

HARRIS, Bobby Lee
THE BROAD SCOPE AND VITAL ROLE
OF GUBERNATORIAL CLEMENCY IN NORTH CAROLINA

The most difficult and trying task confronting the executive is a judicious and proper exercise of the pardoning power.

XGovernor Carr (chief executive from 1893-1896)

As Attorney General of the State I prosecuted every criminal case that came before the Supreme Court in eight years. In the exercise of almost God-like power granted me by the constitution I have not been guided by impulse, by caprice or sentimentalism, but in every case I have put to my soul the question, "Is this man worth saving, and is it possible to save him without hurt to society at large?"

XGovernor Bickett (chief executive from 1917-1920)

It has been my practice to review personally all death cases. The condemned is permitted to make personal appearances and frequently does so.

XGovernor Erhinghaus (chief executive from 1933-1937)

The courts of our state and nation exercise in the name of the people the powers of administration of justice. The Executive is charged with the exercise in the name of the people of an equally important attitude of a healthy society — that of mercy beyond the strict framework of the law.

The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation.

To decide when and where such mercy should be extended is a decision which must be made by the Executive. It cannot be delegated even in part to anyone else, and thus the decision is a lonely one.

It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.

I fully realize that reasonable men hold strong feelings on both sides of every case where executive clemency is indicated. I accepted the responsibility of being Governor, however, and I will not shy away from the responsibility of exercising the power of executive clemency.

Messages, Addresses and Public Papers of Governor Terry Sanford, 1961-1965, 552
(M.F. Mitchell, ed. 1996).

WHY BOBBY LEE HARRIS SHOULD NOT BE EXECUTED

- ≤ **The facts of the case do not support the harsh sanction of death.** The evidence of planning was so weak in this case that two of the justices who reviewed this case voted to vacate the death sentence as disproportionate and to impose a life sentence. Not only was the evidence of premeditation and deliberation weak, there was substantial evidence presented at trial that Harris was remorseful about his actions and that he took steps to assist the victim.
- ≤ **Bobby Lee Harris did not receive adequate representation at his trial and sentencing hearing.** Lead counsel was dying of bone marrow cancer and was in extreme pain during the trial. He suffered from mental confusion as a result of his illness and was forced to withdraw from representation prior to the sentencing hearing. Second counsel, who had been out of law school only three years and had never handled a capital case, was not in a position to compensate for lead counsel's failings. Nor was substitute counsel able to prepare adequately for the sentencing hearing in the short time allowed by the trial judge.
- ≤ **The death sentence for Bobby Lee Harris is disproportionate and capricious.** Joseph Simpson planned the robbery of the victim, urged Harris to attack the victim, and then masterminded the robbery and getaway. Both Harris and Simpson were charged with first degree murder. However, despite the presence of clear evidence of Simpson's guilt of first degree felony murder and evidence that Simpson had lied to law enforcement authorities, the State offered a plea bargain to Simpson whereby the murder charge was dropped. Simpson is expected to be released in August of 2006. Meanwhile, Harris, the more inebricated of the two, the one with the low intellect, the one who ultimately took responsibility for his actions, confessed, and expressed genuine remorse, faces execution. The disparity between the punishments meted out to Simpson and Harris warrants executive clemency.
- ≤ **There would have been no murder if the hospital had given proper care to the victim.** The victim lived for more than 12 hours after Simpson and Harris attacked and robbed him. When the victim reached the hospital, medical personnel failed to appreciate a number of significant aspects of the victim's condition. As a consequence, proper treatment was not rendered. Had the victim received proper care, it is likely he would not have died.
- ≤ **Jurors who served on Bobby Lee Harris's case no longer support the death sentence.** Jurors who sentenced Harris to death support gubernatorial commutation of his death sentence to life without parole. Moreover, if life without parole had been an option at the time of trial, the jurors would not have voted for the death penalty in the first place.
- ≤ **Bobby Lee Harris has consistently accepted responsibility and expressed remorse for his crimes.** This is not a case of a cold-hearted killer with no hope

of redemption. Immediately upon learning that the victim had died, Harris decided to commit suicide. When no weapon was available, he decided to turn himself in. He gave law enforcement authorities a complete and truthful account of what happened and tearfully expressed regret for his actions.

≡ **Bobby Lee Harris has a number of mental health problems.** Harris suffers from severe chronic depression and, at the time of the offense, this illness was untreated. In addition, Harris has suffered from alcohol and crack cocaine addiction since he was an adolescent. He was first hospitalized for substance abuse problems at age 13. Just prior to the offense, Harris was involuntarily committed to a substance abuse treatment facility for in-patient care. After he was released, Harris did not receive appropriate follow-up treatment, and he committed the offense shortly thereafter. Harris was intoxicated at the time of the offense. Finally, Harris has consistently scored in the low 70's on I.Q. tests; this score means he is borderline mentally retarded. The jury that sentenced Harris to death did not know about his depression or low I.Q. Harris's depression, low intellect, and addiction made him particularly susceptible to manipulation by the man who planned the offense, Joseph Simpson.

≡ **Bobby Lee Harris does not present a danger in prison.** In the eight years since he was incarcerated for this crime, Harris has had no disciplinary infractions. (In contrast, his codefendant Joseph Simpson has committed eight infractions X approximately one per year X while incarcerated.) In light of Harris's conduct while incarcerated, a sentence of life imprisonment without parole adequately serves society's interest in just punishment and protection of the public.

≡ **Racial bias may have affected the prosecution of Bobby Lee Harris.** Since reinstatement of the death penalty, North Carolina has executed 16 people. All but one of these individuals was executed for killing white victims. The execution of Bobby Lee Harris for the killing of a white victim would perpetuate the long tradition of punishing the killings of white people more harshly than the killings of people of color. A Legislative Study Commission of the N.C. General Assembly has endorsed legislation to eliminate racial bias in capital sentencing. The Commission has also recommended a moratorium on executions pending further legislative action. The University of North Carolina at Chapel Hill is presently reviewing the effect of racial bias in capital sentencing; the U.N.C. study is expected to be completed in February. In light of these developments, the Governor should grant, at a minimum, a reprieve, so that the General Assembly might have an opportunity to complete its work.

≡ **Bobby Lee Harris's case did not receive full and fair review in court.** The state and federal courts refused to address numerous meritorious issues in Harris's case because his attorneys did not comply with state procedures governing the presentation of post-conviction claims. Most disturbingly, no court has ever held a hearing on the adequacy of Harris's trial counsel, despite the opinion of a

number of respected criminal defense attorneys that trial counsels' representation fell below the standards guaranteed by the state and federal constitutions.

WHY THE DEATH SENTENCE IS DISPROPORTIONATE IN THIS CASE

Since reinstatement of the death penalty, North Carolina juries have sentenced more than 300 people to death. At present there are 215 men and women on death row. In only 15 cases have members of the North Carolina Supreme Court questioned the proportionality of the death sentence duly imposed by a jury. In seven cases, the Court vacated the death sentence and imposed a life sentence. In eight other cases, one or more justices dissented on the grounds of proportionality.

Since 1988, no death sentence has been vacated as disproportionate. However, in 1994, former Chief Justices Exum and Frye dissented to the proportionality of the death penalty in Bobby Lee Harris's case.

Documents attached to this Petition, including the opinion of the majority and dissent of the Supreme Court of North Carolina, Harris's confession, allocution, and account of the offense given to a psychiatrist, all demonstrate that the death sentence is disproportionate in this case and that a sentence of life without parole should be imposed.¹ These documents show the following:

The facts of the case establish a substantial question as to whether Harris planned the killing. Former N.C. Supreme Court Chief Justices Exum and Frye believed that there was "barely enough evidence in the guilt phase to carry the question of premeditation and deliberation to the jury. The fatal stabbing was not planned but took place on the spur of the moment." In addition, after the stabbing occurred, Harris and Simpson "took measures which they thought might save Redd's life. They assisted Redd after the stabbing and left him alive in a place where he might be rescued. Redd was, in fact, rescued alive, and he lived for almost twenty-four hours" after the stabbing.

The State's evidence shows that Harris took responsibility for his actions. Harris voluntarily surrendered himself and gave a full confession to law enforcement authorities. His confession was the principal evidence against him at trial. Had Harris not confessed, the State surely could not have secured his death sentence. Indeed, Harris's codefendant Simpson likely obtained such a favorable plea bargain because he did not confess and did not take responsibility for his role in the killing.

Harris expressed remorse. The death penalty should be reserved for cold-hearted killers, not for prisoners like Harris who have accepted responsibility and expressed regret for their actions.

The jury found a number of mitigating factors. These included the fact that Harris's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The jury also found that Harris had acknowledged his guilt to law enforcement officers; he took responsibility for the killing

¹ In addition, the affidavit of Dr. Joseph A. Moylan provides further evidence that Harris did not intend to kill the victim. Also attached to the Petition are affidavits from jurors attesting to their belief that life imprisonment without parole is the appropriate punishment in this case.

and did not try to minimize his culpability; after the arrest, Harris freely and knowingly waived his constitutional right to remain silent and to have an attorney, and he confessed; his confession was consistent with the evidence uncovered by the sheriff's department in the course of its investigation; Harris is a product of a dysfunctional home environment; he experienced repeated violence in the form of verbal abuse, physical abuse and emotional abuse during childhood; and Harris suffered from continual alcohol and drug abuse from an early age.

The dissent compared this case to others in which a life sentence had been imposed and found that Bobby Harris was even less deserving of the death penalty. In this case, Harris "only planned to rob the victim. It was only after an argument and the consumption of alcohol that the robbery escalated into murder." Harris "also made some attempt to assist the victim after the stabbing." In addition, he "turned himself in to the authorities and took responsibility for his actions." The dissent concluded the evidence in the case showed that "this murder does not rise to the level of egregiousness present in those cases in which juries have returned, and we have affirmed, death sentences. Considering both the crime and the defendant, this case is more like murder cases in which life imprisonment has been imposed."

BOBBY LEE HARRIS'S TRIAL ATTORNEY WAS TOO ILL TO PERFORM AS CONSTITUTIONALLY ADEQUATE COUNSEL

North Carolina law requires that a person facing the death penalty be represented by two attorneys. In Bobby Lee Harris's case, these statutory and constitutional mandates were, for all practical purposes, unfulfilled. Lead counsel was suffering from multiple myeloma, a severe bone marrow cancer that hindered his performance. Second counsel had been out of law school just three years and had never handled a capital case.

The following facts illustrate the effect of lead counsel's fatal illness on his performance and the inability of second counsel to compensate for lead counsel's mistakes.²

- ≤ At the beginning of trial, during jury selection, lead counsel confided to second counsel and to others that he was in physical pain whenever he moved.
- ≤ At least three times during the trial, the court had to interrupt proceedings in order to permit lead counsel to see a doctor about his ongoing, severe pain.
- ≤ Throughout the trial, lead counsel used prescription-strength painkillers.
- ≤ Throughout the trial, lead counsel experienced difficulty sleeping. He required assistance in climbing the stairs to go to bed at night.
- ≤ During the trial, lead counsel told second counsel that lead counsel's doctor believed he had elevated calcium levels and that as a result he might be experiencing mental confusion.
- ≤ During jury selection, the trial judge asked lead counsel to ask questions of the jury panel as a whole. Lead counsel replied that he could not keep track of the answers unless he questioned jurors individually.
- ≤ Harris grew concerned about lead counsel's condition and, on at least one occasion during trial, expressed his concern to second counsel.
- ≤ Second counsel observed the effects of lead counsel's pain and believed that lead counsel's illness adversely affected his trial preparation and presentation in court. In particular, second counsel believed that the case went to trial without adequate investigation and preparation.
- ≤ On one occasion, second counsel and lead counsel had a heated discussion about lead counsel's erratic decision making in the case and the harmful effects of lead

² Attached to this Petition are transcript excerpts, an affidavit from second counsel Charles Medlin, and the motion for appropriate relief and supporting affidavits filed after the trial and prior to the sentencing hearing. These documents show that lead counsel was suffering from a fatal illness that rendered his performance inadequate under constitutional standards.

counsel's actions on the defense. Second counsel was moved to ask lead counsel, "Whose side are you on?"

- ≤ Harris was convicted of first degree murder on May 14, 1992. Four days later, second counsel asked the trial court for a continuance of the sentencing hearing because lead counsel had been admitted to Memorial Hospital in Chapel Hill.
- ≤ Lead counsel was subsequently diagnosed with multiple myeloma.
- ≤ After lead counsel was removed from the case, second counsel consulted with a number of respected criminal defense attorneys in North Carolina concerning lead counsel's performance. These attorneys uniformly concluded that lead counsel's representation of Bobby Lee Harris fell below the standards required by the state and federal constitutions. No court has ever held a hearing on trial counsel's performance.

**THE DISPARATE TREATMENT OF BOBBY LEE HARRIS
AND HIS CODEFENDANT, JOSEPH SIMPSON WEIGHS
IN FAVOR OF IMPOSING A SENTENCE OF LIFE WITHOUT PAROLE**

Joseph Simpson and Bobby Lee Harris were both arrested for the murder of John Redd. Both were charged with robbery and murder. Harris gave a full confession and took responsibility for his actions. A jury later found that Harris's confession was consistent with other evidence gathered during the course of the police investigation. Simpson did not confess or accept responsibility. Instead, he tried to persuade law enforcement authorities that Harris had threatened him and coerced him into participating in the offense. The prosecution investigated Simpson's claim and found it to lack any credibility.

Harris was convicted of first degree murder and sentenced to death. Although clearly guilty of first degree felony murder, and despite his dishonesty with law enforcement authorities, Simpson was allowed to plead guilty to lesser offenses. The murder charge was dropped and Simpson's projected release date from prison, according to Department of Corrections records, is August 2006.

The disparity in treatment of these two men is all the more shocking when one realizes that Simpson took the lead in planning this crime and bullied Harris into killing the victim. Simpson took charge of their getaway and lied to a law enforcement officer. It was Simpson who decided to steal additional items from the victim. In addition, while Harris was under the influence of crack cocaine, Simpson, whose mind was not clouded by crack, masterminded their flight to another state.

Harris's confession X upon which the State relied in prosecuting Harris for his life, and which the jury found to be consistent with the other evidence presented X shows plainly that Harris and Simpson both had substantial responsibility for the victim's death. In light of these facts, it would be a manifest miscarriage of justice to permit the execution of Harris.

The following facts about the crime illustrate the similar culpability of Harris and Simpson. Page references are to Harris's confession of August 27, 1991.³

- ≤ Both Simpson and Harris planned the robbery. [2] They never planned to kill. [4] The original plan was to tie up the victim, take his money and truck, and somebody else would find the victim later. [8]
- ≤ Simpson was the one who first suggested stealing the truck that night. [3]

³ Harris also gave an account of the offense and the events leading up to it to a psychologist. This account, attached to this Petition, is consistent with his confession to police authorities. In addition, documents related to Simpson's plea agreement, the report of law enforcement authorities who investigated Simpson's claim of coercion, and a transcript excerpt reflecting the prosecution's rejection of this claim are attached to this Petition.

- ≤ Simpson came up with the plan on how to steal the truck. [3]
- ≤ At one point, Simpson suggested they tie up the victim, throw him off the boat, and take his money. [3]
- ≤ The victim got upset and began yelling at Harris and Simpson after they dropped a net incorrectly. [3]
- ≤ Simpson got into an argument with the victim just before the stabbing. [4] Every time the victim turned his back, Simpson motioned to Harris to attack the victim. [10] Harris did not want to stab the victim. [10] He did not have the courage to do it. [10] Simpson then lit a cigarette and waived it in front of Harris's face, motioning him to stab Simpson. [10]
- ≤ On account of Simpson's urgings and the victim's yelling, Harris "just kind of lost it." [6, 11] Things got "out of hand." [8] Harris does not know why he stabbed the victim. [8] Harris would not have stabbed the victim if Simpson had not kept motioning to him to do it. [11] Harris wanted simply to tie up the victim, but Simpson refused to do just that. [11]
- ≤ After the stabbing, Harris gave the victim liquor to drink and lit him a cigarette. [4]
- ≤ Harris told the victim he was not going to kill him. [9] Harris asked the victim if he was alright. [4]
- ≤ Simpson untied the boat and planned to leave the victim out on a remote ocean beach. [4]
- ≤ Harris disagreed and insisted they leave the victim in a less remote place. [4] A friend of the victim's was out in his boat near the spot where Harris suggested they leave the victim. Harris could see the lights from the friend's boat and he was hoping that the friend would help the victim. [7]
- ≤ Simpson and Harris went through the victim's wallet. [12] Simpson drove the boat to the spot where they left the victim. Simpson put the victim on the bank and then drove the boat back to shore. [9] Simpson drove the victim's truck to his house. [5]
- ≤ When Harris left the victim, the victim was talking and he seemed all right. [7]
- ≤ When Harris and Simpson were stopped by a wildlife officer just after they left the victim, Simpson did all the talking. Moreover, Simpson lied to the warden. [4] Harris was just scared. [7, 12]

- ≤ Simpson knew that the victim had a .357 Magnum and he knew where the victim kept it. They went to the house and Simpson grabbed a 12-gauge shotgun. [16] Simpson told Harris where the .357 Magnum was supposed to be but it wasn't there. Simpson told Harris to keep looking. Harris found a .22 in a desk drawer. [17] Simpson later took Harris's gun from him and threw it out while keeping his own gun. [5]
- ≤ Simpson and Harris used some of the victim's money to buy crack for Harris. Simpson did not smoke any crack. [13, 15]
- ≤ After Simpson threw away Harris's gun, Simpson drove his grandmother's house. [19] He told Harris to take the truck and leave. Simpson later told Harris that if Harris had tried to leave, Simpson would have shot him. [20]
- ≤ It was Simpson's idea to go to Georgia. [6] Simpson drove to Georgia to the home of his relatives. [15]
- ≤ Once he got to Georgia, Harris called his brother. When he learned that the victim had died, Harris went to get a gun and was going to shoot himself. Simpson had thrown the gun away. [12]
- ≤ Harris then decided to turn himself in to the authorities. [13] He did not want to hurt anyone else. [19]
- ≤ Between the time of the crime and when he turned himself in, Harris had nightmares about the crime.
- ≤ After confessing, Harris began to cry and said he wished he had died. [22]
- ≤ After Harris confessed, Sheriff Brown told Harris, "You've done the right thing." [13] Sheriff Brown also told Harris that he thought Harris had been "real honest" and had told the police things he did not have to admit. [19] In addition, Sheriff Brown said he did not believe Harris was cold blooded. [22]

BOBBY LEE HARRIS DID NOT HAVE FULL AND MEANINGFUL ACCESS TO THE COURTS

At trial, Bobby Lee Harris was represented by a man who was dying of cancer and an inexperienced attorney who had graduated from law school just three years earlier and had never handled a capital case. Documents attached to this petition, including an affidavit from second counsel Charles Medlin, the motion for appropriate relief filed after the jury returned a guilty verdict, transcript excerpts, the order of the federal district court denying Harris's petition for writ of habeas corpus, and the opinion of the court of appeals affirming the denial of the writ, demonstrate that Harris did not receive a fair trial or full appellate review.

The following errors occurred during Harris's trial:

- ⊆ Lead counsel never met with second counsel to discuss the case or develop a trial strategy.
- ⊆ Counsel did not ensure that the jury heard evidence that showed Harris's lack of intent to kill and mitigated his blameworthiness. Consequently, the jury was not given a realistic opportunity to reject the State's evidence of premeditation and deliberation.
- ⊆ Counsel told the jury in opening statement that Harris would testify. However, counsel never discussed with Harris whether he should exercise his constitutional right to testify in his own defense and never prepared him to testify. As a result, despite his counsel's promise to the jury, Harris did not testify. Later, lead counsel told the jury that Harris did not testify because lead counsel was not good at preparing witnesses.
- ⊆ Counsel did not ensure that the jury heard evidence showing that the wounds inflicted on the victim were relatively minor and that, with proper medical treatment, the victim likely would not have died. This evidence would have been extremely significant in showing that Harris did not intend to kill the victim.
- ⊆ Evidence of Harris's depression and limited intellect were not before the jury at guilt/innocence and no mental health expert explained to the jury how these factors impaired Harris's ability to premeditate and deliberate the murder.
- ⊆ Lead counsel ignored Harris's wish to dismiss from jury service the secretary of the presiding judge. This woman served on the jury despite clear North Carolina law that says that when a criminal defendant and his attorney disagree about whether to dismiss a particular juror, the client's wishes must be respected.
- ⊆ Counsel did not protect confidential information related to the defense of Harris, but needlessly revealed damaging information to the prosecutor.

Prior to the sentencing hearing, lead counsel was forced by his illness to withdraw from the case. Substitute counsel was appointed and the sentencing hearing took place just six weeks later. Lead counsel had not prepared for sentencing; junior counsel did not know how to prepare for sentencing; and substitute counsel did not have time to prepare for sentencing. Consequently, the following errors tainted the penalty phase:

- ≤ Counsel did not obtain vital documents concerning Harris's limited intellectual development and history of childhood abuse. In particular, counsel did not gather Harris's school and mental health records.
- ≤ The jury did not learn that Harris has an I.Q. in the low 70's, indicating borderline mental retardation.
- ≤ The jury did not hear substantive evidence concerning the violence in Harris's childhood home and his retreat into substance abuse while a young adolescent.
- ≤ Almost all of the defense evidence at sentencing came from one witness, a mental health expert. Counsel did not present available family and other lay witnesses to corroborate the history of Harris's life given by the mental health expert. Consequently, the prosecutor easily rebutted the defense presentation.

The unfairness of Harris's trial was compounded by the conduct of the presiding judge, a former prosecutor who had aggressively sought the death penalty. During the trial and sentencing jury, the judge took the following unfair actions:

- ≤ The judge did not conduct jury selection in a fair manner. Persons who expressed any hesitation about capital punishment were quickly excused from jury service while the judge took pains to ensure that persons who strongly favored the death penalty were allowed to serve.
- ≤ The judge turned his back when defense witnesses testified.
- ≤ On at least two occasions, the judge interrupted defense counsel in a belittling manner. The judge did not interrupt the prosecutor.
- ≤ The judge also interrupted defense witnesses and pointedly questioned the relevance of their testimony.
- ≤ When he gave the jury instructions on mitigating circumstances, the judge shook his head and used the tone of his voice to indicate that he thought the mitigating evidence was not important.
- ≤ The trial judge sustained objections to relevant mitigating evidence concerning Harris's remorse.

- ≤ As the trial progressed, counsel were physically and mentally exhausted by their adversarial relationship with the judge.

In subsequent appeals, most of the errors made at trial were not properly presented to the state and federal courts. The following facts explain why the review process in Harris's case was not full and fair:

- ≤ Harris did not receive an evidentiary hearing on any of his claims of ineffective assistance of counsel in any court.
- ≤ Harris's trial attorneys asked the judge to appoint the Appellate Defender's Office to represent Harris on appeal. The judge denied this request and appointed trial counsel. Consequently, the same issues that were missed at trial were missed on appeal.
- ≤ Many of Harris's claims were defaulted, including claims of ineffective assistance of counsel, because his post-conviction attorneys did not support the claims with affidavits as required by North Carolina law.⁴
- ≤ Like his trial attorneys, post-conviction counsel never developed medical evidence showing that the victim's wounds were relatively minor and that, with proper medical care, he likely would not have died.

⁴ This error is more fully described in the next section.

WHY THIS CASE RECEIVED NO MEANINGFUL POST-CONVICTION REVIEW

Bobby Lee Harris's state and federal appeals were summarily denied, without an evidentiary hearing. Between the trial and sentencing hearing, counsel for Harris filed a motion for appropriate relief (MAR) alleging that Harris's constitutional right to effective assistance of counsel had been violated as a result of lead counsel suffering from a fatal illness. The trial court denied this motion without a hearing. On direct appeal, the Supreme Court of North Carolina found no error in the trial court's summary denial of Harris's MAR. Importantly, however, the Supreme Court stated that the defense was free to present additional evidence of ineffective assistance of counsel in state post-conviction proceedings. Unfortunately, while post-conviction counsel developed additional evidence of trial counsels' errors, no court ever considered this evidence. In addition, because of errors made by appellate and post-conviction counsel, other important claims were not properly considered by the courts.

In state post-conviction proceedings, two lawyers who had never before represented a death row inmate in post-conviction proceedings were appointed to represent Harris and to file a motion for appropriate relief on his behalf. State law requires that an MAR based on facts outside the record be supported by affidavits or other documents. Harris's counsel erroneously believed that verification of the MAR was the functional equivalent of presenting affidavits in support of the facts alleged in the MAR. As a result, although counsel had developed evidence which supported the claims made in Harris's MAR, particularly with respect to the performance of Harris's trial counsel and with respect to bias demonstrated by the sentencing judge, counsel did not support the MAR with affidavits documenting this evidence. Because counsel failed to submit affidavits, the claims related to ineffective assistance of counsel and judicial bias were denied on procedural grounds.

Additional claims presented in Harris's MAR were denied on procedural grounds because they should have been raised in Harris's direct appeal. Harris's appellate counsel were the same lawyers who had represented Harris in superior court. Counsel asked the trial judge to appoint the Appellate Defender to handle the appeal but this request was denied. Appellate counsel simply failed to identify and argue several significant issues on appeal. Not surprisingly, these were issues which counsel had also missed at trial.

When Harris presented his federal Habeas Petition, the district court also denied relief. The federal court ruled that because claims were denied on procedural grounds in state court, federal law precluded Harris from obtaining relief regardless of the merits of the claims. In addition, although Harris's attorneys filed affidavits in federal court supporting the factual allegations underlying his claims, the district court refused to consider these affidavits because they had not been filed earlier in state court.

Specific claims made by Harris which were denied on procedural grounds in state court and which therefore were summarily dismissed without regard to merits of the claims in federal court included the following:

- Harris's constitutional rights were violated as a result of ineffective assistance of counsel at sentencing.
- Harris's constitutional rights were violated as a result of the bias shown by the sentencing judge, Joe Freeman Britt, during jury selection, during the presentation of mitigating evidence, and in issuing jury instructions.
- Harris's constitutional rights to be present at all stages of his trial and to confront the witnesses against him were violated by the use of a videotaped deposition of Dr. Geiger which was taken in the absence of Harris and of lead counsel, Mr. Merritt. (Dr. Geiger is the emergency room physician who, according to evidence developed in this Petition, improperly treated the victim. Merritt was unable to attend the deposition because of his fatal illness. Medlin lacked the experience to cross-examine Dr. Geiger effectively and did not realize that Harris had a constitutional right to be present for the deposition.)
- Harris's constitutional right to a fair impartial jury was violated because the trial judge's personal secretary sat on the guilt phase jury.
- Harris's constitutional rights were violated by an improper jury instruction on the pecuniary gain aggravating factor.

In addition to summarily dismissing these claims, the district court also refused to consider Harris's additional evidence supporting other claims, including his claim of ineffective assistance of counsel in the guilt phase and on direct appeal.⁵

In addition to the denial of numerous of Harris's claims on procedural grounds, Harris was denied a full and fair post-conviction review by the state court's summary denial of the MAR before the motion was ever calendared for a hearing of any sort. Harris's counsel believed (and continue to believe) that it was inappropriate for Judge Strickland to rule on the MAR for two reasons. First, one of the claims related to the service of Judge Strickland's personal secretary on the jury, a claim which Judge Strickland could not possibly adjudicate in a neutral, detached manner. Second, Judge Strickland had already ruled on related claims of ineffectiveness of guilt phase counsel. In doing so, Judge Strickland expressed his opinion regarding counsels' performance. He also relied on his own extra-record observations in ruling on the earlier claims, making him a witness. Had the MAR been scheduled for a hearing before Judge Strickland, Harris would have filed a motion to recuse. Because the matter was never scheduled for a hearing, Harris's counsel failed to do so. Counsel were completely surprised by the denial of the MAR without any hearing.

⁵ Attached to the Petition is the order of the district court. On pages 7-8, 13, and 28 are Judge Britt's rulings summarily denying Harris's claims on procedural grounds. The court of appeals opinion affirming Judge Britt's order is also attached and explains, in detail, how the failure to submit affidavits prejudiced Harris.

Index to Transcript Submitted in Support of Clemency Petition⁶

Lead counsel's illness and resulting poor representation

- 23 Lead counsel reports pain and upcoming doctor's appointment
- 190 Lead counsel admits tendency to ramble and court admonishes
- 125
counsel Court tells lead counsel to ask questions of jurors collectively; lead
 says he cannot keep track of the answers that way
- 90 Trial must be suspended because of lead counsel's doctor's appointment
- 29 Court proceedings must be delayed because of lead counsel's medical
 appointment
- 1-2 Second counsel explains lead counsel's inability to attend court on account
 of pain and a doctor's appointment
- 4 Lead counsel tells court that he is taking medication
- 23 Lead counsel tells jury that Harris will testify
- 91-92 Lead counsel acknowledges that Harris did not testify and explains to jury
 that he is not good at preparing witnesses
- 116 Lead counsel notifies court of another medical appointment
- 2-10 Court hearing on lead counsel's ability to continue. Lead counsel reports
 that he learned the previous week that he has bone cancer. He will be on
 medication but the disease is fatal and there is no cure.
- 11-16 Court hearing continues after Harris has had an opportunity to confer
 with his attorneys. Lead counsel moves to withdraw from representation.
 Judge asks more about illness and lead counsel states that he will likely
 Be hospitalized four or five times in the next few months for a week at a
 time.
- 17-18 Court hearing continues. Prosecutor states that "there is absolutely
 nothing before the Court that would indicate that [lead counsel] cannot
 physically and mentally proceed."
- 18-20 Second counsel describes problems with lead counsel's representation.

⁶ The transcript is not numbered sequentially but sometimes reverts to one at the commencement of a new volume. For this reason, the numbering may seem awry.

21-24 Court hearing continues. Lead counsel reiterates request to be relieved.
Court grants motion and dismisses jury.

Weaknesses in defense presentation exploited by the prosecution

1909 Prosecutor argues that Harris is mean and will continue to be in the future

1817-19 Prosecutor shows that defense mental health expert did not conduct adequate investigation of Harris's background

1827 Prosecutor again attacks defense mental health expert's failure to produce corroborating evidence

1911 Prosecutor argues that Harris is not retarded

Psychological evidence presented at sentencing

1805-1813 Dr. Tom Brown's testimony concerning intoxication and addiction

State did not find Simpson's attempt to evade responsibility credible

205 Prosecutor indicates lack of belief in Simpson's coercion claim

Harris accepts responsibility for his actions and expresses remorse

1891-92 Harris gives allocution in which he asks for forgiveness

Harris had a troubled background

1800-1806 Defense mental health expert describes Harris's background; unfortunately, because of an objection from the prosecutor, the trial judge instructs the jury not to consider this account as substantive evidence

Harris is denied full access to the courts

2003 Court denies counsel's request to appoint new attorneys for appeal

ATTACHMENTS TO PETITION

Confession of Bobby Lee Harris

Account of offense given by Bobby Lee Harris to psychologist

Opinion of North Carolina Supreme Court (including dissent of former Chief Justices Exum and Frye)

Order of Federal District Court for the Eastern District of North Carolina

Opinion of Fourth Circuit Court of Appeals

Motion for Appropriate Relief and supporting affidavits filed between trial and sentencing hearing

Affidavit of trial counsel Charles Medlin

Affidavit of Geraldine Mode

Affidavit and letter from Dr. Joseph A. Moylan

Letter from former Chief Justice Exum supporting life imprisonment without parole

Affidavits of jurors supporting life imprisonment without parole

State's investigation and other information concerning Joseph Simpson

Department of Corrections record of Bobby Lee Harris's I.Q. testing and disciplinary record

List of reported cases in which defendants were convicted of first degree murder but did not receive the death penalty

Findings of Legislative Research Commission on Capital Punishment, the Mentally Retarded, and Race Bias and recommended legislation

Excerpts from trial transcript