IN THE SUPREME COURT OF FLORIDA

No. SC12-522

PABLO IBAR,

Petitioner,

v.

KENNETH S. TUCKER,
Secretary, Florida Department of Corrections,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS AND FOR EXTRAORDINARY RELIEF

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Ibar was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. Moreover, substantial factual errors permeate this court's direct appeal opinion in Mr. Ibar's case, and a correction of these errors will demonstrate that the court should revisit and reject its prior determination of the harmlessness of the numerous instances of constitutional error found to have occurred at Mr. Ibar's capital trial.

JURISDICTION

A writ of habeas corpus is an original proceeding in this court governed by Fla. R. App. P. 9.100. This court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Art. V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees, "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

This court has jurisdiction because the fundamental constitutional errors challenged herein arise in the context of a capital case in which the court heard and denied Mr. Ibar's direct appeal. ***Baggett v. Wainwright***, 229 So. 2d 239, 243 (Fla.

1969); *cf.* ***Brown v. Wainwright***, 392 So. 2d 1327 (Fla. 1981). This court has plenary jurisdiction over death penalty cases. *See* Art. V, §3 (b)(1), Fla. Const.; ***Orange County v. Williams***, 702 So. 2d 1245 (Fla. 1997).

This court also has the inherent power to do justice. The ends of justice call on the court to grant the relief sought in this case. The petition pleads and establishes 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 is warranted in this action.

REQUEST FOR ORAL ARGUMENT

Mr. Ibar requests oral argument on this petition.

PROCEDURAL HISTORY

In late June of 1994, police entered a residence in Miramar, Florida, and discovered the bodies of the homeowner, Casimir "Casey" Sucharski, and two females, Sharon Anderson and Marie Rogers. An investigation culminated in the indictment, returned on August 25, 1994, of Pablo Ibar and Seth Penalver for three counts of first-degree murder and single counts of armed burglary, armed robbery, and attempted armed robbery. (R1. 2-4).[1]

[1]References to the Record on Appeal from Petitioner's direct appeal shall be

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The two men were tried together beginning in May 1997, but on January 25, 1998, the jury deadlocked and a mistrial was declared. (R2. 393). A second trial began with both defendants on January 11, 1999. However, during jury selection, Mr. Ibar's lawyer was arrested for domestic battery on a pregnant woman in a highly publicized incident. A defense motion for a severance was denied, but a motion for continuance was granted. (R3. 429-30, 437-38). Mr. Penalver's trial continued, and he was convicted as charged and sentenced to death.

Mr. Ibar's third trial began on April 17, 2000. (R3. 499). The jury returned guilty verdicts on each charge on June 14, 2000. (R6. 1000-05). A penalty phase commenced on July 24, 2000, and the jury voted 9-3 to recommend a death sentence on each murder count. (R6. 1021-23). A hearing pursuant to ***Spencer v. State***, 615 So. 2d 688 (Fla. 1993), was conducted on August 14, 2000, and a final sentencing hearing occurred on August 28, 2000, at which time the court entered its sentencing order in which it sentenced Mr. Ibar to death on each murder count, and concurrent terms of 25 and 10 years on the other felonies. (R6. 1094-1116; 1117-35). A timely notice of appeal to this court was filed. (R6. 1138).

On direct appeal, Mr. Ibar raised the following eight issues with various

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referred to as R, followed by the volume and page number. The trial transcripts shall be referred to by the letter "T" followed by the volume and page number.

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subparts to each:

(1) whether certain out-of-court statements were "statements of identification" as contemplated by §90.801(2)(c), Florida Statutes (1995);

(2) whether the trial court erred in admitting witness testimony for the purpose of impeaching that testimony;

(3) whether the trial court erred in admitting the transcript of testimony given by a deceased witness in a prior trial;

(4) whether the trial court erred in allowing the State to introduce hearsay evidence and certain expert testimony;

(5) whether the trial court erroneously precluded the admission of evidence regarding third-party motive and animosity and reputation evidence:

(6) whether the trial court erred in allowing the admission of evidence regarding a live lineup;

(7) whether the integrity of the trial was affected by references to certain evidence denying Ibar due process;

(8) whether the death penalty in this case violates the Florida and Federal Constitutions.

Ibar v. State, 938 So. 2d 451, 459 (Fla. 2006).

In evaluating Mr. Ibar's issues on direct appeal, the court agreed that a number of errors occurred at trial. As to the first issue, the court found that the police testimony of statements by witnesses Peguera, Vindel, Casas, and Klimeczko, allegedly identifying Mr. Ibar from a photograph taken from a covert

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video, were proper as impeachment but not substantive evidence. ***Ibar***, 938 So. 2d at 460 *et seq*. The court, however, concluded that "[a]lthough the trial judge erred in allowing several of the identification statements to be considered as substantive evidence, we find this error harmless." *Id* at 463 (citing ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986)). Next, the court found that the trial court had committed additional error in permitting witness Milman to testify that Alex Hernandez stated his intention to travel to North Carolina on the weekend of the murders; Hernandez was a potential suspect in the homicides and thus this testimony was significant to Mr. Ibar's defense. ***Ibar***, 938 So. 2d at 466 ("the trial court should not have admitted the evidence under the state of mind exception to the hearsay rule"). This error, too, was found harmless because, in the court's view, there was a "wealth of evidence that connected Ibar to this crime and indicated that he was one of the intruders captured on the videotape at the scene of the murders." *Id.*

Despite the error found at Mr. Ibar's trial, this court affirmed his convictions and sentences, including the three sentences of death imposed by the trial court. ***Ibar***, 938 So. 2d at 472-76 (discussing sentencing issues). A timely motion for rehearing was filed by Mr. Ibar[2] and, after its denial, certiorari review was sought in the United States Supreme Court. Certiorari was denied on February 20, 2007.

[2]The state also filed a motion for rehearing in this court.

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Ibar v. Florida, 127 S. Ct. 1326 (2007).

On or about February 19, 2008, Mr. Ibar filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851. Following a limited evidentiary hearing, the trial court denied relief and Mr. Ibar's appeal of that ruling is pending before the court at this time. *See* ***Ibar v. State***, No. 12-522.

GROUNDS FOR RELIEF

Significant errors which occurred at Mr. Ibar's capital trial and sentencing were not presented to this court on direct appeal due to the prejudicially deficient performance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that his deficiencies prejudiced Mr. Ibar. "[E]xtant legal principles . . . provided a clear legal basis for . . . compelling appellate argument[s]." ***Fitzpatrick v. Wainwright***, 490 So. 2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those raised in this petition "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 that appellate counsel omitted establish that "confidence in the correctness and fairness of the result has been undermined." ***Wilson***, 474 So. 2d at 1165.

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CLAIM I

THIS COURT'S HARMLESS ERROR ANALYSIS ON DIRECT APPEAL WAS CONSTITUTIONALLY INADEQUATE AND WAS PREMISED ON FACTUAL MISSTATEMENTS REGARDING THE TRIAL RECORD AND EVIDENCE. THE COURT SHOULD CORRECT THESE ERRORS AND PERFORM A PROPER HARMLESS ERROR ANALYSIS.

In evaluating Mr. Ibar's issues on direct appeal, the court agreed that a number of errors occurred at trial. First, as to the first issue, the court found that the police testimony of statements by witnesses Peguera, Vindel, Casas, and Klimeczko, allegedly identifying Mr. Ibar from a photograph taken from a covert video, were proper as impeachment but not substantive evidence. ***Ibar***, 938 So. 2d at 460 *et seq*. The court, however, concluded that "[a]lthough the trial judge erred in allowing several of the identification statements to be considered as substantive evidence, we find this error harmless." *Id.* at 463 (citing ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986)). Next, this court found that the trial court had committed additional error in permitting witness Milman to testify that Alex Hernandez stated his intention to travel to North Carolina on the weekend of the murders; Hernandez was a potential suspect in the homicides and thus this testimony was significant to Mr. Ibar's defense. ***Ibar***, 938 So. 2d at 466 ("the trial court should not have admitted the evidence under the state of mind exception to the hearsay rule"). This

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error, too, was found harmless because, in the court's view, there was a "wealth of evidence that connected Ibar to this crime and indicated that he was one of the intruders captured on the videotape at the scene of the murders." *Id.*

Despite the error found at Mr. Ibar's trial, this court affirmed his convictions as well as his sentences, including the three sentences of death imposed by the trial court. As established in this petition, however, the court's harmless error analysis was inadequate and was premised on a number of factual misstatements regarding the trial record and the evidence adduced at Mr. Ibar's trial. A review of a complete and accurate view of the evidence below establishes that Mr. Ibar was and is entitled to a new trial, and this court must and should correct its error at this time by concluding that the errors that permeated trial were not harmless beyond a reasonable doubt. To be sure, the state cannot establish that these errors were harmless beyond a reasonable doubt, which is the burden the State must satisfy. *See* ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986); ***Chapman v. California***, 386 U.S. 18 (1967).

1. The Court's Improper Determination of Harmlessness.

In Argument I on direct appeal, Mr. Ibar contended that out-of-court opinions by non-witnesses of the identity of a person depicted in a photograph are not statements of "identification of a person made after perceiving the person"

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under §90.801 (2)(c), Fla. Stat. (1999). In its opinion, the court agreed with Mr. Ibar's legal position, and held that the police testimony of statements by witnesses Peguera, Vindel, Casas and Klimeczko, allegedly identifying Mr. Ibar from a photograph taken from a covert video, was proper as impeachment but not as substantive evidence. ***Ibar***, 938 So. 2d at 459-62. However, the court found these errors to be harmless:

> A close examination of the evidence presented in this case, both the properly admitted and the inadmissible evidence, demonstrates the harmlessness of the error in this instance. In addition to the statements of Peguera, Vindel, Casas, and Klimeczko identifying Ibar, which Ibar concedes was proper as impeachment evidence but not substantive evidence, there were other witnesses and items of evidence from which the jury could conclude that Ibar was one of the perpetrators of this triple homicide. ***First,*** there was a ***videotape*** of the murders. The perpetrator identified as Ibar removed his disguise and his face was visible on the videotape. This evidence was played for the jury. ***Gary Foy***, one of Sucharski's neighbors, testified that he saw two men leaving in Sucharski's Mercedes-Benz. He stated that he did not get a good look at the driver of the car, but he got a good look at the passenger. ***Foy identified Ibar*** as the passenger in the Mercedes. ***Klimeczko*** testified that at some point both Penalver and Ibar came to the residence on Lee Street in a big, black, shiny new car. Although ***Milman*** denied that he had ever positively identified Ibar as the person in the still photograph made from the videotape, he did say that the person in the photograph resembled Ibar. Moreover, the trial judge admitted as substantive evidence Milman's grand jury testimony in which he positively identified Ibar. ***Munroe's statement*** placing Ibar and Penalver together during the weekend of the murder was also admitted as substantive evidence. On the issue of identification, ***the jury also heard evidence from Kimberly San and David Phillips*** that placed Ibar and Penalver in the Mercedes. ***Both***

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> ***Peguera and her mother testified that the person in the photograph resembled Ibar.*** We conclude that any error in admitting some of these identification statements as substantive evidence rather than as impeachment evidence was harmless error. *DiGuilio*, 491 So. 2d at 1135.

Ibar, 938 So. 2d at 463 (emphasis added).

As seen above, the court relied on a discrete set of purported facts from the trial record to conclude that the error in this case was harmless beyond a reasonable doubt. However,

> [o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Goodwin v. State, 751 So. 2d at 537,542 (Fla. 1999) (citations omitted). In other words, "[h]armless error is not a device for an appellate court to substitute itself for the trier of fact by simply weighing the evidence. The focus is the effect of the error on the trier of fact." ***DiGuilio***, 491 So. 2d at 1139.

In conducting the harmless error analysis that it did, the court simply cherry-picked some of the evidence at trial upon which the jury might have rested its verdict. But in doing so, this court misstated or misapprehended the record in several significant areas. The court's harmless error analysis also failed to wholly

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contemplate the significance of the inadmissible testimony on the jury in light of the state's case as a whole, and overlooked the harm caused because admission of the identification evidence as substantive evidence allowed the prosecutor to argue that the jury could consider this identification evidence, particularly that of Mr. Ibar's mother, as evidence of guilt and that his own mother believed he was guilty. (T52. 6889).

The errors and oversights in the court's harmless error analysis are discussed below:

• in analyzing the state's case at trial, this court overlooked the fact that law enforcement officials who processed the crime scene recovered some 114 items of evidence including hair and cellular material from a shirt worm by the assailant believed to be Mr. Ibar, and latent fingerprints from an area where the men were seen wiping surfaces as if to eradicate fingerprints. Yet the state conceded at trial no fingerprints, blood, or hair was matched to Mr. Ibar. Even stronger evidence was adduced that DNA evidence in this case excluded Pablo Ibar as the donor of the hair and cellular samples recovered from the shirt. (T33. 4383-4418). Police found 145 latent prints, none of which were Mr. Ibar's, yet 13 latent prints remained unidentified at the time of trial. Indeed, the prosecutor conceded in closing argument that "there is no question in this particular case there was no

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physical evidence to connect the defendants to this particular case." (T52. 6891). Police also searched the bedroom where Mr. Ibar was living at the time of the offense and found no evidence linking him to the crime scene. Where a capital case rests on the fragile testimonial recollections and tainted or biased witnesses, and no confession or admission is in the record, the absence of physical evidence at a crime scene teeming with physical evidence is a compelling fact which should be considered in any constitutional harmless error analysis.

• this court's direct appeal opinion stated that witnesses testified that they were initially shown the video photograph and either identified Mr. Ibar or said that the person "resembled" Mr. Ibar. However, this was not the testimony at trial. Witness Peguera testified that the question put to her by police was whether the person looked like Pablo Ibar, and her response was that it did but she had not seen him in a long time. (T22. 3067-70). Witness Vindel testified that she told the police[3] while the photograph looked like Mr. Ibar, she could not be sure because the picture was so unclear she would not sign the picture, as she did not believe it was Pablo in the photograph. (T9. 2523-26). Witness Klimeczko testified that he identified Pablo Ibar in a photograph, but it was a Polaroid, not a blurry video still like the one shown him at trial, as that photo "was not easily recognizable as

[3]Vindel spoke only Spanish yet the police questioned her in English.

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Pablo." (T30. 4096-414). Witness Milman testified that he only signed the back of a "gray and shady" picture to signify that he had looked at the picture, but he could not identify anyone. (T34. 4437-39). Witness Monroe testified that she never made an identification, and that her testimony before the grand jury was consistent: "his head is down, you know, so you can't really see them. But just knowing them both, yes, it resembles them both." But she never made a positive identification. (T37. 4763-95). Therefore, the findings in this court's direct appeal opinion that witnesses identified Ibar are inaccurate references to the trial record.

• this court's opinion references the videotape as a factor, perhaps even a determinative factor, in determining that the error was harmless. ***Ibar***, 938 So. 2d at 463 ("First, there was a videotape of the murders"). The existence of the videotape was certainly important enough to the court to warrant its mention as the "first" factor in its harmless error analysis. However, what the court's opinion in Mr. Ibar's case does not reflect or acknowledge is that the witnesses who testified, including police officers, (T25. 3487), observed that the tape was grainy, fuzzy, gray, shady, blurry, and distorted. Indeed, from the court's description of the videotape in Mr. Ibar's direct appeal opinion one concludes that it was a high quality and accurate depiction of the events in question. ***Ibar***, 938 So. at 457-58. This should be compared and contrasted with the court's description of the very

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same videotape in the direct appeal opinion of Seth Penalver as a "grainy videotape" and noting the "poor quality of the video and lighting conditions." ***Penalver v. State***, 926 So. 2d 1118, 1126, 1138 (Fla. 2006). The opinion also omits the fact that Mr. Ibar had been involved in a prior trial, lasting 9 months, where the video was again the most prominent piece of evidence against him, yet the jury was unable to render a verdict. And as to this "grainy videotape," ***Penalver***, 926 So. 2d at 1138, there was testimony at trial that the reproduction process created a distortion called "aliasing" and illusions and distortions called photogammetry occur in the reproduction process. (T17. 2249-2322).

• this court relies on the purported identification made by Gary Foy as a component of its harmless error analysis. Yet the court failed to include critical relevant portions of the testimony *admitted* by Foy during his direct and cross-examination testimony that significantly undermined his testimony. First, Foy acknowledged that there was suggestive prompting by the police in the course of his identification process, and that his view of the suspect was but for seconds, at an angle, and through two sets of tinted car windows. (T21-22. 2810-2989). This court also omits the fact that when the police initially showed Foy a photo lineup, he was unable to make an identification, although he knew the police had a suspect in custody, and advised that there were two men in the photo lineup that he would

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have to see live before he could offer an opinion, as he only saw the two men from "the left side and the back." (T21. 2818-2910). That a subsequent live lineup occurred approximately one week later, and the only man in the live lineup repeated from the identification process from the week before was Mr. Ibar, is an inherently suggestive police strategy. Foy also observed that the photo he was shown from the video appeared shady and grainy, and it was similar to many people that he knew, including a "bowling buddy." Finally, Foy described the aggressiveness of the police wherein they "asked me to pick somebody out. No matter what, pick somebody out. And I said I really didn't see him." (T22. 3022). Given the absence of physical evidence and the reality of the whole record as it relates to Gary Foy, the error in this case could not have been harmless.

• this court's opinion failed to mention other evidence suggesting that individuals who know the victim, Casey Sucharski, may have been involved in the homicides. For example, the court's opinion fails to reference the enmity and animosity a former girlfriend, Kristal Fischer, had a a result of her being evicted a few months earlier and her statement that she and her "drug dealer" boyfriend would be returning for sexually-oriented tapes and jewelry. (T18. 2343-2407). Instead, this court's opinion refers to the fact that a watch was missing and that Mr. Sucharski's car had been taken. ***Ibar***, 938 So. 2d at 450. Yet the testimony at trial

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reflects that narcotics, jewelry, and $5000.00 in cash were left behind. In other words, it appears as though the perpetrators, although they seemed to have ransacked or searched the house, were more interested in visiting violence on Mr. Sucharski and the unwitting visitors with him than in taking jewelry or other items of value. The court's calculation of harmlessness failed to include this inference arising from the evidence, that is, that the individuals may have had a personal stake in the invasion rather than a pecuniary one.

• this court's opinion referenced the testimony of Kimberly San and David Phillips, and their identification of Mr. Ibar. ***Ibar***, 938 So. 2d at 463. Yet the court failed to mention or acknowledge the biases, motives, and the impeachment of these witnesses at trial. For example, Sans, who testified that she knew the day of the homicides that Mr. Ibar was involved, did not come forward for three years, and the only reason she came forward was because her fiancé was charged with a crime and she did not want him to go to prison. Sans tried to get a deal for her fiancé and ended up receiving free housing and food for a year by becoming a witness. Moreover, Sans said the man she saw that day had hair down the back of his neck, while the man in the video did not.[4] Likewise, Phillips, who allegedly

[4]San had also testified against Penalver at Penalver's second trial, a result which this Court reversed. At Penalver's trial, San testified that "Penalver was involved in the murders." ***Penalver***, 926 So. 2d at 1135. Despite this seemingly

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was with Sans at the time, identified the person with Seth Penalver as a tall thin Latin male with medium length hair going down the back of his neck, whereas the individual in the video had close-cropped hair. Phillips also admitted that he was drinking that morning and he had spent time in a drug rehabilitation center before he came forward as a witness. The failure of this court to acknowledge these facts and consider them in determining that the errors in Mr. Ibar's case were harmless should be rectified at this time.

• the last witness considered by this court on the harmless error analysis is that of Mr. Klimeczko. Once again, the court's opinion omits the substantial impeachment evidence adduced at trial. First, Klimeczko had no recollection of any of the incidents, and said that he used drugs daily in 1994. Second, Klimeczko said that the picture he identified as a Polaroid, not a video still, as the picture on the flyer was "not easily recognizable as Pablo." (T30. 4096-4104). In fact, Klimeczko testified that his prior statements were unreliable because his use of drugs, that he implicated other people when he was interviewed by the police because he thought the police were making an accusation against him, he was

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powerful testimony, the court acknowledged San's "motive for testifying" and thus her testimony was merely "circumstantial evidence regarding Penalver's involvement in the crime" that did not save the error in Penalver from being found harmful. *Id.* at 1138. Yet in Mr. Ibar's case, San's motives for testifying were not mentioned.

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angry at Pablo because he had been thrown out of the house by Mr. Ibar, and that he said that his prior statements were "half speculation, you know, half knowledge, the best I could remember." (T32. 4235-39). The failure of the court to consider these underlying reasons why his testimony is unreliable undermines the court's prior finding of harmless error.

• finally, this court observed that while the use of impeached testimony of Casas, Vindel, Peguera, and Klimeczko, as substantive evidence of identification was error, the use of the prior testimony of Milman and Monroe was proper as their testimony had been in sworn proceedings. ***Ibar***, 938 So. 2d at 462. However, the court's opinion omitted the fact that these prior proceedings were not attended by Mr. Ibar nor counsel for Mr. Ibar, and thus he had no opportunity to cross-examine or confront these witnesses at the time their testimony was given. Milman's prior testimony was before a grand jury, while Monroe and Klimeczko had testified at a bond hearing for Penalver. Mr. Ibar's inability to confront those witnesses should have been considered by the court when the court placed so much reliance on them in finding that the errors in this case were harmless beyond a reasonable doubt.

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2. The Court Should Revisit its Harmless Error Analysis and Grant a New Trial.

As seen above, there were substantial misstatements, misapprehensions, and omissions regarding the trial record when this court determined that the trial errors in this case were harmless beyond a reasonable doubt. There was no single piece of evidence that was unrebutted, or went unimpeached, or that otherwise conclusively (or even strongly) linked Pablo Ibar to the crime, including the "grainy videotape" and the photo stills gleaned therefrom. As the state conceded, there was no physical evidence linking Pablo Ibar to this crime. Under these circumstances, given the stakes at issue, this court should re-examine this record carefully. When the matters discussed above are taken into account, as they must be, there can be no conclusion that the errors in Mr. Ibar's case were harmless beyond a reasonable doubt.

This court unquestionably has the power, authority, and jurisdiction to grant relief to avoid a manifest injustice:

> The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." ***Muehlman v. State***, 3 So. 3d 1149, 1165 (Fla. 2009)(alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous)(quoting ***Parker v. State***, 873 So. 2d 270, 278 (Fla. 2004));

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see ***State v. J.P.***, 907 So. 2d 1101, 1121 (Fla. 2004)(same); ***Parker v. State***, 873 So. 2d 270, 278(Fla. 2004)(same); *see also* ***Fla. Dep't of Transp. V. Juliano***, 801 So. 2d 101, 106 (Fla. 2001)("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting ***Strazulla v. Hendrick***, 177 So. 2d 1, 3 (Fla. 1965).

State v. Akins, 69 So. 3d 261, 268 (Fla. 2011).

Indeed, in ***Strazulla v. Hendrick***, 177 So. 2d 1, 3-4 (Fla. 1965), this court explained:

> In 1953 the decision in ***Beverly Beach Properties v. Nelson***, *supra*, 68 So.2d 604, was rendered. In that case this court stated plainly that
>
> > 'We may change 'the law of the case' at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.'
>
> There can be no doubt that the ***Beverly Beach Properties*** decision and the line of cases following the ***McGregor*** decision, supra, are in conflict with the holding in ***Family Loan Co. v. Smetal***, *supra*, and the line of cases cited above which are in accord with the decision in ***McKinnon v. Johnson***, *supra*. The ***Beverly Beach Properties*** decision, as well as the *McGregor* and similar decisions, are, however, consistent with our decisions respecting the doctrine of res judicata and stare decisis, see ***Wallace v. Luxmoore***, 156 Fla. 725, 24 So.2d 302, and with what appears to be the trend in other courts to recognize that the administration of justice requires some flexibility in the rule. See ***Johnson v. Cadillac Motor Car Co.***, 261 F. 878, 8 A.L.R. 1623; ***Union Light, H. & P. Company v. Blackwell's Adm'r.*** (Ky.), 291

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S.W.2d 539, 87 A.L.R.2d 264; ***McGovern v. Kraus***, 200 Wis. 64, 227 N.W. 300, 305, 67 A.L.R. 1381; ***Mangold v. Bacon***, 237 Mo. 496, 141 S.W. 650, 654; ***People v. Terry***, Cal.1964, 390 P.2d 381; cases collected in the annotation in 87 A.L.R.2d, pp. 299-317.

In view of the apparent conflict, it is clear that the ***Beverly Beach Properties*** decision must be held to have impliedly, if not expressly, modified the earlier holding in ***Family Loan Co. v. Smetal***, *supra*, and similar decisions; and, insofar as these earlier decisions may be construed as holding that an appellate court in this state is wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case', we hereby expressly recede therefrom.

We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons-and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule. ***Beverly Beach Properties v. Nelson,*** *supra*.

This court's recognition of its "power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice" under ***Muehlman*** is in accord with the well recognized inherent equitable powers vested in American courts. Indeed, a court's inherent equitable powers were recently explained in ***Holland v. Florida***, 130 S. Ct. 2549, 2563 (2010), where the U.S. Supreme Court explained:

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> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." ***Baggett v. Bullitt***, *377 U.S. 360, 375 (1964)*. In emphasizing the need for "flexibility," for avoiding "mechanical rules," ***Holmberg v. Armbrecht***, *327 U.S. 360, 375 (1946)*, we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," ***Hazel-Atlas Glass Co. V. Hartford-Empire Co.***, *322 U.S. 238, 248 (1944)*. The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.*

The circumstances presented by Mr. Ibar in this petition demonstrate "exceptional circumstances" such that "reliance on the previous decision would result in manifest injustice." ***Muehlman,*** 3 So. 3d at 1165. This is because, as explained herein, this court's prior finding of harmless error "was erroneous and such ruling resulted in manifest injustice." ***Beverly Beach Properties v. Nelson***, 68 So.2d 604, 608 (Fla. 1953). Accordingly, Mr. Ibar submits that this court should revisit its prior determination of harmlessness and, upon a careful accurate review of the record, grant habeas relief in the form of a new trial. To do otherwise would result in a manifest injustice.

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CLAIM II

ON DIRECT APPEAL, THIS COURT FAILED TO ADDRESS MR. IBAR'S CLAIM THAT THE SIXTH AMENDMENT WAS VIOLATED WHEN THE JUDGE, NOT THE JURY, CONSIDERED AND FOUND AN AGGRAVATING CIRCUMSTANCE.

On direct appeal, Mr. Ibar's appellate counsel raised, *inter alia*, a number of general challenges to his death sentences and to Florida's capital sentencing scheme based on the Sixth Amendment, ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) (Initial Brief of Appellant, *Ibar v. State*, No. SC00-2043, at 91-100). One of the sub-issues raised by appellate counsel was the fact that the Sixth Amendment and ***Ring*** were violated when the trial judge did not permit the jury to consider the cold, calculated, and premeditated (CCP) aggravating circumstance but later found the circumstance to exist and weighed it along with the other factors in deciding to sentence Mr. Ibar to the death penalty:

> 2. The trial judge's independent fact-finding: A death sentence in Florida is only imposed in under Section 921.141 if a judge makes specific findings that the aggravating circumstances in subsection (5) outweigh the mitigating circumstances in subsection (6). Spencer v. State, 615 So. 2d 688 (Fla. 1993). A Florida judge is even empowered to find the existence of an aggravating circumstance which was not presented to the jury. Davis v. State, 703 So. 2d 1055 (Fla. 1997). The trial court here declined to instruct the jury on the cold, calculated and premeditated circumstance, finding the evidence

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> too close. T.58.7246. The trial court's sentencing order noted: "the 'CCP' aggravating factor was not given to the jury for consideration; however, the Court is permitted to consider the factor if it is warranted." R.1100. This procedure is precisely what Ring precludes; the trial judge took an issue away from jury consideration because the evidence was too equivocal, then concluded that the factor was proven beyond a reasonable doubt. R.1104. Ring requires that only aggravating circumstances found by a properly instructed jury can justify an enhanced penalty. . . .

(Initial Brief of Appellant. *Ibar v. State*, No. SC00-2043, at 93-94).

In its direct appeal opinion, this court acknowledged that Mr. Ibar had raised challenges to Florida's capital sentencing scheme based on what the court determined to be the argument that Florida's system "unconstitutionally relies upon judicial fact-finding and not jury fact-finding." ***Ibar,*** 938 So. 2d at 472-73. The court went on to reject the argument because "[t]his claim, and variations of this claim, have been addressed and decided adversely to Ibar." *Id.* (citing ***Duest v. State***, 855 So. 2d 33, 49 (Fla. 2003); ***Blackwelder v. State***, 851 So. 2d 650, 654 (Fla. 2003)).

Mr. Ibar submits that, based on this court's direct appeal opinion, it is not clear that the court addressed his specific argument that the Sixth Amendment and ***Ring*** were violated when the trial court found the CCP aggravating circumstance that it had expressly and explicitly withheld from the jury's consideration. As noted above, the court, in rejecting the general Sixth Amendment argument that

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Florida's scheme unconstitutionally relies on judicial, not jury, fact-finding, the court cited two cases–***Duest*** and ***Blackwelder***. Neither of those cases address the issue raised in Mr. Ibar's direct appeal. In fact, in ***Duest***, the mirror image of what occurred in Mr. Ibar's trial was presented: the jury was given an additional aggravating circumstance to consider that was later *not* found by the court. This is an entirely different Sixth Amendment issue than that presented in Mr. Ibar's case, that is, whether the Sixth Amendment is violated when the judge alone considers, finds, and weighs a significant aggravating circumstance when imposing a sentence of death. A clear Sixth Amendment violation occurred in this case that warrants relief.

In ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Id.* at 490. Under ***Apprendi***, a defendant "may not be exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483. The ***Apprendi*** Court found both the Sixth Amendment guarantee of a trial by jury and the Fourteenth Amendment guarantee of due process to contain that requirement. *Id.* at 476-77. Like the state statutes at issue

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in ***Apprendi***, the statutes under which Mr. Ibar was sentenced are independent but interrelate, must be considered together, and require the judge to make findings that increase the penalty for the crime beyond that prescribed by statute.

In ***Ring v. Arizona***, 536 U.S. 584 (2002), the Supreme Court extended ***Apprendi*** to capital cases, holding that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Since Arizona's capital punishment scheme allowed for a judge alone to find aggravating circumstances required for a death sentence, it violated this fundamental Sixth Amendment right. *Id.* at 609. Under ***Ring***, if a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact, regardless of how the state labels it, must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The ***Ring*** Court emphasized that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years[, as was the case in ***Apprendi***,] but not the factfinding necessary to put him to death. ***Ring*** at 609.

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In light of ***Ring*** and ***Apprendi***, Mr. Ibar submits that the Sixth Amendment was violated and that appellate counsel *did* raise this issue on direct appeal. However, it is not clear that this court addressed the issue. If it did, then the court should reconsider that denial or, in the alternative, indicate that the issue presented in the Initial Brief on direct appeal was considered and rejected. If it did not consider the issue despite the fact that it was raised by appellate counsel, the court should entertain the argument at this time and, based on ***Ring*** and ***Apprendi***, grant habeas relief and vacate Mr. Ibar's sentence of death.

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CLAIM III

MR. IBAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BECAUSE COUNSEL UNREASONABLY FAILED TO RAISE MERITORIOUS ISSUES ON APPEAL, TO MR. IBAR'S SUBSTANTIAL PREJUDICE.

A. Introduction.

Petitioner Ibar had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to the appellate courts. ***Strickland v. Washington***, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." ***Evitts v. Lucey***, 469 U.S. 387, 396 (1985). As the Supreme Court observed:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

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Id. The ***Strickland*** test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See* ***Orazio v. Dugger***, 876 F. 2d 1508, 1513 (11th Cir. 1989).

In the following sections of this claim, Petitioner Ibar raises issues which appellate counsel unreasonably failed to present on direct appeal. Because Petitioner was denied the right to effective assistance of appellate counsel, "he is entitled to a decision on the merits of his [constitutional] claim[s] in his habeas petition." ***Jackson v. Leonardo***, 162 F. 3d 81, 85 (2d Cir. 1998). Because the constitutional violations which occurred during Petitioner's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Petitioner's] direct appeal." ***Matire v. Wainwright***, 811 F. 2d 1430, 1438 (11th Cir. 1987). In light of the serious reversible error that appellate counsel never raised, "there [is] more than a reasonable probability that the outcome of the appeal would have been different" and a new direct appeal must be ordered. *Id.* at 1439.

In ***Eagle v. Linaham***, 268 F.3d 1306 (11th Cir. 2001), the Eleventh Circuit ordered habeas relief on a claim of ineffective assistance of appellate counsel. The state trial court had held an evidentiary hearing regarding the claim of ineffective

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assistance of appellate counsel. Although the state trial court did not specifically find that appellate counsel had made a tactical decision not to present the omitted claim, the Eleventh Circuit assumed appellate counsel had made such a tactical decision. *Id.* at 1318. Nevertheless, the court emphasized that "[w]hether the tactic was reasonable . . . is a question of law and is reviewed *de novo*." *Id.* (quoting ***Collier v. Turpin***, 177 F.3d 1184, 1199 (11th Cir. 1999)).

In finding deficient performance in ***Eagle***, the court first examined the reasonableness of counsel's decision not to raise the omitted claim. The court looked at how well established the legal principles supporting the omitted claim were at the time of the direct appeal. *Id.* at 1319-20. The court also relied upon the fact that the error was "apparent on the face of the transcript." *Id.* at 1322. The court found deficient performance where "appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it." *Id.* In Petitioner's case, the legal principles supporting the claims omitted from his direct appeal were well-established at the time of his direct appeal, and the claims were "apparent on the face of the transcript."

As to prejudice, the ***Eagle*** court stated, "To determine whether the failure to raise a claim on appeal resulted in prejudice, we review the merits of the omitted claim. . . . If we conclude that the omitted claim would have had a reasonable

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probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." *Id.* (citation omitted). Finding that the omitted claim would have succeeded on appeal, the court found that omission of the claim undermined confidence in the outcome of the direct appeal sufficient to establish prejudice. *Id. See* ***Clemmons v. Delo***, 124 F.3d 944 (8th Cir 1997), *cert. denied*, 120 S.Ct. 512 (1998); ***Northrop v. Trippett***, 265 F.3d 372 (6th Cir. 2001).

Given the existing precedent and the facts of this case, the arguments below had a reasonable likelihood of success had they been raised on direct appeal. Because appellate counsel unreasonably failed to make these arguments on appeal, Petitioner received ineffective assistance of counsel on his direct appeal, and relief is warranted at this time.

B. Gary Foy's Identification Testimony Should Have Been Excluded as Unduly and Unnecessarily Suggestive, in Violation of the Fifth and Sixth Amendments.

Prior to Mr. Ibar's 1997 trial, defense counsel filed a written motion seeking an order excluding the identification testimony of state witness Gary Foy. (R1 143-45). Aside from a claim that Mr. Ibar was denied his right at a critical stage,[5] the

[5]This claim was raised by appellate counsel on appeal, and rejected by the court on its merits. ***Ibar***, 928 So. 2d at 469-70.

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motion challenged the identification procedure utilized by law enforcement as unduly suggestive and thus irreparably tainted Foy's identifications of Mr. Ibar. (R1. 144). At the 1997 hearing on the motion, defense counsel Morgan cross-examined both Foy and Detective Paul Manzellza regarding the circumstances surrounding the presentation of the photo array and the live lineup, (SR11. 1-215; SR12. 1-80), focusing most sharply on the issue of whether Mr. Ibar was entitled to counsel during the line-up. (SR12. 6-7, 13). As the *sole* basis for denying the motion, the trial court ruled that Mr. Ibar had no right to counsel at the lineup. (*Id.* at 46). Subsequently, defense counsel Morgan filed a Supplemental Proffer and Motion to Reconsider, again focusing on the right to counsel issue. (R2. 199-215). The court denied the motion "for the reasons as stated on the record in open court." (R2. 217).

On April 27, 2000, after the jury had been sworn and jeopardy attached for Mr. Ibar's second trial, the trial court re-addressed Morgan's original motion to exclude Foy's identifications. (T10. 1400-16; T11. 1434-78). The court framed the issue as whether, if it were to suppress the line-up identification based on a violation of Mr. Ibar's right to counsel, would it then suppress any subsequent in-court identification. (T11. 1481-85). The court voiced a concern that the motion had been re-raised untimely and that if it granted the motion "the State is up the

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creek without a paddle." (*Id.* at 1486). The court then denied the motion apparently based on the fact that Mr. Ibar was not entitled to counsel at the live line-up. (*Id.* at 1486-87).

In his Rule 3.851 motion, which is the subject of the pending appeal before this court in ***Ibar v. State***, No. SC12-522, Mr. Ibar raised a claim of ineffective assistance of counsel challenging Morgan's failure to, *inter alia*, fully object to the introduction of Foy's out-of-court identifications of Mr. Ibar on the ground that the identification procedures employed at both the photo array and the live lineup were so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. In response to this claim, the state argued:

> It is Ibar's position [that] Morgan was ineffective because his oral argument for suppression of Foy's identification of Ibar from the photographic and live line-ups focused on the 5th and 6th Amendment issue and not the allegedly suggestive nature of the line-ups. Contrary to Ibar's position, the record refutes this claim. Not only did Morgan include in his motion challenges to the line-up on the grounds of composition and suggestibility, but he referenced such during Foy's testimony (SR.11. 212). At the conclusion of the suppression hearing, Morgan affirmed he was attacking the make-up of the line-ups (SR.11. 213). Such dove-tails into his written motion where he claims the circumstances of the line-ups "further support the natural and reasonable conclusion that the photo array and physical lineup procedures were *impermissibly suggestive* and that, moreover, the same did create a (*presumably*) *very substantial* likelihood of irreparable misidentification of Defendant by Foy." (R.1 145). Hence, the issue Ibar claims should have been raised, was in fact raised and the record refutes the claim under Strickland.

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(PC. 352-53) (emphasis in original).

In addressing this issue in its final order on Mr. Ibar's Rule 3.851 motion, the trial court agreed with the state that this issue had in fact been adequately preserved by defense counsel Morgan and disposed of by the trial court judge. (PC9. 1501). Not only did the lower court summarily reject this claim on its merits, but also determined that

> since these issues were raised with the trial court and disposed of prior to Defendant's trial, *any issue regarding the suggestibility of Foy's out-of-court identifications should have appropriately been raised in Defendant's direct appeal.*

(PC. 1501) (emphasis added).

While Mr. Ibar continues to press his claim of ineffective assistance of counsel with respect to defense counsel Morgan in his appeal from the denial of the Rule 3.851 motion, given the lower court's ruling, Mr. Ibar has no choice but to also raise in this petition his argument that appellate counsel unreasonably failed to raise this issue. If the lower court's ruling that this issue was fully preserved is indeed correct, then Mr. Ibar's allegation of ineffective assistance of appellate counsel is properly raised in this petition and is ripe for consideration.

Mr. Ibar submits that appellate counsel unreasonably and prejudicially failed to press this issue on appeal. Foy's out-of-court identifications of Mr. Ibar should

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have been suppressed on the ground that the identification procedures employed at both the photo array and the live line-up were so unduly suggestive as to give rise to a substantial likelihood of irreparable misidentification. As the Supreme Court wrote in ***Neil v. Biggers***, 409 U.S. 188 (1972), the "primary evil" to be avoided in such claims "is `a very substantial likelihood of irreparable misidentification.'" ***Id.*** at 198 (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)). The "evil" that this type of claim seeks to prevent is *not* police or state misconduct. Rather, as the ***Neil*** Court noted, "[i]t is the likelihood of misidentification which violates a defendant's right to due process." ***Neil***, 409 U.S. at 198. *Accord* ***Stovall v. Denno***, 388 U.S. 218, 302 (1967) (issue is whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law"); ***Rimmer v. State***, 825 So. 2d 304, 316 (Fla.), *cert. denied*, 537 U.S. 1034 (2002).

Regarding any unnecessary suggestiveness, Foy testified at trial "it was obvious that the police had a suspect in the [photo array] pictures." (T21. 2810, 2914; T22. 2981). Upon selecting Mr. Ibar and the other photograph, Foy testified that the detectives indicated he was "on the right track." (*Id.*). When Foy went to the live line-up six days later, Mr. Ibar was the only one he had viewed in the photo array. (*Id.* at 2983). Foy acknowledged he very well could have been

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influenced at the live line-up by the selections he made from the photo array. (*Id.* at 2989). Clearly, Foy's testimony that "it was obvious that the police had a suspect in these pictures" and the fact that he selected two, established unnecessary suggestiveness. The fact that Mr. Ibar was the only person from the photo array n the live line-up also establishes unnecessary suggestiveness. *See* ***Rimmer***, 825 So. 2d at 338 ("With regard to a subsequent live line-up, the dangers of suggestibility as a result of the prior photographic lineup are substantial"); ***State v. Sepulvado***, 362 So. 2d 324, 326 (Fla. 2d DCA 1978) (victim selected defendant from second photo pack where he ws the only one depicted from the first photo pack).

The ***Neil v. Biggers*** factors weigh in favor of the unreliability of Foy's identifications. Foy only had a brief opportunity to observe the passenger in Sucharski's Mercedes; Foy himself acknowledged that his view of the suspect was but for seconds, at an angle, and through two sets of tinted car windows. (T21-22 2810-2989). Foy's testimony likewise established a limited degree of attention. He admitted getting only a "fair look," not a "pretty good look." (Foy's Sworn Stmt., July 15, 1994, at 4). His initial description of the men, *i.e.*, "two young, teens or early twenties, white or Latin males," (T21. 2795-2800), was extremely general. Foy's level of certainty, selecting *two* photos from the array, and the photograph of Mr. Ibar only because it "look[ed] more like [the passenger]," (Foy

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Stmt. at 8), reflect unreliable multiple positive identifications and relative judgment. (PC2. 252-53). Lastly, nearly three weeks passed between Foy's brief, distracted view of the passenger and his selection of two photographs (including Mr. Ibar) from the photo array. The significantly longer interval in this case undermines the reliability of Foy's identification.

For these reasons, Foy's identification of Mr. Ibar from the photo array and live line-ups were subject to suppression, and appellate counsel unreasonably failed to raise this meritorious issue on appeal. In a case where identity is the most crucial fact, the omission of this issue on appeal was highly prejudicial to Mr. Ibar. Given the other substantial errors found by this court to have occurred at Mr. Ibar's trial, the error in admitting Foy's identifications unquestionably would have resulted in a new trial. At a minimum, confidence in the outcome of the appeal process was undermined by appellate counsel's omission, and thus habeas relief is warranted.

C. Mr. Ibar's Sixth Amendment Right to Confrontation was Violated when the Trial Court Permitted the State to Elicit Testimony from Various Witnesses Regarding Prior Statements Made at a Proceeding at Which Mr. Ibar Did Not Have the Opportunity of Confrontation.

At trial, the state presented testimony from, *inter alia,* Jean Klimeczko, (T30; T31; T32; T33), Melissa Monroe, (T35. 4604-17; T36; T37; T38. 4899-

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4927), and Ian Milman. (T34. 4424-4507; T35. at 4523-51). The testimony of each of these witnesses was extensive but the vast majority of their testimony consisted of being peppered with confusing questions about prior testimony each had given in various proceedings, including at a bond hearing/adversarial preliminary hearing for Penalver and before the grand jury. Neither Mr. Ibar nor his counsel were present at either of these proceedings and thus had no opportunity to confront these witness's prior testimony adduced at both proceedings. The jury had to have been confused by the nature of the way the questioning took place, fumbling between questions about prior statements, notably about statements given by these witnesses at prior hearings at which neither Mr. Ibar nor counsel were present and thus had no opportunity for confrontation.

The first of this trio to testify was Klimezko. Prior to his testimony, a discussion about the parameters of his testimony occurred between the prosecutor, defense counsel, and the court. A number of concerns about and objections to Klimeczko's proposed testimony were addressed by defense counsel, who specifically articulated his concern about and objection to Klimeczko's testimony insofar as Klimeczko would be testifying to prior statements he made that were incriminatory to Pablo Ibar but which statements were made at an adversarial preliminary hearing and bond hearing for Seth Penalver on August 31, 1994. (T30.

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3992). As defense counsel explained, at Mr. Ibar's prior trial at which he and Penalver were tried together, the trial judge had let the state present Klimeczko's testimony because Penalver and Penalver's counsel "had an opportunity to confront Mr. Klimeczko at that hearing. So the State was allowed ad nauseam to recite from that hearing, August 31st, hearing . . ." (*Id.*). However, defense counsel argued that now that Mr. Ibar was being tried *without* Penalver, and Mr. Ibar had not been present nor did his counsel have any opportunity to cross-examine Klimeczko's testimony at that prior bond hearing, the State should not be permitted to question Klimeczco on his prior testimony. (T30. 3994-95). Mr. Ibar's counsel also pointed out that, at that prior bond hearing, there were no common interests between Ibar and Penalver because Penalver's position was that "they were trying to put it all on us," "they were putting it on Pablo Ibar" so there was "no correlation of identity interest here with Pablo Ibar and the lawyers that were representing Penalver." (T30. 3998). Defense counsel reiterated that there was a "confrontation problem here at the time the prior statement in question was made. The defendant was not there to confront in his own interest those prior statements." (T30. 4003). Ultimately, after much discussion, the trial court deferred ruling until the issue arose during Klimeczko's testimony. (T30. 4004).

During the direct examination of Klimeczco, the state began to question

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Klimeczko whether he had a recollection of testifying under oath in a proceeding on August 31, 1994, that involved only Seth Penalver. (T30. 4074-76). Klimeczko proved to be a thorny witness for the prosecutor, who tried to elicit statements Kilmeczko had made in police statements and the bond hearing years earlier. Klimeczko recalled little without prompting. He used drugs daily in 1994, and six years of memory erosion had occurred. The state tried hard to refresh his recollection; he read his prior statements but could not remember what he had said in the past and feared that what he "recalled" may be what he had read or been told by others. (T30. 4005-21, 4041). In light of the defense objections, the court gave the jury an instruction to purportedly *assist* its consideration of Klimezcko's testimony but the instruction was far from helpful:

> Ladies and gentlemen of the jury, I'm going to read an instruction to you. Please listen carefully to it. This witness will be confronted with statements allegedly made by him prior to these proceedings. Prior statements made by a witness concerning identification of a person after perceiving the person are admissible both to impeach the witness' credibility and as evidence of its identification.
>
> All other prior statements made by a witness are admissible not to prove the truth of the statement but only to impeach the witness' credibility.
>
> Remember, you are the exclusive finder of fact as to any evidence presented in this trial.

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(T30. 4060). Mr. Ibar's trial counsel's repeatedly objected to the State being allowed to question Klimeczko about his prior testimony at a hearing at which Mr. Ibar was not present. (T31. 4075; T31. 4186; T32. 4201-14; 4240-45; 4256-57. And the identical "limiting" instruction was provided again to the jury prior to Klimeczko's second day of testimony. (T32. 4218-19). Again, the instruction provided no meaningful assistance to the jury, and only served to make confusing testimony all the more confusing.

Klimeczko's testimony consisted essentially of him not recalling information posed by the prosecutor's questions and the prosecutor's then eliciting from Klimeczko information to which he testified in prior statements, notably the prior bond hearing at which neither Mr. Ibar nor counsel attended and therefore had no opportunity to confront Klimeczko. (T30. 4079-80; 4077-80; 4088; T31. 4158-60; 4165-66; 4178-95; T32. 4239; 4245-47; 4252-55.

Much like the testimony of Klimeczko, that of Ian Milman included the prosecutor showing Milman of his prior testimony before the grand jury and reading the substance his testimony to the jury, a procedure to which the defense objected. (T34. 4443-45). The judge overruled the objection and gave the same confusion instruction it gave during Klimeczko's testimony. (T34. 4447). The state was then allowed to question Milman about the substance of what he testified

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to before the grand jury, where again, Mr. Ibar had no opportunity to confront Milman. (T34. 4447-59; 4461-64).

Finally, Melissa Monroe was allowed to testify extensively regarding her prior testimony at the grand jury, a proceeding at which neither Mr. Ibar nor his counsel were present to confront Monroe's statements. Again, defense counsel objected, imploring the judge to stop the prosecutor: "are you going to permit this, continue to permit this kind of questioning?" (T36. 4627). The defense objections continued and the parties discussed the matter once again. (*Id.* 4627-52). Despite repeated objections by defense counsel to this procedure. (T36. 4662, 4687, 4707-13; T37. 4783-92, 4807-08), the court permitted the prosecutor to question Monroe and elicit extensive testimony from her about her own prior testimony at both the bond hearing in Penalver's case and before the grand jury. (T36. 4653-57, 4658-62, 4667-75; T37. 4763-68, 4771-82, 4793-4800, 4808-16; T38. 4911-13, 4916-17, 4922-23).

Mr. Ibar submits that his Sixth Amendment right of confrontation was repeatedly violated throughout his trial during the testimony of Klimeczko, Milman, and Monroe. The state was allowed, with each of these witnesses, to present as substantive and impeachment evidence, testimony from prior proceedings (the grand jury and Penalver's bond hearing) at which Mr. Ibar had no

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opportunity to confront their statements.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." Amend. VI, U.S. Const. The right of confrontation is, of course, one of the most important trial rights guaranteed a defendant and one of the most important tools in the truth-seeking process. *See* ***Crawford v. Washington***, 541 U.S. 36 (2004). The Supreme Court of the United States has explained:

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' 'Our cases construing the (confrontation) clause holds that a primary interest secured by it is the right of cross-examination.' Professor Wigmore stated:
>
> > 'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'
>
> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e. discredit the witness. A more particular attack on the witness' credibility is affected by means of cross-examination directed toward revealing possible biases, prejudices, or

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> ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308, 315-17 (1974).

In Mr. Ibar's case, the statements of Klimeczko, Milman, and Monroe from the grand jury and Penalver's bond hearing were impermissibly admitted because they violated Mr. Ibar's Sixth Amendment right to confrontation. *See, e.g.* ***Petit v. State,*** 92 So. 3d 906 (Fla. 4th DCA 2012) (finding that bond hearing testimony fell within ambit of *Crawford* but no Sixth Amendment violation occurred because defendant's counsel had opportunity to cross-examine witness testimony at bond hearing, an opportunity taken by defense counsel). Appellate counsel unreasonably failed to press this issue on appeal, and this omission prejudiced Mr. Ibar in that there is more than a reasonable probability that, had this claim been raised, relief would have been granted. Particularly in light of the fact of the other errors that occurred both at trial (found by this court on direct appeal) and during the appeal process (outlined in this petition), Mr. Ibar submits that confidence is undermined in the appeal process and thus habeas relief should be granted.

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CONCLUSION

For all of the reasons discussed herein, Mr. Ibar respectfully urges the court to grant habeas corpus relief or other relief as the court deems proper and just to avoid a miscarriage of justice in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2012, this petition was e-filed with the Clerk of the Supreme Court and sent by United States Mail to Assistant Attorney General Leslie Campbell, Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401, and emailed to CrimAppWPB@MyFloridaLegal.com.

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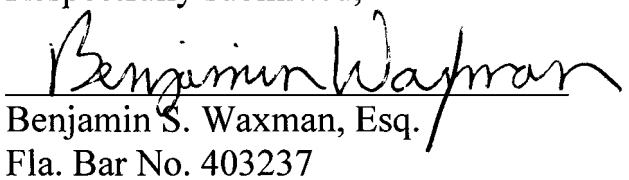
CERTIFICATE OF FONT

This is to certify that the font in this Petition complies with the requirements of Fla. R. App. 9.210.

Respectfully submitted,



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