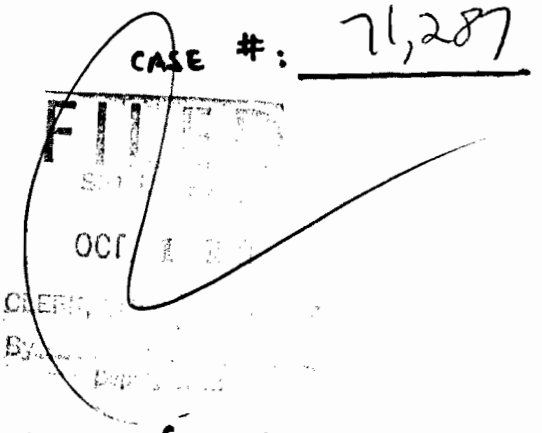
CARY MICHAEL LAMBRIX
— PETITIONER

VS.

RICHARD DUGGER, Secretary, — Dept. of Corrections, State of Florida.; T. L. BARTON, Superintendent, Florida State PRISON, at STARKE, FLORIDA.

IN THE SUPREME COURT OF FLORIDA

CASE #: 71,287



PETITION FOR WRIT OF HABEAS CORPUS
(AND OTHER APPLICABLE RELIEF)

CARY MICHAEL LAMBRIX
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AUTHORITY OF WHICH PETITIONER CLAIMS AUTHORITY TO PROCEED WITH STATE PETITION FOR WRIT OF HABEAS CORPUS

This is an original action under Florida Rule of Appellate Procedure 9.100 (A). This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030 (A) (3), and Article V, section (3) (b) (9), of the Florida Constitution. This Court also has jurisdiction because the acts and omissions which form the basis of this petition occurred in proceedings before this court. See, e.g. WILSON v. WAINWRIGHT, 474 So2d 1162 (FLA. 1985); Knight v. State, 394 So2d 997 (FLA. 1981)

As shown within this petition, petitioner was denied effective legal assistance on appeal due to Appellate counsel's specific, unilateral and deficient acts and omissions. During that appeal counsel failed to raise issue's which, if raised and argued, would have required (1) the reversal of petitioner conviction and sentence (s) of death, and (2) a new trial and (if neccesary) a new sentencing.

Appellate counsel also failed to research, analyze and develop the issues raised in this petition for relief, in that this petition in itself is proof that appellate counsel barely acquitted himself with the facts and record of this case, as well as the law applicable there to. Appellate counsel thus did not have the requisite knowledge and information to function as an effective advocate before this court on petitioners behalf.

Based on the facts contained within this petition, it is clear that the court-appointed appellate counsel was clearly ineffective in protecting the interests of his client, in that he acted incompetently in his appointment as counsel within the standard this Court previously applied in WILSON VS. WAINWRIGHT 474 So2d 1162, 1164 (FLA. 1985) AND Strickland VS. Washington 466 U.S. 668; 104 S. Ct. 2052; 80 L.Ed. 2d. 674 (1984), thus depriving the petitioner of the right to a full and meaningful direct appeal, and the effective assistance of counsel for purpose of that appeal, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, Article I

AND V of the Florida Constitution AND Florida Statutory Law.

Because of the ineffective AND incompetent ASSISTANCE PROVIDED by Court, petitioner NOW claims Authority to petition this Court through this writ for Habeas Corpus, for Relief previously denied due to Appellate counsel's failure to RAISE AND Argue the issues NOW RAISED in this petition.

NATURE OF RELIEF SOUGHT

PETITIONER seeks an order of this Court vacating the judgement and remanding the case for a new trial based on the dispositive points regarding fundemental constitutional and statutory violations which are set forth herein. See DAVIS V. ALASKA, 415 U.S. 308, 94 S. Ct 1105, 39 L.Ed 2d. 347 (1974) WITHERSPOON V. ILLINOIS, 391 U.S. 510, 88 S. Ct. 1770, 21, L. Ed. 2d 186 (1968); DUMAS V. State, 350 So. 2d 464 (FLA. 1977)

Alternatively, petitioner seeks this Courts issuance of a writ of habeas corpus granting him a new Appeal, on the merits, of his conviction and sentence of death. This relief is appropeiate under WILSON V. WAINWRIGHT, 474 So.2d. 1162, 1165 (FLA. 1985) and BARCLAY VS. WAINWEIGHT, 444 So2d. 956 (FLA. 1984)

The proper means of securing this Courts consideration of the issues discussed herein is a petition for a writ of habeas corpus. WILSON V. WAINWRIGHT 474 So2d 1162 (FLA. 1985); BAGGETT VS. WAINWEIGHT 229 So2d 239 (FLA. 1969) cert. dismissed, 235 So 2d 486 (FLA. 1970); POWE VS. State 216 So 2d 446, 448 (FLA. 1968). Although a petition for a writ of habeas corpus may not be used as a routine vehicle for a second or substituted appeal, this Court has consistently recognized that the writ must issue where the constitutional right of Appeal is substantially thwarted on crucial and dispositive points due to Appointed Counsel's deficiencies. See, e.g. WILSON 474 So2d 1162; BARCLAY, 444 So2d 956; MCCRAE V. WAINWEIGHT, 439 So2d 868 (FLA. 1983); State VS. WOODEN, 246 So2d 755 (FLA. 1971), BAGGETT, 229 So2d 239.

Petitioner demonstrates here within this petition for writ of habeas corpus that the Court-Appointed Appellate Counsel Acted ineffectively by his lack of adequate knowledge of instant case as exampled by his failure to fully raise and Argue on direct Appeal the issues set forth in this petition, which clearly will show that the violation to petitioner's constitutional rights to effective assistance of counsel and rights to full appeal of conviction, judgement and sentence were so significant, fundemental and prejudicial that the only relief could be a complete Reversal of both conviction and sentence, with Remand for a New Trial.

III

PROCEDURAL HISTORY OF INSTANT CASE

PETITIONER, CARY M. LAMBRIX, WAS ARRESTED in ORLANDO, FLORIDA ON MARCH 2, 1983 by the ORLANDO POLICE DEPT., on outstanding WARRANTS for the first degree MURDER of one ALICIA DAWN BEYANT, issued by the GLADES COUNTY CIRCUIT COURT, Judge RICHARD ADAMS. IMMEDIATELY following ARREST, petitioner WAS extradited to the GLADES County JAIL, in MOORE HAVEN, FLORIDA, where he WAS formally charged AND booked on one (1) count of First Degree MURDER, in connection with the (APPROX.) Feb. 5, 1983 death of ALICIA DAWN BEYANT. NO bond WAS set pending GRAND JURY INVESTIGATION.

ON MARCH 29, 1983 the GLADES County GRAND JURY REVIEWED the CASE, and formally indicted petitioner on two (2) counts of First Degree MURDER. A second WARRANT for one count of First Degree MURDER WAS served upon petitioner on that date, charging the petitioner with the (APPROX.) Feb. 5, 1983 death of one CLARENCE MOORE A/K/A LAWRENCE LAMBERSON, by Sgt. TOMMY HEARNE of the GLADES County SHERIFF'S Dept.

Petitioner pled not guilty and requested the court to appoint legal representation, MR. KENLEY ENGVALSON of the Ft. MYERS PUBLIC DEFENDERS office WAS appointed to represent petitioner, with the later appointment of ROBERT JACOBS (ASST. Deputy PUBLIC DEFENDER) to ACT AS chief counsel for defense over KENLEY ENGVALSON.

GLADES County CIRCUIT COURT, Judge RICHARD ADAMS, set trial date on this CAUSE for NOVEMBER 29, 1983. The trial went through until DECEMBER 9, 1983, when AFTER 11 hours of deliberations Judge ADAMS declared A "MISTRIAL" due to the jury's failure to reach AN UNANIMOUS VERDICT.

A second trial WAS set on this CAUSE for FEBRUARY 20, 1984, with the court AGAIN denying previously filed MOTION for change of VENUE AND MOTION for individual VOIR DIRE. Judge RICHARD STANLEY substituted Judge RICHARD ADAMS AND the CASE WAS presented to the second jury AS AN almost REPEAT PERFORMANCE of the first trial. Following the States presentation, the defense rested without presenting any CASE. The petitioner did not testify on his own behalf. On FEBRUARY 27, 1984 the jury returned A VERDICT of guilty AS charged on both counts, being First Degree MURDER.

ON February 29, 1984 the penalty phase of the trial was conducted. Both the State and Defense presented testimonial evidence before the Court. The petitioner did not testify on his own behalf. Following deliberations, the jury returned with a recommendation of death on Count I (Alicia Dawn Bryant) by a vote of 10-2, and a recommendation of death on Count II (Clarence C. Moore aka Lawrence Lambertson) by a vote of 8-4.

ON March 22, 1984 Circuit Court Judge R. Stanley adjudicated the petitioner guilty of both counts of first degree Murder, denying petitioners Motion for acquital, And imposed a sentence of death on each count.

Petitioner filed Notice of Appeal to this Court on April 18, 1984.

Petitioner was Appointed appellate counsel by the 20th Circuit Court, Judge W. Pack, in (approx.) May 1984, assigning the Public Defenders office in Bartow, Florida to the case. Due to an overload of pending cases, this office withdrew without any involvement in this case and the Circuit Court then appointed private attorney J.L. "Ray" LeBeaude to represent petitioner upon his direct Appeal.

Appellate Counsel, Mr. LeBeaude then filed numerous continuances and eventually filed the briefs in (approx.) Mid- May, 1985, with oral arguments in this cause previously held on October 11, 1985.

upon direct Appeal, Mr. J.L. LeBeaude Raised five (5) issues challenging the conviction and no issues challenging the sentence of death. On September 25, 1986 this Court ruled on that direct appeal denying all relief sought (Lambrix vs. State 494 So.2d 1143, (Fla. 1986)

Following summary denial of direct appeal, Appointed appellate counsel failed to Motion Court for Rehearing and failed to Motion for writ of Certiorari, thus effectively denying petitioner any review of this adverse Ruling.

IV

LEGAL STANDARD FOR CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The right to a full and meaningful direct appeal, and to effective assistance of counsel for that appeal, is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; Articles I and V of the Florida Constitution and Florida Statutory Law. See, e.g. Evetts v. Lucey 469 U.S. ___; 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Peoffit v. Florida 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d. 913 (1976); STATE V. DIXON 283 So2d 1 (FLA. 1973), Article V, § 3 (b)(1) of the Florida Constitution and § 925.035 et seq. of the Florida Statutes (1985)

Just in 1985 this Court again affirmed its long-held view that "The basic requirement of due process in our adversarial legal system 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" Wilson v. Wainwright 474 So2d 1162, 1164 (FLA. 1985) (emphasis added)

In Wilson, this Court applied the constitutional standard established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, Rehg. denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984), for analyzing ineffectiveness claims regarding appellate representation.:

> "The criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial counsel: Petitioner must show [1] specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and [2] the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result."

Wilson v. Wainwright 474 So.2d at 1163, citing Johnson v. Wainwright 463 So.2d 207 (FLA. 1985). Thus petitioner has the re-

sponsibility to show that the specific acts and/or omissions did in fact result in a failure to be effectively represented on appeal by court-appointed appellate counsel.

In Adams v. State 456 So2d 888 (Fla. 1984), this court likewise relied on the Strickland standard for assessing actual prejudice resulting from ineffective appellate representation. "To prove prejudice ..... the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 891 (emphasis added). Accordingly to establish actual prejudice under Strickland / Wilson standard, petitioner must show that, but for counsel's error in failing to adequately Analyze, Review and Raise the particular issues which form the basis for this petition, a "reasonable probability" exists that the outcome of his direct Appeal would had been different.

An omission which constitutes "a mere sham" and signals presumptive prejudice naturally includes counsel's failure to familiarize himself to the specific's of his clients case and to use "or even consider additional evidence which might have been available to support the defendants case." Blake vs. Kemp 758 F.2d at 534. This omission is fundemental and presumptively prejudicial because "investigation and preparation are the keys to effective representation" Baldwin 688 F.2d. at 739, quoting Rummel v. Estelle 590 F.2d. 103, 104 (5th Cir., 1979) of course, on appeal the advocate's unique investigative duties focus on a review of the trial transcripts, the record on Appeal and any other important records or documents material to the conviction and sentencing of his client; Appellate counsel's unique duty to discover trial-level error and highlight such error for the appellate court neccessarily depends on his grasp of the record on appeal. As such, gross unfamiliarity with the record renders Appellate counsel fundementally ineffective and constitutes a constructive denial of counsel giving Rise to a presumption of prejudice.

Of course, Appellate counsel cannot be considered incompetent or ineffective for failing to raise issues which were procedurally barred. Ruffin v. Wainwright 461 So2d 109, 111 (Fla. 1984) Petitioner must show that the omitted issues were

properly preserved or constituted fundamental error. Id.

Moreover, "sometimes a single error is so substantial that it alone cause(s) the attorney's assistance to fall below the Sixth Amendment standard." Baldwin, 688 F.2d at 744, quoting Nero v. Blackburn 597 F.2d 991, 994 (5th Circuit, 1979) (emphasis added)

Finally, this court has established that "death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981) (Addressing a claim of ineffective assistance of appellate counsel in a death penalty case) This "difference" stems from the utter finality and qualitative uniqueness of capitol punishment relative to all other forms of punishment. E.g., Gardner v. Florida, 430 U.S. 349, 360, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) Accordingly, this court must critically evaluate the instant appellate counsel's conduct and effectiveness when appellate counsel represented petitioner on direct appeal before this Court.

The harm caused by deficient representation, moreover, is proportionate to the exposure for criminal liablity which is present in the particular proceeding at hand. E.g. Blake vs. Kemp 758 F.2d at 533. Lack of preparation during an appeal is therefore proportionately more prejudicial because the defendant is held to carry the proof. Obviously, this Rule applies with the greatest of force in a capitol appellate proceeding because the capitol appellate/defendant will literally be put to death if his appellate counsel fails to make the reasonably necessary preparations to carry the requisite burden of proof.

Appellate counsel's ineffectiveness in this case by his failure to adequately review the trial record, and raise numerous fundamental and constitutional trial errors did, in fact, compromise the petitioner's direct appeal well beyond the Sixth Amendment standard and petitioner submits to this Court that greater prejudice just could not be possible without totally depriving petitioner of his right to counsel altogether.

ISSUES AND SPECIFIC ACTS APPELLATE COUNSEL DID PREJUDICIALLY OMIT RENDERING HIS ASSISTANCE INEFFECTIVE.

(Cont.)

ISSUE I

TRIAL COURT DENIED PETITIONER A TRIAL BEFORE A FAIR AND IMPARIAL JURY

The petitioner in this cause was peeviously teied by a juey on the same chaeges within the ueal community of Glades County on theee (3) months peioe to the tiial befoee the juey which convicted him of the instant capitol caimes.

Peioe to the fiest teial on the same ceiminal capitol chaeges petitionee now stands convicted of, counsel foe petitionee filed a Motion foe Change of Venue, which was suppoeted by ovee whelming evidence of community peejudice and a liteeal insatueation of local media pee- teial coveeage containing many ecconous bits of infoemation not suppoeted by evidence peesented at teial. (R 862- 888 * - see foot note below) This Motion foe change of Venue was subquently denied at a pee- teial heaeing by Judge Richaed Adams, and the fiest teial commenced on Nov. 28, 1983 at the Glades County Couet house, Judge R. Adams peesiding. This teial went theough until Dec. 7, 1983, when following 11 (eleven) houes of juey delibeeation, they weee unable to eeach a UNANIMOUS veedict. Judge R. Adams declaeed a "mistein" due to "hung juey".

On Febuaey 24, 1984 this cause was again beought to teial, with Judge Richaed M. Stanley peesiding at Glades County Couet house, and all peevious motions weee then Renewed. (R 1429) This collective Renewal of peeviously aegued Motions included the above iefeeed to Motion foe Change of Venue, in addition to petitioneis counsel steessing the Motion foe Individual Voie diee (R 1429- 1431), beinging it to the Couets Attention that "a mistein (was) declaeed in this cause two (2) months" peeviously (R. 1430) The Couet Aknowiegded this fact, and the State also was aware that the fact that petitionee was peeviously teied on

* page iefeeences to the ecioed on Appeal Aee designated by an "R" peoceding the appopeiate page Number.

the instant case could create a problem, in that Asst. State Attorney Mc Gauthen stated that :..

> "..... The only problem in picking the jury that we might have difficulty is that it might be no secret to anybody the second time around ..." (R. 1430)

Following the denial of the above motions by the trial court, the jury voir dire examination began in open court.

During the two day voir dire examination the majority of potential jurors had some previous knowledge of the case through the media sources and community small-talk. This is to be expected within a small, rural farming community, of which Glades County is, esspecially in light of the fact that only two (2) weeks previously the local News paper published its "Ten top stories of 1983", of which the petitioner's case was listed as the top story, even superceding that of the county sheriff's death.

But undue prejudice was inflicted upon the petitioner when during the course of voir dire examination of potential jurors in open court, two (2) potential jurors openly voiced knowledge that petitioner was previously tried on the instant case before a jury. Neither commented whether the petitioner was, or was not convicted. The <u>only</u> information the remainder of the jury pool was given was the fact that petitioner was previously placed on trial by the State, and whatever the out come of that previous trial was, it was <u>not</u> an acquital. Without further information, their only assumption could be that petitioner must had been previously convicted. Our society educates its citizens from the time of child hood that no citizen can be placed in jeapoedy twice for the same crime. This Constitutional standard is taught in every school in our land. Furthermore, the media educates our society of the fact that consistently "criminals" are retried on criminal charges following a reversal of previous conviction.

The below relevent portions of record conclusively show that there can be no doubt that by allowing

this VIOA DIRE testimony in open court, the trial court peovided the means of contamination of the entire jury pool, and all peesent in the court room.

(VIOA DIRE EXAMINATION by Asst. State Attoency Mc Geuthea of veniae peason MR. Glovea.) (R. 1459):

"MR. GLOVER: Awd, My neighboa was on the jury on the last teial.

MR. Mc Geuthea: Did you talk with youa neighboa Regaeding the facts of the case?

MR. Glovee: Afta it was supposed to be done with.

MR. Mc Geuthea: Do you have any pee concieved notions at this time as to what youa veadict would be?

MR. Glovee: yes"

... ...

MR. Mc Geuthea: Judge, May counsel Approach the bench foa A moment?

(bench confeence conducted as follows)

MR. Mc Geuthea: Judge, I was afeaid we would have peoblems Along these lines. Its A small community.

The Court: Im AWAEE of that. What you say? Do you have any questions you wish to add?"

(VIOA DIRE EXAMINATION of veniae peason MR. Geeen by ASST. State Attoency Geeene) (R. 1568)

"MR. GEEENE: Have you eead in the papeas About the case?

MR. Geeen: yes

MR. Geeene: Have you discussed this AMong youa feiends?

MR. Geeen: My MOM, she was on the last jury teial."

In addition to this highly pee judicial infoamation of the petitionea being peeviously teied foa the instant case, the pee judice to the petitionea was fuatha Aggaavated when six

other potential jurors testified in open court that they, too had formed preconcieved notions of guilt due to previous knowledge of the case and could not give the petitioner a fair trial. In summary, the records reflects these six venire persons as follows:

1)	Collins	(challenged)	(R. 1532-1533)
2)	Gunn	(excused for cause)	(R. 1566-1567)
3)	Rush	(excused for cause)	(R. 1626-1627)
4.)	Lanier	(challenged)	(R. 1646-1648)
5.)	Swarthout	(excused for cause)	(R. 1679-1680)
6.)	Cheistle	(excused for cause)	(R. 1739)

All of this prejudicial information could had been avoided had the court either granted defense counsel's motion for individual voir dire, or motion for change of venue. But the court did not and now the law is clear.

Just recently the 3rd District Court of Appeal quoted Hughes (Hughes v. State. 490 A.2d. 1034, Del., 1985) when it said in Weber vs. State ____ So2d. ____, 3rd D.C.A, Fla. 1987)

> "It seems unreasonable to expect a juror to divorce from his deliberate process, knowledge that a defendant has been previously tried and .... once more subjected to prosecution.
>
> The 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"

(as quoted in Weber, emphasis added)

Unlike the above Weber case, petitioner was not previously convicted. But the jury had no way to know that. Their only knowledge was that the petitioner was, in fact, previously tried before a jury and the state did place "so much time and expense" to again place the petitioner on trial that "the average lay person (must) assume that such a defendant, must, in fact, be guilty"

As United States V. Williams clearly says:

> "The effect of exposure to extra judical reports on a jurors deliberations may be too substantial even though it is not perceived by the juror himself, and a jurors good faith cannot counter this effect."
> (United State v. Williams 568 F.2d at 471)

So, the mere exposure of such information that petitioner was previously placed on trial for the same charge was highly prejudicial and could not be overcome, eliminating any possiblity to impanel a fair and impartial jury to try this case following the contamination of the entire jury pool.

> "One of the fundamental rules of criminal law is that the government has the burden of establishing guilt solely on the basis of evidence produced in the court room and under the circumstances assuring the attendant judical safeguards"
> Williams at 470, as quoted from Farese vs. United States, 428 F.2d. 178, (5th Cir, 1970)

The Court ignored these available judical safeguards in denying petitioner's counsel's motions for individual voir dire and motion for change of venue. Thus, the first evidence this jury was exposed to was the fact that the petitioner was previously tried before a jury on these charges and that as a result of that previous trial, the court was forced to dismiss six (6) potential juror's from three ranks due to the fact that three previous knowledge would prevent them from giving petitioner a fair trial.

This error cannot possibly constitute "harmless error", as the right to be tried by a panel of fair and impartial jurors is the most basic and fundemental right any criminal defendant has. It is the very root of our judical system and the foundation of

justice itself.

Furthermore, even absent the objection by counsel at the time of the violation itself, this issue was preserved for review on direct appeal as counsel for petitioner did motion the court for adequate and reasonable safeguards and the court denied said motions.

The violation of the petitioners most basic fundemental Constitutional right to be tried by a fair and impaerial jury can only be corrected in a full reveesal of this petitioners conviction and sentence, with an order for remand for new trial.

ISSUE II

COURT ERRORED IN CONDUCTING PORTION OF JURY VIOR DIRE PROCEEDING OUTSIDE PRESENCE OF PETITIONER

This Court has long recognized the basic and fundemental right of all ceiminal defendants to be peesent at all stages of the ceiminal peoceeding against them. This right is fuethee peotected by the sixth and fourteenth Amendments of the Constitution of the United States, and cannot be considered to be waived without a showing of clear waiver of such right made by the defendant in a "knowingly and intelligent" manner.

In this case, the state cannot show any such waiver exist's. The petitionee nevea waived his right to be peesent And the silence of such waivee on recoed cannot be said to infee that such rights weee waived.

> "The question of a waiver of a federally guaranteed constitutional right, is of coaese a Federal question protected by federal Law. Theee is a peesumption against the waiver of constitutional rights (citations omitted), and foa a waivea to be effective it must be clearly established that theee was 'an intentional relinquishment oa abandonment of a known right oa privledge'
>
> Johnson v. Zeebst, 304 U.S. 458, 464, 82 L.Ed. 2d. 1461, 1466, 58 S.Ct. 1019; Brookhaet v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d. 314, 317 (1966)

Without the teial recoed in this case clearly reflecting such standaed, it must theefoe be assumed no waiver existed and thus petitionee did not give up his right to be peesent at all peoceedings against him.

What the recoed in this case does clearly show is that the petitionea was not present dueing a poation of vioa diae that was held in the teial Judge's Chambees. Theee is absolutely no reason given as to why petitionea was not peesent in the recoed. And the teial Judge

did order his presence, but for reasons unknown the record does not show petitioner's presence again until voir dire is continued in open court later in the day. The record reads as follows: (R. 1486 - 1487)

"The Court: We will stay in recess until 1:30.
(whereupon, Court was in recess)
(whereupon, Court resumed and the following were held in the Judges chambers)

MR. JACOBS: MR. McGEUTHER would like to come forward with these two perspective jurors, and I believe he wishes to make a motion before the Court.

MR. MC GEUTHER: Just to tell the situation. First, GARY CLEMMONS, who I have known from prosecuting out in this AREA for awhile --- he came to me, and I think either one of them went to Bob, and told them as juror's to come and approach me. Apparently, MR. CLEMMONS is seeking to be excused from the jury panel, and I believe he may have good reason.

The Court: Tell me about it.

MR. CLEMMONS: I was in jail with MR. LAMBRIX in the same cell for about two or three weeks. We discussed a lot of things about the case.

The Court: No sweat

MR. CLEMMONS: If its all right, my wife wants to get out for the same reason. I discussed alot of things, and my opinions and stuff like that.

MR. JACOBS: The defendant would have no objections if they want to be excused. MR. LAMBRIX has indicated -- as the defendant indicates, he has no objections to the two being excused. Go along with his wishes, if the Court wishes to excuse them for cause.

The Court: You are excused for cause.

MR. MC GEUTHER: Want to do the stipulations?

MR. JACOBS: Judge, we have agreed with MR. MCGEUTHER ---

The Court: Get the defendant back in here. I just want to make sure he is here I don't want

to do anything without him"

Whereupon, the record does not show that petitioner was brought to the Judges chambers, and does not show the petitioners presence until much later, at the afternoon session following the lunch recess. (R. 1490):

> "(The following proceedings were conducted in open court)
> The Court: State ready to proceed?
> Mr. McGeathen: State is ready, your honor.
> The Court: Defense ready to proceed?
> Mr. Jacobs: Defense is ready to proceed, your honor.
> The Court: Defendant being present, you may proceed, gentlemen."

The record is silent as to whether the petitioner was ever brought into the presence of the Court. And although it is well established that a silent record that a silent record must be ruled in favor of the petitioner when a clear waiver is not shown in record, for the sake of argument, the petitioner would point out that in all proceedings before the trial Court, the Court always noted that the petitioner was present. Even when the proceedings were moved into the Judges chambers on other occasions, the court always first noted petitioners presence before proceeding. An example of this is found in the record at page 1511:

> "The Court: Court will stand in recess. Mr. Glover, would you come with us, please?
> (The following proceedings were conducted in the Judges chambers)
> The Court: All right, gentlemen. I believe you have some questions that you want to ask Mr. Glover out of the presence of the balance of the panel. For the record, we are now in chambers. The defendant is present. Also present is Mr. Glover, a prospective juror. State ready to proceed?"

The Court made the same notation on record each and every time the Court resumed, whether in open Court, or in Judges Chambers ..... except this one time, when in fact, the only notation on the record is that the Judge asked that the petitioner be brought back into his chambers. But obviously the petitioner was NOT brought into the Judges chambers. As An exception during the entire 7 day proceeding, this is the only time the Record doesn't first reflect that petitioner was present prior to Court resuming, and instead clearly shows that the petitioner was absent during this portion of voir dire. Furthermore, the record is absolutely void of any form or verbal, or expressed waiver by petitioner of his right to be present at all proceedings against him.

The absence of the petitioner at this portion of voir dire proceeding recorded at 1486—1490 of the record was a clear violation of the petitioners Sixth and Fourteenth Amendment rights, thus constitued fundemental error. This violation was also contrary to Florida Rules of Criminal Procedure, of which Rule 3.180 A (4) states:

> "In all prosecutions for crime the defendant shall be present ..... at the beginning of the trial during the examination, challenging, impaneling and swearing of the jury".

A valid waiver of petitioners right to be present during this portion of voir dire proceedings would constitute a waiver of the petitioners Sixth and Fourteenth rights, and cannot be found to exist from a silent record, or by inference, assumption or innuendo.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions

for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon"
Boyd v. United States, 116 U.S. 616, 634 (1886)

The Sixth Amendment guarantees a criminal defendant the right to confront witnesses against him and the right to be present at all stages of the trial, from impaneling of the jury to return of the verdict. Illinois v. Allen, 397 U.S. 337, 338 (1970); see also Diaz v. United States, 223 U.S. 442, 453-455 (1912) This constitutional right cannot be denied without showing of a clear waiver by the petitioner.

Furthermore, in this instant case, the petitioner had motioned the court to be appointed legal co-counsel to ensure that his rights to be present would be preserved at all costs (R. 776). The Court did then grant the "Motion for Appointment of defendant as Co-counsel" and enter an order as to such (R. 891), thus the recent ruling of United States v. Gagnon, 105 S.Ct 1482 (1985) would not apply, as with the appointment by the Court of petitioner as co-counsel preserved the petitioners right to be present even at in camera hearings within the the Judges chambers. (see also United States v. Boone, 759 F.2d. 345, 347 (4th Cir). This case is totally different from the circumstances of either Boone or Gagnon, as the petitioner was legal co-counsel.

An error of this magnitude constitutes a violation of the basic, fundamental rights of the petitioner as set forth in the Sixth and Fourteenth Amendments and can only be corrected by the reversal of convictions and sentences, with remand for new trial.

ISSUE III

COURT ERRORED IN EXCUSING POTENTIAL JUROR'S FROM VIOR DIRE WITHOUT LEGAL CAUSE OR PROVIDING OPPORTUNITY TO CHALLENGE.

In this case, the teial judge had a feiend. And that feiend had a feiend who was subpeana'ed foe juey duty in this instant case. But foe eeasons that weee neveR beought out, by this potential jueoR diRectly, the Judge decided to do his feiend a favoR and excuse this veniRe peeson without legal cause oR opportunity to challenge. The Recoed says it best:

(Teial Recoed at page 1488 — 1489)

"The Couet: Me. Stossell -- you know the one Im talking about? He is the only outside man foe the peopeaty appeaisee's office, and Me. Sealy told me if I could excuse him, he ceatainly would appeiciatte it. I want to excuse Me. Stossell then."

The excusal of potential jueoR "Me. Stossell" was impeopeR, and denied the petitioneR of his constitutional Right to be teied by A juey dRawn fRom a fair Random selection of the community, which is A violation of petitioneRs Sixth and Fouteenth Amendment Rights.

The State of Floeida is cleaR in its peoceduee to excuse veniee men. This peoceduRe does not include excusing potential jueoes because A feiend of the Couet would "appeiciate it".

Aeticle I, sections 9 and 22 of the Constitution of the State of Floeida beought about the Floeida Rules of (Cimina) Peoceduee, of which Rule 3.300 (b) states:

"The Couet may then examine each peospective jueoR indivually oR may examine the peospective jueoes collectively. Counsel foe both State and defendant shall have the Right to examine jueoe's oeally on thieR voiR diee. The oeden in which the paeties may examine

each juror shall be determined by the Court. The right of the parties to conduct an examination of each juror orally shall be preserved." (emphasis added)

In this case, the record is clear that the right to examine each juror was not preserved. The Judge was obviously aware that the Florida Rules of Criminal Procedure demands he allows the petitioner to examine each juror, but was not interested in preserving that right. The record is clear that that his callous disregard went beyond the exclusion of the venire person MR. Stossell. The record, at page 1489-1490 records this conversation between the court and court clerk:

> "The Court: One thing about it, if I don't appear to be here and these things come up, use your own judgement. You don't get any fuss out of me. By the same token, if its something reasonable, and you all think it is something that I would do, do it."

So, not only did he personally excuse one juror without cause, or opportunity to challenge, but he allowed his court clerk to use its discretion on who should or should not be excused. The record reflects six (6) potential jurors that were called, but had been excused. No legal cause is recorded, nor opportunity to challenge preserved. These six potential jurors could reasonably have constituted half the entire jury panel, which could have reasonably effected the entire outcome of this proceeding.

The record reads as follows:

"

1) page 1595
"The Clerk: Number 100, WANDA S. SEARCY. She was excused."

2) page 1680
"The Clerk: Number 49, DELMER SARGENT. Excused.

3) page 1690
"The Clerk: Number 204, THOMAS GADKINS, JR. He was excused..."

4) PAGE 1691

"The CLERK: NUMBER 119, THOMAS PERRY. HE WAS EXCUSED EARLIER"

5) PAGE 1735

"The CLERK: NUMBER 161, ZOLA MAE TULLICH. SHE WAS EXCUSED."

6) PAGE 1757

"The CLERK: NUMBER 95, CHERYL A ROBERTS. EXCUSED"

THIS ABUSE OF THE TRIAL COURTS AUTHORITY, AND WRONGFUL RELINQUISHMENT OF DUTY TO THE COURT CLERK VIOLATED THE MOST BASIC AND FUNDAMENTAL RIGHT OF THE PETITIONER ..... THE RIGHT TO A FAIR TRIAL. AND EVEN WITH THE EXCUSAL OF ONLY ONE POTENTIAL JUROR WITHOUT LEGAL CAUSE, OR OPPORTUNITY TO CHALLENGE IS REVERSALABLE ERROR. ALTHOUGH THIS ISSUE IS NOT PRESERVED IN THE RECORD BY TIMELY OBJECTION, THE PETITIONER IS NOT PROCEDURALLY BARRED FROM RAISING THIS ISSUE, AS IT CONSTITUTES A VIOLATION OF THE PETITIONERS "DUE PROCESS" AND CANNOT BE PROVEN TO BE "HARMLESS" BEYOND REASONABLE DOUBT.

BEING THAT THIS IS A CAPITOL CASE, UTMOST CARE SHOULD BE TAKEN TO ENSURE THAT THE PANEL OF JURORS WERE WITHIN THE STANDARD OF THE LAWS OF BOTH THE STATE OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES. EVEN THE WRONGFUL EXCLUSION OF ONE POTENTIAL JUROR COULD HAD MADE ALL THE DIFFERENCE. THE COURTS HAVE PREVIOUSLY STATED:

> "THE IMPROPER EXCLUSION OF EVEN ONE OUT OF 83 VENIRE MEMBERS WAS GROUNDS FOR REVERSAL OF A DEATH SENTENCE"

THIS EXCUSAL OF POTENIAL JURORS AND THE EXCUSAL OF MR. STOSSELL BY THE COURT WITHOUT SHOWING LEGAL CAUSE, OR ALLOWING THE PETITIONER THE RIGHT TO CHALLENGE WAS A VIOLATION OF THE PETITIONERS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES, AND STATE STATUTORY LAWS CONCERNING SUCH, TO THE EXTENT THAT THE ONLY REMEDY AVAILABLE TO CORRECT THIS ERROR WOULD BE COMPLETE REVERSAL OF BOTH CONVICTIONS AND DEATH SENTENCES.

ISSUE IV

THE CONVICTION FOR FIRST DEGREE MURDER IN COUNT I AND COUNT II MUST BE REVERSED AS THE STATE FAILED TO ESTABLISH A PRIMA FACIA CASE AGAINST THE PETITIONER.

The evidence of petitioner's guilt on both Count I And Count II AS charged by indictment WAS based on a CASE that relied wholly on circumstanial evidence to peove the returned veadict's of First Degree Muedee. While A CASE based on circumstanial evidence can be legally sufficient to sustain A conviction it Must exclude all reasonable hypotheses of innocence. McArthee v. State, 351 So2d 972 (FLA. 1977) Where the only proof of guilt is circumstanial, no matter how strongly the evidence MAY suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypotheses of innocence. Williams v. State, 437 So.2d 133 (FLA. 1983)

The Motive relied on by the State to support the theory of peemeditated First Degree Muedee in this case WAS Robbeey. The petitioner WAS NEVER charged with Robbeey, nor did the State peesent A "felony Muedee" AAguement. But they had to peovide A Motive. There WAS insufficient peoof that Any robbeey occuered. The States evidence to support any Motive of Robbeey WAS the testimony of thier Key witness, Feances Smith (R. 2517) and hea knowledge of Any theft is not supported by evidence. In fact, the actual evidence in this case contradicts hea testimony. She claims to have seen the petitioner go theough the pockets of the deceased male (R. 2221) with the intention to remove peoperty belonging to the victim. But the evidence found conclusively shows that upon discoveey of the victims body, the veey pockets that the States Key witness claimed to have been seaeched actually contained peesonal valuables. (R. 2014) So Robbeey WAS not peoven beyond A eeasonable doubt. The States second claim WAS that the victims CAR WAS taken by the petitioner, but there WAS no evidence given to show that the petitioner committed Any ceime with the peemeditated intention to defeaud the victim of his

Automobile. Quite to the opposite, the evidence supports the fact that if anything, the car was taken as an after thought. All the evidence the State presented showing that the petitioner might had taken illegal possession of the victims property was clearly after-the-fact, and no premeditation was shown to exist. The petitioner claims that this evidence does not support the State's allegation that the petitioner committed premeditated First Degree Murder so that he could Rob the victims. Removal of a victims property after-the-fact without showing premeditated intent cannot constitute Robbery, as the Courts of this State have ruled that 'Robbery cannot be committed against a corpse." (Travis v. State ___So2d___, 1987)

Even if this Court does accept the Argument that the petitioner committed the capitol crimes for pecuniary gain, that Argument is INVALID, as the State charged the petitioner with premeditated Murder, not felony Murder. And there was no proof of premeditation. It would only be through the indulgence of sheerest speculation that it can be said that the petitioner had formed a premeditated intent to take the lives of the victims. The evidence does not support the juries conclusion that an actual intent was formed in the mind of the petitioner. The State presented absolutely no evidence of a plan. Nobody testified to have actually seen the petitioner commit any crime. Everything in the States case was based on after-the-fact circumstances. And the circumstance's DO NOT exclude a reasonable hypotheses of innocence, or lack of intent.

Only the testimony of Frances Smith supports the States theory of premeditated intent. She claims the petitioner told her how death was inflicted upon the two. And, even if she is to be believed, not once does she claim that the petitioner first formed an actual intent. Its her own testimony that clearly shows the existence of reasonable doubt in whether any premeditation existed. She was the only witness and she claimed that the victims and petitioner were playing Around, having a good time together just prior to their deaths. That they were all laughing and teasing together when she seen them last (R. 2205)

The evidence supports the fact that the two were killed in two entirely different manners. The male victim was beat to death (R. 2064) and the female was "probably" strangled (R. 2073) But the circumstances surrounding the act that led to their death have in no way been established, and to conclude that the method by which the two suffered death in and by itself constitutes sufficient proof to sustain a conviction of premeditated first degree murder is error.

> "Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 303 So2d. 666 (Fla 1975) cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976) Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d. 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (1969) Premeditation does not have to be contemplated for any particular period of time before the act, and may occur at a moment before the act. Hernandez v. State, 273 So. 2d 130 (Fla. 1st DCA), cert. denied, 277 So.2d. 287 (1973) Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such a time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958); Sierci v. State, 399 So.2d 964, 967 (Fla. 1981)"

The circumstances in this case do not support the

conclusion that the deaths of the victims were, in fact, caused by a criminal agency showing premeditated intent. The evidence as such is legally insufficient to support the legal standard of premeditated First Degree Murder to the exclusion of a reasonable hypothesis that a lesser degree of guilt would be applicable, if any guilt at all.

The factors that would allow circumstances to infer that the death was caused with a premeditated design and intent to take the life of the victims in this case is as such, comparable to the standard this Court set forth in above-cited Sireci :

1) Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used.

In this case the weapon was a common tire iron, which the State introduced to the jury as State Exhibit 10 (A). It is not known where this weapon came from. There was no evidence that the petitioner had it at any time prior to the very second it was used. For that matter, it was not even positively identified as the actual murder weapon. The only evidence to the effect that it was the actual murder weapon was the testimony of Medical Examiner Shultz at (R. 2071), to which he could only say it was "consistent". Furthermore, medical examiner Shultz stated that all the wounds that caused death on the male victim were administered to the frontal portion of the victims face-head. There were no defense wounds. With this limited evidence, the State has not even excluded the reasonable hypothesis that the male victim was, in fact, the aggressor.

On the female victim, there was no weapon. The medical examiner could only say that her death was brought about by "probable" strangulation. (R2073), although there was no evidence to conclusively say this was the actual cause of death.

Based on the limited evidence the State offered, it cannot be inferred from the nature of weapon used that the death of either victim came from a premeditated

intent to take three life. The State could not even peove that State Exhibit 10 (a) was, in fact the weapon that beought About death, nor could the State show even circumstantial evidence that the petitionea had actual possesion of State Exhibit 10 (a) until <u>After</u> the Alledged Mueden.

2) The peesence or absence of Adequete peovacation, peevious difficulties between the paeties.

The State showed Absolutely no hostility to exist between the petitionee And the deceased. The States only witness that could testify to what May have took place could only say that when they left hee peesence, they weee all joking Aeound, laughing And teasing (R. 2205) And that she seen no hostility between them. She has No knowledge of what took place outside (R. 2318). She did not heae Any unusual sounds, nor Any sceeams. All she does Actually know is that the petitionee eetuened alone, and told hee "they'ee dead". (R. 2210) As noted peevously, the State could not even show an Actual Motive existed to support the theoey of peemeditation. The eecoed is silent As to what took place. And peemeditation cannot be meecly Assumed by A silent Ecoed. The State had A bueden of peoving peemeditation to the point wheee it would exclude Any Reasonable hypothesis of A lessoe degeee of guilt. They did not.

Fuatheemoe, at the closing of the States case, counsel foe petitionee motioned the Couet foe A judgement of Acquital based on the Allegation set foath in the issue:

(R. 2461-2462)

"MR. JACOBS: Youe Honoe, if it please the Couet? At this time the State has Announced that it has Rested its case. We would move foe A judgement of Acquital on behalf of Me. Lambeix. The State has -- they have not peoven his guilt. -- in this Cause as to the Defendant oe As to deceased Lawence Lambeeson, also known As Clarence E. MOORE. The State has not established beyond A Reasonable doubt, oe

or even a prima facia case concerning First Degree Murder. They may have shown second, but they have not shown First. As to Alicia Bryant, they havn't shown a cause of death.

In this cause, Dr. Shultz could not testify as a medical examiner in this cause that he could pinpoint. He said it was probably manuel strangulation. But the Court heared his testimony. He could not testify that was the exact cause of death, or that there was any criminal agency involved here."

This Court has long accepted the often cited case of Lee v. State, 96 Fla. 59, 117 So. 699 (1928), in which this Court laid the standard that when the State relies on circumstanial evidence to determine whether or not the death was caused by a criminal agency, which is one of the three fundemental elements that must be proven beyond reasonable doubt to establish the Corpus Delecti of the crime of Murder that:

> "When proof of corpus delecti rests upon circumstances, and not upon direct proof, it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt..."
>
> (see also Sims v. State, 184 So.2d 217, (Fla. 1966), Reyes v. State, 155 So.2d. 663 (Fla. 1963), and Jefferson v. State, 121 So.2d. 132 (Fla 1961) (emphasis added).

The medical examiner did not testify that the cause of death was proven by "the most convincing, satisfactory and unequivocal proof"... "excluding all uncertainty or doubt". He testified that the cause of death was

"probably strangulation" (R. 2073) and that to reach this opinion, he based his belief on evidence of the nature of which the body was found, the proximity of the males victims body and circumstances surrounding the male victims death. But all of that was not even based on his own independent knowledge of that circumstances which he based his opinion. Therefore, even his conclusions to which he had reached where based on evidence that he was not qualified to to. use. The record is clear that he was not at the crime scene (R. 2067), thus the autopsy was not based on his own independent knowledge of facts.

Furthermore, "probable" does not exclude doubt. The "websters New World Dictionary" (1982) defines "probable" as:

> "prob·a·ble (präb'ə bl) adj. [< L. probare, prove. 1.) likely to occur or be 2. reasonably so, but not proved — prob'a·bly, adv."
> (emphasis added)

Based on the facts given, the petitioner prays this Court will recognize and correct the injustice and order a directed acquital as to Count I, the death of Alicia Dawn Bryant, As the State has failed to meet its burden of proving that the death of Alicia Dawn Bryant was caused by A criminal Agency, much less by any form of premeditated intent on the part of the petitioner.

As to Count II, the petitioner prays that this Court will find that the state has failed to meet its burden of proof in that the state has not proven that the death of Lawerence Lamberson A/K/A Clarence E. Moore was caused with a premeditated design and intent. There is no evidence to support premeditation in this cause and to allow the verdict to stand as such would deny the petitioner his rights by law.

ISSUE V

TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE OVER TIMELY OBJECTION'S, A LETTER THAT WAS IMPROPER, MISLEADING AND MISREPRESENTIVE OF FACT.

TRIAL COURT ABUSED ITS DISCRETION AND AUTHORITY WHEN OVER DEFENSE COUNSEL'S REPEATED OBJECTIONS, THE COURT ALLOWED THE INTRODUCTION INTO EVIDENCE OF AN ITEM KNOWN AS STATE EXHIBIT # 8, CONSISTING OF A LETTER OF CORRESPONDENCE. THE RECORD SHOWS THAT THIS LETTER SERVED NO PURPOSE BUT TO MISLEAD AND CONFUSE THE JURY. EVEN THE STATE ACKNOWLEDGED THAT IN ITS FORM, IT WOULD CAUSE CONFUSION.

(RECORD AT PG. 2284)

" MR. MCGEATHER: YOUR HONOR, ... I WOULD REQUEST AT THIS TIME, SINCE THE OBLITERATIONS WERE MADE, THERE MAY BE SOME CONFUSION TO THE JURY. ASK THAT THE COURT EXPLAIN THAT THE OBLITERATIONS WERE MADE BY THE COURT".

THE OBLITERATIONS REFERRED TO BY THE STATE WERE MADE ON THREE SEPERATE OCCASIONS, AND EFFECTIVELY ALTERED THIS ITEM TO THE EXTENT THAT RATHER THEN DIRECT THE JUROR'S ATTENTION AWAY FROM THE OBLITERATED AREAS, IT WOULD ONLY FOCUS THIER ATTENTION ON IT.

FURTHERMORE, THE STATE HAD CALLED AN EXPERT WITNESS, ONE SGT. JAMES DRAKE WHO GAVE LENTHY TESTIMONY ON THE PROCESS USED TO OBTAIN FINGERPRINTS FROM AN ITEM. THIS TESTIMONY WAS DIRECTED AT " STATE EXHIBIT # 8 ", WHICH WAS THE LETTER IN QUESTION. THE STATE WENT TO GREAT PAINS TO BRING OUT TESTIMONY FROM SGT. DRAKE THAT HE PROCESSED THIS LETTER IN HIS PROFESSIONAL CAPICITY AS A FINGERPRINT EXPERT AND THAT IN THE COURSE OF PROCESSING THIS PEICE OF EVIDENCE, HE HAD COATED THE ITEM WITH A " PURPLISH PINK" CHEMICAL. (R. 2128) THE JURY HEARD TESTIMONY FROM SGT. DRAKE THAT THE PURPOSE OF COATING THIS ITEM OF EVIDENCE WAS TO BRING OUT A FINGERPRINT THAT WAS FOUND ON THIS LETTER. FOLLOWING THIS LENTHY TESTIMONY WHICH COULD ONLY LEAD

the jury to believe that the print found was that of the petitioner's, Sgt. Deake said that he could not identify the print on the letter. This testimony was highly prejudicial and misleading to the jury. The State purposely intended to lead the jury to believe that Sgt. Deake, in his expert professional capacity, took custody of and processed this item, and in the course of processing this item, found a fingerprint. And that that fingerprint was that of the petitioner.

In addition to Sgt. Deakes testimony, the states Key witness, Frances Smith, testified that she received this letter at "General Delivery" (R. 2267), claiming it came from the petitioner, although no where on it does the petitioner's name appear (R. 2272). Only her testimony that she did recognize the hand writing as that of the petitioner's connected this letter to the petitioner (R. 2268). She further testified that she had absolutely no training as a hand-writing expert or in hand writing analysis (R. 2274-2275). The State had this letter in their custody from February, 1983 until February, 1984, in which during that twelve (12) months there is no reason why they could not had had the letter examined by an expert hand writing analysist.

Counsel for the petitioner repeatedly pleaded with the Court that the letter known as "State Exhibit 8" should not be admitted. The extent of these objections covered portions of the record for 22 pages (R. 2262-2284), thus it would be in appropriate to quote each objection in this brief.

The facts are clear in this case that the item known as State Exhibit 8 was highly prejudicial to the petitioner as its only purpose was to mislead and confuse the jury, and that its probative value was greatly outweighed by the highly prejudicial nature:

> "Relevent evidence is inadmissable if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading to the jury or cumulative" Taffero v. State, 403 So2d. 355

The State led the jury to believe that its fingerprint expert, Sgt. Deake, had found and processed fingerprints on this item belonging to the petitioner of which he did not. The only link between this letter and the petitioner was the testimony of Frances Smith who claimed to recognize the handwriting (R. 2260) but was not learned in the field of handwriting analysis. (R. 2274-2275) The State had ample opportunity to correctly process this item through an expert in the area of handwriting analysis, but chose not to. The Court further aggravating the above by failing to properly admonish the jury to disregard the "pueplish pink" chemical that was testified as the result of processing the item for a print found on it (R. 2127-2128) As this print was not the petitioner's and the Court also failed to admonish the jury on the obliterations made by the Court.

This petitioner does acknowledge the fact that:

> "A trial Court has wide discretion concerning the admissibility of evidence, and absent abuse of discretion, a ruling regarding admissibility will not be disturbed on appeal" Jent v. State, 408 So2d. 1024 (1981)

But would point out that this Court has long held to the standard it applied in "Peeper" in that "if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the juror's in excess of the legitimate probative effect of such evidence ..... then such evidence should be excluded" Peeper V. Edell, 44 So2d 78, 80 (Fla, 1949). Thus, because it is clear that the Court did introduce this item into evidence even though the probative value was clearly outweighed by the danger of unfair prejudice, confusion of issues and misleading to the jury by misrepresenting facts, namely allowing the jury to believe that evidence existed that conclusively connected this item to the petitioner when there was

Actually no substantial, competent evidence existing to suggest any such conclusion, the trial court did clearly abuse its discretion and that abuse was so prejudicial to the petitioner that it constituted a violation of the petitioner's right to a fair trial.

Petitioner further argues that the admission into evidence of State Exhibit 8; (the letter in question) can not be said to constitute "harmless" error, as the State cannot show that the improper evidence did not effect the out come of the entire proceeding. The State itself purposely drew the juries attention to this item of evidence in their closing argument (R. 2518-2519) and admonished the juey to "take it back and read all of it" (R. 2519)

Therefore, this petitioner pleas that this court examine the item of evidence known as State Exhibit 8, and also examine the testimony of Sgt. Deake and key witness Frances Smith, and find that the trial court did abuse its discretion in admitting this item into evidence, and that such error could not be "harmless", thereby ruling that the petitioner is entitled to a new trial on this cause.

ISSUE VI

TRIAL COURT COMMITTED REVERSABLE ERROR IN DENYING PETITIONER'S REQUEST TO INSTRUCT JURY ON APPLICABLE LAW OF INTOXICATION.

At trial, the State presented evidence that supported A reasonable assumption that at the time of the alledged capital felonies which this petitioner stands convicted for, the petitioner was legally intoxicated. In fact two witnesses for the state supported the fact that no other conclusion could be possible, except that petitioner must had been intoxicated.

The first testimony relating to this matter was that of Glades County Sheriff Deputy Ron Council, who had encountered the petitioner on his routine patrol while petitioner was at a local lounge in the company of the victims. (R. 2150-2151) The relevent portion is found at R. 2164, where upon cross-examination by defense the following was stated:

> "Q: officer Council, when you encountered these four individuals that evening, where they all sitting there drinking?
> A: I believe they were drinking"

This officer testified petitioner was drinking in a lounge. But whether petitioner was actually intoxicated, that cannot be said from his testimony alone. But following his testimony the state introduced their "Key Witness" (R. 1825), Frances Smith, who was in the company of the petitioner throughout the night in question. It is her testimony that can leave no doubt that that an instruction as to the law regarding voluntary intoxication was proper under the circumstances presented before this Court. On direct examination by Asst. State Attorney McGeuther at R. 2201, Ms. Smith testified:

> "Q: Let me ask you this. The four of you -- you were having a good time?
> A: Yes sir.
> Q: Were you drinking?

A: Yes
Q: All four of you?
A: Yes, sir.
Q: Okay, what were you drinking?
A: Well, I always drink Tom Collins. And Carey, I think he was taking turns drinking beer and mixed drinks."

(emphasis Added)

Following this witness's direct testimony, petitioner's defense counsel, Mr. Jacobs cross-examined Ms. Smith and brought out the following: (R. 2300-2301)

"Q: Okay, everyone was feeling pretty good, specifically Mr. Lambeeson, who I believe you indicated he was drunk?
A: He appeared to be drunk to me. Everyone else was okay.
Q: They were feeling pretty good?
A: I suppose so.
Q: Would you say Carey was high?
A: It's hard to tell about Carey with anything.
Q: Would you characterize him as being high that night when you left Speaky's Tavern?
A: All I can say is he acted high. I don't know if he was or not. He acted pretty much the same.
Q: Do you recall ever making the statement he was high?
A: Yes, I remember that."

(emphasis added)

The previous statement of which Ms Smith admitted she made N in the trial record at page 500, when upon direct examination by defense counsel Mr. Jacobs, The following took place:

"Q: All right. Had you had anything to drink that night?
A: Yes
Q: How much?
A: I guess two or three drinks. Not very much.
Q: What about Cary?
A: He'd been drinking pretty good.

....

(Recced at 520, continued)
Q: All right. And would you say you were drunk, then?
A: No, I think I was feeling good, but I wasn't drunk at all.
Q: What about Cary?
A: Well, I never could really tell about him. He was high."

(emphasis added)

The record clearly shows evidence that the petitioner was "drinking pretty good", (R. 520) "taking turns drinking beer and mixed drinks" (R. 2201) and "was high" (R. 520, R. 2301) The trial judge, in her legal expertise, would know that for a person to be "taking turns drinking beer and mixed drinks", one would certainly be within the definition of legally intoxicated. And even though the witness, Ms. Smith also said that in her opinion Mr. Lambeson was the only one who appeared intoxicated (R. 2202), she also repeatedly stated that she could not tell if the petitioner was or was not intoxicated (R. 2300-2301, R. 520), only that he was positively "drinking pretty good" and was "high", And that they had spent the preceding four hours in two lounges consuming alcohol beverages.

In a capital case, where premeditation is the foundation of the conviction, the premeditated intent to commit the crime can be legally mitigated by the theory of defense of voluntary intoxication. The courts have long held that

voluntary intoxication can eliminate the ability in ones mind to form an actual intent to commit a crime. In this case the jury was exposed to evidence which would at least have allowed them to consider the issue of whether petitioner was intoxicated or not.

Esspecially so in this case, where the State could present no evidence of actual premeditation, relying solely on circumstances surrounding after-the-fact evidence. Even the State acknowledged that the petitioner had no harsh words with the victims.

Just this year the Florida Courts held in BRONSON v. State, 505 So2d 1361, FLA. 1987 (12 FLW at 1000) that:

> "It is undisputed that [a] defendant is entitled to have a jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." (quoting Hooper v. State, 476 So2d. 1253, 1256, (FLA. 1985)
>
> "
>
> ... the evidence adduced at teral entitled Appellant to a jury instruction on voluntary intoxication. In factually similar circumstances, the Fourth District concluded that in a situation where the defendant did not deny she had been drinking, but gave as her opinion that she was not intoxicated, it did not remove the neccesity to instruct on voluntary intoxication. (See Mellins v. State, 395 So.2d 1207, (FLA. 4th D.C.A.) Review denied, 402 So2d 613 (FLA. 1981); See also Pope v. State, 458 So2d 327, 329 (FLA. 1984)"

Petitioner was entitled to the instruction, as evidence was presented to support the fact that the petitioner was 'drinking pretty good' and 'was high'. It was the States own key witness who testified to this, and the record also clearly shows that this witness could not

really tell if petitioner was, or was not intoxicated, therefore this Court must only accept the evidence showing that the evidence supports a reasonable likelyhood that petitioner was, in fact, intoxicated.

Counsel for petitioner requested three (3) instructions pertaining to intoxication (R. 1273, R. 1274, R. 1275) all of which the trial court denied, stating that no evidence existed to support such jury instructions. As cited previously above, in BRONSON, the trial court erroed because "it is undisputed that [a] defendant is entitled to have a jury instructed ..... if there is any evidence to support such instruction." And this case is similar to Mullins v. State 395 So2d 1207, in that there can be no denial that petitioner was drinking and that an opinion that petitioner was not intoxicated, which was recanted on cross-examination, did not remove the necessity to instruct on voluntary intoxication.

Because of the trial Courts denial to instruct the jury on the law applicable in this case, the jury was not qualified to reach a verdict as they were not instructed to the law of voluntary intoxication. The jury had the duty to decide whether or not the evidence supported premeditation, and the intent that must be formed to constitute a legal degree of premeditation cannot be found if the jury found the evidence supported, in their minds, that the petitioner was intoxicated and thus unable to form an actual intent which is an element that must be present to sustain a conviction for premeditated murder. (see Fouts v. State, 374 So2d 22 (2nd D.C.A, 1979); Russell v. State, 373 So.2d 97 (2nd D.C.A., 1979); and Beitts v. State, 30 So2d. 363, (Fla 1947)

This error constitutes reversable error, and cannot be said to be "harmless", as it cannot be shown that the outcome of the trial would had been the same had the jury been instructed properly. The petitioner is entitled to a complete reversal of both convictions and sentences, with an order to remand to new trial.

ISSUE VII

TRIAL COURT COMMITTED REVERSABLE ERROR IN DENYING PETITIONER'S REQUESTED JURY INSTRUSTIONS ON THE USE OF JUSTIFIABLE USE OF FORCE.

Counsel for the petitioner requested the court to instruct the jury on justifiable use of force, providing such instructions as shown in the record at page 1268-1272. The court denied all of these requested instructions even though the evidence at trial did not exclude a reasonable hypothesis of petitioners need to use justifiable force against either one, or both of the deceased. The evidence is clear in this case that the petitioner was in the company of the deceased Lawrence Lambeeson, aka Clarence Moore and that the last time the petitioner was seen with the deceased, the two had went outside petitioners residence. Immediately prior to departure, evidence shows that the petitioner and deceased were laughing and joking, having a good time. (R. 2205) The only witness present that night was states key witness, Frances Smith, who admitted she had no idea what took place outside (R. 2318) Evidence presented by the state medical Examiner, Robert Shultz shown that the deceased Lawrence Lambeeson, aka Clarence E. Moore died as a result of multiple crushing blows to the frontal portion of the head. (R. 2064) And that States Exhibit 10 (a), which was a common tire iron, was "consistent" with the wounds upon deceased Lambeeson (R. 2071) But no evidence was shown as to where this weapon came from, nor any evidence that petitioner even had possession of it until <u>after</u> the death. Based on this evidence as in its limited form it does not exclude a reasonably hypothesis that at some point following the departure from the presence of State witness Frances Smith the petitioner and the deceased got into an argument, or that a conflict arose which brought about the need for the petitioner to use force in which to defend himself The evidence simply does not exclude this possiblity

And the evidence, in its limited form places a responsibility upon the jury to consider if, in fact the evidence would allow them to conclude this was possible.

Prior to the juries verdict, the petitioner is entitled to a presumption of innocence. That presumption expands itself to the presumption that the petitioner can only be found guilty of a degree of guilt that the evidence supports beyond reasonable doubt. For the jury to adequately determine the petitioners degree of guilt by the evidence presented, it must first be provided with all applicable laws pertaining to the case, and the petitioner must also be afforded the opportunity upon closing arguements to sum up what petitioner believes the evidence will support.

Thus, by denying jury instructions that would allow petitioners counsel to argue a theory of defense in that the evidence does not exclude a reasonable hypothesis of justifiable force, in the protection of himself or another, the Court violated the petitioners Sixth Amendment rights. It is not for the Court to decide whether the evidence was too weak, unsatisfactory or inconclusive to support a theory of justifiable use of force. It is the juries duty to weigh the evidence and interpret the facts as they believe, in their minds, they exist. The court has a duty to instruct the jury on laws applicable, then the jury in turn must at least consider whether the evidence supports the indictment as charged, or a lesser included offense of that charge. The jury cannot meet this duty if the court restricts the duty by refusal to instruct the jury as to such.

Because there is no evidence in this case that can conclusively say that the petitioner intended to cause harm to the "victim" Lawrence Lambreason, AKA Clarence Mosey. And it would be reasonable for the jury to at least consider the possibility that his death was brought about by means of legally justifiable use of force, the instructions as requested were made in good faith with evidence in which the jury could rely on

to consider the law as given in the requested instructions, it was reversable error to deny them. In the case of State v. Riveira, P2d, 793 (1978 Hawaii) that court held:

> "Defendant is entitled to instruction as to self-defense if evidence before jury can be said to reasonably raise that issue, no matter how weak, unsatisfactory or inconclusive testimony might have appeared to court and failure to give such instruction violates defendants right to jury trial under Sixth Amendment"

The courts error in failing to give the jury the requested instruction deprived the petitioner of a trial before a jury qualified to reach the verdict it did, as it was not provided the law applicable to reach such verdict and thus this cause must be reversed and remanded for new trial.

ISSUE VIII

TRIAL COURT ERRORED IN ALLOWING INTO EVIDENCE CRIME FOR WHICH PETITIONER WAS NOT PROVEN TO HAVE COMITTED.

During the sentencing phase of the trial, the State called Polly Moore, a secretary employed by the Florida Department of Corrections at Lakeland Community Correctional Center as a witness. (R. 2579) In the course of direct examination, the State brought out evidence that the petitioner had "escaped" from this facility. The State was aware that charges were pending against the petitioner for escape, but that the petitioner was neither tried, or convicted of that crime. The petitioner has a Constitutional right to be presumed innocent of any charges until the State can prove his guilt. By admitting into evidence that the petitioner had escaped from lawful custody without providing the petitioner a trial on the charges was error. The record is clear that the State did not merely claim that the petitioner is to have alledged to escape, but that he did, in fact, escape from custody.

(upon direct examinaton by Asst. State Attorney McGauthee of witness Polly Moore.)
(R. 2582)

"Q: OKAY. Have there been any additions, deletions, alternations or modifications to those records?
A: only addition was his escape report."

(R. 2583)

"Q: Was the departure of his leaving the institution through normal channels?
A: No, it was not.
Q: Through what means was it, as the record reflects?
A: Escape."

The State never proved that the petitioner had

escaped. The petitioner was never brought to trial on these charges, and the charge of escape was, in fact, dropped shortly after the conviction of petitioner on the instant Capitol felonies. Counsel for the petitioner did enter an immediate objection and move for mistrial, to which the Court denied. The record conclusively shows that as such:

(R2582)

"MR. Jacobs: Judge, at this time we would object to that. That has not been proven, that fact in evidence. Move for mistrial. The Court: Objection be over ruled."

The admittance into evidence that the petitioner had escaped from lawful custody before the petitioner was given opportunity to defend himself against such accusation was an error of Constitutional proportion. The jury heard no evidence that the petitioner was not found guilty of "escape", or that at the time of this testimony the petitioner was entitled to be presumed innocent of any "escape". The State simply did not prove that the petitioner had escaped from custody and to admit such evidence was highly prejudicial and warranted a mistrial, of which the trial court denied.

It has been long held that the state cannot admit into evidence against a defendant facts of which the defendant has not been found guilty of committing. The State purposely intended to lead the jury to believe that the petitioner has previously been proven guilty of escape. Such evidence and conduct prejudiced the petitioner to the point where the only possible remedy would be a reversal of the sentence, with an order that the petitioner be given a new sentencing trial.

ISSUE IX

TRIAL COURT ERRORED IN FINDING THAT PETITIONER WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITOL FELONY.

Following the return of the juries verdict of guilty on both counts, jointly, of First Degree Murder, the Court proceeded into the sentencing stage of trial. Both the State and Defense presented evidence, the both were afforded thier closing arguements. The State did not present any evidence, nor petition the Court to apply the statutory aggravating circumstance of finding that the petitioner was previously convicted of another capitol felony, pursuant to Florida Statute § 921.141 (5)(b), thus counsel for petitioner could see no need to prepare a defense against this circumstance. Even in the States closing argument, the State admonished the jury not to even consider this as an aggravating circumstance. The below portion of record shows that Asst. State Attorney McCutheon agreed this circumstance does not apply:
(R. 2645-2646)

> "What are the aggravating circumstances? ..... the Defendant was previously convicted of another capitol offense for the felony involving the violence to some other person. We are not claiming that. You are not to consider that."
>
> (emphasis added)

The State never suggested this circumstance would apply. They claimed it did not. The subject of this circumstance never came up until the morning the Judge was to sentence the petitioner. Counsel was not given any opportunity to confront any evidence that might support this circumstance. Not even the jury was allowed to consider this. And by law it does not apply.

In this case the petitioner was tried jointly for two counts of first degree murder stemming from

A single criminal episode that took place in the early morning hours of February 6, 1983. For the Court to find that this aggravating circumstance was to apply, it would first have to find that the two capitol felonies were two seperate criminal episodes. And if they are two seperate criminal episodes, then the petitioner was entitled to two seperate trials. But this is, in fact, contemperous convictions which as clearly shown by the joint indictment. (R. 20)

The purpose of this aggravating circumstance was not meant to apply to contemperous convictions, arising from a single criminal episode. This Court has previously ruled in MEEKS V. State, 339 So2d 186 that:

> "Contemperous convictions do not qualify as aggravating circumstances vel non under death penalty statute set forth as aggravating circumstance the fact that defendant was previously convicted of another capitol felony or a felony involving use or threat of violence to the person"

The State presented no evidence that the petitioner was ever previously convicted of any capitol, or violent crime. Furthermore, the Court errored in applying this aggravating circumstance under the authority of King V. State, 390 So2d. 315, as in King the defendant was, in fact, previously convicted in a seperate criminal episode of another capitol felony, or felony involving violence.

Based on the facts set forth above, thes aggravating circumstance must be stricken.

ISSUE X

Settled

TRIAL COURT ERRORED IN FINDING THAT THE CAPITOL FELONIES WERE COMMITTED FOR PECUNIARY GAIN.

The trial court found that the felony convictions for two counts of First Degree Murder were committed for pecuniary gain pursuant to Florida Statute § 921.141 (5)(f). Petitioner challenges this circumstance, as although the State did argue that the possible motive was Robbery, there was not conclusive proof of any such Robbery. In the States closing at the sentencing stage, Asst. State Attorney made the following statement:

> (R. 2648-2649)
> "MR. McCLEATHER: And the crime for which the Defendant is to be sentenced was committed for pecuniary gain, monetary gain. You recall a statement that "At least we have a car". He took a necklace from the body of Lawrence Lamberson before he buried him. There was testimony that he said he sold that when he got up to TAMPA."

From that above, it clearly shows that the State has not shown a premeditated intent to gain from the deaths of the deceased. For that matter, the statement "At least we have a car" certainly does not prove beyond a reasonable doubt that it was petitioner's intent to steal the car. And the State offered no evidence that the victim Lawrence Lamberson ever had a necklace. That issue was not proven as a matter of Law.

Furthermore, on direct appeal to this Court in Lambrix v. State, 494 So2d 1143, 1986 (case # 65,203), this Court reviewed the record under the assumption that the petitioner did not not contest the application of the Applied aggravating circumstance's and under review this Court found that "the circumstance that the murder was committed for pecuniary gain only applies to the murder of

Moore, because following the murder, Lambrix stole Moore's automobile" (emphasis added)

Petitioner does now raise this issue, claiming that the previous court appointed appellate counsel was ineffective for not previously raising it, and further argues that the Courts previous automatic review was not based on full case facts. This Court has stated that it found that the petitioner stole Moore's AKA Lamberson's automobile "following the murder", but no where throughout the entire trial did the State prove beyond a reasonable doubt that the intent to take the car was formed in the mind of the petitioner prior to the deaths.

Recently in McCall v. State, ___ So2d ___ (5th D.C.A., Fla. 1987) the Court ruled that "robbery cannot be committed against a corpse." without a showing beyond a reasonable doubt that there was a formed intent to take the automobile belonging to deceased prior to his death, and that this motive was the reason the petitioner committed this crime, this aggravating circumstance cannot be said to apply. The mere statement that "at least now we have a car" does not show an intent to exist prior to death. Thus the State has not proven beyond a reasonable doubt that the capitol felony was committed for pecuniary gain. They might have shown that the petitioner did take the automobile, or the necklace after Moore AKA Lamberson's death, but they did not prove that the intent existed before the time of death. Thus, the recent ruling of above-cited "McCall" would apply And this Court must find that the petitioner did not commit the capitol felony for pecuniary gain, as "robbery cannot be committed against a corpse".

This aggravating circumstance must be stricken, as it does not apply to this case.

ISSUE XI

COURT ERRORED IN FINDING THAT PETITIONER COMMITTED CAPITOL CRIME IN A COLD, CALCULATED AND PREMEDITATED DESIGN THAT WAS HEINOUS, ATROCIOUS AND CRUEL.

The Court had found that the capitol felonies were especially heinous, atrocious and cruel, pursuant to § 921.141 (5) (h) without adequate evidence to show that these capitol felonies were to the standard set forth by this Court in State v. Dixon, 283 So2d 1, (FLA. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d. 295 (1974)

In the more recent case of Rembert v. State, 445 So. 2d., 337 (FLA. 1984) this Court was confronted by a similiar situation where the defendant, Rembert, was convicted of a capitol felony involving the beating death of a victim, who died later as a result of brain damage. Conclusive evidence in that case showed that the defendant had beat the victim in the course of robbery. In this case, the State argued that one victim was beat to death, while the other was "probably strangled" (R. 2064, R. 2073) Unlike Rembert, there was no evidence that either victim lived a prolonged period of time. In this case, the State medical examiner testified that the male deceased was unconscious upon the first "blow", and that the same trauma was the cause of death. There was no evidence to suggest the deceased suffered to the point to seperate it from the "norm" of capitol cases. As for the female victim, the Court stated that "the facts speak for themselves" (R. 1365). The petitioner agrees .... the facts do speak for themselves. The record shows that the State medical examiner testified the cause of death was "probably strangulation" (R. 2073) but could offer no conclusive proof of cause of death, much less that the death was any more heinous, atrocious or cruel then the "norm" of capitol murders. Therefore, this aggravating circumstance has not been proven as a matter of law, to the standard of above-cited Dixon and cannot be found to be especially heinous, atrocious or cruel. (Compare with

Stewart v. State, 420 So2d 862 (Fla., 1982), cert. denied, — U.S. —, 103 S.Ct. 1802, 76 L.Ed.2d. 366 (1983) and Scott v. State, 411 So.2d. 866 (Fla. 1982) with the facts in this case.

The Court also applied the statutory aggravating circumstance that the capitol felonies were homocides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, pursuant to Florida Statute § 921.141 (5) (i). Petitioner challenges the application of this circumstance, as the Court has failed to meet the criteria set out in Jent v. State, 408 So2d, 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d. 1322 (1982)

The evidence in this case does not meet that criteria, As the evidence presented clearly shows that the petitioner was laughing, teasing and having a good time with the deceased prior to their death. (R. 2205) There has been no evidence of hostility between the deceased and the petitioner. Nor was it shown that there was a cold, calculated and premeditated intent that went beyond the normal premeditation to sustain a conviction as such. There is not even any proof that either of the deceased knew that they would suffer death. The circumstance has not been shown beyond a reasonable doubt to exsist to the standard this court set forth in the above-cited Jent, therefore, this aggravating circumstance must be stricken from this case.

ISSUE XII

COURT-APPOINTED APPELLATE COUNSEL WAS INEFFECTIVE AS COUNSEL FAILED TO PRESERVE PETITIONER'S RIGHT TO FURTHER APPEAL OF PREVIOUSLY RAISED ISSUES BY EXHAUSTING ALL AVAILABLE MEANS.

As set forth peeviously in this application for Habeas corpus relief, the court had appointed petitioner counsel for the purpose of appeal. The appointed counsel did peeviously submit a direct appeal to this court, which this court found to be without meert in Lambeix v. State, 494 so2d 1143, (1986)

Following this Courts ruling on Sept. 25, 1986 in the direct appeal, court-appointed counsel failed to peeserve petitioner's right to further review by filing a timely motion for Rehearing, and raising any requirement of law peertaining to this Courts ruling on direct appeal.

Failure to do such has denied the petitioner an opportunity to peesent these issue's before the Federal Appellate Courts, as by failing to exhaust all available State remedies petitioner would be procedurally barred from peesenting these issues in a Federal writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254 of the Federal codes.

Petitioner in this action now pleas that this failure on the part of court-appointed Appellate counsel did constitute ineffective assistance, and allow the petitioner to now be granted belated "Motion for Rehearing" on peeviously requred issues, pursuant to Florida Rules of Appellate Procedure, Rule 9330 (a).

IN THE SUPREME COURT OF FLORIDA

CARY M. LAMBRIX,
APPELLANT

V.

STATE OF FLORIDA
APPELLEE

CASE # 65,203

MOTION FOR REHEARING

COMES NOW the Appellant, Cary M. Lambrix, petitioning this Court for rehearing on the above cited case pursuant to Florida Rules of Appellant Procedure, Rule 9.330 (a), praying this Court will Rehear the previously filed direct appeal, known as CASE # 65,203, on the Issue known as ISSUE III of the Appellants previously filed initial brief, which stated:

> "The trial Court erroed in restricting the defendants cross-examination of the states key Witness, Francis Smith, in violation of the Appellants rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, section 16 of the Florida Constitution."

Appellant now prays this Court to reconsider the above issue, as the opinion of this court, which can be found in Lambrix, V. State 494 So2d 1143, 1986 was formed in a misunderstanding of the facts in this case.

upon direct appeal, this issue was argued that the Court had improperly restricted the cross-exam-

ination of the State's key witness, Frances Smith. This Court ruled that the trial counsel for the defendant/appellant was "trying to impeach the witness by way of a prior inconsistent statement without opening any doors that would be harmful to his case." Furthermore, the Court found that "defense counsel sought to bring out the inconsistency as follows:

> MR. JACOBS (Defense Attorney): Miss Smith, have you made the statement to any police officer you were not with Casey Lambrix from the 1st to the 5th of February and that you did not see him until the 9th of February?
>
> MISS. SMITH: I don't remember any statement like that.
>
> MR. JACOBS: Judge, that's the only question I have. And I don't know for the record - I don't know where that opens any doors. I don't know where that would be considered opening any doors. That's why I want it proffered."

The Court then did agree that "It is well established that questions on cross-examination must relate to credibility or matters brought out on direct examination. Pearce v. State, 93 Fla. 504, 112 So. 83 (1927)" in their ruling as to Issue IV of the same direct appeal, also involving an issue of the restriction of cross-examination of a witness in this case.

Therefore, this Court's finding that the trial court did not commit error in restricting the cross-examination of key witness Frances Smith on the grounds that such cross-examination would mislead or confuse the jury "by only hinting at

and not establishing the inconsistency." §90.403, Fla. Stat (1983)" is inconsistent, as had the counsel for defense been allowed the question, and witness deny such statement, it would had laid the foundation of impeachment of that key witness. The Court can not say what would had developed had the witness been confronted with the statement in question, as the trial court did not allow it. Thus, this courts finding that questioning on cross-examination as such would only mislead or confuse the jury by hinting at and not establishing the inconsistency was not based on evidence, but rather assumption. The jury would not had been misled or confused by this questioning, as defense counsel would had been allowed to introduce such statement into evidence for purposes of impeachment had the witness denied such previous statement.

Therefore, the Appellant in this cause prays that this Court review the Record and reexamine this issue as raised on direct Appeal, and find that the Appellant was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution and that such error in the improper restriction of the State key witness did constitute reversable error, thus this Court reverse both the Convictions and sentences, with Remand to new trial.

VII.

— CONCLUSION —

The foregoing petition documents the court-appointed appellate counsel's numerous, specific and unjustifable deficiencies throughout all phases of the direct appeal which prejudicially denied petitioner effective legal representation before this Court. The proceeding documented facts and omissions resulted in more then a substanial likelihood that, absent appellate counsels deficiencies, the result of petitioners appeal would have been different. Appellate counsel, as shown in this petition, neglected or ignored even the most obvious issues as exemplified by his failure to challenge the jury which the petitioner was tried before, as the record clearly shows it lacked the impartiality required to try the petitioner on the case, failed to bring it to this courts attention that the petitioner was not even present at all stages of the trial against him although the court had previously appointed petitioner as legal co-counsel, failed to establish on direct appeal that the State did not prove a case of premeditated murder to the degree the law requires. On Count I, the death of ALICIA DAWN BRYANT was not even shown to have been caused by a criminal agency. The facts the State relied on to show and argue a case of premeditation were based on after-the-fact circumstances, there for cannot be said to show a before-the-fact intent. Appellate counsel also failed to raise the issue of the admittance into evidence of a letter which, by law should not had been introduced and that the trial court failed on properly instructing the jury on the law applicable in this case. Without the proper instructions the jury was not qualified to return any verdict.

In the sentencing phase of this trial, the court-appointed appellate counsel failed to raise issues which were clearly preserved for appeal by timely objections. The petitioner was entitled to a new sentencing phase when the trial court allowed the State to elicit information from its witness that the petitioner had escaped, when at the

time of trial, the petitioner was neither tried, nor convicted of the pending escape charge, and in fact the escape charge was dismissed shortly following petitioners trial on instant convictions, therefore, petitioner was never even provided an opportunity to defend himself from this criminal accusation. Appellate counsel also failed to bring it to this courts attention that over petitioners timely objections the trial court improperly applied four of the five aggravating circumstances in which it justified the instant sentence of death. There is also no showing that the court properly considered the mitigating circumstances in this case. Clearly the petitioner was entitled to the statutory mitigating circumstance of no significant prior criminal history. Petitioners only previous criminal act was a single conviction for one "bounced" check, not stolen or forged, but simply insufficient funds in his own bank account. Petitioner has no other prior criminal history, so was entitled to that statutory mitigating circumstance. The court also failed to consider other statutory and non-statutory mitigating circumstances that would apply to this case, and in light of the only actual aggravating circumstance being that the petitioner was under a sentence of the state at the time the capital felonies were committed, it would not be justified to execute this petitioner, as the "sentence" the petitioner was serving was a non-violent first conviction. Certainly this court could not justify the execution simply because petitioner had previously allowed a check to bounce out of his own active bank account.

Appellate counsels obvious lack of factual and legal research, fore thought and preparation was, in effect, denial of counsel altogether. The appellate counsels omissions of issues, failure to research and prepare such issues and obvious ineffectiveness of representation was so continuous and egregious that they constituted a mere sham, amounting to no effective representation at all. Quite simply, the foregoing proceeding clearly shows that this petitioner was previously denied any effective and adequate

challenge to the adversial process, in violation of the petitioner's most basic and fundemental constitutional rights.

The only possible outcome of this proceeding is to reverse this conviction and sentence, and remand this case to the Circuit court for a new teral, before a fair and impartial juey. Justice demands no less.

Wherefore, petitioner, Carey Michael Lambeix, (pro se), respectfully requests that this court confirm and finalize its order to show cause, granting him the relief requested in the foregoing petition and such other and further relief consistent with the petition which this Court deems proper and just.

I, Carey M. Lambeix, (pro se) does hereby swear under the penalty of perjuey that the facts contained within the foregoing petition for writ of Habeas Corpus is true and correct.

Carey M. Lambeix

CAREY M. Lambeix, (pro se)

Sworn and subscribed before me this 29 day of Sept, 1987

NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 24, 1991

VIII

— CERTIFICATE OF SERVICE —

I, Cary M. Lambrix, (pro se) certify under sworn oath that the foregoing petition for writ of habeas corpus and for other relief was furnished by regular mail delivery this _____ day of _____, 1987 to:

1) Honorable Chief Justice
Florida Supreme Court
Tallahassee, Florida 32301

2) Billy Nolas, esquire
Capitol Collateral Representive
Tallahassee, Florida 32301

3) Honorable Robert Butterworth
Attorney General, The Capitol
Tallahassee, Fla. 32301

4) Office of Asst. Attorney General
1313 Tampa St., 8th Floor
Tampa, Florida 33602

Cary M. Lambrix
CARY MICHAEL LAMBRIX (pro se)

NOTARY PUBLIC
9-29-87
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 2nd 1990