

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC02-105

LOWER TRIBUNAL CASE NO. 93-159-CF-A-MH

RICHARD HENYARD,  
Appellant,

vs.

STATE OF FLORIDA,  
Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT  
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

**REPLY BRIEF OF THE APPELLANT**

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## **PRELIMINARY STATEMENT**

This Reply Brief is filed on behalf of the Appellant, Richard Henyard, in response to the Answer Brief of Appellee, the State of Florida. Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as “R” followed by the appropriate page numbers. The evidentiary hearing transcripts will be referred to as “EH” followed by the appropriate page numbers. Any references to the Appellee’s Answer Brief will be referred to as “the Appellee’s brief” followed by the appropriate page number. All other references will be self-explanatory or otherwise explained.

## ARGUMENT

### **THE EVIDENTIARY COURT ERRED IN NOT GRANTING RELIEF BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE RESULTING IN AN INADEQUATE ADVERSARIAL PROCESS.**

The appellee's characterization of the testimony presented by Mr. Henyard at his post-conviction hearing as being cumulative is simply not true. Cumulative or corroborative testimony would be, for example, the individual statements of ten different people who were sitting in the bleachers of the football stadium; each of whom when call to the witness stand declared under oath that it was player number 47 who intercepted the pass and carried the ball across the goal line to score the winning touchdown. In that context, the testimony of one witness is essentially the repetitious or duplicate testimony of every other witness with regard to the issue of which player scored the winning touchdown. That kind of redundant testimony might very well be fairly characterized as cumulative evidence or cumulative testimony.

If, however, the purpose of their testimony was to construct a portrait which reflected a full and fair exposition of number 47's background and character as a uniquely individual human being, then the testimony of those ten witnesses about what they had observed of number 47's background and character when they were alone with him and not in the presence of the other witnesses is in no way cumulative or

reduplicative of the testimony of the other witnesses. To the extent that each new witness has something unique to say about the defendant's background which was not said by one of the previous witnesses, then *that* witnesses' testimonial evidence is not cumulative. *See: Delgado v. Allstate Insurance Co.*, 731 So.2d 11, 16 (Fla. 4<sup>th</sup> DCA 1999)(a civil case where the appellate court held, as a matter of law, that the testimonial evidence of a successive witness is not cumulative to that of a previous witness if "his evidence was based *in part* on the same facts and evidence as the first's but also *in part on new facts and evidence.*"; *Edwards v. State*, 414 So.2d 1174, 1175 (Fla. 5<sup>th</sup> DCA 1982) (a case involving multiple photographs of a murder victim wherein the court held that "each photograph depicted something different, so it cannot be said that they were merely cumulative."); *Land v. State*, 156 So.2d 8, 12 (Fla. 1963)(another murder case where the court approved the testimony of the witness who had discovered the body in addition to the testimony of two physicians who had subsequently arrived at the scene. "[The witness's testimony] was significantly different from that of the physicians in that it described the scene of the crime and the attending circumstances and was not objectionable as cumulative.")

It is axiomatic that a full and fair exposition of a defendant's background at the sentencing hearing is crucially important to effectuate the principle that "punishment should be directly related to the personal culpability of the criminal defendant. If the

sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

Like a compilation of stories which, when gathered together, make up a biography of a person's life, each witnesses' mitigation testimony (or story) contributes a unique "tile" or perspective to the mosaic of number 47's life. "A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone not only destroys the whole, but gives the strand itself a false value." Judge Learned Hand, Proceedings In Memory of Mr. Justice Brandeis, 317 U.S. XI (1942).

To advance Judge Learned Hand's metaphor just a little bit further, in the context of a penalty phase hearing, the Constitution guarantees that the defendant shall be permitted to interweave for the jury's consideration those unique threads of testimony about his life and background which are brought forward by each of the mitigation witnesses he calls forth to testify in his behalf. In a case where a man's life hangs in the balance, the testimony of one witness about one small incident in the

defendant's background can very easily make the difference in the mind of the jury between recommending life in prison or recommending death. Each new witness he brings forward to testify in his behalf moves the jury closer to the crucial "tipping point" between life in prison or death.

In a murder prosecution, especially one where the facts surrounding the homicides are as shocking as they are in this particular case, the facts themselves do double duty merely by their presentation to the jury. On the one hand they establish the grim details of what actually occurred "out on the street"; and on the other hand they concurrently establish the aggravating factors necessary for imposing the death penalty. That is certainly true in the case *sub judice*. In a situation where the defendant has a "death qualified" jury hearing his case (and what capital defendant *doesn't* have such a jury?), it takes little imagination to conclude that in the mind of that kind of a jury, an "eye for an eye" sentence of death is the default position they will be predisposed to take with regard to the appropriate punishment for the acts they have just had shown to them in lurid detail by the prosecution.

Look at the situation from the jury's perspective at the penalty phase. The prosecution has just recently laid out before it in horrific detail the facts surrounding the crime (complete with color photographs of the deceased victims) in sufficient detail for the jury to have determined beyond a reasonable doubt that the defendant

seated over there across the room beside his attorney is the person responsible for having committing the appalling acts depicted in the photographs. The prevailing emotions roiling through each juror after having freshly seen this evidence cannot help but be either righteous anger toward the defendant for having done what he did; or fear that he might do it again to someone else were he to ever be let out of prison.

At this stage of the proceeding, as the twelve jurors sit arms crossed in the jury box, the defense attorney is duty bound to stand up before them and try to overcome the state's already twice proven aggravating factors. I say "twice proven" because the state is permitted to, in effect, present its evidence twice. The first time during the guilt phase to establish guilt or innocence; and following that, the state yet again gets to present (or at least comment upon) that self-same evidence a second time during the penalty phase in order to argue that this or that specific circumstance surrounding the crime qualifies as an aggravating factor.

In the instant case, the jury found four aggravating circumstances, three of which required a second run through of the evidence that had just been presented during the penalty phase. Those three factors were that the murders were: (1) committed in the course of a kidnaping, (2) committed for pecuniary gain; (3) were especially heinous, atrocious or cruel. Although such a review of the evidence may be necessary in order to ascertain whether the statutory aggravating factors apply, the

accompanying consequence of such a cumulative review is to reinforce an already death qualified jury's moral and emotional revulsion toward "anybody who could do something like this."

To understate the obvious, given the facts of this case, the defense had an almost insurmountable obstacle to overcome during the penalty phase. That is the precise reason why it was so critically important in this case that *every* avenue of investigation which could have *reasonably* been pursued prior to trial should have been pursued. "[A]n attorney has a strict duty to conduct a *reasonable investigation* of a defendant's background for possible mitigating evidence. (Citations omitted) The failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so." State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000). (Emphasis added).

In a case such as this one where the facts surrounding the homicides were so obviously shocking to the conscience of the jury, *any* small thread of mitigating testimony that was available to be discovered and knitted together with other small threads of testimony into a coherent defense should have been discovered and presented as a component of the overall defense to the jury. This case was a model of what a "brick by brick" (or "woven thread by woven thread") mitigation defense should have looked like – and would have looked like -- if the trial attorneys had

conducted a *reasonable investigation* prior to trial.

The right to present those intertwining threads of mitigating evidence which are not explicitly set forth in the death penalty sentencing statute should be broadly and generously construed, regardless of how large or how small the differences in the individual accounts may at first blush seem to be. The rule of lenity which mandates that penal statutes must be strictly construed in favor of the defendant (section 775.021(1), Florida Statutes) applies to with equal force to the sentencing guidelines. Flowers v. State, 586 So.2d 1058 (Fla. 1991).

The constitutional guarantee to present non-statutory mitigation evidence has been codified in section 921.141(6)(h), Florida Statutes. That section of the statute is very broad and expansive with respect to what factors may be introduced to the jury at the sentencing hearing as mitigating evidence. The statute provides that a defendant *shall* be permitted to introduce into evidence “*any*. . . factor in the defendant’s background that would mitigate against imposition of the death penalty.”

This statutory provision stands in marked contrast to Section 921,141(5) Florida Statutes which is highly restrictive as to what evidence may or may not be introduced to the jury as an aggravating circumstance. In other words, the sentencing statute permits the defendant to weave an intricate tapestry of mitigation testimony for the jury’s consideration in order to counterbalance the prosecution’s invariable stratagem

of holding up an individual strand or two of this or that statutory aggravating factor; and reprovably arguing that these individual threads of evidence standing alone are sufficient in and of themselves to represent the whole person of the defendant for purposes of condemning him to death.

In support of its claim that the testimony the defense presented at the post-conviction hearing was merely cumulative, the appellee has expressed the opinion that the testimony of each of the witnesses *not* called by the defense during the penalty phase was, in essence, a carbon copy of every other witnesses' testimony. But again, this unsupported assertion of the appellee, beside being untrue, misses the critical point.

To take another example, suppose our ten people were called to the witness stand and each person's testimony consisted of little more than the bald assertion that the defendant experienced a deprived childhood. Well, if *that* broad and conclusory statement alone was the extent of each witnesses' testimony, then yes, their testimony *would* be cumulative and the appellee's assertion would be well taken.<sup>1</sup>

Quite obviously some of the testimony of the mitigation witnesses which was

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<sup>1</sup>In fact, the appellee is demonstrating that very form of reductionism on page 11 of its brief to this court. By dismissively reducing the defendant's mitigation testimony to a string of simple one liners and then listing them in bullet form in its brief, the appellee is in effect *sub silentio* asking this court to give the defendant's all important life or death evidence a short shrift and let's move on to the hanging.

presented at the evidentiary hearing is similar in several respects. But, it is the dissimilarities in the testimony that are important. As was implicitly argued above, what is far more important than the ultimately shared conclusion itself (e.g., that the defendant experienced a deprived childhood) are the facts (i.e., the stories) from which the witnesses' shared conclusion is derived. The descent from the abstract to the particular is what is important in the mitigation phase of the sentencing hearing.

In that respect, as the popular saying goes, even though "all roads lead to Rome," each witnesses' "road" is – to a greater or lesser degree – distinct from every other witnesses' "road." It is the recounting of each individual's distinct and nuanced story to the jury that is important to a full and proper understanding of the those mitigating factors in the defendant's background which are germane to a proper determination as to whether or not the jury should recommend for or against the imposition of the death penalty.

Let us begin with the testimony of Lula Bell Davis. (EH-25) Mrs. Davis testified that she has known the defendant since he was six or seven years of age. She stated that he had "a rough time" as a child because he "didn't have nobody to see after him"; and often didn't have anything to eat. (EH-29) She said that because of his mother's neglect, people were "always trying to give him something to eat or do something for him, different people where he go around." (EH-31) His mother died of

AIDS. (EH-32) No one from the public defender's office ever contacted Mrs. Davis about testifying. (EH-32)

Another witness not called at the penalty phase, Angelette Wiley, testified that she had known Richard Henyard all his life and that he was "terrified" by the fact that his mother was bisexual and had had affairs with other women as well as with men. (EH-79) As a result of his mother's sexual orientation, she said, the other kids in the neighborhood treated him differently by "picking on him" and beating him up. (EH-79) Finally, Mrs. Wiley told the court that he had been raped as a child by a man named Bruce Kyle. (EH-80-81) She was never called to testify as a mitigation witness by the public defender's office. (EH-81)

Another woman named Jacqueline Turner was called to testify at the post-conviction hearing. Mrs. Turner stated that she had gotten possession of the defendant to raise when he was an infant ten months of age; and that it was she who raised him at least 50% of the time for the first two years of his life because his mother was an alcoholic crack addict (EH-49) and never came to see him during this time. (EH-43-44) She told the court that as compared to other children his age, he was a very irritable and hyperactive child when he was young; and cried all the time because of a rash which itched very much. (EH-48) He also tried to set fire to her house two times when he was seven years of age. (EH-50)

Mrs. Turner testified that the defendant went out of town to live with his father when he was ten years of age and returned to the old neighborhood to live permanently when he was fifteen. (EH-51 & 54) She kept in touch with him when he was living with his father and was called by him more than once to come get him because his father had put him out and he was living in an abandoned house. The defendant moved back in with Mrs. Turner at age fifteen. (EH-53-54)

The most critical witness called by collateral counsel at the 3.850 evidentiary hearing, but not called at the sentencing hearing, was Rosa Lee Adams. It was she who revealed the ten foot elephant standing in the corner of this case that was overlooked by the defense. Mrs. Adams was, of course, one of the witnesses who would have testified in Mr. Henyard's behalf at the mitigation part of the penalty phase if she had been called upon to do so by the defense. Mrs. Adams testified at the evidentiary hearing that she had known the defendant since he was a little boy three years of age. The child's mother had admitted to her that she used drugs every day. (EH-25) When asked if she had had the opportunity to observe how the child was raised by his mother, she responded that "[S]he didn't do too much raising. . . . his mother was on drugs bad, and everybody [in the neighborhood] was getting him, carrying him to their house, because the little fellow don't [sic] know what mother's love is." (EH-11) The little boy she knew was oft times abandoned by his mother at

a very tender age and left to fend for himself for long periods of time.

Under Florida law, “abandonment” means “a situation in which the parent ... of a child, while being able, makes no provisions for the child’s support and makes no effort to communicate with the child, which situation is sufficient to evidence a willful rejection of parental obligations.” Section 39.01(1), Florida Statutes (2002).

She characterized the defendant’s young life in almost Dickensonian terms as being that of a wandering and itinerant little street urchin, a “door to door child,” who was dependant upon the kindness of strangers for his daily upbringing and sustenance. (EH-10) She told the court that his mother did not feed him; and that she had often taken it upon herself to do so. (EH-11-12) The child’s mother was “in the streets all the time and different people would get him [to care for, shelter, and feed] . . . because his mother neglected him.” (EH-12 & 15) Among the people who took in the child to raise was Mrs. Adams’ daughter-in-law. (EH-13)

Mrs. Adams’ most significant testimony was her revelation that the defendant was affirmatively taught criminal behavior from an early age by an adult named Jackie Turner. According to the testimony of Mrs. Adams, Jackie Turner was a neighborhood woman whose practice it was to take young children such as the defendant into her home and teach them how to steal for her. (EH-14 & 19)

It is, one could suppose, a form of irony that as a result of the defense

counsel's failure to interview Rosa Adams at the trial level, Jackie Turner, the one person who was the most responsible for the defendant growing up as he did, was called as a mitigation witness during this 3.850 proceeding. Had the defense interviewed Mrs. Adams in its trial preparation in the defendant's behalf, an entirely new avenue of understanding would have been opened for the jury's consideration in mitigation of Mr. Henyard's death sentence.

What was done to Richard Henyard as a child by the actions of Jackie Turner alone was enough to legally establish that Richard was an abused child growing up. "Abuse" mean any willful act . . . that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions." Section 39.01(2), Florida Statutes (2002).

It takes little to no imagination at all to recognize that a youngster who was tutored in sociopathic behavior from early childhood by an adult authority figure will be significantly harmed, both mentally and emotionally, for the rest of his life. Those moral stops and inhibitions against lawlessness and anti-social behavior which are ordinarily inculcated into most of us from an early age in the normal course of a normal upbringing by our parents are largely lacking in persons such as the defendant. For such a person, because of his sociopathic upbringing, the capacity to appreciate

the criminality of his conduct and to conform his conduct to the requirements of law is substantially impaired.

In an environmental subculture where lawless behavior is regarded as the norm, it is exceedingly difficult for a youngster raised in such an environment of criminality to “go straight” later in life. The mores, patterns of thought, and behaviors learned and ingrained in him at an early age are all but impossible to fully transcend later in life.

This is most especially so in a person who, like the defendant, has a below average IQ. (R-2310) Such a disability renders this type of an individual ill equipped to discern later in life as he matures into adulthood that he must repudiate what had heretofore been his life’s guiding principles because they are immoral, illegal, anti-social and unacceptable to the greater society. For such a person to undo the pathological socialization he received as a small child is all but impossible. To paraphrase another popular saying, “as the twig is bent, so grows the tree.” The defendant was morally crippled early in life by circumstances completely beyond his control; and by a person from whom his very living depended for much of his young life. The defendant simply did not have the moral capacity, nor the intellectual ability, to fully conform his conduct to the norms of society as did those of us more fortunate and less disadvantaged than he in our upbringing.

Not to place too fine a point on the matter, but Mr. Henyard’s situation is

roughly analogous to that of a Peruvian Indian who grew up in a culture where the use of coca leaves is an accepted practice for use in overcoming the effects of living at high altitudes; and whereupon coming to the United States is told that he must henceforth forgo the use of coca products because such use is illegal and unacceptable in American society. Even though our Peruvian visitor might be able to comprehend the legal prohibition against coca use at an intellectual level, in his “heart of hearts” he would *really* not be able to appreciate the criminality of such conduct; and would see nothing wrong with a practice he had engaged in since he was a small child, *regardless* of his knowledge that such practices are considered illegal in the United States. As a consequence of these beliefs, his internal inhibitions against indulging himself in coca-leaf chewing would be minimal at best.

Quite obviously his background of coca use would not constitute a defense were he to one day yield to his habit while in the United States and be arrested for possession of a controlled substance. It would, however, more than certainly provide the jury with a compelling mitigating circumstance to consider in arriving at a proper sentence. This is assuming, of course, that his trial attorney conducted a reasonable investigation of his client’s background and discovered this critical component of his upbringing; and assuming further that the attorney thereafter placed evidence of the discover before the jury for its consideration.

It hardly needs to be said that the foregoing argument is the type of argument which should have been made (and could have been made) by Dr. Toomer, the defense psychologist, if he had been given Mrs. Adams's name prior to trial as someone to interview who was intimately familiar with Mr. Henyard's background growing up. But, of course, her name was *not* provided to him.

The United States Supreme Court recognized the importance of psychiatric testimony in Ake v. Oklahoma, 470 U.S. 68, 80; 82 (1985) when it said:

[T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, ***psychiatrists gather facts, through professional examinations, interviews, and elsewhere, that they will share with the judge or jury***; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have been affected his behavior at the time in question. . . . ***[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect.*** (Emphasis added)

In any case, Mrs. Adams testified that no one from the defense team ever contacted her about testifying at trial. (EH-16) If she *had* been contacted she would have told trial counsel and Dr. Toomer about the defendant's years of living with Jackie Turner. Had the defense know "the rest of the story" surrounding the defendant's life with Jackie Turner a whole new theory of mitigation would have been possible for them to argue; and if the sentencing jury had heard the story, a whole new

understanding of the defendant's formative years would have been available for them to consider in mitigation. According to Jackie Turner's own testimony, the defendant lived with her on a regular basis until he was ten or eleven years of age and then again when he was fifteen. (EH-44-47;51) In other words, he was hers to mold and control during the formative years of his life.

It is well-settled that "an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Middleton v. Dugger, 849 F.2d 491,493 (11<sup>th</sup> Cir. 1988); Ragsdale v. State, 798 So.2d 713 (Fla. 2001).

In Gudinas v. State, 816 So.2d 1095, 1104 (Fla. 2002) this court quoted with approval the 11<sup>th</sup> Circuit's analysis in Middleton for determining whether trial counsel's failure to investigate and present mitigating evidence was deficient. The court stated:

*First*, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a *harmlessness review* must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered *actual prejudice* due to the ineffectiveness of his trial counsel before

relief will be granted.

In the case *sub judice*, if a *reasonable investigation* had been conducted such an investigation should have found Mrs. Adams as easily as it found the other neighborhood witness called by the defense to testify. But such an investigation was *not* conducted. The failure to present this woman's vital testimony to the jury at the penalty phase of the trial was not a tactical decision based upon what she might or might not have to say, but a failure of the defense team's investigation to even discover that she existed. In the language of the above analysis, the failure was due to an oversight.

In the context of a Rule 3.850 post-conviction proceeding which is being held to establish the ineffectiveness of trial counsel, the harmless error analysis more commonly seen in the ordinary practice of criminal law where the State must establish that improperly admitted evidence is harmless beyond a reasonable doubt is stood on its head. One is the mirror image of the other. “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24 (1967). “An error is harmless if, ‘there is no reasonable possibility that the error contributed to the conviction.’ State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).” Johnson v. State, 833 So.2d 252, 255 (Fla. 4<sup>th</sup> DCA 2002).

In a post-conviction proceeding concerning the penalty phase performance of trial counsel, a harmless error analysis is an inquiry into whether the mitigation evidence *not* presented to the jury was such that had it *been* presented it would have probably outweighed the aggravating evidence presented by the prosecution; and, consequently, the defendant would have probably received a sentence of life imprisonment rather than death. Rose v. State, 675 So.2d 567 (Fla. 1996). Stated in the obverse, *harmful* error is that mitigation testimony *not* presented at the penalty phase because of trial counsel's failure to discover it through a *reasonable investigation*; and which, if presented to the jury, would have created a significant possibility that the jury would have recommended life imprisonment rather than death. Although this burden is not *quite* the same thing as trying to prove a negative, it is in the ballpark.

It should be mentioned here parenthetically that in making its plenary review of this case, the court is not making a judgment concerning whether the testimony not presented is "more likely than not" to have swayed the jury one way or the other. That standard is too high. As this court noted in Gaskin v. State, 822 So.2d 1243, 1247 n.3 (Fla. 2002): "It is important to note that the reasonable probability language used herein is not synonymous with the 'more likely than not' standard invoked when a defendant asserts entitlement to a new trial on the basis of newly discovered evidence. In rejecting the higher standard placed on newly discovered evidence cases, the

Strickland court explained, “[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” In analyzing this test, Justice Souter explained that the shorthand term “reasonable probability” in a post-conviction proceeding means “a significant possibility.” Strickler v. Greene, 527 U.S. 263, 298 (1999)(Souter, J., concurring in part and dissenting in part).<sup>2</sup>

Reduced to its simplest terms, the question this court must answer is whether the mitigating testimony of Rosa Adams (had it been available through a *reasonable investigation* for the jury’s consideration) could have reasonably cast the penalty phase of the trial in such a different light as to undermine this court’s confidence that the sentence of death was the appropriate penalty. I submit to the court that if such critical testimony concerning the defendant’s upbringing had been brought to the jury’s attention the only reasonable answer to that question is: “Yes. If the jury had know the full circumstances of the defendant’s upbringing it probably would have

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<sup>2</sup>“The Court rightly cautions that the standard intended by these words [reasonable probability] does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. (Citation omitted) Instead, the Court restates the question (as I have done elsewhere) as whether “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence” in the outcome. . .

I think “significant possibility” would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.” Id. at 298-299.

recommended life imprisonment rather than the death penalty.”

**CONCLUSION AND RELIEF SOUGHT**

Based upon the above and foregoing argument and authorities, as well as those contained in the appellant’s Initial Brief, this court should VACATE the appellant’s sentence of death and REMAND the case for such further relief as the Court deems proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, Concourse Central 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013; and Richard Henyard, DOC #225727, P1220S, Union Correctional Institution, 7819 NW 228<sup>th</sup> Street, Raiford, Florida 32026, on this \_\_\_\_ day of May, 2003.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Reply Brief of Appellant was generated in Times New Roman 14-point font pursuant to Fla.R.App.P. 9.210.

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