IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,
APPELLANT

VS.

RICHARD L. DUGGAR, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
APPELLEE

CASE NO. 74,452

APPEAL FROM THE CIRCUIT COURT
IN AND FOR GLADES COUNTY
STATE OF FLORIDA

INITIAL BREIF OF APPELLANT- PRO SE

CARY MICHAEL LAMBRIX
APPELLANT —— PRO SE
PO BOX 747 (482053)
STARKE, FLORIDA 32091

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STATEMENT OF CASE

ON MARCH 29, 1983 A GLADES COUNTY GRAND JURY RETURNED A joint indictment of two Counts FIRST DEGREE MURDER, AGAINST this Appellant. APPELLANT entered, and MAINTAINED A PLEA of Not Guilty throughout the proceedings.

ON NOVEMBER 29, 1983 A JURY WAS enpaneled in GLADES County to try the two consolidated counts of CAPITAL MURDER. This TRIAL went on through DECEMBER 9, 1983, AT which time A "MISTRIAL" WAS declared due to A "hung jury" after eleven hours of deliberation.

ON FEBRUARY 20, 1984 A second TRIAL on the SAME indictment began in GLADES County. DEFENSE MOTIONS for Change of Venue AND INDIVIDUAL VIOR DIRE were denied. After the State RESTED, the DEFENSE WAIVED presentation of ANY defense AND turned the CASE OVER to the jury. On FEBRUARY 27, 1983, following less then one hour of deliberation, the jury returned A verdict of guilty AS CHARGED on both counts.

APPELLANT subsequently sought REVIEW of this COURT on direct APPEAL, the RESULT of which this COURT upheld both CONVICTIONS and sentences of death on SEPTEMBER 25, 1986 (SEE: LAMBRIX VS. STATE, 494 So2d 1143 (FLA. 1986)

Following denial of DIRECT APPEAL, APPELLANT filed A pro se Petition for WRIT of HABEAS CORPUS on SEPTEMBER 27, 1987 - which WAS subsequently RELINQUISHED to the REPRESENTATION of the OFFICE of CAPITAL COLLATERAL REPRESENTIVES. On SEPTEMBER 18, 1988 this COURT denied APPELLANTS Petition. (SEE LAMBRIX VS. State, ____ So2d. _____ (FLA. 1988)

ON SEPTEMBER 27, 1988 GOVERNOR MARTINEZ signed APPELLANTS "death WARRANT", ORDERING execution set for NOVEMBER 30, 1988. AS

A result, the State Agency of Capital Collateral Representives (see below footnote) began priority status review of Appellants case, which resulted in an exhaustive post-conviction, collateral challenge to Appellants convictions and sentences of death. Following denial of such challenge without review at the trial court, appeal was sought in this Court.

On November 29, 1988 this Court granted Appellant a temporary stay of execution, but subsequently denied Appellants collateral review on November 30, 1988 by a 4 to 3 split decision (see Lambrix vs. State _____ So2d _____ (Fla. 1988)

All issues previously raised before this Court in the three previous reviews were filed as a consolidated Petition for Writ of Habeas Corpus in the U.S. District Court, and are now pending review. Appellant ~~was~~ sought and was granted the removal of C.C.R. counsel due to conflict of interest by the U.S. District Court.

* Footnote: Hereinafter, within this brief, the State Agency of Capital Collateral Representives will be referred to as "C.C.R."

STATEMENT OF FACTS

ON NOVEMBER 29, 1983 this APPELLANT WAS BROUGHT BEFORE the GLADES COUNTY CIRCUIT COURT to stand TRIAL on two consolidated counts of FIRST DEGREE MURDER. MOTIONS for CHANGE of VENUE AND INDIVIDUAL VIOR DIRE WERE denied, AND VIOR DIRE EXAMINATION began in open COURT with the entire VENIRE being quickly exhausted. ON DECEMBER 1, 1983 AN additional 100 potential JURORS WERE SUMMONED by "PERSONAL SERVICE" AND VIOR DIRE continued. AMONG these additional 100 potential JURORS WAS ONE MAXINE M. HOUGH, who WAS duly SWORN in AS A potential JUROR, and did sit in open COURT throughout A full day of VIOR DIRE EXAMINATION in open COURT. PRIOR to calling MAXINE M. HOUGH to the JURORS BOX, A full PANEL WAS seated AND the REMAINING VENIRE PERSONS WERE DISMISSED, including MAXINE M. HOUGH.

ON DECEMBER 7, 1983, following "eleven hours of deliberation, A MISTRIAL due to "hung jury" WAS declared by TRIAL judge RICHARD ADAMS. The CASE WAS held for RETRIAL.

ON FEBRUARY 20, 1984 A SECOND TRIAL in this CASE COMMENCED in the GLADES County Courthouse. AGAIN, ALL MOTIONS for change of VENUE AND INDIVIDUAL VIOR DIRE WERE denied (R. 1429-1431) even though both the STATE AND COURT ACKNOWLEDGED that "the only problem in picking the jury that we might have difficulty is that it might be no secret to anybody that (its) the second time around" (R. 1430)

AMONG those SUMMONED for JURY duty WAS (AGAIN) MAXINE M. HOUGH

* PAGE REFERENCES to the RECORD on APPEAL ARE designated by AN "R" preceding the APPROPRIATE PAGE NUMBER.

and BRUCE A. TAYLOR. Both had been summoned, and were present at VIOR DIRE EXAMINATION AT Appellants first trial only two months previously.

On the second day of open VIOR DIRE, the Court called upon MAXINE M. Hough, who took A seat in the jurors box. An intensive examination of juror MAXINE M. Hough began by Asst. State Attorney Greene directly questioning MS. Hough: "Do you have any prior jury experience?", to which MS. Hough replied "No" (R. 1725-1726) MS. Hough continued to deny knowledge of anyone involved in the case, as well as responding in the negative to a question asking if there is "anything else" that might effect her service as a juror in this CASE. (R. 1754).

As MS. Hough sat on the panel, VIOR DIRE EXAMINATION of other potential jurors seated continued around here. DIRECTLY beside her, BRUCE A. Taylor - the second venire person called at both trials - sat. In MS. Hough's immediate presence, MR. TAYLOR WAS EXAMINED and after revealing his involvement in the previous trial, was stricken for CAUSE by the Court. Still, MAXINE Hough remained silent, refusing to reveal the fact that she, too, sat as a potential juror in the first trial. MAXINE M. Hough WAS subsequently impaneled as a juror to try this CASE.

Because of the complexities involved in CAPITAL Appellate review, Collateral challenges to Appellants convictions and sentences of death were not initiated until 1987. C.C.R. counsel, representing Appellant in collateral stages, filed motions to obtain All records, as well as a full transcript of the first trial. The full record and files in this CASE were not obtained until this

Appellant was under an active "death warrant". For reasons beyond this Appellant's comprehension - perhaps in the haste of litigation - C.C.R. counsel failed to identify the documented records which conclusively show Maxine M. Hough's deliberate concealment of her previous experience, thus no issue challenging this obvious juror misconduct, or the subsequent deprival of this Appellants right to exercise peremptory challenges in an intelligent and informed manner was ever raised.

Because Florida Law provides for statutory mandated collateral representation of all persons under a sentence of death, a Due Process right to counsel is created. The creation of such a right to counsel automatically encompasses the right to effective assistance of counsel - or any such right to counsel would be hollow and without meaning. This Appellant had a right to be "effectively" represented by C.C.R. counsel, yet counsel failed to properly investigate and litigate such a significant issue of clear juror misconduct. Had C.C.R. counsel brought this issue before the Court in previous collateral proceedings, this Appellant's convictions and sentences of death would have been vacated.

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANTS CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL APPEAL COUNSEL

This instant action now before this Court is unique, in that it raises an issue which has never before been addressed by this Court. A question of whether a person under a sentence of death is entitled to the effective assistance of collateral appellate counsel in post-conviction stages of appellate review. This appellant originally raised this issue at the trial court level, and was erroneously denied relief.

Post-Conviction, Collateral proceedings seeking review of a criminal conviction outside the scope of direct appeal has long been recognized as civil in nature, Tolan vs. State, 196 So2d. 1, (Fla. 4th DCA, 1967), thus no right to counsel ever existed as a matter of law. State ex rel Cortel vs. Bentley, 457 So2d. 1072 (Fla. 2d DCA, 1984); McCall vs. State, 224 So2d. 370 (Fla. 4th DCA, 1969) Although never specifically mandated by law, the Courts have long enjoyed a discretionary decision to appoint counsel in "Rule 3.850" Post-Conviction proceedings. Ulvano vs. State, 479 So2d. 809 (Fla. 1985); Capetta vs. State, 204 So2d. 913 (1967)

But discretionary appointment of counsel was eliminated in capital cases, involving the collateral challenge of a conviction and sentence of death when the State of Florida passed laws which specifically mandate that 'All persons' under a sentence of death shall be represented ..." Florida Statutes, Chapter 27

The creation of a statutory right to counsel must automatically encompass and include that "the right to counsel is the right to effective assistance of counsel." McMann vs. Richardson, 397 U.S. 759 at 771, N. 14 (1973) or such a right would be meaningless.

In this instant case, the issue goes beyond simply a right to counsel, but must also include the fact that this Appellant even sought to proceed pro se, but was denied an opportunity to do so. Thus the representation by C.C.R. counsel was not simply a statutory appointment but such representation was literally forced upon this unwilling Appellant. In fact, in denying this Appellants attempt to exercise his right of self-representation, the trial Court ordered:

> "I find and conclude, further, that the Legislature of the State of Florida, in Chapter 27, Part 3 of Florida Statutes directed the attention of the entire state of Florida to this matter and need, and provides that for any person sentenced to death in this State, that is unable to secure counsel due to that persons indigency.... this state.... requires legal counsel and active representation in behalf of that person by a source skilled therein."
>
> Ruling of Judge Elmer Friday Dec. 9, 1987.

With that ruling, Judge Friday denied this Appellants motions to dismiss C.C.R. counsel and proceed pro se, taking from this Appellant any opportunity to ensure Appellants collateral review would be handled in an effective manner. Subsequently, C.C.R.

Counsel filed a Rule 3.850 post-conviction proceeding in which the issue of juror misconduct was not litigated. Because the issue raised significantly questions the constitutionality of this Appellants present capital convictions and sentences of death, the failure to properly litigate the issue deprived this Appellant of effective assistance of counsel — after Appellant was <u>literally forced</u> to accept such counsel.

In this case, only one significant issue was not raised. C.C.R. counsel did raise an exhaustive number of issues. But notwithstanding the fact that in other aspects counsels performance may have been effective, "Even a single, isolated error on the part of counsel may be sufficient to establish that an (Appellant) was denied effective assistance. <u>Kimmelman vs. Morrison</u>, 106 S.Ct. 2574, 2588 (1986); <u>United States vs. Cronic</u>, 466 U.S. 648, 657 N. 20 (1984) (<u>See also</u>: <u>Washington vs. Watkins</u>, 655 F.2d. 1346, 1355 (5th Cir.) <u>Reh. Denied, with opinion</u> 662 F.2d. 1116 (1981)

Because this significant issue was not raised, that single deficiency within itself deprived this Appellant of "The basic Requirement of Due Process in our adversial legal system ... that a defendant be Represented in Court at every level by an advocate who represents his client zealously within the bounds of the law." <u>Wilson vs. Wainwright</u> 474 So2d. 1162, 1164 (Fla 1985) The <u>Wilson</u> criteria applies to this case, as <u>Wilson</u> was specifically addressing a claim of Ineffective Assistance of Counsel at an appellate stage. <u>Wilson</u> further established a standard of Review in this State that applied the criteria of <u>Strickland vs. Washington</u>, 466 U.S. 688 (1984) for analyzing ineffectiveness

of counsel claims regarding appellate representation.

> "The criteria for proving ineffectiven assistance of appellate counsel parallel the Strickland standard for ineffective counsel: Petitioner must show 1) specific errors or omissions which show that Appellate counsels 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, supra, at 1163
>
> citing Johnson vs. Wainwright, 463 So2d. 207 (Fla. 1985)

This Appellant has the burden of showing that counsels failure to properly raise and litigate "specific errors" has undermined the confidence of the outcome. In Adams vs. State, 456 So2d. 888 (Fla. 1984) this Court Again Relied on the "Strickland, supra standard of review (as opposed to the four-prong standard set forth in Knight vs. State, 394 So2d. 997, 1001 (Fla. 1981), when this Court held that: "to prove prejudice ..... (an appellant) must show that there is a REASONABLE probability that, but for counsels unprofessional errors the result of the proceeding would have been different".

"Reasonable Probability". It has long been held that such a probability is defined as a probability sufficient to undermine the confidence of the outcome. And within this burden, this Appellant will establish a reasonable probability sufficient to show that this Appellant was

denied effective ASSISTANCE of collateral Appellate counsel, when counsel forced upon this Appellant by the trial court failed to RAISE A significant issue of juror misconduct. And that in all REASONABLE probability, had C.C.R. counsel RAISED and duly litigated the ISSUE, the outcome would had been different, AS the Court would had been legally compelled to VACATE this Appellants convictions and sentences of death.

The trial Court erroneously denied this Appellants original Petition for Writ of HABEAS, AS well AS subsequent Motion for Re-hearing, AS Appellant did, and has, set forth facts sufficient to REQUIRE the ISSUANCE of Writ sought. Appellant would now PRAY that this Court take CORRECTIVE ACTIONS, and upon finding that the underlying ISSUE of juror misconduct sufficient to VACATE both CAPITAL CONVICTIONS and sentences of death, RULE that this Appellant WAS entitled to effective ASSISTANCE of Counsel AS A matter of law, AS A direct RESULT of the States CREATION of the right to counsel in All CAPITAL collateral Appellate proceedings.

Issue II

THE TRIAL COURT ERRED IN DENYING APPELLANTS CLAIM OF JUROR MISCONDUCT - WHICH RESULTED IN DENIAL OF APPELLANTS RIGHT TO A FAIR TRIAL AS WELL AS A DENIAL OF APPELLANTS RIGHT TO EXERCISE PEREMPTORY JUROR CHALLENGES IN AN INTELLIGENT AND INFORMED MANNER....

IN OCTOBER, 1988, following C.C.R. counsel filing a lengthy Rule 3.850 post-conviction collateral Motion to VACATE this Appellants capital convictions and sentences of death, this Appellant immediattely brought it to the Courts attention by way of certified letter that a significant collateral issue had not been included. Appellant specifically requested an opportunity to supplement the "Rule 3.850" Motion, pointing out that if such an opportunity was not afforded, this Appellant would be forced to subsequently file a Petition for writ of Habeas Corpus, as the only alternative means of full judicail review.

The trial court refused to respond to Appellants pleas, And without an opportunity to seek full review, Judge Elmer Friday then summarily denied this Appellants Rule 3.850 Motion Appellant then had only this instant habeas Action as means to seek a full and fair review. Yet Again, Judge Elmer Friday denied this Appellants Actions without any meaningful Review.

Appellant now sets forth, in full, the Argument in support of the issue of juror misconduct which was erroneously And deficiently ommitted from this Appellants Rule 3.850 collateral post-conviction proceeding. A full And fair Review of this issue will

conclusively establish this Appellant is legally entitled to the relief sought within original Petition for writ of Habeas Corpus.

Issue: Juror Maxine Hough's deliberate concealment of information which would had caused her disqualification if honestly disclosed.

"The Sixth Amendment commands that 'In all criminal prosecutions the accused shall enjoy the right to .... An impartial jury ...'" U.S. Const. Amend. VI. This jury must be "capable and willing to decide the case solely on the evidence before it" Smith vs. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946; 71 L.Ed 2d. 78 (1982) Voir Dire protects this right "by exposing possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equip, Inc. vs. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 849; 78 L.Ed2d 663 (1984), As quoted in United States vs. Perkins, 748 F.2d. at 1531 (11th Cir, 1984) This right is attached to criminal defendants in State Courts both through the Sixth and Fourteenth Amendments. Duncan vs. Louisiana, 391 U.S. 145, 149 (1968)

Florida Courts have long stated that the purpose of Voir Dire examination is to obtain a fair and impartial jury to try the issues in the case before the Court. King vs. State, 390 So2d. 315 (Fla. 1980); cert. denied, 450 U.S. 989; Cross vs. State 89 Fla. 212; 103 So. 636 (1925) At voir dire, jurors are questioned for the sole purpose of ascertaining whether they are qualified under law to serve Dicks vs. State 83 Fla. 717, 93 So. 187 (1922) "Qualified under law" has been interpreted to mean that the jurors will be fair, impartial and free from bias, prejudice or interest in the matter to be tried. Ritter vs. Jimenez, 343 So2d. 659 (Fla. 3 DCA 1977), See Also, Boca Tesa Corp. vs.

PALM BEACH CO. 241 SO2d. 110 (FLA. 1974)

The test for determining the qualification of a juror in a criminal matter is whether that juror can lay aside his or her prejudices and render a verdict solely on the evidence and the Courts instructions. The standard applied by the Courts in determining a jurors state of mind is whether there is a reasonable doubt as to that jurors impartiality. Leon vs. State 396 So2d. 203 (Fla. 3d DCA 1981) Rev. Denied 407 So2d 1116 (Fla. 1981) A wide latitude is allowed is allowed in examining prospective jurors at Voir Dire. Cross vs. State, 89 Fla. 212, 103 So 636 (1925) And the examination should be as varied and as elaborate as the circumstances surrounding the prospective jurors under examination in relation to the case on trial would seem to indicate. Pope vs. State, 84 Fla. 428, 94 So. 865 (1923) See also, O'Connell vs. State ___ So2d. ___ (Fla. 1986), Williams vs. State, 424 So2d 148 (Fla. 1982)

Blacks Law Dictionary defines voir dire as "to speak the truth" And obviously the most in-depth and elaborate voir dire examination of prospective jurors would be meaningless if the respective jurors refused to respond completely and truthfully. For this very reason, the long-standing standard of review in Florida is:

> "The well-established rule is that the failure of a juror to honestly answer material questions propounded to (her) on voir dire examination constitutes bad faith requiring (her) disqualification from serving on that jury in that case. Seay vs State, 139 Fla. 433, 190 So 702 (1939) Further, the right to counsel to challenge a juror for cause or peremptorily being indespensible to the successful operation of our jury system. The right of a fair trial by an

impartial jury is destroyed when the right to make an intelligent judgement as to whether a juror should be challenged is lost or unduly impaired. When this occurs, the verdict should be set aside and a new trial should be granted. Ellison vs. Caibb 271 So2d 174 (Fla. App., 1974) For the question is not whether an improperly established tribunal acted fairly, but whether a proper tribunal was established" Skilci vs. Ryder Truck, 267 So2d. 379 (Fla. 1972)" As quoted in Minnis vs. Jackson, 330 So2d 847, 848 (Fla. 1976)

The issue of a juror's concealment of information which, if exposed would have provided a valid basis for "cause" of disqualification has been indisputably settled by the U.S. Supreme Court in Mc Dounough Power Equit. Inc vs. Greenwood 464 U.S. 548; 104 S.Ct. 845, 78 L.Ed 2d. 663 (1984) when it was established by the Court that:

"... to obtain a new trial in such a situation, a party must first demonstrate that a juror first failed to answer honestly a material question on voir dire; And then further show that a correct response would have provided a valid basis for a challenge for cause...." McDonough, Id. 104 S.Ct at 850

Appellant has clearly met this standard in the original Petition for Writ of Habeas before the trial court. And will now fully examine both prongs of Mc Donough.

- First Prong -

Non-Disclosure During Voir Dire

As this Court has previously recognized in earlier review of this capital case, this Appellant has had two trials of this cause, the first resulting in a 'hung jury' after 'eleven hours' of deliberations. It was a second trial in the same small community of Glades County that resulted in the present convictions and sentences of death.

Appellant would direct this Courts Attention to the first trial, specifically, the voir dire stage. On November 29, 1983 voir dire examination began, with 125 venire persons called for duty. Because all motions for Change of Venue and Individual Voir Dire were denied, difficulty arose in empaneling a full jury. Late in the day of November 30, the original 125 venire persons were exhausted. By way of "emergency summons", the Court ordered the midnight service of 100 additional venire persons. As conclusively shown in "Appendix A" of Appellants original Petition for Writ of Habeas, among the additional 100 potential jurors was one "Maxine M. Hough, P.O. Box 158, Moore Haven, Fla." An examination of the transcript of the December 1, 1983 proceedings further shows that the same Maxine M. Hough was present, And did sit through open voir dire the entire day, After being placing under oath by the trial court. (Maxine M. Hough was not actually called to the jurors box, and examined personally, but was present throughout the day) After a full panel was seated, the remaining venire persons were dismissed, including Maxine M. Hough.

Following declaration of a "Mistrial" on December 7, 1983, the case was held for a second trial. Again, All motions for Change of venue And Individual Voir Dire were summarily denied. A second trial was held in Glades County, beginning February 20, 1984. Even before actual voir dire began, Defense Counsel Again pled with the Court to grant

the previously made motions for change of venue and individual voir dire examination, to which the Court and State responded:

> "Judge, my response to that is that..... the only big problem in picking a jury.... is that it might be no secret to anybody the second time around..." (R. 1430)

But even with the obvious fact recognized, the Court <u>refused</u> to take necessary precautions available. As a result, voir dire took place in open court beginning. February 20, 1984. The Court first swore in the entire venire panel in open court (R. 1432) placing all potential jurors under oath, then followed with a collective questioning of general qualifications.

At this point, the Court clerk began a "roll call" of all persons summoned. Appellant would direct this Court to the attention of Appellants original Petition for Writ of Habeas, in which Appellant has attached as Appendix B the venire list of 205 potential jurors called for duty at the second trial. Because of the unique situation of emergency summons of additional jurors at the first trial, the venire list of those summoned December 1, 1983 - including Maxine M. Hough, was not available, nor was the transcript of the first trial's voir dire. (See Footnote) Because of this, counsel did not recognize the fact that Maxine M. Hough also was called to duty at the second trial.

Open voir dire examination continued for two days, and late into the second day the Court clerk called upon "Maxine M. Hough, juror number 14" (R. 1719) with voir dire examination then focused on this

* Footnote: It is noted that transcript of original trial, as well as venire sheets were not made available until <u>September, 1988</u>

prospective juror. Unknown to all parties, Maxine M. Hough had also been summoned to jury duty at this Appellants first trial only two months previously, and the record of the original trial shows that Maxine M. Hough sat through a full day of voir dire.

Asst. State Attorney Greene conducted the following examination of prospective juror Maxine M. Hough:

R. 1725 "Mr. Greene: Do you have any prior jury experience?"
"Mrs. Hough: No, sir."

R. 1726 "Mr. Greene: Do you know myself, Mr. McCutcheon, Mr. Jacobs, Mr. Enquilson, or anyone involved in this case?"
"Mrs. Hough: No."

R. 1726 "Mr. Greene: Do you know the defendant?"
"No, sir."

R. 1754 "Mr. Greene: Mrs. Hough, I haven't talked with you in a long time. Is there any reason that you thought over lunch why this case might put.. an undue burden on you? You thought of somebody you knew, or anything along those lines? Is there anything else I haven't asked you that you can think of that might be affected as far as you being a juror?"
"Mrs. Hough: No, sir."

Following the above exchange, in which Juror Maxine M. Hough

denied "ANY previous jury experience" (it is noted that the question was not jury duty, but "jury experience".) the voir dire examination turned to BRUCE TAYLOR, who sat beside MAXINE M. Hough. LIKE MAXINE M. Hough, MR. TAYLOR had also been called to jury duty at the first trial. (PLEASE EXAMINE APPENDIX A, APPENDIX B of original petition, which will show "BRUCE A. TAYLOR, PO BOX 639, MOORE HAVEN" AS #34 and #130 respectfully) ALMOST IMMEDIATELY, counsel vaguely RECOGNIZED MR. TAYLOR from the first trial, and the following bench conference ensued:

R 1757-1758 "MR. JACOBS: (DEFENSE) your Honor, he looks awfully familiar. I think he was on the other jury panel at the first trial."

"THE COURT: I want to ask you – he was on the panel?"

"MR. McGAUTHER: (PROSECUTOR) Just ask him if he was on that one"

"THE COURT: I'll just ask him"

(IN OPEN COURT)

"THE COURT: MR. TAYLOR?"

"MR. TAYLOR: YES SIR?"

"THE COURT: Have you previously been on jury duty?

"MR. TAYLOR: YES, SIR."

"THE COURT: How long ago?"

"MR. TAYLOR: The last time they had a jury session"

"THE COURT: You may step down, for cause."

MRS. Hough sat within easy hearing distance of this entire exchange. yet she continued to remain silent. The only difference between her involvement in the first trial and MR. TAYLORS involvement

was that Mr. Taylor admitted his. Maxine M. Hough stated, under oath, that she had no "jury experience". Although she did not actually serve on the first jury, the record in this case leaves no doubt that she did, in fact, have previous "jury experience" as she was summoned for jury duty, sworn in with a collective panel, and then sat through a full day of voir dire examination at Appellants first trial.

As she sat through voir dire examination in open court, prior to being called herself, she witnessed every person who admitted actual knowledge of a previous trial being quickly dismissed (see Mr. Glover, R. 1512-1513, Mr. Green, R. 1595) And she wanted to be on the jury panel bad enough to commit perjury, as she surely knew she had previous "jury experience".

By law, per McDonough Appellant must show that juror Maxine M. Hough "failed to answer honestly a material question." Appellant has shown that Maxine M. Hough did fail to answer honestly when questioned as to whether she had previous "jury experience". The question was sufficient in both form and content to clearly encompass her previous experience at this Appellants first trial. And for the sake of argument, even if such a question was not clear to an average person, the record reflects that she was also asked if "... there is anything else (not) asked (her) that (she) can think of that might be affected as far as (her) being a juror" (R. 1754) Again, she said "no", even though the correct and honest response was "yes". Especially after she witnessed the exchange between Mr. Taylor and the Court (R. 1757-1758)

Not only did her dishonesty at voir dire result in her being empaneled as a juror in this case, but because she did not respond

honestly, Appellant was unable to intelligently exercise his available peremptory challenges. When Juror Maxine Hough was asked if she had Any previous jury experience, if she had said "yes", counsel would had conducted a more thorough examination, and found that she had been called at this Appellants first trial.

The first prong of "McDonough" is conclusively established, as the records itself clearly shows that Maxine M. Hough failed to honestly answer a material question." In fact she lied, and compounded this deliberate act of deception by failing to act when it became clear her previous involvement disqualified her from duty, as exampled by the dismissal "for cause" (R. 1758) of venire-person Bruce Taylor. There can be no doubt that she was personally aware that her responses were false, and that she was aware that the information she deliberately concealed - if exposed - would had resulted in her challenge for cause. (See United States vs. Perkins, 748 F.2d. 1519 (11th Cir. 1984)

- Second Prong -

Showing That An Honest Response Would Had Been A Valid Basis for Challenge For Cause -

A party seeking a new trial because of non-disclosure of a juror has the burden of showing bias. United States vs. Tutt, 704 F.2d. 1567, 1569, (11th Cir.), cert. denied ____ U.S. ____; 104 S. Ct. 107, 78 L. Ed. 2d. 156 (1983) Actual bias may be shown in two ways: "By specific admissions, or by specific facts showing such a close connection to the circumstances at hand that bias must be presumed. United States vs. Nell, 526 F.2d. 1223, at 1229 (5th Cir. 1976). The Nell court defines presumed bias in "situations

in which the circumstances point so sharply to bias in particular juror(s) that even his own denials must be discounted in ruling on a challenge for cause." Neil, supra, at 1229, N. 8

Juror Maxine M. Hough's own actions in and of itself reflects a strong indication that she was not impartial. In "Perkins" (cited above) the 11th Circuit was faced with a similiar issue, and in holding to the conclusion reached by the U.S. Supreme Court in McDonough, it said:

> "I agree with the Court that the proper inquiry in this case is whether Defendant has the benefit of an impartial trier of fact. I also agree that in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether a juror was in fact, impartial"
>
> quote from Justice Blackmun as cited in United States vs Perkins, 748 F.2d 1519, at 1592 (emphasis of Court)

Given the inferences of actual bias that arise from Juror Hough's obvious dishonesty, coupled with the fact that she clearly had knowledge as well as personal involvement in Appellants first trial, and felt the need to conceal this disqualifying information so bad that she committed felonious perjury, "actual bias must be presumed;" Mimms vs. Jackson, 330 So2d. 847 (Fla. 3d DCA, 1976) as "the well-established rule is that the failure of a juror to honestly answer material questions propounded to (her) on voir dire examination constitutes bad faith, requiring (her) disqualification from serving on the jury." Seay vs. State 139 Fla. 433, 190 So. 702 (1939) And in light of facts the record clearly support, "we must conclude that actual bias must be peesumed" Perkins supra, at 1533.

Even if this Court was to find that prejudice is not presumed by the Record itself, this Appellant has at the very least shown that a "reasonable possiblity" exists of juror prejudice and Appellant was erroneously denied an opportunity for an evidentiary hearing which would had allowed Appellant to establish actual prejudice. A long-established standard of review began with yet another Glades County murder case, involving juror misconduct, in which the Florida Appellate Court held that:

> "In order to give the Appellant the benefit of any doubt, if there is a reasonable possiblity that this juror was prejudiced against him, he should have a new trial."

Thompson vs. State, 300 So2d. 301, at 303. (2nd DCA, 1974)

This case is even more so clearer that a reasonable possiblity exists, than in Thompson. And no doubt exists that had Juror Hough truthfully revealed the documented fact that she was called to jury duty at this Appellants first trial, the Court would had been compelled to remove Juror Hough from the panel for cause, just as it did Mr. Bruce Taylor when he truthfully admitted previous involvement. Thus the question of whether Juror Hough's failure to respond honestly was prejudicial to this Appellant is clearly answered, as had Juror Hough responded in the affirmative as to whether she had previous jury experience, she would had been immediatley disqualified for cause.

This Appellant has clearly established both prongs of McDonough, in that this Appellant has set fourth sufficient facts, conclusively supported by the record itself that Mrs. Maxine M. Hough, a person

who served as a juror to try this cause before the Glades County Circuit Court did fail to respond truthfully to a material question propounded to her at voir dire; and that had Juror Maxine Hough responded truthfully, revealing that she did, in fact, have "previous jury experience", such a response would had provided a valid basis for a challenge for cause. In fact the record shows that another potential juror, Mr. Bruce Taylor, was disqualified "for cause" when he did reveal the exact same degree of "previous jury experience" as Juror Maxine Hough.

In that Appellant has established all that is required by McDonough, and that the facts are legally sufficient in and of itself to require habeas relief from present capital convictions and sentences of death, Appellant would still wish to point out that the trial Court further errored in failing to provide Appellant an evidentiary hearing to allow Appellant an opportunity to present further evidence. (See: Thompson, supra at 301.) By law, this Appellant is legally entitled to relief, but because of political implications due to the fact this case is a highly publicized local case, the trial court refused to provide entitled relief. It truly is a sad commentary that a judicial system would deny justice to a capital defendant, allowing the ultimate punishment to be imposed, when if the same issue existed in a less politically influenced case, relief would result.

Appellant would further argue that the trial court failed to grant relief requested in Appellants original Petition for Writ of Habeas Corpus as Appellant did set forth facts sufficient to conclusively establish that Juror Maxine Hough's failure to respond honestly

to the question as to whether she had "any previous jury experience" deprived this Appellant of an opportunity to intelligently exercise his available peremptory challenges. Although Appellant would submit that the facts already argued have conclusively shown that had Juror Hough admitted previous jury experience her response would had resulted in disqualification for cause, Appellant would wish to preserve the consolidated issue that absent disqualification for cause, the actions of Juror Hough all but eliminated this Appellants protected right to exercise peremptory challenges intelligently.

Had Juror Hough's involvement in the defendants first trial been exposed, that fact in and of itself would had, without doubt, compelled this Appellant to exercise a peremptory challenge and have her stricken from the panel. Just the fact that she had knowledge of the previous trial - much less actual involvement - would have been enough to question her impartiality. It has long been recognized that prejudice is presumed when a juror learns that a defendant had previously stood trial for the same offense. United States vs. Williams, 568 F.2d. 464 (5th Cir., 1978) (See Also Jackson vs. State, ___ So2d ___, in which this Court overturned a capital case due to jurors knowledge of previous trial. Mandate issued September 24, 1989) And this was most especially addressed in Weber vs. State, 501 So2d. 1379 (Fla. 3d DCA, 1987) when the Weber Court vacated a criminal conviction, holding that:

> "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 layperson to assume that such a defendant must, in fact, be guilty."

Weber, 501 So2d, at 1383, quoting Hughes vs. State, 490 A.2d 1034, 1044 (Del. 1985) (emphasis added.)

Juror Hough did not simply have knowledge that the Appellant had previously tried for the same case, but was actually involved in the first trial, and sat through voir dire process in both trials. As "unreasonable" as it is to expect an "average layperson" to be able to divorce himself from such knowledge, so much more unreasonable would it be to expect Juror Hough not to be influenced. If prejudice is presumed when a jury gains knowledge of a previous trial, then that standard of presumption would apply all the more to a juror who was actually involved in the previous trial.

"The right of counsel to challenge a juror for cause, or peremptorily, being indespensible to the successful operation of our jury system; the right of a fair trial by an impartial jury is destroyed when the right to make an intelligent judgement as to whether a juror should be challenged (for cause, or peremptorily), is lost or unduly impaired. When this occurs, the verdict should be set aside and a new trial granted. Ellison vs. Cribb, 271 So2d. 194 (Fla. App., 1972) Because "certainly when possible non disclosure is secreted and compounded by the untruthfulness of a potential jurors answer on voir dire, the result is deprivation of the Defendants Right to a fair trial." United States vs. Bynum, 634 F.2d. 768 (4th Cir., 1980); United States vs. Perkins, 748 F.2d. 1519 (11th Cir, 1984) And as in Ellison, Bynum and Perkins, the instant convictions and sentences

of death must be set aside as Juror Maxine Hugh's failure to respond in complete honesty to a material question not only deprived this Appellant of his established Sixth and Fourteenth Amendments rights to be tried before a qualified, fair and impartial jury, but also deprived this Appellant of his equally established rights to exercise his peremptory challenges in an intelligent and informed manner.

Furthermore, because of the extreme finality of the imposed sentence of death, this Court should "exercise a special scope of review" to protect the possibility of the ultimate miscarriage of justice. (See Elledge vs. State, 346 So2d. 998, 1002 (Fla. 1977); Brown vs. Wainwright, 392 So2d. 1327 (Fla. 1981); Wilson vs. Wainwright 474 So2d. 1163, 1165 (Fla. 1985)

CONCLUSION

Appellant has set forth facts within this instant brief that are basically identical to this Appellants original Petition for Writ of Habeas Corpus. The facts set forth conclusively show that this Appellant was and is entitled to Relief sought.

As stated, this Action is unique, in that it is brought before this Court by a person presently condemned to death, and confined to a six foot concrete cell with no direct access to a law library.

Further, it presents an issue of clear juror misconduct, which if such issue was previously raised within this Appellants "Motion to Vacate Judgement and Sentence", (filed oct. 27, 1988 pursuant to Florida Rules of Criminal Procedure, Rule 3.850) this Appellant would have- as well he should have- been granted Relief. Because this is a classic "collateral" type issue, theoritically it could be raised by a second "Rule 3.850" Motion within the trial court. But because collateral counsel waited until the last possible moment to file this Appellants Rule 3.850 Motion, such an avenue of review no longer exists. By no fault of this Appellants, the statutory deadline for a subsequent Rule 3.850 Motion has expired.

Thus, a Petition for Writ of Habeas Corpus is and was the only available avenue in which this Appellant could seek full and fair review.

This Appellant did all humanly possible to avoid the need to seek this instant extraordinary review. The trial Court was placed on notice at least one year prior to the filing of Appellants Rule 3.850 Motion. Yet Trial Court Judge Elmer Friday Refused to take the necessary precautions. As a result, just as this Appellant had

previously predicted, the Rule 3.850 motion filed in behalf of this Appellant was inadequate, and failed to raise numerous easily identifiable issues classically involving "collateral" matters. In respect for this Court, Appellant sought extraordinary review of only the issue of juror misconduct. This issue, in and of itself is conclusively sufficient to establish that C.C.R. counsel acted ineffectively, as if such issue was raised in the original Rule 3.850 motion, this Appellant would had been provided relief.

The Appellant level right to counsel automatically comprehends the Sixth Amendment right to effective assistance of counsel. Evitts vs. Lucey, 105 S.Ct. 830 (1985) Appellate counsel must function as "An active advocate" Anders vs. California, 386 U.S. 738, 744-745 (1967) providing his client the "expert professional... assistance... necessary in a system governed by complex laws and rules and procedures..." Lucey, 105 S.Ct. at 835, N. 6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the Appellant was denied effective assistance. Kimmelman vs. Morrison, 106 S.Ct. 2574, 2588 (1986) And this case is an example of exactly that. (See, United States vs. Cronic, 466 U.S. 648, 657, N. 20 (1984), notwithstanding the fact that in other aspects counsel's performance may have been "effective". (See Also: Washington vs. Watkins, 655 F.2d. 1346, 1355 (5th Cir.), Reh. Denied, with opinion, 662 F.2d 1116 (1982) The basic requirement of Due Process, therefore, is that a Defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Wilson vs. Wainwright. 474 So2d. 1162, at 1164 (Fla. 1985)

In this instant case, C.C.R. counsel had a statutory duty to provide representation in behalf of this Appellant. Because Florida Law mandates specifically that "All persons under a sentence of death shall

be Represented" by the Office of Capital Collateral Repleseentives, such specific langauge creates a statutory right to counsel for "all persons under a sentence of death" in this State. Such a right to counsel would Automatically encompass the right to effective assistance of counsel. But C.C.R. counsel failed to act "effectively", as C.C.R. counsel erroneously failed to raise the instant issue of juror misconduct. That failure in and of itself deprived this Appellant of a full and fair review. Had counsel raised the instant issue of juror misconduct, this Appellant would had been entitled Relief. Such a deficiency of performance has prejudicially subjected this Appellant to possible death, an error no body of true justice should condone.

The issue of juror misconduct as set forth within conclusively establishes that the Appellant was deprived of his constitutionally protected, fundamental right to be tried before a fair and impartial jury. The encroachment upon this Appellants Sixth and Fourteenth Amendments is further aggravated by the deprival of protections of the Eighth Amendment, as Appellants sentences of death were illegally imposed by an unqualified jury panel.

This Appellant has clearly established - as the record itself conclusively supports - that he has been deprived of the most basic and fundamental judicial safeguards. The jury empaneled to try the case upon which this Appellant now stands condemned was comprised of, and included an unqualified juror - Mrs. Maxine M. Hough, who through the criminal act of perjury did deliberately fail to answer questions propounded to her at voir dire in an honest manner. Her failure to respond honestly was then aggravated by her ongoing deliberate concealment of information which, if exposed, would had established a

valid challenge for cause.

Furthermore, her failure to respond in complete truth all but eliminated this Appellants protected right to exercise his peremptory challenges in an intelligent and informed manner.

By long-established and vigorously protected lanes of legal jurisprudence in this State, the facts of this case demand that the convictions and subsequent sentences of death must be VACATED, and this case REMANDED back to the trial court for RETRIAL. Clearly, this Appellants present convictions and sentences of death exist only as a result of this Appellants deprival of Sixth, Eighth and Fourteenth Amendments protections. Appellant would now pray that relief sought before this Court is granted in full, and that this case is remanded back to the trial court with specific instructions that Writ of Habeas Corpus is to issue, and convictions stand VACATED.

WHEREFORE, Appellant does now submit the above and foregoing action before this Court, with all facts as stated true and correct, and submitted in good faith.

Cary Michael Lambrix (DC# 56)
Florida State Prison
PO Box 747 (482053)
Starke, Florida 32091

Sworn and Subscribed
before me this 26
day of September 1989

Notary Public

B. R. GUTHRIE, NOTARY PUBLIC
THE STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES 11-29-92

Certificate of Service

I, Cary Michael Lamberix, Pro Se, do hereby certify that a true and correct copy of the above and foregoing Initial Brief has been provided to Mr. Robert Krauss, Asst. Attorney General, Park Trammel Building, 1313 Tampa Street, (Suite 804) Tampa, Florida, 33601 by U.S. Mail on this 26th day of September 1989.

Cary Michael Lamberix (Pro Se)
Florida State Prison
PO Box 747 (482053)
Starke, Florida 32091