IN THE SUPREME COURT OF FLORIDA

NO. 71,287

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

CONSOLIDATED SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS AND REPLY TO STATE'S RESPONSE TO ORDER TO SHOW CAUSE

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INTRODUCTION

This original action under Fla. R. App. P. 9.100(a) was initiated by Mr. Lambrix's filing of his pro se Petition for Writ of Habeas Corpus (See Exhibit A, attached). After the State responded to this Court's Order to Show Cause, this Court allowed counsel to enter an appearance on behalf of Mr. Lambrix, and granted an extension of time within which to file a reply to the State's responsive pleading, and to supplement and/or amend the original petition as necessary (see Exhibit B, attached). The instant pleading is intended to serve as both a reply to the State's response and as supplementation of some of the issues presented in Mr. Lambrix's original pro se habeas petition.

The forementioned request for an extension of time was grounded, in part, on undersigned counsel's need for a transcript of the original proceedings against Mr. Lambrix, which ended in a mistrial (see Exhibit C, attached). Such a transcript was never provided to the Court on direct appeal. The trial court ordered that those proceedings be transcribed and provided to Mr. Lambrix (see Exhibit D, attached), but as of this date the court reporter has not completed the transcription. These transcripts are necessary for a thorough review of Mr. Lambrix's case, and to provide this Court with a complete record upon which to base its decision. Mr. Lambrix, through undersigned counsel, therefore respectfully requests that this Court grant him the right to supplement his original petition to reflect any issues (e.g., double jeopardy claims) which might arise from a review of the records of the mistrial proceedings.

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The instant pleading is authorized by Fla. R. App. P. 9.100(i). Mr.

Lambrix's pro se petition and the instant pleading present issues which directly concern the judgment of this Court during the appellate review process on direct appeal. See Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). Consequently, jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Lambrix to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 12 F.L.W. 473 (Fla. Sept. 9, 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165; Brown v. Wainwright, supra, 392 So. 2d 1327. This Court has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. Wilson; Downs; Riley. Mr. Lambrix's pleadings present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of his capital convictions and sentences of death, and of this Court's appellate review. Mr. Lambrix's claims are of the type classically considered by this Court pursuant to its habeas corpus jurisdiction; the claims also involve fundamental error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson.

The petition also involves claims of ineffective assistance of counsel on appeal. Because the challenged acts and omissions of counsel occurred before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). This and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Lambrix's pleadings show that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures . . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986);

United States v. Cronic, 466 U.S. 648, 657 n.20 (1984), notwithstanding the fact that in other aspects counsel's performance may have been "effective". See also Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by appellate counsel's deficiency:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process" therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to fulfill the constitutionally required role of advocate for the client. In fact, it is no overstatement to say that Mr. Lambrix was provided with little "advocacy", in any true sense, on direct appeal, particularly with regard to his sentences of death. The "adversarial testing process" simply did not work in Mr. Lambrix's direct appeal. See Matire v. Wainwright, 811 F.2d

1430, 1438 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Lambrix must show: 1) deficient performance, and 2) prejudice. Matire v. Wainwright, 811 F.2d at 1435. Mr. Lambrix can.

1. Deficient Performance

The deficiencies in counsel's performance virtually leap out from the record. Substantial constitutional issues, some involving per se reversible error, were unreasonably ignored. No challenges to Mr. Lambrix's death sentences were raised on appeal, although compelling constitutional issues were implicated by the imposition of those sentences. Counsel's numerous specific errors and omissions are discussed individually in the following sections of the instant pleading.

2. Prejudice

What counsel ineffectively failed to present would have provided his client with relief. The non-raised issues discussed below "leaped out upon even a casual reading of the transcript." Matire, 811 F.2d at 1438. The claims involved clear, per se reversible error. All were fully cognizable: most were preserved by specific, proper trial level objections and motions. The others were subject to no trial-level contemporaneous objection.

The claims required no elaborate presentation. Counsel only had to direct the Court to the errors. Cf. Wilson v. Wainwright, supra. The Court would have done the rest, pursuant to legal requirements which had been settled at the time of the direct appeal. Mr. Lambrix's convictions and sentences would have been reversed but for counsel's non-advocacy. See, Wilson v. Wainwright, supra, 474 So. 2d at 1164-65.

CLAIMS FOR RELIEF

CLAIM I

THE TRIAL COURT'S FAILURE TO GRANT MR. LAMBRIX'S MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, AND APPELLATE COUNSEL'S FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE CONSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and argument presented in court without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Taylor v. Kentucky, 436 U.S. 478 (1978); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1478 (11th Cir. 1986). Mr. Lambrix was deprived of this right when the trial judge denied his motions for change of venue and for individual voir dire, despite the existence of overwhelmingly extensive pretrial publicity and despite the extent of the venire's prejudicial exposure to the facts of the alleged offense. In fact, the substantial prejudice to Mr. Lambrix resulting from the community's exposure to the case and the preconceptions regarding the accused's guilt was demonstrated even during the voir dire process itself. Appellate counsel's unreasonable failure to raise these obvious issues on direct appeal was a glaring omission which infected the direct appeal process with unreliability. These issues were preserved by specific, timely motions and objections presented to the trial court by Mr. Lambrix's trial counsel; the issues involved no technical niceties, but Mr. Lambrix's fundamental rights to a fair trial before an impartial jury. Appellate counsel's failure to present these issues simply cannot be deemed in any sense "tactical". See Wilson v. Wainwright, supra; Matire v.

Wainwright, supra. The failure was inexcusable. Counsel's failure to urge the Court to review the trial court's actions regarding these issues on direct appeal deprived Mr. Lambrix of his constitutional right to the effective assistance of counsel. Moreover, the error was not cured by this Court's independent review of the record. Mr. Lambrix urges that the Court now correct the substantial errors which form the basis of this claim.

While it is true that a motion for change of venue is addressed to the sound discretion of the trial court (See Response to Petition for Writ of Habeas Corpus [hereinafter "Response"] at p.3, citing Davis v. State, 461 So. 2d 67 (Fla. 1984)), it is equally true that where a community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," the court is obligated to grant the motion. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). Accordingly, when as in this case, the inherently prejudicial nature of the publicity to which the community has been exposed is extreme, the voir dire examination of prospective jurors is deemed incapable of curing the impact of that publicity, and due process requires a change of venue without regard to voir dire. See Rideau, supra; Groppi, supra; Oliver v. State, 250 So. 2d 888 (Fla. 1971). This was such a case.

Although it may well be true that "[s]ome prior knowledge of the case by jurors does not mean he [sic] cannot be fair and impartial," (Response at p.4, citing Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987)), this is not an accurate characterization of Mr. Lambrix's case nor of this issue. The extensive and prejudicial pretrial publicity which saturated the small, rural community in which Mr. Lambrix was tried, convicted, and ultimately sentenced to death was so all-pervasive as for all practical purposes to prohibit the empanelment of an impartial,

untainted jury. Local media provided extensive and detailed coverage of the offense, the investigation, the arrest of Mr. Lambrix, and his purported prior criminal history. The media provided detailed version of the alleged "facts" of the case. The effect of this pervasive media coverage in such a small community was then compounded by the fact that the initial proceedings against Mr. Lambrix had ended in a mistrial less than three months prior to the trial resulting in his conviction and death sentence. All this was reported. The atmosphere created by these circumstances assured that an impartial, untainted jury could not be empaneled.

The offense for which Mr. Lambrix was tried was literally the biggest news event of the year, if not the decade, in Glades County. Only two weeks prior to the commencement of the instant proceedings, the area's largest newspaper selected the murder of Alicia Bryant and Clarence Moore as number one of "The Ten Top Stories of 1983."1/ The offense was the topic of discussion among virtually everyone in the community, as was readily apparent from the potential jurors' responses at voir dire. One venire-person, a local elementary school teacher, expressed the extent to which the offense had preoccupied the community: "at the time, it was discussed, even by my children in the classroom" (R. 1722).

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1. As noted in the introduction to this pleading, the record of the mistrial proceedings was never prepared and never put before the Court on direct appeal. As a consequence, defense counsel's motions, juror responses, and other matters reflected in the mistrial record which demonstrate the extreme level of prejudicial pretrial publicity were not made part of the record on appeal before this Court. A transcript of the mistrial proceedings has been requested from the Circuit Court and the Circuit Court has ordered that one be prepared. It will then be forwarded to this Court for review as it pertains to the instant habeas corpus proceedings.

Contrary to the Respondent's assertions (See Response at p. 3: "While several potential jurors were excused because they had formed an opinion . . . the great majority of those questioned knew very little or nothing about the case"), virtually every member of the venire had been exposed to this pretrial publicity: almost all potential jurors had read or heard about the case in the local news media and/or discussed it with friends, neighbors or family. (See, e.g., R. 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1532, 1533, 1566, 1568, 1600, 1601, 1626, 1630, 1647, 1665, 1679, 1722, 1738, 1748, 1769, 1781). Some had even discussed the case with relatives of one of the victims. (See, e.g., R. 1626, 1647). Six potential jurors in fact admitted that their exposure to pretrial publicity was such that they had already formed opinions which would affect their impartiality and prevent them from giving Mr. Lambrix a fair trial. (See R. 1532-33, 1566-67, 1626-27, 1646-48, 1679-80, 1739). Venire-persons who had not been exposed to extrajudicial information regarding the case were the rare exception to the rule.

Eight persons who ultimately served on the jury which convicted and sentenced Mr. Lambrix to death admitted to having had been exposed to pretrial publicity in some form or another. (See R. 1471, 1472, 1473, 1475, 1476, 1601, 1630, 1769). One of these actual jurors could not even say that he had not already formed an opinion as a result of the newspaper articles he had read:

> MR. McGRUTHER: [Defense Attorney]: Reading that material [newspaper articles], have you formed any opinion at this point as to any guilt or innocence or anything else involved in this trial?
>
> MR. SNYDER: [Juror]: I can't really say. I don't know. I usually think of the police doing their work right. That's the way I feel about it.

(R. 1472) (emphasis added). Another venire-person who ultimately served on Mr. Lambrix's jury had, after reading extensive newspaper coverage of the offense, formed the opinion that the

crime was "senseless." (R. 1522).

The smallness of the community and the resultant facility with which information could be disseminated, digested, discussed, and passed on was also apparent from the jurors' voir dire responses. Twenty-five potential jurors knew either a state witness (or witnesses), a victim or relative of a victim, and/or the prosecutors and law enforcement officers involved in the case (See R. 1479, 1486, 1516, 1553, 1554, 1563, 1607, 1610, 1626, 1631, 1635, 1636, 1669, 1670, 1678, 1696, 1723, 1726, 1738, 1751, 1761). Four of these people actually served on Mr. Lambrix's jury (See R. 1607, 1635, 1696, 1726). Moreover, many of the potential jurors knew or were related to one or more of their fellow venire persons (See R. 1557, 1661-62, 1688, 1765). Obviously, the details provided through the media and other sources were discussed, and opinions were formed.

The pervasive nature of the pretrial publicity relating to the offense and arrest, combined with the small, close-knit nature of the community, resulted in an atmosphere in which it was virtually impossible to obtain a jury untainted by prejudicial extra-judicial information. See Manning v. State, supra. The fact that Mr. Lambrix had already been tried for the offense, in proceedings that ended in a mistrial just three months previously, made the impossibility of securing an impartial and untainted jury even more obvious. The renewal of media publicity prompted by the first trial removed any possibility that the passage of time between the offense and the instant trial created "a sufficient change in the nature or amount of the publicity to conclude that 'the feelings of revulsion that create prejudice have passed.'" Coleman v. Kemp, 778 F.2d at 1541, citing Patton v. Yount, 467 U.S. 1025 (1984). Those who had not by the time of the first trial already been exposed to the extensive pretrial publicity, or who may have forgotten what they had heard, were certainly exposed to the

publicity generated by the first trial. In any event, there is nothing in the record to show that the taint had in fact dissipated -- the record show that it had not.

The Respondent argues that "[t]he mere fact that two persons2/ had some knowledge of a prior trial" should have had no effect on the trial court's ruling regarding Mr. Lambrix's motion for a change of venue (Response at p. 4). However, as discussed above, this issue involves a great deal more than "two [venire] persons." Moreover, as will be discussed below in detail, because only group voir dire was permitted by the trial court, Mr. Lambrix's trial attorney was prevented from directly inquiring of the potential jurors with regard to their knowledge of the previous trial without infecting the entire venire and undermining the voir dire process itself. Given such a choice, counsel's voir dire questioning was nowhere as thorough as the case required.3/

Given the preclusive voir dire conducted in this case, it is clear that those persons who did admit knowledge of the prior trial did so voluntarily and of their own accord -- they were not necessarily the only venire persons who were aware of the prior proceedings, but rather the only ones who volunteered such information. Moreover, because the entire venire was present during voir dire, they were all exposed to the highly prejudicial extra-judicial information when those jurors related their knowledge of the previous trial.

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2. There were, in fact, actually three venire persons who demonstrated extra-judicial knowledge of the previous trial, one of whom who had actually been on the panel in the previous trial (See R. 1758).

3. To the extent that the Court may have any questions in this regard, Mr. Lambrix urges that the Court temporarily relinquish jurisdiction to the lower court for a fact-finding hearing on the extent to which counsel's efforts were limited, and on the resulting ineffective assistance at voir dire which counsel was forced to provide due to the court's preclusive rulings.

The Respondent also argues that the cases cited by Mr. Lambrix's pro se petition (appended hereto) "are not applicable to this case since the information received by jurors in those cases went far beyond the mere mention of some other trial." (Response at p.4, citing United States v. Williams, 568 F.2d 464 (5th Cir. 1978) and Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987)). Although the jurors in both Williams and Weber had learned that the defendant's previous conviction for the offense for which he was then being tried had been reversed, the same concerns are implicated here. The jurors here knew that there had been a previous trial, and that the State was again bringing Mr. Lambrix to trial on the same charges. Under such circumstances,

> [t]he mere expenditure of so much time and expense on the part of the State might lead the average lay person to assume that such a defendant must, in fact, be guilty.

Weber, 501 So. 2d at 1383, quoting Hughes v. State, 490 A.2d 1034, 1044 (Del. 1985).

Both the prosecutor and the trial judge recognized the effect that the previous mistrial might have on Mr. Lambrix's ability to seat a jury (see R. 1430: "big problem in picking the jury that we might have difficulty is that it might be no secret to anybody the second time around" [prosecutor]; R. 1459: "I was afraid we would have problems along this line. It's a small community" [prosecutor]; R. 1460: "One thing I'm thinking is where we're going to have problems picking a jury" [trial judge]). Defense counsel, of course, anticipated the difficulty and filed motions in that regard. The difficulties anticipated materialized: the entire panel learned during voir dire that Mr. Lambrix had been previously tried for same offense. Although the jurors were given the usual admonishments to disregard extra-judicial information, under the circumstances which existed here

> an ordinary admonition... that is indistinguishable from other admonitions given during the trial to disregard

> everything not heard in court, or one... that is indistinguishable from other admonitions given during trial to disregard media reports of the trial, are not, as a matter of law, sufficiently specific, meaningful or strong to impress upon the jurors the unfairness of their considering the prejudicial information. Similarly, an inquiry designed to elicit a simple yes or no response to the question whether the information will influence the juror's verdict or whether the juror is capable of putting the information out of his mind is much too perfunctory to be accepted in any case.

Weber, 501 So. 2d at 1383-84 (citations omitted). Such a perfunctory procedure is all that was allowed at Mr. Lambrix's trial.

Even if the effect of the prejudicial pretrial publicity in Mr. Lambrix's case could have been ameliorated by the voir dire process, it was not and could not have been by the group voir dire process actually conducted. Trial counsel recognized the inadequacy of group voir dire under such circumstances, and moved for individual and sequestered voir dire (R. 288). This motion was also denied, and its denial deprived Mr. Lambrix of his right to be tried by a fair and impartial jury.

In order to protect the sixth and fourteenth amendment rights of the accused in a case where, as here, there has been extensive and prejudicial pretrial publicity,

> it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the voir dire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Association v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, Marshall, Stevens, JJ., concurring). This was such a case. The trial court's denial of Mr. Lambrix's motion for individual and sequestered voir dire consequently violated his due process rights to be tried by a fair and impartial jury. Cf Patton v. Yount, 467 U.S. 1025 (1985); Irvin v. Dowd, 366 U.S. 717 (1961); United States v. Hawkins, 658 F.2d 279 (5th Cir.

1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

Where, as here, pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Rideau, 373 U.S. at 726-27; Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Although Mr. Lambrix is therefore not required to demonstrate actual prejudice, Rideau, supra; Murphy, supra, he undeniably can demonstrate substantial prejudice in this case: as previously discussed, two of the jurors who actually served on the jury which decided his guilt and sentenced him to death could not say that they had not already formed opinions as to Mr. Lambrix's guilt. Cf Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983). Under such circumstances, due process requires the trial court to grant a change of venue, See Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire. This Court doubtless would have reversed had appellate counsel presented these errors. As stated, the errors were timely preserved before the lower court. Appellate counsel's failure undermines confidence in the appellate review process. This Court's independent review of the record did not serve to cure the harm. As a consequence, Mr. Lambrix's capital conviction and death sentence were allowed to stand notwithstanding the fact that they were obtained in violation of his due process rights to a fair and impartial jury trial, and to the effective assistance of counsel, and simply cannot be allowed to stand under any standard, much less so under the scrutiny which the eighth amendment mandates in capital cases. The proceedings resulting in Mr. Lambrix's conviction and death sentence stand in violation of the fifth, sixth, eighth, and fourteenth amendments, and the Court should therefore now correct the error and grant habeas corpus relief.

CLAIM II

CRITICAL STAGES OF THE PROCEEDINGS AGAINST MR. LAMBRIX WERE CONDUCTED IN HIS ABSENCE, IN VIOLATION OF FLA. R. CRIM. P. 3.180 AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892). This Court has unequivocally held that the voir dire process and the concomitant exercise of jury challenges is a "critical stage" at which this guarantee is operative. See Francis, supra.

The record here is clear: Mr. Lambrix was absent during a critical stage of his trial at which four jurors were excused and at which stipulations regarding identification of the victims were made by the parties (See R. 1486-90). The trial judge carefully informed the parties as to what his standard operating procedures were and would be:

> So that the record will be in order and . . . because I have got an idea there is a very good possibility one side or the other is going to take this thing up, I would like to keep the record as straight . . . even for the appellate court . . . . I always swear all the witnesses. And the court reporter can tell you that in my court it doesn't just say that the witness was being duly sworn. It says the witness being duly sworn by the judge. So, if it becomes necessary for a perjury case later down the line who swore the witnesses and you don't know whether this one did it or that one did it, it's on the record.

> By the same token, you will notice each time when we come back in just before the jury is brought back: State ready to proceed? Defense ready to proceed? Defendant being present, the jury may be brought in . . . . That's just for the purpose of keeping the record straight.

(R. 1871)(emphasis added). The judge followed his carefully expressed practices throughout the trial, announcing the presence of the defendant at the commencement or recommencement of each stage of the proceeding. There was no such announcement during the proceedings herein discussed: Mr. Lambrix was not there. In fact, the record reflects that it was only after discussions regarding the excusal of jurors had already commenced, that the judge ordered that the defendant be brought in (See R. 1487). It was not until some time later, and after four jurors had been excused and stipulations regarding the identity of the victims were entered into, that Mr. Lambrix was indeed brought into the courtroom (See R. 1490). Mr. Lambrix was absent, involuntarily, during this critical stage.

In Francis, supra, a case remarkably similar to Mr. Lambrix's, this Court reversed a capital conviction because a defendant was not present during the exercise of peremptory challenges. Relying both on Florida's Rules of Criminal Procedure and the Fourteenth Amendment, this Court held that defendants have a constitutional right to be present during jury challenges as well as a right created by Fla. R. Crim. P. 3.180 (e)(4). Because such a right must be intelligently and knowingly waived, on the record, before proceedings can be held in the defendant's absence, the Court granted relief. Francis' conviction was reversed because

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom after selecting a jury. His silence, when his counsel and others retired to the jury

> room or when they returned after the selection process did not constitute a waiver of his right. the State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustamonte, 412 U.S. 218, 83 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 83 L.Ed. 1461 (1938).

Francis, 413 So. 2d 1178. That analysis applies with full force to Mr. Lambrix's case: Mr. Lambrix was never questioned with regard to his understanding of his right to be present; no inquiry was made as to whether he wished to waive that right; Mr. Lambrix povided no waiver (much less a record waiver) of his right to be present (and thus to personally agree or disagree with the excusal of the jurors or the stipulation at issue, see, infra [discussing Mr. Lambrix's official status as pro se co-counsel]; Mr. Lambrix never acquiesced in his attorney's purported waiver of his presence,4/ or even knew that proceedings took place in his absence until long after trial.

The error here is even more egregious than in Francis, however, as Mr. Lambrix was acting as co-counsel pursuant to court appointment (See R. 891). Thus, not only was Mr. Lambrix deprived of his Sixth and Fourteenth Amendment rights to be present at all critical stages of his trial, but also of his right to act as his own counsel, see Faretta v. California, 422 U.S. 806 (1975); McKaskle v. Wiggins, 465 U.S. 168 (1984); Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986), a status which the trial had already conferred.

The state here cannot show that there is no "reasonable possibility" that Mr. Lambrix's rights were prejudiced because of his absence. See Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983); Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964). The

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4. In fact, there is no record waiver of Mr. Lambrix's right to be present even on the part of counsel.

prejudice to Mr. Lambrix's rights is evident. Jury selection through the free exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights guaranteed the criminally accused. See Francis v. State, supra; Pointer v. United States, 151 U.S. 396 (1894); Lewis v. United States, 146 U.S. 370 (1892). A necessary corrollary to this right is the ability to freely oppose challenges for cause of potential jurors. The excusal of jurors in Mr. Lambrix's absence denied him that ability, and fundamentally undermined his free exercise of his peremptory challenges. (Again, it is noteworthy that Mr. Lambrix had been appointed by the trial judge as co-counsel.)

Furthermore, one of the jurors who was excused during Mr. Lambrix's involuntary absence was excused because he claimed to have been in the jail with Mr. Lambrix at some unspecified point of time prior to the trial (See R. 1486-87). His wife, who was also on the panel, was excused because of her husband's asserted associations with Mr. Lambrix (Id.). No showing was made that theses assertions were in fact true, nor any evidence to that effect proffered. Mr. Lambrix, the one person who could have confirmed or denied that juror's story, and the one person who had the absolute right to accept or deny that juror, was involuntarily absent from the courtroom at the time. In this regard, Mr. Lambrix's case is in all pertinent respects no different than Proffitt v. Wainwright, supra. There, the defendant was involuntarily absent from a hearing held after the jury had rendered its advisory sentence at which a doctor presented testimony concerning psychiatric reports that had been presented to the court. 685 F.2d at 1256-58. The state argued that Proffitt's absence was harmless. The federal Court of Appeals, however, applied the well-established standard attendant to such situations and refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a

difference." Proffitt, 685 F.2d at 1260, citing Davis v. Alaska, 415 U.S. 308, 317 (1974). Rather, the court explained that because Proffitt could have provided information to counsel which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless even though the defendant had not shown that the information would have changed the doctor's opinion. Proffitt, 685 F.2d at 1260-61.

Similarly, here, Mr. Lambrix could have (and would have) provided information to counsel regarding the potential witness' story. In fact, as co-counsel, he himself could have provided such information directly to the trial court. But Mr. Lambrix could suggest nothing to counsel, and counsel could not consult with his client -- Mr. Lambrix was not in court.

Moreover, even if the juror's story had been true, standing alone the story by no means formed a sufficient basis for a valid challenge for cause of that juror, and was even less so a valid legal basis upon which to base the excusal for cause of the juror's wife. Had he been in court, Mr. Lambrix could (and would) have opposed the excusal, and thus could have forced the State to exercise its own peremptory challenges if it wished to exclude those jurors.

The same holds true with regard to the other jurors excused in Mr. Lambrix's absence. For example, the desire of a friend of the trial judge's that he not sit on the jury simply do not and cannot constitute a proper, legal basis for the excusal of the juror. A juror was excused, however, in Mr. Lambrix's absence, for precisely that reason. Had he been there Mr. Lambrix could also have objected to the excusal of another juror who was improperly excused because his boss "would certainly appreciate it" (R. 1489). Mr. Lambrix, however, was allowed to exercise none of these rights -- he was not present. He was therefore precluded from opposing the excusal of these jurors. He was denied his right to be heard on these issues, to exercise

peremptory challenges, or to in any way present his views.

As in Francis, supra, it is here impossible to assess the full extent of the prejudice Mr. Lambrix sustained through his involuntary absence and his inability to consult with counsel during this crucial stage of the jury selection process. In addition, the record reflects no consent and no ratification on Mr. Lambrix's part. Accordingly, Mr. Lambrix's

> . . . involuntary absence without waiver by consent or subsequent ratification was reversible error and [Mr. Lambrix] is entitled to a new trial.

Francis, 413 So. 2d at 1179.

As stated, this case presents an even more significant violation of a capital defendant's right to presence than the error found sufficient to warrant reversal in Francis. Mr. Lambrix had invoked his constitutional right to self-representation, see Faretta v. California, supra, and had been officially appointed as co-counsel by the trial court (see R. 891). Any decision regarding the litigation of his capital trial therefore could not be made without his presence or acquiesence. The excusal of jurors by stipulation was such a decision. Fla. R. Crim. P. 3.300 (b) guarantees counsel for both parties to a criminal action the absolute right to orally examine each and every potential juror.5/ As co-counsel, the right was personal to Mr. Lambrix, and could not be waived absent his consent or acquiesence. Yet this is exactly what took place when jurors were excused while Mr. Lambrix was involuntarily not in the courtroom. Moreover, decisions to stipulate to critical evidence regarding identification of the victims were also made by defense counsel in Mr. Lambrix's absence, decisions

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5. Fla. R. Crim. P. 3.300 (b) provides that "[c]ounsel for both State and Defendant shall have the right to examine jurors orally on their voir dire," and that "[t]he right of the parties to conduct an examination of each juror orally shall be preserved." Mr. Lambrix, as co-counsel, had been personally assured that right.

exclusively within the province of counsel and which thus could not be made without the consent or acquiesence of pro se co-counsel, Mr. Lambrix.

Conducting the proceedings discussed herein while Mr. Lambrix was involuntarily absent from the courtroom consequently violated his sixth amendment right to represent himself as well. See Faretta, supra; see also, McKaskle v. Wiggins, 465 U.S. 168 (1984). The right to proceed pro se is absolute, id., and is subject to no harmless error analysis. McKaskle v. Wiggins, supra. Mr. Lambrix's involuntary absence directly resulted in the denial of that right; prejudice under such circumstances is presumed:

> [G]iven the nature of the constitutional right at issue here, we are compelled to find inherent prejudice in the denial of the right. The Supreme Court has held that the denial of the right to proceed pro se is not amenable to harmless error analysis. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 951 n.8, 79 L.Ed.2d 122 (1984)("The right [to proceed pro se] is either respected or denied; its deprivation cannot be harmless"). If the deprivation of this right cannot be harmless, it must, by definition, be prejudicial.

Dorman v. Wainwright, 798 F.2d 1358, 1370 (11th Cir. 1986).

The Respondent is correct in asserting that there was no objection by trial counsel to the proceedings which occurred in Mr. Lambrix's absence (See Response at p. 4). The Respondent is incorrect, however, in its argument that the lack of a trial-level objection to Mr. Lambrix's absence precluded appellate counsel from raising this issue on direct appeal (Id.). First, Mr. Lambrix was co-counsel. Since he was absent, he could make no objection. Second, this record reflects no waiver, acquiescense, or agreement on Mr. Lambrix's part of the actions counsel took in his absence. In this regard, the United States Court of Appeals' analysis in Johnson v. Wainwright, is worthy of note:

> We agree that petitioner has a persuasive argument that he had good cause for his

> failure to comply with the Florida rule requiring a contemporaneous objection at trial. That rule is designed to encourage counsel to bring out objections in the proceedings at the point where they are best understood and most efficiently considered. It would be anomalous, however, to apply the rule to bar habeas corpus review where the constitutional inquiry relates to the defendant's, as opposed to his lawyer's, failure to exercise his rights knowingly. We cannot fault the defendant for failing to assert an objection when his attorney-- the individual on whom he depended to preserve his rights-- arranged for him to be removed from the courtroom.

Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985). Similarly, here, Mr. Lambrix cannot be faulted for failing to object at trial to proceedings which took place in his absence. Appellate review under such circumstances would not have been precluded. See also Francis v. State, supra.

As this Court recognized in Francis, this issue is substantial and meritorious. Appellate counsel's failure to raise such an issue cannot be deemed strategic or tactical under any analysis. Mr. Lambrix, in this regard, was denied his right to effective assistance of counsel on appeal. The harm caused by counsel's omission was not aired by this Court's independent review. In sum, the proceedings resulting in this conviction and death sentence violated Mr. Lambrix's fifth, sixth, eighth, and fourteenth amendment rights. Habeas corpus relief is proper.

CLAIM III

THE TRIAL COURT'S EXCUSAL OF JURORS WITHOUT LEGAL CAUSE AND WITHOUT AFFORDING MR. LAMBRIX THE OPPORTUNITY TO EXAMINE THOSE JURORS OR OBJECT TO THEIR EXCUSAL VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL

Petitioner relies on the arguments presented in his pro se petition and in the preceding issue of the instant pleading with regard to this issue. He notes again that he was proceeding as pro se co-counsel and, accordingly, that because this error

denied him the absolute right to proceed pro se, it is inherently prejudicial and subject to no harmless error analysis. Faretta, supra; McKaskle v. Wiggins, supra; Dorman v. Wainwright, supra.

CLAIM IV

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF FACT AND LAW TO PROVE MR. LAMBRIX'S GUILT OF PREMEDITATED MURDER BEYOND A REASONABLE DOUBT, AND APPELLATE COUNSEL'S FAILURE TO CHALLENGE THIS DEPRIVATION OF MR. LAMBRIX'S FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS ON DIRECT APPEAL WAS PREJUDICIALLY INEFFECTIVE

Mr. Lambrix relies on the arguments presented in his pro se petition.

CLAIM V

THE TRIAL COURT'S ADMISSION INTO EVIDENCE, OVER OBJECTION, OF AN IRRELEVANT, MISLEADING, AND HIGHLY PREJUDICIAL LETTER PURPORTED (BUT NOT PROVEN) TO HAVE BEEN WRITTEN BY MR. LAMBRIX VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL

Mr. Lambrix relies on the arguments presented in his pro se petition with respect to this claim. He notes that this error resulted in the denial of his sixth amendment right to confront his accusers as well as his eighth amendment right to a fundamentally fair and reliable capital sentencing determination.

CLAIM VI

THE TRIAL COURT'S DENIAL OF MR. LAMBRIX'S REQUEST TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION VIOLATED HIS FUNDAMENTAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS CLAIM DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. Introduction: The Legal Standards Attendant to a Defendant's Right to an Instruction on Voluntary Intoxication

The law regarding voluntary intoxication is clear:

> Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly. 68 So.2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985) (emphasis added). That voluntary intoxication is a defense to specific intent crimes is not a novel principle. Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891). The standard governing a defendant's right to a jury instruction in this regard is also settled: Any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner, supra; Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

This Court's citation to Mellins in Gardner is a good starting point. There, the defendant testified she was not intoxicated:

> At the charge conference defense counsel

requested an instruction on the defense of intoxication. The request was denied because of appellant's testimony to the effect that she had not been intoxicated. Conviction and this appeal followed.

Appellant takes the position that there was some evidence of intoxication so that she was entitled to an instruction on this theory of defense.

Appellee counters by pointing out that while inconsistent defenses are permissible this is so only so long as proof of one does not disprove the other. In addition, appellee maintains that even if there was error in this regard it was harmless because defense counsel "fully and completely argued the meaning of intent and intoxication." Therefore, the jury had an opportunity to consider the effect of intoxication in this context so that the failure to instruct could not have "injuriously affected the substantial rights of the appellant" citing Paulk v. State, 376 So.2d 1213, 1214 (Fla. 3d DCA 1979).

There were no scientific tests made to determine whether appellant was intoxicated at the time of the alleged offense. There could therefore be no empirical evidence of intoxication. The only evidence on this issue was the testimony of the police officers. We have concluded in a previous case, however, that evidence elicited solely in the cross-examination of the state's witnesses may be sufficient to give rise to a duty to instruct on a defense suggested by that testimony. To hold otherwise would seriously jeopardize the right of the accused to refrain from testifying. Weaver v. State, 370 So.2d 1189 (Fla. 4th DCA 1979).

Voluntary intoxication is a defense to the crime of battery on a police officer, Russell v. State, 373 So.2d 97 (FLa. 2d DCA 1979), as in other crimes requiring a specific intent. Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979). Where intent is a requisite element of the offense charged and there is some evidence to support this defense, the question is one for the jury to resolve under appropriate instructions on the law. Frazee v. State, 320 So.2d 462 (Fla. 2d DCA 1975).

The law is very clear that the court, if timely requested, as here, must give instructions on legal issues for which there exists a foundation in the evidence. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976).

It is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the

> Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court's instructions, not from argument of counsel. It must be assumed that this admonition is generally followed. For this reason the error may not be considered harmless.

Mellins, 395 So. 2d at 1208-10 (emphasis added).

The Fourth District Court of Appeals has in fact acknowledged that voluntary intoxication defenses must be pursued by competent counsel if there is evidence of intoxication, even under circumstances in which trial counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). See also Presley v. State, 389 So. 2d 1385 (Fla. 2nd DCA 1980); Price v. State, No. BH-155 (Fla. 1st DCA Feb. 20, 1986). The key question is whether the record reflects any evidence of voluntary intoxication. Gardner, supra; Mellins, supra; Parker v. State, 471 So. 2d 1352 (Fla. 2d DCA 1985); Heathcoat v. State, 430 So. 2d 945 (Fla. 2d DCA), aff'd, 442 So. 2d 955 (Fla. 1983). Even when (1) the evidence arises from cross-examination of state's witnesses, (2) the evidence is not supported by empirical evidence, (3) the defendant doesn't testify, or does and denies intoxication, or (4) where the defense is proffered as an alternative theory of defense, an instruction is required. Pope v. State, 458 So. 2d 327 (Fla. 1st DCA 1984); Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983); Mellins; Price; Gardner, supra. The evidence in Mr. Lambrix's case far surpasses those standards.

The stringent requirements pursuant to which the denial of voluntary intoxication instructions are to be analyzed were established, in part, because intoxication is an issue particularly suited for juror or fact-finder resolution. A defendant's right to fact-finder resolution on this issue is ironclad:

> It is axiomatic that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such an instruction, and the trial court may not weigh the evidence in determining whether the instruction is appropriate. Smith v. State, 424 So.2d 726 (Fla. 1982). The evidence need not be "convincing to the trial court," before the instruction can be submitted to the jury. Edwards, at 359, as it suffices that the defense is "suggested" by the testimony. Mellins, at 1209. "'However disdainfully the trial Judge may have felt about the merits of such defense from a factual standpoint, however even we may feel about it, is beside the point.'" Laythe v. State, 330 So.2d 113, 114 (Fla. 3d DCA 1976).
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> The testimony in the instant case concerning the degree of appellant's state of intoxication might have been conflicting, but it certainly constituted evidence of intoxication sufficient to go to the jury as an issue of fact. Consequently, the trial court erred in failing to instruct the jury on the defense of voluntary intoxication.

Pope, 458 So. 2d at 329. See also Frazee v. State, 320 So. 2d 412 (Fla. 3rd DCA 1975) ("the resolution of such question is solely for the trier of the facts").

Ample evidence of Mr. Lambrix's intoxication at the time of the offense was adduced at trial, far more than that needed to require an appropriate instruction in the cases discussed above. As discussed in the pro se petition, the testimony indicated that Mr. Lambrix had spent the entire evening proceeding the offense drinking, in several different bars (See Pro Se Petition for a Writ of Habeas Corpus, pp. 36-38). Mr. Lambrix spent the evening switching between beer and mixed drinks (R. 2201). He and the victims spent the evening drinking in bars, and purchased a bottle of whiskey to take with them when they left the last bar (R. 2204). State's witness Frances Smith, who had been with Mr. Lambrix and the victims the entire evening, testified variously that Mr. Lambrix was "high" and "acted high" that night (R. 520, 2301). The evidence of intoxication here thus went well beyond the applicable "any evidence" standard and was more than sufficient to require an instruction on voluntary intoxication.

Cf. Gardner, supra, 480 So. 2d at 93 (evidence that defendant had consumed 3 1/2 cans of beer, smoked one or two marijuana cigarettes, and "looked high" sufficient to require a jury instruction on voluntary intoxication, and trial court erred in refusing to provide instruction).6/ Mr. Lambrix was entitled to the instruction.

B. The Due Process Violation

A criminal defendant's due process right to a conviction resting only on proof of his guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), requires the trial court to adequately charge the jury on a defense which is timely requested and supported by the evidence. United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (S.D. South Dakota, 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). See also, United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Perez v. United States, 297 F.2d 12, 13-14 (5th Cir. 1961); United States v. Lofton, 776 F.2d 918 (10th Cir. 1985).

The due process right to a theory of defense instruction is rooted in a criminal defendant's right to present a defense. As a unanimous Supreme Court has recently explained in a similar context,

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6. In this regard, it should be noted that Mr. Lambrix's case is clearly distinguishable from Jacobs v. State, 396 So. 2d 1113 (Fla.) cert. denied, 454 U.S. 973 (1981). As this Court noted in Gardner: "It is not error to refuse such an instruction where there is no evidence of the amount of alcohol consumed during the hours preceding the crime and no evidence that the defendant was intoxicated." Id. at 480 So. 2d at 93, discussing and analyzing Jacobs v. State. Here, the evidence went far beyond that in Jacobs -- the state's key eyewitness testified that the defendant was "high" and ample testimony was adduced regarding the substantial amount of alcohol consumed by Mr. Lambrix throughout the evening of and immediately prior to the offense.

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. [479], at 485 [1984]. . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."

Crane v. Kentucky, ___ U.S. ___, 106 S.Ct. 2142, 2146 (1986) (emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257 (1948). The trial court's failure to instruct on the defense of voluntary intoxication denied Mr. Lambrix that essential "opportunity". Relief under such circumstances is proper, for the failure to adequately instruct on a theory of defense is undeniably an error, one of constitutional magnitude, warranting habeas corpus relief. See, e.g., United States ex rel. Means v. Solem, supra, 646 F.2d 322; Zemina v. Solem, supra, 573 F.2d 1027; see also, United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States ex rel. Collins v. Blodgett, 513 F.Supp. 1056 (D. Montana, 1981); cf. Dawson v. Cowan, 531 F.2d 1374 (1976).

Mr. Lambrix's conviction was derived from such a constitutionally defective proceeding. The trial court's failure to instruct left Mr. Lambrix defenseless, cf. Crane, supra, and relieved the State of its burden to prove his guilt. By taking the intoxication issue from the jury's province, the trial court effectively directed a verdict for the State on the most critical issue raised by the evidence at Mr. Lambrix's trial, see, Rose v. Clark, 106 S.Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), and deprived Mr. Lambrix of his right "to raise a reasonable doubt in the jurors' minds." Zemina v. Solem, supra, 438 F.Supp. at 470 (S.D. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). The trial court therefore violated Mr. Lambrix's fundamental right to have the state put to its burden, In re Winship, supra, and to have the jury determine whether that

burden had been met. In not instructing the jury on the defense of intoxication the court effectively

> creat[ed] an artificial barrier to the consideration of relevant ... testimony ... [and] the trial judge reduced the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972).

C. The State's Failure to Prove Every Element of the Offense Beyond a Reasonable Doubt

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the United States Supreme Court held that jury instructions which shifted the burden of persuasion on an essential element of an offense unconstitutionally relieved the State of the burden to prove guilt beyond a reasonable doubt. Following Mullaney, numerous courts have found errors of constitutional magnitude when criminal defendants were forced to bear the ultimate burden on an element of the offense, as defined by state law. See Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. Unit B, 1981); Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979); cf. Sandstrom v. Montana, 442 U.S. 521 (1979).

Yet, the constitutional principles established by Mullaney permit the State to ask that criminal defendants come forward with some evidence of a defense negating an element of the crime, before the burden shifts to the State to disprove that defense beyond a reasonable doubt. Mullaney, supra, at 701-03; Simopoulos v. Virginia, ___ U.S. ___, 103 S.Ct. 2532, 2535 (1983); see generally, Holloway v. McElroy, supra 632 F.2d at 620-28 (analysis of constitutional caselaw respecting the State's burden to prove guilt beyond a reasonable doubt).

Florida's law of defenses follows this approach. Under Florida law, once evidence is presented which tends to support a voluntary intoxication defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. See Edwards, supra, 428 So. 2d 357; Mellins, supra; see also, Yohn v. State,

450 So. 2d 898, 900-01 (Fla. 1st DCA 1984); Bolin v. State, 297 So. 2d 317 (Fla. 3 DCA, 1974). Although a specific instruction on the State's burden to disprove the defense may not be required, the instructions, taken as a whole, must fairly present the jury with the theory of defense and the State's burden to prove guilt beyond a reasonable doubt. See Yohn, supra, at 900-01; Holmes v. State, 374 So. 2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980), rehearing denied, 448 U.S. 910 (1980); Spanish v. State, 45 So. 2d 753 (Fla. 1950); Bolin, supra; McDaniel v. State, 179 So. 2d 576 (Fla. DCA 1965). The State is therefore required to prove that the defense does not raise a reasonable doubt. See Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983) (voluntary intoxication); State v. Bobbitt, 389 So. 2d 1094, 1098 (Fla. 1st DCA 1980) (self-defense); McCray v. State, 483 So. 2d 5 (Fla. 4th DCA 1983) (entrapment); Bryant v. State, 412 So. 2d 350 (Fla. 1982) (withdrawal); Yohn v. State, supra (insanity). In short, when the defense meets its burden of production, and thereby establishes the defense as a material issue, the State must disprove the defense in order to establish the elements of the offense. See, e.g., Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981).

The trial court's refusal to provide an instruction on Mr. Lambrix's sole defense therefore denied him his right to a conviction resting on proof of his guilt beyond a reasonable doubt on the offense as defined by state law, i.e., under the State's burden to disprove his defense. See Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968); Holloway v. McElroy, supra; Mullaney v. Wilbur, supra; cf. In re Winship, 397 U.S. 358 (1970).

Furthermore, under the due process clause, "the State may not place the burden of persuasion . . . upon the defendant if the truth of the 'defense' would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d at

625. The trial court did more than place the ultimate burden on Mr. Lambrix. It took from the State any burden at all on that issue. Thus, if the intoxication defense negates any elements of the offense of first degree premeditated murder, Mr.Lambrix has established a clear abrogation of his constitutional rights.

Mr. Lambrix was charged with and convicted of first degree premeditated murder-- he was not, nor could he have been, alternatively charged under a felony murder theory. Thus, the elements of the offense which the State was required to establish were 1) an unlawful killing of a human being, 2) perpetrated from a premeditated design to effect the death of the person killed. Fla. Stat. section 782.04 (1)(a) 1. The State's burden was to prove each of these elements beyond a reasonable doubt.

The intoxication defense effectively negated the crucial element of the offense -- premeditation. Once Mr. Lambrix asserted the defense of voluntary intoxication, he challenged the specific intent necessary to establish "premeditation". When evidence was elicited supporting his proffered theory, Mr. Lambrix effectively met his burden of production on the material issue of his specific intent. See, Graham v. State, 406 So. 2d 503, 504 (Fla. 3d DCA 1981); Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983); see also, Wynn v. Mahoney, 600 F.2d 448, 450-51 (4th Cir. 1979); Holloway v. McElroy, supra; Moody v. State, 359 So. 2d 557 (Fla. 4th DCA, 1978). The burden then shifted to the State to establish premeditation beyond a reasonable doubt by disproving the proffered defense of intoxication. See Mullaney v. Wilbur, supra; Wynn v. Mahoney, supra; Holloway v. McElroy, supra; Clark v. Louisiana State Penitentiary, 697 F.2d 699, 700-01 (5th Cir. 1983) (on rehearing); Clark v. Jago, 676 F.2d 1099, 1104 (6th Cir. 1982). In short, Mr. Lambrix's voluntarily induced state of intoxication negated his ability to form the specific intent necessary to establish the element of "premeditation".

Mr. Lambrix adduced evidence that he was intoxicated when the murders occurred. He therefore met his burden of production on the material issue of whether the killings were premeditated. The burden therefore shifted to the State to prove premeditated murder by disproving his defense of voluntary intoxication beyond a reasonable doubt. See Mellins v. State, supra, 395 So.2d at 1209-10; Holloway v. McElroy, supra; Stump v. Bennett, supra; cf Gutherie v. Maryland State Penitentiary, 683 F.2d 820, 826 (4th Cir. 1983). Only if the State bore the burden of proving beyond a reasonable doubt that Mr. Lambrix had the ability to form the specific intent necessary to establish the element of premeditation could his conviction meet the due process standards established in Mullaney and In re Winship.

This burden was never met, however, because the trial court removed that issue from the jury's consideration. In effect, the trial court created more than a presumption of guilt on that element, Sandstrom v. Montana, supra, 442 U.S. at 526, it directed the verdict for the State. Its refusal to instruct on voluntary intoxication was tantamount to a judicial decision that the jury find for the state on that issue. As a consequence, the trial court reduced the state's burden on the question of premeditation.

"[A] trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelmingly the evidence may point in that direction." Rose v. Clark, supra, 106 S.Ct. at 3106, citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). Here, the trial court did just that. The fifth, sixth, eighth and fourteenth amendments preclude such a deprivation of a capital defendant's rights. See Beck v. Alabama, infra; Potts v. Zant, 734 F.2d 526, 530 (11th Cir. 1984) reh. denied with opinion, 764 F.2d 1369 (1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1386

(1986); Holloway v. McElroy, supra, 632 F.2d 605; see also, Tennon v. Ricketts, supra, 642 F.2d 161.

D. The Requirement of Heightened Scrutiny in Capital Cases

In Beck v. Alabama, 447 U.S. 625 (1980), the Supreme Court held that a sentence of death may not be constitutionally imposed when the jury is not permitted to consider a verdict of guilt on a lesser-included, non-capital offense. The court reasoned that the failure to give an instruction on a lesser included offense enhances the risk of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Id. at 637; see also Anderson v. State, 276 So. 2d 17, 18 (Fla. 1973). The necessity for such instructions is predicated upon the greater reliability requirements demanded by the Court in capital proceedings. Gardner v. Florida, 430 U.S. 349 (1977); see also, Potts v. Zant, supra, 734 F.2d at 530.

In this case, with ample evidence supporting an intoxication instruction, the trial judge's failure to instruct violated the principles of Beck v. Alabama, supra. See Hopper v. Evans, 456 U.S. 605 (1982) (lesser-included offense instructions mandated when supporting evidence is elicited). An instruction on intoxication would have allowed the jury to convict on the lesser included offense of second degree murder, while acquitting Mr. Lambrix of the murder charge. Consequently, Mr. Lambrix was denied his due process right to a reliable verdict in a capital case. Beck v. Alabama, supra; Hopper v. Evans, supra; see also Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982); Potts v. Zant, supra. The Beck Court mandated reversal under such circumstances because of the unreliability introduced into the proceedings through such trial court instruction errors, an unreliability which the constitution cannot countenance in capital proceedings. This very unreliability exists in this case, and habeas relief is proper.

The trial court's refusal to give the requested instruction also had direct effects on the reliability of the death sentences. Three of the aggravating circumstances found by the trial judge and urged before the jury involved an element of specific intent (pecuniary gain; heinous, atrocious, or cruel; and cold, calculated, and premeditated). Mr. Lambrix's intoxication was an issue which the jury and judge should have considered as it pertained to those aggravating circumstances. A finding on those circumstances beyond a reasonable doubt would likely have been precluded had the jury been properly instructed. Moreover, Mr. Lambrix's intoxication would have served as an independent non-statutory mitigating circumstance had the jury been allowed to consider it through appropriate instructions.

In the context of the heightened reliability requirements mandated in capital cases, Beck v. Alabama, supra; Gardner v. Florida, supra, 430 U.S. at 357-58 (opinion of Stevens, J.); Woodson v. North Carolina, 428 U.S. 280 (1976); Potts, supra, the failure to present the jury at Mr. Lambrix's trial with an instruction on his sole defense, although he adduced sufficient evidence to warrant the charge, requires that he be granted the relief he seeks in these proceedings.

The trial court deprived Mr. Lambrix of his basic due process right to have the prosecution prove guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The absence of the proffered defense charge "may well have influenced the jury in reaching a verdict of guilty of murder in the first degree." Ross v. Reed, 704 F.2d 705, 707 (4th Cir. 1983), affirmed, Reed v. Ross, ___ U.S. ___, 104 S.Ct. 2901 (1984). The trial court's failure to instruct created the "substantial risk" that the jury was denied the opportunity to entertain a reasonable doubt. Clark v. Jago, 676 F.2d 1099, 1105 (6th Cir. 1982). The trial court permitted the jury to convict Mr. Lambrix although the jurors may never have examined all the evidence

concerning the elements of the crimes charged. Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969, 978 (1983). These deprivations of Mr. Lambrix's fundamental constitutional rights to a fair trial cannot be "harmless beyond a reasonable doubt." See Rose v. Clark, supra.

Mr. Lambrix is accordingly entitled to reversal of his convictions or, at a minimum, a new appeal of his convictions and death sentences. This Court's decision in Wilson v. Wainwright, 464 So. 2d 1162 (Fla. 1985) compels the latter. In Wilson, appellate counsel failed to address the sufficiency of the evidence of premeditation. This Court granted a new appeal, explaining that,

> [t]he decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

Wilson, 474 So. 2d at 1165. That analysis fully applies to Mr. Lambrix's case, for the heart of this case was similarly overlooked through appellate counsel's unreasonable and ineffective failure.7/ The failings in this case violated Mr. Lambrix's sixth, eighth and fourteenth amendment rights. As the error was not corrected through this Court's independent review, Mr. Lambrix is entitled to habeas corpus relief.

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7. This issue was preserved for appellate review. Trial counsel made specific, proper requests for the voluntary intoxication instruction, and preserved the error through proper objections.

CLAIM VII

THE TRIAL COURT'S DENIAL OF MR. LAMBRIX'S REQUEST TO INSTRUCT THE JURY ON THE APPLICABLE LAW REGARDING JUSTIFIABLE USE OF FORCE VIOLATED MR. LAMBRIX'S FUNDAMENTAL CONSTITUTIONAL RIGHTS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS CLAIM DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Petitioner relies on the argument presented in his pro se habeas petition, and in the preceding claim of the instant pleading, with regard to this issue.

CLAIM VIII

THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF UNRELIABLE TESTIMONY REGARDING AN ALLEGED "ESCAPE" WITH WHICH MR. LAMBRIX HAD NEVER BEEN CHARGED AND FOR WHICH HE WAS NEVER CONVICTED

As Mr. Lambrix discussed in his pro se habeas petition (appended hereto), during the penalty phase of his capital trial the State was allowed to elicit testimony that Mr. Lambrix had "escaped' from the Lakeland Community Correctional Center while he was serving a two-year sentence there on a previous nonviolent felony offense (see R. 2579, 2582-83). The testimony was elicited from a secretary at the Lakeland Correctional facility [Polly Moore] who was simply asked to take the stand and read a report regarding the alleged escape from the jail's records (R. 2582). She was then asked to describe those records (R. 2583). Mr. Lambrix was never even charged with, much less convicted of, the escape at issue; the witness had no personal knowledge of the alleged escape; the jail records were not sworn to; the report read into the record contained, and it itself was, rank hearsay; and no witness took the stand to provide first-hand testimony that Mr. Lambrix did in fact "escape." As it stands, it is clear that Mr. Lambrix never did escape from the Lakeland facility, and the only evidence the State could muster on the issue was the

unsupported hearsay reference reflected in the jail's records.

The State used the secretary's record-reading testimony to sentence Mr. Lambrix to death -- i.e., to argue for aggravation and to rebut mitigation (e.g., no significant previous criminal history). More importantly, the uncorroborated hearsay report regarding the escape was, and was used as, rank propensity evidence. The trial court itself then relied on this evidence in sentencing Mr. Lambrix to death.

Defense counsel objected at the time the testimony was introduced (R. 2582) and moved for a mistrial. Id. The court denied counsel's objection.

The introduction of the secretary's testimony, the prosecutor's presentation in that regard, and the jury's and court's apparent reliance on that testimony in sentencing Mr. Lambrix to death rendered the sentencing proceedings fundamentally unreliable and unfair, and violated the eighth and fourteenth amendments. It has, in fact, long been settled that evidence of other crimes, wrongs or "bad acts" is flatly inadmissible to prove propensity or to show the defendant's bad character. See Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959). None of the Williams exceptions -- e.g., motive, intent, opportunity, etc. -- exist in this case. The secretary's testimony was flatly excludable. A capital defendant simply cannot be sentenced to death on the basis of such unsubstantiated propensity evidence.

Here, in fact, the State failed to even adduce sufficient proof indicating that Mr. Lambrix ever did in fact escape. The only "evidence" introduced on this issue was a report from jail files read into the record by a secretary. No details were given. No corroboration was provided. (It is, in fact, no secret that corrections' records are notoriously inaccurate). No formal charges were brought, and not even jailhouse disciplinary charges are reflected in the records. It would be stretching

Williams beyond proportion to argue that the State established a sufficient "connection" between the defendant and the alleged "escape" by simply having the secretary read the "report." See, e.g., Parnell v. State, 218 So. 2d 535, 538 (Fla. 3d DCA 1969)("In order for evidence of collateral crimes to be admissible, however, there must be clear and convincing proof of a connection between the defendant and the collateral occurrences."); Chapman v. State, 417 So. 2d 1028, 1031 (Fla. 3d DCA 1982). Not only were the references to an "escape" in the jailhouse report insufficient proof that Mr. Lambrix "escaped," they were insufficient to establish that an "escape" ever even took place. The jail "report" did not even come close to "clear and convincing" proof of the alleged escape. Parnell, supra.

Moreover, under no construction can it be said that any conceivable relevance that can be ascribed to the secretary's reading of the report was not substantially outweighed by the undue prejudice which resulted from the introduction of her testimony. See Fla. Stat. sec. 90.403; Williams v. State, supra. The undue prejudice here was substantial, as an uncorroborated reference in a jailhouse report was used as evidence of Mr. Lambrix' propensity to "escape," and was used to sentence him to death.

Finally, this error was by no means "harmless." The propensity evidence was presented and argued to the jury. In this regard, the impermissible evidence denied Mr. Lambrix his right to the protections afforded under the Tedder v. State, 322 So. 2d 908 (Fla. 1975), standard. See Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985)("[e]very error . . . which makes it less likely that the jury will recommend a life sentence . . . deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life.") Beyond the undue prejudice directly resulting from the introduction of such "bad character" or

propensity evidence, and beyond the fact that the jury was urged to use it in aggravation of the offense (under sentence of imprisonment, Fla. Stat. sec. 921.141[5][a]; prior offense, Fla. Stat. sec. 921.141[5][b]), as the prosecutor urged, the jury was asked to use the "escape" report to rebut mitigation (e.g., no significant previous criminal history), and thus the jury's consideration of evidence in mitigation was unconstitutionally precluded. Cf. Riley v. Wainwright, 12 F.L.W. 457, 458-59 (Fla. 1987)(constitution violated when jury's consideration of mitigating circumstances is limited or diminished).

The court relied on the "escape" as well to find one (under sentence of imprisonment, Fla. Stat. sec. 921.141[5][a]) and arguably two (Fla. Stat. sec. 921.141[5][b]) aggravating circumstances. This was also improper. Moreover, the sentencing court used the impermissible escape evidence to rebut mitigation (e.g., no significant prior criminal history). This alone is sufficient to establish eighth amendment error. Cf. Proffit v. Wainwright, 685 F.2d 1227, 1256-61 (11th Cir. 1982), modified, 706 F.2d 311 (1983). Without the jailhouse "escape" report, Mr. Lambrix' prior record reflected only one nonviolent prior felony offense involving a forged check charge, and the lack of a previous significant criminal history apparent from such a record would have supported a finding on that circumstance. Since a mitigating circumstance may very well have been appropriate without the improper "escape" evidence, and at least one aggravating factor was improperly found on the basis of that evidence, the error cannot be deemed harmless beyond a reasonable doubt. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977)(aggravating circumstance error not "harmless" in cases where mitigation exists).

Other independent mitigating evidence was introduced at sentencing. Given the innumerable factors that go into a capital sentencing jury's determination, it simply cannot be said that

this error was harmless beyond a reasonable doubt.

As discussed, the "escape" evidence violated Mr. Lambrix' eighth and fourteenth amendment rights. It rendered the sentence of death fundamentally flawed, unfair, and unreliable. The unreliable, unsubstantiated "escape" testimony was a classic example of "misinformation of constitutional magnitude" used to sentence a defendant to death. See Zant v. Stephens, 462 U.S. 879, 887-88 (1983); cf. United States v. Tucker, 404 U.S. 443, 447-49 (1972). The eighth amendment was violated because the jailhouse "escape" report was used in aggravation, see Zant v. Stephens, supra, and to rebut mitigation. See Proffitt v. Wainwright, supra. The jailhouse "escape" report also denied Mr. Lambrix his right to a fundamentally fair and reliable sentencing determination, for it infected a degree of unreliability into these capital sentencing proceedings which the eighth amendment does not countenance. Cf. Gardner v. Florida, 430 U.S. 349 (1977) (reliability key aspect of capital sentencing determination); Beck v. Alabama, 447 U.S. 652 (1980)(same); see also Lockett v. Ohio, 438 U.S. 586 (1978)(eighth amendment requires that capital defendant be provided with individualized and reliable capital sentencing determination based on his character and background and the circumstances of the offense). A sentence of death resulting from such flawed proceedings simply cannot be relied upon. In short, the secretary's improper "escape" testimony "serve[d] to pervert the jury's deliberations [and the court's consideration] concerning the ultimate question of whether in fact [Cary Michael Lambrix should be sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). The error was not harmless.

As noted, this sentencing error was preserved: it was objected to and a mistrial was requested. However, appellate counsel rendered patent ineffective assistance in failing to raise it. Appellate counsel in fact presented no challenges to

Mr. Lambrix' unconstitutional sentence of death on direct appeal. See Lambrix v. State, supra, 494 So. 2d at 1148. Presentation of this error would have made a difference -- Mr. Lambrix' death sentence was and is unreliable.

This Court then independently reviewed the penalty phase record for error, id., 494 So. 2d at 1148, but nevertheless allowed the sentence to stand. In this regard, Mr. Lambrix respectfully submits that the Court erred -- aggravation was improperly found and mitigation improperly rebutted because of the improper "escape" testimony. Constitutional error was and is present with regard to Mr. Lambrix' sentence of death. Mr. Lambrix urges that the Court now correct this fundamental error, an error which rendered this death sentence unreliable.

CLAIMS IX- XI

MR. LAMBRIX'S SENTENCES OF DEATH ARE UNRELIABLE, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO CHALLENGE THE PROPRIETY OF MR. LAMBRIX'S UNCONSTITUTIONALLY IMPOSED DEATH SENTENCES, IN VIOLATION OF MR. LAMBRIX'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This Court is especially vigilant in its policing of counsel's performance on capital appeals. Although it should be obvious, this Court has found it necessary to stress to appellate counsel that "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny." Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Consequently:

> [T]he role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the

> thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Id at 1165 (emphasis supplied).

Appellate counsel in Mr. Lambrix's case raised no sentencing issues. This cannot be deemed "Strategy". It was, in truth, "inadequacy of research and briefing of the appeal . . ." Wilson, 474 So.2d at 1163. Four of the aggravating circumstances found by the trial judge were invalid, yet appellate counsel raised no challenges to the propriety of the death sentence. Mitigation also should have been found. See, e.g., Claim VIII, supra. Moreover, various errors occurred before the jury, see, e.g., Claim VIII, supra, errors which deprived Mr. Lambrix of his rights to a fair and reliable jury recommendation. Cf. Riley v. Wainwright, supra. None of these issues were presented by appellate counsel, see Lambrix, supra, 494 So. 2d at 1148, and the errors were not cured by this Court's independent review function. In fact, the use of the improperly found aggravating circumstances to sentence Mr. Lambrix alone warrants that his death sentences be reversed.

A. Pecuniary Gain

Because the aggravating circumstances set out in Fla. Stat. section 921.141 actually define those crimes for which the death penalty may be imposed, they are essential elements of capital murder and thus must be proved beyond a reasonable doubt. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Alvord v. State, 307 So. 2d 433 (Fla. 1975); Williams v. State, 386 So. 2d 538 (Fla. 1980).

As discussed in Issue X of Mr. Lambrix's pro se petition, the evidence does not support a finding that the killing was committed with the specific intent to commit robbery, i.e., to

achieve pecuniary gain. The state thus did not meet its burden of proving the existence of this aggravating circumstance beyond a reasonable doubt. The trial court's application of this aggravating circumstance violated Mr. Lambrix's right to have the state prove its case beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), and rendered his sentences of death fundamentally unreliable and violative of the eighth and fourteenth amendments.

B. Heinous, Atrocious, or Cruel

An analysis of the application of this aggravating circumstance must begin with this Court's original definition of the term "especially heinous, atrocious, or cruel." This circumstance was initially defined in Dixon v. State, 283 So. 2d 1 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. what is intended to be included are those capital crimes where the actual commission of a capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conciousless or pitiless crime which is unnecessarily tortous to the victim.

Id. at 9.

In its decision in Tedder v. State, supra, this Court recognized that while "it is apparent that all killings are atrocious, and that appellant exhibited cruelty . . . still, we believe the legislature intended something especially henious, atrocious, or cruel when it authorized the death penalty for first degree murder." Id. at 910, n.3 (emphasis added).

On the heels of Tedder came Halliwell v. State, 323 So. 2d 557 (Fla. 1975), wherein this Court again invalidated a finding of henious, atrocious, or cruel because the Court perceived

"nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. The description of the murder, markedly similar to one of the instant case, was graphic:

> Appellant grabbed a 19-inch breaker bar and beat the [victim's] skull with lethal blows and then continued beating, bruising, and cutting the [victim's] body with the metal bar after the fatal injuries to the brain.

Id. at 561. Despite the obvious brutality of the crime, this Court found the heinous, atrocious, and cruel aggravating circumstance inapplicable, "see[ing] nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Id.; cf. Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982) (Trial court's finding that bludgeoning murder was heinous, atrocious, or cruel reversed on appeal because "[t]here was no proof that the victim was aware that he was going to be struck" or that "the victim was subjected to repeated blows while living."); see also Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983) ("Where death has been instantaneously inflicted on an unsuspecting victim, or where the manner in which the victim was murdered had not exceeded the atrocity and cruelty inherent in any murder, this . . . aggravating circumstance has not been found to apply").

The trial court's basis for the application of this aggravating circumstance was simply that "the facts speak for themselves." (R. 1355). An examination of those facts indicates that this was not the type of case "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies," Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), and that neither killing was heinous, atrocious, or cruel under the above interpretations.

According to the testimony of the State's medical examiner, the cause of Clarence Moore's death was "multiple crushing blows to the head," (R. 2064) causing multiple skull fractures, any one

of which could have caused death and any one of which would have caused immediate unconsciousness (R. 2093). There was no evidence of struggle or lingering death. In all probability the victim died as a result of the initial blow. There was no evidence to indicate otherwise.

The cause of Alicia Bryant's death was "probably" manual strangulation (R. 2073), although the fragile hyoid bone in the front of the throat was not broken (R. 2078). The only other signs of physical trauma noted by the medical examiner were a three-centimeter laceration on the ear and, "on the right hand, a ring which had been badly distorted." (R. 2046). There was no testimony as to when these latter wounds were inflicted, nor any evidence showing that they in fact occurred before death and not during the burial.

Here, there was no evidence of "additional acts" which set the instant killings "apart from the norm of capital felonies." Dixon, 283 So. 2d at 9. No evidence was presented which demonstrated that either killing was the type of "consciousless or pitiless crime which is unnecessarily torturous to the victim" id., and to which therefore the "heinous, atrocious, or cruel" aggravating circumstance, Fla. Stat. section 921.141 (5)(h), was applicable under the above-discussed established state law.

In Zant v. Stephens, 103 S.Ct. 2733, the United States Supreme Court recognized that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: to circumscribe the class of persons eligible for the death penalty." Id. at 2743. In order to "minimize the risk of wholly arbitrary and capricious action," Id. at 2741, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty." Id. at 2742-43.

If Fla. Stat. section 921.141 (5)(h) can be properly applied to the facts of this case, it does not serve its constitutional function of "genuine[ly] narrow[ing," and thus violates the

Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 420 (1980). In Godfrey, Georgia's similar statutory aggravating circumstance ("outrageously or wantonly vile, horrible, or inhuman... involving depravity of the mind or an aggravated battery to the victim"), while valid on its face, Gregg v. Georgia, 428 U.S. 153 (1976), was found unconstitutional in application, because there was in fact no narrowing accomplished through its application in Godfrey's case. Godfrey, 446 U.S. at 433 ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.")

Section 921.141 of the Florida Statutes must "genuinely narrow the class of persons eligible for the death penalty" in order to pass constitutional muster. Stephens, supra, 103 S.Ct. at 2742-43. In this case it does not, for it does not apply to either of the instant killings under the established precedents of this Court. Nothing in the record shows that the deaths were not instantaneous. Thus, the trial court's finding of this aggravating circumstance impermissibly infected the trial judge's balancing of aggravation and mitigation, and rendered Mr. Lambrix's sentences of death unreliable. The analysis presented below is also pertinent to this aggravating circumstance; Mr. Lambrix therefore refers the Court to that analysis, especially as it pertains to post-offense actions.

C. Cold, Calculated, and Premeditated

The trial court based its application of this factor to Mr. Lambrix's case on its findings that the "Defendant had not had one harsh word with either of the victims and, in fact, had not known them before that night," and that after the killings were concluded, Mr. Lambrix "went back into the trailer, washed up, and ate a plate of spaghetti." (R. 1355). The State's argument in support of the application of this aggravating circumstance

had foreshadowed the trial court's theme: because, according to the prosecutor, Mr. Lambrix "came back in the trailer and proceeded to eat a plate of spaghetti" after the killings were completed, and because of the manner in which the bodies were later disposed of, Fla. Stat. section 921.141 (5)(i) applied.

There was no factual basis for the finding of this aggravating factor, and its existence was thus not proven beyond a reasonable doubt. The findings made by the trial court regarding Mr. Lambrix's relationship with the victims if anything support a finding that the killings were spontaneous, and that the heightened degree of premeditation required for the valid application of this factor was therefore absent. Moreover, as discussed in Issue VI, supra, Mr. Lambrix's intoxication at the time of the offense would have negated the application of this aggravating factor, had the trial judge appropriately instructed the jury to or had he himself considered it.

The trial court's finding of the existence of this factor was also based on wholly improper considerations. This Court has repeatedly held that a defendant's post-offense actions cannot form the basis for the application of aggravating circumstances. See, e.g, Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Smith v. State, 344 So. 2d 915, 918 (1977); Washington v. State, 362 So. 2d 658, 665 (Fla. 1978); Blair v. State, 406 So. 2d 1103, 1109 (Fla. 1981); Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1078 (1983); Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985). Thus, Mr. Lambrix's later actions and his alleged disposal of the bodies were irrelevant and improper factors upon which to base a finding of the "cold, calculated, and premeditated," or any, aggravating factor.

Again, if Fla. Stat. section 921.141 (5)(i) can be properly applied to the facts of this case under state law, it does not serve its constitutional function of "genuine[ly] narrow[ing],"

and thus violates the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 420 (1980).

D. Under Sentence of Imprisonment

This aggravating factor was discussed in Claim VIII, supra. the evidence introduced in support of this circumstance was the jailhouse log's indication that Mr. Lambrix had "escaped". As discussed (Claim VIII, supra), that evidence was simply not enough to establish the existence of this aggravating circumstance beyond a reasonable doubt.

CLAIM XII

THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S CROSS-EXAMINATION OF KEY STATE WITNESSES DEPRIVED MR. LAMBRIX OF HIS RIGHT TO CONFRONT AND MEANINGFULLY CROSS-EXAMINE THE WITNESSES AGAINST HIM, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This issue was raised on direct appeal. At the time, the Court denied relief. Lambrix v. State, 494 So. 2d 1143, ___ (Fla. 1986).

Mr. Lambrix's contention with regard to the trial court's restriction of his right to cross-examine two key state witnesses was and is that the trial court's refusal to allow trial counsel to fully question the two witnesses deprived him of his constitutionally guaranteed right to confront his accusers.

The sixth amendment guarantees the right to confront adverse witnesses. This right is fundamental and made obligatory on the states by the fourteenth amendment. Smith v. Illinois, 390 U.S. 129 (1968). The right of confrontation embodies the right of defendants to cross-examine the witnesses against them.

> [T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out truth in the trial of a criminal case.

Pointer v. Texas, 380 U.S. 400 (1965). The purposes underlying this provision were stated quite clearly in California v. Green, 399 U.S. 149, (1970):

> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of the trial that forms the core of the values furthered by the confrontation clause. The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, from being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they might look upon him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Mattox v. United States, 156 U.S. 237, 242-43 (895).

California v. Green, 399 U.S. at 157.

Prejudice results from a denial of the opportunity to place the witness in his proper setting and to test the weight of his testimony and credibility. Smith v. Illinois, 390 U.S. at 132. The right to cross-examine witnesses would be an empty right were a defendant not afforded the opportunity to meaningfully cross-examine. "If the right to effective cross-examination is denied, constitutional error exists without the need to show actual prejudice." Skinner v. Cardwell, 564 F.2d 1381, 1388 (9th Cir. 1977), cert. denied, 435 U.S. 1009.

Actual prejudice, however, is apparent in Mr. Lambrix's case. The area of cross-examination restricted by the trial court concerned the key aspects of the two witnesses' testimony. For example, witness Frances Smith had provided a prior statement in which she denied being with Mr. Lambrix on the night of the offenses (See R. 2322-25). The impeachment value of such evidence is obvious.

The trial court's refusal to allow proper cross-examination precluded Mr. Lambrix from "exposing falsehood and bringing out

the truth," Pointer, supra, and this rendered his convictions and sentences of death violative of the sixth, eighth, and fourteenth amendments.

This Court did not rule on this issue as it affected Mr. Lambrix's sixth, eighth, and fourteenth amendment rights. Mr. Lambrix respectfully urges this Court to revisit the issue now, and to vacate his unconstitutional convictions and sentences of death.

WHEREFORE, Mr. Lambrix, through counsel, respectfully urges that the Court grant the habeas corpus relief he seeks and vacate his capital convictions and sentences of death. Alternatively, Mr. Lambrix urges that the Court permit a new appeal. Wilson v. Wainwright, supra. Since factual issues are presented in this proceeding which cannot be determined on the trial record, Mr. Lambrix respectfully requests that in that regard the Court relinquish jurisdiction for the proper resolution of contested facts. Finally, as the transcript of the proceedings resulting in a mistrial (a transcript never provided to the Court on direct appeal) will be forwarded to the Court when the court reporter completes its preparation, Mr. Lambrix respectfully requests that the Court allow him to supplement this pleading with any issues which that transcript may make apparent.

Respectfully submitted,

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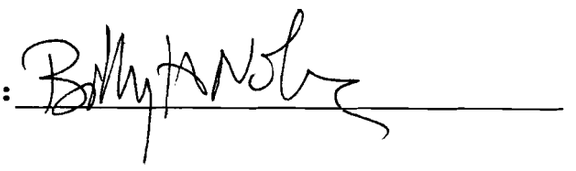
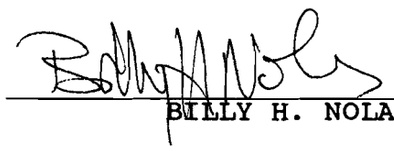
By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Kim W. Munch, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, FL 33602, this 27th day of January, 1988.



BILLY H. NOLAS