IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2021
LOWER TRIBUNAL CASE NO.: 90-16062-CFA

CHADWICK WILLACY,

Defendant/Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

_____/

PETITION FOR WRIT OF HABEAS CORPUS RELIEF

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides, "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. These claims demonstrate Mr. Willacy was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and sentence of death violated fundamental constitutional imperatives.

Citations shall be as follows: The post-conviction record on appeal shall be referred to as "PCR___" followed by the appropriate page numbers. The record on appeal in case no.: 79,217 shall be referred to as "1991R.___" followed by the appropriate page numbers. Appellant's Initial Brief on direct appeal in 1991 shall be referred to as "1991IB.__" followed by the appropriate page numbers. The supplemental record on appeal shall be referred to as "1991SR.___". The record on appeal in case no.: 86,994 shall be referred to as "1995R.___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Willacy lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Willacy accordingly respectfully requests that this Court permit oral argument.

INTRODUCTION

Significant errors occurred in Mr. Willacy's trial which were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel was ineffective for failing to challenge on direct appeal the probable cause for Mr. Willacy's arrest and subsequent search of Mr. Willacy's residence. In addition appellate counsel failed to challenge the trial court's verbatim adoption of the state's proposed order denying Mr. Willacy's motion for new trial despite the trial court having made no findings of fact and being aware of Mr. Willacy's objections to the State's proposed order. Moreover, appellate counsel failed to properly argue the inherent prejudice resulting from Juror Clark's service on Mr.

Willacy's jury and Juror Clark's misconduct which would have entitled Mr. Willacy to a new trial.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Willacy involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and cumulatively, the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original); Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984).

Additionally, the petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Willacy is entitled to habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION FOR WRIT OF HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). See Art. 1, Sec.13, Fla. Const. 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 petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Willacy's sentence of death.

Jurisdiction in this action lies in this Court, see e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Willacy's direct appeal. See Wilson v. State, 474 So. 2d 1327 (Fla. 1981). A petition for writ of habeas corpus is the proper means for Mr. Willacy to raise the claims presented herein. See e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition asserts claims involving

fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those plead herein, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Willacy's claims.

PROCEDURAL HISTORY

Petitioner Chadwick Willacy was convicted of first-degree murder, arson, robbery with a deadly weapon and burglary of a dwelling with an assault. He was sentenced to death in December 1991 by the Honorable Theron Yawn of the Eighteenth Judicial Circuit, in and for Brevard County. Mr. Willacy's conviction was affirmed by this Court, and the sentence was vacated and remanded for a new penalty proceeding, Willacy v. State, 640 So. 2d 1079 (Fla. 1994).

In November 1995, following a jury recommendation of 11 to 1, the trial court again sentenced Mr. Willacy to death. In April 1997, this Court affirmed the sentence of death. Willacy v. State, 696 So. 2d 693 (Fla. 1997), cert. denied, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed. 2d 321 (1997).

On or about March 18, 2002 Mr. Willacy filed his Amended Motion for Post Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 in the trial court. A hearing was held on August 16, 2002 pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). On December 19, 2002 the trial court entered its Huff order wherein the trial court granted an evidentiary hearing on claims I, VII, X, XIII, XVII, XVIII, XXI, XXII, XXIV, XXV, XXXI and denied claims II, III, IV, V, VI, VIII, IX, XI, XIV, XV, XVI, XIX, XX, XXVI, XXVII, XXVIII, XXIX, and XXX.

An evidentiary hearing was held by the trial court on December 3, 4, 5, and 19, 2003 and February 16, 2004 and May 17, 2004 on his rule 3.851 motion. The trial court denied Mr. Willacy relief as to the evidentiary hearing claims on November 19, 2004. Mr. Willacy then timely filed a Motion for Rehearing with the trial court which was denied on December 17, 2004. Mr. Willacy timely appealed the trial court's order denying him collateral relief. This petition is being filed simultaneously with the rule 3.851 appeal pursuant to Florida Rule of Appellate Procedure 9.140(b)(6)(e). This is Mr. Willacy's first petition for habeas relief.

Mr. Willacy remains incarcerated at Union Correctional Institution under sentence of death by a court established by the Laws of Florida within

the meaning of Florida Rule of Criminal Procedure 3.850(a) and section 924.066, Florida Statutes.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for writ of habeas corpus, Mr. Willacy asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE LACK OF PROBABLE CAUSE TO ARREST MR. WILLACY AND RESULTING LACK OF PROBABLE CAUSE TO SEARCH MR. WILLACY'S RESIDENCE.

a) PROBABLE CAUSE TO ARREST.

On September 6, 1990, during the morning hours, the victim was discovered murdered in her home. Law enforcement suspected that on September 5, 1990 the victim had been murdered when she unexpectedly entered her home, interrupting a burglary in progress. Mr. Willacy's home was located next door to the victim's residence. A window in Mr. Willacy's

home, which overlooked the victim's home, was broken. As such, law enforcement suspected that his home too may have been burglarized. A police officer entered Mr. Willacy's home to look for further potential victims and any evidence of a burglary of Mr. Willacy's home. Mr. Willacy was not home at the time.

Sometime later Mr. Willacy returned home and was informed of the murder of his next door neighbor. Detective Santiago of the Palm Bay Police Department asked Mr. Willacy to provide fingerprint samples and Mr. Willacy refused. However, Mr. Willacy agreed to speak to Detective Santiago and gave a taped statement denying any involvement in the homicide.

Throughout the course of the day on September 6, 1990, law enforcement had obtained statement from neighbors who reported seeing a muscular black male in his 20's the day of the homicide. Also that afternoon the victim's stolen automobile was discovered abandoned behind a shopping plaza approximately one mile from the victim's home. Law enforcement located a juvenile, John Barton, who maintained that as he got off the bus on September 5, 1990 he observed a dark black male in his 20's with short hair park the victim's automobile behind the shopping plaza. Law enforcement subsequently drove Mr. Barton to Mr. Willacy's home and caused Mr.

Willacy to come outside. Mr. Barton told the police that Mr. Willacy looked a lot like the person he had seen in the victim's vehicle but that he was not 100% sure. Specifically he testified, "I told them that it was about eight and half" on a scale of ten. (1991R at 3121).

On the evening of September 6, 1990, Mr. Willacy's live-in girlfriend, Marissa Walcott, and her father found a check register in the wastebasket of Mr. Willacy's bathroom. Mr. Willacy contacted Detective Santiago regarding the check register. Detective Santiago came to Mr. Willacy's home. Mr. Willacy showed the detective the check register which had been returned to the wastebasket after the telephone call. Detective Santiago then contacted Agent Cockreil of the Brevard County Sheriff's Department. They examined the handwriting on the check register and compared it to handwriting found in the victim's home. While Detective Santiago's view was that the handwritings matched, Agent Cockriel indicated that,

> the best I could tell him with my expertise in that particular area is that they seemed to be authored by the same person. They definitely were worth collecting and subsequently sending to the crime lab for an official examination of the items.

(1991R at 3247). Detective Santiago immediately arrested Mr. Willacy. Upon his arrest, Mr. Willacy was fingerprinted.

Subsequent to his arrest, Mr. Willacy spoke with a public defender and invoked his right to counsel and to remain silent. Ignoring Mr. Willacy's invocation of constitutional rights, Detective Santiago questioned Mr. Willacy and obtained an incriminating statement.

Mr. Willacy's fingerprints were compared to latent fingerprints found in the victim's residence. A latent print was identified as belonging to Mr. Willacy. Law enforcement obtained a search warrant for Mr. Willacy's home. Pursuant to the warrant, Mr. Willacy's home was searched and a number of items belonging to the victim were uncovered.

At trial, defense counsel filed a motion challenging the probable cause for Mr. Willacy's arrest. (1991R at 3303-3305). The trial court denied the motion. (1991R at 3341-3342). Defense counsel renewed the objection at trial, thus preserving the issue for appellate review. However appellate counsel failed to raise the issue on direct appeal. Such omission by appellate counsel was substantial and as such prejudiced the appellate process.

Probable cause to arrest exists when the totality of the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it. See Shriner v. State, 386 So. 2d 525, 528 (Fla. 1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 899, 66 L.Ed.2d 829 (1981).

The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. Id. at 528. "Ín dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practicial considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed. 2d 527, 544 (1983). See also State v. Maya, 529 So. 2d 1282 (Fla. 3d DCA 1988); McNeil v. State, 512 So. 2d 1062 (Fla. 4th DCA 1987).

In light of the above standard for determining probable cause, law enforcement lacked probable cause to justify Mr. Willacy's arrest. In this regard, the illegal show-up's equivocal identification, which was suppressed by the trial court, cannot be used to support probable cause. Without the show-up identification, the only evidence available to law enforcement was (1) a black male in his 20's with short hair was seen in the victim's vehicle; (2) Mr. Willacy was a black male in his 20's with short hair; (3) an unknown check register was found in Mr. Willacy's home, a residence which law enforcement had suspected of also having been burglarized; (4) Mr. Willacy and his friends had reported the discovery of the check register to the police; and (5) a law enforcement officer in his lay opinion believed the check

register writing looked like writing found in the victim's home, while another officer felt it was worth sending to an expert for evaluation.

These facts are clearly insufficient for a reasonable person to conclude that Mr. Willacy is the individual who committed the homicide. Accordingly Mr. Willacy's Fourth Amendment rights were violated.

b) PROBABLE CAUSE TO SEARCH MR. WILLACY'S RESIDENCE.

At trial, defense counsel filed a motion to suppress incriminating evidence uncovered during the search of Mr. Willacy's home. (1991R at 3303-3305). The trial court denied the motion. (1991R at 3341-3342). Defense counsel renewed the objection at trial, thus preserving the issue for appellate review. However, appellate counsel failed to raise the issue on direct appeal. Such omission by appellate counsel was substantial and as such prejudiced the appellate process.

In preparing the affidavit in support of the issuance of the search warrant, Detective Santiago included a number of misrepresentations of fact. The search warrant also included information which had been obtained through unlawful police conduct. (1991R at 3262-3279).

If an affidavit for a search warrant contains intentionally false statements or statements made with reckless disregard for the truth, the trial

court must excise the false material and consider whether the affidavit's remaining content is sufficient to establish probable cause. Franks v. Delaware, 438 U.S. 154, 156, 98 S.Ct. 2674 L.Ed.2d (1978); Terry v. State, 668 So. 2d 954 (Fla. 1996). This rule contains two components.

First, the trial court must determine whether the affidavit contains intentionally false statements or a statement made in reckless disregard for the truth. Statements made by innocent mistake or neglect are insufficient. Franks, 438 U.S. at 171. Second, if the trial court finds the police acted deceptively, the court must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. Id. at 171-172. If the remaining statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. Terry v. State, 668 So. 2d at 958. If, however, the false statement is necessary to establish probable cause, the search warrant must be voided, and the evidence seized as a result of the search excluded. Id. (citing Franks, 438 U.S. at 156).

Here Detective Santiago intentionally misrepresented that a composite drawing had been completed which resembled Mr. Willacy. In actuality, John Barton worked on the composite at the police statement for approximately ten minutes but, according to Mr. Barton, "it wasn't working

at all. It was just – I couldn't pick the right nose or the right like eyes. . . ." (1991R at 3118). In short, Mr. Barton testified that the composite was not very accurate. (1991R at 3130; 3135).

The illegally obtained show-up identification must be excised from the affidavit. Since Mr. Willacy's fingerprints were obtained as a result of an illegal arrest, they could not lawfully be used for comparison purposes. As such, the comparison results must be excised from the affidavit. So too must Mr. Willacy's illegally obtained statement to law enforcement.

The focus thus turns to what facts would remain to justify issuance of the warrant. Once information obtained through illegal police activity is removed from the analysis, the search warrant crumbles. The mere fact that Mr. Willacy is a black male of similar age and hair length as the suspect viewed by Mr. Barton would be insufficient to justify issuance of a search warrant of Mr. Willacy's residence. Similarly Mr. Willacy's refusal to voluntarily supply his fingerprints while agreeing to speak with the law enforcement in his home, does not give rise to a sufficient level of probable cause. Lastly, the discovery in Mr. Willacy's home of an unknown check register which possibly contained similar handwriting as that found in the victim's residence does not rise to the level of probable cause. This is particularly so when Mr. Willacy himself notified law enforcement

immediately upon discovering the check register and law enforcement had suspected that Mr. Willacy's home had also been burglarized.

It is clear that a magistrate considering the few remaining facts would not find probable cause to order a search warrant be executed on Mr. Willacy's home. Furthermore, law enforcement lacked a good faith basis to rely on a search warrant issued by a magistrate who was not privy to the factual misrepresentations and numerous illegal activities employed by law enforcement. Accordingly, appellate counsel was ineffective for failing to challenge probable cause on appeal. Had appellate counsel raised this issue, this Court would have ruled that law enforcement lacked probable cause to arrest Mr. Willacy and subsequently search his residence. As a result Mr. Willacy would have been entitled to a new trial.

CLAIM II

MR. WILLACY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY HAVING A JUROR WHO WAS PENDING PROSECUTION SERVE AS THE FOREMAN OF HIS JURY.

In preparation of Mr. Willacy's 1991 direct appeal, Mr. Erlenbach uncovered that the jury foreman, Edward Clark, had pending felony charges at the time of jury selection in Mr. Willacy's case. (R 65-66). Mr. Erlenbach requested and received from this Court the opportunity to file a motion for new trial in the trial court. (1991SR 3628). An evidentiary hearing was conducted on October 12, 1992. Thereafter, on December 28, 1992, the trial court signed an order denying the motion:

> 1. The defendant was tried before this court for first degree murder and other crimes and on October 17, 1991, the jury returned verdicts of guilty. On October 18, 1991, a penalty phase was heard and the jury recommended the death penalty. The defendant was sentenced to death. He was represented throughout by Kurt Erlenbach and Susan Erlenbach of Erlenbach and Erlenbach, P.A., who are husband and wife.
>
> 2. Kurt Erlenbach, as defendant's counsel upon appeal, testified he made a criminal records check on certain of the jurors, during preparation relating to the appeal, and on July 8, 1992, discovered that Edward Paul Clark, the foreman of the trial jury, had been pending criminal charges in Brevard murder and other crimes and on October 17, 1991, the jury returned verdicts of guilty. On October 18, 1991, a penalty phase was heard and jury recommended the death penalty. The defendant was sentenced to death. He was represented

by Kurt Erlenbach and Susan Erlenbach of Erlenbach and Erlenbach, P.A., who are husband and wife.

3. Mr. Clark had been arrested February 19, 1991 and posted a $1,000 bond on the same day. On October 29, 1991, Assistant State Attorney Chris White, reviewed an investigative report from the Office of Parole and Probation and approved Mr. Clark for Pretrial Intervention Program. Mr. Clark never appeared in court. Mr. Clark successfully completed the program and, on May 14, 1992, the State entered a nolle prosequi in his case.

4. On October 7, 1991 during jury qualification proceedings and prior to jury selection, the venire was asked a series of questions under oath by the jury clerk pertaining to their qualifications to sit as jurors. One or more of such questions is designed to elicit whether any prospective jurors are under prosecution at the time of their service. When asked these questions, Mr. Clark did not respond or otherwise reveal the fact of his arrest or the status of his criminal case.

5. During voir dire of the jury, Mr. Clark responded to questions from the prosecution and defense counsel and revealed biographical information. When Mr. Clark, together with another juror, was asked by the prosecution, "Have either of you had any prior experience in the courtroom before in any capacity at all?", Mr. Clark did not respond. When asked by the prosecutor, "Have either of you had any sort of contact with a law enforcement agency or officer that left you with a particularly strong feeling about the contact in the way you were treated or the way your matter was handled?," Mr. Clark answered, "No."

6. After the jury, including Edward Paul Clark, was selected and sworn, at some point during the trial Chris White was informed by his secretary that Mr. Joe Brand of Parole and Probation thought a juror named Edward Clark was a candidate for pretrial intervention. During the course of the trial, prior to the submission of the case to the jury for deliberation, the State brought this fact to the attention of counsel for the defendant. Defense counsel took no action,

and this mater was never brought to the court's attention nor made a part of the trial proceedings.

7. Counsel for the defendant was put on notice of Edward Clark's status as a pretrial intervention candidate prior to the verdict. The defense cannot stand silent and permit a jury to render its verdict with notice of some potential grounds to challenge a juror and then assert the same grounds to set aside the verdict. [citations omitted]

8. Edward Paul Clark's case had been submitted for consideration for pretrial intervention by his attorney before he received his summons for jury service. He had been interviewed and approved for entry into the diversion program prior to his jury service, and the only thing remaining to be done was the ministerial act of signing the contract which occurred on October 29, 1991.

9. The court finds no juror misconduct on the part of Mr. Clark due to failure to respond to questions by the jury clerk during qualifications of the venire or his response or lack of response to questions propounded during voir dire. He reasonably believed his case was disposed.

10. Edward Paul Clark was not disqualified to sit as a juror under section 40.013(1), Florida Statutes (1991). State of Florida v. Edward Paul Clark, Case No.: 90-16802-CFA was not a pending criminal prosecution when Mr. Clark served as a juror in this cause. Likens v. State, 16 So. 2d 158 (1944).

11. Counsel for the defendant made no inquiry of the prospective jurors, and particularly of Edward Clark, concerning any pending prosecution against them. Counsel has an affirmative duty to discover any potential disqualification or the basis for any challenge for cause of a prospective juror.

12. Edward Paul Clark testified at the hearing held upon the defendant's Motion for New Trial. The Court finds Mr. Clark to be a credible witness. He related the circumstances surrounding the criminal charge filed against him, and he testified that this matter had no effect whatsoever upon his jury service or deliberations. In the absence of a showing of some bias or prejudice on the part of the juror, the defense has waived any right to challenge the verdict on the basis of

> a juror's disqualification, particularly where counsel made no inquiry during voir dire and could have readily discovered the basis for the challenge. [citations omitted]

(PCR 1993-1997).

A. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S FAILURE TO RULE ON MR. WILLACY'S OBJECTIONS TO THE TRIAL COURT'S ORDER DENYING THE MOTION FOR NEW TRIAL.

On December 3, 1992, a non-recorded telephone conference took place between the State, defense counsel and the trial court. The trial court indicated that it was denying the motion for new trial and directed the State to prepare the order. (R 2000-2002)(See Appendix A). At that time, the trial court made no findings of fact. Thereafter on December 28, 1992, the trial court signed an order prepared by the State denying relief. On December 31, 1992, defense counsel filed an "Objection to State's Proposed Order." Simultaneously with the filing of the objection, defense counsel wrote the trial court a letter stating:

> I received on December 28 a copy of the order you signed in the above case, and I also received that date a copy of the letter Glenn Craig sent you dated December 22. I had been discussing with Chris White the contents of the proposed order Mr. White and Mr. Craig had prepared, and I sent Mr. White a lengthy letter on December 17 discussing my objections. I next heard from Mr. Craig that you had called him requesting that the order be sent, and he called me after he had sent the proposed order, but before he had discussed with either Mr. White or myself the objections to the order.

> It is important to my client that my objections to the order be of record. I enclosed a copy of a pleading I have filed detailing my objections and setting forth the course I wish the court would utilize. Under the unusual circumstances of this motion, and the conflicting factual testimony you heard at the hearing in October, our position is that the state should not be directed to prepare an order for your signature without specific findings of fact being articulated on the record by the order, either in a hearing or in a letter. In the brief telephone conference on December 3, the court announced no specific findings, and I believe that to facilitate proper review it is important that the court, not the state, articulate the necessary findings of fact.

(R 2002)(See Appendix B). There was no response from the trial court.

As noted in Mr. Erlenbach's letter, he had contacted the State both orally on December 15, 1992 and in writing on December 17, 1992, expressing his objections in detail to the State's proposed order. (See Appendix C). The State forwarded the proposed order to the trial court on December 22, stating in part:

> Enclosed is an original and two copies of the proposed Order in the above referenced case. I was unable to confirm whether Mr. Erlenbach has previously been furnished a copy. By copy of this letter, I am requesting that Mr. Erlenbach communicate directly with the court regarding any objections which he may have regarding the proposed order.

(See Appendix D). On December 23, 1992, the State again wrote the trial court:

> After I had already sent the proposed order out to you by Federal Express, I was able to speak to Kurt Erlenbach. He and Chris White had conferred regarding the proposed order. Following my conversation with Mr. Erlenbach, I amended the

> proposed order in accordance with his suggestions. I do not mean to imply that Mr. Erlenbach agrees to the order as amended, however we do agree that the changes appearing in the amended order are appropriate.
>
> * * *
>
> . . . I anticipate that Mr. Erlenbach will communicate his objections and requests to you directly by letter or pleading. . . .

(See Appendix E) (emphasis added).

Appellate counsel was ineffective for failing to raise on direct appeal the trial court's failure to rule on the objections to the proposed order. Long prior to the trial court's signing the order, Mr. Erlenbach informed the State of his concerns regarding the order. Likewise, the trial court was similarly informed. On December 23, 1992, the State notified the trial court that it "anticipated that Mr. Erlenbach will communicate his objections and requests to you directly by letter or pleading." (See Appendix E). Yet, the trial court signed the proposed order on December 28, 1992.

In Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), the appellant argued that that the trial court had improperly delegated his decision-making authority when he entered the appellee's 25-page proposed final judgment. In this regard, the trial court made no findings of fact or conclusions of law on the record. Moreover, the trial court made no changes, additions or deletions to the proposed order, but rather adopted the order verbatim. Id. at 387. Further the trial court did not permit the appellant an opportunity to

submit his own proposed final judgment or to object to the appellee's proposed final judgment. This Court concluded that such gave rise to an appearance that the trial court did not independently make factual findings[1] and legal conclusions. Perlow, 875 So. 2d at 389.

This Court in Perlow affirmed the decisions in Cole Taylor Bank v. Shannon, 772 So. 2d 546 (Fla. 1st DCA 2000), Ross v. Botha, 2003 WL 22136080 (Fla. 4th DCA 2003), and Hanson v. Hanson, 678 So. 2d 522 (Fla. 5th DCA 1996), and held that "while a trial judge may request a proposed final judgment from either or both parties, the opposing party must be given an opportunity to comment or object prior to the entry of an order by the court."[2] Perlow, 875 So. 2d at 390.

Like in Perlow, the trial court here made no findings of fact. The trial court directed the State to prepare the order which the trial court signed

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[1] In Vitalis v. Vitalis, 799 So. 2d 1127, 1131 (Fla. 5th DCA 2001), the court noted the importance of requiring findings of fact. "First, it requires the judge to determine what the 'facts' of the case actually are. Too often appellate judges cite the testimony of one party or the other as the facts of the case. Testimony is not a fact until the trial judge says it is a fact. . . ." The second purpose of the findings of fact is even more important. It permits a comparable fairness analysis.

[2] See also Cannon 3B(7) of the Florida Code of Judicial Conduct which provides:

> A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

verbatim. Yet more egregious, the trial court, fully aware from the State that defense objections were forthcoming, signed the order upon receipt, denying Mr. Willacy an opportunity to raise and litigate his objections. On the record Mr. Erlenbach subsequently sought to rectify the situation by filing objections to the order which went ignored by the trial court.

This Court's well-founded concerns over the apparent impropriety in Perlow, a divorce case, are magnified when the issue at hand is the fairness of a death penalty proceeding. The magnitude of this problem resonates throughout the entire procedural history of this case. This Court has based its previous rulings upon the words written by the State and signed by the trial court in denying Mr. Willacy's motion for new trial. Without question the trial court itself never made any finding of fact and thus, this Court's reliance on that order has been misplaced. There was a clear dispute between the lawyers for both sides as to whether the Juror Clark's PTI status was ever communicated. This scenario underscores the necessity that the trial court and not the litigants, in this instance the witnesses themselves, make the findings of credibility and fact.

Mr. Erlenbach preserved the issue for appellate review and yet, failed to litigate the issue on direct appeal. His failure to pursue this issue constitutes ineffective representation. Had Mr. Erlenbach presented the

issue, this Court would have followed the principles in Perlow, and granted Mr. Willacy relief. Accordingly Mr. Willacy's Fifth and Sixth Amendment rights were violated, entitling Mr. Willacy to habeas corpus relief.

B. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE INHERENT PREJUDICE TO MR. WILACY RESULTING FROM JUROR CLARK'S SERVICE ON THE JURY.

In the state-prepared order denying the motion for new trial, the trial court applied an improper standard of law and held:

> In the absence of a showing of some bias or prejudice on the part of the juror, the defense has waived any right to challenge the verdict on this basis of a juror's disqualification, particularly where counsel made no inquiry during voir dire and could have readily discovered the basis for the challenge.

(PCR 1997).

On appeal, Mr. Erlenbach argued that "the court erred when it failed to grant a new trial when it was discovered that jury foreman Edward Clark was found to be ineligible to serve under section 40.013, Florida Statutes (1991)." (1993 Initial Brief). In its 1994 opinion, this Court, relying on the state-prepared order, wrote:

> In his final voir dire challenge, Willacy claims that Clark was under prosecution when selected as a juror and seating him violated section 40.013(1), Florida Statutes (1991). [footnote omitted] We disagree. Willacy mistakenly equates Clark's

> placement in Pretrial Intervention Program with prosecution. Pretrial intervention is "merely an alternative to prosecution." [citation omitted]. Since Clark was not under prosecution, Willacy's motion for new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision.

Willacy v. State, 640 So. 2d 1079, 1082-1083 (Fla. 1994). At no time did appellate counsel argue the inherent prejudice resulting from having a juror, who is pending prosecution[3] by the same office that was prosecuting Mr. Willacy, serve on Mr. Willacy's jury. Rather appellate counsel incorrectly argued an actual harm standard despite available case law to the contrary. Such a standard needlessly placed the burden on Mr. Willacy and impinged on his Fifth and Sixth Amendment rights to a fair and impartial jury.

In Lowrey v. State, whose facts are identical to Mr. Willacy's facts, the defendant sought relief based on the grounds that a member of the jury who convicted him was inherently biased in favor of the State because at the time of the trial the juror was being prosecuted by the same state attorney's office that was prosecuting Lowrey. 705 So. 2d 1367, 1368 (Fla. 1998). Specifically, the facts in Lowrey were that on January 4, 1995 "Juror A" was charged with two counts of battery. On May 8, 1995, jury selection took place in Lowrey's case. Juror A was selected to serve on Lowrey's jury.

[3] Section 40.013, Florida Statutes, provides that "no person who is under prosecution for any crime . . . shall be qualified to server as a juror."

On May 18, 1995, nine days after the conclusion of Lowrey's trial, Juror A signed a contract to enter a pretrial intervention program for the battery charge. Thereafter, through coincidence, counsel for Lowrey uncovered this fact, and Lowrey filed a motion for new trial. Id. at 1368.

This Court agreed that Lowrey was entitled to a new trial. In this regard, this Court concluded that under the circumstances of Lowrey's case there was a

> clear perception of unfairness, and the integrity and credibility of the justice system is patently affected. As noted by the Texas Court of Appeals, a juror with pending criminal charges should be "absolutely disqualified" and a defendant convicted by a panel that includes such a juror should be entitled to a new trial without any showing of actual harm.

Lowrey, 705 So. 2d at 1370. Thus, the case law establishes that Mr. Willacy was not required to demonstrate actual harm. Rather, the harm was inherent in Juror Clark's service, and Mr. Willacy was entitled to a new trial.

In deciding Lowrey, this Court relied on Thomas v. State, 796 S.W. 2nd 196 (Tex.Crim.App. 1990) wherein the Court held that a juror with pending criminal charges is absolutely disqualified and harm need not be shown. This law was available to appellate counsel at the time he prepared the initial brief, yet he failed to argue inherent prejudice on appeal. Mr. Erlenbach's failure to do so constitutes ineffective assistance of appellate

counsel and infringed on Mr. Willacy's Fifth and Sixth Amendment rights. Accordingly Mr. Willacy is entitled to a new trial.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE STATE'S FAILURE TO INFORM THE TRIAL COURT OF JUROR CLARK'S STATUS WHICH RESULTED IN THE STATE DEPRIVING MR. WILLACY OF HIS CONSITUTITIONAL RIGHT TO A FAIL AND IMPARTIAL JURY.

At the 1992 hearing on the motion for new trial, Assistant State Attorney Christopher White testified that he did not alert the trial court, and made no effort to make the facts concerning Juror Clark part of the record. In fact he took no steps to even confirm that the Edward Clark submitted for PTI was actually the Edward Clark on Mr. Willacy's jury. (PCR 102-103).

The record conclusively establishes that the State was aware of Juror Clark's status during the presentation of evidence. As such it was incumbent upon the State to inform the trial court or otherwise make part of the record Juror Clark's criminal status. The State defended its failure to inform by arguing ignorance of the statute. The State cannot circumvent its duties by such a claim. In failing to inform the trial court, the State deprived Mr. Willacy of his Fifth and Sixth Amendment right to a fair and impartial jury.

Prosecutors are held to the highest standard because of their unique powers and responsibilities. The Florida Bar v. Cox, 794 So. 2d 1278,

1285(Fla. 2001). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 2d 1314 (1935), the United States Supreme Court observed that a prosecutor has responsibilities beyond those of advocate[4]. In this regard, the court held:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . He may prosecute with earnestness and vigor - - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Thus "a prosecutor has a duty not only 'to fairly present the evidence and permit the jury to come to a fair and impartial verdict' but also 'properly function in a quasi-judicial capacity with reference to the accused . . . to see that the accused is accorded a fair and impartial trial." The Florida Bar v. Cox, 794 So. 2d at 1285 (quoting Pendarvis v. State, 752 So. 2d 75, 77 (Fla. 2d DCA 2000); Gonzalez v. State, 97 So. 2d 127, 128 (Fla. 2d DCA 1957). Here, the State failed in its obligation to inform the trial court of Juror Clark's status and his blatant juror misconduct. As such, the State deprived

[4] See also R. Regulating Fla. Bar 4-3.8 comment. "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." See R.Regulating Fla. Bar 4-3.8, cmt.

Mr. Willacy of his Fifth and Sixth Amendment right to a fair and impartial jury. Had appellate counsel challenged the State's conduct, Mr. Willacy would have received a new trial. Accordingly Mr. Willacy's constitutional right to effective legal representation was violated, entitling him to habeas corpus relief.

D. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL JUROR MISCONDUCT BY JUROR CLARK.

In his motion for new trial, Mr. Erlenbach alleged that Mr. Willacy was entitled to a new trial due to juror misconduct on the part of Juror Clark. A hearing was held on the motion and evidence presented on Mr. Willacy's allegation of juror misconduct. Thus the issue was preserved for appellate review, yet appellate counsel failed to properly present the issue on direct appeal.

Juror Clark's blatant disregard for his oath as a juror to answer questions truthfully violated Mr. Willacy's constitutional right to a fair and impartial jury under the Fifth and Sixth Amendments. His contemptuous behavior toward the jury system is evident in both his 1992 and 2003 testimony.

During the 1992 hearing, Juror Clark was asked the following:

Q: . . .Had you ever been arrested before?

A: No, sir.

Q: And you understood that you were being charged with a felony when you were arrested; is that correct?

A: I was asked to go down and turn myself in per my attorney's instructions.

Q: You understood it to be a serious matter, though correct?

A: I understood it to be a civil matter that got out of hand.

Q: But you also recognized that you were involved with the courts and involved with a criminal matter. You were being charged criminally, correct?

A: No, sir.

Q: You didn't consider yourself to be charged criminally?

A: No, sir.

Q: Do you understand the system to be such that the police get involved and you get arrested and have to bail out in civil matters?

A: No, sir.

Q: . . . but had your attorney described to you what it meant to be charged with grand theft?

A: No, sir. Not at that time.

Q: At any time during the course of the proceeding, during the course of your case?

A: Yes, sir.

Q: When?

A: After I had done what she had asked about turning myself in and then we met the next day.

Q: Okay. So that was in, I believe, January or February or so?

A: I have no idea.

Q: Several months before the trial, correct?

A: Yes, sir.

Q: At that time it was explained to you that you were being charged with a felony?

A: Yes, sir.

(PCR 38-40).

In 2004, Juror Clark continued to demonstrate a convenient yet incredible lack of memory as to circumstances of his jury service or his prosecution. He testified that once arrested, he secured a bondsman and bonded out of jail. Unbelievably, he testified that he secured a bondsman "because I was told I needed one," and had "no idea" what would have happened if he had not bonded out. (PCR 1816). He testified that his arrest on these charges was not a significant event in his life. In this regard, he stated, "it was a civil matter, as far as I was concerned." (PCR 1822). According to Juror Clark, the outcome of the criminal matter did not matter to him, and therefore, the PTI contract signing was not significant to him. In this regard, he also stated that having the charges dropped left no impression

on him. In his view, what was significant, was the outcome of the civil trial. (PCR 1849; 1857). Yet, he acknowledged that the charges against him were valid. (PCR 1860).

Jury selection began in this case on October 7, 1991. Juror Clark was scheduled for docket sounding for his grand theft charge on October 21, 1991. Yet, inexplicably, Juror Clark told no one of his upcoming court date. (PCR 1825).

He testified that he had no memory of being in the jury assembly room. He failed to read his jury summons. He testified that he had "no idea" if the jury clerk ever asked any questions concerning pending criminal charges. Yet, later in his testimony, he stated that he was never questioned about any pending criminal charges, and, if he had been, he would have divulged the information. (PCR 1843). Lastly, Juror Clark testified that he did not pay any attention to fellow jurors' responses during voir dire, stating flippantly "why would I?" and "I didn't find them relevant." (PCR 1844).

The law in Florida is clear that in order to determine whether a juror's non-disclosure of information during voir dire warrants a new trial, the complaining party must satisfy a three-part test: (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the

information was not attributable to the complaining party's lack of diligence. De la Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995). See also Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953); Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So. 2d 253 (Fla. 1973).

Despite well-established state law, appellate counsel argued a two-part test announced by the United States Supreme Court in McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d. 663 (1984). The brief noted that McDonough test had not been employed in Florida. Inexplicably, appellate counsel did not argue the decades-old three-prong standard in effect in Florida. See Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953); Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2nd DCA 1972). For unknown reasons, appellate counsel argued the wrong standard of law to this Court.

A prospective juror has a duty to answer fully and truthfully all questions asked during voir dire, "neither falsely stating any fact, nor concealing any material matter." Young v. State, 720 So. 2d 1101, 1103 (Fla. 1st DCA 1998)(quoting De La Rosa v. Zequeira, 659 So. 2d 236, 241 (Fla. 1995). Any juror who conceals a material fact that is relevant to the controversy is guilty of misconduct, and this misconduct is prejudicial to at

least one of the parties because it impairs his or her right to challenge the juror. Id.

Here, Juror Clark's pending felony charges, which were being prosecuted by the same state attorney and were being considered for pre-trial intervention, were clearly material and relevant information. Without question, both parties were entitled to this information in order to make an informed judgment as to a prospective juror's impartiality and suitability for jury service. The record conclusively establishes that Juror Clark concealed the information by failing to respond to questioning by the jury clerk, failing to fill in this information on his juror questionnaire sheet[5], and by failing to respond to questioning by the State and defense counsel. Moreover, unlike in De La Rosa, the record establishes that Juror Clark was not listening to questions asked of fellow jurors[6], and in fact did not listen to general

[5] Interestingly, the State relied on Juror Payne's failure to disclose arrest information on the juror questionnaire as the basis to peremptorily strike Juror Payne. The State urged that "the questionnaire the Court handed out would seem to indicate that a person should relate to us any sort of connection they may have had with the law and certainly if any charges have been filed against them." (1991R at 453). Surely if Juror Payne should have responded so too should have Juror Clark.

[6] During voir dire, Juror Clark was asked: "Let me ask both of you [Juror Clark and Juror Giguere]. Have either of you had any prior experience in the courtroom before in any capacity at all?" There was no response from Juror Clark. (1991R at 621). He was then asked, "Have either of you had any sort of contact with a law enforcement agency or officer that left you with a particularly strong feeling about that contact in the way that you were

questions asked of the entire venire. Rather, he only paid attention to questions which began with "Mr. Clark." (PCR 1845).

Here, as in Young, "it is abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through voir dire without realizing that it was . . . [his] duty to make known to the parties and the court" his pending criminal charges. Young, 720 So. 2d at 1103 (quoting Mobile Chemical Co. v. Hawkins, 440 So. 2d 378, 381 (Fla. 1st DCA 1983), rev. denied, 449 So. 2d 264 (Fla. 1984).

Had appellate counsel argued the correct standard of law, Florida's three-prong standard would have been easily met, and Mr. Willacy's conviction would have been reversed to Juror Clark's misconduct. The failure to argue well-established law falls well below any reasonable

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treated or the way your matter was handled?" Again no response from Juror Clark. (1991R at 622). Thereafter, Juror Bandini who was seated next in the jury box was asked, "Now have you had any prior experiences with the judicial system." (1991R at 642). Based on her response, she was asked "That's been your only experience in the courtroom?" (1991R at 643). Juror Wynn was asked, "Have you had any prior experience in the courtroom." (1991R at 681). Based on her response, she was asked, "And that's the extent of your experience in the courtroom then?" (1991R at 682). Juror Hayes was asked, "Ever have any prior experiences in court or in the judicial system as a juror." Juror Hayes responded that he had received a traffic citation once. He was then asked, "Is there anything about that experience that leaves you with any particular feelings about the courts and the criminal justice system." (1991R at 726-727).

standard of professionalism. Therefore Mr. Willacy has established ineffective assistance of appellate counsel, entitling Mr. Willacy to a new trial. Accordingly Mr. Willacy's Fifth and Sixth Amendment rights have been violated and his conviction should be reversed.

E. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION FOR REHEARING CHALLENGING THIS COURT'S FINDING THAT JUROR CLARK WAS NOT PENDING PROSECUTION.

In Willacy, this Court wrote:

> Willacy mistakenly equates Clark's placement in the Pretrial Intervention Program with prosecution. Pretrial intervention is "merely an alternative to prosecution." Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied.

Willacy, 640 So. 2d at 1082-1083.

Appellate counsel failed to file a motion for rehearing, citing section 944.025, Florida Statutes (1990), constituting ineffective assistance of appellate counsel. Section 944.025 defines the pretrial intervention program. In this regard, subsection (4) provides, "[r]esumption of *pending criminal proceedings* shall be undertaken at any time if the program administrator or state attorney finds such individual is not fulfilling his obligation under this plan or if the public interest so requires." (emphasis

added). Therefore, under the clear language of the statute, Juror Clark's criminal charges were pending and remained pending until he had completed all the terms and conditions of the program and the charges were nolle prossed. As such appellate counsel's failure to alert this Court to the controlling provisions of section 944.025 constitutes ineffective assistance of counsel under Strickland.

Moreover this Court's reliance on Cleveland v. State, 417 So. 2d 653 (Fla. 1982) for the proposition that "pretrial intervention is merely an alternative to prosecution" is misplaced and overlooks section 944.025. In Cleveland, the defendant was arrested for welfare fraud and subsequently sought admission into the pretrial intervention program. Despite the defendant satisfying all the prerequisites for admission into the program, the state refused to consider her application based on a rule from the Department of Offender Rehabilitation which denied individuals charged with welfare fraud admission into the program. Id. at 654. The trial court then ordered that she be accepted into the program stating that the withholding of consent by the state was subjective and contrary to the legislative intent of the PTI program.

This Court concluded that the "pretrial diversion is essentially a conditional decision not to prosecute." Specifically, this Court stated:

> It is a pretrial decision and does not divest the state attorney of the right to institute proceedings if the conditions are not met. The pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion.

Cleveland, 417 So. 2d at 654. This Court further noted:

> Two factors in the statutory scheme which create the pretrial intervention program support the determination that each party concerned has total discretion to refuse to consent. First, section 944.025(2) requires consent of the administrator of the program, victim, judge, and state attorney, but fails to provide *any* form of review. In addition, section 944.025(4), Florida Statues, allows the state attorney to *continue prosecution* if defendant is not fulfilling his obligations under the program or if the public interest requires. The fact that the state attorney has this discretion to reinstate prosecution is consistent with the view that the pretrial diversion consent by the state attorney is a prosecutorial function.

Id. (emphasis added). Thus, Cleveland is essentially a case on prosecutorial discretion, and addresses the absolute authority of the prosecution to decide whether and how to prosecute a case. Cleveland does not address the provisions of section 944.025 or its workings. At no time does Cleveland address whether charges remain pending once a Defendant's case is submitted for approval into PTI or subsequently admitted into PTI. Had appellate counsel filed a timely motion for rehearing, this Court would have recognized that Section 944.025 and not Cleveland was controlling. Accordingly, this Court would have concluded that Juror Clark was pending prosecution at the time he was selected as a juror and therefore, statutorily

ineligible under section 40.013. Appellate counsel was ineffective under Strickland, and as such Mr. Willacy's Fifth and Sixth Amendment rights were violated, entitling him to a new trial.

F. THIS COURT'S DECISION IN LOWREY V. STATE, 705 So. 2d 1367 (Fla. 1998) SHOULD BE APPLIED RETROACTIVELY IN THIS CASE.

In its 1993 order denying the Defendant's motion for new trial, the trial court found:

> Edward Paul Clark testified at the hearing held upon the defendant's Motion for New Trial. The Court finds Mr. Clark to be a credible witness. He related the circumstances surrounding the criminal charge filed against him, and he testified that this matter had no effect whatsoever upon his jury service or deliberations. In the absence of a showing of some bias or prejudice on the part of the juror, the defense has waived any right to challenge the verdict on this basis of a juror's disqualification, particularly where counsel made no inquiry during voir dire and could have readily discovered the basis for the challenge. [citations omitted]

(R 1997). (emphasis added). This Court in Lowrey v. State, 705 So. 2d 1367 (Fla. 1998) examined the question:

> Must a convicted defendant seeking a new trial demonstrate actual harm from the seating of a juror who was under criminal prosecution when he served but, though asked, failed to reveal this prosecution?

This Court concluded that "where it is not revealed to a defendant that a juror is under prosecution by the same office that is prosecuting the

defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial." Id. at 1368. In so ruling, this Court noted that,

> [t]he very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror.

Lowrey, 705 So. 2d 1369-1370. Such a situation gives rise to a "clear perception of unfairness and the integrity and credibility of the justice system is patently affected." Id. at 1369. See Massey v. State, 760 So. 2d 956 (Fla. 3rd DCA 2000)(defendant entitled to a new trial where juror, although directly questioned, failed to disclose that less then four years prior, she had been charged with a felony, placed in PTI, and later had the case dismissed upon successful completion of the program); Reese v. State, 739 So. 2d 120 (Fla. 3rd DCA 1999)(inherent presumption of prejudice arose when jury deliberations continued with soon-to-be arrested juror). See also Young v. State, 720 So. 2d 1101 (Fla. 1st DCA 1998). Cf. Coleman v. State, 718 So. 2d 287 (Fla. 4th DCA 1998)(juror's failure to disclose prior arrest record did not give rise to "clear perception of unfairness" such that "the integrity and credibility of the justice system is patently affected").

Lowrey clearly meets Florida's retroactivity analysis announced in Witt v. State, 387 So. 2d 922 (Fla. 1980). Witt held that a change in the law

does not apply retroactively in Florida unless the change (a) emanates from this Court or the United States Supreme Court; (b) is constitutional in nature; and (c) constitutes a development of fundamental significance. Id. at 931. A development of fundamental significance is either one that "places beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test in Stovall[7] and Linkletter.[8]" Witt v. State, 387 So. 2d at 929.

This Court's Lowrey decision is constitutional in nature and constitutes a development of fundamental significance of such magnitude as to require retroactive application under the three-fold test; namely: (a) the purpose to be served by the rule; (b) the extent of reliance on the prior rule; (c) the effect that retroactive application of the new rule would have on the administration of justice. Witt 387 So. 2d at 926.

Quite clearly, the purpose of the rule in Lowrey is to safeguard the fairness of the trial and the integrity of the criminal justice system. As noted in Witt, new rules will not warrant retroactive application "in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." Witt, 387 So. 2d at

[7] Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).
[8] Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

929. Lowrey casts such doubt as the integrity of the trial is at issue, and therefore, the first Witt factor has been satisfied.

The second Witt factor, the extent of reliance on the prior law also supports retroactive application of Lowrey. The only Florida law addressing the statutory eligibility of jurors was Rodgers v. State, 347 So. 2d 610 (Fla. 1997). Rodgers addressed with whether a defendant was entitled to a new trial where a juror who was under 18 years of age sat on the jury. This Court denied relief, concluding that there was no perception that the disqualified juror rendered an unfair or impartial verdict. Rodgers addressed a very limited situation, without widespread application. As such, there can have been little or no reliance on the old law.

Lastly, retroactive application of Lowrey will have little effect on the administration of justice. With certainty, it would not require the reconsideration of any large number of cases nor require a large undertaking by the criminal justice system. In Witt, this Court noted:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his

> life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (emphasis added) (quoting ABA Standards Relating to Post-conviction Remedies §2.1 cmt. At 37 (Approv. Draft 1968)). It is highly likely that the Defendant is the only death row inmate, possibly the only inmate, affected by the Lowrey decision. Therefore the third-prong of Witt has been satisfied, and the Defendant is entitled to relief under Lowrey, a clearly indistinguishable case.

Lowrey also meets the more restrictive federal test[9] for retroactive application under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Under Teague, new rules would not be applied retroactively unless they (1) placed conduct beyond the power of the government to proscribe, or (2) announced a "watershed" rule of criminal procedure that "implicate[s] the fundamental fairness of the trial" and is "implicit in the concept of ordered liberty." Johnson v. State, 904 So. 2d 400, 30 Fla.L.Weekly S297 (Fla. 2005)(citing Teague v. Lane, 489 So. 2d at 311).

Lowrey clearly meets the Teague test. The Lowrey decision is easily classified as a "watershed" rule in that it establishes the criteria for review

[9] See Johnson v. State, 904 So. 2d 400 (Fla. 2005).

when statutorily disqualified jurors render a verdict. Lowrey defines when and why relief is appropriate:

> In Rodgers, we held that a defendant was not entitled to a new trial under circumstances where the juror was statutorily disqualified because the juror was under eighteen years of age. In that case, no evidence or perception existed to indicate that the disqualified juror rendered an unfair or impartial vote. In this case, however, there is a clear perception of unfairness, and the integrity and credibility of the justice system is patently affected.

Lowrey, 705 So. 2d at 1369. The Lowrey decision announced a rule of criminal procedure that is implicit in the concept of ordered liberty. In this regard, the Lowrey court wrote,

> . . . the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror.

Id. at 1370. Thus the Defendant is entitled to relief under Lowrey. Moreover, Juror Clark's service on the Defendant's jury violated the Defendant's 5th and 6th Amendment rights. Accordingly the trial court's order denying relief must be reversed.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR RESULTING FROM THE TRIAL COURT'S FAILURE TO SWEAR THE PROSPECTIVE JURORS.

Florida Rule of Criminal Procedure 3.300(a) states:

> The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of oath shall be as follows: 'Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors, so help you God?'

The only record evidence of any swearing of jurors indicates that the jury pool was sworn collectively in the jury waiting room. In this regard, the record demonstrates that the jury clerk, Lucile Rich, outside the presence of the trial judge, Mr. Willacy, or attorneys, administered the oath. Prior to voir dire, the trial court clerk stated, "Judge, the jurors have been qualified by our clerk. I don't know if you want to do it again or that's enough." (1991R at 57).

In Lott v. State, the Second District Court of Appeal noted that in "many Florida courts, the preliminary oath is administered to the venire in a jury assembly room, before the jurors are questioned about their legal qualifications and before they are divided into smaller groups for questioning in individual cases." 826 So. 2d 457, 458 (Fla. 2nd DCA), rev.

denied, 845 So. 2d 891 (Fla. 2003). The court further stated, "[r]ule 3.300(a) does not require that the preliminary oath be given at a particular time or that it be given more than once. If the jurors have taken the oath in the jury assembly room, they need not take it again in the courtroom." Id. Similarly, the Fifth District Court of Appeal recognized the common practice in Florida of obtaining oaths from the venire outside the courtroom. Martin v. State, 898 So. 2d 1036 (Fla. 5th DCA 2005).

This Court has not addressed the appropriateness of obtaining oaths from veniremen outside of the courtroom. See Smith v. State, 866 So. 2d 51 (Fla. 2004)(holding only that where there is no record one way or the other regarding whether the jury was sworn, no error has been shown).

The Second District and the Fifth District analyses are short-sighted for two reasons. First, both courts failed to consider rule 3.191(c), Florida Rule of Criminal Procedure.[10] While it may be common practice for weekly jury panels to be qualified outside the courtroom, it is not until a specific jury panel is sworn to answer voir dire questions for a specific trial that the trial has actually commenced and speedy trial concerns are fulfilled. See

[10] Florida Rule of Criminal Procedure 3.191(c) states "… The trial is considered to have commenced when the trial jury panel for that **specific** trial is sworn for voir dire examination or …" (emphasis added).

Moore v. State, 368 So. 2d 1291 (Fla. 1979); Stuart v State, 360 So. 2d 406 (Fla. 1978); State v. May, 332 So. 2d. 1456 (Fla. 3rd DCA), cert. denied, 339 So. 2d 1172 (Fla. 1976).

Secondly, the courts failed to consider the practicalities of swearing the jury pool, which quite often consists of a large number of people, and the procedures failure to convey the seriousness of the procedure. This is evident in Mr. Willacy's case.

Juror Clark testified that he had no memory of being in the jury room, or the jury clerk administering the oath and asking questions regarding the juror qualifications. In this regard, he stated, "it just wasn't significant enough to put in the memory bank." (PCR 1836-1842). At the hearing on the motion for new trial in October 1992, he testified regarding the jury clerk's questioning stating, "[t]here was so many of us in the room it seemed like just a formality, something that had to be done at that time for whatever reason." (PCR 28). He could not recall any questioning regarding whether any one was under prosecution for any crime. He testified that there was a lot of people in the room, he had no idea who the jury clerk was or her affiliation with the trial court, and that while people were listening, not intently. (PCR 30).

The record conclusively establishes that Juror Clark failed to disclose his pending felony charges. He gave little or no regard to the oath administered by the jury clerk and the subsequent questioning by the jury clerk. In fact, he testified that this was of little significance to him. This highlights the deficiencies in the position taken by the district courts of appeal that an oath administered outside the courtroom conveys the magnitude and solemnity of the occasion to a prospective juror. Here Juror Clark continued this deliberate and cavalier pattern of nondisclosure by failing to respond to pointed questions regarding his involvement in the court system by the State. Had a trial court administered the oath, Juror Clark would not have perceived the questioning as a "formality" but would have clearly known the import of the jury selection process.

At no time did appellate counsel challenge the trial court's failure to properly swear the jurors for Mr. Willacy's specific voir dire. The trial court's failure amounted to fundamental error, warranting a new trial. Appellate counsel's failure to raise this issue violated Strickland and deprived Mr. Willacy of his Fifth and Sixth Amendment rights. Accordingly Mr. Willacy's is entitled to habeas corpus relief.

CLAIM IV

MR. WILLACY WAS DENIED EFFECTIVE REPRESENTATION APPELLATE COUNSEL BY COUNSEL'S FAILURE TO ARGUE THAT THE JURY WAS IMPROPERLY INSTRUCTED AS TO THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDIATED.

Mr. Willacy's 1995 jury was empaneled solely to render a verdict on sentencing. As such, the jurors had not been previously instructed by the trial court as to the elements required to be proven in order to convict Mr. Willacy of first-degree premeditated murder. Without the necessary foundation of what constitutes "ordinary" premeditation, the jury was not in a position to render an informed verdict as to the alleged aggravating circumstance of cold, calculated and premeditated. Although Mr. Kontos requested that the trial court instruct the jury as to the elements of "ordinary" premeditated murder, the trial court denied this request. (1995R at 2984; 2991; 2993). This issue, while properly preserved, was not raised on direct appeal.

The record establishes that the jurors were instructed, "Premeditation means that the defendant exhibits a higher degree of premeditation than that which is normally required in a premeditated murder." (1995R 3134-3135). This instruction left the jurors in a vacuum as to what is "normally required." The present jury instruction reflects the necessity for the

sentencing jury to understand the distinction between "ordinary" premeditation and the aggravating circumstance of cold, calculated and premeditated:

> The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.
>
> "Cold" means the murder was the product of calm and cool reflection.
>
> "Calculated" means having a careful plan or prearranged design to commit murder.
>
> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premediation demonstrated by a substantial period of reflection, is required.
>
> A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

Fla. Std. Jury Instr. (Crim) 7.11(9)(emphasis added).

It is important that jurors be fully and completely instructed. In this regard, incomplete and confusing instructions clearly affect the validity of a jury's verdict.

> It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of "harmless error".

Gerds v. State, 64 So. 2d 915 (Fla. 1953). See also State v. Delva, 575 So. 2d 643 (Fla. 1991); Battle v. State, 2005 WL 2095673 (Fla. 2005); Sloss v. State, 2005 WL 2396309 (Fla. 5th DCA 2005). Failure to give a complete or accurate instruction constitutes fundamental error if it relates to an element of the charged offense. Dowling v. State, 723 So. 2d 307, 308 (Fla. 4th DCA 1998).

Appellate counsel's failure to litigate this issue was ineffective and deprived Mr. Willacy of his Fifth and Sixth Amendment rights. It was fundamental error for the trial court to not completely and accurately instruct the jury as to the distinction between "ordinary" premeditation and heightened premeditation necessary to establish the cold, calculated and premeditated aggravating circumstance. The void in the trial court's instructions failed to fully define the required elements of the aggravating circumstance. As such, the State's burden of proof was lessened. Thus the jury's verdict is called into question as it is unknown what weight the jury

gave this aggravating circumstance. The verdict therefore is unreliable. Accordingly Mr. Willacy's Fifth and Sixth Amendment rights were violated, entitling him to a new penalty phase proceeding.

CLAIM V

MR. WILLACY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE, UNDER THE FLORIDA SENTENCING SCHEME, THE FACTUAL FINDINGS REQUIRED TO RENDER MR. WILLACY ELIGIBLE FOR DEATH WERE MADE BY THE TRIAL JUDGE AND NOT THE JURY.

In light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and this Court's decisions in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert.denied, 537 U.S. 1070 (2002) and King v. Moore, 831 So. 2d 143 (Fla.) cert.denied, 537 U.S. 1067 (2002), Mr. Willacy is entitled to relief. Specifically Mr. Willacy maintains that Florida's capital sentencing statute and his death sentence violate his Fifth and Sixth Amendment rights under Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). Mr. Willacy contends that Ring requires aggravating circumstances be individually found by a unanimous jury verdict.

On November 20, 1995, a sentence of death was imposed by the trial court in the instant case. In it written findings of fact in support of a death sentence, the trial court found the following aggravating circumstances:

(1) The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, any robbery…arson…burglary; (2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) The murder was committed for pecuniary gain; (4) The capital felony was especially heinous, atrocious and cruel; and (5) The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Mr. Willacy did not have any prior violent felonies and no such aggravating circumstance was found by the trial court. Review of this Court's decisions in Bottoson and King indicates that the petitioners were denied relief because each had prior violent felonies. The opinions in Bottoson and King indicate that based on the facts and circumstances of Mr. Willacy's case, he is entitled to relief.

Existence of a prior violent felony, according to the reasoning of Justices Shaw and Pariente, was the determining factor in denying relief to Bottoson and King. As explained by Justice Pariente, the presence of the prior violent felonies in those cases meet the threshold requirement of

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Ring. Without the presence of a prior violent felony, the requirements of Ring dictate that any increase in the authorized punishment be based on findings of fact established beyond a reasonable doubt. Since there is not the presence of a prior violent felony in Mr. Willacy's case, any and all aggravators relied upon to enhance Mr. Willacy's punishment should have been proven beyond a reasonable doubt.

The aggravating circumstances relied upon to enhance Mr. Willacy's sentence did not met the test in Apprendi and Ring. Similarly there is no record support for which, if any, of the aggravating circumstances listed by the trial court in Mr. Willacy's sentencing order were found by the jury to have been proven beyond a reasonable doubt. This is a constitutional flaw in Florida's capital sentencing scheme.

Mr. Willacy recognizes that this Court has previously rejected similar arguments and ruled that Ring v. Arizona does not apply retroactively in Florida. See Johnson v. State, 904 So. 2d 400 (Fla. 2005); Zack v. State, 2004 WL 1578217 (Fla. 2005). Nevertheless, Mr. Willacy continues to maintain that Ring is retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980). In Johnson v. State, this Court noted that Ring meets the first two prongs of Witt because the United States Supreme Court issued a new rule

that is constitutional in nature. Johnson, 904 So. 2d at 409. However, this Court concluded that the purpose of the new rule in Ring does not support retroactivity but rather the rule was intended to conform criminal procedure to the Sixth Amendment jury trial guarantee and was not intended to enhance the fairness or efficiency of death penalty procedures. Nevertheless, Mr. Willacy urges, as did Justices Shaw and Pariente that the decision in Ring "goes to the very heart of the constitutional right to trial by jury," is of fundamental significance, was "unanticipated" and "inescapably changed the landscape of Sixth Amendment jurisprudence." As such, Ring is retroactive under Witt. Mr. Willacy's Fifth and Sixth Amendment rights were violated, entitling him to relief.

CLAIM VI

DEATH BY LETHAL INJECTION VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Despite this Court's position to the contrary, see Sochor v. State, 883 So. 2d 766 (Fla. 2004)(citing Provenzano v. Moore, 744 So. 2d 43 (Fla. 1999); Sims v. State, 754 So. 2d 657 (Fla. 2004), Mr. Willacy contends that death by lethal injection violates Article I, section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution.

CLAIM VII

MR. WILLACY'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT MAY BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." The rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to section 922.07, Florida Statutes, and Martin v. Wainwright, 497 So. 2d 872 (Fla. 1986).

The same holding exists under federal law. Poland v. Stewart, 41 F.Supp. 2d 1037 (D. Ariz. 1999)(such claims truly are not ripe unless a death warrant has been issued an execution date is pending); Martinez –Villareal

v. Stewart, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore, his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, in In re:Provenzano, the Eleventh Circuit Court of Appeals has stated:

> Realizing that our decision in In re: Medina, 109 F. 3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 119 S.Ct. 1618 (1998). Under our prior panel decision rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision overruled or conflicted with it. [citations omitted]
>
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

215 F.3d 1233 (11th Cir. 2000).

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition. In order to exhaust state court remedies, the claim is being filed at this time.

Mr. Willacy has been incarcerated since 1990. Statistics have shown that incarceration over a long period of time will diminish an individual's mental capacity. Inasmuch as Mr. Willacy may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Chadwick Willacy respectfully urges this Court to grant him habeas corpus relief.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Barbara Davis, Esquire, Office of the Attorney General, 444

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