based her opinion on the Defendant's emotional, social, and intellectual background. (E.H. 9125). Dr. Carbonel stated that Defendant understood that it was a trial and who the participants were, But beyond the superficial level, he did not have a very good grasp of the proceeding. The Defendant decided to let his lawyer do whatever he thought best. Id. The Defendant said he did not understand the motions and the things that were happening in court. The Defendant knew that the judge would decide his case and the jury would decide his guilt or innocence, At this point, the court noted that Defendant had accurately described Florida's bifurcated system in capital cases. (E.H. 9126, 27). The Defendant told her that he didn't know anything about the law, and that he let Mr. Guralnick do the talking. In response to an inquiry from the Court, she stated she thought the Defendant's disinterest in purely legal matters was unusual. (E.H. 9127, 28).

The Defendant claimed that he never knew he could receive the death penalty, rather only life without parole. (E.H. 9128). It is interesting that Dr. Carbonel believes that the Defendant totally trusted his lawyer and was incapable, due to his lack of understanding of the legal process, to complain or challenge his lawyer's performance. (E.H. 9130). Interesting because he fired his first lawyer because he was upset that certain key depositions had not been taken (*See* testimony of Joel Kershaw

below). Dr. Carbonel further states that the Defendant's inability to understand the legal motions demonstrates that he could not adequately assist counsel. (E.H. 9133). She relies on trial counsel's notation that "He didn't testify. He's an idiot," and counsel's assertion that the case could have been won had the Defendant followed his advice. Id.

Dr. Carbonel doesn't believe the Defendant could make a rational choice, rather he would do whatever his lawyer wanted due to his passive personality and lack of understanding. (E.H. 9136). Again, the Defendant's low I.Q. indicates he would not overrule his lawyer, but rather would do whatever the lawyer wanted. (E.H. 9137). The Defendant did have the ability to turn down a plea offer, but that was only because he insisted he was innocent. (E.H. (170). The Defendant did not fully understand the role of witnesses. (E.H. 9141).

Dr. Carbonel testified that Defendant's understanding of the charges against him was that a parole officer had been shot and people said he did it, and that the Defendant recognized the impact of what that meant. However, the Defendant told her he did not know he could be sentenced to death. (E.H. 9142, 43). Defendant did not understand the adversarial nature of the proceedings against him. However, he understood there was someone "for" him, there was someone "against" him, that the prosecutor was "out to get him", and a jury was involved. (E.H.

9144, 9145). Dr. Carbonel did not think the Defendant was able to relate to anyone, therefore, he could not have related to his trial counsel. Additionally, Dr. Carbonel thought the Defendant was unable to provide coherent accounts of events because of his poor remote memory. Id. She believed that Defendant's capacity to testify on his own behalf was limited to a denial defense, (E.H. 9149, 50), and that he believed his role in the courtroom was to be present, and to do what his counsel said. The Defendant could not understand the complex procedures of a capital case, (E.H. 9151), was incapable of planning complex actions, (E.H. 9154), and has not undertaken normal planning and preparations at any point in his life. Id.

Dr. Carbonel further testified that Defendant's background should have been presented to the jury as a mitigating factor during the sentencing phase of the proceedings. The jury should have been presented with evidence of the physical abuse at the hands of his father, the family's stark proverty, the Defendant's emotional deprivation, poor intellectual functioning and withdrawal. (E.H. 9163-9165). The jury should also have been presented with evidence of Defendant's passive-aggressive condition, and told that this condition caused his troubles. She described him as "schizoid", which is not a mental illness like schizophrenia but rather people who are totally withdrawn, what used to be called autism. (E.H. 9165, 66). The jury should have been told that the combination of these problems created an ever

present extreme emotional disturbance in Defendant. (E.H. **9168**). Dr. Carbonel **also** stated the Defendant was unable to conform his conduct to the requirements of law, (E.H. **9169**), and was incapable of acting in a cold, calculated and premeditated manner. (E.H. 9170). ***He does not even possess the ability to form the premeditation necessary to be convicted of first degree murder.*** **(E.H. 9170).**

Dr. Carbonel would not rely on either Dr. Haber's or Dr. Miller's evaulation of the Defendant since neither based their opinion on collateral data nor on psychological testing beyond the interview with the Defendant. (E.H. 9171-9184).

On cross-examination, Dr. Carbonel testified that if the Defendant was having trouble with his parole officers because they were threatening him with jail, then shooting the parole officer eight or nine times would be to a certain extent consistent with an individual of Defendant's passive/aggressive personality. (E.H. 9188, 89). Defendant had always claimed he was innocent, though such a claim did not fit into the passive-aggressive personality. Id. Additionally, Dr. Carbonel testified that Defendant was not psychotic nor schizophrenic. (E.H. **9184**). ***The Defendant's emotional deficits would have accompanied him throughout his life, and would also have rendered him incompetent to stand trial on the 1963 conviction for attempted murder of an off-duty police officer, and the 1972 conviction for armed robbery.*** (E.H. 9203, 04). In reference to the Defendant's assertion that he never knew he could be

sentenced to death until after he was convicted, Dr. Carbonel said that there was a possibility that the lengthy death qualification process during voir dire had gone completely over the Defendant's head, or the Defendant could simply have ignored it. The trial court was quite interested in this incongruity. (E.H. 9206-9209).

The State had Dr. Carbonel read into evidence a letter written by the Defendant while awaiting trial. (E.H. 9213-9216). The letter reads:

> "This is Bro Phillips. I'm at I.C.D.C. I was transferred here Monday afternoon. I haven't found out why I'm here. At this time I'm in security cell. Tell (MUSOP) to be cool and be aware of Peanut. He's definitely an agent for these people. Regardless of how much snitching he does, he's not hoping to be released. Make sure you let the fellows know that nigger is an agent. Also tell everybody I'm treated very well over here, but I'm still cautious. Tell Craig next door where I am. In the event we don't meet again, make sure you and (MUSOP) remember these names: Jerry Adams, Anthony Smith, William Scott, James Farley, Albert Fox, David Scott. They will do anything to get their freedom. Bro White, I'm innocent as hell. I don't care what happens to me anymore. But, I have been assured by the fellows at U.C.I. and F.S.P. that the above names will be handled accordingly. I have already sent the above name family addresses ta a reliable source on the outside world. I hate like hell to do that but the innocent must suffer."

The letter was introduced at trial (R.215), with the last five words omitted. A copy is attached to this brief, labeled "Exhibit A", for the Court's convenience.

Dr. Carbonel's opinion was that the letter was very primitive, as it did not mention that "he was going to tell my attorney about this, these people are going to testify against me." (E.N. 9214). Dr. Carbonel thought the letter demonstrated useless lashing out in anger, and that the statement "I have been assured by the fellows at U.C.I. and F.S.P. that the above names will be handled accordingly" may just simply be bravado on the Defendant's part. (E.H. 9215). Dr. Carbonel would not expect a competent person to write such a letter. (E.H. 9216).

At this juncture Dr. Carbonel acknowledged that she had viewed the four alibi notes which the Defendant had given Larry Hunter while awaiting trial[1]. She reasoned that the note [between jail inmates whose property is subject to search and confiscation] did not specifically say "I want you to testify for me, I need you to do this," and thus was not a "well constructed alibi." (E.H. 9217, 18). The lack of a prepared script and express instructions leads Carbonel to dismiss the notes as "sad

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[1] Three of the notes were admitted at trial (R.216-220), and copies are attached to this brief as Exhibit's B, C, and D.

and pathetic,'' and "pretty primitive," and "pretty bad". (E.H. 9218, 9219).

Dr. Jethro Toomer

Dr. Toomer's evaluation proceeded along the same lines as Dr. Carbonel's. Dr. Toomer's conclusions substantially parallelled Dr. Carbonel's. Defendant's I.Q. score on the Revised Beta test was 76, whereas the American Association for Mental Deficiency utilizes a score of 70 to 72 as reflecting retardation. (E.H. 8904-07). Dr. Toomer found that Defendant's emotional functioning was characterized by passivity, acquiescence, compliance and a need for acceptance. (E.H. 8904, 05). Based on these tests, Defendant was diagnosed as very timid, fearful, and suffering a great deal of anxiety, with affective dimensions. Id. Defendant also has some intellectual deficits in his capacity to reason abstractly (E.H. 8913), and functions in the borderline area in terms of mental functioning (E.H. 8907). The Bender Gestalt results "suggested" organicity. (E.H. 8910). The Defendant has very low self-esteem (E.H. 8918), is not a drug abuser (E.H. 8915), and does not have an antisocial personality. (E.H. 8917). His poor performance on the Rorschash and T.A.T. tests are indicative of intellectual deficits, depression and emotional withdrawal. (E.H. 8922). His functioning today is basically the same as it was in 1983. (E.H. 8925).

Dr. Toomer believes the Defendant was incompetent to stand trial in 1983 due to intellectual and emotional deficits that resulted from his environment, including the neighborhood in which he grew up, the poverty his family suffered, and the abuse by his father, who then abandoned the family at a vulnerable time in the defendant's life. (E.H. 8927, 28). He was incompetent because he was suffering the effects of emotional deprivation and intellectual deficits, which precluded him from understanding the nature of the criminal proceedings. Dr. Toomer testified consistently with Dr. Carbonel, in that the Defendant was not psychotic nor schizophrenic, and indicated that Defendant's behavior was characterized by self-hate, and that his actions were a self-fulfilling prophecy. (E.H. 8937-8940).

Dr. Toomer further testified that Defendant was incompetent to stand trial in 1983 because his level of intellectual functioning did not permit him to understand the seriousness of the charges, because he was unable to appreciate the range of possible penalties, because the Defendant had only a rudimentary understanding of the adversial nature of the proceedings, and because he did not have the intellectual capacity to understand the various aspects of a capital case. (E.H. 8941-8943). He explained that the Defendant understood only that the prosecutor was "on the other side". He was unable to appreciate the role of the judge or the jury, and unable to

provide a rational, logical, and consistent account of events to his counsel, or be assertive enough to volunteer information. (E.H. **8943-8945).** Dr. Toomer believed the Defendant did not have the ability to aid in his defense in **1983**, and that he could only answer questions with "a basic yes or no or maybe," and that would be especially true as to issues that were emotionally charged. (E.H. **8948).** The Defendant **was** incapable of challenging the prosecution witnesses or of testifying on his own behalf in a meaningful way, because he lacked the ability to reason logically. The Defendant lacked motivation to help himself in the proceedings, because he did not believe he had a significant part in them, and because he hated himself. (E.H. **8948,** 49). Dr. **Toomer** believed that the Defendant could have been rendered competent to stand trial but would have needed a level of assistance beyond what is normally required. (E.H. 8951, 52). When Toomer stated that the Defendant had a great need to be accepted, and would do whatever others told him, the Court asked why, at trial, all his parole officers testified that the Defendant was hostile and refused to follow instructions. (E.H. **8956-8959).**

Dr. Toomer testified that Defendant's deprived background and emotional deficits should have been considered by the jury as a mitigating factor. An additional factor would be the racism in Defendant's environment. (E.H. 8965-67). The jury should have been presented with evidence that the Defendant cared for his

family and attempted to provide for them when he could. (E.H. 8968). Dr. Toomer voiced the opinion that Defendant had an emotional disturbance and inability to conform his conduct to the requirements of the law, and that his lack of self-esteem should also have been raised as a mitigating factor. (E.H. 8971-73). Dr. Toomer did not believe the Defendant capable of reasoning in an abstract manner, therefore he found the Defendant incapable of committing an act defined as heinous, atrocious and cruel, or cold, calculated and premeditated. (E.H. 8973, 74). Toomer believes the Defendant's intellectual functioning is "child-like," and that he had a "concrete child-like level of understanding" (E.H. 8984). His primary goal in life is to gain acceptance. Id.

On cross-examination, Dr. Toomer was offered the "Bro White" letter written by the Defendant prior to trial. He stated that the letter indicates non-passivity, but in itself did not indicate the Defendant was competent to stand trial in 1983. (E.H. 8996-8999). Dr. Toomer offered the same conclusion when offered the alibi notes written to Larry Hunter asking Hunter to remember August 31st, at 8:25-8:55 p.m., and the description of the supermarket and purchases of chicken and orange juice. (E.H. 9001-03). He stated the notes were consistent with the Defendant's rudimentary understanding of the adversial nature of the proceedings, and that he would need to know if Defendant wrote the "Bro White" letter without any assistance. (E.H. 8904-

06). Dr. Toomer's professional background was mostly in industrial psychology, and his training in clinical psychology was not in a forensic setting. Dr. Toomer stated that he weighed "all factors" including Defendant's environment when evaluating the Defendant, and that his training as a community psychologist emphasized environmental factors. He believed that the Defendant could be capable of toying with the homicide Detectives and of giving a rather complex alibi, depending on how the Defendant had been questioned or led. (E.H. 9013-15). Toomer was not aware that the Defendant gave three lengthy statements to the detectives, which included a detailed alibi and alternative explanations of haw the murder might have occurred, while maintaining his own innocence. This would not alter his opinion. Dr. Toomer stated that "toying" was often used by deficient individuals to mask their deficiencies, and that he did not think Defendant was capable of trying to mislead the detectives by suggesting there may have been more than one assailant. (E.H. 9014-9017). Defendant's acts or statements made contemporaneously with or shortly before the trial, were "useful" but not important in determining his competency at that time. (E.H. 9022). Dr. Toomer was not aware that the day after the defendant shot up the house of his former parole officer, Michele Brochin, he asked a coworker if scrubbing his hands with comet would get rid of the gunpowder residue sufficiently to pass the swab test the police had given him. (E.H. 9020).

On re-direct Dr. Toomer stated that in his view the "Bro White" letter indicated an impending sense of despair. However, it did not establish that Defendant understood the charges against him or the nature of the criminal proceedings. (E.H. 9025-32).

Dr. Leonard Haber

Dr. Haber was appointed to determine the Defendant's competency to stand trial in 1983. It is extremely helpful for this purpose to examine the records of the Defendant's words and actions at or about the time of trial. Ds. Haber examined such records, detailed below, and also the report of Dr. Carbonel, which contained a detailed history of the Defendant's background and the results of her psychological testing. (E.H. 9403, 04). Although test results are useful, it is also possible to estimate intelligence by conversing with the subject, based upon an assessment of his ability to comprehend, respond appropriately, read, write, utilize and process information, and recollect. (E.H. 9405).

Dr. Haber does not dispute the I.Q. test results obtained by Dr. Carbonel. (E.H. 9406). However, he totally disagrees with her conclusion that the defendant suffers from "serious intellectual and emotional deficits." Her conclusions are not supported by the raw data in her report or the results of Dr.

Haber's evaluation of the Defendant. (E.H. 9408, 09). Dr. Haber examined the Defendant in excess of one hour, then observed the examination conducted by Dr. Miller, with both exams totalling over two and a half hours. (E.H. 9409). After Miller concluded his examination, Dr. Haber asked the Defendant several additional questions. They each arrived at their own independent conclusions, with Haber offering the following assessment:

> **A.** My examination revealed Mr. Phillips to be very cooperative, althaugh serious in mood, directly responsive, alert, oriented to time place and person, well able to comprehend, and well able to speak and communicate with no difficulties, demonstrating an adequate grasp of vocabulary, an adequate grasp of content, an adequate recollection for both recent and remote events, an ability to recount early experiences, an ability to recount current experiences, and a recollection of a legal history.
>
> Mr. Phillips was not only alert and responsive, he was, I would say, perfectly cooperative.
>
> He demonstrated, based upon his vocabulary, based upon his ability to discern nuances in questions, based upon responding affirmatively to some questions, negatively to others, and with questions about the questions in another instance --
>
> He demonstrated the ability to understand, comprehend and appreciate the things that are going on about him, to understand the verbiage, to respond to that, to those verbal questions **and** concepts; to retain information, to store information, to recover information, to project it, to utilize it in assessing situations and in generating attitudes, and in generating responses and/or possible solutions to problems.

> Mr. Phillips demonstrated, in my opinion, an intelligence that would formally be measured within the range that Dr. Carbonell suggested, between 75 and 87, suggesting an intellectual category placement of between borderline and low average intelligence.
>
> But, I would say that some of the other materials would clearly suggest that that is an adequate, correct designation, far removed from the area of mental retardation, clearly removed in my mind, eliminating any possibility that such a condition could be in place.
>
> **(E.H. 9410-12).**

In reference to the "Bro White" letter written by the Defendant while awaiting trial, Dr. Haber stated:

> A. This letter was, first of all, very well written, and so it evidenced good hand-eye coordination and good visual motor skills.
>
> It was well framed, and so it reflected good conceptual skills.
>
> The content was clear, it reflected goal-directed activity.
>
> The spelling was very good, which would clearly correlate with intelligence and suggested probably law average intelligence.
>
> And, the words used show -- would correlate to the vocabulary portion of an I.Q. test, and would again suggest possibly low average or maybe even average intelligence.
>
> There were goaled words, meaning high order level words, in this letter.
>
> And, the way in which it was conceived, executed, the way in which the

> thoughts were communicated, showed a clarity of thought, the ability to conceive, the ability to direct, the ability to relate to others, the ability to anticipate events and to plan future events.
>
> This letter totally strongly suggested the presence of intellectual abilities somewhere near the low average category.
>
> (E.H. 9415).

Dr. Haber testified that the letter was an important source for assessing Defendant's competency at the time of trial in 1983, because it was written by the Defendant shortly before the trial. In applying the competency criteria to the letter, he found it had bearing on Defendant's appreciation of the seriousness of the charges, related to Defendant's appreciation of the adversarial nature of the proceedings, and had a considerable bearing on Defendant's ability to relate to his counsel and communicate his position. (E.H. 9416, 17). The letter reflected interest, willingness, and capacity to defend himself. (T.693). Dr. Haber testified that assuming the names listed on the letter corresponded to the inmates listed on the State's witness list, the letter reflected the Defendant's understanding of the role of the witnesses, and what the consequences of their adverse testimony might be. Id.

Dr. Haber was then asked his opinion regarding the alibi notes Defendant provided to Hunter. His opinion was that the

individual who wrote the notes to Hunter was well oriented in time and place, and was able to conceive ideas and execute them. (E.N. **9418).**

Dr. Haber testified that the Defendant was fully competent to stand trial in 1983. Further, his own examination led him to conclude that Defendant did not suffer from any serious emotional or intellectual deficiencies nor any disability pertaining to the competency criteria. (E.H. **9421).**

On cross-examination, Dr. Haber stated that the test in which the defendant scored 84 (he had misspoken when he said 87 on direct) was a memory quotient, which is a valid measure of intelligence. (E.H. 9423).

Be testified that it was not customary for a clinical psychologist to conduct an independent investigation on the information supplied by the patient unless it appears to be necessary. (E.H. 9432). Dr. Haber concluded that Defendant's narrative was congruent, for the most part, with the background information documented in Dr. Carbonel's report. Defendant's accounts were reasonable and credible, except where the Defendant said he was not aware he was facing the death penalty even after sitting through the entire trial **and** sentencing. (E.H. 9495). Dr. Haber explained that the Defendant could have repressed or blocked this piece of information.

Dr. Haber relied on his experience as a clinicial psychologist for over twenty-five years and his in-house training in a forsensic psychiatric hospital in concluding that Defendant understood his questions and gave adequate responses, was able to reorder his thoughts, remember the questions, and even able to detect nuances in the questions themselves. (E.H. 9435, 36). Dr. Haber felt that minor discrepancies in the Defendant's version did not indicate a faulty memory. (E.H. 9443, 44). This opinion was buttressed by his own tests which found that Defendant's memory was adequate.

Dr. Haber stated that it was extremely common for an individual to function at a higher level than his I.Q. test scores would indicate, though a large discrepancy is uncommon. The Defendant functions at a slightly higher level than the 75 range which he ha3 consistently scored in. (E.H. 9474-76). In regards to his conclusions, Haber states:

> Q. You told Mr. Waksman that you saw no evidence of emotional problems?
>
> A. No, sir, I did not say that.
>
> Q. I'm sorry.
>
> what did you say?
>
> A. Mr. Waksman's questian, I believe, had to do with significant mental disorder, significant mental or emotional disorder.

And, I said I did not have evidence of significant mental or emotional disorder, or of any evidence to suggest to me the presence of mental deficiency or mental retardation.

Q. Mental disorder.

For example, schizophrenia?

A. Major thought disorder, psychosis.

Q. Some kind of psychosis?

A. Either psychasis or significant interference with his mental functioning, cognitive process, perception, memory, hand-eye coordination, appropriateness of mood, behavior control.

I saw no breakdowns in those areas.

Q. Is there evidence here of emotional problems?

That's a layman's term, but just emotional deficits?

A. There would be.

I would be shocked if there were no emotional problems for this gentleman, or most anybody else today. We can find it in the Supreme Court judges.

(E.H. 9479, 80).

As for the Defendant's responses during the interview, Dr. Haber stated that they were uniformly direct and responsive. They were not monosylabic, but rather focused and to the point. (E.H. 9494, 92). He again stated that the Defendant's test scores are in the borderline category, and his actual functioning in the borderline to low average area. (E.H. 9493).

Finally, in finding that the Defendant's "I never knew I could get the death penalty" contention was not credible, Dr. Haber stated:

> Q. Why did you doubt the credibility of the report?
>
> A. Because death penalty cases are the ultimate in importance, in seriousness. They capture everybody's attention -- the judges attention, the court's attention, the defense, state attorney, other defendants.
>
> A person wha has a long history in the criminal justice system, who has been incarcerated in various places, who has faced charges before, who has ongoing interactions with other defendants and other prisoners, in my experience almost always tends to discuss these things, to have them discussed, and discuss strategies with other prisoners, to have comments made, recommendations made.
>
> They sit through a trial. The trial, in my knowledge -- I am not an attorney; merely as an observer -- there is a death qualification on juries.
>
> If a person sits through the jury phase, there are an evolving series of discussions which are hard to miss, to be alert to the fact of what you face.
>
> And, then in general, most people know, just as a matter of general information, like we know of national holidays and we know who the president of the United States is and who the first president was, we tend to know that capital punishment is a fact in the State of Florida. It's been widely publicized, and that is associated with the charge of first degree murder.
>
> Those are all the reasons that led me to question the credibility of that particular statement.

(E.H. 9501, 02).

Dr. Lloyd Miller

Dr. Miller's evaluation consisted of a psychiatric interview with the Defendant. He did not administer any further tests or independently investigate Defendant's statements. (E.H. 9554, 55). His background information came from Mr. Guralnick, Defendant's trial counsel, the report submitted by Dr. Carbonel, (E.H. 9564, 65), and the police reports relating to the Defendant's prior attempted murder and armed robbery cases. Dr. Miller also read the police reports prepared by Detective Greg Smith containing the substance of the interviews between Smith and the Defendant during the investigation of the Svensen murder, and he also read the alibi notes supplied by Hunter. (E.H. 9545-47).

Dr. Miller stated that Defendant told him that his trial counsel had suggested that he plead guilty, but that Defendant had opted to proceed to trial. (E.H. 9547, 48). Defendant recalled the specific years of his prior arrests and whether he had pled guilty or proceeded to trial. Defendant told Dr. Miller that he pled guilty when he was guilty and had a trial when he was not guilty, although he was found guilty at trial. (E.H. 9552). Based on his evaluation, Dr. Miller found that the Defendant was not mentally ill and that he was not identifiable

as a mentally retarded person. (T. 824). The Defendant is not a substance abuser nor does he have any mental illness, thus his mental state would not show any significant fluctuation over time. (E.H. 9549). Dr. Miller, by extrapolating the Defendant's present mental state to the time of trial, found that the Defendant was competent to stand trial in 1983. (E.H. 9550). He was able to name his judge, his lawyer, to recall conversations with those individuals, to recall some of the people who testified on his behalf, as well as people who testified against him. He recalled the amount of time the trial took, and how many jurors there were. This established he was alert. He was in good touch with reality at or during the time of trial. This finding was further supported when Defendant stated he did not testify in court at trial, he didn't do the crime, and he was not guilty because he was not there when the murder occurred. Dr. Miller did not find Defendant to be mentally ill. His general level of intelligence was assessed as less than average, but certainly not in the retarded range. (E.H. 9550, 51).

Dr. Miller reviewed the "Bro White" letter and found it was rational and well-formed, definitely not the work of a retarded individual. The letter indicated hostility towards those who were going to testify against him, and indicated awareness of the role of witnesses, the adversary process, and the consequences of adverse testimony. (E.H. 9551, 52, 9601, 02).

On cross-examination Dr. Miller stated that the Defendant knew that a judge would decide his case, and that a jury would decide his innocence or guilt. (E.H. 9574-9577). The Defendant told Dr. Miller the judge said it was a "capital" case, but the Defendant said he did not know what that meant at the time of trial. (E.H. 9577-9581). Dr. Miller did not, based on his evaluation, find Defendant's statement credible. Id. He again stressed that he did not believe the Defendant's assertion that he never realized he could get the death penalty. (E.H. 9583). The Defendant has the capacity to understand the death penalty now, and he had it at the time of trial. (E.H. 9584).

Ronald Guralnick

Guralnick inherited the case from Joel Kershaw, with whom he had extensive discussions. (E.H. 9242). When he first saw the Defendant, he told him not to discuss the case with anyone. The Defendant did not follow this advice, and indeed the Defendant usually did not follow Guralnick's advice. (E.H. 9247). An example of this was at sentencing, where the Defendant said as he left the courtroom, "The motherfucker deserved what he got." Id. Guralnick's reaction was that the defendant was an "idiot". He felt the Defendant had average intelligence, though he was not particularly bright. (E.H. 9248). If the Defendant had done what he was told, he would not be facing the electric chair. Id.

Guralnick did not file a motion for change of venue because there was not a great deal of publicity about the case. (E.H. 9257). Guralnick has probably worked on over thirty (30) capital cases. (E.H. 9264). He hired an investigator in this case, Richard McGraw, who got statements from and did a background investigation of the cellmates that testified against the Defendant. (E.H. 9267). The investigator was eventually prosecuted for subjourning perjury based on his dealings with these witnesses. (E.H. 9268, 69). If he had thought there were mental health issues in the case he would have pursued that area. (E.H. 9272).

The Defendant was a difficult, uncooperative client. (E.H. 9276, 77). He had numerous meetings with the Defendant, usually in the jury room when the case was on calendar, as is Guralnick's practice, rather than going to the jail.[2] The fee affidavit Guralnick submitted does not reflect his numerous contacts with the Defendant, which numbered between five and fifteen. (E.H. 9279, 80). In referring to the infamous "client can't testify, he's an idiot" notation Guralnick made during trial, Guralnick states that "I didn't actually mean that the man is the caliber of an idiot." (E.H. 9289).

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[2] The Defendant's current counsel raves on ad nauseum in his brief because Guralnick only saw the Defendant once in the jail prior to trial. That Guralnick prefers the seclusion of the jury room to the chaotic confines of the Dade County Jail hardly seems a fitting bone of contention in this cause.

On cross-examination, Guralnick stated that he looks for indications of mental health problems with his client, and if he discerns any he has his client evaluated by experts. (E.H. 9337). The most important indicators are the client's speech and behavior. (E.H. 9338). He has had several clients declared incompetent to stand trial. The Defendant herein never gave indications that a competency evaluation was needed. The Defendant totally refused to follow his advise, which is why he referred to the Defendant as an idiot. The Defendant was not an idiot in the intellectual sense, he simply would not listen to Guralnick's advice. (E.H. 9340). The Defendant understood his instructions, stated that he would follow them, then did the opposite. (E.H. 9341). The Defendant's initial lawyer, Joel Kershaw, never said anything to Guralnick concerning the issue of the Defendant's competence.

Guralnick discussed with the Defendant whether he should testify, and they agreed he should not. (E.H. 9346). During trial he discussed the testimony of the witnesses with the Defendant. (E.H. 9357). The Defendant had no difficulties discussing the case with Guralnick. (E.H. 9357). The reason the Defendant did not take the stand to present a viable defense is that none existed, (E.H. 9359).

Joel Kershaw

Kershaw was originally obtained by the Defendant's family, and then appointed by the court. The Defendant eventually filed a form motion to have someone else represent him. (E.H. 9368). When he spoke with the Defendant about it, the Defendant said Kersaw was not representing his best interests, not following up on certain matters. (E.H. **9372).**

Kershaw has dealt with incompetent clients in the past. There are numerous warning signals that trigger concerns about a client's competency. (E.H. **9379).** The Defendant never gave any indications that competency was an issue. The Defendant fired him because he had not yet taken the deposition of several of the cellmates turned State's witnesses. (E.H. 9380). Kershaw always felt the Defendant understood what Kershaw was talking about. The Defendant knew what the charge was and the possible penalties. (E.H. 9381). The Defendant provided Kershaw with an alibi far the time of the murder. **(E.H. 9382)**

Georqia Jones Ayers

Ayers and the Defendant first met at church services in their neighborhood. After the Defendant's most recent release from prison, **he** came to her seeking help finding a job. She directed a program designed in part for this purpose. (E.H. **9630).** This was in 1981. The Defendant's mother arranged the

meeting. (E.H. 9632). The Defendant was quiet and withdrawn, and he wanted to get a job and help his mother. Ayers has also sponsored church services at the jail, and the Defendant's mother always volunteered to come along, and thus would be able to see the Defendant. (E.H. **9634).** The Defendant was always introverted. Ayers was surprised when she heard about the murder, because Harry seemed to have wanted to stay out of prison and turn his life around. (E.H. 9637). She believes the Defendant is innocent. No one ever contacted her at the time of trial,

On cross-examination, she stated she did not know the Defendant **was** convicted of shooting a policeman in **1963,** and of armed robbery in 1973. The Harry Phillips she knows wouldn't do that. (E.H. **9641,** 42).

William Farley

For each of the cellmates who testified at the Defendant's trial, the State will first recount their trial testimony, in order to present the complete chronology of events.

At the December, 1983 trial, Farley testified his presumptive parole date was November, 1984, (T.T. 807). He met the Defendant for the first time in 1982, at Lake Butler Correctional Institute. After this first meeting he was visited

by Detectives Smith and Hebding. They asked if the Defendant had said anything about a murder case, and Farley said no. They did not ask Farley to question the Defendant about his case. (T.T. 809). Farley then went back to his cell. The Defendant returned awhile later. The Defendant told Farley he had been questioned by two Detectives. Farley told the Defendant that the same detectives had questioned him, and that he didn't appreciate getting hassled about somebody else's case. The Defendant apologized for not warning Farley that the cops might try and question him about a murder case in which the Defendant was a suspect. (T.T. 811).

The Defendant then showed Farley a newpaper clipping about the case. The Defendant had underlined the part about his refusal to confess to the police. The Defendant told Farley that he murdered "the cracker." The Defendant said he had "laid across the street" for half an hour, then shot him "a whole heap of times." (T.T. 813). The Defendant said he got the gun after his release from prison. The Defendant bought the gun to kill the victim, his parole officer, because he had wrongfully violated his parole and sent him back to prison. The Defendant said the victim was carrying something in his arms when the Defendant shot him. (T.T. 814). Farley never asked the Defendant any questions about his case. (T.T. 815).

After the Defendant made the above statements, Farley told his jailors to contact Detective Smith, who then came to see him at Polk Correctional Institute, where Farley had been transferred. Detective Smith then tape recorded a statement from Farley. Det. Smith made no promises to Farley prior to the statement, and he had not promised him anything the first time they met, at Lake Butler. (T.T. 816). Farley could be released on parole as early as March (1984), as that is when he will be interviewed again by the parole board. Neither Detective Smith nor prosecutor Waksman had anything to do with arranging that interview. (T.T. 817). When the Defendant told him about the murder, he said the police had nothing an him, and that he was going to get away with it. (T.T. 818). When asked his motive for testifying, Farley said it was because of the way the Defendant had bragged about the murder, and that he felt sorry for the victim's little boy, whose picture was in the article the Defendant showed him. (T.T. 819). Farley said he was not testifying in exchange for an early parole release date. Id.

On cross-examination Farley said he had one felony conviction. He was given five (5) years probatian in 1974 for assault with intent to commit robbery, He violated his probation in 1976 and was sent to prison. (T.T. 820). When Detective Smith interviewed him at Polk C.I., Smith turned an the tape at the start of the interview. (T.T. 822, 823). Defense counsel then asked Farley why, if he was such a humanitarian, he had used a

gun in an armed robbery. The prosecutor's objection was sustained. (T.T. 823, 24). Defense counsel then elicited from Farley testimany that he had been imprisoned the past eight years, and was not a happy camper in prison. (T.T. 827).

Guralnick then questioned Farley about an affidavit he had executed in the jail, in which he recanted his taped statement to Det. Smith. (T.T. 8282). Farley stated that he was forced to sign the affidavit in the Dade County Jail. Nine or ten inmates approached him and told him to sign it, so he signed it. (T.T. 980). Farley told the guards what happened, and he was transferred to another cell. Guralnick read the affidavit into evidence. (T.T. 833). The affidavit states that the Defendant told Farley he was innocent, and that Farley made up the confession in hopes of getting out of prison, "away from my enemies," and that "everything I said about Phillips is a lie. The authors of the document, obviously right on top of the situation, concluded the affidavit with" I further swear that this affidavit is true and without fear or coercion" (T.T. 833, Record on direct appeal at p.224).

Farley then acknowledged later signing a second affidavit brought to him by the Defendant's investigator, Mr. McGraw (who Guralnick testified was convicted of subjorning perjury for his dealings with the State's inmate witnesses in this case). This affidavit (record on direct appeal, p.226) states that Farley's

signature an the first affidavit was a fabrication, and that both Det. Smith and prosecutor Waksman offered to write letters to the parole board in exchange for Farley's testimony at trial. Farley did not read this second affidavit before signing it. Farley repeated tht he had in fact signed the first affidavit, but only because he was forced to. (T.T. **836).**

Farley stated that both Waksman and Det. Smith had promised to write letters to the parole board in return for his testimony at trial. (T.T. **837).** He told prior defense counsel (Kershaw) about the letters in his deposition. (T.T. **841).** In a second deposition to Guralnick twenty-four **(24)** hours earlier, ***he stated that after the Defendant confessed to him, he believed that if he called the Detectives and told them about it, they would probably help him in his own case.*** (T.T. **842).** Neither Det. Smith nor Waksman promised him anything prior to Farley giving the taped statement to Detectives Smith and Hebding at **Polk** C.I. (T.T. 846).

On redirect, Farley stated that he told Waksman about being forced to sign the affidavit, and that as a result he was moved four different times for his safety. He was beaten and threatened for being a witness in this case, for being a "snitch". (T.T. 847, 878). **The** Defendant's investigator, Mr. McGraw, tried to persuade him not to testify. McGraw told him he could end up getting shot after his release, if he testified. (T.T. 848). He also told Farley that Waksman would exploit him, and would never send the letter to the parole board. (T.T. 850).

Parley's 3.850 Testimony

Farley certainly cannot be accused of testifying consistantly with his trial testimony. When he met the Defendant for the very first time, the Defendant told him he was suspected of shooting his parole officer, but that he didn't do it. (E.H. 9658). The Defendant did show him an article about the murder, which helped Farley make up the story about the Defendant's confession. Id. Within a couple days of speaking with the Defendant, he was visited at Lake Butler by Det. Smith. Smith told him that the Defendant was the prime suspect in a Miami murder. After this first meeting he was placed back in the cell with the Defendant, which was his assigned cell. (E.H. 9667). At this initial meeting, Det. Smith had wanted to know if the Defendant had said anything about a murder. After Farley said no, Smith told him to keep his ears open, and call Smith if the Defendant said anything about a murder. (E.H. 9668). Before they parted, Det. Smith told Farley that he looked tired of being in prison, which Farley interpreted to mean that if Farley could obtain a confession from the Defendant, Det. Smith would help Farley get out of prison. (E.H. 9669, 70).

When Farley went back to his cell, he told the Defendant about being questioned by Det. Smith, and the Defendant again denied committing the murder. (E.H. 9675, 76). He stated,

consistent with his trial testimony (and the testimony of Dets. Smith and Hebding, see below), that he did not question the Defendant about the murder, rather the Defendant initiated the discussion. (E.H. 9677). The Defendant never said anything about how many times the victim was shot. (E.H. 9680).

After the first visit by Det. Smith, Farley began thinking about the victim's young son, whose picture was in the article the Defendant showed him. Farley thought the Defendant must "perhaps" be guilty, and that "maybe I could get out of prison" if he told Det. Smith what he wanted to hear. (E.H. 9681, 82). He told his jailors to contact Det. Smith, who came to see him at Polk C.I. where he had been transferred. The first question that Det. Smith asked was how many times the Defendant said he shot the victim. When Farley said once or twice, Smith told him no, it was numerous times. Smith told Farley there was a reward, and that Smith could help Farley get out of jail. (E.H. 9635).

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[3] There is absolutely no evidence in the record as to how it came about that the Defendant and Farley were in the same cell together at Lake Butler at the time of there initial meeting, or why Farley was subsequently transferred to Polk. Det. Smith testified he had nothing whatever to do with Farley's cell assignment or transfer (see below), and he certainly had no motive to have Farley, whom he didn't know from Adam, placed in the Defendant's cell. Rather, the detectives visited Farley initially because, fortunately for them, the Defendant had shown himself to have a misplaced sense of bravado when it came to the murder, and they were hoping that it carried over to his cellmate at Lake Butler, whomever he might be (see testimony of Det. Smith below).

During the discussion about the bullets, the tape machine was not on. They talked for fifteen to twenty minutes before the tape was turned on. (E.H. 9687). Det. Smith made the promise about getting Farley paroled before the tape was started. (E.H. 9690). Farley was not anxious to obtain Smith's assistance, but he figured Smith would probably assist him anyway. (E.H. 9690, 91). Det. Smith promised to write a letter to the parole board, which the parole board would follow. Id. Farley, was told the family had offered a $1,000 reward for testimony if the Defendant was convicted. (E.H. 9693). Det. Smith did not turn on the tape until after telling Farley what to say. (E.H. 9695). Farley cannot remember the details, except that it was important to say that the Defendant confessed to shooting his parole officer numerous times. (E.H. **9697).** Farley didn't say anything about the reward money on the tape because "Well, I wasn't really concerned about the thousand dollars." (E.H. 9700). Det. Smith wrapped up this episode of LETS **FRAME HARRY** PHILLIPS by telling **Farley** he would soon be moved to Dade County so he would be available to testify in the case. (E.H. **9702).**

After being transferred to Dade County, Farley mat with Det. Smith and the prosecutor, David Waksman. Detective Smith told Farley they would **help** him get paroled after he testified. (E.H. 9709). Just prior to testifying, Waksman told him it was important that the Defendant said he shat the victim numerous

times, and that if the Defendant was convicted Waksman would help Farley get parole and the reward money. (E.H. 9711, 12). Waksman had a written list of questions, and he told Farley how to answer the questions. (E.H. 9714).

Farley then read into the record a letter he wrote to Waksman on February lst, 1984, two months after trial. In the letter Farley refers to the prophecy of McGraw, the Defendant's investigator, that Waksman would abandon Farley after trial. Farley further states "I feel deep inside that you're apathetic and unenthusiastic about getting me out of jail." (E.H. 9721). Farley wrote a second "Dear Dave" letter eleven days letter. The letter is reproduced at page 49 of the Defendant's brief herein. The last portion contains a threat to "do everything I can to sabotage the case" if he doesn't get confirmation of his release date, and the reward money, by the end of the month. Farley stated that the contents of both letters are true. (E.H. 9723, 9725).

Farley then identified a check, dated May 22nd, 1984, for $175.00, which Farley received as his portion of the $1,000.00 reward. This was the money Waksman and Det. Smith promised him prior to trial. (E.H. 9729). Actually, he had been promised the full $1,000.00 (E.H. 9730, 31). Mr. Waksman gave him the check after he was released from jail, at Waksman's office. (E.H. 9732).

After he wrote the first letter, Det. Smith visited him at the detention center. Farley was very concerned for his safety, due to his testimony against the Defendant. Farley told Det. Smith he was ready to tell the truth about the case (that Farley, the detectives and Waksman had framed Phillips) unless he was released. Det. Smith did not react positively, indeed he almost attacked Farley at this point. (E.H. 9734, 35). After Det. Smith left Farley was put in a "harsher" cell than before. Id. Farley never saw Det. Smith again.

At some point in time, "I think maybe sometime in January, maybe February," Waksman sent Farley a copy of the letter Waksman sent to the parole board on his behalf. (E.H. 9739). Farley is not sure if he received the copy before or after he sent the letters to Waksman. Farley was paroled March 21st, 1984. (E.H. 9740). After his release Farley was arrested in Broward County. Farley then tried to reveal the big frame-up by writing letters to the editors of a Fort Lauderdale paper, but no one listened. (E.H. 9741).

Farley believes that Waksman told him to say that, in his confession, the Defendant told him the victim was carrying something in his arms when he was shot. (E.H. 9744). Waksman told him this "indirectly." Waksman told him the killer had concealed himself across the street, so he put that into the

Defendant's confession as well. (E.. 9745, 46). The Defendant never told him anything about the crime, rather the specifics were all provided by Det. Smith and Waksman. (E.H. 9747).

Farley then reviewed his prior criminal record. He said at trial he had one conviction for robbery in 1974 and a probation violation. He also had a 1976 burglary conviction (presumably the basis for the 1976 probation revocation he revealed at trial, see above), and a 1981 conviction for escape. (E.H. 9750). When he said one conviction at trial, it was a lie. He never discussed his prior convictions with either Waksman or Det. Smith. (E.H. 9751, 52).

On cross-examination by the State, Farley stated he was arrested for grand theft in Broward County shortly after his March 21, 1984 release on parole. He called Mr. Waksman, hoping he would call the Broward prosecutor to see if Farley could plead to "county time." Farley ended up pleading to a year and a day in state prison. (E.H. 9758). After his release from state prison he again was arrested in Broward County. He called Waksman again, and Waksman refused to help him. At that point, for some reason, he did not play his whistle blower ("Dear Dave") trump card. (E.H. 9758, 59). As of the date of the 3.850 hearing, Farley is facing robbery and drug charges in Broward County. Snitches nave a tough time in prison, but he is not worried about carrying the label of a snitch," not that the

label of being a snitch will bother me." (E.H. 9760). "What bothers me was the injustice that I did to Harry Phillips." He can always explain to his fellow inmates how he came charging forward at the eleventh hour to set the record straight, how he "gladly came forward." (E.H. 9761).

Farley then explained that prior to trial, other inmates had indeed forced him to sign the first affidavit, recanting his taped statement to Det. Smith, as he testified at trial. All's well that ends well, since "even at that time when they compelled me to write that document, I knew it was something that I should have been doing all the time. (E.H. 9762). Farley did not know what was in the affidavit, but he knows its contents must be true because he lied the whole time. (E.H. 9764). The reason he denounced the affidavit at trial is because he foolishly believed the Defendant was guilty, and he didn't want to sabotage the State's case. (E.H. 9765).

Larry G. Hunter

At trial Hunter offered the following testimony. Hunter met the Defendant in the law library of the Dade County Jail. Hunter was awaiting trial in his own case. The meeting occurred in early 1983. (T.T. 650). At that time the Defendant talked about his murder case. The Defendant's purpose in confiding in Hunter was that he wanted Hunter to provide him with an alibi for

the evening of August 31st, 1982. (T.T. 652). The Defendant told Hunter he had stalked the victim by approaching the parking lot from the east end of the parole building, where there were bushes to hide in. The Defendant saw there was only one car in the lot. The Defendant shot a man by the gate at the entrance to the lot, left the way he came, then went home. (T.T. 653, **54).** The Defendant told Hunter that the alibi was that they were at a store together at a precise time on August 31st, 1982, and the Defendant gave Hunter several notes with the exact contents of the alibi. (T.T. **653).**

When Hunter returned to his cell, he told his cellmate what the Defendant said and showed him the notes. His cellmate contacted homicide detectives without Hunter's knowledge. Id. When the Detectives came to ***see*** him the first time, he told them he didn't have any notes. Hunter then decided not to risk perjury charges, so he had his cellmate call the detectives again. This time he gave the notes to Det. Greg Smith. (T.T. 654). The Defendant wrote out the notes so that Hunter would remember the details. The Defendant wrote the notes an four different dates, and Hunter wrote the dates on two of them, 4/29/83 and 5/31/83. The **Defendant** told Hunter to call the Defendant's lawyer, Joel Kershaw, and tell him he would testify for the Defendant at his trial. Hunter never called Kershaw because he had enough problems of his own. **(T.T. 655, 56).**

when he gave the letters to Det. Smith and agreed to testify, Smith said the detectives would tell Hunter's judge about his assistance. Hunter told Smith he didn't think he would need Smith's help. He was innocent of the pending charges against him, hence he wouldn't need a good word at his sentencing. (T.T. 656, 657). The alibi the Defendant wanted was for Winn Dixie on August 31st, 1982, between 8:25 and 8:55 p.m.. The store was crowded, the Defendant had on a white uniform (the Defendant worked at Neighbors Restaurant at the time, see below), and the Defendant had chicken and orange juice in his cart.

The Defendant said he killed his parole officer because he had previously revoked his parole and sent him back to prison, and that the revocation hearing was held in Lake Butler. (T.T. 658). After Hunter agreed to testify, he saw the Defendant again in the law library. The Defendant told Hunter that Hunter's name was on the State's witness list, and the Defendant wanted Hunter to sign some paper stating that he knew nothing about the case. (T.T. 658). Hunter refused to sign at that time. However on another occasion he was in a holding cell waiting to go to court, and the Defendant asked him to sign it and he did so, because the cell was crawded and he didn't want to start a confrontation. (T.T. 659).

On another occasion the Defendant and several of his friends met him in the library, and the Defendant tried to get

him to sign an affidavit stating he knew nothing about the case. The Defendant's friends threatened him, but he still refused to sign. Id. Hunter became afraid for his mother's safety when he saw the "Bro White" letter signed by the Defendant, as he was one of the state's witnesses named therein. (T.T. 660). Prosecutor Waksman had Hunter moved out af the Dade County Jail to protect him from retaliation. **(T.T. 661)**.

On cross-examination, Hunter stated he had four prior felony convictions. (T.T. 665). Hunter turned the alibi notes over to his attorney, who gave them to the police. (T.T. 668). Hunter told Waksman and Det. Smith that he was innocent of the pending charges, and that they would believe him if they did a little homework on his case. (T.T. 672).

Hunter's 3.850 Testimony

Hunter informed the court, via his attorney, Brian MacDonald, that he would refuse to testify and invoke his Fifth Amendment priviledge not to incriminiate himself. (E.H. 9780). In Hunter's affidavit, which is printed in full at pages 78 and 79 of the Defendant's brief herein, he (or whoever prepared the affidavit) states that the Defendant never confessed, and that Waksman and Det. Smith committed more high crimes and misdemeanors by feeding him the extensive details of the Defendant's confession to which he falsely testified at trial.

The affidavit further states that Det. Smith made him a firm offer of five years probation in his pending sexual battery case if he testified. Waksman was more careful, though he did let slip that if Hunter didn't testify he would get life for the sexual battery, and that if he did testify he would get probation. Hunter tricked the Defendant into giving him the alibi notes so he could use them as ammunition to get a deal from the cops. Hunter tried to jump off the LETS FRAME HARRY PHILLIPS bandwagon several times, but Waksman and Det. Smith threatened to "put a lot more charges on me." They said testify or get life.

Waksman, Det. Smith, and Jefferey Samek, his lawyer in his sexual battery case, all ganged up on his mother and convinced her to convince Hunter to take the deal, "between them and my mother, I just felt like I didn't really have any choice." Waksman and Det. Smith hammered him over and over with the facts he had to testify to," to make sure I said the right things and didn't mess up the story." Waksman and Det. Smith went to court with him when he pleaded guilty and got five (5) years probation (charges were sexual battery, car theft and cocaine possession). Det. Smith gave him $200 shortly thereafter.

Malcolm Watson

Watson did not testify at the 3.850 hearing nor was an affidavit presented in his name. The Defendant alleged in his

motion and his brief that Watson got certain assistance from Waksman in his own armed robbery case after the Defendant's trial, and that Waksman must therefore have promised such assistance to Watson prior to trial. Waksman testified in detail as to his exact promise to Watson, and that he disclosed the promise to Guralnick prior to trial. These facts are summarized at length below in the relevant portions of Waksman's testimony. Watson testified at trial as follows.

The Defendant, whom he had known quite awhile, came into Watson's store seeking a $50.00 loan, and offered Watson a gun as collateral, which Watson refused. (T.T. **691**). At this time the Defendant told him that his parole officer was trying to violate him because of problems he was having with a lady that works at the parole office. (T.T. **693**). The Defendant said he would get even with them. This conversation occurred in 1980. Watson met the Defendant again in September, **1982** in the Dade County Jail. Watson asked the Defendant if he had finally gone and killed his parole officer, and the Defendant said "Yeah, Yeah, but they got to prove it." They talked about the Defendant's gun, and the Defendant said he had warned his parole officer not to violate him, and had fired at him but it didn't scare him off, and that he threw the gun away. (T.T. 695). He later overheard the Defendant talking in the law library. The Defendant said he had shot into his parole officer's house because he was trying to violate his parole. The Defendant said the police had nothing on him, that they couldn't prove he did it. (T.T. **697**).

Watson then called the police, and he told Det. Smith what the Defendant said. Det. Smith did not promise the Defendant anything in exchange for the information. (T.T. 699). At this time Watson had already been convicted and sentenced in his own (armed robbery) case. After Watson agreed to testify, the Defendant cornered Watson in the law library and threatened to kill Watson and his family if Watson testified. (T.T. 700). Watson is testifying because he has a brother who is a cop, and his brother was shot and paralyzed. Other inmates also threatened Watson, so Watson was moved for his own protection. Id. He began telling other inmates he didn't know anything about the Defendant's case in order to avoid further threats and harassment.

The gun the Defendant had in 1980 looked like a .38. In 1980 the Defendant hadn't mentioned the sex of his parole officer. In 1982, the Defendant had said that his parole supervisor was a man, and his parole officer was a woman. (T.T. 703).

On cross-examination Watson admittd to four felony convictions. (T.T. 704). He was not promised anything for his testimony. Id. Watson then explained about the polygraph test and his case. Det. Smith told him if he passed the polygraph, Smith would "speak up" for him, Det. Smith is doing this because

he knows Watson is innocent. (T.T. 706, 07). He hasn't taken the test yet, but if he passes he knows Smith will help him. Smith is only going to help him if he passes the polygraph. (T.T. 710). The reason he hasn't taken the polygraph test yet is because his case is still on appeal in the Third District. If he wins on appeal the whole case is gone. The polygraph is only as to whether he had a gun during his robbery. (T.T. 712). He stole the car, but he wasn't armed. (T.T. 714, 715). As is discussed below, Watson passed the polygraph.

Tony Smith

Tony is not the subject of any accusations of impropriety, however he is the fifth witness who testified to the Defendant's statements at the trial, and a brief summary of his trial testimony could only improve the clarity of the overrall picture in this cause.

At the time of trial he was serving a one year sentence for violating probation. In late August of 1982 he met the Defendant at a bar. There was a group of patrons, including the Defendant and Tony, who were all on parole or probation, and the topic of conversation was parole and probation officers. (T.T. 612). The Defendant said he had two parole officers, a man and a woman, and they had hassled his mother while he was in prison and they were doing it again. The woman officer drove a green

Toyota, and had gone by his house and hassled his mother. Id. The Defendant said that the female officer kept hassling him even though she wasn't his parole oficer anymore. The Defendant said he had "tried to take care of her, but he missed." (T.T. 613). He said he tried to shoot her on the street, but missed. The Defendant said he was gaing to put a stop to the hassling.

The Defendant was carrying either a .38 or 357 medium barrel revolver that night. (T.T. 614). Tony knows guns because he hunts alot. Tony did not tell the police about this conversation. The first person he told was his lawyer in his own case. (T.T. 615). He was arrested in December 1982. He was on probation at the time. (T.T. 616). As past of a negotiated plea, the judge reinstated probation with the special condition that he testify in the instant case. Id. Tony got arrested again two months later. The judge reinstated probation with special conditions of a year in jail, no credit for time served, (T.T. 617), and that he testify herein. Tony was set for release 5/4/84. No one promised him anything for testifying other than with regard to his plea agreement. (T.T. 618). He got a break in his probation case by agreeing to testify. (T.T. 619, 20).

On cross-examination he stated he has been an informant for Det. Smith for some time. (T.T. 621). Tony has violated his probation three times, He then stated that the Defendant's investigator threatened him. (T.T. 630). Tony recently had his

motion to mitigate his one year sentence denied. Tony had hoped Waksman would help him on that, but he didn't. (T.T. **632, 633).** Tony signed an affidavit, prepared by the Defendant's investigator, McGraw. Tony signed the affidavit without reading it, because the investigator told him if he didn't sign it, he wouldn't live long, and that he better not testify. Tony told Waksman about McGraw's visit. (T.T. **637-642).**

William Smith/Scott

Smith changed his name to Scott, and will hereafter be referred to as Scott. He could not be located at the time of the initial 3.850 hearing. In his brief the Defendant accuses Waksman of either deliberate concealment or wilful ignorance of Scott's presence in the courthouse at or about the time of the initial hearing. The State submits that there is absolutely no evidence of any impropriety by Mr. Waksman. He repeatedly said he didn't know where Scott was, and there is no evidence to the contrary. (E.H. **9965).** Scott testified at trial **as** follows.

Scott had known the Defendant since **1971.** (T.T. 581). During approximately the first week of September, **1982,** he met the Defendant in the Dade County Jail. Scott was charged with assaulting his wife's boyfriend, and for violating parole by leaving the State without permission. (T.T. 582). The assault charge was also part of the parole violation. In speaking with

the Defendant, Scott told him he was arrested for aggravated battery and parole violation. The Defendant responded that "I just downed one of them motherfuckers." "Down" means to kill. (T.T. 583). Scott told the Defendant that he better get rid of the gun, and the Defendant replied he wasn't worried about the gun, because some woman was holding it for him. The Defendant said they couldn't prove nothing without the gun. (T.T. 584).

After speaking with the Defendant, Scott called Detective Hough in homicide, whom he had known since 1965. Det. Hough put Scott in touch with Det. Smith. (T.T. 585). Scott was not promised anything in exchange for his testimony. Scott got his wife to convince her boyfriend to drop the assault charges. The dropping of those charges had nothing to do with the Defendant's case. Scott's parole violation is still pending, and he is free on his own recognizance until it is resolved. (T.T. 586). No one has promised him anything in exchange for his testimony. The Defendant told Scott that the reason he "downed" his parole officer was because the officer was "fucking him over" and "riding him" (T.T. 587, 88).

On cross-examination Scott stated he had been a paid confidential informant for the Federal government for four years, and that he was paid $1,000.00 a month to be an informant. (T.T. 590, 91). Scott pleaded guilty to armed robbery in 1968. Scott then violated his probation when he shot a man after the man shot

him. After Scott talked to the Defendant in the holding cell, Scott called Det. Hough, who Scott had given information to about a prior murder where a lady had been killed. He called Hough, so Hough could "check it out." When asked if he was "a member of any police agency," Scott replied, "No, No, No, I'm not a police agent." (T.T. 593, 94). Scott repeated that he was not offered a benefit in exchange for his information. Id.

After the assault charges were dropped, on September 7th, 1982, all he had left was a parole violation. He was on parole for a forty (40) year sentence of which he had served 10 years. (T.T. 595, 96). Scott was not given money for reporting the Defendant's statements, as he had been in other cases. Id.

Scott's 3.850 Testimony

Scott now uses the name Smith because he was put in the Federal witness relocation program several years ago, around 1981. (E.H. 10069). Scott did not know Det. Smith before the instant case. (E.H. 10087). Scott had known Det. Sapp prior to this case. He met Det. Sapp through Det. Hough. Scott first met Det. Hough in 1968, when Hough arrested him for robbery. (E.H. 10088). Scott worked as an informant for Det. Hough in 1972. Scott then went back to prison, and worked for Det. Hough again when he got out in 1980. (E.H. 10089). The Defendant's 3.850 counsel then read from Scott's pretrial deposition, in which he

said he called Det. Hough, after Defendant's confession, because he was familiar with Hough, as "I had helped him out in the past." (E.H. 1009). When asked if "helped out" meant informing on someone, Scott had replied "No, not really informing on somebody. But, I helped him out." (E.H. 10092).

At the time he gave the depositian, Scott did not have an informant number with Metro Dade Police Department. (E.H. 10093, 94). He was an informant for D.E.A., and had helped out Det. Hough and Det. Sapp in some cases. Id. Scott had gotten an informant number from D.E.A. in 1981. Scott had received money from Det. Hough for information in other cases prior to the time of his deposition, and he has continued to work as an informant off and on since that time. (E.H. 10098-10101). Det. Hough recruited Scott's assistance as as informant in 1972 to help solve the murder of a girl in Cutler Ridge. (E.H. 10106, 10107). In exchange for his assistance, Scott received probation instead of prison. (E.H. 10110). Scott insisted, as he did at trial, that he did not receive anything as a reward for his information and testimony in the Defendant's case. (E.H. 10112).

Scott then explained the parole problem he had at the time of his early September 1982 meeting with the Defendant, just after the August 31st murder. Scott had been arrested August 22nd, 1982 on aggravated battery charges. Scott was also being held on a parole violation warrant, and he had had a preliminary

hearing 9/2/82, which was prior to meeting the Defendant in the holding cell at the jail. (E.H. 10115, 15). Scott doesn't know who was at the hearing. **Dets.** Hough and **Sapp** could have been there. It was a fast hearing, and Scott was pretty upset at the time. (E.H. 10117). Scott then explained that his parole got messed up when the Federal government relocated him out of State in 1980. The warrant also included a state charge for assaulting his wife with a knife in 1980. As Scott stated at the September 2nd preliminary hearing, he had long since been acquitted of this charge before Judge Thomas Scott in 1980 (See Defendant's appendix, exhibit #3, and testimony of Janis Scott below).

At this juncture in the State's copy of the record (E.H. 10120), the next page, though stamped 10121, represents a loss of 13 pages (from page 63 of that day's transcript to page 76). When the transcript picks up again Scott is talking about his visit to the Defendant's sister's and mother's house to try and gather information for the Detectives. (E.H. 10121). Scott had told Guralnick about these trips in his deposition (see Defendant's appendix, exhibit #1). Scott was acting as an informant on these two unproductive trips. (E.H. 10122-28).

In 1983 Scott was arrested for hitting his daughter's mother, Tanlyn Hodges, but she never pressed charges. (E.H. 10129). After the defendant was convicted, Scott received $300.00 from Tallahassee. Det. Smith brought him the check, **(E.H. 10136).**

In late August 1982 when he was slapped with a parole violation warrant, he called Det. Hough and Det. Sapp to see if they could help him, since he worked for them off and on as an informant. (T.T. 10145). They argued unsuccessfully for an ROR release at the 9/2/82 preliminary hearing. (Defendant's exhibit #3). It should be noted that this had nothing whatever to do with the Defendant, as Scott had not yet met the Defendant. Indeed, had Scott been released as those detectives requested, he never would have met the Defendant in the holding cell the next day, as is fully discussed in the argument section below.

Scott did not know about the reward money until just before he received it. He then states he might have heard about it a couple of weeks before trial. (E.H. 10156).

On cross-examination by the State, Scott clarified a crucial area. Prior to his meeting with the Defendant in the holding cell, he never discussed the Defendant with the detectives, which makes sense given that he hadn't seen the Defendant since the mid 70's in Raiford, and neither Hough nor Sapp were assigned to the Defendant's case. He was talking to Dets. Hough and Sapp, eliciting their support for his ROR at the 9/2/82 preliminary hearing, but that had nothing to do with Phillips, whom he hadn't run into yet. (E.H. 10167, 68). After Scott talked to Phillips in the holding cell, he called Det. Hough, who sent aver Det. Smith to interview Scott.

Several days or a week after meeting Det. Smith, the parole people released him. At his initial meeting with Det. Smith in the jail, Smith told Scott he would have to take a polygraph, which Scott took. (E.H. 10171), and according to Smith, passed (E.H. 10172). Det. Smith's report confirms that Scott passed the polygraph. (Defendant's app. #9).

Scott explained that when Det. Hough and Sapp came to the 9/2/82 preliminary hearing it had nothing to do with the Defendant's case. They told the parole people he deserved an ROR release because his Federally sponsored relocation to North Carolina is what messed up the parole, it wasn't Scott's fault. (E.H. 10183, 84). Scott was in jail for about a week after his meeting with the Defendant, and then released.

David Waksman

Waksman stated that prior to trial Guralnick was permitted to depose him for the specific purpose of revealing what promises had been made to the state witnesses in exchange for their testimony. (E.H. 9796). In his deposition, Waksman stated that the only promise he made to Malcolm Watson was that if Watson, who was serving a life sentence for armed robbery, passed a polygraph concerning his involvement in that crime, Waksman would tell Watson's judge the results of the test. (E.H.

9798, 99). Watson had a presumptive parole release date sometime in the next century. The disposition sheet for the robbery case, approved by Chief Assistant George Yoss, states that Watson had given substantial assistance in the successful prosecution of Harry Phillips, and that further investigation into Watson's robbery charge raised a question as to whether he used a gun during its commission. The charge was therefore reduced via Rule 3.850 to strong-arm robbery, and Watson pled guilty and received five (5) years probation with credit for time served of thirty (30) months. (E.H. 9802).

Watson's 3.850 motion, filed on 3/7/84 by his attorney, Rory Stein, contained a stipulation by the State that based on newly discovered evidence, the conviction of armed robbery would be vacated and that judgment would be entered for simple robbery with a fifteen (15) year sentence, with credit for time served, five (5) years probation, and the remaining portion suspended. (E.H. 9805, 06). Waksman next identified a memo in Watson's robbery file, dated 10/26/81, from Chief Assistant George Yoss, stating he is a career criminal and should not be pled out to less than twenty-five (25) years without his approval. (E.H. 9807).

Prior to turning over one of Det, Smith's police reports to Guralnick, Waksman had deleted the following segment with regard to witness Larry Hunter:

A. "On Tuesday 17 May 1983, subsequent to receiving a telephone message, this investigator contacted Assistant State Attorney David Waksman with regards to this investigation."

"At that time Mr. Waksman advised that he had received a phone call from an individual identified as Larry Hunter, who is an inmate at the Dade County Jail."

"Mr. Hunter related to Mr. Waksman that he had information regarding the murder of the parole officer and Harry Phillips."

(E.H. 9818).

In his deposition to Guralnick, when asked how Hunter came to volunteer information, Waksman had stated:

"I don't know. I think the police found him. He called the police and told the police what was going on, and they told me. I think he called the police and volunteered. You can ask him more specifically. I don't recall."

(E.H. 9820).

Later in the same deposition, when asked who saw Hunter first, Waksman had said that "the police saw everybody first. I didn't investigate this case. They brought me the names of the witnesses." Id.

Waksman deleted the paragraph quoted above because he did not feel it was discoverable. Instead of whiting out the deleted part, he cut and pasted, as he often does when deleting nondiscoverable segments. (E.H. 9820-22). If he has any doubts about what is discoverable, he turns it over, Id.

Waksman remembers that witness William Smith/Scott had previously worked as an informant for the federal Government and also had provided information to Detective Lloyd Hough of Metro Dade homicide. (E.H. 9823, 24).

Waksman knew that all the witnesses to wham the Defendant confessed had criminal records. He did not do a specific background check, but if the detectives gave him a rap sheet, he put it in the file. (E.H. 9836). His main concern is having certified copies of the Defendant's convictions. Generally he gets a computer printout of the witnesses' criminal record. Id. Waksman is pretty sure he looked at his witnesses' rap sheets in **this** case. (E.H. 9841). Waksman could not remember each witnesses' criminal history, but he did offer the following astute observation:

> Q. You would have known how much time they served?
>
> A. Not necessarily.
>
> If I'm going to walk a guy into court, especially through the back door in prison, whether he **says** two felonies or four felonies or I served three years or **six** years, the jury really doesn't care what he says.
>
> They know he's a bum.

(E.H. 9846).

Waksman then read from his deposition to Guralnick, in which he stated that the only promise he made to William Farley

was that he would write a letter to the parole board, that Farley said he wouldn't need the letter because he was getting out soon anyway, and that Farley got beat up in the jail, causing Waksman to move him for his protection. (E.H. 9852). He and Det. Smith fulfilled their promise to send a letter to the board on January 9th, 1984 (a month before Farley wrote the two "Dear Dave, 1'11 sabotage the case if I'm not released'' letters to Waksman). The letter states that Farley provided outstanding assistance, and that Waksman recommended early parole. (E.H. 9853, 54).

Waksman again recited from his deposition to Guralnick, where he stated that if witness Larry Hunter testified, he would appear before the judge in Hunter's sexual battery case and let him know about Hunter's valuable assistance. (E.H. 9855). That was the only promise Hunter received. (E.H. 9856).

Waksman then read from the disposition sheet, dated 1/25/84, for Hunter's grand theft and child abuse case. (E.H. 9857). Hunter had been caught in a stolen van sniffing glue with two juveniles, and he admitted knowing the van was stolen. On 12/29/83, the prosecutor with the participation of David Waksman, allowed the Defendant to plead guilty to grand theft, receiving five (5) years probation with nine months county jail time. The child abuse charge was nolle prossed based an lack of proof. The plea was concurrent with Hunter's plea to a separate charge of sexual battery. Both were approved by Chief Assistant George

Yoss based on the assistance Hunter rendered in a homicide prosecution (the instant case). Id. The sexual battery case involved a male victim, 16-18 years old. (E.H. 9859). The plea colloquy begins by citing to Hunter's "invaluable help to David Waksman in a serious murder trial." (E.H. 9860). Pursuant to negotiations between Hunter's attorney, Jeffrey Samek, and Waksman, as to the armed sexual battery charge Hunter pled guilty and received five (5) years probation with ten months county time consecutive to the nine (9) months for the grand theft, for a total of nineteen (19) months, with credit for time served of nineteen months. He also pled guilty in a separate cocaine possession case and received five (5) years probation, all three probationary terms to run concurrently. (E.H. 9861, 62).

A memo in Hunter's sexual battery file indicates that Hunter's sexual battery trial was postponed until after Phillips trial because, if Hunter was acquitted of the rape, he might not be available for Phillips' trial, whereas if he was convicted, he might refuse to testify. (E.H. 9866, 67). Waksman did not talk to the victim of the sexual battery or his family, but he knows that prosecutor Elyse Targ obtained their agreement. (E.H. 9875).

On cross-examination by the State, Waksman stated that he gave the defense everything he felt was discoverable, either under the Rule or Brady. The portion concerning Hunter contacting him and his instructions to Det. Smith to go interview

Hunter was deleted because it involved his own work on the case. (E.H. 9878-9881). If one of his witnesses misstated the number of his prior convictions, he would correct the mistake on redirect or interrupt and announce the correct numbers. (E.H. 9881).

All the promises made to the witnesses were testified to accurately in his deposition to Guralnick. Id. The following exchange at the 3.850 hearing is absolutely critical:

> Q. A lot of your direct testimony was based on your deposition and Brady material and what you promised there and what eventually happened.
>
> The witnesses that we're dealing with are William Smith/Scott, Farley, Hunter and Watson.
>
> Is everything that you promised to these witnesses in this deposition what they knew at the time they testified as to what promises were made?
>
> A. Yes.
>
> At the time they testified the only thing that they knew that I was going to do for them was what I said in my deposition.
>
> Q. All right.
>
> Clearly the files and records reflect you did more afterwards?
>
> A. Yes.
>
> Q. Can you tell us what your reason was for doing more?
>
> A. Sure.

Some of them had been beaten up in the county jail awaiting trial.

Some of them had to spend months in small safety cells, smaller than the bathroom in your house to protect them.

Some of them, like Hunter and Watson wanted their cases disposed of earlier, and I wanted to know where they were when this trial came around.

This trial took me about 13, 14 months from the beginning of the investigation 'til trial.

And I wasn't going to be looking for these guys when I needed them. I wanted to know where they were.

And, I felt that some of these inmates had put up with an awful lot with solitary confinement, with beatings, and just with sitting in jail another six months so I wouldn't have to worry about them not showing up for trial.

So, after my case was over I attempted to do as much for them as I could.

Considering that I'm not the king here, I went around and asked people can we do this, can we do that.

And, that's basically why some of them got more than my "I'll talk to your judge."

Q. Did any of the witnesses who were made promises know that you were going to do this as to when they testified?

A. I didn't tell them. I'm sure Greg Smith didn't tell them.

Nobody knew what I was going to do.

When the case was over I sat down with people like Elyse Targ and said: Now what can we do for Hunter? He did a

> lot for me. He put up with a lot. I want to try my best to help him. He's got a serious case.
>
> I asked her to talk to the family and see if they would be satisfied with him doing eighteen or 20 months.
>
> And, then we had --
>
> I remember Hunter wanted to go to trial. He swore he was innocent. He didn't want my promises. He wanted and he wanted to go to trial.
>
> Now, he didn't want to *go* to trial four or six months later.
>
> And, eventually his attorney, Samek convinced him that innocent or guilty, if they're willing to give you withhold and probation, you better grab it.
>
> (E.H. 9881-9884).

At some point near the time of trial, Det. Smith told Waksman that the Policemen's Benevolant Association **had** offered a one thousand dollar reward. Waksman *never* mentioned the reward to any of the witnesses. After the trial the money was divided between the five inmates who testified. (Smith/Scott, Malcolm Watson, Larry Hunter, William Farley, and Tony Smith). Smith/Scott got **the** most because he was the first to contact the police with information (E.H. 9885). The witnesses were not told about the reward until after trial. Id.

As for the testimony of William Farley at the 3.850, Waksman denied telling him what to say at trial or offering him reward money. (E.H. 9887, 88). He **gave** all the witnesses copies

of their police statements and depositions, as he does with any witness. Id. The reason Det. Smith visited Farley at Lake Butler was because Smith interviewed "whatever warm body happened to be the cellmate of Harry Phillips." (E.H. **9889).** Waksman had previously given Det. Smith copies of the ***Messiah*** and ***Henry*** cases, and the detectives knew they couldn't tell Farley to question the Defendant, so they specifically told him ***not*** to ask questions, but rather only listen. (E.H. 9890).

As for Larry Hunter's affidavit, he never told Hunter what to say concerning the Defendant's confession. (E.H. 9892). Waksman did not offer him reward money or threaten him with a life sentence. (E.H. 9893). Waksman definitely did not promise Hunter five (5) years probation on the sexual battery case. (E.H. 9894). The only promise to Hunter was that Waksman would tell his judge what happened. Waksman never threatened Hunter with additional charges if he refused to testify. (E.H. **9897).**

On redirect, Waksman stated that when he cut and pasted Det. Smith's report to delete the part he felt was his own work product, he was not trying to deceive anyone. (E.H. 9901).

As for witness William Smith/Scott, as far as Waksman is aware the only case he had was a parole violation based on a charge that he assaulted his wife ok girlfriend, and that the charge was dropped because the victim did not wish to prosecute.

He may have had other technical violations as well. (E.H. 9916, 17).

As for William Farley's "Dear Dave'' letters, Waksman stated that after Farley's parole (3/20/84), Farley called him several times after he was arrested for various offenses. (E.H. 9929). The first time Farley had been arrested for theft, and Waksman wrote the prosecutor in the case on Farley's behalf. Farley was then arrested again on theft charges and Waksman refused to intercede. After several calls from Farley, Waksman received the Dear Dave letters in which Farley threatened to sabotage the Phillips' case. (E.H. 9930, 31).

Larry Hunter violated his probation not too long after the trial, and he called Waksman for help. Waksman told his probation officer of Hunter's assistance, and asked that Hunter be placed in a less secure facility. Hunter eventually wrote Janet Reno complaining that Waksman was going back on his promise to assist him. After interviewing Waksman, she wrote Hunter a letter telling him that his past assistance was not a license to commit further crime. (E.H. 9932-34).

Det. Gregory Smith

Smith was called by the State at the evidentiary hearing. He stated that he travelled to Lake Butler C.I. to speak to the

Defendant's cellmate, whoever that might be (E.H **9981, 82).** He learned that William Farley was the Defendant's cellmate, so he interviewed him. He asked Farley if the Defendant had said anything about why he was incarcerated, and Farley said he had just been put in the Defendant's cell and hadn't talked to the Defendant about anything. Smith had nothing to do with Farley's cell assignment. Id. Det. Smith then told Farley not to ask the Defendant any questions, but to listen to whatever the Defendant said, and contact him if he heard the Defendant talk about why he was in prison. (E.H. **9983).** Det. Smith made no promises to Farley, either express or implied, that he would help Farley in any way for assistance Farley might render in reporting the Defendant's statements to Smith. Id.

Two days later Det. Smith was called by officials at Lake Butler, because Farley told them he needed to speak with Smith. In preparing to visit Farley, Det. Smith learned he had been transferred to Polk C.I. Smith had nothing to do with that transfer. (E.H. 9984). Smith went to Polk to interview Farley, along with Det. Hebding. Farley told Smith that the Defendant said he had killed his parole officer. (E.H. **9986).** After a brief break in testimony, Det. Smith informed the Court that during that break, the Defendant had told Smith "Kiss my Ass, Cracker," (E.H. 9987). Det. Smith **had** a tape recorder with him. They conducted a lengthy preinterview, and then the formal taped interview. Det. Smith did not provide Farley with any

information about the murder during the preinterview (E.B. 9988), which took about an hour and a half, which is not long for a preinterview. Farley told Smith the exact same thing he told the jury at trial concerning the Defendant's statements. (E.H. 9989). Smith did not make any promises to Farley nor did he mention a reward. (E.H. 9990).

Smith saw Farley again in the Dade County Jail, when he questioned Farley about threats he had received from the Defendant's investigator (E.H. 9991). Farley had two black eyes at the time, which he got for being a witness in this case. The only promise he ever made to Farley was that if he testified at trial, Smith would tell the judge. (actually, his parole board) about his assistance. (E.H. 9992). Smith never told Farley about the reward until after the trial. Farley got $175.00 of the P.B.A.'s $1,000 reward. The reward had been offered for information leading to the arrest and conviction of Tom Svenson's murderer. (E.H. 9994).

As to Larry Hunter, Det. Smith was told by Waksman that either Hunter or his attorney, Jeffrey Samek, had contacted him and told him that Hunter had information about the case. Smith visited Hunter, who told Smith the same thing he told the jury at trial. (E.H. 9995). The alibi the Defendant told Hunter to give was the exact one that the Defendant gave the detectives the day after the murder. (E.H. 9997). Det. Smith did not provide Hunter

with any details of the offense nor did he tell Hunter to question the Defendant about the offense. The only promise he made Hunter was that he would tell Hunter's judge about his assistance. Hunter insisted he was innocent of his pending sexual battery charge, so he wouldn't need Smith's assistance. Farley had made a similar statement, to the effect that he wouldn't need any help because he would be released on parole soon anyway. (E.H. 9998). Smith told Hunter, just like he told Farley, that he could not ask the Defendant any questions, but rather could only listen. Id. Smith never told Farley about the reward money prior to trial. After the trial Farley received $175.00.

On cross-examination, Smith said he provided Waksman with all his police reports and the rap sheets of the witnesses. (E.H. 10003). When William Farley said the tape had been turned on immediately, that was inaccurate. (E.H. 10006). When Waksman said that all the witnesses were located by the police, he was mistaken as to Hunter. (E.H. 10009). Prior to this case he had not worked with Scott, though he has worked with him since. Scott told Det. Smith that he had worked with Det. Hough in the past (E.H. 10012), and Hough confirmed this. Scott was not a "documented informant" for Metro Dade Police Department at the time, though he is now. Smith does not know how often Scott had worked with Det. Hough in the past. Smith knew only of a prior murder case, because Scott told him about it. (E.H. 10013, 14).

Prior to Scott's ROR release on his parole revocation (9/7/82), Det. Smith spoke by telephone to someone in the parole department in Tallahassee. Smith does not remember what he said, but he may well have told them he needed Scott released on ROR so he could help Smith investigate the murder. (E.H. 10016, 17). Det. Smith then related how they attempted to use Scott to get evidence about the murder weapon from the Defendant's family (Scott had described this activity to Guralnick in his pretrial deposition).

Scott did not necessarily lie at trial when he said he was an agent of the federal government but not the State. It would depend on how Scott interpreted the word agent. (E.H. 10019).

As for Malcolm Watson, Det. Smith gave him a polygraph concerning Watson's armed robbery case, as per the State's agreement with Watson. (E.H. 10037, 34). Watson insisted he never had a gun when he stole the car. George Slattery determined that Watson was telling the truth about not having a gun. (E.H. 10035). On second thought, it is possible he is confusing Watson with another witness. (E.H. 10038). He was indeed correct, however, as the polygraph report indicates. (R. 8483-8488).

Detective Charles Hebding

Hebding was present during the interview of William Farley by Det. Smith at Polk C.I. His testimony mirrored that of Detective Smith. They did not supply Farley with information prior to the crime or make him any promises of assistance. (E.H. 10045). There was no discussion of a reward. Farley specifically stated that he had *not* asked the Defendant any questions, but rather had just listened to what the Defendant said about his case. (E.H. **10048, 49).**

Janice Scott

The final witness at the evidentiary hearing was Scott's wife Janice. **She** testified that in 1980 Scott was arrested for stabbing her, and that he was found not guilty, in **case** no. 80-**086.** The trial court reviewed the file, and determined the stabbing occurred 4/11/80, that the case was in Judge Thomas Scott's division, that Scott received a jury trial 12/8/80 and was found not guilty. (E.H. 9956-58). This coincides with Scott's testimony at his 9/2/82 parole revocation preliminary hearing, where he said that this stabbing case, by far the most serious allegation in his parole violation affidavit, had been settled long ago by a not guilty verdict in front of Judge Scott (see Defendant's exhibit #3). The allegation in the affidavit concerning Scott's failure to appear for arraignment in state

circuit court on 5/16/80, obviously related to the stabbing case, as the trial court stated the arraignment date was 5/14/80. (E.H. 9957).

STATEMENT OF THE ISSUES

I.

WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

II.

WHETHER THE PROSECUTION VIOLATED ITS DUTIES UNDER BRADY AND GIGLIO.

III.

WHETHER THE PROSECUTION VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHTS UNDER HENRY.

IV.

WHETHER THE DEFENDANT WAS COMPETENT TO STAND TRIAL IN DECEMBER 1983.

V.

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT PHASE.

VI.

WHETHER THE DEFENDANT'S CALDWELL CLAIM IS PROCEDURALLY BARRED.

VII.

WHETHER THE DEFENDANT'S PENALTY PHASE JURY INSTRUCTION BURDEN SHIFTING ISSUE IS PROCEDURALLY BARRED.

VIII.

WHETHER THE DEFENDANT'S PENALTY PHASE JURY INSTRUCTION ISSUE, RELATIVE TO THE NUMBER OF JURORS NEEDED FOR A LIFE RECOMMENDATION, IS PROCEDURALLY BARRED AND WITHOUT MERIT.

SUMMARY OF ARGUMENT

Although trial counsel was deficient for not conducting any investigation for the penalty phase, the Defendant has not satisfied the prejudice prong of Strickland. **The** apinions of his experts as to his allegedly minimal intelligence, emotional disturbances and passive personality flew directly in the face of the evidence the jury **and** trial court heard concerning his actions prior to, during and after the murder. Their opinions were also directly contradicted by the State's experts. Although the Defendant did grow up in proverty, performed poorly in school, and suffered some physical abuse by his father (who left the family when the Defendant was ten years old), there was also evidence of a strong and healthy relationship with his mother, with whom he was living at the time of the murder. Moreover, the Defendant was almost 37 years old at the time of the murder. **The** same judge who conducted the trial conducted the 3,850 proceeding, and he found that neither the jury nor the court would have been swayed by the evidence of the Defendants upbringing. This finding is supported by the record and should be affirmed.

As to the Defendant's Brady and Giglio claims, the record fully supports the trial court's findings that the State did not withhold material exculpatory evidence within the meaning of Brady, nor did it withhold evidence of promises or inducements

which would have reflected upon the witnesses' motive or bias in testifying, within the framework of Giglio. The Defendant's allegations of a criminal conspiracy to frame the Defendant are ludicrous and postively refuted by the record, as are his allegations that the State used informants to elicit statements in violation of Henry.

The evidence presented at trial and at the 3.850 hearing amply demonstrates that the Defendant was fully competent to stand trial. As for the allegations of trial counsel's ineffectiveness at the guilt phase, the allegations themselves are devoid of specific facts and, as found by the trial court, the Defendant presented no evidence to support the allegations at the 3.850 hearing. The Defendant's remaining claims are all procedurally barred.

I.

TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE BECAUSE THE DEFENDANT FAILED TO ESTABLISH PREJUDICE FLOWING FROM COUNSEL'S DEFICIENT PERFORMANCE.

The trial court found that counsel's performance was deficient because he did not conduct an investigation for the penalty phase. (R. 8700). The only evidence Guralnick presented at the penalty phase was the brief testimony of the Defendant's mother, who stated that the Defendant had lived with her whenever he was not in prison, and during those periods he helped support her, and helped her with the housework and yardwork. The Defendant was a very good son who treated her well and did whatever she requested. She loved her 38 year old son very much. (T.T. 1244-46).

In its order the trial court reviewed the background evidence, including the poverty, lack of supervision, physical abuse and abandonment by the father, poor school performance, support for his mother and kindness toward his sister's children. Id. The trial court then reviewed the conclusions of the defense experts, including their assessment of borderline intelligence, limited intellectual functioning, and history of passive/aggressive behavior, which taken together with his upbringing allegedly caused the Defendant to suffer from an extreme emotional disturbance at the time of the offense (a

disturbance which they believed prevented the Defendant from confarming his conduct to the requirements of law). The trial court found their opinions to have been "explicitly refuted" by the State's experts, Drs. Haber and Miller, who found that the Defendant "was not suffering from any serious intellectual or emotional disturbances." (R.8700, 01).

The trial court, which had conducted the trial and imposed the death sentence, found that the mitigating evidence presented at the hearing "would not have changed the outcome of the sentencing hearing." Based on the strength of the aggravating factors and the evidence presented at trial surrounding the murder, the court found "no reasonable probability" that the evidence "*would have altered the jury's decision* and certainly not this Court's decision." Id.

That the trial court conducted the original trial, and **heard** all the evidence therein firsthand, places the court in an especially advantageous position to weigh the probable effect of the nonproduced mitigating evidence upon the sentencing jury (and obviously the sentencing judge). This is especially true herein, where the opinions of the defense experts were refuted not only by the State's experts, but by everything the jury and judge heard about the Defendant's words and deeds at trial. In Routly v. State, So.2d ___, no. 73, 963 (Fla. October 17 1991), this Court stated:

> Finally, the judge who presided over Routly's 3.850 motion was the same judge who presided over his trial and imposed the death sentence. In imposing the death sentence, the trial judge found five aggravating factors, all of which were affirmed on appeal. The judge found no mitigating factors. In ruling an the instant claim, the judge found that the failure to present this evidence at the sentencing phase had no effect on the sentence. This finding is entitled to considerable weight. Francis v. State, 529 So.2d 670, 673 n.9 (Fla. 1988).
>
> (Slip op. at 12, 13).

The Defendant's assertion that the trial court failed to consider the probable impact of the evidence on the jury, in violation of Hall v. State, 541 So.2d 1125 (Fla. 1989), is refuted by the express language of the trial court quoted above.

The evidence of the Defendant's background showed that his family was poor, and both parents had to work, so the Defendant and his two siblings were not properly supervised. The Defendant's father was a gambler who physically abused the Defendant, his mother and his brother, and who abandoned the family when the Defendant was ten years old. The Defendant was a quiet boy who kept to himself, and did poorly in school. However, the Defendant had an excellent relationship with his mother and siblings.

In 1962, at the age of seventeen, the Defendant attempted to commit first degree murder upon an off-duty police officer.

He was paroled from prison in 1970, and until **1972** had a steady job with the Sanitation Department. He lived with his mother and helped support her. Rather than continue in this stable situation as a productive member of society, as he had shown himself perfectly capable of doing, the Defendant, now 27 years old, committed an armed robbery and was sent back to prison. He was released on parole in June **1980**. He received help from Georgia Ayers in finding a job, and for six months was doing fine with his parole (see trial testimony of Nanette Brochin, T.T. **343-345**). The Defendant was again living with his mother and gainfully employed.

Rather than continue in this mode, the Defendant tossed away this second opportunity to be a productive member of society in November 1980 by harassing Brochin and threatening her husband and refusing to follow the instructions of the parole supervisors, including the victim (T.T. **346-371**). The Defendant, born in **1945**, was now **35** years old. Due to the above behavior his parole was violated. He spent **1981** in prison and was again paroled in the summer of 1982. He again lived with his mother, and was gainfully employed at Neighbor's Restaurant. The Defendant, now almost 37 years old, literally blew away this third opportunity to become a law abiding, productive member of society. On August 24th, 1982, he tried to kill Brochin and her husband by shooting into their livingroom, in which they were sitting. The Defendant told both Tony Smith and Malcolm Watson

he shot at them to avenge their attempts to violate his parole. (T.T. 697, 613). A week later, the Defendant laid in wait for their supervisor, Bjorn Svenson, and brutally executed him as revenge for Svenson carrying out his lawful duties as a parole officer.

The State respectfully submits that there is no possibility, much less a reasonable probability, that the background evidence concerning the Defendant's childhood would have caused the jurors to recommend life. The evidence was not that compelling to begin with. More importantly, the Defendant was already entering middle age when he committed this brutal revenge killing. The Defendant had shown himself fully able to function as a productive member of society, with the full support of his family and other members of the community, including Ayers and his mother's pastor. Indeed, given the Defendant's age and criminal history, the jurors might well have been turned off by attempts to argue the Defendant's childhood as mitigation. In Francis v. State, 529 So.2d 670 (Fla. 1988), this Court stated:

> Francis' mother died when he was six and her sister (his aunt) raised him and his sisters in a poor, black community. His aunt, youngest sister, and the ex-wife of his aunt's son testified at the evidentiary hearing. Although the ex-wife testified that the aunt's common law husband mistreated Francis, neither his aunt nor his sister said that. Not only is the testimony of these witness' inconsistent, it deals with events remote in time from the instant homicide. Francis was thirty-one when he committed

> this murder; that this evidence would be found to establish mitigating circumstances is merely speculative. ***Bolender; Lusk.***

Id. at 673.

See also Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990):

> Given the particular circumstances of this case including, among other things, the fact that Francis was thirty-one years old when he murdered Titus Walters, evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight. ***See Francois v. Wainwright,*** 763 F.2d 1188, 1191 (11th Cir. 1985).

Id. at 703.

In sum, the trial court's conclusion that the background evidence would not have altered the jurors' recommendation is fully supported by the record.

That leaves the expert testimony of Dr. Carbonel and Dr. Toomer. They testified that, based on the Defendant's severe emotional and intellectual deficits, the Defendant suffered a permanent, perpetual extreme emotional disturbance and substantial inability to conform his conduct to the requirements of law. The State's experts, though not questioned specifically on these two statutory mitigating factors, nevertheless stated unequivocally that the Defendant did not suffer from any significant emotional or intellectual deficits. The trial court,

as finder of fact, agreed. The Defendant's argument that his evidence of the two statutory mitigating factors is "unrebutted" is highly unrealistic. A similar argument was rejected by this Court in Ponticelli v. State, So.2d ___, 16 FLW S669 (Fla. October 10, 1991) (trial court properly rejected "unrebutted" testimony of defendant's expert that statutory mental health mitigating factors existed, as evidence adduced at the trial and competency hearing contradicted expert's opinion). As in Ponticelli, the Defendant's experts herein never discussed the facts of the offense with the Defendant.

The State could end its analysis here, because the trial court resolved a factual dispute, and it is not within the province of the reviewing court to second-guess this type of factual resolution. See Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987). The State further contends, however, that the testimony of Dr. Carbonel and Dr. Toomer was so totally at odds with the evidence adduced at trial that no attorney in his right mind would have presented it to the jurors in this cause.

Dr. Carbonel testified that the Defendant was so intellectually deficient that he was incapable of planning ahead, and did not even have the ability to form the premeditation necessary for first degree murder. Dr. Toomer described his intellectual functioning as "child-like," stating he had a "concrete child-like level of understanding." The jurors would

well have wondered whether Toomer and Carbonel examined the same Harry Phillips who they convicted of first degree murder. The evidence at trial showed he planned and executed the ambush murder in a ruthless, methodical manner, after which he immediately undertook to establish an alibi by purchasing goods at a Winn-Dixie while retaining the receipt showing date and time of purchase. He then related the alibi to Det. Smith the next day, and solicited Hunter to verify his alibi, and provided him with the exact details of the alibi the Defendant had given Det. Smith. The jurors heard the campaign the Defendant waged to harass and intimidate the witnesses, including the "Bro White" letter and his personal threats to kill Malcolm Watson and Watson's family. The Defendant, after learning that Det. Smith was questioning inmates about him, threatened the health of Det. Smith's family if Smith continued such questioning (T.T. 888), specifically referring to Det. Smith's fifteen year old son.

The above is just one example of how the testimony of Dr. Carbonel and Dr. Toomer concerning the Defendant's abilities and personality was in diametric opposition to what the jurors knew the Defendant was indeed capable of based on the guilt phase testimony. The State submits that the most probable effect on the jurors of Dr. Carbonel's and Dr. Toomer's testimony would have been one of disbelief followed by antagonism toward the defense for insulting their intelligence.

II.

THE STATE DID NOT VIOLATE ITS RESPONSIBILITIES UNDER BRADY AND GIGLIO.

If the allegations of William Farley, in his 3.850 testimony, and Larry Hunter, in his affidavit, were true, the State would have a lot more to worry about than violations of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). If Waksman, Det. Smith and Det. Hebding fed Farley key facts about the offense so as to frame the Defendant for this murder, and if Waksman and Det. Smith did the same with Larry Hunter, they are guilty of subjourning perjury, obstructing justice, civil rights violations, and maybe even RICO violations.[4] Fortunately for the integrity of our criminal justice system, the trial court believed the testimony of Waksman, Det. Smith and Det. Hebding over the testimony of Farley and the extremely well written and neatly typed affidavit signed by Larry Hunter, who for some reason felt it not in his best interest to testify at the 3.850 hearing.

These patently fraudulent allegations against Waksman and the detectives were properly deposited in the dung heap by the trial court ("incredulous and unbelievable," Farley, and "rejected outright," Hunter, R. 8605, 06). As is demonstrated below, most of the rest of the alleged Brady and Giglio matters

[4] Maybe not RICO, but with that statute, who knows?

are based on factual allegations that are either not proven or expressly contradicted by the trial and **3.850** records and testimony. The others all involve matters which are not material under the standard of United States v. Bagley, 165 S.Ct. 3375 (1985), although this Court will not need to reach the materiality issue because virtually all the matters were readily available to defense counsel by the use of due diligence.

In Routly, supra, the Defendant raised several **Brady** and Giglio claims, and this Court's analysis therein is most instructive. Therein this Court recited the four prongs of Brady. The second prong is "that the Defendant did not possess the evidence, ***nor could he obtain it with any reasonable diligence***." slip op. at 4. An excellent analysis of this prong is provided by Judge Jorgenson in his concurring opinion in Lewis v. State, 497 So.2d 1162 at 1163, 64 (Fla. 3d **DCA 1986).** As will be demonstrated, almost all the factual allegations that were substantiated below involve matters which easily could have been uncovered by defense counsel.

As to claims under Giglio dealing with impeachment evidence, this Court stressed in Routly that the focus of Giglio is on matters concerning the motive and bias of the State's witnesses. The prosecutor must correct false statements that relate to motive or **bias.** slip op. at 6. Additionally, if a witness' answer is equivocal, there is no violation of Giglio. Id. at 7.

A final preliminary matter involves the Defendant's characterization of the strength of the evidence of the Defendant's guilt, which of course would be relevant to a materiality analysis under Bagley. The State presented a comprehensive summary of the guilt phase evidence in its brief on direct appeal, case no. 64,883. In addition to the testimony of the five (in Waksman's words) "Bums," which is summarized above, the State presented a good deal of circumstantial evidence relating to the Defendant's motive and opportunity. Although the Defendant did not specifically admit to the murder, he made statements to Det. Smith which indicated his knowledge that the victim was shot numerous times (T.T. 874), which was not released to the public. The Defendant asked Det. Smith if they had found the murder weapon yet, which was significant because the fact that the murder weapon was not found at the scene was never disclosed. T.T. 907).

The Defendant also knew that the police had no eyewitnesses, another fact that was never disclosed. Id. The Defendant told Det. Smith he had no case because they didn't have the gun, and had no eyewitnesses. (T.T. 908). The Defendant didn't hide his hatred of the victim, stating he "didn't kill the motherfucker, but he was glad he was dead." The Defendant then said, "They were lucky," and when Det. Smith asked what he meant, the Defendant explained: "They're lucky they got me when they did

because I would have killed every last motherfucker in that office" (T.T. 907-909), and "If somebody does me harm, I do them harm." Id. Obviously when the Defendant met Tony Smith just prior to the murder and told him that he planned to stop the hassling by his parole officers, the Defendant meant business. (T.T. **613**). As the Defendant left the interview room, he told Smith, "Smith, you ain't got no witnesses. These ain't nobody saw me kill that motherfucker." (T.T. **910**, **911**). That **is of** course because the murder was carefully planned and timed, although Dr. Carbonel would have something to say about that.

The most damning evidence was not the sheer number of inmate confessions, though obviously that is an important consideration, nor the fact that they were totally unconnected vis-a-vis each other, though that was significant as well. The most powerful factor was that they had details about the murder (number of shots, victim carrying something in arms, murderer left the scene by a particular route, which was verified by an independent witness, exact location of shooting) that only the killer would know, and they also had specific knowledge about the defendant's problems with a female parole officer and the shooting into her house, which only the Defendant could have known. These details were spread across the various unconnected "Bums."

William Scott

The first matter concerns the Defendant's allegations that the police withheld information that Scott was an informant for the Metro Dade Police Department at the time he had his conversation with the Defendant in a holding cell on September 3, 1982, two days after the Defendant's arrest. The Defendant also seems to allege that the detectives arranged this encounter so that Scott could elicit statements from the Defendant. The Defendant further alleges Scott was promised assistance in his pending parole revocation proceeding and in his pending aggravated battery case. The trial court found that the State had not withheld information that Scott was an informant for Metro Dade, that there was no evidence of any promises to Scott, nor evidence that the police were instrumental in having assault (aggravated battery) charges dropped. (R. 8604). In order to intelligently analyze the Defendant's allegations, a complete chronology is in order.

In 1980 Scott was on parole. In that year he was charged in May with stabbing his wife, and he was acquitted by a jury in December 1980 before Judge Thomas Scott. During this period Scott was a well paid, documented registered informant for D.E.A., and he also provided information to Det. Hough of Metro Dade who had arrested the Defendant in 1972 for robbery, at which time Scatt had received probation because he helped Hough solve

the murder of a girl in Cutler Ridge, and had testified at that trial. Scott was not a registered informant for Metro Dade, in that he had no informant number (though after the Defendant's trial he eventually was given one by Det. Smith, with whom Scott had had no dealings prior to meeting the Defendant in the holding cell).

Also in 1980, Scott was relocated to North Carolina by the Federal Government, but apparently the Florida Parole Authorities were never informed. They issued a parole violation warrant based on the stabbing charge, failure to appear for arraignment for that charge and technical violations based on failure to report, pay costs, etc. At some point in 1981 or 1982 Scott returned to Florida, after which he continued to provide information to Det. Hough and possibly Det. Sapp as well. On August 22nd, 1982, nine days before the murder, Scott was arrested for aggravated battery in a domestic dispute with a friend of his wife. Det. Sapp was the arresting officer. The arraignment was set for September 7th. In addition, a parole violation hold was placed on Scott, so he could not bond out on the battery charge. Scott requested a preliminary hearing on the parole revocation because he wanted an ROR release pending his revocation hearing. The preliminary hearing was scheduled for September 2nd, 1982, two days after the murder and one day after the Defendant was arrested for violating his parole.

Scott had contacted Dets. Hough and Sapp to come to the preliminary hearing and they did so. The minutes of the hearing (Defendant's exhibit #3) show that Det. Hough and the Defendant explained that the Defendant's failures to report and failure to appear for arraignment in 1980 were because of his relocation by the Federal government. The Defendant told the examiners he had long since been acquitted in the 1980 stabbing case involving his wife. Scott also said he was still working with the police. Dets. Hough and Sapp "felt very strongly" that Scott should be released, and Sapp offered to find the Defendant a job. The examiner recommended that the request for ROR be denied, in part because of the pending aggravated battery charge and his history of failing to appear.

The Scott story must be interrupted at this juncture to make a key point. ***Nothing*** that occurred up through and including September 2nd, 1982, had anything to do with the Defendant's case. Neither Det. Sapp nor Det. Hough were working the murder. They wanted Scott ***released*** because he was a source of information for them and because the parole affidavit allegations concerned a case he already was acquitted of, and because his failures to appear weren't his fault, as he had been relocated for his safety as part of an ongoing federal investigation, ***Had he been released, Scott never would have met the Defendant in the holding cell the next day.*** The point here is that the Defendant's allegation that Scott was somehow planted in the holding cell is pure bunk.

On September 3rd, 1982, the Defendant and Scott had their encounter in the holding cell. Scott, who knew the Defendant from Raiford, told the Defendant he was in for parole violation. The Defendant responded that he downed "one of them motherfuckers," because he was going to violate the Defendant's parole.

When Scott got back to his cell he called Det. Hough, who contacted Det. Smith, who then checked Scott out the jail and took a statement from him on 9/4/82 (Defendant's exhibits #9, 11). On 9/6/82 Scott was given a polygraph, which he passed (Defendant's #9).

Scott's arraignment on the aggravated battery charge was the next day, 9/7/82. Scott testified at trial that at the time of the holding cell meeting with the Defendant, Scott was being held on technical parole violations and aggravated battery charges upon a friend of his wife, but that he knew that the victim was not going to press charges because his wife had already convinced the victim not to do so. Det. Sapp, who had arrested Scott on the aggravated battery charges and who was told by the victim that the victim wasn't going to press charges, took an "I'm not prosecuting" form to the victim, who signed the form

so that the charges could be no actioned,[5] which they then were at the 9/7/82 arraignment.

There is absolutely no doubt that on 9/7/82 the police, under the direction of Det. Smith, were trying to get Scott, their first real break in the case, onto the street to assist them in the Harry Phillips investigation. In addition to Sapp taking the signed form to the arraignment, Det. Smith called the parole authorities in Tallahassee on 9/7/82 and told them they needed Scott's help in locating the firearm (the defendant told Scott a woman was holding the gun for him. After Scott's release, the detectives took him to the Defendant's sister's house and mother's house, without results). The parole authorities agreed (Defendant's exhibit #5).

The State will again stop the cameras to make a salient point. There is *no evidence* that Scott was aware of Det. Smith's call to the parole authorities, or that *any* promises either direct or implied were made to him regarding his release. There is indeed solid evidence to the contrary. The parole department memo (Defendant's exhibit #5) does not say that Scott had agreed to go on location to try and get the gun. It simply relates the

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[5] Scott was arrested 8/22/82, so the 21st day would be 9/12/82, and the 35th day 9/26/82. Had the victim not signed the "I don't want to prosecute" form, and rather simply not come to the prosecutor's office for the prefiling conference (victim's are given two chances to appear) the official no action would not have occurred until one of these later dates.

contents of the Defendant's admissions to Scott. Det. Smith's police report shows that Scott was released 3:30 p.m. 9/7/82. At 4:30 p.m. a team conference was held at which the members agreed to contact Scott and *ask him if he would go with them to the sister's and mother's house in order to try and locate the gun* (Defendant's exhibit #9). There was obviously no "we get you released, you help us get gun" deal.

In the pretrial deposition of Det. Smith, he was asked why he thought Scott had contacted Det. Hough after his holding cell encounter with the Defendant, and Det. Smith stated he assumed it was because Scott "*is an informant with our department*", though he wasn't sure if Scott had an informant number (Defendant's exhibit #29 at p.38). In his own deposition Scott stated that he called Det. Hough because he had given information in the past, "I was familiar with him. I had helped him out in the past." When asked if "help" meant informing on people, he stated, "No, *not really* informing on somebody, but I have helped him out." Scott said he was not a listed informant with Metro Dade, but was with Larry Hahn of D.E.A., and that Hahn had paid him a thousand dollars a month for four years for being his informant. The Federal government had to relocate him to North Carolina, and he changed his name before he returned to Florida. (Defendant's exhibit 1 at p.14-16). Scott further stated that he had a pending aggravated battery charge and a parole violation when he met the Defendant, but he already knew that the

aggravated battery victim, a friend of his wife, wasn't going to press charges because he told Scott he wasn't going to. Id. at 18, 19. When Scott called Hough, Hough told him not to expect anything, and Scott acknowledged that he wasn't asking for or expecting anything. Id. at 22. Scott also described his visits to the Defendant's sister and mother's homes to try and get information about the gun.

At trial Scott stated he had been a paid confidential informant for four years, receiving one thousand dollars a month. Scott called Det. Hough because he had given Hough information about a prior murder. When asked if he was "a member of any police agency," Scott said, "No, no, no, I'm not a police agent." (T.T. 593, 94). In Det. Smith's 3.850 testimony, when asked if the above statement by Scott was a lie, he replied no because it depends on how Scott interpreted "agent." If it meant registered, numbered informant, it was not a lie.

In his 3.850 testimony, Scott stated that at the time of his deposition and trial, he did not have an informant number. Prior to September 1982 he had been paid by Det. Hough on several occasions for giving him information. Det. Hough first used the defendant in 1972 in solving a girl's murder, and in exchange for testimony in that case he got probation in his own robbery case. Scott again stressed that he was never promised anything for his assistance in this case. Scott then explained that his parole

revocation hearing on September 2nd had nothing to do with this case (as is explained above). He was released on ROR because the State charges were dropped and the technical violations which remained were not his fault.

The burning question posed at this juncture is, what did Det. Hough say in *his* pretrial deposition? Had defense counsel been interested in the exact details of Scott's history with Det. Hough, who better than Hough to ask? Scott's answers to Guralnick in the deposition (Scott "helped him out" in prior cases, but it was "*not really* informing on somebody") were definitely ambiguous. Guralnick knew that Scott had a parole hold when he met the Defendant. He could also have asked Det. Smith if he had anything to do with Scott's release from that hold.

ANALYSIS

As for the assistance of Det. Hough and Det. Sapp at Scott's 9/2/82 preliminary hearing, it had nothing whatever to do with the Defendant's case, other than helping to establish that Scott was an informant for Hough. This fact was certainly a poorly guarded secret, as Det. Smith said in his deposition that Scott was an informant for Metro Dade. Scott's deposition testimony confirmed his history with Hough, though Scott shied away from the term informant. If Guralnick was interested in the exact details of the Scott-Hough connection he could have deposed Det. Hough.

As for Det. Sapp speeding along the no action process in Scott's aggravated battery case[6], there is absolutely no evidence that Scott asked that this be done *or even knew it occurred*. All Scott knew was that the case was no actioned because he had talked the victim into not prosecuting. The same is true of Det. Smith's call to the parole authorities in Tallahassee on 9/7/82. There is no evidence, *none*, that Scott was offered assistance in obtaining his ROR release in exchange for his assistance in this case. Additionally, the defense could have asked Det. Smith if he had anything to do with Scott's release from his parole hold. All of the above matters could have been discovered by defense counsel. Finally, they are clearly not material, because they do not establish that any promises or inducements were offered to Scott regarding his ROR release.

As to the prosecutor not correcting Scott's "No, no, no, I'm not an agent" trial testimony, Scott's response was ambiguous, because the question was ambiguous. Giglio hence is not implicated. Additionally, defense counsel had or could have had the details of Scott's prior work for Det. Hough. Finally, the jury heard Scott's lengthy history as a paid informant in

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[6] In his brief the Defendant alleges that the portion of Det. Smith's report (Defendant's exhibit #9) referring to Sapp's efforts was deleted from the copy given to defense counsel. The State cannot verify or dispute this allegation, but it is certainly curious that Defendant's 3.850 counsel did not ask Waksman about this deletion, as he did about others.

prior *unrelated* federal cases. The exact details of his assistance to Hough in prior *unrelated* state cases would not have added anything. Det. Hough had nothing to do with this case, other than that he relayed Scott's call to Det. Smith. Scott stated he called Hough because he had provided Hough with information in a prior murder case. Additional instances of Scott's assistance in prior unrelated cases, whether State or Federal, would not have added anything. This nonsuppressed information thus was also not material under Bagley.

William Farley

William Farley's issues are quite easily dealt with. As for allegations that he was acting as an "agent" when he "elicited" statements from the Defendant at Lake Butler, there is absolutely no evidence of this even from Farley's 3.850 testimony. Farley testified at the hearing, as at trial, that he never asked the Defendant any questions about his case, though the detectives had asked him to do so. Dets. Smith and Hebding testified at the hearing and at trial that they were well aware of the dictates of United States v. Henry, 447 U.S. 264 (1980), and they told Farley he must not ask the Defendant any questions, but rather just keep his ears open and call them if the Defendant said anything about his case. Det. Hebding further testified at the hearing that Farley told them he in fact had *not* asked the Defendant any questions. Det. Smith also testified he had *nothing*

to do with Farley's cell assignments or transfer to Polk C.I.. The trial court found that Farley's 3.850 assertion, that the Detectives told him to question the Defendant, was a fabrication. (R. 8605). End of story.

At the hearing, Farley testified that the detectives and Waksman fed him details of the crime, promised him reward money, and guaranteed they would get him an early parole. Waksman and the detectives denied this, stating the only promise was a letter to the parole board, which they sent in January, 1983. The trial court found Farley's testimony to be a complete fabrication. Id.

As for the "Dear Dave" letters and Waksman's assistance to Farley in his subsequent grand theft case, in Broward County, Waksman explained that the only promise to Farley was the letter to his parole board, which he sent in January, 1983. After the trial he went well beyond that with several of the witnesses. Farley in particular had been physically beaten and had to be kept in a small isolation cell. Perhaps the Defendant's current counsel is unaware that being a witness against a fellow inmate accused of killing a law enforcement officer can make for a hot time in the pokey, which is certainly what occurred here. The trial court credited Waksman's and the detective's testimony that the *only* promise was a letter to the parole board (R. 8605). That Waksman subsequently went the extra mile for Farley (and others, see below) is irrelevant to Farley's motive and bias in testifying.

At trial Farley said he had only one conviction for armed robbery and a probation violation, which resulted in his serving the past eight years in prison, when in fact he had three prior convictions, the other two being burglary and escape. If defense counsel had asked what the probation violation was for, he would have learned it was for the burglary conviction. Trial counsel also either had or could have obtained Farley's rap sheet. It is not the prosecutor's job to impeach its own witnesses. The prosecutor's duty to correct false testimony under Giglio is limited to material falsehoods concerning motive and bias. That is certainly not the case here. Additionally, the discrepancy was immaterial, as the jurors knew Farley was a convicted felon who had violated his probation for a serious crime. Finally, the fact that Farley said at trial that the tape was turned on immediately is totally immaterial, and defense counsel knew or should have known, from deposing Dets. Smith and Hebding, that they had conducted an hour and a half preinterview, as they always do. This point is frivolous.

Larry Hunter

In his affidavit Hunter states the police and Waksman fed him information, promised him reward money and specifically promised him five (5) years probation in his pending cases, including his sexual battery case. Waksman and the detectives

flatly denied these allegations, stating the only promise they made to Hunter was that they would tell the judge in Hunter's case about his assistance (which is the extent of the promise Hunter testified to at trial). The trial court "rejected outright" the allegations in the affidavit.

After trial Waksman asked the prosecutor in Hunter's sexual battery case to ask the victim and his family if they would agree to five (5) years probation with jail time equal to what he had already served, and the victim (and chief assistant George Yoss) agreed. Hunter also pled to other lesser charges, all described fully above, the sentences concurrent to that in the sexual battery case. As a result, Hunter was released on probation two weeks after trial.

Clearly Waksman went to bat in a big way for Hunter after the Defendant's trial was over, however the *only* promise to Hunter, by both Waksman and Det. Smith, was that they would tell the judge in Hunter's case of his assistance. Waksman explained that at the time of trial even he didn't know what he would eventually do for the witnesses. He certainly couldn't have promised Hunter a specific sentence even if he wanted to, because the prosecutor in that case, the victim and his family, and George Yoss would have to approve any plea agreement, as Waksman stated at the hearing.

In sum, the trial court's findings are once again fully supported by the record.

Malcolm Watson

The trial court found that the exact promise to Watson ("if you pass a polygraph that shows you had no gun, we will tell this to the judge who convicted you of armed robbery") was accurately testified to by him at trial. After trial, Watson passed the polygraph (see R. 8483-8488). Waksman and Det. Smith testified at the hearing that they made no promise to Watson of what would happen if Watson passed, other than that they would tell his judge he passed. After trial Watson's attorney filed a 3.850 motion based on newly discovered evidence, which contained a stipulation by Waksman that Watson passed the polygraph showing he did not have a gun when he stole the car from the dealer during a test drive. The conviction was thus reduced to simple robbery, and Watson received, in essence, probation with credit time served. Again, the jury heard exactly what was promised.

The State cannot predict now nor could it have disclosed prior to trial how the inmates interpreted the promises made by Waksman and Det. Smith. All the State can ever do in such a situation is reveal the exact promises it gave. It is up to defense counsel to then ask the witness how he interprets the promise made by the State.

III.

THE DEFENDANT'S SIXTH AMENDMENT RIGHTS UNDER HENRY WERE NOT VIOLATED.

The trial court found this issue was procedurally barred. It would not be barred however if the Defendant had presented credible evidence of a Henry violation that had been withheld by the State, however that certainly is not the case herein.

IV.

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT WAS COMPETENT TO STAND TRIAL.

The trial court, which heard the original trial and thus had the opportunity to observe as well as listen to the Defendant during trial and pretrial proceedings, conducted a lengthy review of the relevant facts and made a factual determination that the State's experts' testimony should be credited, and that their testimony was congruent with the letters the Defendant wrote and the other evidence at trial, as well as his observations of the Defendant throughout the trial proceedings. The State will rely on the trial court's findings and the summary of testimony set forth above. If this Court wishes to observe the distinction between an expert who is in touch with reality and one who is not, it need only contrast Dr. Haber's analysis of the "Bro White" letter with that of Dr. Carbonel. If this court agrees with Dr. Carbonel that the "Bro White" letter could not have been

written by a competent person, then this Court should seriously consider granting relief, because the letter was definitely written by Harry Phillips. The letter is attached to this brief as exhibit "A".

V.

THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM OF INEFFECTIVENESS OF COUNSEL AT THE GUILT PHASE.

In rejecting this claim, the trial court stated:

> Phillips alleges that counsel was ineffective at the guilt or innocence phase for his failure to move to suppress the statements of the jailhouse informants; for his failure to move for a change of venue based on pretrial publicity; for his failure to adequately prepare for trial; and for his failure to employ experts in the area of mental health and firearms. At the evidentiary hearing, evidence was not presented to establish deficient conduct in these areas. Based on this failure, this claim is denied.
>
> (R. 8609).

Counsel was not ineffective for not filing a motion to suppress the Defendant's statements because there was no legal basis for the motion. There is no evidence that any of the witnesses elicited testimony at the State's request, in violation of Henry. Venue was never an issue because the case received a relatively small amount of publicity. The Defendant's

allegations that counsel did not adequately prepare for trial involve trivial points which establish neither deficiency nor prejudice. Counsel did not employ mental health experts at the guilt phase because there were no mental health issues therein, and there was no legitimate issue as to competence. There was also no basis to challenge the State's firearms expert's testimony. In sum, the Defendant's conclusory and totally unsupported allegations were properly rejected by the trial court, as the Defendant fulfilled neither prong of Strickland v. Washington, 466 U.S. 668 (1984).

VI.

THE TRIAL COURT PROPERLY FOUND THE DEFENDANT'S CALDWELL CLAIM TO BE PROCEDURALLY BARRED.

This claim was properly found to be procedurally barred by the trial court. See Dugger v. Adams, 489 U.S. 401 (1989).

VII.

THE TRIAL COURT PROPERLY FOUND THE DEFENDANT'S PENALTY PHASE BURDEN SHIFTING CLAIM WAS PROCEDURALLY BARRED.

This claim is procedurally barred, as found by the trial court. Additionally, the trial court gave the standard instruction which accurately reflects Florida's sentencing scheme.

VIII.

THE TRIAL COURT CORRECTLY FOUND THAT THE DEFENDANT'S CLAIM BASED ON ROSE V. STATE, WAS PROCEDURALLY BARRED.

This claim could and should have been raised on direct appeal, and thus is procedurally barred. Additionally, the jury was specifically instructed that if their vote was six to six, they must return a life recommendation. The dictates of Rose v. State, 425 So.2d 521 (Fla. 1982) were thus not violated.

CONCLUSION

The order of the trial court denying 3.850 relief is proper, and should thus 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 **BILLY NOLAS**, ESQ., P.O. Box 4905, Ocala, Florida 32678-4905 on this 25 day of October, 1991.

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Assistant Attorney General

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