IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-148

VIRGINIA GAIL LARZELERE,

Petitioner,

v.

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

Respondent,

and

CHARLIE CRIST,
Attorney General,

Additional Respondent.

~~**PETITION FOR WRIT OF HABEAS CORPUS**~~

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PRELIMINARY STATEMENT

Article l, 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 filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Ms. Larzelere was deprived of the rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in her conviction and death sentence violated fundamental constitutional imperatives.

The following symbols will be used to designate references to the record in this instant cause:

"PR" **B** first record on direct appeal to this Court;

"ROA" **B**post conviction record on appeal (51 Volumes)

REQUEST FOR ORAL ARGUMENT

Ms. Larzelere was sentenced to death at the trial level. In postconviction, the circuit court granted a new penalty phase due to the ineffective assistance of trial counsel. The resolution of the issues involved in this action may eventually determine whether she lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Ms. Larzelere, through counsel, accordingly urges the Court to

grant oral argument.

INTRODUCTION

Significant errors which occurred at Ms. Larzelere=s capital trial were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Ms. Larzelere. "[E]xtant legal principles...provided a clear basis for **...** compelling appellate argument[s]." 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," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984), the claims appellate counsel omitted establish that A*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural History

Dr. Norman Larzelere was shot and killed on March 8, 1991. On May 4, 1991 an arrest warrant was issued for Virginia Larzelere for "aiding, abetting, counseling and hiering (sic) Jason Eric Larzelere age 18 years to commit the murder of her husband Norman B Larzelere, this [] known to be true via sworn statements by [Steven Heidle and Kristen Palmieri]." [ROA Vol. 18, pp. 2916] On May 24, 1991 the Grand Jury, in

and for Volusia County returned an indictment for First Degree Murder against both Virginia Larzelere and Jason Larzelere. [ROA Vol. 18, pp. 2915] Ms. Larzelere pled not guilty and proceeded to trial. The guilt phase of Ms. Larzelere=s trial was held between January 27, 1992 and February 24, 1992. The jury found Ms. Larzelere guilty as charged.

Following the jury=s verdict, Ms. Larzelere proceeded to penalty phase, although the defense presented absolutely no evidence for the jury=s consideration. On March 4, 1992 the jury returned a recommendation in favor of death by a vote of 7-5. The trial court held a sentencing hearing and sentenced Ms. Larzelere to death on May 11, 1993.

Ms. Larzelere appealed the judgment of conviction and sentence of death. This Court affirmed Ms. Larzelere=s conviction and death sentence. Larzelere v. State, 676 So. 2d 394 (Fla. 1996). Ms. Larzelere petitioned the United States Supreme Court for a Writ of Certiorari which was denied. Larzelere v. State, 519 U.S. 1043 (1996).

This petition is filed following the lower court=s March 24, 2005 postconviction Order affirming Ms. Larzelere=s conviction for first degree murder. Although the conviction was affirmed by the lower court, Ms. Larzelere=s sentence of death was vacated by the lower court due to ineffective assistance of trial counsel at the penalty phase [ROA Vol. 21, pp. 3343-3414]. Ms. Larzelere has asked this Court to affirm the lower court=s ruling granting a new penalty phase, and has asked this Court to grant guilt phase relief as well. In the instant petition, Ms. Larzelere respectfully urges this Honorable Court to grant habeas relief.

The evidentiary hearings in this case were held in Volusia County from May 13-24, 2002, as well as June 3-4, 2002. Following the evidentiary hearings, witnesses Dennis Harris, Ronald Bilbrey, and Bernadette D=Alvia Eady, came forward and executed affidavits detailing trial counsel=s dealings in and use of cocaine and methamphetamine at the time of the Larzelere case [affidavits located at ROA Vol. 19, pp. 3051-3054, Vol. 20, pp. 3252-3259, Vol. 20 pp. 3314-3317, respectively]. Dennis Harris provided a deposition on November 3, 2003 detailing lead trial counsel Jack Wilkins= illegal drug use [ROA Vol. 30, pp. 4819-4867, ROA Vol. 31, pp. 4868-5076], and that deposition was filed and considered as substantive evidence with permission of the lower court. The lower court did not consider or mention the affidavits of D=Alvia Eady and Bilbrey in its Order denying guilt phase relief.

B. Facts at Trial

Ms. Virginia Larzelere was married to the victim, Dr. Norman Larzelere. She managed his dental office in Central Florida at the time of the murder. On March 8, 1991 at approximately 1:00pm, a masked gunman rushed into the dental office of Dr. Norman Larzelere in Edgewater, Florida, chased down Dr. Norman Larzelere, and delivered a fatal shotgun blast to his chest, then fled the scene. A patient, an office assistant, and Ms. Larzelere were all present in the dental office at the time of the shooting. The state=s original theory was that Jason Larzelere was the shooter, but argued to the jury at trial that there could have been another shooter who conspired with Ms. Larzelere.

Ms. Larzelere was arrested for the murder with her son, Jason Larzelere, based on

information received from later-immunized witnesses Kristen Palmieri and Steven Heidle. The state=s theory of the case was that Virginia Larzelere manipulated her natural born son Jason Larzelere into killing Dr. Norman Larzelere for an interest in several life insurance policies and a share of estate assets. Shortly after the murder, the state witnesses informed law enforcement that Virginia Larzelere sent Jason Larzelere to retrieve some items from storage the night before the murder, including a will and some life insurance policies. Allegedly, the state witnesses overheard Ms. Larzelere inform Jason Larzelere that he would Aget his $200,000 for taking care of business.@ Ms. Larzelere allegedly complained after the shooting that Jason was 30 minutes late to the dental office, and that his tardiness complicated matters in the murder of her husband. The immunized state witnesses also informed law enforcement that Ms. Larzelere directed them to encase the alleged murder weapons in concrete and dispose of them, which they did. They also informed law enforcement that Ms. Larzelere and Jason reenacted the murder in their presence, with Jason playing the role of the gunman and Ms. Larzelere playing the role of the victim.

During Ms. Larzelere=s trial, two other state witnesses testified that they engaged in extramarital affairs with Ms. Larzelere, and that she encouraged them to assist her with the execution of her husband. Ms. Larzelere was convicted of first degree murder, but her son, Jason Larzelere, was acquitted in a subsequent and separate trial.

C. Facts from the Evidentiary Hearing and Postconviction Proceedings

Virginia Larzelere was represented at trial by private attorney John Carleton

Wilkins III, aka AJack@ Wilkins. After Ms. Larzelere was convicted of first degree murder and sentenced to death in 1993, Jack Wilkins was convicted of tax evasion, withholding subpoenaed financial documents from the federal government, and lying to a federal grand jury. He was sentenced to five years federal prison for his criminal conduct. He resigned from the Florida Bar in 1995 in lieu of impending disciplinary proceedings before serving his prison sentence.

During the time Jack Wilkins represented Virginia Larzelere, his longtime office manager and bookkeeper Gladys Jackson revealed that Wilkins drank vodka and gin Aall of the time.@ [ROA Vol. 35, pg. 5582]. His staff would pick up Ajugs@ of vodka for him (Athe ones with the handles@), he was known to drink around Anoontime@ in the office, and Wilkins was known to leave the office with the bottle in hand. [ROA Vol. 35, pp. 5583-5584]. Wilkins could be seen having several drinks throughout the day regularly in his office [ROA Vol. 35 pg. 5586]. He was even seen drinking vodka at 10am in the office [ROA Vol. 35, pg 5587]. Jack Wilkins admitted at the evidentiary hearing that he drank in his office, sometimes even at noon before he played golf, and that he even had a bar Abuilt@ in his office at the time he represented Virginia Larzelere [ROA Vol. 35, pg. 5696]. At the time of being retained in the Larzelere case, Wilkins was dating court reporter Kimberly Fletcher [ROA. Vol. 41, pg. 6491]. Ms. Fletcher testified that Wilkins would drink alcohol at lunch during the week, he would continue drinking liquor into the night, and on the weekends he would even drink vodka and orange juice in the mornings [ROA. Vol. 41, pg. 6491]. At night Wilkins would switch to whiskey, and at the time she

considered Wilkins to be a Aheavy drinker.@ [ROA Vol. 41, pg. 6492]. Assistant state attorney Dorothy Sedgewick even smelled liquor on Wilkins= breath during the Larzelere case just outside of the courtroom, and she became concerned because this was such a Aserious case@; she discussed the situation with her co-counsel, assistant state attorney Les Hess [ROA Vol. 41, pg. 6474]. The two state attorneys decided that they would watch Wilkins closely, and that if they observed any signs of impairment, they vowed to promptly report this to the court [ROA Vol. 41, pg. 6475]. Ms. Sedgewick did not remember what portion of the case this incident took place, but she remembered there were court reporters present, talking to Wilkins at the time she smelled alcohol on his breath; she expected the reporters to approach her and ask if she smelled the alcohol on Wilkins= breath [ROA Vol. 41, pg. 6476]. Ms. Larzelere=s sister, Patsy Antley, remembers going to lunch on occasion with Wilkins during the time of the Larzelere trial and observed him Adr[i]nk during lunch.@ He would not eat but he would drink three to four drinks of straight liquor [ROA Vol. 38, pg. 6129].

Jeannette Atkinson testified that she went to Wilkins= office one morning at approximately 9am or 10am and she observed Jack Wilkins have three vodka drinks [ROA Vol. 38, pg. 6028]. At her sister=s bond hearing she said she definitely smelled alcohol on him, and that was at 9am [ROA Vol. 38, pg. 6028]. Attorney Rodney Kent Lilly testified that he knew Wilkins to drink at lunch [ROA Vol. 35, pg. 5738]. Attorney Jonathan Stidham observed Jack Wilkins in court at the time of the Larzelere case and observed his hands shaking. Mr. Stidham suspected at that time that Wilkins was having

withdrawals from alcohol and needed a drink [ROA Vol. 39, pg. 6242]. Courtroom observer Dorriejean Muller attended the Larzelere trial and smelled alcohol emanating from Jack Wilkins as he walked past her [ROA Vol. 38, pg. 6078]. Private Investigator Gary McDaniel recalled his first meeting with Jack Wilkins in May of 1991 at Wilkins' office. He recalled that Wilkins had about three whiskey drinks during a 40 minute case discussion [ROA Vol. 40, pg. 6289]. Florida Department of Law Enforcement agent David Waller recalled that Wilkins was drinking liquor in his office during a meeting in 1993, one month before Larzelere was sentenced to death [ROA Vol. 39, pg. 6195-6196]. Wilkins was charged with Boating Under the Influence of alcohol in 1993 and was subsequently convicted.

Dennis Harris informed that at the time of the Larzelere case, Jack Wilkins was buying and using large quantities of the illegal drug Methamphetamine, and he asked Harris, who was at the time a law client of Wilkins, if he knew of a cheaper drug supplier [ROA Vol. 19, pg. 3053]. Wilkins informed that he bought Methamphetamine by the quarter pound, and that the high quality of the drug kept him up and wired for 6-7 days [ROA Vol. 19, pg. 3053]. Another individual, Ronald Bilbrey, Jr., swore that in the late 1980s Jack Wilkins asked him to supply him with an ounce of cocaine, which he did, and he personally observed Jack Wilkins ingest the cocaine through his nose [ROA Vol. 20, pg. 3254]. Bilbrey supplied Jack Wilkins with an ounce of cocaine per month at the time leading up to the Larzelere trial. In June of 1992 to June of 1993 (the time of Larzelere's sentencing), Bilbrey was supplying Wilkins with an ounce of Methamphetamine per

month [ROA Vol. 20, pg. 3257]. Another individual, Bernadette D=Alvia Eady, swore that in May of 1991 she shared vodka and cocaine with Jack Wilkins in a hotel bar in South Florida [ROA Vol. 20, pg. 3315]. During that meeting Wilkins informed her that he was purchasing Methamphetamine at $2000 per ounce [ROA Vol. 20, pg. 3315]. During another meeting at a South Florida nude bottle club in May of 1991, D=Alvia Eady and Wilkins shared large amounts of vodka, cocaine, and methamphetamine together in a restroom on a toilet seat [ROA Vol. 20, pg. 3316].

Ms. Gladys Jackson remembers the costs of the Larzelere capital case totaling approximately $25,000 [ROA Vol. 35, pg. 5591]. She never remembers Volusia County paying for any costs or expenses related to the case, and she remembers that Wilkins=s firm was responsible for the costs and expenses of the case [ROA Vol. 35, pg. 5592]. She remembers that the Larzelere case caused a great financial strain on Wilkins= law office, and at the time of the Larzelere trial the firm was low on money [ROA Vol. 35, pg. 5593]. In 1994 Wilkins received a federal subpoena requesting his firm=s past receipt books, and Wilkins asked her to Aget rid@ of the books [ROA Vol. 35, pg. 5594]. The receipt book that was destroyed by Wilkins could have reflected money that was received in 1991-1992 [ROA Vol. 35, pg. 5596-97]. Ms. Jackson testified against Wilkins before a federal grand jury [ROA Vol. 35, pg. 5598].

Florida Department of Law Enforcement agent David Waller testified at the evidentiary hearing. Documents regarding Wilkins= misdealings were introduced during Waller=s testimony as Defense EH Exhibit 6 [ROA Vol. 39, pg. 6178]. Defense EH

Exhibit 5 contains further details of Wilkins= financial misdealings. Prior to the Virginia Larzelere case, Jack Wilkins had never before tried a first degree capital murder case [ROA Vol. 35, pg. 5647, 5649]. Jack Wilkins agreed to take the murder case knowing that Virginia Larzelere really did not have any money, and hoping that life insurance policies on Dr. Larzelere=s life would be paid in full and could be used to cover his legal fees. Wilkins forecasted that if Virginia Larzelere was acquitted in the criminal case, the insurance polices would be paid to his client in full in the civil case [ROA Vol. 35, pg. 5655].

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, 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 Ms. Larzelere=s conviction.

This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Ms. Larzelere=s direct appeals. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of

habeas corpus is the proper means for Ms. Larzelere 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 pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Ms. Larzelere=s claims.

GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MS. LARZELERE=S CONVICTION.

A. Introduction.

Appellate counsel had the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

"Obvious on the record" constitutional violations occurred during Ms. Larzelere's trial which "leaped out upon even a casual reading of the transcript," yet appellate counsel failed to raise those errors on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy which involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

B. The state unconstitutionally amended the charges in the indictment, through jury instruction and argument, resulting in a jury verdict that is insufficient as a matter of law and violating Ms. Larzelere's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Appellate counsel was ineffective for not raising this issue on appeal, thus violating Ms. Larzelere's Constitutional Rights.

In Mills v. Maryland, 486 U.S. 367, 376 (1988), the United States Supreme Court stated:

> With the respect of findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another; and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. [Citations omitted]. In reviewing death sentences, the Court has demanded even greater certainty that the jury=s conclusions rested on proper grounds . . .

Id.

Likewise, this Court cannot be certain which of the two theories (Jason Larzelere as the sole co-conspirator/shooter or some unknown individual as a co-conspirator/shooter) the jury relied on in reaching the verdict, or if the jurors unanimously agreed on either theory. Since the State argued both theories and the trial court instructed on both theories, it is impossible to determine which theory the jury accepted. The verdict therefore violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

When the state switches theories, from Jason as the shooter, to someone else as the shooter, this unconstitutionally broadens the charges in the indictment. Though the development of constructive amendment law comes from the Grand Jury Clause of the Fifth Amendment which applies only to federal courts, state criminal defendants have an equally fundamental right to be informed with the nature of the accusations against them. Lucas, 179 F.3d at 417. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No

principle of procedural due process is more clearly established than the notice of the specific charge, and a chance to be heard in trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.").

The addition to the jury instruction altered the circumstances alleged in Ms. Larzelere's indictment. This was an amendment and was per se prejudicial error. The amendment between the indictment and the prosecution closing argument and jury instructions gave Ms. Larzelere no notice of the charge against her and deprived any defense, in violation of her rights under the Sixth and Fourteenth Amendments. The error prejudiced Ms. Larzelere because it deprived her of the opportunity to develop a consistent defense throughout trial, part of which included Jason Larzelere was not the shooter. It was just before closing arguments that the defense were provided with notice that the state's theory of the crime was not limited to Virginia Larzelere conspiring with Jason Larzelere.

Had appellate counsel raised this issue on appeal, which was preserved at the trial level, there is a reasonable probability that this Court would have determined the amendment "reach[ed] down into the validity of the trial itself to the extent that a verdict could not have been obtained without the assistance of the alleged error" and remanded the case for a new trial. Cochran v. State, 711 So.2d 1159, 1162 (Fla. 1998) *quoting*

Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996). Appellate counsel was ineffective.

C. The Substance of the Constructive Amendment Claim

There were no other named or unnamed co-conspirators or participants listed in the indictment of Virginia Larzelere besides Jason Larzelere. As alleged in the sworn criminal complaint, the state based its case on the theory that Virginia Larzelere solicited Jason Larzelere to perform the killing, and Jason Larzelere shot and killed Norman Larzelere. On May 4, 1991 an arrest warrant was issued for Virginia Larzelere for:

> "aiding, abetting, counseling and hiering (sic) Jason Eric Larzelere age 18 years to commit the murder of her husband Norman B Larzelere, this [] known to be true via sworn statements by [Steven Heidle and Kristen Palmieri]."

[ROA Vol. 18, pp. 2916].

In preparing for trial, Virginia Larzelere was on notice that she had to defend against that particular allegation. At trial, the state essentially argued that Virginia Larzelere could be convicted if the jury found that any known or unknown, unnamed/unlisted phantom co-conspirator of Virginia Larzelere did the shooting. The jury was virtually instructed that Virginia Larzelere could be convicted on the theory of a phantom conspiracy not limited to Jason Larzelere. The indictment charged Virginia and Jason Larzelere together as co-defendants with Murder in the First Degree, charging that:

> "VIRGINIA GAIL LARZELERE and JASON ERIC LARZELERE did, on the 8th day of March, 1991, in Volusia County, Florida, in violation of Florida Statute 782.04, form a premeditated design to affect the death of NORMAN LARZELERE, murder NORMAN LARZELERE, in the County and State aforesaid, by shooting him with a firearm."

[Dir. ROA pg. 1086, ROA Vol. 18, pg. 2915]

While the indictment was limited to alleging participation between Virginia and Jason Larzelere, the state's argument and jury instructions unconstitutionally opened the door to an overbroad and wide-ranging, not-otherwise alleged conspiracy and conviction.

The following discussions regarding jury instructions, specifically the conspiracy instruction, were held prior to closing arguments:

> The Court: Fine. Now, over at the principal instruction, I have done some research on this, and I'm concerned that we're using the term co-conspirator in that instruction, and yet but for the instruction that was earlier given, included the definition of conspiracy, there is no definition as it relates to this instruction of the elements of conspiracy.
>
> It occurs to me that it would be appropriate to define the elements of conspiracy, either by referring to the previously given definition in the [sic] these instructions, or a new definition that plugs into this instruction.
>
> I don't know authority for that as far as case law, but I'd like to at least have argument briefly here, to see if you agree. And, of course, you folkes [sic] object to that instruction, but my request of you is, aside from that objection, if it's going to be given, do you agree or disagree that to be complete, it would need to have either reference to or definition separately of the conspiracy definition?
>
> Mr. Wilkins [for the defense]: Judge, I think you can cure it by substitution [of] Jason Larzelere for the word conspirator.
>
> Ms. Sedgewick [for the state]: I object to that. It's not required that we prove that the killer was Jason Larzelere. We only have to prove that the killer was a co-conspirator of Virginia Larzelere.

Mr. Howes [for the defense]: Judge, on their theory of the case, and theory of the facts, the only person it can be is Jason Larzelere. There are no other co-conspirators.

Ms. Sedgewick: There are two other co-conspirators, Kristen Palmieri and Steven Heidle, based upon the evidence presented in the case.

The Court: What says the State as to the Court's point on the need for definition of conspirator or conspiracy.

Ms. Sedgwick: I agree.

Mr. Howes: We object, Your Honor, We think it's sufficient as is, or it be replaced with the name of Jason Larzelere, because under the State's theory of the case, that's the only person it could be. Otherwise, if it could be someone other than Jason Larzelere, we have a due process problem, because we're finding now, immediately preceding closing arguments, that Steven Heidle and Kristin Palmieri were co-conspirators in the murder.

The Court: I'm going to work in definition for instructions for conspiracy elements that won't be any different than the general instructions on the conspiracy. But it will start out with some language that ties the definition with the principal instruction that we're speaking of. And it will fall on the same page as this instruction.

Mr. Howes: Your Honor, we further object to any instruction other than the standard with respect to this matter.

Ms. Sedgewick: The state wishes to make clear that the Court's instructions that the Court intends to give is not limiting the co-conspirator pursuant to this definition to be Jason Larzelere.

The Court: No. I am going to give a general definition of elements of conspiracy...

[Dir. ROA, pp. 5771-5773, ROA Vol. 18, pp. 2919-2921]

Kristin Palmieri and Steven Heidle were not listed in the indictment. And neither were two other alleged co-conspirators, Phil Langston and Norman Carnes. The State should have made itself more clear in the original indictment and presentation to the grand jury. Because they were not clear, and because the State was able to expand its theory from that alleged in the indictment, fundamental notions of fairness, the Fifth Amendment and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution, were violated in the case at bar. The above passages clearly illustrate that the state was detracting from and expanding the crime that they alleged and initially set forth in the indictment. The conspiracy elements as instructed to the jury were not limited to Jason Larzelere as they should have been. If the state was proceeding on a theory of conspiracy, they should have charged conspiracy in the indictment. If the jury is going to be instructed on conspiracy, the terms of the conspiracy need to be adequately defined in the indictment. Due process requires that the state adequately inform the defendant of the nature of the charges. Because the State did not submit the "phantom conspiracy" theory to the grand jury, and the indictment did not advance the theory of any "named or unnamed co-conspirators as the shooters," Virginia Larzelere lacked adequate notice of the crime she was to defend herself against, and learned shortly before closing arguments that she was facing an undefined, ever-expanding, and actually limitless conspiracy.

Fla. R. Crim. Pro. 3.140(o) reads as follows:

> **Defects and Variances**. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses for any cause whatsoever, *unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense* or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense. (emphasis added)

The only individuals listed in the indictment were Virginia and Jason Larzelere. Yet the jury was instructed as follows:

> The elements involved in a conspiracy that must be shown by independent evidence are, one, that the intent of Virginia Gail Larzelere was that the offense that was the object of the conspiracy would be committed. And two, that in order to carry out that intent, Virginia Gail Larzelere agreed, conspired, combined, or confederated with Jason Eric Larzelere to cause said offense to be committed, either by them or one of them, *or by some other person.* (emphasis added) [Dir. ROA pg. 5895, ROA Vol. 18, pg. 2922]
>
> It is not necessary that Virginia Gail Larzelere do any act in the furtherance of the conspiracy. It is a defense to a charge of criminal conspiracy that a defendant, *after conspiring with one or more persons to commit the offense* that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so...
>
> *If two or more persons help each other commit a crime and the defendant is one of them,* the defendant must be treated as if she had done all the things *the other person or persons did...*
>
> If a defendant paid or promised to pay *another person or persons to commit a crime...* (emphasis added) [Dir. ROA pg. 5896, ROA Vol. 18, pg. 2923]

> ...the defendant and the co-conspirator agreed, conspired, combined, or confederated to cause said offense to be committed, *either by them or one of them, or by some other co-conspirator*. (emphasis added) [Dir. ROA pg.5897, ROA Vol. 18, pg. 2924]
>
> ...a defendant, *after conspiring with one or more persons* to committ [sic] the offense that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so... (emphasis added) [Dir. ROA pg. 5898, ROA Vol. 18, pg. 2925]

The above jury instructions constituted constructive amendments and fatal variances from the indictment which warrants relief from the conviction. A trial modification that broadens the charge contained in the indictment is reversible error. Lucas v. O=Dea, 179 F. 3d 412, 416 (6th Cir. 1999). It is Ms. Larzelere=s position that she was not charged with conspiracy, so the instructions regarding conspiracy should not even have been given. If the conspiracy instructions were lawfully given to the jury, the instructions should have been limited to naming Jason Larzelere as the sole co-conspirator. Opening the conspiracy to limitless unnamed co-conspirators had the effect of expanding the terms of the limited indictment. Jason Larzelere was the only other person named in the indictment, therefore it was improper to instruct the jury that Virginia Larzelere could be found guilty if the jury felt that she conspired with someone other than Jason Larzelere. *See* Lucas v. O=Dea, 179 F. 3d 412, 416 (6th Cir. 1999) citing Stirone v. United States, 361 U.S. 212, 217-219 (1960). Amendments occur when the charging terms of the indictment are altered, literally or in effect, by the court or the prosecutor after the grand jury has passed upon them. Id. Variances occur when the charging terms of an

indictment are not altered, but the evidence at trial proves facts different from those alleged in the indictment. Id. (Internal citations omitted). Jury instructions that alter the circumstances upon which a conviction can be based from those alleged in the indictment are constructive amendments. Id. In the case of United States v. Ford, 872 F. 2d 1231 (6th Cir. 1989), the defendant was charged with possessing a firearm on or around a certain date. The jury was instructed that they could convict the defendant if they found that the defendant possessed a firearm at anytime during a one year period. The Sixth Circuit held that this constructive amendment was a "fatal variance" and was per se prejudicial error. Id. It is noted that in the case at bar, only one date is mentioned in the indictment: the date Dr. Larzelere was shot and killed. One must question whether it was proper to instruct the jury on a general conspiracy without specifying the date listed in the indictment, March 8, 1991. Lack of notice in the indictment of a specific date upon which the crime occurred could have precluded a possible defense of alibi.

Though the development of constructive amendment law comes from the Grand Jury Clause of the Fifth Amendment which applies only to federal courts, state criminal defendants have an equally fundamental right to be informed with the nature of the accusations against them. *See* Lucas 179 F. 3d at 417.

A case almost directly on point came out of the 11th Circuit Court of Appeals in 1990. United States v. Keller, III, 916 F. 2d 628 (11th Cir. 1990). Keller, III involved multiple counts of bank robbery and conspiracy to commit bank robberies. Regarding count three of the indictment in Keller, III, Keller and an individual named Smith were

alleged in the indictment to have conspired to commit a bank robbery. There were no other named or unnamed co-conspirators in the indictment, just as in the Larzelere case. During the deliberations in Keller, III, the jury had a question. In regards to count three of the indictment, they asked if they could find one defendant guilty, and the other defendant not guilty. The Court answered and instructed the jury that they could feasibly convict a defendant if they were to find that the defendant conspired *with some other person.* Keller, III, at 636. The Court found that this constituted an amendment and reversed the conviction. The Court reasoned and held the following:

> The court=s instructions had the effect of adding the phrase "with other named and unnamed co-conspirators" to Count Three of the indictment. The grand jury could have included a similar phrase in the indictment, but did not. The grand jury understood that it could include similar language, because it did so in Count Seven of the indictment. The jury instructions altered an essential element of the offense and thereby broadened the possible bases for conviction of Keller by allowing the jury to convict him if he conspired with anyone, when the indictment alleged he conspired solely with Smith. (footnote omitted).
>
> We conclude that the trial court=s jury instructions constituted a constructive amendment of the indictment and therefore violated Keller=s Fifth Amendment right to be charged by grand jury indictment. Such a violation is reversible error *per se*. United States v. Peel, 837 F. 2d 975, 979 (11th Circuit 1988), United States v. Figueroa, 666 F. 2d 1375, 1379 (11th Cir. 1982).

Keller, III at 636.

Just as in Keller, III, the jury instructions in the Virginia Larzelere case constituted a constructive amendment to the original indictment. No other named or unnamed co-

conspirators were listed in the indictment. The state may argue that the indictment did not specifically allege that Virginia conspired with Jason. The fact that conspiracy was not even alleged in the indictment illustrates just how vague and indistinct the indictment was. The state could have listed other known or unknown persons in the indictment, but it did not. The jury instructions broadened the possibilities not listed in the original indictment for the state to obtain a conviction. This constitutional violation constitutes per se reversible error. United States v. Peel, 837 F. 2d 975, 979 (11th Circuit 1988). The lower court=s Order denying relief in the case at bar failed to distinguish the Keller case. The lower court failed to distinguish or address any of the cases cited by Larzelere pertaining to this claim.

The lower court held that this particular claim was procedurally barred. In the alternative, the court held that the case of State v. Roby, 246 So.2d 566 (Fla. 1971) should sustain the conviction. The lower court was wrong to cite this case as it does not address the specific issue of constructive amendments and fatal variances to an indictment, sufficiency of the indictment to provide adequate notice of the particular accusations against a defendant, and it is therefore clearly legally distinguishable. It is also factually distinguishable. In Roby, it was clear that two individuals, including Roby, even by Roby=s own admission, shot the victim. The shooting was the cause of death of the victim following an escalating bar brawl. It was unclear if a .22 caliber bullet (known to be fired by Johnson) or if a .25 caliber bullet (known to be fired by Roby) caused the fatal wound. In this case, Ms. Larzelere did not shoot Dr. Larzelere, and she did not

admit to shooting Dr. Larzelere or conspiring with her son to have Dr. Larzelere shot. In Roby, three individuals (Roby, Johnson, and Williams) were specifically named and jointly charged by indictment for murder. One defendant was acquitted (Johnson). In the case at bar, only Jason Larzelere and Virginia Larzelere were named and charged by indictment. Roby holds that if an indictment specifically charges one person with committing a felony, and charges another person of being an aider or abettor in the offense, both people can be found guilty of the offense whether they actually committed the offense, or whether the other named person in the indictment committed the murder, and one simply aided and abetted the actual murderer in the offense. As such, in the case at bar, under the reasoning of Roby, Virginia Larzelere can be found guilty of murder if she aided and abetted Jason Larzelere in the murder, and if Jason actually committed the murder with her help. *But contrary to what the lower court stated in its Order denying guilt phase relief*, Roby does not stand for the proposition that Virginia Gail Larzelere can be found guilty of aiding and abetting an unknown co-conspirator who committed the actual murder, a co-conspriator who is not jointly-named and not charged in the indictment. At a minimum, if the state is proceeding on such a theory, the instant Larzelere indictment should have charged that "Jason Larzelere, Virginia Larzelere, and any known or unknown co-conspirators or individuals murdered Dr. Norman Larzelere." Roby does not authorize constructive amendments to an indictment as the lower court suggests.

Contrary to the lower court=s Order, it is immaterial that Ms. Larzelere was not

actually charged with conspiracy. The jury convicted her based on a theory of conspiracy after being instructed on the charge of conspiracy. Virginia Larzelere is entitled to a favorable merits ruling on this particular claim.

The case of Stirone v. The United States, 361 U.S. 212 (1960), holding that constructive amendments to an indictment are *per se* prejudicial and thus warrant relief, has not been reversed, and remains good case law. In the instant case, the trial attorneys actually objected to the notion of instructing the jury that Ms. Larzelere could be found guilty on a theory of conspiracy that involved her conspiring with someone other than Jason Larzelere to commit the murder. The direct appeal attorney failed to raise this critical issue involving a constructive amendment to the indictment, and therefore, Ms. Larzelere was provided with ineffective assistance of counsel during her direct appeal.

The lower court erred in holding this claim procedurally barred. The lower court erred further in finding this claim "misplaced" just because Ms. Larzelere was not officially charged with conspiracy. The jury was instructed on conspiracy, and that was obviously the state=s theory of the case. There is state case law to suggest that this type of claim is so fundamental that it should never be procedurally barred. In the case of Hodges v. State, 878 So. 2d 401 (Fla. 4th DCA 2004), the trial court expanded the definition of kidnapping in the jury instructions beyond what was charged in the information (although the standard jury instruction on kidnapping was read, the actual information failed to allege every element that was contained in the standard jury instructions). Trial counsel failed to object to the expansion/standard jury instruction, and

appellate counsel failed to raise the claim on appeal. It was initially ineffective for trial counsel to fail to make an objection. Arguably, because the error was not preserved at the trial level, appellate counsel should not have been faulted for failing to raise an issue that was not preserved at the trial level. The Fourth District Court of Appeal nonetheless granted relief notwithstanding the obvious procedurally bars. In the case at bar, trial counsel *did* object to the instructions, yet appellate counsel inexplicably failed to raise this vital issue.

Ms. Larzelere suggests that the error is so basic and fundamental that she was not even charged with the correct crime. The jury was instructed on a completely different crime not listed in the indictment, and she was convicted of an unindicted crime. Ms. Larzelere was indicted for first degree premeditated murder under F.S.A. 782.04. Under the state=s theory of the case at trial, she should have actually been charged with principal, solicitation or conspiracy to murder under F.S.A. Chapter 777.011 or 777.04.

The lower court failed to acknowledge or address any of the following case law cited as supplemental authority for her claim XVI: United States v. Narog et al, 372 F. 3d 1243 (11th Cir. (Fla.) 2004) (held, it is per se reversible error when essential elements of offense contained in the indictment are altered by jury instructions so as to broaden possible bases for conviction beyond what is contained in indictment), Griffis v. State, 848 So. 2d 422 (Fla. 1st DCA 2003) (expanding the definition of a crime beyond that which is charged in the information, resulting in a conviction of a crime not charged, is fundamental error), Concepcion (et al) v. State, 857 So. 2d 299 (Fla. 5th DCA 2003)

(erroneous jury instructions constituted fundamental error, and claim was not barred by the contemporaneous objection rule), Dixon v. State, 823 So. 2d 792 (Fla. 2d DCA 2002) (reversible fundamental error found where defendant=s jury was instructed with language not contained within the information), Zwick v. State, 730 So. 2d 759 (Fla. 5th DCA 1999) (convictions reversed where general verdict made it impossible to determine whether jury found defendant guilty of uncharged acts), Jeffries v. State, 849 So. 2d 401 (Fla. 2d DCA 2003) (held, it is fundamental error to instruct the jury on a crime not charged in the information, the resulting verdict is a nullity), and United States v. Bobo, 334 F. 3d 1076 (11th Cir. 2003) (insufficiently-pled indictment requires reversal; indictment not framed to apprise defendant, with reasonable certainty, of nature of accusation against him is defective, even if it follows language of statute). It is clear that in the case at bar, the indictment contained defects so serious and was so vague, indistinct and indefinite that the conviction cannot be upheld. Due to the faulty indictment, Ms. Larzelere was not apprised with reasonable certainty of the nature of the accusations against her, and was found guilty of conspiring with unknown individuals not listed or noticed in the charging document. *See also* Cabrera v. State, 890 So. 2d 506 (Fla. 2d DCA 2005) (held, trial court's unobjected-to administration of jury instructions on conspiracy offenses with which defendant was charged, by including "and/or" conjunction between defendant's and codefendant's names as to elements State was required to prove beyond reasonable doubt, was fundamental error, as jury could have convicted defendant based solely upon a conclusion that codefendant's conduct satisfied

an element of one of the offenses; a defendant has the right to have a trial 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).

If the jury is going to be instructed on a theory of conspiracy, the terms of the conspiracy need to be sufficiently defined in the indictment. In other words, the instructions need to be limited to the participants listed in the indictment. Otherwise, a defendant is in jeopardy of being convicted of an uncharged crime, she lacks notice of the crime charged, and her due process rights are violated. Attorneys Howes and Wilkins defended this case on the theory of "Jason Larzelere was not the shooter," only to learn just prior to closing arguments that the state need not prove that Jason Larzelere was the shooter [Dir. ROA, pg. 5773, ROA Vol. 18, pg. 2921]. The prejudice here is obvious, and case law even holds that prejudice is presumed in these types of cases.

D. Prejudice.

Appellate counsel=s failures to raise the above arguments on direct appeal prejudiced Ms. Larzelere, although constructive amendments constitute per se reversible error and require no showing of prejudice.

At the time of Ms. Larzelere=s appeal, this Court had held that "constitutional errors, with rare exceptions, are subject to harmless error analysis". State v. DiGuilio, 491 So.2d 1129, 1134 (Fla.1986). This Court had also held that harmless error analysis "requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied,

and in addition and even closer examination of the impermissible evidence which might have possibly influenced the verdict." Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error Adid not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]@. DiGuilio, 491 So.2d at 1138. Accordingly, reasonable competent performance obligated counsel to raise and address all "of the impermissible evidence which might have possibly influenced the verdict" to hold the state to its burden of proof. Id; Fitzpatrick v. State, 490 So.2d 938 (Fla.1986). Counsel had "a duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland, 466 U.S. at 688. Appellate counsel failed to do so. Had appellate counsel addressed the errors that occurred when the court opened a conspiracy to terms outside of the indictment, there is a reasonable probability that the outcome of the appeal would have been different. Strickland, 466 U.S. at 688. See Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001) ("Where, as here, appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so.").

CLAIM II

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MS. LARZELERE OF THE FUNDAMENTALLY FAIR CAPITAL TRIAL AND APPEAL GUARANTEED UNDER THE FIFTH, SIXTH,

EIGHTH, AND FOURTEENTH AMENDMENTS.

Ms. Larzelere did not receive the fundamentally fair trial to which she was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Ms. Larzelere=s trial, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Ms. Larzelere=s 3.850 motion, 3.850 appeal, and in her direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed conviction and death sentence. Repeated instances of ineffective assistance of counsel and the trial court=s numerous errors significantly tainted Ms. Larzelere trial and direct appeal to this Court. Under Florida case law, the cumulative effect of these errors denied Ms. Larzelere her fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Ms. Larzelere respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of January, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P.

9.210.

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